

## Working Paper

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### The Role of Gender Diversity in Corporate Governance

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# THE ROLE OF GENDER DIVERSITY IN CORPORATE GOVERNANCE<sup>+</sup>

By Terry Morehead Dworkin\* and Cindy A. Schipani\*\*

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The existence of a correlation between female presence on boards and performance of the firm has been noted, at least among Fortune 500 companies. For example, one analysis found that a high proportion of women on a Fortune 500 company's board is associated with significantly higher return on sales and return on invested capital.<sup>1</sup> Similarly, a more recent analysis found that firms with diverse boards among the Fortune 500 see nearly 2% greater return on assets ("ROA") than firms with male-only boards.<sup>2</sup>

Similar relationships have been uncovered by other researchers, with some analyses indicating that companies with more women involved in leadership positions tend to outperform their sector in terms of return on equity, operating result, and stock price growth. According to McKinsey's 2015 report *Why Diversity Matters*, businesses with a greater proportion of women on their boards outperformed rivals in terms of returns on invested capital, returns on equity, and sales.<sup>3</sup> Specifically, the report found that gender-diverse companies are 15% more likely to outperform their peers.<sup>4</sup> Furthermore, a recent Deloitte Australian research study shows that in team-based assessments, inclusive teams outperform otherwise identical counterparts.<sup>5</sup> Similar correlative analyses find that on their face, more diverse boards are associated with improved firm performance across a number of metrics.<sup>6</sup>

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1. Lois Joy et al., *The Bottom Line: Corporate Performance and Women's Representation on Boards*, CATALYST (2007), [https://www.catalyst.org/system/files/The\\_Bottom\\_Line\\_Corporate\\_Performance\\_and\\_Womens\\_Representation\\_on\\_Boards.pdf](https://www.catalyst.org/system/files/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf) [https://perma.cc/W7ZR-FF3Q].

2. Francesca Lagerberg, *Women in Business: The Value of Diversity*, GRANT THORNTON (2015), [https://www.grantthornton.global/globalassets/wib\\_value\\_of\\_diversity.pdf](https://www.grantthornton.global/globalassets/wib_value_of_diversity.pdf) [https://perma.cc/6VRK-DZNB].

3. Vivian Hunt et al., *Why Diversity Matters*, MCKINSEY & CO. (2015), <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters> [https://perma.cc/QFQ6-9JFB].

4. *Id.* at 1.

5. Juliet Bourke & Bernadette Dillon, *The Diversity and Inclusion Resolution, Eight Powerful Truths*, DELOITTE INSIGHTS (Jan. 22, 2018), <https://www2.deloitte.com/insights/us/en/deloitte-review/issue-22/diversity-and-inclusion-at-work-eight-powerful-truths.html> [https://perma.cc/493X-Y92H].

6. See *infra* Part I(B) and accompanying notes 54-60 (discussing the impact of diverse boards on non-financial metrics).

It should be noted, however, that correlative studies do not establish causality.<sup>7</sup> Some industry studies, like those conducted by Catalyst, include an explicit footnote that “correlation does not prove or imply causation.”<sup>8</sup> Others, like a Grant Thornton study, note the “opportunity cost” in terms of ROA as a result of a dearth of female board members.<sup>9</sup> One study, while establishing a positive relationship between board gender diversity and some indicators of firm performance provides evidence of causality from board diversity to firm performance as a result of female presence on the audit committee (as opposed to the compensation and nomination committees).<sup>10</sup> The results, however, were statistically weak, hence the authors state that “decisions concerning the appointment of women or ethnic minorities to corporate boards should be based on criteria other than future financial performance.”<sup>11</sup> Similar studies have arrived at equally ambiguous results.<sup>12</sup> These ambiguities have led some researchers to suggest that practical interpretation of these correlations, along with corresponding policy prescriptions, are essentially impossible due to the ambiguity of the relationship between board diversity and firm performance.<sup>13</sup>

Yet, there are plausible arguments that a diverse board may signal independence, creative thought, opportunities for break-out strategies and an open-mindedness on the part of the company<sup>14</sup>, which are increasingly important in the global marketplace.<sup>15</sup> In a review of the then existing

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7. See, e.g., Lagerberg, *supra* note 2 (extrapolating observed premiums on returns earned by firms with women on boards and claiming that if all 1,050 studied firms added women to the board, annual output would increase by \$655 billion); Hunt et al., *supra* note 3 and Joy et al., *supra* note 1 (noting that correlation does not equal causation and explicitly state they do not establish a causal relationship); see also Barnali Choudhury, *Gender Diversity on Boards: Beyond Quotas*, 26 EUR. BUS. L. REV. 229 (2015) (analyzing the use of quotas as a way to increase the number of women on corporate boards).

8. Joy et al., *supra* note 1, at 1 n. 2.

9. Hunt et al., *supra* note 3.

10. David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE: AN INT’L REV. 396, 401 (2010).

11. *Id.* at 396.

12. Helena Isidro & Márcia Sobral, *The Effects of Women on Corporate Boards on Firm Value, Financial Performance, and Ethical and Social Compliance*, 132 J. OF BUS. ETHICS 1 (2014).

13. Benjamin E. Hermalin & Michael S. Weisbach, *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature*, 9 ECON. POL’Y REV. 7 (2003).

14. Nick Wilson et al., *Family Business Survival and the Role of Boards*, 37 ENTREPRENEURSHIP THEORY & PRAC. 1369, 1384 (2013).

15. *New Alliance for Board Diversity Report Finds Little Change in Diversity on Corporate Boards*, CATALYST, <https://www.catalyst.org/media/new-alliance-board-diversity->

literature on workplace diversity, Milliken and Martins found that diversity of all sorts, including gender diversity, has generally been connected to improved workplace outcomes through the “number of alternatives considered, quality of ideas, degree of cooperation in complex tasks”<sup>16</sup> and other areas. Further, although members of diverse groups may “communicate more formally and, perhaps, less frequently with each other than members of less diverse groups . . . they may communicate more frequently with those outside the group.”<sup>17</sup> In addition, having women in key positions may add value by bringing in diverse skills and creating cultures of inclusion.<sup>18</sup> Furthermore, boardroom diversity may aid in avoidance of “groupthink,” a complacency that may lead to the failure of the board to serve its monitoring role in corporate governance.<sup>19</sup> Other studies have suggested that board gender diversity may be causally related with improved compliance with ethical and social standards<sup>20</sup> and that diversity may be linked to enhanced practices of corporate social responsibility (CSR).<sup>21</sup> These, in turn, may boost firm financial performance.

Nevertheless, the number of women in boardrooms in the United States is still disappointingly low. Statistics show that women comprise only 19.8% of board seats of companies in the 2017 Fortune 1000 companies.<sup>22</sup> This may be due to numerous factors including gender bias seen through management feedback, performance recognition and reward, and promotion, which all contribute to women’s frustrations with their work environment.<sup>23</sup>

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report-finds-little-change-diversity-corporate-boards [https://perma.cc/59JN-GEL2] (“Clearly, many shareholders recognize that strategic and competitive value [of boardroom diversity], especially in a complex global marketplace”).

16. Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 416 (1996).

17. *Id.* at 417.

18. Daehyun Kim & Laura T. Starks, *Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?*, 106 AM. ECON. REV. 267, 267-68 (2016).

19. Jeffrey L. Coles et al., *Director Overlap: Groupthink Versus Teamwork* 23 (Dec. 21 2015), (unpublished manuscript) (on file with the American Economic Association) <https://www.aeaweb.org/conference/2016/retrieve.php?pdfid=1209> [https://perma.cc/T8T2-LC6T].

20. Isidro & Sobral, *supra* note 12, at 1.

21. Eunjung Hyun et al., *Women on Boards and Corporate Social Responsibility*, 8 SUSTAINABILITY, March 2016, at 1, 15.

22. *Gender Diversity Index, 2020 WOMEN ON BOARDS*, at 2 (2018), [https://www.2020wob.com/sites/default/files/2020WOB\\_GDI\\_Report\\_2017\\_FINAL.pdf](https://www.2020wob.com/sites/default/files/2020WOB_GDI_Report_2017_FINAL.pdf) [https://perma.cc/NXY2-WC9K].

23. Paola Cecchi-Dimeglio, *How Gender Bias Corrupts Performance Reviews, and What To Do About It*, HARV. BUS. REV. (2017), <https://hbr.org/2017/04/how-gender-bias-corrupts-performance-reviews-and-what-to-do-about-it> [https://perma.cc/M5AH-A8J9].

Additionally, we see that women sometimes face different problems at work than their male colleagues, such as enduring sexual harassment, having their contributions undervalued,<sup>24</sup> and being disrespected or questioned about their competence and productivity<sup>25</sup> (which is exacerbated if a woman has children). Moreover, there also exists asymmetry in the way in which both men and women perceive one another in a workplace scenario, as they have different views on what aspects of work should be prioritized and what factors contribute to constructing a healthy workplace.<sup>26</sup> Within the corporate board, researchers have noted that “sex-based biases or stereotyping by male directors might be inhibiting women directors’ voice” within boards, which could explain why some researchers find that the evidence regarding correlations between gender diverse boards and financial performance is mixed.<sup>27</sup> Thus, there is need for targeted solutions such as policies for equal opportunities, promotion of a gender inclusive environment and supporting women who become mothers.

Recent trends have, fortunately, shown promise. The 2020 Gender Diversity Index (GDI), which has been tracking female presence on American boards since 2011, notes significant improvements in gender parity in Fortune 1000 boards since tracking began.<sup>28</sup> The most recent report, which includes data through 2017, finds that since 2011 the proportion of Fortune 1000 firms with at least 20% female representation on boards has climbed from just over a quarter to 55%.<sup>29</sup> Furthermore, since 2011, the total proportion of female board members on Fortune 1000 boards has risen from just below 15% to over 20%, with Fortune 100 companies seeing an increase in proportion from just below 20% to nearly 25% in 2017.<sup>30</sup> This is indicative of a broader trend: while firms near the top and bottom of the Fortune 1000 have increased at a similar pace (the total increase in proportion for the Fortune 100 firms over the period was 4.8%, and 6.3% for

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24. Madeline E. Heilman & Michelle C. Haynes, *No Credit Where Credit is Due: Attributional Rationalization of Women’s Success in Male-Female Teams*, 90 J. APPLIED PSYCHOL. 905, 905 (2005).

25. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 12 AM. J. OF SOC. 1297, 1305 (2007).

26. Michael Peterson, *What Men and Women Value at Work: Implications for Workplace Health*, 1 GENDER MED., no. 2, 2004, at 106, 108.

27. Jeremy Galbreath, *Are There Gender-Related Influences on Corporate Sustainability? A Study of Women on Boards of Directors*, 17 J. OF MGMT. & ORG. 17, 30 (2011); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. LAW 377, 383 (2014).

28. 2020 WOMEN ON BOARDS, *supra* note 22.

29. *Id.* at 2.

30. *Id.* at 3.

the Fortune 501-1000), the largest firms retain the lead in proportion.<sup>31</sup> There is stronger progress in the European Union, where between 2010 and 2015, the overall proportion of female board seats increased from 11.9% to 21.2%.<sup>32</sup>

Yet, not all is rosy. The U.S. continues to lag in progress compared to the European Union, which has achieved much stronger results in a shorter time frame.<sup>33</sup> Furthermore, the lower a firm's rank in the Fortune 1000, in general, the lower the proportion of women on the board.<sup>34</sup> If the trend among Fortune 1000 companies is extrapolated to the 4000-odd<sup>35</sup> listed firms in the U.S., it suggests a much grimmer situation for the majority of firms. Moreover, even the best performers, the top 100 companies in the U.S., still have barely a quarter of their board seats filled with women, a long shot from parity; progress has continued to be slow during the time data has been recorded by the GDI.<sup>36</sup>

This Article addresses the role of gender diversity in corporate governance. It begins in Part I with a review of studies analyzing gender diversity and firm performance. Part II follows with consideration of gender inequality in the workplace, with a focus on role incongruity, continuing in Part III with analysis of sexual harassment. Part IV focuses on potential solutions followed by concluding remarks.

## I. BOARD GENDER DIVERSITY AND FIRM PERFORMANCE

Although the presence of women on corporate boards has been steadily growing over the last several decades, female board membership still lags behind the equitable ideal. Between 2014 and 2015 alone, the proportion of women directors worldwide increased from 12.4% to 15%, with nations like Norway and France seeing about 35% female representation on the boards of major corporations.<sup>37</sup> And while egalitarian impulses have motivated some of the moves to introduce women into the boardroom, in recent years

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31. *Id.*

32. Věra Jourová, *Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling*, EUROPEAN COMMISSION, (July 2016), [ec.europa.eu/newsroom/document.cfm?doc\\_id=46280](https://ec.europa.eu/newsroom/document.cfm?doc_id=46280) [<https://perma.cc/L9FZ-HCFJ>].

33. *Id.*

34. 2020 WOMEN ON BOARDS, *supra* note 22, at 3.

35. Four thousand, three hundred and thirty-one firms were listed as of 2016. Listed Domestic Companies, THE WORLD BANK, <https://data.worldbank.org/indicator/CM.MKT.LD.OM.NO> [<https://perma.cc/7RVG-HYJW>].

36. Joy et al., *supra* note 1.

37. Linda-Eling Lee et al., *Women on Boards: Global Trends in Gender Diversity on Corporate Boards*, MSCI, at 3 (Nov. 2015).

there has been a focus on whether gender-diverse boards are more successful.<sup>38</sup> A growing interest in the effects of diversity in the boardroom has generated a wide array of literature examining this topic.

*A. Correlation between Gender Diversity and Financial Measures*

The existence of a correlation between female presence on boards and performance of the firm has been documented by several studies, at least among Fortune 500 companies. As noted above, one study found that a high proportion of women on a Fortune 500 company's board is associated with significantly higher return on sales and return on invested capital,<sup>39</sup> and another analysis similarly found that firms with diverse boards among the Fortune 500 companies see nearly 2% greater ROA than firms with male-only boards, with smaller but still significant premiums on ROA among companies with diverse boards in India and the U.K.<sup>40</sup>

Recent studies reported by the National Center for Women and Technology also highlight that gender diverse teams “demonstrate superior productivity and financial performance compared with homogenous teams.”<sup>41</sup> Additionally, a Credit Suisse report analyzed 2,360 firms in a variety of different industries and found that companies with boards comprising balanced representation of both genders outperformed companies with single-sex boards.<sup>42</sup> “Gender-diverse management teams showed superior return on equity, debt/equity ratios, price/equity ratios, and average growth.”<sup>43</sup> Because many of these benefits were evident after the global economic crash in 2008, researchers suggest that gender diversity might be particularly valuable in times surrounding a recession.<sup>44</sup> The study suggests that “gender-diverse executive boards decrease volatility and

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38. Choudhury, *supra* note 7 (examining the literature and various arguments for gender diversity on boards).

39. N.M. Carter & H.M. Wagner, *The Bottom Line: Corporate Performance and Women's Representation on Boards 2004-2008*, CATALYST, (Mar. 1, 2011), [http://www.catalyst.org/system/files/the\\_bottom\\_line\\_corporate\\_performance\\_and\\_women%27s\\_representation\\_on\\_boards\\_%282004-2008%29.pdf](http://www.catalyst.org/system/files/the_bottom_line_corporate_performance_and_women%27s_representation_on_boards_%282004-2008%29.pdf) [https://perma.cc/5NCK-49BU].

40. Lagerberg, *supra* note 2.

41. Lecia Barker et al., *What is the Impact of Gender Diversity on Technology Business Performance? Research Summary*, NAT'L CTR FOR WOMEN & INFO. TECH., at 2 (May 29, 2014), <https://www.ncwit.org/sites/default/files/resources/impactgenderdiversitytechbusinessperformanceprint.pdf> [https://perma.cc/MWA5-WQG5].

42. Mary Curtis et al., *Gender Diversity and Corporate Performance*, at 3 (Aug. 2012), CREDIT SUISSE RESEARCH INSTITUTE, [https://www.calstrs.com/sites/main/files/file-attachments/csi\\_gender\\_diversity\\_and\\_corporate\\_performance.pdf](https://www.calstrs.com/sites/main/files/file-attachments/csi_gender_diversity_and_corporate_performance.pdf) [https://perma.cc/E5T7-CCGR].

43. Barker et al., *supra* note 41, at 3.

44. *Id.*



increase balance throughout the economic cycle.”<sup>45</sup>

Another McKinsey study selected 101 public, private, and nonprofit companies, and discovered that having three or more women on boards led to improved performance when compared to competitors.<sup>46</sup> The study measured performance in terms of, “[l]eadership, direction, accountability, coordination and control, innovation, external orientation, capability, work environment and values.”<sup>47</sup> Additionally, a particularly interesting field experiment involved asking twelve member groups of student entrepreneurs to start, sell shares of stock, and operate forty-three actual companies with the goal of maximizing profit and shareholder value.<sup>48</sup> The study found lower performance for male dominated teams, but noted that their “estimates lack the precision to draw firm conclusions . . . when [the share of women] exceeds 0.6.”<sup>49</sup>

Yet, another study showed after analysis of 272 projects at four firms,<sup>50</sup> gender diversity on technical work teams resulted in “individual and collective performance [being] . . . increased.”<sup>51</sup> Furthermore, a report from the Peterson Institute for International Economics identifies the benefits of having women in C-suite positions.<sup>52</sup> This study of 21,980 publicly traded companies in ninety-one countries demonstrates that the presence of more female leaders in top positions of corporate management correlates with increased profitability of approximately 6%.<sup>53</sup> It is important to note that these studies present interesting correlations between gender and firm performance. They do not, however, necessarily show causation. The next Part considers causal factors.

### *B. Causal Relationship between Gender Diversity and Non-Financial*

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45. *Id.*

46. DESVAUX ET AL., MCKINSEY & COMPANY, WOMEN MATTER: GENDER DIVERSITY, A CORPORATE PERFORMANCE DRIVER 12-14 (2007).

47. *Id.* at 12.

48. Sander Hoogendoorn, Hessel Oosterbeek & Mirjam van Praag, *The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a Field Experiment*, 59 MGMT. SCI. 1514 (2013).

49. *Id.* at 1524.

50. Laure Turner, *Gender Diversity and Innovative Performance*, 4 INT’L J. OF INNOVATION AND SUSTAINABLE DEV. 123, 126 (2009).

51. *Id.* at 133.

52. Marcus Noland, Tyler Moran, & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, (Feb. 2016), <https://piie.com/publications/wp/wp16-3.pdf> [<https://perma.cc/ZAQ7-HFVE>].

53. *Id.* at 9.

*Indicators*

Recent studies have suggested some novel causal mechanisms between board diversity and firm performance. Isidro's & Sobral's broad study of European firms found that, although the presence of women on boards was not directly associated with improved financial performance, gender diversity was associated with greater compliance with ethical and social standards, which the authors further suggest is tied to firm value indirectly.<sup>54</sup> A similar study examined the relationship between corporate social responsibility (CSR) practices and female directors, finding that female presence on boards has a causal effect on enhancing CSR due to both a potentially different moral orientation with regard to firm operations and personal reputational concerns.<sup>55</sup> The authors hypothesize that "men and women are different in their orientation toward moral principle, largely because women have better internalized ethical and communal values through their social roles"<sup>56</sup> and so would be more inclined to implement CSR policies, or alternatively, that "women independent directors can establish or improve their reputational standing within an organization through their expertise in CSR-relevant issues," and so use CSR implementation as a way to secure their reputation.<sup>57</sup>

Similarly, a paper examining Malaysian firms found a correlation between female board presence and company environmental reporting, though no causal link was established.<sup>58</sup> Furthermore, a study of Australian firms suggested a causal link between female board presence and internal monitoring and firm-wide ethical conduct, arguing that women typically have stronger "relational abilities" which promotes "social responsiveness" within the firm.<sup>59</sup> Improved monitoring, may in turn lead to better outcomes for the firm by ensuring that "shareholder funds are not misappropriated, resulting in better economic performance."<sup>60</sup>

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54. Isidro & Sobral, *supra* note 12, at 15.

55. Hyun et al., *supra* note 21, at 6.

56. *Id.* at 5.

57. *Id.* at 6.

58. Michelle Siew Huei Phua & Poh-Ling Ho, *Female Directors of Corporate Boards: Does Female Leadership Drive Corporate Environmental Transparency?*, 34 SHS WEB OF CONFERENCES (2017) [https://www.shs-conferences.org/articles/shsconf/pdf/2017/02/shsconf\\_four2017\\_05002.pdf](https://www.shs-conferences.org/articles/shsconf/pdf/2017/02/shsconf_four2017_05002.pdf) [<https://perma.cc/K3W9-FVAB>].

59. Galbreath, *supra* note 27, at 17.

60. *Id.* at 30.

*C. Human Capital Differentials between Men and Women*

Another stream of research has examined the effects of human capital differentials among male and female directors. One study found that women board members were more likely to fill skill or expertise gaps in boards compared to their male counterparts and that the introduction of female directors increases the heterogeneity of expertise and experience on a board, thus allowing it to make better informed decisions.<sup>61</sup> These heterogeneity effects independent of gender have been confirmed by past research.<sup>62</sup> Further, another study suggests that female directors attend board meetings more often and engage in a range of similar minor behaviors that, overall, may make them more “competent” directors.<sup>63</sup> Yet, other researchers conclude that gender is merely an intermediary factor between diversity of experience and firm performance.<sup>64</sup>

In addition, there may be compounding effects at play. One paper examining female presence on Norwegian company boards found that the perceived influence of individual female directors increased as the total proportion of women on the board increased.<sup>65</sup> Notably, this study found that female board members generally felt that they had a fair amount of influence on company decisions, mollifying concerns from some quarters that the introduction of female board members is more a token or political effort than anything else.<sup>66</sup> Whether this Norwegian conclusion applies to the rest of the world is an open question. It should be further mentioned that another recent study found no effect on Norwegian firm performance as a result of female board inclusion, although capital accumulation did increase.<sup>67</sup>

Several studies discussed above, such as the study of Australian firms, have noted that improved firm performance of gender-diverse boards may have more to do with the tendency of female directors to be more skilled or

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61. Kim & Starks, *supra* note 18, at 268-69.

62. Milliken & Martins, *supra* note 16 (Noting that heterogeneity effects have been associated with diversity in age, ethnic and racial background, experience, occupational background and other categories).

63. R.B. Adams & D. Ferreira, *Women in the Boardroom and their Impact on Governance and Performance*, 94 J. OF FIN. ECON. 291 (2009).

64. Kim & Starks, *supra* note 18, at 270.

65. Beate Elstad & Gro Ladegard, *Women on Corporate Boards: Key Influences or Tokens?*, 16 MANAG. GOV. 595 (2012).

66. *Id.* at 610.

67. Harald Dale-Olsen, Pål Schone, & Mette Verner, *Diversity among Norwegian Boards of Directors: Does a Quota for Women Improve Firm Performance?*, 19 FEMINIST ECON., 110 (2013).

otherwise better qualified than their male counterparts. This begs the question, however: why do female directors have, for example, more skills than their male counterparts? Or to put it another way: why must women be more skilled than men before they are placed on boards? Professor Hyun and her colleagues surmise that reputational concerns may more strongly influence the behavior of women board members.<sup>68</sup> Research has shown that women are often stereotypically perceived as poorly suited for leadership positions for emotional reasons by both male and female peers.<sup>69</sup> Notably, role incongruity and related theories suggest that because leadership is still widely perceived, consciously or subconsciously, as a role not suitable for women, women leaders are evaluated more negatively under a variety of circumstances compared to otherwise identical male counterparts, and therefore, hampered in their advancement to leadership roles like board membership.<sup>70</sup> As noted earlier, Hyun et al. find that female directors likely engage in CSR promotion to solidify their reputations as competent members of the board,<sup>71</sup> a conclusion corroborated by evidence that women generally have more difficulty establishing credibility in technical areas.<sup>72</sup>

#### *D. Reputational Effect of Gender Diversity on Boards*

Some studies conclude that the presence of women on boards may have positive reputational effects for firms, particularly those that interact directly with consumer sectors.<sup>73</sup> This suggests that firms may accumulate benefits from having female board members completely independent of their skills and qualifications: merely their presence may be enough to improve performance in some way.<sup>74</sup> Researchers studying Spanish firms have proposed that media attention surrounding the mere nomination of female directors may act as a positive signaling mechanism for firms to their stakeholders, though the evidence on this point is inconclusive within the Spanish sample examined.<sup>75</sup> Another study also looking at Spanish firms

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68. Hyun et al., *supra* note 21, at 6.

69. Victoria L. Brescoll, *Leading with their hearts? How Gender Stereotypes of Emotion Lead to Biased Evaluations of Female Leaders*, 27 *THE LEADERSHIP Q.* 415 (2016).

70. *Id.*

71. Hyun et al., *supra* note 21, at 6.

72. A.C. Rusaw, *Achieving Credibility: An Analysis of Women's Experience*, 16 *REV. OF PUB. PERSONNEL. ADMIN.* 19, 22 (1996).

73. S. Brammer, A. Millington, & S. Pavelin, *Corporate Reputation and Women on the Board*, 20 *BRIT. J. OF MGMT.* 17-29 (2008).

74. Milliken & Martins, *supra* note 16, at 416.

75. Celia de Anca & Patricia Gabaldon, *The Media Impact of Board Member Appointments in Spanish-Listed Companies: A Gender Perspective*, 122 *J. OF BUS. ETHICS*

found a positive association between firm reputation ranking and the presence of female, as well as independent, directors, although causality was not definitively established.<sup>76</sup> Overall, there is some evidence that the mere presence of female board members may have positive effects on firm reputation and ensuing potential positive effects on firm performance.

## II. GENDER INEQUALITY IN THE WORKPLACE: ROLE INCONGRUITY

The comprehensive annual report written by McKinsey & Company and Lean In in 2017 (2017 Report) found an increasing number of companies are committing to gender equality.<sup>77</sup> Major firms like Apple, IBM and CVS have also faced major pressure from shareholders in the form of investor proposals to adopt policies promoting gender equality within their firms.<sup>78</sup> Additionally, investor-driven proposals for gender diversity have seen mixed success: these proposals put forth at major corporations in 2016 saw only 25% support among voting shares, on average.<sup>79</sup> Companies, therefore, seem to be struggling with implementing gender equality policies.

### A. *Gender Disadvantages Identified by McKinsey & Company and Lean In*

Looking at the corporate pipeline, it is evident that inequality begins at the very first promotion and continues to increase at each subsequent step.<sup>80</sup> On average, the 2017 Report finds that women are hired and promoted at lower rates compared to men, and at senior levels women shift to staff roles rather than continuing the path to becoming CEO.<sup>81</sup> Because a vast majority of CEOs come from line roles, this shift dramatically influences women's odds of reaching C-suite positions negatively.

Women also feel disadvantaged in their daily interactions with other colleagues and managers in the workplace. The 2017 Report indicates that

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425 (2013).

76. Francisco Bravo, Cristina Abad, & Joaquina L Briones, *The Board of Directors and Corporate Reputation: An Empirical Analysis*, 28 ACADEMIA REVISTA LATINOAMERICANA DE ADMINISTRACIÓN 79 (2015).

77. McKinsey & Co. & Lean In, *Women in the Workplace Report*, (2017), <https://womewithintheworkplace.com/> [<https://perma.cc/B6ZR-CUF8>].

78. Jeff Green & Emily Chasan, *Investors Push Corporate Boards to Add Women, People of Color*, CHICAGO TRIBUNE (Mar. 2, 2017).

79. McKinsey & Co. & Lean In, *Women in the Workplace Report*, (2017), *supra* note 77.

80. *Id.* at 10.

81. *Id.* at 4.

women do not experience an even playing field because they do not believe their contributions are appropriately valued; they are unable to meaningfully participate in meetings; they do not feel they are receiving challenging assignments; and they are not turned to for input on important decisions.<sup>82</sup>

*B. Reasons for the Under-Representation of Women in Corporate Governance*

The 2017 Report also highlights that women are 15% less likely to get promoted than are men.<sup>83</sup> At this rate, it will take more than a century to achieve gender parity in the C-suite.<sup>84</sup> Not being given the same opportunities for both promotions and moving up in a firm creates frustration and lack of motivation for women to excel in a work environment.

In 2015, Lean In and McKinsey & Company issued a report (2015 Report) and similarly found that fewer women compared to men were aiming for top positions.<sup>85</sup> Women cited pressure as one of their primary reasons for not wanting to hold a top position.<sup>86</sup> The 2015 Report also highlights the misconception that women with children are less ambitious to reach top level positions in a firm.<sup>87</sup> This is because, according to the survey, mothers were 15% more interested in being a top executive as compared to women without children.<sup>88</sup> Furthermore, the research found that, “[m]ore than 90% of women and men believe taking extended family leave will hurt their position at work.”<sup>89</sup> This creates a barrier for women as they tend to feel the pressure for a work life balance, making them less likely to be considered for a promotion opportunity.

A study conducted by Korn Ferry tracked board composition in the

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82. *Id.* at 24.

83. *Id.*

84. *Id.* at 4.

85. McKinsey & Co. & Lean In, *Women in the Workplace 2015*, available at <https://womenintheworkplace.com/2015> [<https://perma.cc/F6A4-MDK5>], at 11); see also Shana Lebowitz, *A New Study from Lean In and McKinsey Finds Exactly How Much More Men are Likely to get Promoted than Women*, BUSINESS INSIDER, (Oct. 1, 2015, 1:40 P.M.), <https://www.businessinsider.com/women-are-less-likely-to-get-promoted-2015-10> [<https://perma.cc/G4GN-462H>]

86. *McKinsey & Co. & Lean In, Women in the Workplace 2015*, *supra* note 85, at 11.

87. *Id.*

88. *Id.* at 10.

89. *Id.* at 16.

largest 100 publicly listed companies in ten Asia Pacific economies and found that when it comes to executive leadership, Asia is ahead of some of the western developed nations.<sup>90</sup> The numbers show that, “[t]he proportion of women in senior management was much greater in China (38%) and Indonesia (41%) as well as Southeast Asia, than in the US (22%) and European markets like the UK (20%) and Germany (14%).”<sup>91</sup> This suggests that there is an increasing female executive presence in Asia. Possible reasons may include: in-built childcare, rapid economic growth of the private sector, and firms identifying and rewarding strong performers regardless of gender. All these factors contribute to a good work-life balance for women, allowing them to excel at work while maintaining a healthy household.<sup>92</sup>

In addition, another researcher conducted twenty-seven one-on-one in-depth interviews with women in the financial services industry.<sup>93</sup> Sixty-three percent of women in this study discussed leaving a senior role, of which 82% were in investment banking.<sup>94</sup> The main reasons given by the women for leaving were frustration, change and choice.<sup>95</sup> Their frustration stemmed from the finance firm culture, such as long hours and the need to be seen, thus limiting a work-life balance and the ability to work flexible hours.<sup>96</sup> This may cause frustration particularly for women with families. Additionally, a largely male workforce creates a masculine culture, and the “boys club” mentality creates a homogenous workforce.<sup>97</sup> Also, given the high competitiveness of the finance industry, women could only experience considerable opportunities if they played politics.<sup>98</sup> Moreover they found that issues such as balancing work and family responsibilities and bias against women in the workplace causes women to become further frustrated with their job.<sup>99</sup>

Thus, according to the study, it appears that women’s frustrations with

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90. KORN FERRY INSTITUTE, THE DIVERSITY SCORECARD 2016: BUILDING DIVERSITY IN ASIA PACIFIC BOARDROOMS (April 18, 2016), <https://www.kornferry.com/institute/korn-ferry-diversity-scorecard-2016-building-diversity-in-asia-pacific-boardrooms>; Aimee Hansen, *Spotlight on Asia: Gender Diversity is Both Catching up and Leading*, THE GLASSHAMMER, (last visited Sept. 21, 2018) <http://theglasshammer.com/2016/08/11/spotlight-asia-gender-diversity-catching-leading/> [<https://perma.cc/9RYW-SX6V>].

91. *Id.*

92. *Id.*

93. Carolyn Neck, *Disappearing women: why do women leave senior roles in finance?*, 40(3) AUSTRALIAN J. OF MGMT. 488, 494 (2015).

94. *Id.* at 494.

95. *Id.* at 496.

96. *Id.* at 496.

97. *Id.* at 498.

98. *Id.* at 499.

99. *Id.* at 501.

the culture and lifestyle of the financial services industry limits their willingness to take a more senior position at a financial institution. Of the fourteen women leaving investment banking in this study, only 29%, or four women, moved to a senior role in banking.<sup>100</sup> “They found attractive opportunities that addressed their work frustrations (such as better hours, more flexibility and management support) and fulfilled their desire for change (new location or a new opportunity).”<sup>101</sup> The women who left investment banking continued to work outside the financial services industry.<sup>102</sup>

A study involving hiring at Hewlett-Packard revealed an interesting concept: “[m]en apply for a job when they meet only 60% of the qualifications, but women apply only if they meet 100% of them.”<sup>103</sup> Tara Sophia Mohr surveyed over 1,000 females and males asking them, “[i]f you decided not to apply for a job because you didn’t meet all the qualifications, why didn’t you apply?”<sup>104</sup> A majority of the respondents said they did not apply for the job because they thought they were not qualified. Furthermore, 20% of women did not apply because they feared failure, suggesting that “we need to expand the burgeoning conversation about women’s relationship with failure, and explore how bias, stereotype threat, the dearth of women leaders, and girls’ greater success in school all may contribute to our greater avoidance of failure.”<sup>105</sup>

Twice as many women as men in this study also noted that they did not apply for a job because they were following the guidelines of applicant requirements, suggesting that women are, “socialized to follow the rules.”<sup>106</sup> It appears that women tend to see the recruiting process of as more “by-the-book”<sup>107</sup> than men. Thus, we see that social misconceptions, lack of access to needed services, work mentality, and gender bias are some of the key reasons restricting women from top executive positions at firms.

### *C. Challenges of Gender Diversity in the Work Environment*

Diversifying the work environment involves several challenges.

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100. *Id.* at 506.

101. *Id.*

102. *Id.* at 507.

103. Tara Sophia Mohr, *Why Women Don’t Apply to Jobs Unless They’re 100% Qualified?*, HARV. BUS. REV. (Aug. 25, 2014), <https://hbr.org/2014/08/why-women-dont-apply-for-jobs-unless-theyre-100-qualified> [<https://perma.cc/J8M9-JVJZ>].

104. *Id.* at 1.

105. *Id.* at 3.

106. *Id.*

107. *Id.*



Professor Peterson conducted a study for a health education company LLumari, Inc.<sup>108</sup> The study's objective was to see what men and women value in workplace, how each gender defines a healthy work environment and what impacts their health and stress.<sup>109</sup> The study was conducted using an online questionnaire using specific stimulus including words and phrases with which participants could relate and each response was given a weighted score. A total of 1123 individuals participated, 608 males and 515 females.<sup>110</sup>

The results reveal that although men and women value the same aspects of work, they ordered and prioritized them differently.<sup>111</sup> For example, "men valued pay, money, and benefits, as well as power, authority, and status significantly more than women did,"<sup>112</sup> while women valued, different aspects that could be obtained in the workplace, including "friends and relationships . . . recognition and respect . . . communication . . . fairness and equity . . . teams and collaboration . . . family and home."<sup>113</sup> Furthermore, the results show that the men surveyed tend to be unaware of women's work-related issues while women overestimate the extent to which men value authority, pay and money.<sup>114</sup> Women also reported being more stressed at work as compared to men.<sup>115</sup> Thus, we see that the differences in opinions, priorities, and values create further conflict in the workplace.

In addition, researchers at New York University have evaluated how in the contemporary workplace, where work takes place in teams and it is difficult to exactly determine an individual's contribution to the success of the team, women frequently get less credit in subjective evaluations.<sup>116</sup> The authors ran three separate studies to determine how the genders were evaluated when working within mixed-gender teams, manipulating how information about those being evaluated was presented.<sup>117</sup> They found that across the board, otherwise identical female team members were consistently evaluated more poorly, and "thought to be generally less competent, less influential in arriving at the successful team outcome, and less apt to have taken on a leadership role in the task than were their male counterparts."<sup>118</sup>

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108. Peterson, *supra* note 26, at 106.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Heilman & Haynes, *supra* note 24, at 905.

117. *Id.*

118. *Id.* at 914.

Providing those performing evaluations with objective measures of individual performance, however, helped alleviate this difference.<sup>119</sup>

Finally, Professor Deborah Tannen discusses how voice and confidence plays a role in a work environment.<sup>120</sup> In a referenced study,<sup>121</sup> each senior manager reviewed individuals in his group and evaluated them for promotion. No female was selected because the managers believed that none of the women had the self-confidence needed to be promoted.<sup>122</sup> Furthermore, the studies appear to show that the managers selected people for promotion by their own linguistic norms.<sup>123</sup> Women, however, may have different styles of speaking and conveying their opinions than men, which appears to disadvantage them when males are making promotion decisions.<sup>124</sup>

In general, Tannen describes men to be sensitive to the power dynamics as they often speak in ways that position themselves as one up and resisting being put in a one-down position by others.<sup>125</sup> On the other hand, women tend to speak in ways which save face for others and avoid statements seen as putting another person down, which can be seen as lacking self-confidence or assurance by employers.<sup>126</sup> Women also tend to refer to “we” in situations where men refer to “I,” which can influence which particular party gets credit for a certain activity.<sup>127</sup> “One woman explained that it would sound too self-promoting to claim credit in an obvious way by saying, ‘I did this.’ Yet she expected—sometimes vainly—that others would know it was her work and would give her the credit she did not claim for herself.”<sup>128</sup> This further suggests that women may tend to downplay their certainty while men may tend to downplay their doubts, making them come across as more confident and self-aware.

An interesting point highlighted by Tannen is the use of the word “sorry” by women and men.<sup>129</sup> This is because many men avoid apologies as they see them as putting themselves in a lower position.<sup>130</sup> Women use

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119. *Id.*

120. Deborah Tannen, *The Power of Talk: Who Gets Heard and Why?*, HARV. BUS. REV. (Sept.-Oct., 1995), <https://hbr.org/1995/09/the-power-of-talk-who-gets-heard-and-why> [<https://perma.cc/6ED4-YM8K>].

121. *Id.* at 1.

122. *Id.*

123. *Id.*

124. *Id.* at 2.

125. *Id.* at 6.

126. *Id.* at 19.

127. *Id.* at 6.

128. *Id.*

129. *Id.* at 10.

130. *Id.*

the word “sorry” more frequently and use it to express concern.<sup>131</sup> This difference was voiced when some of the employees Tannen interviewed said that they dislike working with people who do not admit to their own mistakes.<sup>132</sup>

### III. GENDER INEQUALITY IN THE WORKPLACE: SEXUAL HARASSMENT

Another reason for the perceived role incongruity of women as leaders can, at many companies, be attributed to sexual harassment. This is especially true in some areas where there is a male-dominant culture in professions such as entertainment, politics, and law.<sup>133</sup> Sexual harassment is an abuse of power by those in positions of power over the job<sup>134</sup> and results when women are seen more as sex objects rather than for their competence and skills in the job. When there is harassment, most women just leave the harassing conditions and move on to another job rather than report it or deal with it directly. According to one study, only one quarter to one third of people experiencing harassment report it to a supervisor or union representative, and only 2% to 13% file a formal complaint.<sup>135</sup> The result of this pattern is that women must reestablish themselves at a new workplace and rebuild credibility. This in turn results in women being behind men in terms of experience, good recommendations, salary, and the ability to time their departures under conditions that benefit them. Additionally, the failure to report is seen by some as evidence that harassment did not happen or was not serious enough to worry about, thus the harmful behavior goes uncorrected.<sup>136</sup>

Over the decades since the courts first recognized the right to seek relief for sexual harassment in the 1970s,<sup>137</sup> there have been surges in interest and

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131. *Id.*

132. *Id.*

133. Aarti Rawaswami et al., *The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers*, 37 J. OF CAREER DEV. 692, 694 (Jan. 2010).

134. Dacher Keltner, *Sex, Power, and the Systems That Enable Men Like Harvey Weinstein*, HARVARD BUS. REV. (Oct. 13, 2017), <https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein> [<https://perma.cc/3K5P-AHGL>].

135. Claire Cain Miller, *Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES, Apr. 11, 2017, at B2 (citing a meta-analysis of studies by Professors Lilia Cortina and Jennifer Berdahl).

136. *Id.*

137. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.*; *Williams v. Bell*, 587 F. 2d 1240 (D.C. Cir. 1978); *Tomkins v. Public Serv. Elect. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).

lawsuits about harassment.<sup>138</sup> Sexual harassment has traditionally been viewed as a form of sex discrimination covered by Title VII of the Civil Rights Act of 1964.<sup>139</sup> Sexual harassment is seen as an abuse of power because of the traditional inequality of power between men and women in society, magnified in employment because of an employer's power over the employee and a typically male-dominated work environment.<sup>140</sup> A (male) employer or supervisor abuses his power when he subjects an employee over whom he has power to unwelcome conduct. He uses his economic power to coerce the employee to engage in conduct that the employee feels forced to accept. This is known as *quid pro quo* sexual harassment because submission to the power is exchanged for a job benefit.<sup>141</sup> If sufficiently severe, one act of harassment is sufficient to state a claim. The lack of an objection from the employee does not mean that the behavior is welcome; she may feel she has no power to object.<sup>142</sup> As noted above, because most women just leave, this comports with actual behavior. In Title VII suits, the claim is against the employer.<sup>143</sup> The employee can also sue the harasser under tort and other theories if the facts fit the requirements.<sup>144</sup>

The ability of an employee to seek redress under Title VII was greatly expanded when the Supreme Court adopted the theory of hostile environment.<sup>145</sup> Under this theory, the employer abuses its power when it

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138. Jessica Campbell, *The First Woman Who Alleged 'Sexual Harassment'*, LEGACY.COM (2017), <http://www.legacy.com/news/culture-and-trends/article/the-first-brave-woman-who-alleged-sexual-harassment> [<https://perma.cc/95LV-YKR5>]. The term "sexual harassment" was first used by three female Cornell University professors. FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW*, 218-25 (1st ed., 2009). It was first used in the media in a 1975 article. Enid Nemy, *Women Begin to Speak Out Against Sexual Harassment at Work*, N.Y. TIMES, Aug. 19, 1975, at 38.

139. 42 U.S.C. §§ 2000e-2000e-17 (2012).

140. See *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1452 (1984); Terry Morehead Dworkin, et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125, 127 (1988) (showing the relationship between sexual harassment claims and Title VII).

141. The threat can either be explicit or implicit. 29 C.F.R. § 1604.11(a) (2018).

142. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* 83 (2016) (showing how Vinson, a bank employee, was subjected to groping, lewd comments, and sexual assault from her boss, including intercourse over 40 to 50 times; she submitted to the behavior because she needed the job and her boss threatened to kill her if she was not "perfectly cooperative").

143. 42 U.S.C. §§ 2000e-2000e-17 (2012). The employer is vicariously liable for the harassment even though it did not participate or condone the behavior.

144. Dworkin et al., *supra* note 140.

145. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION*, 44 (1979).

creates or tolerates a harassing environment created by co-employees, a supervisor, or even a customer.<sup>146</sup> In general, it differs from *quid pro quo* harassment in that no job benefits are on the line, and because several incidents are required to create a harassing environment.<sup>147</sup> A hostile environment is created when the behavior has the effect or purpose of unreasonably interfering with the victim's work, or is offensive or intimidating enough to do so.<sup>148</sup> The employer is liable if it knew or should have known about the harassment and it did not take swift and or appropriate remedial action.<sup>149</sup> The employer can also be held liable under a theory of constructive firing if the victim quits rather than tolerate the behavior.<sup>150</sup>

Under a theory of harassing environment, the employer can escape liability if the employer can show that he or she exercised reasonable care to prevent harassment or appropriately dealt with the harassing environment. If the employee unreasonably failed to take advantage of opportunities provided by the employer to prevent or correct the behavior, then the employer will not be liable.<sup>151</sup> This protection from liability for this class of harassment led most large employers to set up programs to prevent harassment. If employers explain what harassment is, train employees, create clear reporting procedures,<sup>152</sup> adequately investigate reports, and take appropriate action if the report is verified, they can escape liability.

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146. ANNE C. LEVY & MICHELE A. PALUDI, *WORKPLACE SEXUAL HARASSMENT* 21 (2d ed., 2001). The employer can also be liable if the harassment is male-on-male, not just one gender versus another. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

147. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

148. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11(a) (2016). Whether the behavior is sufficient to create a hostile environment is judged by a reasonable person, reasonable victim, or reasonable woman standard—would the reasonable person, considering all the circumstances, find it abusive. Even if it does not seriously affect the employee's psychological wellbeing, if it "detract[s] from the employee[']s job performance, discourage[s] employees from remaining on the job, or keep[s] them from advancing in their careers" it is sufficient. *See Harris*, 510 U.S. at 22 (holding that between the two, courts look at the circumstances from the perspective of a female rather than the gender-neutral reasonable person standard); *see also*, *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 963 (8th Cir. 1993) (holding that unwelcome sexual advances supported a claim of sexual harassment).

149. MARK ROTHSTEIN ET AL., *EMPLOYMENT LAW* 300 (5th ed., 1994).

150. *Id.* This is known as constructive firing. To be successful, the victim must show that the conditions were sufficiently intolerable that a reasonable person would feel compelled to quit.

151. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743 (1998).

152. The procedure must include an alternative place to report in case the procedures require the employee to report to the harasser. *Sexual Harassment Policy and Complaint/Investigation Procedure*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (May 24, 2018), [https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms\\_000554.aspx](https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_000554.aspx) [<https://perma.cc/4Z8W-Z8MY>].

After each of these important decisions, attention to workplace harassment rose, as did lawsuits alleging harassment. Another significant spur for attention and suits was the Senate hearings about the appointment of Clarence Thomas to the Supreme Court in 1991.<sup>153</sup> Thomas was accused of harassment by his former employee, Anita Hill; nonetheless, he was confirmed.<sup>154</sup> The publicity surrounding the hearings, however, made women more aware of their rights and protections and lawsuits ensued. Employer efforts to try to prevent workplace harassment also greatly increased. Over time, however, the programs became less about changing the workplace culture and more focused on preventing liability.<sup>155</sup>

At present, there is another surge in attention focusing on sexual harassment. What is different about the current surge is that it is happening largely outside the legal system and, in several cases, allegations alone have caused powerful people to lose their jobs and their reputations. As in the Thomas hearings, the current surge was kicked off by focusing on a powerful individual, in this case a man in the entertainment industry, Harvey Weinstein, one of Hollywood's most prominent producers. Articles in the *New York Times* and the *New Yorker* in 2017 revealed information about Weinstein and his almost forty years of sexual harassment (and worse).<sup>156</sup> The fallout, "[t]he newest uprising of the women on behalf of the right to be treated with the civility and respect due any citizen . . . ,"<sup>157</sup> termed by some as the "Weinstein Effect,"<sup>158</sup> is having an ever-broadening impact. Once

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153. In a twist of fate, Anita Hill, currently a professor at Brandeis University, has now been tapped to lead the Commission on Sexual Harassment and Advancing Equality in the Workplace. The Commission, formed in December, 2017, is designed to combat inequality and harassment in the entertainment industry. Ellen McCarthy, *Anita Hill chosen to lead Hollywood sexual harassment commission*, WASH. POST (Dec. 16, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/12/16/anita-hill-chosen-to-lead-hollywood-sexual-harassment-commission> [<https://perma.cc/UJ47-XSNB>].

154. Former Vice President Joe Biden said he now regrets the way Hill was treated by the Senate Judiciary Committee during the hearings in 1991. *Id.*

155. Miller, *supra* note 135.

156. Jodi Kantor & Megan Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*, N.Y. TIMES, Oct. 6, 2017, at A1; Ronan Farrow, *Harvey Weinstein's Army of Spies*, THE NEW YORKER: NEWS DESK, (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies> [<https://perma.cc/86TS-JS6E>]; Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER: NEWS DESK, (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/8WVK-AMP>]; see also Lynn S. Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., (Mar.-Apr., 1994) (finding that executives who ignore ethics increase the risk of personal and corporate liability).

157. Vivian Gornick, *They Were True Believers*, N.Y. TIMES MAGAZINE, Dec. 17, 2017, at SR9.

158. Vanessa Fuhrmans, *Sexual Misconduct Rocks Media, Politics*, WALL ST. J., Dec. 19,

Weinstein's abuse of power and his decades-long cover-ups became known, it sparked a national conversation that led to the forced resignation or firing of many men in positions of power and leadership. Among these are directors (including Weinstein),<sup>159</sup> media personalities,<sup>160</sup> judges or judicial candidates,<sup>161</sup> CEOs,<sup>162</sup> and legislators.<sup>163</sup> In this respect it is much broader than an employer's liability for sexual harassment.

The current movement is different in important respects from earlier ones in that it has been greatly facilitated by social media. Women now feel much more empowered to speak out through groups such as #MeToo and #TimesUp.<sup>164</sup> "Now the victims are on the offensive, and the accused are on the defensive."<sup>165</sup> Although many of the claims would not rise to successful

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2017, <https://www.wsj.com/articles/natural-disasters-shootings-and-harassment-claims-1513108128> [<https://perma.cc/7FDK-5L9P>].

159. Weinstein was forced to leave the company he founded, and it has recently been sold to a group led by Maria Contreras-Sweet. Ben Fritz, *Group Agrees to Buy Weinstein Assets*, WALL ST. J., Mar. 2, 2018, at B6.

160. Braden Campbell, *Matt Lauer Canned by NBC After Sexual Misconduct Report*, LAW 360 (Nov. 29, 2017, 11:40 AM), <https://www.law360.com/articles/989278/matt-lauer-canned-by-nbc-after-sexual-misconduct-report> [<https://perma.cc/G3AK-H8KG>].

161. See, e.g., Sara Randazzo, *Sexual-Harassment Probe of Judge Set*, WALL ST. J., Dec. 16-17, 2017, at A2 (reporting investigations of Judge Alex Kozinski following sexual harassment allegations from former law clerks); Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/2GAN-ML7X>] (reporting that Ninth Circuit Judge Alex Kozinski had been accused of groping women, including a law student, among other allegations, and that he subsequently retired).

162. AnnaMaria Andriotis, *Visa Fired Executive after Tip in Email*, WALL ST. J., Dec. 18, 2017, at B1.

163. See, e.g., Brendan Farrington, *Florida senator resigns amid sexual misconduct allegation*, THE SEATTLE TIMES: NATION & WORLD (Dec. 20, 2017), <https://www.seattletimes.com/nation-world/florida-governor-senator-should-step-down-over-allegations/> [<https://perma.cc/28UU-VDC3>] (reporting resignations of government officials following investigations finding credible evidence of sexual misconduct); The Associated Press, *Nevada Democrat, Facing Ethics Probe, Won't Seek Re-election*, THE SEATTLE TIMES: NATION & WORLD (Dec. 16, 2017), <https://www.seattletimes.com/nation-world/nevada-democrat-facing-ethics-probe-wont-seek-re-election/> [<https://perma.cc/3N4C-EJKQ>] (reporting a U.S. Representative's announcement not to seek re-election following sexual harassment allegations). Although almost all incidents have involved men harassing women, a few females have also been accused.

164. A USA Today survey reported that 94% of women in the entertainment industry said they had experienced some form of sexual harassment or assault in their careers. Maria Puente & Cara Kelly, *How Bad Is Hollywood's "Me Too" Problem?*, USA TODAY, Feb. 21, 2018, at A1. Only one of four women reported the incident for fear of personal or professional backlash. *Id.* at 2A.

165. Alexandra Wolfe, *Gloria Allred: The Controversial Attorney Talks About Her Long Career and Defends Her Often Criticized Tactics*, WALL ST. J., Feb. 17-18, 2018, at C11.

sexual harassment claims under Title VII, the women are being listened to and actions are being taken. These actions, while benefitting people in a variety of ways, also mean that boards and companies need to change their thinking and actions around diversity and equal treatment.

The Weinstein Effect has proved beneficial for women in ways other than simply a forum and empowerment to speak up. In several cases it had the secondary effect of some women being promoted to positions in the C-suite as men have been forced to resign or have been fired because of their abuse of power.<sup>166</sup> These include Jennifer Salke, the new head of Amazon Studios, who replaced Roy Price who left after allegations of harassment.<sup>167</sup> This development could be called the glass elevator.

In some ways, this development is similar to the “glass cliff” effect where boards have put a woman in a leadership position only after there is a crisis that the male leaders have been unable to solve.<sup>168</sup> Named after the glass ceiling,<sup>169</sup> it is called a cliff because the company is in a very tenuous position and failure is difficult to overcome.<sup>170</sup> If the female leader fails, or falls off the cliff, gender is blamed for part of the failure and cited as a reason why women do not belong in such positions.<sup>171</sup> The women filling vacancies

166. See, e.g., *2017 Whistleblower of the Year Nominee-The Weinstein Whistleblowers*, CONSTANTINE CANNON WHISTLEBLOWER INSIDE BLOG (Dec. 22, 2017), <https://constantinecannon.com/2017/12/22/2017-whistleblower-year-nominee-weinstein-whistleblowers/> [<https://perma.cc/8TE2-KW5U>] (describing how the Weinstein whistleblowers encouraged other women to report prominent men engaging in sexual harassment). As of December 22, 2016, over ninety women have accused Weinstein of rape, sexual assault, and sexual harassment. *Id.*

167. Joe Flint, *NBC Taps New Co-Anchor for ‘Today’*, WALL ST. J., Jan. 3, 2018, at B4 (describing a woman’s successful replacement of a male who was fired for sexual misconduct).

168. See DG McCullough, *Women CEOs: Why Companies in Crisis Hire Minorities—and Then Fire Them*, THE GUARDIAN: SUSTAINABLE BUSINESS (Aug. 8, 2014, 2:42 PM), <https://www.theguardian.com/sustainable-business/2014/aug/05/fortune-500-companies-crisis-woman-ceo-yahoo-xerox-jc-penny-economy> [<https://perma.cc/8SEB-HTUD>] (explaining the glass cliff theory); Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549 (2007) (expanding further on the glass cliff theory).

169. The term “glass cliff” was coined by Exeter University Professors Ryan and Haslam. Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549 (2007).

170. Katrin Benhold, *Female Leaders May Face ‘Glass Cliff,’* N.Y. TIMES, Oct. 7, 2016, at A3. Benhold claimed that the same effect occurs in politics as in companies. She highlighted that after the appointment of Theresa May as prime minister after Brexit, “[a]ll the men who were responsible for the mess stabbed each other soundly in the back and then ran away.” *Id.*

171. McCullough, *supra* note 168 (citing a study by Utah State University professors).



caused by sexual harassment, though, are starting in a better position to be successful. The company probably is not in a precarious position, and there may be some thought that because she is female, the harassment issue is solved. Some of the new female leaders are likely to be questioned because of the way they were put in the job, however.<sup>172</sup>

The harassment scandals have also led to changes in how boards search for and screen CEO candidates.<sup>173</sup> They are doing more careful screening of candidates particularly in relation to sexual harassment, because, “[r]eputation management is becoming an increasingly important component of the valuation of a business.”<sup>174</sup> This stress on reputation is shown by the forcing out of powerful leaders after allegations of harassment.<sup>175</sup> It is anticipated that undisclosed sexual harassment in a prior job can later give grounds for firing for cause and diminish the reputation of the organization.<sup>176</sup> Although boards have often done background and reference checks, and even psychological evaluations before choosing a CEO, these evaluations often miss lawsuits alleging workplace sexual harassment.<sup>177</sup> Social media, which is easily searchable, can help in the screening. Perhaps most notably, the “#Me Too” movement where people share their experiences of sexual harassment, has played an important role in bringing incidents to light. Continued attention paid by the media, including the Golden Globe Awards<sup>178</sup> and articles in widely seen publications such as

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172. *Id.* Another downside is that a female CEO is more likely to be replaced by a male CEO. In addition, the terms of female CEOs are more likely to be shorter and therefore they have less time to prove themselves.

173. Joann S. Lublin, *Scandals Reshape CEO Searches*, WALL ST. J., Dec. 28, 2017, at B6.

174. *Id.* (quoting the chief executive of Allergan and a director of Cisco Systems Inc.).

175. See Cannon, *supra* note 166.

176. Senator Al Franken was forced to resign after allegations and photos showed him kissing women without their consent. These incidents occurred before he was elected to the Senate. See Heather Caygle, *Another Woman Says Franken Tried to Forcibly Kiss Her*, POLITICO, Dec. 6, 2017, <https://www.politico.com/story/2017/12/06/al-franken-accusation-sexual-harassment-2006-281049> [<https://perma.cc/4D4S-LB4F>] (reporting the allegations that Al Franken tried to forcibly kiss a former staffer, saying that he was entitled to do so as an entertainer).

177. Lublin, *supra* note 173.

178. See Erich Schwartzel, *Causes Outshine Celebrities at Golden Globes*, WALL ST. J., Jan. 8, 2018, at A11 (“At the 75<sup>th</sup> Golden Globe Awards . . . the entertainment industry’s reckoning over sexual harassment across Hollywood upstaged every category and celebrity.”). The article predicted the presentation of the Oscars at the Academy Awards ceremony would likely have the same influence. Some of the stars have formed an organization called Time’s Up to help women who have been harassed.

*New York Times Magazine*<sup>179</sup> and *Time Magazine*<sup>180</sup> have also made it easier for women to speak up.

Boards have another cause for concern – their own liability. One example is the experience of the board of Wynn Resorts Ltd. After Steve Wynn, the “king of Las Vegas,”<sup>181</sup> left his position as top executive of the casino empire he founded because of multiple allegations of harassment, regulators began to look into whether board members and other executives knew about a \$7.5 million settlement Wynn allegedly paid to a manicurist who alleged Wynn forced her to have sex with him, and whether they failed to report it.<sup>182</sup> Nevada’s gambling regulators have set up a reporting system for tips and complaints about Wynn, and regulators in Massachusetts and Nevada are considering whether the company’s gambling licenses should be pulled.<sup>183</sup> There have been calls for the board’s resignation and some calls for liability on their part for their failure of corporate governance.<sup>184</sup> Stock prices plunged after the publicity about the alleged decades-long pattern of misconduct.<sup>185</sup>

Another example involves Fox News. A shareholder, the City of Monroe Employees’ Retirement System (Retirement System), filed a derivative complaint against 21<sup>st</sup> Century Fox and its board alleging that the board breached its fiduciary duty by failing to clean up the network’s “hostile work environment.”<sup>186</sup> In 2016, a former anchor at the company sued Fox News Chairman Roger Ailes for sexual harassment and retaliation. During the ensuing eighteen months several more women came forward with allegations. The Retirement System suit alleges the sexually charged environment should not have been invisible to the company.<sup>187</sup> In August

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179. Melinda Tuhus, *In the Workplace, Power and Sex*, N.Y. TIMES, Oct. 12, 1997, at CN14.

180. Stephanie Zacharek et al., *2017 Person of the Year: The Silence Breakers*, TIME, Dec. 18, 2017, at 34.

181. Chris Kirkham, Kate O’Keefe & Susan Pullman, *Wynn Resorts Board Gets Scrutiny After Steve Wynn’s Resignation*, WALL ST. J. B1 (Feb. 8, 2018); Elizabeth Winkler, *The Board of Wynn Resorts Needs to Go, Too*, WALL ST. J. B12 (Feb. 7, 2018).

182. Kirkham et al., *supra* note 181.

183. Chris Kirkham & Kate O’Keefe, *Nevada Regulator, Inundated With Reports About Steve Wynn, Starts Website to Field Tips*, WALL ST. J. (Feb. 12, 2018), <https://www.wsj.com/articles/nevada-regulator-inundated-with-reports-about-steve-wynn-starts-hotline-for-tips-1518452745> [<https://perma.cc/HS3P-6PJQ>].

184. Winkler, *supra* note 181, at B12.

185. *Id.* Winkler notes that the board has not taken any responsibility for the alleged abuse of female employees and only reluctantly accepted his resignation.

186. Keach Hagey, *Fox Creates Advisory Committee in Settlement of Shareholder Complaint Over Sexual Harassment*, WALL ST. J. B6 (Nov. 20, 2017).

187. *Id.* “In a series of highly public scandals and settlements,” many top executives and on-air personalities left. *Id.*

2017, the company reported it had paid \$50 million in costs and fees related to sexual harassment suits. It also paid Ailes an exit package of more than \$40 million. The Retirement System also sued for unjust enrichment of Ailes estate.<sup>188</sup> As part of a settlement agreement of the Retirement System suit, Fox set up an outside council to help change its culture.<sup>189</sup>

Sexual harassment lawsuits resulting in a payout are usually accompanied by a secrecy agreement. Weinstein, among other prominent men who have paid settlements, used secrecy agreements to keep their reputations untarnished.<sup>190</sup> In light of this, Congress is considering a bill that would negate such agreements, as are several states. According to the National Conference of State Legislatures, Arizona, California, Florida, New York, New Jersey, Pennsylvania, South Carolina, and Virginia have proposed legislation regarding secrecy agreements.<sup>191</sup> These bills are often part of a package designed to facilitate harassment claims. They can also go beyond harassment to deal with related claims such as discrimination and retaliation.<sup>192</sup> As such, they will limit a company's options for defending and resolving workplace disputes and raise the vulnerability of boards who fail to monitor their company's efforts in this regard.

An additional legislative effort by some states such as California, New Jersey, New York, and Washington is limiting the use of mandatory arbitration agreements in employee contracts.<sup>193</sup> In Washington, for example, the bill is part of a package of bills designed to address sexual harassment.<sup>194</sup> The use of mandatory arbitration agreements has grown annually, in part because of the U.S. Supreme Court's strong preference for arbitration over litigation.<sup>195</sup> Although arbitration has some advantages in

188. *Id.* The suit was settled in November.

189. *Id.*

190. Cannon, *supra* note 166.

191. Agueda Pacheco-Flores, *Legislation in Olympia targets sexual harassment in the workplace*, SEATTLE TIMES, (updated Mar. 20, 2018, 11:00 AM), <https://www.seattletimes.com/seattle-news/politics/legislation-in-olympia-targets-sexual-harassment-in-the-workplace/> [<https://perma.cc/WU8F-XVG4>].

192. Maxine Neuhauser, *NJ Bill Could Make Resolving Employment Disputes Tougher*, LAW 360 (Jan. 5, 2018).

193. Braden Campbell, *States Act To Quell Harassment as #MeToo Momentum Surges*, LAW 360 (Jan. 10, 2018).

194. Pacheco-Flores, *supra* note 191. Another bill would create a group to develop model practices. Microsoft recently announced that it was ending a practice requiring employees to agree to arbitration of sexual harassment suits.

195. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that only employment contracts of transportation workers were exempted from the Federal Arbitration Act); *Palcko v. Airborne Express, Inc.*, No. Civ.A. 02-2990, 2003 WL 21077048 (E.D. Pa. Apr. 23, 2003) (holding that the plaintiff employee was required arbitrate her claims against defendant shipping company according to the arbitration agreement); *see also* Norman D.

that it is often cheaper and quicker than litigation, it is also private (an advantage for employers). In areas which have an important impact on public policy and society, such as sexual harassment and other forms of discrimination, mandatory arbitration of claims means that it is very difficult if not impossible to tell the extent of discriminatory practices and which employers are engaging in them. The proposed state legislation will help shine light on the issue.

This is not an exclusive list of actions legislatures are considering taking. For example, some states have, or are considering, extending the statute of limitations in sexual assault cases.<sup>196</sup> Others are strengthening their whistleblower and anti-SLAPP (strategic lawsuit against public participation) protections.<sup>197</sup> What seems clear is that boards need to pay closer attention to sexual harassment in their organizations and work to change the company culture. This is true not just for liability purposes, but failure to do so can have a significant effect on the bottom line. Cities<sup>198</sup> and pension funds have stated they will be reluctant to invest in companies with poor records on gender issues.<sup>199</sup>

#### IV. POTENTIAL SOLUTIONS FOR PROMOTING BETTER LEADERSHIP AND GENDER DIVERSITY

##### A. *Changing Company Norms*

It seems clear that boards that ignore the changing views on sexual harassment and equality in the workplace do so at their – and the company’s – peril. There are a variety of actions a board can take to help the company adapt and also probably increase the bottom line. The most basic action centers on ensuring a culture in which people treat each other with respect and in which they feel free to speak.<sup>200</sup> The focus should be less on legal

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Bishara, et al., *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS. 37, 104-110 (2013) (discussing several cases in which courts compelled arbitration in whistleblower claims).

196. Wolfe, *supra* note 165.

197. Bruce E.H. Johnson & Antoinette Bonsignore, *Protect #Me Too Victims from Retaliatory Lawsuits*, SEATTLE TIMES A (updated Jan. 23, 2018, 3:54 PM), <https://www.seattletimes.com/opinion/protect-metoo-victims-from-retaliatory-lawsuits/> [<https://perma.cc/97A5-HCK9>]. SLAPP is designed to prevent citizens who speak up about matters of public interest from being sued to prevent them from speaking.

198. Sarah Krouse, *Chicago Rethinks Investing - Proposed legislation seeks to consider 'ESG' factors in investment decisions*, WALL ST. J. B10 (Mar. 1, 2018). Chicago is the country’s third-largest city, and its investment decisions can have an important impact.

199. Joann S. Lublin, *Boards Urged to Get Tougher on Sexual Harassment*, WALL ST. J., Mar. 2, 2018, at B6.

200. Workers at the Wynn Resorts blame the culture and warnings not to speak as reasons

protection and more on creating and or maintaining a place where people want to work.<sup>201</sup> To this end, there are several concrete steps that can be implemented. The most important step is informing employees that the goals are coming from the top down. There is consensus that without this, measures will again be viewed as window dressing and probably ineffective.<sup>202</sup> The board should insist that members of senior management understand the importance of and agree with the culture tenets, and will help to implement them. Implementation and results should be part of the assessment by the board of top personnel and should be part of the salary determination.<sup>203</sup>

The message can be reinforced by having board members interact with employees on certain issues. Ideally, the board should help implement an open organization where information flows freely among the various levels.<sup>204</sup> This helps facilitate reporting and raising of problems. In larger organizations, it is likely that the framework for such exchanges already exists. In response to the Corporate Sentencing Guidelines<sup>205</sup> and the Sarbanes-Oxley Act,<sup>206</sup> among other laws, reporting procedures including hotlines should be in place. To encourage their use, a board member (most likely in a video or on-line format) followed by the CEO or some other top executive, can explain the importance of the goals to the organization, the kinds of behaviors of particular interest, and what can be expected if reports are made. Non-retaliation should be stressed. This could be followed by small group discussions as part of a training exercise led by others lower in management.

Of equal importance is an established procedure to follow up and investigate reports,<sup>207</sup> and report back to the individual about appropriate

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why the harassment and abuse persisted for so long without action being taken. Alexandra Berzon, *et al.*, *Wynn Accusers Fault Firm Culture - Employees say managers discouraged complaints or looked the other way*, WALL ST. J. (Mar. 28, 2018), at A1.

201. Bettina Deynes, Vice President for H.R. at the Society for Human Resource Management, stated, “[t]he motive is not the legal liability but the culture you want,” in reference to getting employees to report harassment. Miller, *supra* note 135.

202. See Terry Morehead Dworkin, *et al.*, *Encouraging Internal Reporting*, 7 COMPLIANCE & ETHICS PROF’L 26, 27-28 (2010) (discussing research that indicates managers should both encourage employees to speak out and clearly explain procedures to employees).

203. It does not necessarily follow that an increase in reports should be viewed as a negative. It can signal that the process is working because there is more trust in the system. Miller, *supra* note 135.

204. Dworkin, *et al.*, *supra* note 202 at 27.

205. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C).

206. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

207. There should be at least two, if not several venues to report. This increases the

action taken.<sup>208</sup> At least annually, if not more often at board meetings, the board should review whether the procedure is working, the types of reports received, and whether appropriate action was taken. Another source of information, the exit interview, could also help stop future problems. The interviewer should try to ascertain whether retaliation was a cause of the exit, and if so, this should be reported to the board.<sup>209</sup>

A summary of reports and actions taken, issued by the board and made available to the employees would go a long way to emphasize that the board is actively interested in an open culture and that the organization is a fair place to work. The same report, made available to shareholders and potential investors, could also be helpful to the organization. At this time, special attention should be paid to reports of harassment. The Council of Institutional Investors has urged directors to have staff report sexual harassment to the board and inform the board of every settlement of a harassment case.<sup>210</sup> It stated that directors should be “providing leadership on corporate culture, including combating sexual harassment.”<sup>211</sup> According to a survey by Boardlist, a marketplace for female board talent in the technology sector, as of the summer of 2017, 88% of boards had not adopted a plan to deal with sexual harassment.<sup>212</sup> Adoption of these recommendations would be helpful in dealing with the issue.<sup>213</sup>

### *B. Changing the Culture through Changing the Numbers*

The European Union and its member nations, which so far have seen the strongest policy action regarding board gender equity, have in recent

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likelihood that employees with an issue can find someone they are sufficiently comfortable with to report.

208. Appropriate action means proportional consequences. Some low-level issues can be handled with a conversation. See Miller, *supra* note 135 (discussing best practices for handling complaints, including rewarding managers when complaints of harassment increase in their departments).

209. Dworkin, et al., *supra* note 202, at 28.

210. *Id.* They also encouraged recouping executive pay from alleged harassers and revising the rules regarding office romances.

211. *Id.* The deputy director of the Council of Institutional Investors, Amy Borus, stated that overall “boards have not been taking a close look at how their companies are managing the risk of sexual harassment.” *Id.*

212. *Id.* The poll covered 414 people, virtually all of whom serve on company boards.

213. Several other institutional investors such as Black Rock are putting pressure on boards to change their organizations’ culture. Krouse, *supra* note 198 See also Lublin, *supra* note 173; Sarah Krouse & Kristen Grind, *Fidelity Rethinks Star Managers*, WALL ST. J., Feb. 27, 2018, at A1 (discussing current trends in the business world to overhaul business plans to remediate cultural issues within companies).

years pushed hard for gender quotas as a solution to the matter.<sup>214</sup> In 2014, the European Commission set a target for all publicly listed EU firms to have a board composed of at least 40% women, while establishing guidelines to ensure that “qualification and merit remain the key criteria.”<sup>215</sup> A wide range of EU countries have gone ahead with their own sets of legislation, executive ordinances and other policies meant to promote gender diversity on boards.<sup>216</sup> The results of these efforts have been overall successful, but concentrated in a few EU states: between 2010 and 2016, female board membership had overall doubled to 23.3% across the EU, with France and Italy seeing approximately 25% female representation on boards while others, like the Czech Republic and Romania, seeing declines in female board representation.<sup>217</sup> Generally, nations that saw the greatest gains had enacted hard quotas with specific deadlines, while nations with smaller gains or declines had enacted weaker, voluntary policies or had taken no policy action at all.<sup>218</sup> These results highlight that although quotas are effective at rapidly increasing female representation on boards, mere recommendations or voluntary standards at the national level are not enough to fix the matter.

Opponents of quota systems may claim that quotas may cause firms to prioritize the gender of the candidate over merit, or otherwise may result in women being added merely as “token[s].”<sup>219</sup> Fortunately, there is some standing research on this matter. Norway implemented aggressive gender quotas for boards in 2003, and studies have examined its effects. For example, Elstad & Ladegard note that in the years following the implementation of the policy, female board members felt they did have influence on the decisions of the board,<sup>220</sup> while another study found no deleterious effects on financial performance as a result of this policy.<sup>221</sup> It seems that in practice, the alleged deleterious effects of quota systems do not manifest: women do not feel like mere tokens, and performance does not decline (though the authors of the latter study find no significant improvement in financial performance either, aside from greater capital

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214. Jourová, *supra* note 32.

215. *Id.* at 5.

216. *Id.* at 6.

217. *Id.* at 3.

218. *Id.* at 6.

219. See, e.g., Kathleen Elkins, *Top JPMorgan Exec: Gender Quotas Are Bad for Women in Business*, CNBC (Oct. 25, 2016), <https://www.cnbc.com/2016/10/25/top-jpmorgan-exec-gender-quotas-are-bad-for-women-in-business.html> [<https://perma.cc/Y9KR-QBJU>].

220. Elstad & Ladegard, *supra* note 65.

221. Monika Leszczyńska, *Mandatory Quotas for Women on Boards of Directors in the European Union: Harmful to or Good for Company Performance?*, 19 EUR. BUS. ORG. L. REV. 35 (Nov. 14, 2017).

accumulation). This does not mean, of course, that no negative effects exist, and more research is needed to determine the true effects of these policies. These studies seem to indicate that it is possible for a well-implemented quota policy to avoid these negative effects.

Quotas as a solution to disparities have not been allowed in the U.S. since the 1970s, however. In *Regents of University of California, Davis Medical School v. Baake*,<sup>222</sup> the Supreme Court, in a fractured opinion, held that strict quotas were a violation of the equal protection clause.<sup>223</sup> The law has evolved to the point that private employers may set goals as part of an affirmative action plan so long as they meet certain requirements, notably that the plan be flexible, temporary, and address past discrimination or significant disparities.<sup>224</sup> Boards that wish to diversify can encourage use of an affirmative action plan that may help bring more women into the organization. They can also indicate priorities for inclusion of women as part of the group being considered for leadership positions. There is pressure on boards to take such action.

External pressure to increase the number and advancement of women is coming from a variety of sources. Investors in the U.S. who oversee about ten trillion dollar in assets see this as a way to increase profitability and stock prices, and prevent disasters such as those at Wynn Resorts and the Weinstein Companies.<sup>225</sup> Interest groups, such as those made up of more than two dozen CEOs of companies such as LinkedIn Corp. and Newmont Mining Corp., have signed pledges to create measurable targets for women at every level and ensure influential senior men sponsor promising women.<sup>226</sup>

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222. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The case involved a white applicant to a program who was denied admission even though his test scores were higher than some of the minority students admitted under a policy that reserved 16 of the 100 places for minority group members. The school wanted to diversify the student body. *Id.* at 276-77.

223. *Id.* at 320. The Court was split 4-1-4.

224. *See, e.g., United Steelworkers of America AFL-CIO v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency, Santa Clara Cnty, Cal.*, 480 U.S. 616 (1987) (showing the current state of affirmative action law).

225. Elizabeth Winkler, *Why Sexual-Harassment Scandals Matter to Investors*, WALL ST. J., (Dec. 5, 2017), <https://www.wsj.com/amp/articles/why-sexual-harassment-matters-to-investors-1512495760> [<https://perma.cc/TDN7-L27W>]; *see also* Ken Brown, *Real Losers in Epic Casino Battle were Wynn Shareholders*, WALL ST. J., (Mar. 9, 2018), <https://www.wsj.com/amp/articles/real-losers-in-epic-casino-battle-were-wynn-shareholders-1520612121> [<https://perma.cc/B5SG-ZBHY>].

226. Joann S. Lublin, *CEOs' New Vow: Advancing More Women at Work*, WALL ST. J. (Dec. 6, 2016), <https://www.wsj.com/amp/articles/ceos-new-vow-advancing-more-women-at-work-1481058002> [<https://perma.cc/T6W6-TR7X>]; *see also* Dani Burger, *'SHE' ETF debuts as gender diversity lures buyers*, SEATTLE TIMES (Dec. 10, 2016), <https://www.seattletimes.com/business/she-etf-debuts-as-gender-diversity-lures-buyers/> [<https://perma.cc/>



Some celebrities are also bringing pressure to bear. Jana Partners LLC enlisted Sting to help raise billions of dollars to target companies they feel should be more socially responsible.<sup>227</sup> And Frances McDormand, in accepting her Oscar at the 2018 Academy Awards ceremony, suggested inclusion riders in contracts when individuals have sufficient bargaining power to do so.<sup>228</sup>

### C. *Creating a More Inclusive Work Environment*

Given the challenges and factors restricting gender diversity in the workplace, this Part addresses some ways businesses can work toward a more gender inclusive work environment. Cindy White, a professional writer who also spent several years in mid-management positions for a Fortune 500 company, highlights the need to take action and implement policies that work to reduce gender inequalities in a work environment.<sup>229</sup>

In sum, White advocates providing training on gender equality to management, providing employees with quality on-site child care facilities, showcasing the firm's successful women, and publicizing the firm's efforts of gender inclusiveness.<sup>230</sup> Furthermore, she explains the need for fundamental change through policies that ensure women and men are compensated equally for the same work, allow both men and women to enjoy a work-life balance, and forbid any form of sexual harassment.<sup>231</sup> Hence, White advocates institutional changes through company policies including creating opportunities for women to be recognized and rewarded in the workplace.<sup>232</sup>

Similarly, Xuan Minh Hoang, an executive at an employer branding agency in London, identifies four specific steps for improving gender

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57G7-ZBNU] (explaining how gender diversity can attract investors).

227. David Benoit, *Wall Street Fighters, Do-Gooders – And Sting – Converge in New Jana Fund*, WALL ST. J. (Jan. 7, 2018), <https://www.wsj.com/amp/articles/wall-street-fighters-do-goodersand-stingconverge-in-new-jana-fund-1515358929> [<https://perma.cc/5KZL-ANAS>].

228. Debra Cassens Weiss, *Frances McDormand Has People Asking: What Is an Inclusion Rider?*, ABA JOURNAL (Mar. 5, 2018), [http://www.abajournal.com/news/article/frances\\_mcdormand\\_has\\_people\\_asking\\_what\\_is\\_an\\_inclusion\\_rider](http://www.abajournal.com/news/article/frances_mcdormand_has_people_asking_what_is_an_inclusion_rider) [<https://perma.cc/LG M7-72U9>]. An inclusion rider in a contract, according to her, means that “you can ask for and/or demand at least 50 percent” of the people in non-star roles and those working on the movie represent the demography of the venue where the film is taking place. *Id.*

229. Cindy White, *How to Promote Gender Equality in the Workplace*, CHRON. (Mar. 17, 2016, updated Aug. 8, 2018), <http://work.chron.com/promote-gender-equality-workplace-10258.html> [<https://perma.cc/S3FZ-R7BK>].

230. *Id.*

231. *Id.*

232. *Id.*

diversity in the workplace.<sup>233</sup> Her strategies include improving transparency in pay, acknowledging and challenging one's own bias, fostering the next female leaders, and supporting parents.<sup>234</sup>

#### *D. Structural Factors*

Other researchers have examined how factors which create hostile environments for female leaders are more deeply rooted than previously believed, and would be difficult to solve merely by individual firms. Self-promotion, or the practice of highlighting one's own accomplishments, is critical to advancements in the business world, yet "women experience social and economic penalties (i.e. backlash) for self-promotion, a behavior that violates female gender stereotypes."<sup>235</sup> Corinne A. Moss-Racusin and Laurie A. Rudman found that fear was the driving factor in limiting self-promotion among female subjects in their study, and that this fear is not experienced nearly to the same degree by male subjects. The researchers, however, also found that female subjects were more capable of peer-promotion, or promoting the accomplishments or merit of their peers and coworkers.<sup>236</sup> In light of these findings, they suggest several local solutions in the face of stereotypes that could take many years to change: weighting peer evaluations in the hiring or promotion process, or offering training to promote "awareness and effective management of backlash threats" for individuals in the workplace.<sup>237</sup>

Many of the obstacles women face, both in terms of backlash effects and general evaluation of others, seem to be rooted in gender stereotypes clashing with what is considered to be good leadership. Research by Victoria L. Brescoll, Erica Dawson and Eric Luis Uhlman found that female leaders face a variety of minefields in handling emotional expression, which in turn strongly affect how others evaluate them as leaders.<sup>238</sup> Their research finds a disparity between stereotypical female traits (more communal, less agentic) and the traits held by successful leaders.<sup>239</sup> Both embracing the stereotypical

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233. Xuan Minh Hoang, *4 Ways to Promote Gender Equality in the Workplace*, UNDERCOVERRECRUITER: EMPLOYER (2015), <https://theundercoverrecruiter.com/gender-equality-workplace/> [https://perma.cc/7X48-2JYV].

234. *Id.*

235. Corinne A. Moss-Racusin & Laurie A. Rudman, *Disruptions in Women's Self-Promotion: The Backlash Avoidance Model*, 34 PSYCHOL. WOMEN Q. 186 (2010).

236. *Id.* at 199.

237. *Id.* at 200.

238. Victoria L. Brescoll et al., *Hard Won and Easily Lost: The Fragile Status of Leaders in Gender-Stereotype-Incongruent Occupations*, 21 PSYCHOL. SCI. 1640 (2010).

239. *Id.* at 416.

communal traits and adopting the stereotypically leadership-oriented agentic traits are, however, poor strategies for women: the former frequently results in the female subject being perceived as too emotional, while the latter is commonly associated with perceptions of coldness, which is not the case with otherwise similar male subjects.<sup>240</sup> Furthermore, once female leaders are conveyed status, even minor perceived slip-ups result in significantly more negative views of them than there would be of male leaders who make similarly minor mistakes.<sup>241</sup> Displaying anger is an especially significant taboo for female leaders while male leaders are expected to express occasional emotional outrage. The Brescoll et al. experiments show that a fictional “angry female [leader] was judged to be the least competent of all the targets, including not just the high- and low-status angry men, but also the *low-status* angry female target.”<sup>242</sup> Citing evidence that these biases are “one of the strongest gender stereotypes held in Western cultures,”<sup>243</sup> the researchers also suggest the expansion of “information and discussion about the ways that gender-emotion stereotypes hinder women’s ability to succeed in leadership roles” within company training programs.<sup>244</sup> A wide range of evidence implies that the gender socialization begins early in childhood<sup>245</sup> as early as preschool,<sup>246</sup> and is tied to parental attitudes<sup>247</sup> as well as the broader cultural environment.<sup>248</sup> This suggests that workplace training may be too little, too late to ameliorate the situation, and that broader social policies meant to target the root of the problem may be the most effective solution in the long term.

#### *E. Concerns Regarding Motives for Reform*

Much of the work on gender equality on the board has focused on

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240. *Id.* at 421.

241. *Id.*

242. *Id.* at 422.

243. *Id.* at 415.

244. *Id.* at 425.

245. See Susan M. McHale et al., *Family Context and Gender Role Socialization in Middle Childhood: Comparing Girls to Boys and Sisters to Brothers*, 70 CHILD DEV. 990 (1999) (analyzing the results of study of the extent of sex-typing during different periods of childhood development).

246. Erin R. Baker et al., *What Can Boys and Girls Do? Preschoolers’ Perspective Regarding Gender Roles across Domains of Behavior*, 19 SOC. PSYCHOL. EDUC. 23 (2016).

247. Hillary Paul Halpern & Maureen Perry-Jenkins, *Parents’ Gender Ideology and Gendered Behavior as Predictors of Children’s Gender-Role Attitudes: A Longitudinal Exploration*, 74 SEX ROLES 527 (2016).

248. See, e.g., Euan Robertson, *Media Gender Stereotypes and Interpretations by Female Generation Y*, F. ON PUB. POL’Y (2010).

improvements in financial performance as a result of improved gender balance, hence many researchers at least implicitly argue that firms should strive to improve gender balance in order to improve financial performance. The focus on financial results is understandable. As Isidro & Sobral write, “it is usually said that firms will appoint more women to their boards only if doing so results in economic benefits for the firm . . . for that reason, the bulk of academic research investigates the economic outcomes for firms that have female directors on their boards.”<sup>249</sup> Yet, public policy should be largely motivated by ethical or egalitarian concerns rather than concerns over corporate performance. In 2014, the European Union’s Commissioner on Justice stated that the Union’s aggressive policy push to encourage more female board members was driven by an understanding that “gender equality is not an option, it is not a luxury, it is an imperative. That is why Europe needs strong rules to tackle the gender imbalance in company boardrooms.”<sup>250</sup>

Despite this statement though, “[t]he [European] Commission’s reasoning underlying the draft Directive [on gender equity on boards] is so strongly pervaded by economic considerations that it gives the impression that women are merely instruments useful to attain economic objectives.”<sup>251</sup> Dr. Marek Szydlo points out that jurisdictions like the European Union, which have pushed especially strongly for gender parity on boards,<sup>252</sup> have substantive legal bases to push for such parity, for example on the basis of the EU’s fundamental right of equality between men and women.<sup>253</sup> Nevertheless, the EU and other similar institutions frequently rely on the business case as a source of legitimacy, if not the fundamental driving force behind such policies.<sup>254</sup> This raises a natural concern:

It may be that the expected economic benefits of women’s increased participation on the boards of companies in the future will not materialize (and, in fact, it is doubtful that they will materialize at all). Would this indicate that gender equality on the boards of companies is unnecessary and unfounded and should be abolished?<sup>255</sup>

Thus, it is important to not lose sight of the ethical and egalitarian issues in play.

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249. Isidro & Sobral, *supra* note 12.

250. Jourová, *supra* note 32.

251. Marek Szydlo, *Constitutional Values Underlying Gender Equality on the Boards of Companies: How Should the EU Put These Values into Practice?*, 63 INT’L & COMP. L. Q. 167 (2014).

252. Jourová, *supra* note 32.

253. *Id.* at 178.

254. *Id.* at 179.

255. *Id.* at 180.

## CONCLUSION

Overall, the evidence regarding female board representation and firm performance has strengthened over recent years, but any direct relationship remains ambiguous. Various studies, as discussed above, suggest that female representation on corporate boards has a causal relationship with certain indirect indicators of firm valuation and performance, for example, commitment to ethical standards and CSR practices. Additionally, women who make it to these upper leadership roles tend to be more diversely skilled than their male counterparts, contributing to the widely observed positive relationship between female board representation and firm performance. However, a range of confounding factors and covariates makes the establishment of strong, direct and causal relationships between these two factors difficult at the present time.

On the whole, there is gender inequality in opportunities for promotions, feedback from managers, and overall participation. Many studies have found that women contribute to organizations in numerous ways enabling firms to experience increased profitability, and better financial ratios and indicators. Yet, with these benefits, there are still limitations for women attempting to enter both entry-level and managerial positions. Some reasons identified for the disparity are that women tend not to apply for jobs unless they are a “cookie cutter” fit, they have insufficient growth opportunities and promotions, and women in senior positions tend to leave their jobs because of work pressure, gender bias and lack of work-life balance. Furthermore, we also see challenges of gender inclusiveness in the workplace, such as, lack of asymmetry between women’s and men’s values and priorities at work and differing gender linguistic styles in the work environment.

There has been some success with quota systems in the EU in promoting gender diversity on boards in some nations, though the relative recency of these policies and disparity in their effectiveness indicates that more work must be done to determine how to best implement them. Yet, government-mandated quotas are not a viable option in the U.S.

Regardless of whether a so-called business case can be established regarding the effect of women in leadership on corporate performance, gender equality is a fundamental right and the environment which seems to block the pathways for women to positions of organizational leadership can be changed. As discussed above, we advocate changing company norms which include creating a culture in which people treat each other with respect

and in which they feel free to speak.<sup>256</sup> Along these lines, claims of sexual harassment need to be reported up the chain to the board and shareholder levels, and need to be acted upon. Furthermore, silence should not be required as part of any settlement agreement with employees.

In addition, although a system of quotas as required by many European countries would face legal obstacles in the U.S., private employers should set gender goals to address past discrimination. The bottom line is that business can and should create a more gender-inclusive work environment for employees with opportunities for women to participate in corporate governance.

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256. See Berzon et al., *supra* note 200 (describing how workers at the Wynn Resorts blame the culture and warnings not to speak as reasons why the harassment and abuse persisted for so long without action being taken). See generally, Frances J. Milliken, Cindy A. Schipani, & Terry Morehead Dworkin, *The Impact of Employment Law and Practices on Business and Society: The Significance of Worker Voice*, 19 PA. J. OF BUS. L. 979 (2016-17) (analyzing the significance of voice in the workplace).