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INNOVATING INCLUSION: THE IMPACT OF WOMEN ON PRIVATE COMPANY BOARDS

JENNIFER S. FAN*

ABSTRACT

Eight percent—that is the percentage of women who serve on the boards of directors of private high technology companies. Private companies, particularly high technology companies, have transformed citizens' daily lives, while the unprecedented availability of private capital has allowed those companies to remain private longer. This rise, however, has also obscured some of the weaknesses of private companies, which are not subject to public disclosure and regulatory oversight: rampant sexual harassment, the lack of women leaders in technology companies, the relative absence of female venture capitalists, and the dearth of female board members, to name a few. Yet thus far, legal scholarship on gender diversity on corporate boards has focused almost exclusively on public companies, overlooking the stark lack of women in the vastly wealthy and influential sector of private capital. This Article documents the exclusion of women from the boards of nearly all the major private high technology companies currently influencing American business, and it explains why this male-only hegemony matters. It then offers a new paradigm, the innovation imperative, for creating a business culture in which people of all genders can make valued contributions. This Article analyzes two potential arenas for change: the legal and business realms. It concludes that a combination of legal and business reforms, such as adding inclusion riders to contracts and rethinking certain hiring and networking practices, would pave the way for progress in getting more women on boards.

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I. INTRODUCTION

By most standards, 2015 was a banner year for venture capital, with new unicorns being anointed on a regular basis, startups flush with cash, and venture capital firms with seemingly endless deep pockets. Despite these outward indications of success, 2015 certainly was not the year of the woman. Ellen Pao's landmark discrimination case[1] against vaunted Silicon Valley venture capital firm Kleiner Perkins Caulfield & Byers turned a glaring spotlight on the mistreatment of women in technology and the lack of women in the rarefied world of venture capital.[2] As one journalist observed, "even some of [her] critics concede[d] that she [was] exposing an uncomfortable truth about Silicon Valley: starting tech companies . . . is still a male game, and so is funding them."[3] Although ultimately unsuccessful in her lawsuit,[4] some observers opined that Pao's case would bring much-needed change in the make-up of venture capital firms. However, as time passed, the number of women in venture capital improved little; if anything, the situation became worse. In 2017, only 8% of women in venture capital firms had

1. Pao v. Kleiner Perkins Caufield & Byers LLC, No. A136090, 2013 WL 3224589, at *1 (Cal. App. Dep't Super. Ct. June 26, 2013). The case ended in 2015 after Pao decided not to appeal.

2. Other startups were also experiencing allegations of sexism, sexual harassment, and/or intimidation. Two such startups are Tinder (co-founder sued Tinder for sexual harassment) and GitHub. Sapna Maheshwari, *Tinder Settles Fast with Co-Founder in Sexual Harassment Suit*, BUZZFEED NEWS (Sept. 8, 2014, 4:44 PM), https://www.buzzfeed.com/sapna/tinder-settels-fast-with-co-founder-in-sexual-harassment-sui [https://perma.cc/DLF7-3KSQ]; Alex Wilhelm & Alexia Tsotsis, *Julie Ann Horvath Describes Sexism and Intimidation Behind Her GitHub Exit*, TECHCRUNCH (Mar. 15, 2014), https://techcrunch.com/2014/03/15/julie-ann-horvath-describes-sexism-and-intimidation-behind-her-github-exit/ [https://perma.cc/W82P-8JTR].

3. David Streitfeld, *Lawsuit Shakes Foundation of a Man's World of Tech*, N.Y. TIMES (June 2, 2012), http://www.nytimes.com/2012/06/03/technology/lawsuit-against-kleiner-perkins-is-shaking-silicon-valley.html [https://perma.cc/WV8L-26R2].

4. *See* Judgment on Special Verdict, Pao v. Kleiner Perkins Caufield & Byers LLC, No. CGC-12-520719, 2015 WL 1726539, at *4 (Cal. App. Dep't Super. Ct. Apr. 3, 2015).

decision making authority;[5] in 1999, the corresponding figure was 10%.[6]

The year 2017 represented a turning point for the technology industry. The ugly truth about the pervasiveness of sexual harassment in the startup world came to light with the now infamous blog posting of Susan Fowler, a former employee of Uber, one of the darlings of the startup world.[7] The #MeToo movement threatened to crash the gates of the venture capital realm.[8] As this Article will discuss, the

5. In accelerators and corporate venture firms, women comprise 15% of partners' roles—nearly double that of venture capital firms. Ned Desmond & Gené Teare, *Announcing the 2017 Update to the Crunchbase Women in Venture Report*, TECHCRUNCH (Oct. 4, 2017), https://techcrunch.com/2017/10/04/announcing-the-2017-update-to-the-crunchbase-women-in-venture-report/ [https://perma.cc/9LQS-UMMN]; Dan Primack, *Venture Capital Still Has a Big Problem with Women*, FORTUNE (Apr. 1, 2016), http://fortune.com/2016/04/01/venture-capital-still-has-a-big-problem-with-women/ [https://perma.cc/SR2J-H7S6]. In contrast, "[a] 2011 survey by the National Venture Capital Association and Dow Jones VentureSource found 89% of investors were male and 11% female, while 87% were white." Jessica Guynn, *Exclusive: Venture Capital to Make Diversity Pledge*, USA TODAY (Aug. 4, 2015), https://www.usatoday.com/story/tech/2015/08/04/national-venture-capital-association-white-house-demo-day-diversity-pledge/31064159/ [https://perma.cc/QRE4-HLZ9]. "The lack of women and minorities affects who gets funding. Pepperdine University found in a [2014] survey . . . that female and minority entrepreneurs were significantly less likely to raise venture capital than their white, male counterparts." *Id.*

6. From 1999 to 2014, the number of female investment partners in venture capital firms declined from 10% to 6%. Michael Chmura, *Babson Releases New Study on Venture Capital Funding for Women Entrepreneurs*, BABSON C. (Sept. 30, 2014, 12:05 AM), http://www.babson.edu/news-events/babson-news/Pages/140930-venture-capital-funding-women-entrepreneurs-study.aspx [https://perma.cc/K4CE-N7AD].

7. According to a 2013 survey conducted by YouGov, 70% of people who experienced sexual harassment did not report it. Mona Chalabi, *Data Hints at the Iceberg of Sexual Harassment Still Beneath the Surface*, GUARDIAN (Oct. 10, 2017, 3:54 PM), https://www.theguardian.com/world/2017/oct/10/data-sexual-harassment-iceberg [https://perma.cc/EP99-7LE2]. There were also salacious headlines from the world of media, with Roger Ailes, Bill Cosby, and Harvey Weinstein named as alleged perpetrators of sexual harassment. *Id.* Bill Cosby has since been convicted on three counts of sexual assault. Manuel Roig-Franzia, *Bill Cosby Convicted on Three Counts of Sexual Assault*, WASH. POST (Apr. 26, 2018), https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1f1ee_story.html?utm_term=.a5377b9504af [https://perma.cc/9D3K-JD9P]. Although Roger Ailes passed in May of 2017, he has not been exempted from further scrutiny, as he will soon be the subject of a biopic that tells the story of the "women who took on the toxic male culture of Fox News and helped depose its chief architect." Helena Andrews-Dyer, *Nicole Kidman and Margot Robbie in Talks to Join Charlize Theron in Movie About Roger Ailes and Fox News*, WASH. POST (Aug. 1, 2018) (internal quotations omitted), https://www.washingtonpost.com/news/reliable-source/wp/2018/08/01/nicole-kidman-and-margot-robbie-in-talks-to-join-charlize-theron-in-movie-about-roger-ailes-and-fox-news/. Harvey Weinsten continues to face the plethora of cases brought against him. *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC (Jan. 10, 2019), https://www.bbc.com/news/entertainment-arts-41594672 [https://perma.cc/S2QW-E5ZT]. Even now, there are stories about sex parties in brotopia. Emily Chang, *"Oh My God, This Is So F---ed Up": Inside Silicon Valley's Secretive, Orgiastic Dark Side*, VANITY FAIR (Jan. 2, 2018, 5:00 AM), https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum [https://perma.cc/WHZ4-H9X3].

8. *See infra* Section III.C; Sophie Gilbert, *The Movement of #MeToo: How a Hashtag*

problems of sexism and sexual harassment highlighted above are inextricably tied to the lack of gender diversity in Silicon Valley[9]—on private company boards of directors, as venture capital partners (i.e. investors), and as founders of startups. These problems are not new. However, there is now a renewed focus on the dearth of women in the venture capital world due to the public outcry over the pervasiveness of sexism and sexual harassment. It has galvanized various industries, including the high technology industry, to change a culture which has long ignored the importance of gender diversity. Unlike litigation, transactional law is prospective—it seeks to prevent problems before they happen. However, in the case of private company boards, board diversity is typically an afterthought.[10] Indeed, it is only when companies go public that they seriously begin to contemplate board diversity.[11] By the time a company goes public, though, diversifying the board is challenging—the company culture has ossified, and meaningful change is difficult to implement.[12] This Article takes the position that in order for lasting change to occur, cultural, business, and legal factors all need to align to make gender diversity a priority in venture capital-backed startups before corporate governance within startups will change for the better.

Some of today's greatest companies were initially funded by venture

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Got Its Power, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/C5M7-HU8H]; Jeff Green, *#MeToo Snares More Than 400 High-Profile People*, BLOOMBERG (June 25, 2018, 10:45 AM), https://www.bloomberg.com/news/articles/2018-06-25/-metoo-snares-more-than-400-high-profile-people-as-firings-rise.

9. Legal scholarship in diversity has its roots in the works of Douglas M. Branson, Katharine T. Bartlett, Paulette M. Caldwell, Lynn L. Dallas, Angela Y. Davis, Theresa A. Gabaldron, Angela P. Harris, Darren L. Hutchinson, Peter Kwan, Kathleen A. Lahey, Steve Ramirez, Sarah W. Salter, Christopher Stone, Kellye Testy, Francisco Valdes, Cheryl L. Wade, and Joan C. Williams.

10. Sukhinder Singh Cassidy, *Board Diversity Still Stumbling Block to Good Governance*, INFO. (Nov. 28, 2017, 6:45 AM), https://www.theinformation.com/board-diversity-still-stumbling-block-to-good-governance [https://perma.cc/8W82-8RAD].

11. Claire Cain Miller, C*urtain Is Rising on a Tech Premier with (as Usual) a Mostly Male Cast*, N.Y. TIMES (Oct. 4, 2013), https://www.nytimes.com/2013/10/05/technology/as-tech-start-ups-surge-ahead-women-seem-to-be-left-behind.html [https://perma.cc/JB2S-VGJV].

12. Note, however, that shareholder pressure coupled with the #MeToo movement has created momentum to recruit more women to U.S. boards. "In the first five months of 2018, women accounted for 248, or 31%, of new board directors at the country's 3,000 biggest publicly traded companies . . . ." Vanessa Fuhrmans, *Women on Track to Gain Record Number of Board Seats*, WALL ST. J. (June 21, 2018), https://www.wsj.com/articles/women-on-track-to-gain-record-number-of-board-seats-1529573401 [https://perma.cc/T3XZ-7X5F]. Not all the news was good, however, as women are still not leaders in the boardroom. "Though women occupy 18% of board seats at the 3,000 biggest companies, 10% of lead independent directors are women and 4% of boards are led by a chairwoman, not a chairman . . . ." *Id.*

capital:[13]Amazon,[14] Apple,[15]Facebook,[16] Google,[17] and Netflix.[18] Popularly referred to as the FAANG stocks,[19] they have changed the way we consume and store information, communicate, and purchase goods and services. New industries have been born or advanced due to the economic might and reach of these companies, including artificial intelligence, big data, blockchain technology, cloud computing, e-commerce, machine learning, and social media, to name a few. All of these companies were able to scale due to the initial funding that venture capital provided.

Men have dominated and continue to dominate these companies at every level. "Seven out of 10 workers at major tech companies such as Google and Facebook are men. Women comprise 20% or less of technical staff. Few women reach the senior executive level or the boardroom. And they don't fare much better as entrepreneurs."[20] The Fortune 500 is comprised primarily of men.[21] United States-based

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13. "The industry is small but it has a disproportionate impact on wealth creation and the economy," Ray Leach, Chief Executive Officer of JumpStart said. Guynn, *supra* note 5.

14. Amazon was funded by Madrona Venture Group's Tom Alberg. Amazon.com, Registration Statement (Form 10-K) (Mar. 24, 1997); *Tom Alberg*, MADRONA VENTURE GROUP, http://www.madrona.com/team-profiles/tom-alberg/ [https://perma.cc/ZB3J-PR3K].

15. Apple was funded by Sequoia Capital. *Apple*, SEQUOIA, https://www.sequoiacap.com/company-story/apple-story/ [https://perma.cc/25GC-JPL3].

16. Facebook was funded by Accel, DST Global Limited, and T. Rowe Price Associates. Facebook, Inc., Registration Statement (Form S-1), at 127 (Feb. 1, 2012).

17. Google was funded by Kleiner Perkins Caufield & Byers and Sequoia Capital. Google Inc., Registration Statement (Form S-1), at 84 (Apr. 29, 2004).

18. Netflix was funded by Technology Crossover Ventures, Institutional Venture Partners, Europ@web B.V., and Foundation Capital. NetFlix.com, Inc., Registration Statement (Form S-1), at 58 (Apr. 18, 2000).

19. *FAANG Stocks*, INVESTOPEDIA, http://www.investopedia.com/terms/f/faang-stocks.asp [https://perma.cc/245S-7TWH].

> Facebook (FB), Amazon (AMZN), Apple (AAPL), Netflix (NFLX), and Alphabet (GOOG) are the five technology giants trading publicly in the market today, as of 2017. Wall Street grouped these companies into one acronym to capture the collective impact that these companies have on the markets. As of June 9, 2017, the market capitalization of these companies summed up to $438.07B + $467.70B + $774.86B + $68.22B + $665.87B = $2.415 trillion, which is about the size of the entire economy of France and 13% of the size of the US economy.

Id.

20. Jessica Guynn & Marco della Cava, *Silicon Valley's Dirty Little Secret: The Way It Treats Women*, USA TODAY (Mar. 3, 2017, 11:55 AM), https://www.usatoday.com/story/tech/news/2017/03/03/silicon-valleys-dirty-little-secret-sexual-harassment-discrimination-of-women/98646108/ [https://perma.cc/HAX9-SJAM].

21. In 2015, "[o]nly 25 Fortune 500 companies [had] a woman as [chief executive officer], and 23 had all-male corporate boards . . . ." Erica Swallow, *The Most Exclusive Boys' Club: America's Largest Startups*, FORTUNE (Mar. 16, 2015), http://fortune.com/2015/03/16/unicorns-women-boards/ [https://perma.cc/974F-FQ8N]. The number of women-led Fortune 500 companies peaked in 2017 at thirty-two but has since declined by 25% to twenty-four. Alan Murray & David Meyer, *China Tariffs, Google Denial, Barrick and*

unicorns[22] are even more male-dominated, with men controlling over 90% of the board seats.[23] "America's 55 unicorn companies collectively represent 354 board director seats, the Fortune analysis shows, and only 22 are held by women. A full 60%—or 33—of the U.S. unicorn companies have all-male boards, as compared with nearly 5% of Fortune 500 companies."[24] The tech industry has fallen woefully behind its counterparts in other industries in terms of gender diversity. "Among Silicon Valley's 150 largest companies, only 15[%] of board seats were filled by women in 2016, compared with 21[%] for companies in the Standard & Poor's 500 Index, according to the research firm Equilar."[25] In the United States, 14% of corporate board seats are held by women; in Europe, it is 22%.[26] Among Fortune 500 companies, one-fifth of all boards of directors (or 20.6%) are comprised of women.[27]

Randgold: CEO Daily for September 24, 2018, FORTUNE (Sept. 24, 2018), http://fortune.com/2018/09/24/china-tariffs-google-bias-barrick-randgold-ceo-daily-for-september-24-2018/ [https://perma.cc/KJC3-Z7CH]. Despite some new additions, including the recent promotion of Beth Ford to chief executive officer (CEO) of Land O'Lakes, the number dropped again after PepsiCo's Indra Nooyi announced that she will be stepping down. Claire Zillman, *Beth Ford, Gwynne Shotwell, Barbara Humpton: Broadsheet July 27th*, FORTUNE (July 27, 2018), http://fortune.com/2018/07/27/beth-ford-gwynne-shotwell-barbara-humpton-broadsheet-july-27th/ [https://perma.cc/JJ5H-ZLBK]; Polina Marinova, *Term Sheet -- Monday, August 6*, FORTUNE (Aug. 6, 2018), http://fortune.com/2018/08/06/term-sheet-monday-august-6/ [https://perma.cc/YU8Z-LHDE]. To add to these low numbers, as of May 2018, twelve Fortune 500 companies had no women on their boards and only three of the remaining 488 boards had achieved gender parity or better. *See* Clair Zillman, *These Are the 12 Fortune 500 Companies with Zero Women on Their Boards*, FORTUNE (May 22, 2018), http://fortune.com/2018/05/22/fortune-500-companies-women-boards/ [https://perma.cc/GEL3-MGNS]. Interestingly, one of the industries with the most female CEOs is the defense industry, where four out of five of the top U.S. defense companies are led by women. Murray & Meyer, *supra*.

22. Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 586 (2016) [hereinafter Fan, *Regulating Unicorns*].

23. *See* Swallow, *supra* note 21.

24. *Id.* Women held a mere 6.2% of board seats in 2015. *Id.* Of the fifty-five unicorns with women on the board, none have more than one. *See id.*

25. Pui-Wing Tam, *Join Our Board: Companies Hotly Pursue New Wave of Women in Tech*, N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/technology/join-our-board-companies-hotly-pursue-new-wave-of-women-in-tech.html [https://perma.cc/BKM2-2RPZ].

26. DELOITTE, GLOBAL CTR. FOR CORP. GOV., WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE 11, 43 (5th ed. 2017), https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom5th-edition.html [https://perma.cc/4773-SZGV] (statistics current as of Dec. 15, 2016). For an additional report on the changes in board diversity on a global scale over time, see Ashley Summerfield et al., *2018 Global Board Diversity Tracker: Who's Really on Board?*, EGON ZEHNDER (Jan. 3, 2019) [hereinafter *2018 Global Board Diversity Tracker*], https://www.egonzehnder.com/what-we-do/board-advisory/insights/2018-global-board-diversity-tracker-whos-really-on-board [https://perma.cc/7CSB-UH4V].

27. Jennifer Reingold, *This Is the One Area Where Women Are Making Big Progress in Business*, FORTUNE (Sept. 8, 2016, 1:00 PM), http://fortune.com/women-boardroom-power-positions/ [https://perma.cc/VQ6J-XG2Y].

"Nearly 28% of the heads of the crucial nominating and governance committee of *Fortune* 500 companies are women . . . and audit and compensation committee chairs are 18.2% and 12.6% female, respectively. The numbers are more dismal when it comes to the most powerful position, the chairmanship."[28] There are just thirty female chairmen in *Fortune* 500 companies.[29] In corporate America at large, only one in five C-suite executives is a woman.[30] For women of color, that number is far lower—one in twenty-five.[31]

The way these companies assess their employees greatly disadvantages women, too.[32] Stack ranking, which is "a zero-sum evaluation that pits employees against one another,"[33] is used by one-third of Fortune 1000 companies and has been found to disadvantage women because managers' conscious and unconscious biases come into play; in one study, women were found to receive highly critical feedback in subjective categories at a rate 1.4 times higher than men.[34]

Despite all of their innovations, high technology companies have not been able to "hack" the problem of the lack of women in their companies. The Chief Executive Officer of Airbnb,[35] Brian Chesky, observed, "I think for a lot of tech companies they've been able to live in a world where the consequences were only internal. Machines and algorithms can govern things. And they haven't maybe historically had to engage."[36] Chesky also pointed out that Airbnb hired women early

28. Jennifer Reingold, *Why Top Women Are Disappearing from Corporate America*, FORTUNE (Sept. 9, 2016, 6:30 AM), http://fortune.com/women-corporate-america/ [https://perma.cc/H7EG-L74F].

29. *Id.*

30. David Meyer, *Soros Bomb, SoftBank and Saudis, Monsanto Ruling: CEO Daily for October 23, 2018*, FORTUNE (Oct. 23, 2018), http://fortune.com/2018/10/23/soros-bomb-softbank-saudi-monsanto-ceo-daily-for-october-23-2018/ [https://perma.cc/VET8-7D98].

31. *Id.*

32. Rebecca Greenfield & Jeff Green, *Uber's Employee Ratings Put Women at a Disadvantage, Suit Says*, BLOOMBERG (Nov. 8, 2017, 9:53 AM), https://www.bloomberg.com/news/articles/2017-11-08/uber-s-employee-ratings-put-women-at-a-disadvantage-suit-says.

33. *Id.*

34. *Id.* For an in-depth look into the triple-fold negative effects of these kinds of high stakes or zero-sum systems on women, see June Carbone et al., *Women, Rule-Breaking, and the Triple Bind*, AALS (Feb. 15, 2019), https://am.aals.org/wp-content/uploads/sites/4/2018/12/AM19SocioEconPaperWomenRuleBreaking.pdf [https://perma.cc/J79J-XGT3].

35. Airbnb is described on its company website as "a global travel community that offers magical end-to-end trips, including where you stay, what you do and the people you meet." *About Us*, AIRBNB, https://www.airbnb.com/about/about-us [https://perma.cc/GE9P-5X2Q].

36. Leigh Gallagher, *Airbnb CEO: "We Need More Women Leaders"*, FORTUNE (Oct. 24, 2017), http://fortune.com/2017/10/24/airbnb-ceo-no-more-hands-off-approach-on-techs-impact/ [https://perma.cc/6VTG-9FBU]. Chesky went on to say:

> Eventually everyone goes through some transition where you realize you have to engage with civic leaders and politicians and have to be mindful of the byproducts and the outside environment that your product creates. So I think we're all going through that. And I think it's a reminder of how important

on, and the culture of his company benefited from it.[37] This raises the question: for all the wonderful new technology and innovations that have been brought by such companies, how many more could we have had if entrepreneurs and investors came from different backgrounds?

During the past few years, a slew of media articles lamented the lack of women in technology companies.[38] In legal scholarship, many articles have addressed the lack of women on public company boards specifically.[39] With the burgeoning ranks of private companies, however, it is imperative to address the impact of the lack of women on private company boards as well. In this new age of private companies, the Securities and Exchange Commission (SEC) is already carefully watching companies that stay private and are not subject to extensive securities law disclosures required of public companies.[40] Corporate governance is not a high priority, but the private economy's Enron[41] equivalent may be Uber. Society is beginning to recognize that " '[t]here are unprecedented forces out there that are drastically reshaping the world,' putting greater demands on business leaders. As a result, 'the business of business is no longer just business. The business of business is society.' "[42]

> technology is—that because it's becoming so important, the responsibility is to more than just your user's immediate needs.

Id.

37. *Id.*

38. Jessica Guynn, *Women Can't Crack the Glass Ceiling When It Comes to Tech Boards*, USA TODAY (Aug. 25, 2017, 3:40 PM)] [hereinafter Guynn, *Women Can't Crack the Glass Ceiling*], https://usatoday.com/story/tech/2017/08/25/women-missing-tech-boards/598706001/ [https://perma.cc/9YHD-W9WH; Claire Cain Miller, C*urtain Is Rising on a Tech Premier with (as Usual) a Mostly Male Cast*, N.Y. TIMES (Oct. 4, 2013), http://www.nytimes.com/2013/10/05/technology/as-tech-start-ups-surge-ahead-women-seem-to-be-left-behind.html [https://perma.cc/Q688-WX6H]; Sarah Ashley O'Brien, *VC: We Can't Find Women Who Meet Our Standards*, CNN BUS. (Dec. 3, 2015, 5:41 PM), http://money.cnn.com/2015/12/03/technology/michael-moritz-sequoia-vc-women/ [https://perma.cc/XXU3-EJ2Q]. "Companies have come to the realization that in this time of disruption and change, the 'traditional' perspective on governance is no longer sufficient. New voices are needed — and many of those are women." *2018 Global Board Diversity Tracker*, *supra* note 26.

39. For a discussion on the role of publicness in corporate governance, see *infra* Section III.B.

40. Lizette Chapman & Kartikay Mehrota, *Investors Warn Unicorns: Share Info Evenly or Get Sued*, BLOOMBERG (June 13, 2016, 2:23 PM), http://www.bloomberg.com/news/articles/2016-06-13/investors-warn-unicorns-share-information-evenly-or-get-sued.

41. Many articles were written about how to reform corporate governance in the wake of the collapse of Enron. *See, e.g.*, Charles M. Elson & Christopher J. Gyves, *The Enron Failure and Corporate Governance Reform*, 38 WAKE FOREST L. REV. 855 (2003). Eventually, it led to the amendments to New York Stock Exchange Listing Standards and the passage of the Sarbanes-Oxley Act. *Id.* at 875-80; Troy A. Paredes, *Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 495, 515-19 (Nancy B. Rapoport & Bala G. Dharan eds., 2004); *see also* Fan, *Regulating Unicorns*, *supra* note 22, at 583-86 (explaining private economy).

42. Alan Murray & David Meyer, *Google Suit, Olympus Activists, Huawei Arrest: CEO*

This Article is a call to reexamine corporate governance from a private company perspective with a particular emphasis on the role of publicness[43]—which, in this case, is the media's role in bringing important issues to the forefront of the national consciousness—and how to increase the number of women on private company boards moving forward.

This Article proceeds in three parts. Part II illustrates the stark absence of women at every stage of the lifecycle of high technology private companies and demonstrates how pervasive the problem is, providing evidence of the relative absence of women serving on the boards of directors of venture-backed private companies in the software sector. Part III shows how the publicness of sexual harassment, sexism, and the #MeToo movement provided the impetus for a cultural shift in an industry known for its male hegemony. It illustrates how this shift provides an opportunity to change corporate governance practices in private companies, and by extension the structure of such companies' boards. Part III also offers a new paradigm for gender diversity—the innovation imperative. Finally, Part IV discusses how the law, together with business, can provide a foundation for systematically dismantling the barriers which preclude women from taking leadership positions on private company boards.

II. STATE OF ENTREPRENEURSHIP AND VENTURE CAPITAL

Although the wage gap between men and women in the workplace has decreased since the 1960s, women still earn only 80% of what men earn.[44] It is not until 2059 that women are expected to reach pay equity with men; it could be even longer if the rate of change slows.[45]

Daily for January 11, 2019, FORTUNE (Jan. 11, 2019), http://fortune.com/2019/01/11/google-suit-olympus-valueact-huawei-arrest-ceo-daily-for-january-11-2019/ [https://perma.cc/AUN7-YZWT]. *See also* Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. (forthcoming 2019).

43. Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1012 (2013) (putting forth "a theory of public governance as a form of publicness by exploring corporate governance and decision making, and developing them with a more textured understanding of the nature of corporations and their role").

44. AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 6 (Spring 2018 ed.). Furthermore, in 2016, women earned 80.5 cents for every dollar men earned. Claire Zillman, *On Equal Pay Day 2018, There's a Troubling Trend Behind the Shrinking Gender Pay Gap*, FORTUNE (Apr. 10, 2018), http://fortune.com/2018/04/10/equal-pay-day-2018-closing-gender-pay-gap/ [https:/perma.cc/VW75-YKFB]. Although the amount of money women earned has increased since 2015—when women made 79.6 cents for every dollar men earned—it is important to keep in mind that during the same period men earned less than in prior periods. Zillman, *supra*.

45. "At the rate of change between 1960 and 2016 women are expected to reach pay equity with men in 2059. But even that slow progress has stalled . . . [recently]. If change continues at the slower rate seen since 2001, women will not reach pay equity with men until 2119." AAUW, *supra* note 43, at 4.

In addition, few women-led businesses[46] receive private equity funding despite the fact that women-owned firms have some of the most rapid rates of growth.[47] Women own 38% of businesses in the United States, yet they only receive 2% of all venture funding.[48] The bottom line is that women are not getting funded by venture capital.[49] This is due to numerous factors, many of which are discussed below.

In the venture capital ecosystem, there are not many women who are founders, executive team members, investors, or service providers. The prevailing wisdom is that sexism, the "gender patent gap,"[50] and pipeline issues have each contributed to the dearth of women in venture capital.[51] Although theories abound about the cause of the relative absence of women in the venture capital ecosystem, they have not led

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46. Women-led businesses are defined as "companies with at least one woman as a member of the senior executive management team." JMG CONSULTING, LLC, & WYCOFF CONSULTING, LLC, SMALL BUS. ADMIN. OFFICE OF ADVOCACY, VENTURE CAPITAL, SOCIAL CAPITAL, AND THE FUNDING OF WOMEN-LED BUSINESSES 8 (2013) [hereinafter JMG CONSULTING, VENTURE CAPITAL], https://www.sba.gov/sites/default/files/files/rs406tot(4).pdf [https://perma.cc/2GJW-PCDV].

47. SMALL BUS. ADMIN., SMALL BUSINESS RESEARCH SUMMARY: VENTURE CAPITAL, SOCIAL CAPITAL AND THE FUNDING OF WOMEN-LED BUSINESSES (April 2013), https://www.sba.gov/sites/default/files/files/rs406.pdf [https://perma.cc/B9UL-A7D5]. The report summary explains: "[s]ome reasons given for this disparity include women's lack of education in high technology, their underrepresentation among investors, or a lack of experience required by venture investors. Other research sources show that [venture capital firms (VCs)] typically invest in high-growth companies in growing markets, and that [women-led businesses] tend not to be in these markets." *Id.*

48. One article reported women received 2% of all venture capital money. Dana Kanze et al., *Male and Female Entrepreneurs Get Asked Different Questions by VCs – and It Affects How Much Funding They Get*, HARV. BUS. REV. (June 27, 2017), https://hbr.org/2017/06/male-and-female-entrepreneurs-get-asked-different-questions-by-vcs-and-it-affects-how-much-funding-they-get [https://perma.cc/8WGW-GHFK]. Another article reported that women-owned businesses received 3% of venture capital funding. Carrie Kerpen, *How Women Entrepreneurs Are Closing the Venture Capital Gap*, FORBES (Apr. 9, 2018), https://www.forbes.com/sites/carriekerpen/2018/04/09/how-women-entrepreneurs-are-closing-the-venture-capital-gap/#7f6f33af1cf0 [https://perma.cc/CP4R-LP43]. The difference is probably due to rounding. Whether it is 2% or 3%, however, the fact of the matter is that the percentage of women receiving venture capital is very low. See *infra* Section II.A.1 for further discussion about these numbers.

49. Kimberly Weisul, *Venture Capital Is Broken. These Women Are Trying to Fix It*, INC. (Nov. 2016), https://www.inc.com/magazine/201611/kimberly-weisul/new-face-of-funding.html [https://perma.cc/5HND-NGFX].

50. Patent development teams that include women obtain approximately 18.8% of all patents; for women-led patents it is even smaller: 7.7% of all patents. JESSICA MILI ET AL., INST. FOR WOMEN'S POL'Y RES., THE GENDER PATENTING GAP 1-2 (2016), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C441%20(2).pdf [https://perma.cc/3L9U-6QAC]. And in those cases, the report said, most of the innovations were concentrated in patent technologies "associated with traditional female roles, such as jewelry and apparel." *Id.* at 3.

51. *See* Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 580 (2006).

to any meaningful reforms. Neither scholars nor practitioners have addressed the problem of underrepresentation of women in venture capital. The problem is a seemingly intractable one because there are not enough women at any part of the startup cycle who can disrupt the status quo in a meaningful way. Few women founders receive venture capital funding. The number of women partners who wield investment decisionmaking powers and are chosen to serve as independent directors[52]—board members who are industry experts but not investors or founders—provides striking evidence of the disadvantages women must overcome. This Part gives an account of the obstacles women face in the venture capital context in the United States.

A. *Obstacles to Women-Funded Startups*

Some progress has been made in terms of the number of women founders, but there is more to be done. In 2009, only 9% of all startups had at least one female founder.[53] By 2012, that number had increased to 17% but has remained the same for five years.[54] A closer look at what comprises the 17% illustrates that over half of the 17% still has at least one male-founding member; one-third of the 17% is comprised of teams with only female founders; another one-third is comprised of two member co-founding teams with one male and one female; finally, the remaining one-third have three or more co-founders with one or more female founders.[55] There are several compounding factors that may contribute to this overall paucity of women-led startups.

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52. *See* Brian Boughman, *The Role of Independent Directors in Startup Firms*, 2010 UTAH L. REV. 461, 468-69.

> Despite the fact that [venture capital firms] hold more board seats than the other parties, they generally do not control the board. Rather, board control is typically shared. [Venture capital firms] control the board 25% of the time and entrepreneurs control the board 14% of the time. In the remaining firms (61%), [venture capital firms] and entrepreneurs share control of the board with third-party independent directors holding the tie-breaking vote(s).

Id.

53. Gené Teare, *It's 2017, and Women Still Aren't Being Funded Equally*, TECHCRUNCH (July 16, 2017) [hereinafter Teare, *It's 2017*], https://techcrunch.com/2017/07/16/its-2017-and-women-still-arent-being-funded-equally/ [https://perma.cc/8PZV-8YDP]. From 2009 to 2014, the absolute numbers of companies with female founders quadrupled. There were 117 companies founded by women in 2009 and 555 in 2014. Gené Teare & Ned Desmond, *Female Founders on an Upward Trend, According to CrunchBase*, TECHCRUNCH (May 26, 2015) hereinafter Teare & Desmond, *Female Founders*], https://techcrunch.com/2015/05/26/female-founders-on-an-upward-trend-according-to-crunchbase/ [https://perma.cc/6RBN-9TKE].

54. Teare, *It's 2017*, *supra* note 52. There was a slight difference in the numbers provided in a different source, but not enough to make a statistical difference. "In 2009, 9.5% [of] startups had at least one woman founder, but by 2014 that rate had almost doubled to 18%." Desmond & Teare, *Female Founders*, *supra* note 52.

55. Teare, *It's 2017*, *supra* note 52.

1. *Funding Challenges*

(a) *Funding Dynamics and Trends*

One of the most famous venture capitalists, John Doerr, said that the world's greatest entrepreneurs "all seem to be white, male, nerds who've dropped out of Harvard or Stanford and they absolutely have no social life. So when I see that pattern coming in—which was true of Google—it was very easy to decide to invest."[56] This example aptly illustrates venture capital's propensity to fund certain types of individuals.

Venture capital financings at the seed and early stages of a startup are very high risk and are largely dependent on the venture capitalists' perception of the founding team and the space that the startup is in.[57] The risk and perception affect whether women-founded companies receive venture capital funding, as well as the amount. Women-founded companies represent a miniscule fraction of venture capital deals completed in a given year.[58] Since 2010, for every $100 a male-founding team raised, female-only founding teams raised $82 at the seed funding stage.[59] In early-stage ventures, female-only teams raised even less—on average, they raised $77 for every $100 that male-only founding team raised.[60] Interestingly, this gap between female-only

56. Scott Austin, *Doerr and Moritz Stir VCs in One-on-One Showdown*, WALL ST. J. (May 8, 2008, 11:59 PM), https://www.wsj.com/articles/SB121025688414577219 [https://perma.cc/4RKX-GF7U].

57. *See* BRAD FELD & JASON MENDELSON, VENTURE DEALS: BE SMARTER THAN YOUR LAWYER AND VENTURE CAPITALIST 61 (3d ed. 2016).

58. In the first half of 2017, approximately 15% of all seed funding dollars—which translates into $332 million—went to startups with a female founder. Teare, *It's 2017*, *supra* note 52. Women-founded companies as a whole raised $6.5 billion in the first half of 2017, which represents a little more than 11% of all dollars invested. *Id.*

59. The number originated from the collection of data from "2,400 rounds for female-only founding teams and 37,000 rounds for male-only founding teams." Teare, *It's 2017*, *supra* note 53. "[T]here is a persistent gap between what male-only teams can raise, and what female-only teams can raise. Teams with founders that are both men and women land in the middle, a somewhat new trend that has become more pronounced since 2015." *Id.* In 2018, companies with at least one woman founder have fared slightly better with 20% of global seed dollars; however, the gap between median venture rounds for male-only founded startups and female-only startups grew to $3.8 million (from approximately $2 million between 2015 and 2017. *See* Gene Teare, *2018 Sets All-Time High for Investment Dollars into Female-Founded Startups*, CRUNCHBASE NEWS (Jan. 15, 2019), https://news.crunchbase.com/news/2018-sets-all-time-high-for-investment-dollars-into-female-founded-startups/ [https://perma.cc/C5RF-MEEN]. "Only 39% of all-female founder teams follow-on funding for their startups, compared to 52% for all male-teams. Moreover, follow-on rounds for all-female teams comprise just 1.57% of all [venture capital] rounds since 2008." Kia Kokalitcheva, *Female Founders Face VC Funding Cliff*, AXIOS (May 15, 2018), https://www.axios.com/how-female-founderss-fundraising-challenges-1525945648-afb6cc8a-d1a9-4ade-b3b9-228d00bc3bdd.html [https://perma.cc/AQS4-MEMH].

60. For the early-stage venture statistic, TechCrunch "reviewed more than 1,000 rounds for female-only founding teams and 22,000 rounds for male-only founding teams."

founding teams versus male-only founding teams has widened every year since 2014, where the ratio was $89 for the female-only founding teams for every $100 the male-only founding teams made.[61] If venture capital firms have female investment partners, they "are twice as likely to invest in companies with a woman on the management team . . . [and] three times more likely to invest in companies with women CEOs."[62]

The amount of money raised by venture capital-backed startups totaled $84 billion across 8,076 deals—the highest amount of capital deployed to startups since the dot-com boom.[63] However, the funding rounds are larger than in the past and coming at later stages of a company's lifecycle.[64] In fact, the new normal is very large rounds in the later stages.[65] To cite a few examples, in the second quarter of 2017, WeWork, "a global network of workspaces where companies and people grow together,"[66] raised $4.4 billion and Airbnb raised $1 billion.[67] Unicorns[68] account for almost 22% of the aggregate deal value year-to-date, but they represent less than 1% of the deal count in 2017.[69] As of November 2017, the cumulative unrealized value of U.S. unicorns was close to $600 billion.[70]

Teare, *It's 2017*, *supra* note 52.

61. *Id.*

62. This statistic is based on the time period of 2011–2013. CANDIDA G. BRUSH ET AL., BABSON COLLEGE, DIANA REPORT, WOMEN ENTREPRENEURS 2014: BRIDGING THE GENDER GAP IN VENTURE CAPITAL 11 (2014) [hereinafter DIANA REPORT].

63. Bérénice Magistretti & Anna Hensel, *VCs Invested the Most Capital in 2017 Since the Dotcom Era*, VENTUREBEAT (Jan. 8, 2018, 9:01 PM), https://venturebeat.com/2018/01/08/vcs-invested-the-most-capital-in-2017-since-the-dotcom-era/ [https://perma.cc/FG9L-R3WQ]; *but cf.* PWC/CB INSIGHTS: MONEYTREE REPORT Q4 2017, at 2 (Jan. 10, 2018), http://keiretsuforum-midatlantic.com/wp-content/uploads/2016/12/cb-insights_moneytree-q4-2017.pdf (noting that despite a year of mega-rounds, the number of seed deals decreased to an 8-quarter low). In 2017, there were 109 mega-rounds of $100 million or more. *Id.* The amount of money raised by venture capital-backed startups totaled nearly $72 billion across 5,052 deals—it was the second biggest year of investments for U.S. startups that received venture capital money. *Id.*

64. *See* NAT. VENTURE CAP. ASS'N, VENTURE MONITOR 3Q 2017, at 3 (2017) [hereinafter VENTURE MONITOR], https://files.pitchbook.com/website/files/pdf/3Q_2017_PitchBook_NVCA_Venture_Monitor.pdf.

65. *Id.* at 4.

66. *Welcome to WeWork*, WEWORK, https://www.wework.com/ [https://perma.cc/S9PZ-PGPR].

67. VENTURE MONITOR, *supra* note 63, at 6.

68. *See* Fan, *Regulating Unicorns*, *supra* note 22, at 586 (defining unicorns).

69. VENTURE MONITOR, *supra* note 63, at 6.

70. Anthony Mirhaydari, *Why Unicorns Are Overvalued (and the Industry Knows It)*, PITCHBOOK (Nov. 28, 2017), https://pitchbook.com/news/articles/why-unicorns-are-overvalued-and-the-industry-knows-it [https://perma.cc/7JFT-8E5D]. In one study, the researchers suggested that "unicorn valuations are overstated by 50% above fair value on average when one

Fewer companies are being funded, too.[71] Compounding the fact that fewer companies receive venture capital funding is the reality that less funding is being invested at the angel and seed funding stages of a company; for the first time since 2012, such funding comprises less than 50% of venture capital financings.[72] This decline is attributed to the fact that seed financings "have moved further into the venture lifecycle."[73] Companies are also raising angel or seed rounds almost twelve months later than before: the median age of companies raising such rounds is now 2.4 years.[74] The median size of angel and seed deals was also more than $1 million in 2017—this is the first time such deals reached that amount in the past ten years.[75]

All of these trends taken together will undoubtedly impact and exacerbate the problem that women have of getting funded because already-existing companies receive the lion's share of venture capital funding and, if there are female-founded companies at the early stages seeking funding, less capital is being deployed. Such growth can be attributed to the excess of capital available for investment. From 2014 to September 30, 2017, twenty-one U.S. venture capital funds have closed on $1 billion or more—this is more than funds closed from 2007 to 2013.[76] Since 2010, the median late-stage deal size and the median Series D+ pre-money valuation has dramatically increased.[77]

On the public company side the numbers are not much better. Between 1996 and 2013, only 3% of companies that went public in the United States had women chief executive officers.[78]

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compensates for various distinctions between common and preferred shares and 'riders' granted to late-stage investors." *Id.*

71. Although deal values have exceeded $20 billion, the number of deals has declined for three consecutive years. VENTURE MONITOR, *supra* note 63, at 4.

72. *Id.* at 5.

73. *Id.*

74. "[T]he maturation of the stage has inspired more discipline in capital deployment. As these investors have sought companies with more traction, deals have naturally moved larger and later." *Id.*

75. This number is as of September 30, 2017. *Id.*

76. This number is as of September 30, 2017. *Id.* at 10.

77. These numbers are as of September 30, 2017. *Id.* ("[T]he median late-stage deal size has grown 1.85x since 2010, and the median Series D+ pre-money valuation has jumped by 3.8x in that same time—by 75% since last year.").

78. Telis Demos & Douglas MacMillan, *Female CEOs Missing in IPO Boom*, WALL ST. J. (Jan. 24, 2014, 7:29 PM), https://www.wsj.com/articles/in-ipo-market-few-women-in-charge-1390584689 [https://perma.cc/6J23-KC82].

(b) Dearth of Funding for Women-Led Startups

In a recent study, over 97% of companies that received venture capital from 2011 to 2013 were headed by men.[79] In dollars, $1.5 billion went to women-led ventures while men received approximately $49.5 billion in funding that startups received over those two years.[80] Recent numbers do not show much in the way of improvement—women-led companies received a paltry 2% of all venture capital funding in 2016.[81] A closer look reveals that for women of color, the numbers are truly abysmal—in 2015, only 0.2% of companies founded by women of color received venture capital funding.[82] Women founders received 2.2% of all venture capital funding in 2018—the same percentage as in 2017.[83] The top ten largest deals of 2018 went to all-male founding teams.[84] One improvement for women: 2018 was the largest ever increase in the number of women added as investment partners in venture capital firms in Silicon Valley.[85] It remains to be seen whether this increase in women investment partners leads to an increase in the number of women on the boards of private companies.

2. Absence of Human Capital

(a) Few Women Venture Capital Partners

At top-tier venture capital firms, 92% of the senior investment teams are male and 78% are white; in contrast, 77% of leadership teams of

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79. Jillian Berman, *The Venture Capital System 'Simply Does Not Work for Women,' Study Finds*, HUFF. POST. (Sept. 30, 2014, 12:05 AM), https://www.huffingtonpost.com/2014/09/30/babson-gender-report_n_5901806.html [https://perma.cc/3SD6-MH52]. In this article from 2014, female founders experienced pattern-recognition bias (thought to be a male trait) and would be subject to inappropriate questions and asked on dates. *See id.*

80. *Id.* "In the period from 2009 to 2014, CrunchBase records 14,341 U.S.-based startups that received funding. Of those, 15.5%, or 2,226, have at least one female founder." Gené Teare & Ned Desmond, *Female Founders on an Upward Trend, According to CrunchBase*, TECHCRUNCH, https://techcrunch.com/2015/05/26/female-founders-on-an-upward-trend-according-to-crunchbase/ [https://perma.cc/3GPX-W543].

81. Polina Marinova, *This VC Says Stitch Fix's IPO Paved the Way for Female Founders*, FORTUNE (Dec. 13, 2017), http://fortune.com/2017/12/13/susan-lyne-bbg-ventures/ [https://perma.cc/FS8S-88NM].

82. Weisul, *supra* note 48.

83. Emma Hinchliffe, *Funding for Female Founders Stalled at 2.2% of VC Dollars in 2018*, FORTUNE (Jan. 28, 2019), http://fortune.com/2019/01/28/funding-female-founders-2018/ [https://perma.cc/J9Q9-SWQY]. Note that the actual amount in funding increased from $1.9 billion to $2.9 billion—most likely due to so-called "mega-rounds." *Id.*

84. *Id.*

85. Thirty-six women were added as investment partners in Silicon Valley venture capital firms. *Id.*

major tech companies are male.[86] Approximately 40% of venture capital professionals went to either Harvard or Stanford. [87] At the top 100 venture firms, only 7% of senior investing partners are women,[88] and only 18% of *all* venture professionals are women.[89] In the case of Sequoia Capital, a top-tier venture capital firm which invested in the likes of Google, Airbnb, Dropbox, and Instagram, it only recently appointed its first female partner in its forty-four year history.[90] The chairman of Sequoia Capital, Michael Moritz said, "I like to think . . . that we're blind to somebody's sex, to their religion, to their background."[91] However, he stated that Sequoia is "not prepared to lower our standards" in order to have female partners.[92] Mr. Moritz went on to explain that the firm had trouble identifying women with tech backgrounds who were ambitious and hardworking.[93] According to their websites, as of December 31, 2018, Accel Partners,[94] IVP,[95] Kleiner Perkins,[96] Madrona Venture

86. Peter Shulz, *Introducing the Information's Future List*, INFO. (Oct. 6, 2015, 6:51 AM), https://www.theinformation.com/introducing-the-informations-future-list [https://perma.cc/5TLU-GMTQ].

87. Dan Primack, *Tech's Diversity Crisis: 40% of VCs Went to Harvard or Stanford*, AXIOS (July 30, 2018), https://www.axios.com/venture-capital-educational-diversity-harvard-stanford-60ba2369-6a0a-416a-a759-f7ee17e3a8ba.html [https://perma.cc/5BJW-YLTE].

88. Teare, *It's 2017*, *supra* note 52. "Female founders face a greater challenge than male founders when fundraising, as they are required to break into male networks, which predominate at most investment firms." *Id.* In a comprehensive study done by TechCrunch in 2016, it found that women make up 7% of investing partners at the top 100 venture and micro-venture firms; it rises to 8% when one looks across all 2,300 firms that have been active since 2014 in TechCrunch's database. Ned Desmond & Gené Teare, *The First Comprehensive Study on Women in Venture Capital and Their Impact on Female Founders*, TECHCRUNCH (Apr. 19, 2016) [hereinafter Desmond & Teare, *The First Study*], https://techcrunch.com/2016/04/19/the-first-comprehensive-study-on-women-in-venture-capital/ [https://perma.cc/KVZ7-USH2].

89. Primack, *supra* note 86.

90. Lizette Chapman & Sarah McBride, *Sequoia Capital Hires Yahoo's Jess Lee as First Woman U.S. Investing Partner*, BLOOMBERG TECH. (Oct. 20, 2016, 9:56 AM), https://www.bloomberg.com/news/articles/2016-10-20/sequoia-capital-hires-yahoo-s-jess-lee-as-first-woman-u-s-investing-partner [https://perma.cc/5WTC-FHWS].

91. O'Brien, *supra* note 38.

92. *Id.*

93. *Id.* The storied venture capital firm was also rocked by claims of sexual abuse by one of its former partners. In 2016, a former Sequoia Capital partner—who was on the Midas list—Michael Goguen, was named in a breach of contract lawsuit. *Profile: #52 Michael Goguen*, FORBES, https://www.forbes.com/profile/michael-goguen/ [https://perma.cc/73HC-ZXDD]; Connie Loizos, *Longtime VC Michael Goguen Was Just Hit with an Explosive Lawsuit*, TECHCRUNCH (Mar. 11, 2016), http://techcrunch.com/2016/03/11/longtime-vc-michael-goguen-was-just-hit-with-an-explosive-lawsuit/ [https://perma.cc/GE9G-4JDM]. Mr. Goguen allegedly abused his former mistress and signed a contract to pay her $40 million, of which $10 million had already been paid. Loizos, *supra.*

94. *Team*, ACCEL, https://www.accel.com/team [https://perma.cc/LQ75-V5EY].

95. *Our Team*, IVP, https://www.ivp.com/team/ [https://perma.cc/X8LZ-KSY5].

96. Partners Lynne Chou-O'Keefe and Mary Meeker both recently left Kleiner Perkins to raise their own funds. Polina Marinova, *Term Sheet -- Tuesday, October 30*, FORTUNE (Oct.

Group,[97] and Mayfield Fund,[98] do not have any female investment partners in the United States.[99] Bessemer Venture Partners,[100] Benchmark,[101] General Catalyst,[102] Maveron,[103] and Redpoint Ventures[104] only have one female investment partner each.[105] There is little evidence that, on an industry-wide basis, firms with a female partner are more likely to invest in startups with a female founder.[106] However, "[t]here is clear evidence . . . that the small number of venture firms with female founders and/or an unusually high percentage of female partners, invest at elevated levels in female entrepreneurs."[107]

There has also been rapid growth of female-founded venture firms—twenty newly launched venture and micro-venture firms (or

30, 2018), http://fortune.com/2018/10/30/term-sheet-thursday-october-30-2/ [https://perma.cc/B7LW-THC9].

97. *Team*, MADRONA VENTURE GROUP, http://www.madrona.com/team/ [https://perma.cc/NHE3-KN69].

98. *Team*, MAYFIELD, https://www.mayfield.com/team/#investment [https://perma.cc/8GEC-RVL8].

99. Chapman & McBride, *supra* note 89. "Some investors in venture funds have said they apply pressure on firms to become more diverse at the partner level, but calling for change requires extreme diplomacy." *Id.* "We always ask about the team, plans to add women and try, where appropriate, to introduce managers to women candidates," said Joelle Kayden, founder of Accolade Partners, which invests in venture firms including Andreessen Horowitz and Accel." *Id.* (internal quotation marks omitted).

100. *Investment Team*, BESSEMER VENTURE PARTNERS, https://www.bvp.com/team [https://perma.cc/433A-Z7RZ].

101. *Benchmark > Current Team*, CRUNCHBASE, https://www.crunchbase.com/organization/benchmark/current_employees/current_employees_image_list [https://perma.cc/S4AN-BDSC].

102. *The Team*, GENERAL CATALYST, http://generalcatalyst.com/team/ [https://perma.cc/DR3H-APE6].

103. *Team*, MAVERON, http://www.maveron.com/team [https://perma.cc/ZG55-Q782].

104. *People*, REDPOINT VENTURES, http://www.redpoint.com/people/ [https://perma.cc/HT2N-EWC].

105. Venture capital firm Andreessen Horowitz did not have any female general partners until June 2018. *See* Alex Konrad, *Andreessen Horowitz Launches $300 Million Crypto Fund Co-Led by Its First Female Partner*, FORBES (June 25, 2018), https://www.forbes.com/sites/alexkonrad/2018/06/25/a16z-hires-first-female-gp-for-crypto-fund/ [https://perma.cc/4Y59-ZKUA]. Then, in the span of three months, it hired one new female general partner and promoted two from within. Ben Horowitz, *Katie Haun*, ANDREESSEN HOROWITZ (June 25, 2018), https://a16z.com/2018/06/25/katie-haun/ [https://perma.cc/6JPR-94GH]; Polina Marinova, *VC Firm Andreessen Horowitz Promotes Connie Chan to General Partner*, FORTUNE (July 17, 2018), http://fortune.com/2018/07/17/andreessen-horowitz-connie-chan/ [https://perma.cc/7GES-9UEG]; Polina Marinova, *Term Sheet -- Thursday, August 30*, FORTUNE (Aug. 30, 2018), http://fortune.com/2018/08/30/term-sheet-thursday-august-30/ [https://perma.cc/Y36M-ETLN] (Angela Strange was promoted). Other venture firms have seen a spate of promotions of women over the summer. Polina Marinova, *Term Sheet -- Thursday, September 13*, FORTUNE (Sept. 13, 2018), http://fortune.com/2018/09/13/term-sheet-thursday-september-13/ [https://perma.cc/7GES-9UEG].

106. Desmond & Teare, *The First Study*, *supra* note 87.

107. *Id.* Seed investors follow identical patterns to their venture firm counterparts regarding the overall percentage of female partners and their effect on startups with women founders. *Id.*

16%) had at least one female founder.[108] It also appears that female co-founders of venture capital firms tend to hire other female investment partners. In the last five years, of the twenty-nine firms founded by at least one female co-founder, 50% of the investing partners were women.[109] Notably, venture capital firms with female partners were more active than all-male teams.[110]

(b) Few Women Board Members

Having women on the boards of directors of technology companies remains "tech's ultimate glass ceiling."[111] Although the number of women on corporate boards has gone up slightly, women are still underrepresented on the boards of both public and private technology companies.[112] According to the research firm Equilar, the boards of technology companies lag behind the boards of other businesses.[113] In the Russell 3000 index, women comprised 16.2% of the boards; in technology companies, it was even lower—14.3%.[114] Delving deeper into the numbers, Equilar found that almost one-third of high technology company boards had no women, while nearly 80% of Russell 3000 companies had at least one woman on their boards.[115]

According to another study focused on the boards of private tech companies, only a quarter of these boards include any women.[116] Together with the analytics firm Qualtrics, theBoardlist[117] conducted a survey among chief executive officers and founders regarding their respective board composition and found that 39% of independent seats

108. *Id.*

109. *Id.*

110. DIANA REPORT, *supra* note 61, at 12.

111. Guynn, *Women Can't Crack the Glass Ceiling*, *supra* note 38.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* "As recently as 2013, nearly half of those public company tech boards had no women." *Id.*

116. In contrast, 99% of S&P 500 company boards have at least one female director, and 80% have two or more. Claire Zillman & Emma Hinchliffe, *WeWork Rent the Runway, Heidi Cruz, Cyan Banister: Broadsheet October 19*, FORTUNE (Oct. 19, 2018), http://fortune.com/2018/10/19/wework-rent-the-runway-heidi-cruz-cyan-banister-broadsheet-october-19/ [https://perma.cc/LBY5-2BFW]; Vauhini Vara, *How The Boardlist Plans To Get More Women Onto Startup Boards*, FAST COMPANY (Apr. 18, 2016), https://www.fastcompany.com/3058458/how-the-boardlist-plans-to-get-more-women-onto-startup-boards [https://perma.cc/F3HF-PX52]. TheBoardlist is "a tool designed to connect boards with qualified female candidates." Kristen Bellstrom, *Boardlist Wants to Be the LinkedIn for Female Director Candidates*, FORTUNE (Feb. 2, 2016), http://fortune.com/2016/02/02/boardlist-launch-women-boards/ [https://perma.cc/H99C-PHAX].

117. THEBOARDLIST, https://theboardlist.com/ [https://perma.cc/7W9M-TPAD]. TheBoardlist is described in more detail in Section III.C.

had yet to be filled.[118]

In 2017, "[n]early 74% of private tech companies [had] no women on their board of directors";[119] in 2016, it was even higher—79%.[120] Statistically speaking, the numbers are grim in spite of improvements. "According to [theBoardlist], 91% of tech unicorn board seats and nearly 93% of private tech company board seats are held by men. Since July 2016, 74% of board seats of unicorn tech companies and 81% of private company board seats were filled by men."[121]

As detailed in the prior sections above, founders and funders are disproportionately white men and those are generally the individuals who fill board seats in private companies.[122] The only seats that remain are typically for independent board members, who are usually chief executive officers or founders of other companies—and male. Some claim that there are not enough qualified women to fill the board seats of venture-backed private companies. Sukhinder Singh Cassidy, the founder of theBoardlist, rejects this idea and argues, "it's not really a pipeline problem as much as it is an access to networks problem."[123] In the public company context, ISS Analytics did a study of the largest publicly traded companies and found that over 75% of new male directors have no prior experience on corporate boards.[124] In contrast, the same study found that "[w]hen a woman fills a board seat, there's a 32% chance she's already served as a director, yet when a man fills a board seat, there's a 23% [chance] he's already served as a director . . . ."[125]

(c) Lack of Women in Leadership Positions in Venture-Funded Startups

A 2014 Babson College study on women in venture capital analyzed 6,793 unique companies in the United States and found that more than 15% of the companies with women on the executive team received venture capital funding between 2011 and 2013.[126] During this same time

118. Vara, *supra* note 115. In public companies, available board seats are filled immediately when they are vacated. *Id.* In particular, they seek individuals with certain expertise (such as auditing finances). *But cf. id.* (noting that this either creates opportunities for female candidates with less executive experience or excludes them due to their inexperience).

119. Guynn, *Women Can't Crack the Glass Ceiling*, *supra* note 38.

120. *Id.*

121. *Id.*

122. Vara, *supra* note 115.

123. Michael Smiroldo, *How This CEO Is Making Boardroom Diversity a Reality*, FORTUNE (Oct. 23, 2015), http://fortune.com/video/2015/10/23/joyus-singh-cassidy-boardlist/ [https://perma.cc/4JQP-KHVH].

124. Guynn, *Women Can't Crack the Glass Ceiling*, *supra* note 38.

125. *Id.*

126. DIANA REPORT, *supra* note 61, at 6.

period, less than 3% of companies that received venture capital funding had a woman chief executive officer.[127]

The same study found that from 2011 to 2013, venture capital firms investing in companies with a woman on the executive team or women chief executive officers were more active than companies with all-male teams or a male chief executive officer. [128]

3. *Cultural Disadvantages*

(a) Implicit Biases Against Women

Although it is unclear whether male entrepreneurs outperform female entrepreneurs,[129] entrepreneurship is largely thought of as a male domain.[130] "Compared with men, women in male gender-typed positions are more likely to have their performance devalued, less

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> The total dollar investment in companies with a woman on the executive team during 2011-2013 was 21% or $10.9 billion out of $50.8 billion. This figure also rose annually: in 2011 companies with women on the executive team received 9% ($816 million) of the total $8.9 billion invested, while in 2013 they received 27% ($7.1 billion) of the total $26.4 billion invested.

Id. at 7. However, findings in 1999 found that less than 5% of all startups with women on the executive team received venture capital funds. *See id.*

127. "[O]nly 2.7% of the companies, or 183 of 6,517 companies receiving venture capital funding during this period, had a woman [chief executive officer]." *Id.* at 9. Furthermore, "[c]ompanies with women entrepreneurs on the executive team are more likely to have higher valuations at both first (64% larger) and last (49% larger) funding, consistent with the fact that they are receiving later-stage funding, are older, and are larger." *Id.* at 10.

128. *Id.* The article did not delve into whether greater oversight was good or bad. On the one hand, greater oversight could mean that the venture capital firms had a vested interest in helping the team succeed; on the other hand, it could be interpreted as a lack of confidence in the team.

129. In fact, some reports like the one from First Round Capital, a prominent venture capital firm, indicate that women outperform men. Kia Kokalitcheva, *This VC Firm Found that Female Founders Actually Do Better than Their Male Peers*, FORTUNE (July 29, 2015), http://fortune.com/2015/07/29/female-founders-better-vc/ [https://perma.cc/45DS-5YWM]. In First Round Capital's self-study of their own portfolio companies over a ten-year period, teams with at least one women founder outperformed all-male teams by 63%. *Id.* A recent study by the Boston Consulting Group utilizing data from MassChallenge, which is a network of startup accelerators, noted that "startups founded and cofounded by women actually performed better over time, generating 10% more in cumulative revenue over a five-year period: $730,00 compared with $662,000." Katie Abouzhar et al., *Why Women-Owned Startups Are a Better Bet*, BCG (June 8, 2018), https://www.bcg.com/en-us/publications/2018/why-women-owned-startups-are-better-bet.aspx [https://perma.cc/T4K6-RABP]. Furthermore, for every dollar of funding, startups founded and co-founded by women generated 78 cents, while male-founded startups generated less than half that—just 31 cents. *Id.*

130. A recent PwC survey of corporate directors reported that, while 94% of directors agree that board diversity brings needed unique perspectives, 58% of male directors say that this push is motivated by political correctness and 54% say that shareholders care too much about the subject. Zillman & Hinchliffe, *supra* note 115. Comparatively, only 26% of female directors believe it is motivated by political correctness and only 20% think shareholders are too preoccupied with this issue. *Id.*

likely to receive opportunities for career advancement, and more likely to encounter challenges and skepticism in starting and running ventures."[131] They are also likely to be offered less support by their managers, especially if they are women of color.[132]

There are studies that document that "[b]oth professional investors and nonprofessional evaluators preferred pitches presented by male entrepreneurs compared with pitches made by female entrepreneurs, even when the content of the pitch was the same. . . . [R]esults also suggest that persuasiveness is moderated by male physical attractiveness."[133]

Another study demonstrates that funding differences between male and female entrepreneurs are socially constructed based on "gender stereotypes when assessing the potential of female and male entrepreneurs applying for venture capital."[134]

(b) Structural Inequities and the Lack of Social Networks for Women

The Office of Advocacy of the U.S. Small Business Administration commissioned a study which focused on "women entrepreneurs' access to equity funding and the influence of social networks on venture capital investment decisions."[135] The study looked at a dataset of investments by U.S.-based venture capital firms in companies headquartered in the United States.[136] The data originated from Thomson-Reuters VentureXpert from the years 2000 to 2010 of 2,500 venture capital firms, 18,900 portfolio companies, 92,500 individual management team members, and 90,000 investment rounds.[137] The study concluded that "there are multiple dimensions of social capital[,] and these dimensions may have different, even conflicting, effects on outcomes."[138] This makes it difficult to evaluate the impact of social capital on venture capital investments. Even though venture capital firms may take

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131. Alison W. Brooks et al., *Investors Prefer Entrepreneurial Ventures Pitched by Attractive Men*, 111 PROC. NAT'L ACAD. SCI. 4427, 4427 (2014).

132. Meyer, supra note 30.

133. Brooks et al., *supra* note 130, at 4429.

134. Jeaneth Johansson, Malin Malmström & Joakim Wincent, *Gender Stereotypes and Venture Support Decisions: How Governmental Venture Capitalists Socially Construct Entrepreneurs' Potential*, 41 ENTREPRENEURSHIP THEORY & PRAC. 833, 835 (2017), http://onlinelibrary.wiley.com/doi/10.1111/etap.12275/full [https://perma.cc/DL5M-F4GF]. "When they notice the sex of the entrepreneur, [government venture capitalists] resort to ascribing socially constructed gender attributes in their decision making." *Id.* at 837.

135. OFFICE OF ADVOCACY, SMALL BUS. ADMIN., SMALL BUSINESS RESEARCH SUMMARY: VENTURE CAPITAL, SOCIAL CAPITAL AND FUNDING OF WOMEN-LED BUSINESSES NO. 406 (2013); *see also* JMG CONSULTING, VENTURE CAPITAL, *supra* note 45.

136. JMG CONSULTING, VENTURE CAPITAL, *supra* note 45, at 7.

137. *Id.*

138. *Id.* at 20.

on high risk ventures, they are risk averse when it comes to investing within unfamiliar social networks. Those with well-established syndicates—where venture capital firms frequently partner with the same venture capital firms as a group—typically have a higher percentage of investments in women-led companies.[139] When they made such investments, they improved the performance of their venture capital firm, and it led to subsequent investments in women-led companies.[140]

Also, although venture capital deals are predicated on a network effect, some new evidence shows that that the best potential deals may not be in a venture capital firm's network at all. In the case of First Round Capital, companies that they discovered through nontraditional channels, such as Twitter and Demo Day, "outperformed referred companies by 58.4%. And founders that came directly to [First Round Capital] with their ideas did about 23% better."[141]

(c) Lack of Gender Diversity in Service Providers to Venture Capital

The service providers that serve the venture capital industry likewise lack gender diversity. As an example, the legal profession does not have many women at its highest echelon. Even though women have made up almost half of the graduating law school classes for almost twenty years, a survey conducted by the New York City Bar Association in December 2015 found that in large New York City law firms, women only comprised 45% of first-year associates—this was a decrease of five percentage points from eleven years ago.[142] Women only made up 35% of all lawyers in the firms and had a higher attrition rate (18.4% for women and 12.9% for white men).[143] Seventy-seven percent of equity partners were white males.[144]

Due to a difference in origination credit, on average, male partners make 44% more than female partners.[145] For minority female associ-

139. *Id.* at 6.

140. *See id.*

141. *10 Year Project*, FIRST ROUND, http://10years.firstround.com/ [https://perma.cc/ZP5Q-CS4H].

142. *Diversity Benchmarking Report 2015*, N.Y. CITY B. 6 (2015), http://documents.nycbar.org/files/NYC_Bar_2015_Diversity_Benchmarking_Report.pdf [https://perma.cc/55YS-TB9N].

143. *Id.* at 2-3.

144. *Id.* at 2.

145. Debra Cassens Weiss, *Male Partners Make 44% More on Average than Female Partners, Survey Finds*, ABA J. (Oct. 13, 2016, 8:24 AM), http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/ [https://perma.cc/NJ5Y-RLJ2]. The results were based on a survey taken by more than 2,150 partners. *Id.*

ates, the numbers are even more abysmal. "Eighty-five percent of minority female attorneys in the [United States] will quit large firms within seven years of starting their practice."[146]

In 2003, the ABA Commission on Women in the Profession conducted the Women of Color Research Initiative. "Findings concluded that, in both law firms and corporate legal departments, women of color receive less compensation than men and white women; are denied equal access to significant assignments, mentoring[,] and sponsorship opportunities; receive fewer promotions; and have the highest rate of attrition."[147]

In the National Association of Women Lawyers survey put forth in 2015, in the Am Law 200,[148] 18% of equity partners were women, and even though they had comparable work, hours, and revenue generation as their male counterparts, they only earned 80% of what men did.[149]

The statistics for women lawyers who are also minorities are even more grim. In a November 2015 National Association for Law Placement press release, it was reported that minority women comprised just 2.55% of partners for that year, and they "continue to be the most dramatically underrepresented group at the partnership level, a pattern that holds across all firm sizes and most jurisdictions."[150]

B. Problems of Gender Diversity on Boards of Venture Capital-Backed Companies

So far, this Article has demonstrated the absence of women at each stage of the lifecycle of high technology venture capital-backed private companies. This Article now turns to focus on gender disparities on private company boards.

One of the most important terms and key control mechanisms for a startup company is its board of directors.[151] Typically, there are three to five board members in an early stage company.[152] At a more mature startup, there may be seven to nine board members, including "[t]he CEO and one of the founders . . . along with a few of the [venture

146. Liane Jackson, *Minority Women Are Disappearing from BigLaw—and Here's Why*, ABA J. (Mar. 2016), http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why [https://perma.cc/ZD94-GV8A].

147. *Id.*

148. A comprehensive list of the top 200 American law firms.

149. Jackson, *supra* note 145.

150. *Id.*

151. FELD & MENDELSON, *supra* note 56, at 67.

152. There are usually five board members at the early stage—the founder, CEO, venture capital representative, a second venture capital representative, and an independent (sometimes called "outside") board member. *Id.* at 69.

capitalists] (depending on the amount of money raised). However, the majority of the additions to the board are outside board members, typically experienced entrepreneurs or executives in the domain in which the company is operating."[153] A standard provision in a term sheet for a venture capital financing follows under the heading "Voting Agreement":

> At the initial Closing, the Board shall consist of [______] members comprised of (i) [*name*] as [the representative designated by [____], as the lead Investor, (ii) [*name*] as the representative designated by the remaining Investors, (iii) [*name*] as the representative designated by the Founders, (iv) the person then serving as the Chief Executive Officer of the Company, and (v) [___] person(s) who are not employed by the Company and who are mutually acceptable [to the Founders and Investors][to the other directors].[154]

The report issued by former U.S. Attorney General, Eric Holder, in the wake of the Uber scandal provides some guidance on what constitutes good corporate governance in the board context. Holder's suggestions included enhancing the independence of the board, installing an independent chairperson of the board, and creating an oversight committee which would "enhance a culture of ethical business practices, diversity, and inclusion within the organization."[155] However, the reality is that very few board members are independent on private company boards; the chief executive officer is typically the board chairperson, and there is no oversight committee to improve the culture of the company, particularly with respect to diversity.

When board members are selected in tech startups, it has generally been an informal process where "candidates advertise themselves, [and] founders ask around . . . . And given the demographics of Silicon Valley's elite, it has favored white men."[156] In other words, the circle of people from which board members are selected is extremely small. In a recent study, researchers made "clear the extent to which private tech companies have avoided expanding and diversifying their boards and installed structures that consolidate power among insiders."[157]

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153. *Id.*

154. *Sample Term Sheet: Model Legal Documents*, NAT. VENTURE CAP. ASS'N 13 (June 2013), https://nvca.org/resources/model-legal-documents/ [https://perma.cc/V6S3-UBWC] (follow "Term Sheet" hyperlink).

155. ERIC HOLDER, TAMMY ALBARRÁN & COVINGTON & BURLING LLP, COVINGTON RECOMMENDATIONS FOR UBER 2 (2017), https://drive.google.com/file/d/0B1s08BdVqCgrUVM4UHBpTGROLXM/view.

156. Vara, *supra* note 115.

157. Alfred Lee, *Most Big Private Tech Firms Fall Far Short on Governance*, INFO. (Nov. 28, 2017, 6:46 AM) [hereinafter Lee, *Private Tech Firms*], https://www.theinformation.com/most-big-private-tech-firms-fall-far-short-on-governance [https://perma.cc/V6CK-VDGH].

Only 18% of directors of private companies in the study were independent; in public companies, 83% of directors were independent.[158] Boards are also structured to diminish shareholder rights. "Many companies have structured the elections of their boards and their company stock to increase founder control."[159] Put simply, boards are designed in a way to keep the investors and founders in control of the company in the private company context.

Additionally, since the venture capital community—as a general matter—is not actively recruiting board members outside of their network, there is the problem of overboarding, where the same venture capitalists sit on numerous boards because there are not enough of them to go around. Many venture capitalists "sit on multiple boards, and it isn't uncommon for the number to rise as success leads to more and better investment opportunities."[160] As a result, "venture capitalists neglect investments because they sit on too many boards. Venture capitalists might not have the time to help these companies properly develop into profitable businesses that will either be sold or go public."[161] Accordingly, overboarding may not only be contributing to poor corporate governance but also the lack of gender diversity. In the public company context, the problem of overboarding was addressed by shareholders' groups and, in recent years, has led to a decline in the number of directors who hold multiple seats.[162] In the private context, there is no similar check. "Silicon Valley has always operated under its own set of informal rules that prize personality and energy over

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The study reviewed "1,000 data points on 30 prominent, privately held tech companies in the [United States]." *Id.*

158. *Id.*

159. *Id.* Private tech companies are also "pulling back on publicly disclosing information about their fundraising and stock value, with few consequences." *Id.* Typically, a Form D (notice of an offering of securities) is filed with federal regulators within fifteen days of fundraising. U.S. SEC. & EXCH. COMM'N, SEC1972, FORM D: NOTICE OF EXEMPT OFFERING OF SECURITIES, https://www.sec.gov/files/formd.pdf [https://perma.cc/NTB2-SER4]. Some private tech companies have delayed the filing, saying that it is not legally required, or have filed them with states which makes them more difficult to locate. Lee, *Private Tech Firms*, *supra* note 156. "Some companies that do business or have employees in California also appear to be less frequently filing information about their stock with the California Department of Business Oversight." *Id.* Others have even used novel legal strategies to avoid disclosing their share prices in charter documents which are publicly filed. *Id.*

160. Alfred Lee, *How Many Board Seats Is Too Many?*, INFO. (Jan. 17, 2018, 7:01 AM) [hereinafter Lee, *Board Seats*], https://www.theinformation.com/how-many-board-seats-is-too-many [https://perma.cc/9ZF9-FBXG].

161. Thomas Lee, *Stretched Thin: Venture Capitalists Serve on Too Many Boards*, S.F. CHRON. (Aug. 26, 2017, 10:04 AM) [hereinafter Lee, *Stretched Thin*], http://www.sfchronicle.com/business/article/Stretched-thin-Venture-capitalists-serve-on-too-11966545.php [https://perma.cc/W5U3-P8F8]. The term "overboarding" refers to directors committing to too many boards. *Id.*

162. According to a recent study by ISS Analytics, "63 directors at S&P 500 companies hold[] more than five seats, down from 83 in 2012." Lee, *Board Seats*, *supra* note 159.

sound corporate governance."[163] Well-known venture capitalists sit on multiple boards. Bill Gurley, a partner at Benchmark Capital, sits on thirteen boards.[164] At the same time, he helped raise $425 million for Benchmark's newest fund.[165] Jeffrey Jordan, a partner at Andreessen Horowitz, sits on the boards of eight companies, including several unicorns—Airbnb, Pinterest, and Instacart—which were collectively valued at $45 billion.[166] John Doerr, chairman of Kleiner Perkins Caufield & Byers, sits on an astounding fifteen private company boards, is a board observer for another one (which means he can attend all meetings although he cannot vote), and is a member of the board for Alphabet, Google's publicly traded holding company.[167] Amish Jani of FirstMark Capital sits on eighteen boards.[168] It is not uncommon for venture capitalists who are in high demand to sit on at least nine boards.[169]

Some may argue that startups do not demand the time that publicly traded companies do. However, a good director of a private company board does not only offer advice on marketing, product development, and financing, but he or she is constantly engaged with the company.[170] "The director of yesteryear could probably expect to attend four board meetings a year, one every three months. But given the quickening pace of technological change and the enormous money at stake, directors need to talk to each other beyond formal meetings and spend time with management . . . ."[171] In fact, startups may need more attention

163. Lee, *Stretched Thin, supra* note 160.

164. According to Crunchbase data as of July 31, 2018. *Bill Gurley Board and Advisor Roles*, CRUNCHBASE, https://www.crunchbase.com/person/bill-gurley/board_and_advisory_roles/current_board_and_advisory_roles_image_list [https://perma.cc/3Y99-T8Q7].

165. Lee, *Stretched Thin*, *supra* note 160.

166. *Id.*

167. *Id.* However, in a news article published on January 17, 2018, John Doerr was reported to have sat on seventeen boards. Lee, *Board Seats*, *supra* note 159.

168. Lee, *Board Seats*, *supra* note 159.

169. As of January 2018, the following venture capitalists sat on ten or more boards—and they are not limited to private companies: Scott Sandell of New Enterprise Associates (sixteen boards), Peter Levine of Andreessen Horowitz (fifteen boards), Ben Horowitz of Andreessen Horowitz (fourteen boards), Daniel Rimer of Index Ventures (fourteen boards), Hemant Taneja of General Catalyst Partners (fourteen boards), Michelangelo Volpi of Index Ventures (thirteen boards), Bandel Carano of Oak Investment Partners (twelve boards), Bryan Schreier of Sequoia (twelve boards), Forest Baskett of New Enterprise Associates (eleven boards), Chamath Palihapitiya of Social Capital (eleven boards), Marc Andreessen of Andreessen Horowitz (ten boards), Peter Fenton of Benchmark Capital (ten boards), Jeff Jordan of Andreessen Horowitz (ten boards), and Joe Lonsdale of 8VC (ten boards); all of them are men. *Id.* The following individuals sat on nine boards: Ronald Bernal of New Enterprise Associates, Roelof Botha of Sequoia, Andrew Braccia of Accel, Navin Chaddha of Mayfield Fund, Noah Doyle of Javelin Venture Partners, John Frankel of Venture Capital, Reid Hoffman of Greylock Partners, and Michael Moritz of Sequoia. *Id.*

170. Lee, *Stretched Thin*, *supra* note 160.

171. *Id.*

because they present the greatest risk to investors at the beginning of their lifecycles.[172] Also, with private companies staying private longer, the issues become more complex as startups are trying to grow without developing the necessary corporate governance infrastructure. There have been spectacular failures in corporate governance in recent years, including Theranos, which developed blood-testing technology; Zenefits, which created human resource software; and, most recently, Uber.[173] "As more companies stay private longer, directors serve a key function in challenging founders, warning about company culture problems and even spotting fraud . . . ."[174] In sum, in light of a director's various responsibilities, the high number of boards that private company board members serve on and the increasingly complex issues that arise, it is clear that serving on a board takes significant time.[175]

Ultimately, having more women on private company boards may help improve corporate governance because women directors can be expected to devote more time and attention to cultivate startups since they do not sit on as many boards as their male counterparts. This could result in the company having a higher likelihood of success and, hopefully, a return on investment of the venture capital firm for its limited partners.[176]

Venture capital-backed companies often recruit women to their boards when they become public companies.[177] For example, Zynga and Facebook only appointed their first women directors after they went public; contrastingly, Twitter kept its all-white, male board upon going public.[178]

Groups that advise and advocate for women in tech, such as Astia and the Anita Borg Institute, find that "[d]iversity benefits research, development and innovation, the heartbeat of Silicon Valley. It also increases profit . . . ."[179] Despite these facts, women candidates for venture-backed private company board positions are not common. The

172. *Id.*

173. "Regulators and federal prosecutors are investigating Theranos . . . for misleading investors about its blood-testing technology. Zenefits . . . paid millions of dollars in fines to state regulators because its employees sold insurance without proper licenses." *Id.*

174. Lee, *Board Seats*, *supra* note 159.

175. According to the National Association of Corporate Directors, board members of public companies each spent an average of 190 hours working on board matters in 2005—in 2014, that number had increased by 46% to 278 hours per year. Lee, *Stretched Thin*, *supra* note 160.

176. This is a speculative, though logical, claim. It is difficult to prove because so many factors contribute to success related to return on investment.

177. Miller, *supra* note 11.

178. *Id.*

179. *Id.*

fact that there are few women partners in venture capital firms (where board members typically originate from) only compounds the problem of having few women on private company boards. Larry Fink, the Chief Executive Officer of BlackRock, a global investment firm which manages $6.3 trillion in assets,[180] opined in an open letter to chief executive officers that diverse boards result in "a more diverse and aware mindset. They are less likely to succumb to groupthink or miss new threats to a company's business model. And they are better able to identify opportunities that promote long-term growth."[181] He went on to state, "the board is essential to helping a company articulate and pursue its purpose, as well as respond to the questions that are increasingly important to its investors, its consumers, and the communities in which it operates."[182] Yet, despite all the benefits that accrue from having more women on boards, there are still very few women board members—especially on the boards of private companies.

C. Evidence of Lack of Women on Private Company Boards

To put into context the stark absence of women on the boards of private companies, this Article provides evidence of the number of women on the boards of directors of private companies in the software industry.[183] Using data from PitchBook, a financial data software with information on private capital markets,[184] this Article found that out of 15,053 contacts listed as board members in December 2017, 1,237 of the board members (or 8.23%) were women.[185] From December 2016 to December 2017,

180. Alex Morrell, *Larry Fink, CEO of $6.3 Trillion Manager BlackRock, Just Sent a Warning Letter to CEOs Everywhere*, BUS. INSIDER (Jan. 16, 2018, 1:44 PM), http://www.businessinsider.com/blackrock-ceo-larry-fink-just-sent-a-warning-to-ceos-everywhere-2018-1 [https://perma.cc/RJ3S-9HCW].

181. Larry Fink, *Larry Fink's Annual Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/en-us/investor-relations/larry-fink-ceo-letter [https://perma.cc/2XRZ-DPHD].

182. *Id.*

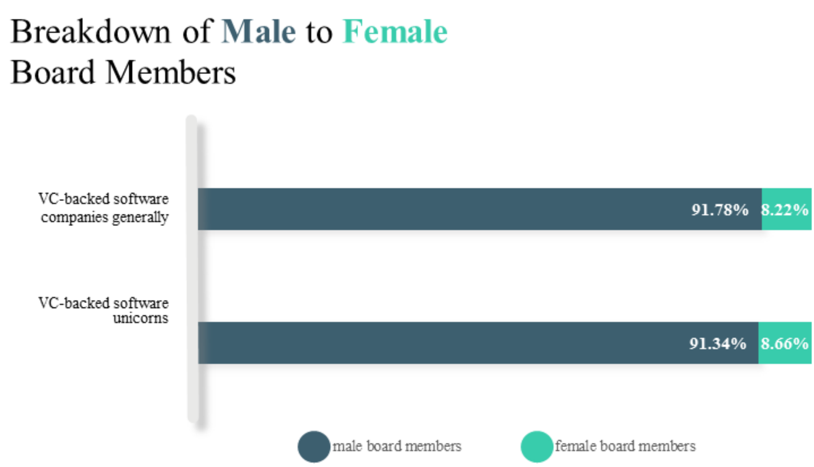
183. The reason this particular industry was highlighted was that it has received the most media attention and criticism. PitchBook categorizes "software" as a subset of the "information technology" industry. *See* RSM & PITCHBOOK, RSM QUARTERLY SPOTLIGHT: INFORMATION TECHNOLOGY, 2016 ANNUAL 3 (Mar. 15, 2017), https://files.pitchbook.com/pdf/RSM_US_IT_Spotlight_2016_Annual.pdf. Software is defined to include application software, automation/workflow software, business/productivity software, communication software, database software, educational software, entertainment software, financial software, Internet software, multimedia and design software, network management software, operating systems software, social/platform software, software development applications, vertical market software, and, of course, "other." PITCHBOOK, https://pitchbook.com/ [https://perma.cc/RC4B-4BMV]. (These categories can be viewed within the PitchBook software itself, which requires paid access.)

184. *See* PITCHBOOK, https://pitchbook.com/ [https://perma.cc/RC4B-4BMV].

185. This superset of data was generated using PitchBook's "People Search" functionality, targeted to identify active board members of venture capital-backed, U.S. firms in the

out of the 335 contacts listed as board members for software unicorns, 29 (or 8.66%) were women.[186] The board members include female founders, independent board members, and partners in venture capital firms. The graph below illustrates the stark differences in the percentage of active male and female board members over a two-year period.

Figure 1[187]



Parsing the numbers down further, of the 1,237 female board members on private company boards in the software industry, 483 (or 3.21%) were independent, 369 (or 2.45%) were founders, and 385 (or 2.56%) were venture capital investors. In contrast, for software unicorns, 19 (or 5.67%) were independent, 5 (or 1.49%) were founders, and 5 (or 1.49%) were venture capital investors.[188] In both private compa-

software industry. (Report on file with the author.)

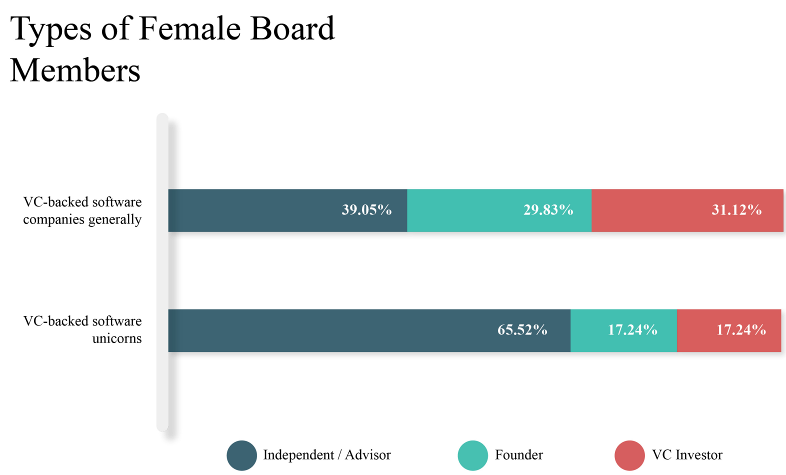
186. This superset of data was generated by a custom PitchBook search, designed December 5, 2017, to target active board members at venture capital-backed software companies headquartered in the United States with a post-valuation of over $1 billion. (Report on file with the author.)

187. These percentages were derived from a superset of 15,053 contacts generated using PitchBook's "People Search" functionality, targeted to identify active board members of venture capital-backed firms in the U.S. software industry. Of the total 15,053 board members, 13,816 were male and 1,237 were female. (Report on file with the author.)

188. To arrive at the figures for independent female board members for software companies and software unicorns, men were first excluded from the superset of male and female board member names. To validate that those women counted held positions of true—rather than nominal or ceremonial—investment power, female board members serving in advisory or independent board member capacities, or those included as original founding members, were then excluded as well. The figures for female founders and female venture capital investors who served as board members for software companies and unicorns used similar validation techniques. (Report on file with the author.)

nies and unicorns in the software industry, women were predominately in the independent director category; there were fewer women in the founder and venture capital investor categories of directors as depicted in Figure 2.

Figure 2[189]



From a corporate governance perspective, if women comprise a mere 8% of boards across all venture capital-backed private companies, as shown in Figure 1, that means that there is not the critical mass of women needed to create the proper tone at the top with respect to the importance of gender diversity on private company boards and at all levels of the company. It is also likely that a very particular type of viewpoint is advanced because most boards are comprised of white males from similar backgrounds.[190]

III. The Effect of Corporate Governance, Publicness, Sexual Harassment, and the Innovation Imperative on Private Company Boards

In light of the increasing publicness of private companies and media attention due to high profile sexual harassment scandals, private companies would be well advised to revisit their corporate governance

189. These percentages were derived from a superset of 335 contacts generated by a custom PitchBook search, designed December 5, 2017, to target active board members at venture capital-backed software companies headquartered in the United States with a post-valuation of over $1 billion. Of the total 335 board members, 306 were male and 29 were female. (Report on file with the author.)

190. *See* Zillman & Hinchliffe, *supra* note 115 (noting that even male directors agree that diversity helps bring unique perspectives).

structure—in particular, the gender composition of their boards of directors—to deflect criticisms and avoid undermining the image of innovation. This Article has documented the uphill battle that women face in entrepreneurship in the venture capital context. It then provided evidence about the lack of women on private company boards of directors and explained how the low numbers of women impacts the venture capital ecosystem and corporate governance more generally.[191] This Part gives an overview of corporate governance and its connection to publicness and how the media's focus on sexism and sexual harassment has become a lightning rod for a call to action to increase the number of women in positions of power across various industries, including high technology companies. Furthermore, this Part delves into the importance of the connection between gender diversity and the innovation imperative.

A. Corporate Governance

The term "corporate governance" lacks a uniformly accepted definition. The definition spectrum runs from corporate governance encompassing external and internal constraints to a focus on internal governance.[192] This overt focus on corporate governance is a relatively new phenomenon.[193] One scholar looks at the impetus behind this rise of corporate governance, ascribing the rise to politics.[194] "Indeed, a key promise of the corporate governance movement is that, once the proper decision-making processes internal to the corporation are in place, external substantive regulation of corporate action will become increasingly superfluous, as corporations will be in a position to govern themselves."[195] This Article does not claim that corporate governance is the

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191. For a more robust discussion on the issue of sexual harassment and how it fits into corporate and securities law, please see Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018).

192. One conception of corporate governance is a horizontal one where the majority of the power rests with the managers, "but not the most important bits. Those belong to the board, which has important powers over a limited set of key issues." Stephen J. Lubben, *Separation and Dependence: Explaining Modern Corporate Governance*, 43 SETON HALL L. REV. 893, 903 (2013). "Shareholders provide boundaries to the exercise of power by both the board and management." *Id.* Power among officers (also referred to as managers), directors, and shareholders "is separate and also codependent." *Id.* at 893.

193. *See* Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 362 (2016) (noting that the term "corporate governance did not exist in the English language until the 1970s, but its use has exploded since").

194. *See generally id.* Corporations are analogized to government by having a system of "checks-and-balances through strong independent boards and (shareholder) democracy—in the hope of tackling numerous economic and social problems." *Id.* at 366 (internal quotation marks omitted).

195. *Id.* Pargendler gives an account of corporate governance in the 1970s through the financial crisis in 2008, explaining why the corporate governance framework as a response

only solution to the lack of women on private company boards, but if used in tandem with regulatory action, it is a step in the right direction. "Governance solutions . . . concern the proper balance of power and incentive structure within the corporation . . . [and] primarily pertain to the decision-making process rather than to the content of corporate conduct."[196] Thus far, the normative defense[197] of corporate governance practices largely pertains to shareholder value.

Publicness plays a particular role in the governance structure, as pointed out by Professor Hillary A. Sale and described further in Section III.B below.[198] "Corporations make choices, including, for example, choices about how the company handles certain events and how officers, directors, and shareholders interact with each other and the public."[199] Then when the corporations share their choices with the public, they understand "how the corporations have chosen to delegate power and responsibilities, as well as about where the gaps and weaknesses in governance might be."[200] In private companies in particular, the decisionmaking process needs to be reexamined, especially with regard to how board members are appointed. "Arguably . . . outside actors can even become part of the governance rubric, creating pressure for changes in the decision-making structure or the allocation of power within the corporation."[201] In the case of venture capital-backed startups, the outside actor was the media. When the media exposed the rampant sexism and sexual harassment allegations against prominent venture capitalists, the presumed meritocracy of the startup world came into question, and the flawed methodology in choosing private company board members came to light in a more prominent way.

B. Publicness

The new publicness[202] of private companies, particularly unicorns, based on media reports and the increasing focus on the lack of diversity of women and minorities in high technology companies, has led to

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to various "corporate failures and unbridled corporate power" was amenable to those across the political spectrum. *Id.* at 366-67; *see also id.* at 373-89.

196. *Id.* at 370.

197. *Id.* at 395-99.

198. Hillary A. Sale, Essay, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014).

199. *Id.* at 1630.

200. *Id.* at 1630-31.

201. *Id.* at 1631.

202. Hillary A. Sale, *The New Public Corporation*, 74 L. & CONTEMP. PROBS. 137, 141 (2011) (defining "publicness" in the public company context) [hereinafter Sale, *The New "Public" Corporation*].

a heightened level of scrutiny. This new level of scrutiny means companies would be better off addressing issues—such as the dearth of women on the boards of directors of private companies—at the early stages of the company rather than in anticipation of going public, which happens much less frequently than in the past.[203] In light of the substantial capital in Silicon Valley, startups are not incentivized to exit through an acquisition or go public.[204] For example, in 2015, there were 1,003 exits; in 2016, there were 857; and in 2017, there was a slight uptick to 885 exits.[205] The number of venture-backed exits decreased slightly in 2018 to 864, but with the total exit value reaching its highest point since 2012.[206]

Professor Hillary A. Sale asserts that corporate governance is not limited to the balance of power among directors, officers, and shareholders under private law, but is rather "a more textured, substantive, and public view of governance, a form of 'publicness,' defined by scrutiny and government."[207] Sale argues that "the government and the media have increasing influence over public corporations and their governance, and the private sphere is diminishing. The result is a theory of the corporation that operates in a public sphere—public in a different way—with changing obligations and an evolving, not a fixed, definition."[208] As corporations mature, there is a corresponding increase in their responsibilities. "When they choose to become public

203. *See* Magistretti & Hensel, *supra* note 62**;** *cf.* Jennifer S. Fan, *Catching Disruption: Regulating Corporate Venture Capital*, 2018 COLUM. BUS. L. REV. 341, https://ssrn.com/abstract=2889443 [https://perma.cc/7QTA-ZA6Z].

204. Magistretti & Hensel, *supra* note 62.

205. *Id.*; PITCHBOOK & NAT'L VENTURE CAPITAL ASS'N, VENTURE MONITOR 4Q 2018 27 (2019), https://files.pitchbook.com/website/files/pdf/4Q_2018_PitchBook_NVCA_Venture_Monitor.pdf. The Q4 2017 Venture Monitor originally reported the total exits for 2017 at 769—which would have been the lowest since 2011. PITCHBOOK & NAT'L VENTURE CAPITAL ASS'N, VENTURE MONITOR 4Q 2017 26 (2018), https://files.pitchbook.com/website/files/pdf/4Q_2017_PitchBook_NVCA_Venture_Monitor.pdf. For these reports, exits are defined as "the first majority liquidity event for holders of equity securities of venture-backed companies. This includes events where there is a public market for the shares (IPO) or the acquisition of majority of the equity by another entity (corporate or financial acquisition)." *Id.* at 35. Secondary sales, further sales after the initial liquidity event, or bankruptcies are not included in this count and M&A deals are reported based on disclosed figures. *Id.* These discrepancies in the reported exits are not specifically explained in the reports but are likely due to more information about the exit events of 2017 becoming public over time.

206. VENTURE MONITOR 4Q 2018, *supra* note 205, at 27.

207. Sale, *The New "Public" Corporation, supra* note 201, at 141.

208. *Id.* at 138. Professor Sale goes on to say that the effects of this publicness mean that we need to "change in the way that officers and directors understand and do their jobs." *Id.* Furthermore, she points out that

> Private ordering was always a privilege and that privilege is subject to erosion. Government was there from the beginning, allowing private ordering to exist. But what is given can be taken away; Sarbanes-Oxley and Dodd-Frank both

corporations, they become subject to multiple regimes. Then, when scandals occur, public focus on what they are doing and the corporate governance system grows. The result is public pressure and, then, government in governance."[209] In the public company realm, a shift has occurred between the theoretical and actual balances of power.[210] As a result, "[t]he federal government, through the SEC and, indirectly, the [Department of Justice], occupies more of the governance space. That space is becoming increasingly susceptible to public pressure."[211] Once a company legally becomes a public company, its publicness plays a role in the way it is regulated and the expectations upon it.[212] This Article contends that the publicness Professor Sale alludes to extends to private companies as well, particularly venture-backed private companies. The difference, however, is that the media plays an increasingly prominent role to fill the void left by the lack of regulation by the SEC since private companies are not subject to the same rigor of public companies. Therefore, change is initially wrought, not through legal means, but by what is deemed newsworthy by the media. Corporate governance plays a role only after the indiscretions of the private company are brought to light through media coverage. And even then, there are no proactive measures being implemented because the media simply reports on what has already happened and does not offer a framework for how to fix or prevent undesirable outcomes from happening—that is the province of the law.

C. Sexual Harassment

While this Article is not focused on sexual harassment, sexual harassment in the workplace often reflects broader, systemic issues women face in technology, and it provides a backdrop for discussion about the importance of women on private company boards.[213] The media coverage and resulting publicness of this issue illustrated the pervasiveness of such behavior and may prove to be the catalyst for the

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> prove that point. They highlight the privileges previously accorded, arguably abused, and now lost.

Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1032-33 (2013).

209. Sale, *The New "Public" Corporation, supra* note 201, at 141.

210. *Id.*

211. *Id.*

212. *Id.*

213. The California legislature and governor enacted bill S.B. 224 on September 30, 2018. The bill gives additional examples of professional relationships where sexual harassment may arise, including "investor[s]." S.B. 224, 2017-2018 Leg., Reg. Sess. (Cal. 2018); Janet Burns, *California Bill Tweaks Sexual Harassment Law to Account for Venture Capital*, FORBES (Aug. 27, 2017, 5:18 PM), https://www.forbes.com/sites/janetwburns/2017/08/27/california-bill-tweaks-sexual-harassment-law-to-account-for-venture-capital/#364472273688 [https://perma.cc/89PJ-V2DU].

changes that are outlined later in this Article. As the founder of theBoardlist, Singh Cassidy, observed at the second annual Tech Inclusion conference, "[i]n tech itself, there were a lot of bad actors. For the first time, it was also amplified across media and across politics . . . . This is a defining moment for us."[214] When the media exposed the lack of women in high technology companies and reported the prevalence of sexual harassment and sexism in the industry, the cultural factors aligned with the #MeToo movement. This cultural force is now driving the business leaders to action and this, in turn, has the potential for changes to occur in the law.

As noted in Part II, sexist behavior and implicit bias against women permeates the startup world.[215] In a survey conducted by theBoardlist among its network of women, the results were as follows: "72% reported experiencing gender-based discrimination [and] 45% reported experiencing sexual harassment."[216] In another recent survey, "six in 10 women in tech said they experienced harassment."[217] Venture capital has an organizational structure which rewards star power and enables bad actors with star power to engage in inappropriate behavior.[218] Singh Cassidy opined, "I believe industries that have a paradigm of absolute power brokering at the top may be more susceptible to [sexual harassment] issues . . . . My sense is that

214. Terry Collins, *Women Outing 'Bad Actors' in Tech Was Defining Moment, Experts Say*, CNET (Dec. 12, 2017, 3:53 PM), https://www.cnet.com/news/inclusion-in-tech-sexual-harassment-silicon-valley/ [https://perma.cc/MY2M-S2K4].

215. At Noah, a major startup conference that took place in June 2016 in Berlin, Germany, escorts were allegedly invited to the invitation-only event. David Meyer, *Escort Scandal Hits Major Startup Conference*, FORTUNE (June 10, 2016), http://fortune.com/2016/06/10/noah-berlin-escorts/ [https://perma.cc/657A-685Z]. Some female entrepreneurs were reportedly propositioned by the males in attendance at the event. *Id.* Only 11 of the 108 speakers at the event were women. *Id.*

216. Megan Rose Dickey, *Boardlist Founder Says Sexual Discrimination Is More Prevalent than People Think*, TECHCRUNCH (Jan. 28, 2017) [hereinafter Dickey, *Boardlist Founder Says*], https://techcrunch.com/2017/01/28/boardlist-founder-says-sexual-discrimination-is-more-prevalent-than-people-think/ [https://perma.cc/34GZ-JX5S].

217. Jessica Guynn & Jon Swartz, *Sexual Harassment Scandal Shakes Insular, Influential Venture Capital World*, USA TODAY (June 30, 2017, 1:52 PM), https://www.usatoday.com/story/tech/news/2017/06/29/sexual-harassment-scandal-shakes-insular-influential-venture-capital-world/103292998/ [https://perma.cc/VRA6-8RHK] (the referenced survey was released around the same time this Article was initially written, in June of 2017).

218. Ellen Pao, *This Is How Sexism Works in Silicon Valley: My Lawsuit Failed. Others Won't.,* CUT (Aug. 2017), https://www.thecut.com/2017/08/ellen-pao-silicon-valley-sexism-reset-excerpt.html [https://perma.cc/KLM4-P49K] (excerpt from ELLEN PAO, RESET (2017)) ("In venture capital, a ton of power is concentrated in just a few people who all know one another. Tips and information are exchanged at all-male dinners, outings to Vegas, and sports events."). A recent survey by business consulting firm Semaphore found that 88% of respondents—who work in private equity, VC, or related fields—believe that sexual misconduct, harassment, and gender bias are a problem in the venture capital and private equity industry. Polina Marinova, *Term Sheet -- Monday, February 11*, FORTUNE (Feb. 11, 2019), http://fortune.com/2019/02/11/term-sheet-monday-february-11/ [https://perma.cc/G6ZS-BB5C].

industries that have king-making environments can breed this kind of behavior."[219]

In August 2017—post-Uber scandals, but pre-Harvey Weinstein scandals—Qualtrics and theBoardlist conducted a survey of more than 600 public and private companies and found that 77% of corporate directors had not discussed sexual harassment at the board level.[220] The reasons cited ranged from "the topic 'just hasn't come up,' 'board members are men,' and it wouldn't be 'well-received.' "[221] Although corporate governance deals with issues such as financial and audit risks and compensation, it is telling that it has not encompassed cultural risks and the dangers of not setting the proper tone at the top. An interesting aspect to the survey, however, was that "[a] majority (83%) of [venture capital] board members who responded said that their boards had talked about the [sexual harassment] accusations."[222] After such discussions, "[h]alf (50%) reported that they were implementing plans as a result, nearly half (45%) are re-evaluating current plans in place, and nearly half (43%) have discussed appropriate behaviors around company culture (drinking, partying and sexist attitudes and behaviors)."[223] Venture-backed private company boards may be taking actions where their counterparts in other types of companies have not because of the publicness of their culture due to media accounts. The media's numerous reports on venture capital-backed private companies—ranging from sexual harassment allegations, the lack of women in leadership (as founders and on the boards), and a "bro culture"[224] that has largely not supported diversity—has helped to galvanize such boards to action in a way that legal mechanisms alone could not.

In February 2017, Susan Fowler wrote a blog that documented Uber's sexist culture and incidents of sexual harassment.[225] It read in part:

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219. Jena McGregor, *How Too Much Focus on 'Superstar' Workers Enables Harassment*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/12/19/the-metoo-movement-is-a-warning-sign-about-the-star-system-at-many-companies/ [https://perma.cc/S6AM-GFVH].

220. Jeff Green, *Harassment Discussions Rarely Make It Through Boardroom Doors*, BLOOMBERG (Oct. 24, 2017, 2:08 PM), https://www.bloomberg.com/news/articles/2017-10-24/harassment-discussions-rarely-make-it-through-boardroom-doors.

221. *Id.*

222. *Corporate Boards Aren't Preparing for Sexual Harassment and Gender Discrimination Issues*, MEDIUM (Oct. 24, 2017), https://medium.com/@theBoardlist/corporate-boards-arent-preparing-for-sexual-harassment-and-gender-discrimination-issues-24ba425d6497 [https://perma.cc/QD26-6P94].

223. *Id.*

224. Chang, *supra* note 7.

225. *See* Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber [https://perma.cc/L5EE-DJK8].

> After the first couple of weeks of training, I chose to join the team that worked on my area of expertise, and this is where things started getting weird. On my first official day rotating on the team, my new manager sent me a string of messages over company chat. He was in an open relationship, he said, and his girlfriend was having an easy time finding new partners but he wasn't. He was trying to stay out of trouble at work, he said, but he couldn't help getting in trouble, because he was looking for women to have sex with. It was clear that he was trying to get me to have sex with him, and it was so clearly out of line that I immediately took screenshots of these chat messages and reported him to [human resources].[226]

Uber's human resource department acknowledged that the incident constituted sexual harassment, but it noted that the individual in question was a high performer so he merely received a "stern talking-to" and a warning.[227] Ms. Fowler ultimately left the team. Eventually, Fowler's allegations led to an investigation of 215 employees and the termination of more than twenty employees at Uber.[228] The floodgates opened as more women discussed rampant sexual harassment in various industries,[229] including the venture capital realm.[230]

In the summer of 2017, the once rarified venture capital world saw its reputation further tarnished as allegations of sexual harassment by male partners in venture capital firms became public.[231] In June

226. *Id.*

227. *Id.*

228. Sarah Buhr, *Uber Has Fired More than 20 People over Harassment Probe*, TECHCRUNCH (June 6, 2017), https://techcrunch.com/2017/06/06/uber-may-have-fired-more-than-20-people-over-sexual-harrasment-probe/ [https://perma.cc/XTG9-PUDC]. Arianna Huffington, an Uber board member who serves on a board subcommittee investigating the sexual harassment, claims that there was no systemic sexual harassment problem. *Id.* "Uber has also been accused of having a bloated and inexperienced management structure leading up to a culture of misogyny and mismanagement—3,000 of its 12,000 employees are in management positions and many have had no prior management experience." *Id.*

229. Sexual harassment itself has received more attention now than ever before due to Harvey Weinstein, a now disgraced media mogul. Revelations about sexual harassment allegations against Weinstein have galvanized women. *See* Megan Garber, *All the Angry Ladies*, ATLANTIC (Nov. 6, 2017), https://www.theatlantic.com/entertainment/archive/2017/11/all-the-angry-ladies/545042/ [https://perma.cc/4YJN-2584]. It has become "a story of women's anger, weaponized." *Id.*

230. Joan C. Williams, *Why Sexual Harassment Is More of a Problem in Venture Capital*, HARV. BUS. REV. (July 12, 2017), https://hbr.org/2017/07/why-sexual-harassment-is-more-of-a-problem-in-venture-capital [https://perma.cc/UY76-ELRA].

231. *See* Rachel Lerman, *Bellevue VC Firm Ignition Dismisses Executive After Second Misconduct Complaint*, SEATTLE TIMES (July 12, 2017, 5:03 PM), http://www.seattletimes.com/business/technology/ignition-dismisses-executive-after-another-misconduct-complaint/ [https://perma.cc/5EWW-2644]; Dan Primack, *How Lightspeed Responded to Caldbeck's Alleged Behavior*, AXIOS (June 27, 2017), https://www.axios.com/how-lightspeed-responded-to-caldbecks-behavior-with-stitch-fix-founder-2449360633.html [https://perma.cc/3BGZ-8DRL]; Theodore Schleifer, *Storied Venture Firm DFJ Is Investigating Founder Steve Jurvetson for Sexual Harassment*, RECODE (Oct. 24, 2017, 8:59 PM), https://www.recode.net/

2017, a number of women who had either worked for Justin Caldbeck, then a partner at Binary Capital, or were entrepreneurs seeking venture capital funding, went on record about the sexual harassment they had experienced at his hands.[232] In a few short days, Mr. Caldbeck went from denying the claims to apologizing for his past behavior to resigning from the firm he had co-founded.[233] His behavior also led to other resignations at Binary Capital, including that of his co-founder, and the winding down of the $175 million fund they had recently raised, as well as actions taken against the firm by investees of their $125 million debut fund.[234] Two of Binary's portfolio companies, Havenly and Dia&Co, terminated their board relationship with the firm while another one, Assist, asked to buy back its investment from Binary and terminate any relationship with it.[235] Mr. Caldbeck had been accused of sexual harassment in the past while at his former firm, Lightspeed Venture Partners (Lightspeed).[236] Katrina Lake, an entrepreneur, said that Mr. Caldbeck had sexually harassed her, and she asked Lightspeed to remove him as a board observer (which they agreed to).[237] Lightspeed, in turn, asked her to sign a nondisparagement agreement.[238] Since Ms. Lake was in the process of securing another investor in a subsequent round of financing and needed Lightspeed's approval for the financing to go through, she complied with their request.[239]

But Mr. Caldbeck was not the only bad actor. The media uncovered even more alleged transgressions by members of the venture capital

2017/10/24/16539644/dfj-steve-jurvetson-sexual-harassment-allegation-venture-capital-vc-draper-fisher [https://perma.cc/5NYQ-F7HD].

232. Connie Loizos, *The Latest in the Binary Capital Blowup and What It Means for Startup Investing*, TECHCRUNCH (June 27, 2017), https://techcrunch.com/2017/06/27/the-latest-in-the-binary-capital-blowup-and-what-it-means-for-startup-investing/ [https://perma.cc/GH43-LQAA].

233. *Id.*

234. *Id.*

235. Erin Griffith, *Term Sheet -- Wednesday, June 28*, FORTUNE (June 28, 2017), http://fortune.com/2017/06/28/term-sheet-wednesday-june-28/ [https://perma.cc/3U4A-UVGM].

236. Primack, *supra* note 230. When Katrina Lake, the Founder of Stitch Fix, told Lightspeed Venture Partners, an early investor in her company, that Mr. Caldbeck had sexually harassed her, they asked her to sign a nondisparagement agreement. Minda Zetlin, *Stich Fix Founder Katrina Lake Was Coerced into Silence over VC Justin Caldbeck's Sexual Harassment*, INC. (July 2, 2017), https://www.inc.com/minda-zetlin/stitch-fix-founder-had-to-choose-between-speaking-.html [https://perma.cc/4GR4-BH3G].

237. Zetlin, *supra* note 235.

238. *Id.*

239. *Id.* In the aftermath of the scandal surrounding Mr. Caldbeck, he was invited to speak about "bro culture" in Silicon Valley at Duke University, his alma mater. *Caldbeck, the Penitent Duke Bro?*, CHRONICLE (Nov. 20, 2017), http://www.dukechronicle.com/article/2017/11/171120-ko-edit [https://perma.cc/4ELW-RXHS].

community. On July 9, 2017, Frank Artale, one of the managing directors at Bellevue, Washington-based Ignition Partners, was asked to resign after allegations of misconduct were brought against him a second time.[240]

Steve Jurvetson, founder of Draper Fisher Jurvetson ("DFJ"), was accused of sexual harassment in 2017.[241] DFJ hired an external law firm to investigate the allegations.[242] Jurvetson sits on the boards of SpaceX and Tesla, two companies that DFJ funded.[243]

In November 2017, noted venture capitalist Shervin Pishevar, who founded Sherpa Capital, was accused of sexual misconduct by five women.[244] Specifically, Mr. Pishevar exploited "a professional connection, and us[ed] the prospect of a job, mentorship or investment to make . . . unwanted sexual advance[s]."[245] In early December 2017, Mr. Pishevar took a leave of absence from Sherpa Capital, as a director in Sherpa Capital's portfolio companies, and Hyperloop One, a company he co-founded.[246] He resigned later that month.[247]

In the wake of widespread sexism and sexual harassment allegations in venture capital, there may be a window of opportunity to make strides in how business in venture capital is conducted with women and what types of contributions they can make to venture capital-

240. Lerman, *supra* note 230.

241. Schleifer, *supra* note 230.

242. Serena Saitto & Amir Efrati, *DFJ Investigating Allegations About Jurvetson*, INFO. (Oct. 24, 2017, 4:23 PM), https://www.theinformation.com/dfj-investigating-allegations-about-jurvetson [https://perma.cc/WTQ2-WN62].

243. *Id.*; *Board of Directors*, TESLA, http://ir.tesla.com/corporate-governance/board-of-directors (last visited July 31, 2018); *SpaceX > Board Members and Advisors*, CRUNCHBASE, https://www.crunchbase.com/organization/space-exploration-technologies/advisors/current_advisors_image_list [https://perma.cc/PRN8-BG3T].

244. Sarah McBride & Emily Chang, *Silicon Valley VC Shervin Pishevar Takes Leave from His Companies After Misconduct Claims*, BLOOMBERG (Dec. 5, 2017, 1:28 PM), https://www.bloomberg.com/news/articles/2017-12-05/investor-pishevar-takes-leave-from-sherpa-virgin-hyperloop-one.

245. *Id.*

246. Megan Rose Dickey, *Shervin Pishevar Takes Immediate Leave of Absence from Hyperloop One and Sherpa Capital*, TECHCRUNCH (Dec. 5, 2017), https://techcrunch.com/2017/12/05/shervin-pishevar-takes-immediate-leave-of-absence-from-hyperloop-one-and-sherpa-capital/ [https://perma.cc/2VY4-KPW5]. But also consider the case of former SoFi/Social Finance Inc. Chief Executive Officer Mike Cagney, who stepped down after a former employee filed a lawsuit against SoFi alleging that managers sexually harassed women employees without repercussions and also admitted to having affairs with subordinates. Peter Rudegeair, *In Second Act, a Silicon Valley CEO Opens Up About Affairs*, WALL ST. J. (July 27, 2018, 12:32 PM), https://www.wsj.com/articles/in-second-act-former-sofi-ceo-opens-up-about-affairs-1532709121 [https://perma.cc/7USD-58XP]. He recently raised $58 million in venture capital for his new company, Figure Technologies Inc. *Id.*

247. Reuters, *Uber Investor Departs Venture Capital Firm Amid Sexual Harassment Claims*, FORTUNE (Dec. 14, 2017), http://fortune.com/2017/12/14/uber-investor-departs-venture-capital-firm-sexual-harassment-claims/ [https://perma.cc/UKZ4-DD28].

backed companies. It is also an opportunity for venture capital firms to do more due diligence on the private companies in which they invest. A recent indication of how things may be changing is that venture capital firms may not invest in startups—even with seasoned founders of a promising startup—due to misbehavior. As an example, one of the co-founders of HQ Trivia, a popular trivia app, was accused by multiple women of "creepy" behavior and poor management skills; as a result, several venture capital firms decided to pass on investing in the startup.[248]

The entire specter of sexism and sexual harassment has led many leaders in the venture capital realm to reflect on how they can do better and what they can do to change a system that favors a "bro culture" that has led to the rapid rise and demise of the founder of Uber, Travis Kalanick.[249] Kalanick, more than anyone, epitomized the hubris of the founder who could do no wrong.

The combination of the Uber scandal and the allegations of sexism and sexual harassment in venture capital has moved such issues from the private realm to the public one. As a result, there is intense scrutiny of these types of issues and how they may have contributed to the lack of women founders, leaders, employees, venture capital investment partners, and board members of private companies. More people are paying attention to issues of setting the tone at the top and corporate governance than ever before, including powerful limited partners who invest in funds of venture capital firms. "Some of the nation's biggest investment firms such as BlackRock and State Street Global Advisors are lobbying for more women board members."[250] The inequities women face in venture capital at every level discussed in Parts II and III, coupled with the evidence of the lack of women on private company boards discussed above, provide a compelling case for why there should be more women on private company boards.

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248. David Z. Morris, *Investors Are Passing on HQ Trivia Because of Its Co-Founder's Behavior at Twitter*, FORTUNE (Dec. 20, 2017), http://fortune.com/2017/12/20/hq-trivia-losing-investors-sexual-harassment/ [https://perma.cc/CK5K-WHBF]. In the past, investors may not have passed on an opportunity to invest on a "hot" company based on a founder's behavior. One need look no further than Travis Kalanick and Uber as an example. He was eventually ousted as chief executive officer because of the toxic culture he created there. *See* Zoe Kleinman, *Uber: The Scandals that drove Travis Kalanick out*, BBC NEWS (June 21, 2017), http://www.bbc.com/news/technology-40352868 [https://perma.cc/596S-XK6P].

249. Kleinman, *supra* note 248; Polina Marinova, *Term Sheet -- Friday, January 5*, FORTUNE (Jan. 5, 2018), http://fortune.com/2018/01/05/term-sheet-friday-january-5/ [https://perma.cc/GP9S-PE5X]. *See* Kurt Wagner, *HQ Trivia's Founders Are Facing Fundraising Roadblocks After Investors Learned of Alleged Bad Behavior*, RECODE (Dec. 18, 2017, 1:01 PM), https://www.recode.net/2017/12/18/16752796/hq-trivia-founders-fundraising-bad-reputation-creepy-behavior-twitter-vine [https://perma.cc/6V2Q-V2PU].

250. Guynn, *supra* note 38.

D. The Innovation Imperative for Diversity

Thus far, the main arguments made by scholars for gender diversity on the boards of directors of public companies are related to business, the social good, and better decisionmaking. This Article briefly summarizes the first three arguments for context and offers a new imperative—the innovation case—that is especially important in this new age where private companies stay private longer and have the maturity of public companies, but without the accompanying public disclosures and regulatory oversight. While the high technology industry prides itself on its mission to change the world through innovation, this belief stands in stark contrast to its discriminatory treatment of women.[251] Lack of gender diversity may in fact impede innovation instead of helping it to progress and flourish.

1. The Prior Cases for Diversity

Three primary arguments have been offered in the past for diversity: business, social good, and better decisionmaking The business case for diversity is grounded on two primary principles: it "provides equal opportunity to groups historically excluded from positions of power"[252] and it "improve[s] organizational processes and performance."[253] In the *Grutter v. Bollinger* decision by the U.S. Supreme Court, affirmative action was upheld at the University of Michigan Law School in part due to the court's reliance on "statements from business leaders regarding the importance of diversity in corporate America."[254] The business case for diversity is not as compelling as it once was. Various studies have concluded that board composition does not necessarily correlate to whether the business succeeds.[255] "Because boards perform multiple and varied tasks, diversity may affect different functions in different ways, making it difficult to establish any consistent relationship between

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251. Gené Teare, *The Portion of VC-Backed Startups Founded by Women Stays Stubbornly Stagnant*, CRUNCHBASE (Jan. 10, 2018), https://news.crunchbase.com/news/portion-vc-backed-startups-founded-women-stays-stubbornly-stagnant/ [https://perma.cc/8Y7M-43YQ].

252. Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 382 (2014).

253. *Id.* at 383.

254. Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 796 (2005) (stating that sixty-five businesses filed an amicus curiae brief in support of diversity in business).

255. *See, e.g.*, James A. Fanto et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901, 917 (2011); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999); Rhode & Packel, *supra* note 251, at 377 (discussing specifically the methodological limitations of the studies conducted and "conclud[ing] that the relationship between diversity and financial performance has not been convincingly established").

board diversity and firm performance."[256] The studies ranged from a univariate analysis from the time period of 2001 to 2004, which focused on women on boards,[257] and to a means comparison of 2,360 companies from across the globe with at least one female director,[258] to a dataset of 112 large companies for a period of five years. This was to determine whether there was a correlation between return on assets and return on investment based on board composition.[259] In a 2018 study, female representation on boards of directors of companies in innovation intensive industries was found to have a positive effect on corporate innovation.[260] There are also a number of studies in other countries dealing with gender diversity on boards.[261] "In sum, the empirical research on the effect of board diversity on firm performance is inconclusive, and the results are highly dependent on methodology."[262]

Justifications for diversity based on social good also play a prominent role in supporting why women should be on boards. "A diverse board signals that women's perspectives are important to the organization, and that the organization is committed to gender equity not only in principle but also in practice."[263] Companies who make such commitments are able to tap into a wider talent pool with broader leadership skills

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256. Rhode & Packel, *supra* note 251, at 392-93.

257. LOIS JOY ET AL., CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007), http://www.catalyst.org/system/files/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf [http://perma.cc/ZP5N-PA3E]. A 2007 Catalyst study looking at women on boards in Fortune 500 companies from 2001 to 2004 found that the boards with the women in the highest quartile outperformed those in the lowest quartile. *Id. But cf.* Mijntje Luckerath-Rovers, *Women on Board and Firm Performance*, 17 J. MGMT. & GOVERNANCE 491, 497-98 (2013) (highlighting deficiencies in the Catalyst study); NANCY M. CARTER & HARVEY M. WAGNER, CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2004-2008) 1 (2011), http://www.catalyst.org/system/files/the_bottom_line_corporate_performance_and_women%27s_representation_on_boards_%282004-2008%29.pdf [http://perma.cc/BEE2-ZJMU] (in a follow-up report for the time period 2004 to 2008, the return on equity did not significantly differ between the two aforementioned groups).

258. CREDIT SUISSE, GENDER DIVERSITY AND CORPORATE PERFORMANCE 3 (2012), https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=88EC32A9-83E8-EB92-9D5A40FF69E66808 [https://perma.cc/97LE-T34S].

259. Niclas L. Erhardt, James D. Webel, & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE 102, 106-07 (2003).

260. *See* Jie Chen et al., *Female Board Representation, Corporate Innovation and Firm Performance*, 48 J. EMPIRICAL FIN. 236, 249 (2018). Innovative success was measured by patent and citation counts for certain research and development expenditures. *Id.* The study found that the positive effects of women directors were stronger when product market competition was lower and when managers are more entrenched in firms where innovation and creativity play important roles. *Id.*

261. See examples of such studies in Rhode & Packel, *supra* note 251, at 386-87. However, studies that showed "no relationship or a negative relationship between board diversity and firm performance." *Id.* at 387.

262. *Id.* at 390.

263. *Id.* at 401.

than those who do not.[264] However, there are barriers to diversity such as lack of leadership experience,[265] "in-group bias,"[266] and tokenism.[267]

Another line of reasoning for why diverse boards are important is based on studies related to decisionmaking by small groups, the individual experiences of board members, and board processes.[268] The idea is that diverse boards are less likely to engage in groupthink.[269] There are three different theories for why diversity leads to better performance: 1) greater inclusion ensures representation of the different valuable strengths and capabilities that women and men possess;[270] 2) the different life experiences of women and minorities compared to white men will lead to a more diverse set of options and solutions on a board;[271] and 3) diversity itself changes board dynamics in beneficial ways.[272]

Venture capital could also benefit from better decisionmaking processes. A recent report on the venture capital industry shows that "[o]nly twenty of 100 venture funds generated returns that beat a public-market equivalent of more than 3[%] annually," that the majority of funds (62%) "failed to exceed returns," and that the average venture capital fund fails to return investor capital after fees.[273] In light of the striking homogeneity of those who make the decisions in the industry, more diversity may be a solution.[274]

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264. *Id.*

265. *Id.* at 402.

266. *Id.* at 404; *see also* Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 420-21 (1996).

267. Rhode & Packel, *supra* note 251, at 408; *see also* Rosabeth Moss Kante, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 967-69 (1974); Joan Macleod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249, 253-54 (2009).

268. Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 590 (2006).

269. IRVING L. JANIS, VICTIMS OF GROUPTHINK 3 (1972).

270. Rhode & Packel, *supra* note 251, at 394.

271. *Id.* at 395. *But cf.* Katherine W. Phillips et al., *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 336, 337, 346 (2009) (noting that problem solving results were not that different when members of a group making decisions were from "socially similar" backgrounds).

272. Rhode & Packel, *supra* note 251, at 398 (discussing signaling theory).

273. *See* DIANE MULCAHY ET AL., "WE HAVE MET THE ENEMY…AND HE IS US": LESSONS FROM TWENTY YEARS OF THE KAUFFMAN FOUNDATION'S INVESTMENTS IN VENTURE CAPITAL FUNDS AND THE TRIUMPH OF HOPE OVER EXPERIENCE 3-4 (2012), https://ssrn.com/abstract=2053258 [https://perma.cc/Q9W7-TXRX] (describing the need to try new approaches rather than entrenched practices for future success).

274. *Id.*

2. *The Innovation Case for Diversity*

This Article argues another compelling case for gender diversity: innovation. Although there were 700,000 more businesses created from 1985 to 1994 compared to 2005 to 2014,[275] since the year 2000 "the number of transformational startups, those that contribute disproportionally to job and productivity growth, has been in decline."[276] The numbers illustrate that, despite all the talk of innovation, the United States is falling behind. There may be trouble looming on the horizon for the progress of innovation as initial public offerings dwindle and the number of public companies decline.[277]

During the past few decades, industries have become more concentrated—the economic might of very large corporations has increased.[278] "[T]wo-thirds of all sectors of the U.S. economy became more concentrated from 1997 to 2012, and . . . the average share of the top four firms in each sector rose from 26% to 32%."[279] The number of mergers and acquisitions has also increased.[280] This, in turn, could lead to less innovation if power is concentrated in the hands of a few large corporations.

There has also been consolidation in the venture capital community as well because of mega-rounds of financing.[281] Masayoshi Son, the chief executive officer of SoftBank, has raised $93 billion for the SoftBank Vision Fund, which has been backed by sovereign nations, such as Saudi Arabia and the United Arab Emirates, and Apple, Qualcomm, and Sharp.[282]

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275. Gary Hamel & Michele Zanini, *A Few Unicorns Are No Substitute for a Competitive, Innovative Economy*, HARV. BUS. REV. (Feb. 8, 2017), https://hbr.org/2017/02/a-few-unicorns-are-no-substitute-for-a-competitive-innovative-economy [https://perma.cc/G8AM-KZXD].

276. *Id.*

277. "[O]ver the past 20 years the [United States] has lost almost 50% of its publicly traded firms." *Id.*; Craig Doidge et al., *The U.S. Listing Gap* 1 (Nat'l Bureau of Econ. Research Working Paper, No. 21181, 2015), http://www.nber.org/papers/w21181.pdf [https://perma.cc/386J-KAT8]. However, some large companies, like Amazon, continue to innovate in-house becoming "a new-business factory." Hamel & Zanini, *supra* note 274.

278. *Id.*

279. *Id.* (citing an analysis by The Economist). A report in 2016 by the President's Council of Economic Advisers came to a similar conclusion. COUNCIL OF ECON. ADVISORS, ECON. REP. OF THE PRESIDENT (2016), https://obamawhitehouse.archives.gov/sites/default/files/docs/ERP_2016_Book_Complete%20JA.pdf.

280. *See generally* Adam Putz, *The State of Play for M&A in 12 Charts*, PITCHBOOK, (Nov. 3, 2017), https://pitchbook.com/news/articles/state-of-play-for-ma-in-12-charts [https://perma.cc/XVT5-M265] (tbl. 3: M&A Activity in North America).

281. Theodore Schleifer, *SoftBank's Masayoshi Son Is About to Make Either Himself or You Look Like a Fool*, RECODE (Dec. 6, 2017, 5:16 PM), https://www.recode.net/2017/12/6/16680760/masayoshi-son-softbank-ceo-china-investment-recode-100 [https://perma.cc/WX6W-T43D].

282. Rani Molla, *SoftBank's Vision Fund Is the Biggest Technology Investment Portfolio Ever. This Is Where its $93 Billion Has Gone so Far*, RECODE (Sept. 18, 2017, 6:25 PM), https://www.recode.net/2017/9/18/16317902/uber-softbank-vision-fund-big-investment-

"[I]t's the largest technology investment fund ever."[283] He has promised to be "the biggest investor in the technology industry over the next five years and he has already begun to make good on that pledge."[284] The "SoftBank Effect" is also pressuring venture capital firms to raise larger pools of capital.[285] As an example, in late December 2017, it was reported that Sequoia, one of the most storied venture capital firms, is raising a $6 billion fund.[286] Other well-known venture capital firms will likely follow suit with large funds of their own (but nowhere near the size of Mr. Son's fund).

Additionally, despite the fact that women are a formidable consumer force—comprising 70% to 80% of all consumer purchasing, either through their direct buying power or their influence on someone else's purchase[287]—their needs are largely ignored and venture capital firms invest very little in women-founded companies.[288] "The fact that there are women who are building companies that directly address a pain point for that female consumer is a huge opportunity magnified by the fact that the vast majority of the venture world is ignoring them."[289]

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saudi-arab-emirates-apple-qualcomm-sharp [https://perma.cc/TT6N-FDB9]. Mr. Son announced in May 2018 that SoftBank will set up a second Vision Fund in the near future. Sam Nussey, *SoftBank's Son Says New Vision Fund to Be Set Up in 'Near Future'*, REUTERS (May 15, 2018, 4:58 AM), https://www.reuters.com/article/us-japan-conference-son-softbank-group/softbanks-son-says-new-vision-fund-to-be-set-up-in-near-future-idUSKCN1IG13E [https://perma.cc/URX4-KX3K].

283. Molla, *supra* note 282.

284. Bloomberg, *SoftBank's Vision Fund Raises $93 Billion in Its irst Close*, ECON. TIMES (May 21, 2017, 2:02 PM), https://economictimes.indiatimes.com/small-biz/startups/softbank-closes-funding-for-record-93-billion-investment-fund/articleshow/58771842.cms [https://perma.cc/Y2P6-LYV9].

285. Kara Swisher, *Sequoia Is Raising a New Fund that Could Top $6 Billion, as Pressure from SoftBank's Mega-Fund Increases on Silicon Valley VCs*, RECODE (Dec. 20, 2017, 10:00 PM), https://www.recode.net/2017/12/20/16804282/sequoia-raising-new-fund-6-billion-softbank [https://perma.cc/4V2Z-X9DZ].

286. *Id.* Its previous global growth fund closed in 2015 and was $2 billion. *Id.* Sequoia raised $6 billion by mid-2018. Connie Loizos, *Confirmed: Sequoia Has Already Secured Three-Quarters of What Will Be an $8 Billion Global Fund*, TECHCRUNCH (June 26, 2018), https://techcrunch.com/2018/06/26/confirmed-sequoia-has-already-secured-three-quarters-of-what-will-be-an-8-billion-global-fund/ [https://perma.cc/C6N3-38UR].

287. Bridget Brennan, *Top 10 Things Everyone Should Know About Women Consumers*, FORBES (Jan. 21, 2015, 10:36 AM), https://www.forbes.com/sites/bridgetbrennan/2015/01/21/top-10-things-everyone-should-know-about-women-consumers/#294478246a8b [https://perma.cc/QB6L-D9WN]. Their purchasing power is likely multiplied by others they need to buy for, including partners, parents, and children. *Id.*

288. Dana Olsen, *Another Look at Whether Female Founders Get Better Results*, PITCHBOOK (Feb. 23, 2018), https://pitchbook.com/news/articles/another-look-at-whether-female-founders-get-better-results [https://perma.cc/5NB6-VVP7] (noting that companies with female founders received only about 2.2% of U.S. venture funding in 2017).

289. Marinova, *supra* note 80.

Only two in ten women believe that most companies understand the needs of women.[290]

> Though male [venture capital firm members] should be able to evaluate the merit of any early-stage company on the basis of its business plan, market research, and leadership, they would often declare ignorance and go home and ask their wives about it. . . . Sand Hill Road has "a comfort zone," and if you're not in it, "they just shut down."[291]

The bottom line is that men are not innovating in areas that focus on female consumers; women are but are not given the funds to scale appropriately.

There is another way to stimulate innovation: give women entrepreneurs more access to venture capital. Venture capital-backed companies play a critical role in economic growth through their innovations, job creation, and ability to generate wealth for employees, entrepreneurs, and investors.[292] Women can play a critical role in innovation if given the opportunity. Currently, there is likely untapped innovation potential among women-led businesses because of the lack of access women have to venture capital funding.[293]

Different perspectives, such as those of women, have the potential for great benefits. Problems can be tackled in a number of different ways, but if one only has a particular viewpoint then a product may never be as great as it could otherwise be. For example, take the development of a new product. When YouTube created a mobile app that allowed people to upload videos from their phone, approximately 10% of them were uploaded upside down.[294] This was due to the fact that the left-handed people who this happened to picked up their phones differently from right-handed ones.[295] Only right-handed designers and engineers had worked on the app so they did not anticipate this issue.[296] Indeed, the trajectory of a field of study may differ depending on who is involved in the development of that particular field. In the world of artificial intelligence, the lack of women may bode ill for the future of the field.[297] There are examples of chatbots that became misogynistic and

290. Lisa Abeyta, *Jeff Bezos Is Now the Richest Person in the World: Here's Why We Need to Bet that Big on Female Founders*, INC. (Oct. 31, 2017), https://www.inc.com/lisa-abeyta/jeff-bezos-is-now-richest-man-in-world-here-is-why-we-need-to-bet-that-big-on-female-founders.html [https://perma.cc/2HSS-QEEA].

291. Weisul, *supra* note 48.

292. JMG CONSULTING, VENTURE CAPITAL, *supra* note 45, at 4-5.

293. *See id.*

294. Farhad Manjoo, *The Business Case for Diversity in the Tech Industry*, N.Y. TIMES: BITS (Sept. 26, 2014 1:41 PM), https://bits.blogs.nytimes.com/2014/09/26/the-business-case-for-diversity-in-the-tech-industry/ [https://perma.cc/GH39-4L6S].

295. *Id.*

296. *Id.*

297. Michael Litt observes that:

racist after being launched[298] and crime prevention software that was biased against African-Americans.[299] Sometimes the lack of a different perspective can even be fatal. The lone Food and Drug Administration-approved artificial heart fits 80% of men but only 20% of women, even though heart failure affects men and women at the same rate.[300]

IV. PROPOSED SOLUTIONS

It is clear that venture capital has a deep-rooted problem with gender, as prior Parts in this Article have illustrated.[301] Now that problems of sexism in Silicon Valley culture have been widely acknowledged and discussed, the political will to diversify the venture capital ecosystem has gained ground. The next step is to determine what legal and business tools can be implemented to create lasting change. To this end, Part IV evaluates potential legal, business, and cultural solutions to address the paucity of women on private company boards. Pledges,[302] quotas[303] and federally-mandated disclosure requirements have not proven effective in diversifying the technology ranks or the boards of directors of companies. However, other legal alternatives—together with business initiatives—can provide a foundation from

> An aura of objectivity and neutrality has traditionally surrounded AI. But the reality is that it's built and programmed by humans, who definitely aren't perfect, and it "learns" from human behavior. And when that community of imperfect human programmers is predominantly male (and, more specifically, predominantly white and male), we can wind up, whether intentionally or not, with a system that can replicate unconscious bias.

Michael Litt, *Why We Need to Get More Female Developers in Tech Now, Before AI Cements a Male Bias*, LINKEDIN (Nov. 15, 2017), https://www.linkedin.com/pulse/why-we-need-get-more-female-developers-tech-now-before-michael-litt/ [https://perma.cc/9RDU-HLX5].

298. James Vincent, *Twitter Taught Microsoft's AI Chatbot to Be a Racist Asshole in Less than a Day*, VERGE (Mar. 24, 2016, 6:43 AM), https://www.theverge.com/2016/3/24/11297050/tay-microsoft-chatbot-racist [https://perma.cc/3SQW-44VJ].

299. Julia Angwin et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/XR5M-UMCP].

300. Rose Eveleth, *The Design Bias of Heart Failure*, MOTHERBOARD (June 15, 2016, 6:00 AM), https://motherboard.vice.com/en_us/article/53d5mn/a-heart-two-sizes-too-big [https://perma.cc/T5PU-GYYW].

301. *See supra* Part II.

302. While the diversity pledge made by dozens in the venture capital community to stop sexual harassment and other inappropriate behavior was laudable, it did not have any legal effect. *See* Reed Albergotti, *Venture Capitalists, Tech Leaders Back 'Decency Pledge'*, INFO. (June 24, 2017, 8:18 PM), https://www.theinformation.com/venture-capitalists-tech-leaders-back-decency-pledge [https://perma.cc/BN6C-JGR9].

303. Quotas have been instituted in Europe and elsewhere outside of the United States. For more information about the sixteen countries that instituted quotas for board membership, see Rhode & Packel, *supra* note 251, at 413 n.235. The effect of quotas on financial performance and governance has been mixed. *Id.* at 415.

which to address the issues facing women, particularly with respect to the paucity of women on private company boards, in a systemic way.

A. Varying Levels of Success with Past Efforts

In January 2015, at the biggest gathering of the tech community, the Consumer Electronics Show, the chief executive officer of Intel pledged in his keynote speech to commit $300 million over five years to diversify Intel's ranks.[304] Apple followed suit two months later, pledging approximately $50 million to improve the pipeline of women and minorities entering tech by partnering with nonprofits.[305] Then Google announced that it would increase its annual budget by $35 million (from $115 million to $150 million) to promote diversity.[306] Eventually, the professed commitment to diversity culminated in thirty-three companies signing a pledge to work towards a more diverse workforce.[307] In another example, a nonprofit organization started to encourage companies to sign on to the "ParityPledge," where companies agreed to consider one qualified women for board seats and every open role of vice president and higher.[308]

While these pledges are well intentioned, they do not get to the root of the problem—changing the hiring practices of the company and the leadership of the companies to reflect the diverse communities they serve. "All too often [companies] use hiring practices that are ad hoc, subjective, and, as a result, deeply influenced by bias . . . [when instead] companies need to focus on recruiting from a wider pool of candidates."[309] These pledges are a good place to start, but they do not have the binding effect of law and are only as strong as the commitment of those who signed on to them. If it becomes expedient for political or business reasons to ignore the pledges, leaders can do so with little consequence.

Outside of the United States, countries instituted quotas to ensure

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304. Dean Takahashi, *With Diversity Push, Intel Aims to Change the Faces of Silicon Valley*, VENTUREBEAT (Jan. 12, 2016, 9:01 AM), https://venturebeat.com/2016/01/12/with-diversity-push-intel-aims-to-change-the-faces-of-silicon-valley/ [https://perma.cc/9MQG-7JWX].

305. Michal Lev-Ram, *Apple Commits More than $50 Million to Diversity Efforts*, FORTUNE (Mar. 10, 2016), http://fortune.com/2015/03/10/apple-50-million-diversity/ [https://perma.cc/59WY-BE4M].

306. Victor Luckerson, *Here's How Google Plans to Hire More Minorities*, TIME (May 6, 2015), http://time.com/3849218/google-diversity-investment/ [https://perma.cc/LD4J-TFJT].

307. Grace Donnelly & Stacy Jones, *The White House Tech Inclusion Pledge, a Year Later*, FORTUNE (July 24, 2017), http://fortune.com/2017/06/22/tech-diversity-white-house-pledge-year-later/ [https://perma.cc/T7TY-EPQ6].

308. *ParityPledge*, PARITY.ORG, https://parity.org/take-the-pledge/ [https://perma.cc/3Y3E-V7VX].

309. O'Brien, *supra* note 38.

that more women serve on boards.[310] In Nordic countries, policies designed to increase gender diversity have reaped significant economic benefits.[311] In 2008, Norway introduced a 40% quota for female directors; other European countries followed suit.[312] However, there was a glaring problem with this approach—the same women were recruited to serve on boards, so instead of having five different women serve on five different boards, the same woman would serve on five different boards.[313] The quota system ultimately did not successfully address the problem of increasing the pool of women that companies considered for board positions.[314] Instead public companies relied on the network of women that they already knew. Therefore, in recruiting women, a better strategy might be for a law to state that when recruiting individuals to boards, at least two other members of the board must not be in their network. As an example of success, according to the European Women on Boards, a nongovernmental organization dedicated to advocating for and promoting women's inclusion on boards in Europe,[315] France has the highest share of women on European listed public company boards at 44.2%.[316] This result follows France's 2011 decision requiring that women comprise at least 40% of all CAC 40 (benchmark

310. Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States,* 26 PACE INT'L L. REV. 38, 39 (2014) (twelve countries have gender quotas: France, Italy, Norway, the Netherlands, Belgium, Spain, Germany, Denmark, Finland, Greece, Austria, and Slovenia).

311. "The region [Nordic countries] . . . has spent the past 50 years bringing more women into the workforce in a shift that has added as much as 20[%] to economic growth per capita . . . ." Frances Schwartzkopff, *The Key to Getting Much Richer Is All About How You Treat Women*, BLOOMBERG (May 15, 2018, 7:48 AM), https://www.bloomberg.com/news/articles/2018-05-15/world-s-happiest-place-has-women-to-thank-for-big-wealth-gains [https://perma.cc/BBP6-XVX6]. Furthermore, additional women-friendly policies could add another estimated 30% to the region's economic growth rates by 2040. *Id.*

312. *Ten Years on from Norway's Quota for Women on Corporate Boards,* ECONOMIST (Feb. 17, 2018), https://www.economist.com/business/2018/02/17/ten-years-on-from-norways-quota-for-women-on-corporate-boards [https://perma.cc/QM9H-VFDT].

313. *Id.*

314. *See id.* And indeed, although Norway met the 40% women directors target within two years, it has not improved since and actually dropped to 36.7% in 2018. *2018 Global Board Diversity Tracker*, *supra* note 26.

315. EUROPEAN WOMEN ON BOARDS, https://europeanwomenonboards.eu/ [https://perma.cc/D49N-ZRWV]. The group has created several programs to promote women for board positions, including the EWoB International Board Professionals, an online pool of selected board women, the European Mentoring Programmes, and the EWoB-Ethics & Board Gender Diversity Index. *What We Do*, EUROPEAN WOMEN ON BOARDS, https://europeanwomenonboards.eu/what-we-do/ [https://perma.cc/6LPX-2GBZ].

316. EWOB & ETHICS & BOARDS, EWOB – ETHICS & BOARD EUROPEAN GENDER DIVERSITY INDEX (GDI) 2018 (2018), at 1, https://europeanwomenonboards.eu/wp-content/uploads/2018/11/ewob_facsheet.pdf [https://perma.cc/3QSR-P2P3]. This gender diversity index assessed gender representation at the 200 largest European listed companies in Belgium, the Czech Republic, Finland, France, Germany, Italy, the Netherlands, Spain, and the United Kingdom. *Id.*

French stock market index) boards by the end of 2017.[317] France's quota-based system for increasing the number of women on public company boards to 40% appears to have been successful. However, it is unclear if the same women are being appointed to various boards.[318] There is also the question of whether quotas could be implemented in the United States, which is culturally different from its European counterparts.

B. Proposed Legal Reforms

There are several areas ripe for legal reform that could potentially change the make-up of the boards of private companies. First, changes could be made at the federal or state levels, or in the language in model acts upon which state law may be based (either in part or in whole) to encourage gender diversity. The greatest change, however, can occur at the individual company level by incorporating language regarding independent directors and independent chairpersons.

At the federal level, in 2009 the SEC amended its proxy rules to mandate the disclosure of diversity as a factor in the director nomination process in a company's policy.[319] The problem was that they did not define what diversity meant, so public companies interpreted that word quite broadly. If a law is passed with regard to board diversity for private companies, the meaning of diversity should be defined. Again, however, the impact of this type of measure will be minimized if the same women are considered for the "diversity" seat. It may also lead to allegations that there are unqualified women to fill those positions—all arguments which have been posited in the past.[320] To make this a reality, however, Congress would need to pass a new law granting the SEC much broader authority than it currently has over private companies.

At the state level, one possible solution is for state legislatures to pass resolutions encouraging private companies in their home states

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317. Claire Zillman & Emma Hinchliffe, *Michelle Obama Lean In, Shirley Chisholm Statue, France Boards: Broadsheet December 3*, FORTUNE (Dec. 3, 2018), http://fortune.com/2018/12/03/michelle-obama-lean-in-shirley-chisholm-statue-france-boards-broadsheet-december-3/ [https://perma.cc/7QHW-SJY4].

318. This is not to suggest that there should be no network connections on the board, as there can be real value in having board members who know and trust each other from other boards and who have a broad range of experience.

319. Proxy Disclosure Enhancements, 74 Fed. Reg. 68, 334 (Dec. 23, 2009) (codified at 17 C.F.R. pts. 229, 239, 240, 249, 274).

320. See Sequoia partner's comment about recruiting for women partners for its firm. Jessica Guynn, *Michael Moritz Taking Heat for Comments About Hiring Women*, USA TODAY (Dec. 3, 2015, 5:51 PM), https://www.usatoday.com/story/tech/2015/12/03/michael-moritz-sequoia-capital-women-diversity-silicon-valley/76736642/ [https://perma.cc/5THK-YDHN].

to aim for a certain number of women directors on their boards of directors, or bills mandating that they do so. As an example, in California, the state senate first passed a resolution encouraging public companies headquartered in its home state to have one to three female directors in 2013.[321] This was followed by the state government enacting bill S.B. 826 on September 30, 2018, which amended the Corporations Code and mandated that public companies headquartered in California have a minimum number of women on their boards.[322] The companies must have at least one female director by the end of 2019, and, by the end of 2021, two women if the board has five directors or three women if the board has six or more directors.[323] More than a pledge, this law forces boards to be more proactive and start thinking about how to add women to their boards. As a practical matter, however, this tactic is not as effective as it would be if Delaware did so, since Delaware is the state in which most venture-backed companies incorporate.[324] But, California is influential in the private company realm because of the sheer number of companies that are headquartered there, so its action may spur other states to adopt similar laws.

Interestingly, in the case of one prominent Silicon Valley-based law firm, Fenwick & West, they advise against stating an intent to comply with the law and against citing the statute as the basis for choosing one candidate over another.[325] Instead, they suggest a general statement that in seeking board candidates, the company considers diversity, among numerous other factors.[326] By taking this course of action, they hope to avoid the expected legal challenges that this statute will face in the future.[327]

321. S. Con. Res. 62, 2013-2014 Leg., Reg. Sess. (Cal. 2013).

322. S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

323. *Id.* The first violation will cost a company $100,000 and subsequent violations will cost $300,000 each. *Id.* California state senator Hannah-Beth Jackson, the author of the bill, cited that the fact that 25% of California-based companies had no women on their board as a primary motivator for the legislation. Claire Zillman & Emma Hinchliffe, *US Open, Barnes and Noble CEO, Cate Blanchett: Broadsheet*, FORTUNE (Aug. 30, 2018), http://fortune.com/2018/08/30/us-open-barnes-and-noble-ceo-cate-blanchett-broadsheet-august-30/ [https://perma.cc/68JC-VY58].

324. Tyler Tate, *Startup Cheat-Sheet: How to Incorporate Your Company*, MEDIUM (Aug. 9, 2017), https://medium.com/@tylertate/startup-cheat-sheet-how-to-incorporate-your-company-c85384e8f7a0 [https://perma.cc/QC42-QZ2P] (noting that most startups are incorporated in Delaware). The majority of Fortune 500 companies are also incorporated in Delaware. *About the Division of Corporations*, DELAWARE.GOV, https://corp.delaware.gov/aboutagency/ [https://perma.cc/CJ2P-7Z7J]. Even if Delaware took this step, however, companies could choose to reincorporate to another jurisdiction to avoid the requirement.

325. David A. Bell, *New California Law Requires Representation of Women on Public Company Boards*, FENWICK & WEST LLP (Oct. 2, 2018), https://www.fenwick.com/publications/Pages/New-California-Law-Requires-Representation-of-Women-on-Public-Company-Boards.aspx [https://perma.cc/Z5Y7-N97H].

326. *Id.*

327. *Id.*

The Model Business Corporation Act may provide another avenue for change. The Committee on Corporate Laws of the Business Law Section of the American Bar Association promulgated and approved the Model Business Corporation Act (the Model Act).[328] All, or substantially all, of the Model Act has been adopted by thirty-two jurisdictions as their general corporation statute,[329] including two states which are in the top five states which produce venture-backed private companies[330]—Massachusetts and Washington. Under Section 1.43, a "Qualified Director" is one who:

> [Is] both *disinterested*, in the sense of not having exposure to an actual or potential benefit or detriment arising out of the action being taken . . . and *independent*, in the sense of having no personal or other relationship with an interested director . . . that presents a reasonable likelihood that the director's objectivity will be impaired.[331]

It does not mean, however, that such a director "has or should have special expertise to act on the matter in question."[332] Since "independent" is defined as "having no personal or other relationship with an interested director,"[333] perhaps revising the definition to specifically state that the independent director has not served on a board with the interested board member or is a first-time board member may be helpful in diversifying the board candidates considered to be "Qualified Directors."

Second, counsel to private companies could advise their clients to include additional independent board seats at appropriate intervals as the company matures in order to comply with good corporate governance practices. This arrangement would then be memorialized in the voting agreement during each round of financing. Additionally, drafting bylaws in a way that requires the chairperson of the board to be independent is another possible tactic to foment change. As discussed in the research provided in Part II, there are more women board members who are in the independent category as compared to women

328. CORPORATE LAWS COMM., ABA, MODEL BUSINESS CORPORATION ACT (2016) [hereinafter MBCA], http://apps.americanbar.org/dch/committee.cfm?com=cl270000 [https://perma.cc/M4JL-39B4].

329. *A Map of the Model Business Corporation Act States*, PROFESSORBAINBRIDGE (Nov. 4, 2013), https://www.professorbainbridge.com/professorbainbridgecom/2013/11/a-map-of-model-business-corporation-act-states.html [https://perma.cc/X865-UW34]. For more information about how model acts work, see Mary Whisner, *There Oughta Be a Law—A Model Law*, 106 LAW LIBR. J. 125 (2014).

330. NAT'L VENTURE CAP. ASS'N, PITCHBOOK, 2017 YEARBOOK 14, https://nvca.org/blog/nvca-2017-yearbook-go-resource-venture-ecosystem/ [https://perma.cc/KY4M-MCL3].

331. MBCA, *supra* note 327, at §1.43 cmt.

332. *Id.*

333. *Id.*

founders or venture capital partner investor ranks. Therefore, as the number of women founders or venture capital investors grow over time, private companies should consider qualified women who do not necessarily have C-suite experience—but valuable experience nonetheless—to fill the independent board seat.

Third, at the venture capital firm level, the limited partners who invest in a particular fund of a venture capital firm could incorporate language in their respective limited partnership agreements to mandate that the firm consider investing in women-founded companies in the pool of candidates for funding. Limited partners in venture capital funds are typically pension funds, foundations, university endowments, and wealthy individuals.[334] As a business matter, these limited partners, as well as the constituencies they serve, include those who may value diversity as a priority. Melinda Gates, the co-founder of the largest foundation in the world, the Bill & Melinda Gates Foundation, is an investor in the latest fund of a women-led venture capital firm, Aspect Ventures.[335] In her philanthropic work, Ms. Gates focuses on women, and she puts her wealth to work on these issues in both the philanthropic and business settings.[336] Put simply, "[limited partners] are the ultimate power brokers in venture capital, and we need them to step up."[337] An influential limited partner like Ms. Gates can set the tone and change the expectations of what is required of a venture capital firm when she invests in one of its funds.[338]

334. Pocket Sun, *Venture Capital 101: Structure, Returns, Exit and Beyond*, MEDIUM (June 29, 2015), https://medium.com/sogal-adventures/venture-capital-101-structure-returns-exit-and-beyond-2048f22247a5 [https://perma.cc/7KJ4-ZT6E].

335. Michal Lev-Ram, *Melinda Gates on Stopping Harassment in Tech: 'We Need LPs to Step Up'*, FORTUNE (Jan. 24, 2018) [hereinafter Lev-Ram, *Melinda Gates*], http://fortune.com/2018/01/24/melinda-gates-tech-harassment/ [https://perma.cc/DP7H-PXCF].

336. Polina Marinova, *Why Melinda Gates Has Been Funding Female VCs Through Her Secretive Investment Firm*, FORTUNE (May 30, 2018), http://fortune.com/2018/05/30/melinda-gates-limited-partner-venture-capital/ [https://perma.cc/HMJ3-VL8G]. Ms. Gates and her investment firm, Pivotal Ventures, have also teamed up with McKinsey & Company to survey thirty-two tech companies on their internal efforts to close the gender gap. Polina Marinova, *Term Sheet -- Wednesday September 12*, FORTUNE (Sept. 12, 2018), http://fortune.com/2018/09/12/term-sheet-wednesday-september-12/ [https://perma.cc/HJ8C-ERRX]. They found that only 5% of the $500 million spent by tech companies last year on philanthropic giving went to programs aimed at correcting the gender imbalance, and less than 0.1% was focused on women of color specifically. *Id.* Following this revelation, twelve of the thirty-two companies agreed to form a tech coalition with the aim of closing the gender gap for women of color in tech. *Id.* "Ultimately," Ms. Gates says, "if we want more innovation and better products, we've got to put more money behind women and minorities. That wasn't happening, so I decided to step in and see what I could do to help a little bit." *Id.*

337. Lev-Ram, *Melinda Gates*, *supra* note 334.

338. Similarly, proxy firms are recommending that institutional investors should vote against the directors responsible for nominating new members if the board has no women. Andrea Vittorio, *Proxy Firms Urge Investors to Vote 'No' on All-Male Boards*, BLOOMBERG L. NEWS (Nov. 20, 2018), https://news.bloomberglaw.com/corporate-law/proxy-firms-urge-

Limited partners have the power to mandate that venture capital firms have more diversity in their ranks and build it into their contracts with such firms. Furthermore, it may be appropriate for the contracts to have provisions that require action to be taken to address allegations of sexism and sexual harassment against the founders of a startup that the venture capital firm is considering investing in.[339] Limited partners could also decline to sign a nondisclosure agreement which would prevent them from talking about the investments that general partners in venture capital firms make. Another tactic that limited partners have is to refrain from investing in funds of particular venture capital firms in the future if they perceive that their concerns regarding sexism and sexual harassment are not taken seriously. "[A]s awareness and concern reaches critical mass, it's likely that a growing number of [limited partners] will make their voices heard—if not with words, then with dollars. Down the road, that could have tangible impact on venture capital firms that are not evolving to meet current demands."[340]

Fourth, the inclusion rider, made infamous by actress Frances McDormand's Oscar speech, is another possible method to address the problem of the relative absence of women on boards.[341] The purpose of

investors-to-vote-no-on-all-male-boards [https://perma.cc/TS3W-X8U3]. Institutional Shareholder Services Inc. and Glass & Lewis Co., the top proxy advisory firms, have incorporated this recommendation into their annual recommendations for 2020 and 2019, respectively. *Id.*

339. Jeremy Liew of Lightspeed Ventures, an early investor in HQ Trivia, sits on the board of the company stated:

> We heard back from a couple of firms that they were not going to move forward, specifically because of rumors of what was characterized as womanizing on Colin's part . . . . I was concerned that this might be code for sexual harassment. So in my capacity as a board member, I conducted an investigation to find out what actually happened. . . . The investigation was exhaustive and included the most knowledgeable primary sources. I found a good deal of negative sentiment about Colin and the Vine team and some discomfort with his behavior, but I did not find evidence that warrants his removal from the company.

Kurt Wagner & Theodore Schleifer, *HQ Trivia Is Raising $15 Million at a Valuation of More than $100 Million from Founders Fund*, RECODE (Feb. 1, 2018), https://www.recode.net/2018/2/1/16962808/hq-trivia-funding-founders-fund-cyan-banister [https://perma.cc/3XT7-3UCC]. What constituted the "exhaustive" investigation is unclear, but limited partners could ensure that their concerns are addressed if they specify what such investigations would entail if allegations of sexism and sexual harassment are made.

340. Michal Lev-Ram, *How Investors Like Melinda Gates Are Helping These VCs Tackle Tech's Bro Problem*, FORTUNE (Jan. 23, 2018), http://fortune.com/2018/01/23/diversity-aspect-ventures-melinda-gates/ [https://perma.cc/6AEU-8CL9].

341. Cara Buckley & Daniel Victor, *What Did Francis McDormand Mean by an 'Inclusion Rider' at the Oscars?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/movies/inclusion-rider-frances-mcdormand-oscars.html [https://perma.cc/T5MK-NTCA]. In the media context, an inclusion rider is "the idea that A-list actors have the ability to stipulate in their contracts that diversity be reflected both onscreen and in 'below the line'

the inclusion rider in a contract would be for startups to agree to make diversity on its boards and in management positions (for example, C-level positions) a priority. There may even be penalties put in place to further incentivize them, or an outline of a specific timeline in which such diversity efforts need to be made. In the venture capital context, such a rider could be included in either the voting rights agreement in a venture capital financing or the limited partnership agreement signed by the venture capital firm and the limited partners who invest in them. The original impetus behind the inclusion rider was "to ensure the world onscreen looks like the world in which we live."[342] Likewise, in the venture capital realm, the purpose of the inclusion rider would be to have the high technology world reflect our diverse society. This, in turn, would have ripple effects in other areas: more women in key positions in startups, more women investors, and more women board members. Melinda Gates perhaps put it best: "When the only people giving and receiving venture funding belong to a small, homogenous group, society misses out on all kinds of breakthrough ideas and financial opportunities. Over the long term, our economic competitiveness begins to erode."[343] The inclusion rider would be an effective vehicle to contractually obligate startups to make meaningful changes with respect to the composition of their boards and management teams.

Fifth, forming a nonprofit organization focused on diversity and inclusion can help to centralize efforts and have a greater impact on the problem of the lack of women on private company boards. Such organizations have already begun to emerge. Project Include[344] and All Raise[345] are two such examples. In the case of All Raise, its mission is "to accelerate the success of female funders and founders. We believe that by improving the success of women in the venture-backed tech ecosystem, we can build a more accessible community that reflects the diversity of the world around us."[346] Events such as Female Founder Office Hours (described in the business solutions section below) and Founders for Change, where modern founders and chief executive officers commit to diversity in their teams, boards, and capitalization tables (cap tables),[347] originated from All

positions, where women, people of color, and members of L.G.B.T. communities are traditionally underrepresented." *Id.*

342. *Id.* (internal quotation marks omitted).

343. Lev-Ram, *Melinda Gates, supra* note 334.

344. *About Project Include*, PROJECT INCLUDE, http://projectinclude.org/ [https://perma.cc/8F6Z-F9LJ].

345. ALL RAISE, https://www.allraise.org/ [https://perma.cc/S37C-YAAU].

346. *Id.*

347. Aileen Lee, *Announcing AllRaise.org*, MEDIUM (Apr. 3, 2018), https://medium.com/allraise/announcing-allraise-org-d15a1b592f63 [https://perma.cc/8WTP-ZS5J]. "[O]ver 700 founders from seed stage thru public tech companies have committed [to Founders for

Raise.[348] All Raise aims to: "1) [d]ouble the percentage of female investment partners at tech [venture capital] firms over the next 10 years (one fund cycle) and 2) [i]ncrease the venture funding going to teams with a female co-founder from 15 to 25% in 5 years (this number has plateaued over the last 4 years)."[349] To achieve their goals, they intend to use Female Founder Office Hours and Founders for Change, a diverse candidate database for venture capital (which is being created), data sharing, introductions between limited partners and female venture capitalists, and collaborations with other diversity organizations.[350] All Raise recently launched its newest project, VC Champions, to help mentor the next generation of venture capitalists. VC Champions matches women and underrepresented men who are rising principal-level investors (the level just below partner in venture capital firms) with top general partners in Silicon Valley.[351]

Lastly, litigation is another possible tool to increase gender diversity. Although not palatable to many because of the time, energy, and emotional toll on the plaintiff, as the Ellen Pao case demonstrates,[352] pursuing litigation shows that women who are subject to sexism, implicit bias, and the like will not be cowed into silence. Instead of being resigned to the status quo, women will rise up and have their voices heard through the courts, if necessary.

C. Proposed Business and Cultural Reforms

Ultimately, however, what will drive the change to increase the number of women on private company boards will not be the law alone. In order for gender diversity to become a reality in the private company context, business and cultural shifts need to accompany any legal shift. Therefore, the number of women investment partners in venture

Change], including the founders of Airbnb, Dropbox, Lyft, Instagram, StitchFix, Eventbrite, and more." *Id.*

348. *Female Founder Office Hours*, ALLRAISE, https://www.allraise.org/female-founder-office-hours/ [https://perma.cc/MP43-T252]; *Founders for Change*, ALLRAISE, https://www.allraise.org/founders-for-change/ [https://perma.cc/WNC3-FCU3]; Pui-Wing Tam, *Hundreds of Start-Ups Tell Investors: Diversify, or Keep Your Money*, N.Y. TIMES (Mar. 20, 2018), https://www.nytimes.com/2018/03/20/technology/founders-for-change-tech-diversity.html [https://perma.cc/48F5-B6PQ].

349. Lee, *supra* note 346.

350. Megan Rose Dickey, *All Raise Wants to Increase the Amount of Venture Funding Female Founders Receive*, TECHCRUNCH (Apr. 3, 2018), https://techcrunch.com/2018/04/03/allraise-wants-to-increase-the-amount-of-venture-funding-female-founders-receive/ [https://perma.cc/5CLG-T6LF].

351. Polina Marinova, *Term Sheet -- Thursday October 25*, FORTUNE (Oct. 25, 2018), http://fortune.com/2018/10/25/term-sheet-thursday-october-25/ [https://perma.cc/5YBY-SCER]. "Investors who apply and are accepted to the inaugural class of about 25 will be matched with a different general partner for a one-on-one meeting each quarter. One of the priorities? Get more men involved — both as participants as well as mentors." *Id.*

352. *See supra* notes 1-5 and accompanying text.

capital firms (who will then serve as board members) needs to increase. More women must be recruited to boards as independent directors. In order for any of this to happen, more women must be advanced and cultivated at every point in the venture capital ecosystem, including venture capital firms, the private companies themselves, and corporate venture capital.[353] The ways in which women are recruited and interviewed for private company boards, C-level executive positions, and venture capital firms needs to be reimagined as part of this effort. There should also be greater investment in female-founded companies and better diversity trainings. Additionally, the following steps should be considered: the development of different types of venture capital firms, the cultivation of future venture capital women leaders, and recruiting male allies. Without such a holistic approach, systemic change will not happen and having more women on private company boards will not become a reality.

Venture capital firms can increase the number of women in their partnership ranks by either promoting from within or looking at candidates with backgrounds that differ from those of traditional venture capitalists. There is a correlation between increasing the number of women partners in venture capital firms with increased investments in management teams with women. More specifically, venture capital firms with female partners invested in companies with women on the management teams at more than double the rate of venture capital firms with only male partners.[354] In the case of companies with women as chief executive officers, venture capital firms with female partners invested three times more in such companies than the venture capital firms with only male partners.[355]

Additionally, in the interview process for venture capital firms, a rule similar to the Rooney Rule in football could be instituted,[356] but instead of one diverse candidate, companies would consider at least two diverse candidates (at least one being a woman) for every opening.[357] Diversity

353. Fan, *Catching Disruption*, *supra* note 202, at 405 (explaining how corporate venture capital differs from traditional venture capital firms).

354. The rate was 34% to 13%. DIANA REPORT, *supra* note 61, at 11.

355. The rate was 58% to 15%. *Id.*

356. "The Rooney Rule was first adopted in the National Football League, where it requires all teams to interview at least one person of color each time a head coaching or general manager role comes open." Jason Del Rey, *Amazon Will Adopt a 'Rooney Rule' to Increase Board Diversity After its Initial Opposition Sparked Employee Outrage*, RECODE (May 14, 2018, 4:49 PM), https://www.recode.net/2018/5/14/17353626/amazon-rooney-rule-board-diversity-reversal-shareholder-proposal [https://perma.cc/R9PB-PVEC] (noting that Amazon will now include women and people of color when considering candidates for its boards of directors). The implementation of the Rooney Rule in the board context has been suggested by well-known scholars, such as Professor Deborah Rhode at Stanford Law School. *See* Rhode & Packel, *supra* note 251.

357. *See* Stefanie Johnson, *What Amazon's Board Was Getting Wrong About Diversity*

Lab, an incubator for innovative ways to boost diversity in law, partnered with forty-four of the country's top law firms to pilot their own version of the Rooney Rule—dubbed the Mansfield Rule after Arabella Mansfield, the first women admitted to practice law in the United States.[358] The Mansfield Rule, launched in the summer of 2017, requires participating law firms to track the diversity of candidates and include at least 30% women and minority individuals in their candidate pools for promotions, senior level hiring, and significant leadership roles in the firm; as of July 6, 2018, the diversity definition has been expanded to include LGBTQ+ candidates.[359] This policy has already increased discussions of diverse candidate consideration and more tracking and transparency in the hiring process.[360]

Similarly, there is the possibility for merger agreements to contain clauses that mandate proper behavior by executives or the greater inclusion and promotion of women within the company. The recent phenomenon of the so-called "Weinstein clause" adds language to merger agreements that "legally vouches for the upstanding behavior of a company's leaders" and potentially gives buyers the right to claw back money if substantial revelations of inappropriate behavior surface.[361] Currently, this clause only protects against financial and reputational harm from sexual harassment claims following a merger, but it could be one way to address the issue of the insufficient promotion of women. "The ins and outs of business contracts are decidedly unsexy, but we shouldn't overlook their legally-binding nature as an agent for real change."[362]

More women could be recruited to serve on private company boards. In the wake of Ellen Pao's defeat, theBoardlist was founded in July

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and Hiring, HARV. BUS. REV. (May 14, 2018), https://hbr.org/2018/05/what-amazons-board-is-getting-wrong-about-diversity-and-hiring/ [https://perma.cc/V464-3JYG].

358. *44 Law Firms Pilot Mansfield Rule to Boost Diversity in Leadership Ranks—2.0 Version Announced for July 2018*, DIVERSITY LAB, http://www.diversitylab.com/pilot-projects/mansfield-rule/ [https://perma.cc/J2NC-XA9P]. Art Rooney II, son of Rooney Rule namesake Dan Rooney and partner in Buchanan Ingersoll & Rooney, is piloting the Mansfield Rule's implementation. *Id.*

359. *Id.* The expanded definition comes with the launch of "Mansfield Rule 2.0." *Id.* More than thirty of the original forty-four participating law firms have already signed on to pilot Mansfield Rule 2.0, along with eleven new law firms and over seventy corporations' legal departments. *Id.* In addition to tracking candidate diversity in promotions and hiring, the new version will also measure "consideration for participation in client pitch meetings and request that participating law firms make appointment and election processes transparent to all lawyers in their firms." *Id.*

360. *Id.*

361. Claire Zillman, *The Weinstein Clause, USC Moonves, Boz Saint John: Broadsheet August 2*, FORTUNE (Aug. 2, 2018), http://fortune.com/2018/08/02/the-weinstein-clause-usc-moonves-boz-saint-john-broadsheet-august-2/ [https://perma.cc/KLG3-2EQE].

362. *Id.*

2015.[363] It is described as "a curated talent marketplace that connects highly qualified women leaders with opportunities to serve on private and public company boards."[364] TheBoardlist is a members-only platform and relies on the recommendations of venture capitalists and C-level executives, even if the candidate does not have prior board or tech experience.[365] Business leaders are also asked to provide specific information, such as "what stage of the company might make the most sense for their candidates (Series B through Series F), what each candidate's functional and industry expertise is, and what it is that each person excels at particularly."[366] Its founding members include high profile venture capital firms and C-level executives.[367] Essentially, it replicates the informal process of board selection in a more formal way. "The site's staffers create profiles for each candidate, populating them with information such as whether the nominator believes a woman is best suited for an early-stage startup or a company that is further along."[368] As of December 2016, there were over 1,300 women candidates on theBoardlist.[369]

In October 2015, theBoardlist placed its first board candidate with Challenged, a private company developing a social awareness app.[370] The co-founder and president of Challenged, Justin Jarman, noted that his network encompassed male executives with board experience.[371] Jarman stated, "[theBoardlist] was like having an extended network of peer elected/reviewed candidates and served as an

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363. Megan Rose Dickey, *Boardlist, The Tool for Getting Women on Tech Boards, Has Its First Win*, TECHCRUNCH (Oct. 20, 2015) [hereinafter Dickey, *Boardlist, The Tool for Getting Women on Tech Boards*], https://techcrunch.com/2015/10/20/boardlist-the-tool-for-getting-women-on-tech-boards-has-its-first-win/ [https://perma.cc/J8FA-EKNZ]. TheBoardlist is a subsidiary of ChoosePossibility and exists "partly with an eye toward creating similar, complementary products, including around board education." Connie Loizos, *Boardlist is a Curated Platform With 600-Plus Independent, Board-Ready, Female Members*, TECHCRUNCH (July 15, 2015), https://techcrunch.com/2015/07/15/introducing-boardlist-a-curated-platform-with-600-plus-female-independent-board-members-ready-to-serve/ [https://perma.cc/BU95-5GNU].

364. *About*, BOARDLIST, https://theboardlist.com/about [https://perma.cc/PU6P-G5ZP]. The venture capitalists who use theBoardlist will pay $10,000; those in the C-suite will not have to pay a fee. Loizos, *supra* note 362.

365. Loizos, *supra* note 362.

366. *Id.*

367. *Id.*

368. Vara, *supra* note 115. Note that theBoardlist is not the only such organization to curate the names of women as prospective board members—there is also Shattered Glass. *See id.*

369. Tam, *supra* note 25.

370. Karla Martin served as director of global business strategy and strategic planning at Google, and she was the first board candidate placed on a private company board by theBoardlist. Dickey, *Boardlist, The Tool for Getting Women on Tech Boards*, *supra* note 362.

371. *Id.*

awesome catalyst in helping us find the perfect board member."[372] As of January 2017, theBoardlist had placed five women on the boards of directors of tech companies.[373] TheBoardlist also compiled data that only ninety-six women have been appointed to such boards since July 2015.[374]

Various groups other than theBoardlist have formed to identify more women candidates, such as Women in the Boardroom[375] and the Athena Alliance.[376] "The goal: to counter the common complaint that there are not enough women executives available to consider. To borrow a phrase from a one-time presidential candidate, they are accumulating 'binders full of women.' "[377] In addition to nonprofits, there are also private companies that seek to expand the network of women.[378]

Private companies could also appoint more women board members in the early stages of the company when there are fewer board members and the culture of the company is being formed. Limited partners that deploy capital to the funds of venture capital firms may potentially play a role in this, as they could encourage the partners of venture capital firms to recruit more women to boards.[379] As a startup matures, there should be a more concerted effort to recruit at least three women to its board. Research has shown that at least three women need to be on a board to get the critical mass necessary to effectuate change at a company and improve corporate governance.[380]

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372. *Id.*

373. Dickey, *Boardlist Founder Says*, *supra* note 215.

374. This number is current as of the January 2017 date of the article. *Id.* As of July 2018, theBoardlist site states that it has influenced over one hundred placements onto private and public boards since its inception. *TheBoardlist Success Stories*, BOARDLIST, https://theboardlist.com/success [https://perma.cc/BB5L-R9QJ].

375. Jennifer Reingold, *Why Top Women Are Disappearing from Corporate America*, FORTUNE (Sept. 9, 2016, 6:30 AM), http://fortune.com/women-corporate-america/ [https://perma.cc/DQD2-6QT8].

376. The Athena Alliance is a nonprofit organization that helps to place women on boards. *About the Athena Alliance*, ATHENA ALLIANCE, https://athenaalliance.org/about/ [https://perma.cc/TJF4-9VU5].

377. Reingold, *supra* note 374.

378. See, e.g., Chief, which has raised $3 million to launch "a real-life and digital private network for women working at the VP level and above." Emma Hinchlife, *Chief Raises $3 Million for an Executive Network to Get Powerful Women to the Top*, FORTUNE (Oct. 16, 2018), http://fortune.com/2018/10/16/chief-executive-network-women-ypo/ [https://perma.cc/65L9-UMMM].

379. Although limited partners such as universities, pension funds, and wealthy investors relinquish decisionmaking powers to venture capital firms as to which private companies to invest in, that does not mean that they cannot influence the firms since they are typically repeat investors that such firms want to keep happy.

380. *See generally* Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37 ORG'L DYNAMICS 145, 149-56 (2008). This study is based on interviews and discussions with fifty women directors, twelve chief executive officers, and

Broadly disseminating information about the lack of women in positions of power in startups and venture capital firms is another avenue to bring more attention to such issues. For example, a group of former early and executive female employees of Twitter started #ANGELS; they invest together in early-stage startups.[381] Together, they have started a movement to have more transparency around cap tables, which is a record of who owns shares in a company.[382] They chose to focus on the cap table "[b]ecause it holds the roadmap to wealth and power in Silicon Valley."[383] With respect to the lack of women in venture capital firms, there is now an annual VC Diversity Index.[384] The 2018 VC Diversity Index reported that "the [venture capital] industry remains predominantly male and white . . . . But small gains made by women—several prominent firms such as Benchmark and Union Square Ventures hired their first female partner last year—suggest the industry is paying more attention to gender diversity."[385] In addition, programs and apps have become increasingly popular as viable methods to combat implicit biases against women. For example, Slack, a high technology company that provides a popular workplace communication platform, is beginning to implement programs that will provide Slack users with personal analytic data on whether their communication style changes when they speak with people from different demographics.[386] Furthermore, in the nonprofit sector, GenderAvengers, a group that seeks to protect women's representation in the public dialogue, created an app where users can input basic data—"like the gender breakdown of a panel or number of minutes of airtime given to men vs. women during a group discussion"—and the app will turn the data into a graphic that can be easily shared on social media.[387]

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seven corporate secretaries from *Fortune* 1000 companies. *Id.* at 149; *see also 2018 Global Board Diversity Tracker*, *supra* note 26 (noting that thirteen of forty-four countries surveyed have achieved this "magic number," although pipeline issues still exist).

381. *#TheGapTable*, MEDIUM (Feb. 28, 2018), https://medium.com/angels-news/thegaptable-9982230d923a [https://perma.cc/DYN6-DHCF].

382. *Id.*

383. *Id.*

384. Madeline Garber, *Diversity and Venture Capital: What We Learned from the Information's Diversity Index*, MEDIUM (Apr. 13, 2018), https://medium.com/rga-ventures/diversity-and-venture-capital-what-we-learned-from-the-informations-diversity-index-f990934dc6ae [https://perma.cc/9VV8-SWF9].

385. *Id.*

386. Leah Fessler, *Slack Is Developing Tools to Tell If Someone's Mansplaining*, QUARTZ (Mar. 28, 2018), https://work.qz.com/1238413/slack-analytics-will-soon-know-if-you-speak-to-men-and-women-differently/ [https://perma.cc/BAX4-DRBQ].

387. Kristen Bellstrom, *Want to Blow the Whistle on All-Male Panels? There's an App for That*, FORTUNE (Apr. 9, 2018), http://fortune.com/2018/04/09/all-male-panel-app-genderavenger/ [https://perma.cc/5CTY-P85S].

Corporate venture capital can also take the lead and pledge money to fund more female entrepreneurs and investors. Goldman Sachs has already pledged $500 million for female founders.[388] Dubbed " 'Launch With GS,' the program will invest capital in businesses run or founded by women"[389] to help close the investment gap. Being a brand name funder, Goldman Sachs could then suggest female board candidates for the companies in which it invests.

Diversity conferences and training sessions are yet another way to change culture. They are everywhere in Silicon Valley—the center of the high technology world.[390] Venture capital firms should have training on what types of questions to ask women entrepreneurs. Women should have just as much opportunity as men to respond to promotion-oriented questions. One of the reasons attributed to the gap in venture capital funding between men and women is the difference in the types of questions that female entrepreneurs are asked compared to male entrepreneurs. In a recent study by Harvard Business Review, which was conducted at TechCrunch Disrupt New York, an annual startup funding competition, investors asked male entrepreneurs promotion-oriented questions, which focus "on hopes, achievements, advancement, and ideals."[391] In contrast, investors asked prevention-oriented questions to female entrepreneurs, "which [are] concerned with safety, responsibility, security, and vigilance."[392] Male entrepreneurs were asked promotion-oriented questions 67% of the time while female entrepreneurs were asked prevention-oriented questions 66% of the time.[393] The startups led by males in this study raised five times as much funding as their female counterparts.[394] A study on the topic of the types of questions male versus female entrepreneurs were asked in Sweden yielded similar results.[395]

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388. Jordyn Holman, *Goldman Sachs Pledges $500 Million for Female Founders*, BLOOMBERG (June 19, 2018, 2:08 PM), https://www.bloombergquint.com/markets/2018/06/19/goldman-sachs-pledges-500-million-to-invest-in-female-founders [https://perma.cc/N54C-X4KS].

389. *Id.* Goldman Sachs initiated a similar program in 2008 called "10,000 Women," which developed women-owned businesses; $100 million was allocated for this program. *Id.*

390. There is a cottage industry of consultants and software makers that have proliferated to help with such conferences and trainings. Liza Mundy, *Why Is Silicon Valley So Awful to Women?*, ATLANTIC (Apr. 2017), https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788/ [https://perma.cc/N3TE-YMG5].

391. Kanze et al., *supra* note 47. Promotion and prevention-oriented questions originate from the psychological theory of regulatory focus. *Id.* For more context about these types of questions, see Heidi Grant & E. Tory Higgins, *Do You Play to Win—or to Not Lose?*, HARV. BUS. REV. (Mar. 2013), https://hbr.org/2013/03/do-you-play-to-win-or-to-not-lose [https://perma.cc/HYT9-P3KD].

392. Kanze et al., *supra* note 47.

393. *Id.*

394. *Id.*

395. In a different Harvard Business Review study with government venture capitalists in Sweden, the researchers found that the questions asked of female founders differed from

One of the problems with diversity programs is that they have a one-size-fits-all approach.[396] Instead of tailoring programs to women and minority groups separately, they are viewed as one and the same.[397] One study showed that white women respond better to language that embraces diversity of experience, whereas minorities respond better to language couched in terms of equity and fairness.[398] The differences in the types of diversity should be kept in mind as cultural changes occur in both the boardroom and the venture capital ecosystem more generally. It will be important to pay careful attention to the language used to recruit women, as well as to question the assumption that there are not enough qualified women to serve in various positions, so that women are not considered an afterthought to the real interview process.

Another option to increase women on private company boards is to encourage more women-founded venture capital firms. Since venture capital firms have historically been founded by men, women who have a more inclusive vision of what venture capital firms should look like and who they should fund would be a welcome addition to the venture capital landscape. In recent years, there have been more women-founded venture capital firms, some of which have a focus on funding startups with female founders. One of the earliest was Golden Seeds.[399] It was founded by mostly Wall Street women and made angel investments in female-led companies.[400] Other early-stage investment groups followed, such as Aspect Ventures, which was started by two women, and Broadway Angels.[401] Another example of a woman founder

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that of male founders:

> Men were characterized as having entrepreneurial potential, while the entrepreneurial potential for women was diminished. Many of the young men and women were described as being young, though youth for men was viewed as promising, while young women were considered inexperienced. Men were praised for being viewed as aggressive or arrogant, while women's experience and excitement were tempered by discussions of their emotional shortcomings. Similarly, cautiousness was viewed very differently depending on the gender of the entrepreneur.

Malin Malmstrom et al., *We Recorded VC's Conversations and Analyzed How Differently They Talked About Female Entrepreneurs*, HARV. BUS. REV. (May 17, 2017), https://hbr.org/2017/05/we-recorded-vcs-conversations-and-analyzed-how-differently-they-talk-about-female-entrepreneurs [https://perma.cc/LKA7-9XKW]. Ultimately, the female founders in the study received their funding requests 25% of the time while the male founders received their funding requests 52% of the time. *Id.*

396. Nicole Stephens & Evan Apfelbaum, *The Real Reasons Diversity Programs Don't Work*, FORTUNE (Aug. 16, 2016), http://fortune.com/2016/08/16/diversity-workplace-lessons/ [https://perma.cc/2LAS-TU7Z].

397. *Id.*

398. *Id.*

399. Weisul, *supra* note 48.

400. *Id.*

401. *Id.*

of a venture capital firm is Susan Lyne, who boasts a resume that includes positions such as the chairperson of Gilt Groupe and chief executive officer of Martha Stewart Living Omnimedia.[402] Ms. Lyne founded BBG Ventures, "an early stage fund focused on consumer internet and mobile startups with at least one female founder."[403]

Limited partners who invest in the funds of venture capital firms can also choose to invest in funds that support diversity. Recently, Melinda Gates did just that by investing in a female-founded venture capital firm, Aspect Ventures, making clear that diversity was a priority for her.[404] She stated, "I want to back the people best positioned to successfully invest in tomorrow's groundbreaking ideas—and they're not always the people who successfully invested in yesterday's."[405]

There is also a growing number of women-focused venture capital firms.[406] One such example is The Pink Ceiling, which was founded by Cindy Whitehead who sold two companies for over $1.5 billion in less than ten years.[407] They have a "Pinkubator . . . for women led or women focused entrepreneurial businesses."[408]

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402. *Team*, BBG [VENTURES], https://www.bbgventures.com/team/ [https://perma.cc/9YEW-SJRZ]. Bumble, the woman-founded dating app, recently announced the launch of its own fund to invest in other female-founded startups. Claire Zillman, *Bumble Investment Fund, FEMA Harassment, Mario Batali: Broadsheet Aug. 16th*, FORTUNE (Aug. 16, 2018), http://fortune.com/2018/08/16/tinder-lawsuit-omarosa-manigault-newman-primary-results-broadsheet-aug-16th/ [https://perma.cc/YR5D-LPBC]. The fund has already given out $1 million in $5,000 to $250,000 portions to companies geared toward women and with diverse female founders. *Id.* Bumble acknowledges that the smaller size of its fund means that it only gives smaller investments, but Bumble COO and the fund's leader, Sarah Jones Simmer, stated that "our ability to give back early in our life cycle is important. We are trying to do what we can with our platform already." *Id.*

403. BBG VENTURES, http://www.bbgventures.com/ [https://perma.cc/Q4Q5-NHDC].

404. Lev-Ram, *Melinda Gates, supra* note 334.

405. *Id.* Freada Kapor Klein and Mitch Kapor, early seed investors in Uber, took the unusual step of posting an open letter to Uber Chief Executive Officer Travis Kalanick to express "their concern that the company is attempting to manage its way out of the allegations former employee Susan Fowler made." Johana Bhuiyan, *Early Uber Investors Mitch Kapor and Freada Kapor Klein Say the Company Needs to Change Its 'Toxic' Culture Patterns*, RECODE (Feb. 23, 2017, 3:27 PM), https://www.recode.net/2017/2/23/14716084/uber-investors-kapor-change-toxic-culture-patterns [https://perma.cc/842E-A3S3].

406. Arlan Hamilton, a woman of color, successfully attracted influential limited partners to her firm, Backstage Capital, including individuals such as Marc Andreessen and Ellen Pao. Polina Marinova, *Why This VC Is Betting on Women, People of Color, and LGBTQ Founders*, FORTUNE (Jan. 24, 2018), http://fortune.com/2018/01/24/arlan-hamilton-backstage-capital/ [https://perma.cc/7C7E-XEMR]. Backstage focuses on investing in women, people of color, and LGBTQ entrepreneurs. *Id.*

407. *Meet Cindy*, THE PINK CEIILING, https://thepinkceiling.com/meet-cindy [https://perma.cc/BZ3L-NSUY].

408. *Pinkubator and Crowdfunder Announce Partnership for Women's-Focused Entrepreneurial Businesses*, PR NEWSWIRE (Mar. 2, 2017, 4:19 PM), https://www.prnewswire.com/news-releases/pinkubator-and-crowdfunder-announce-partnership-for-womens-focused-entrepreneurial-businesses-300417395.html [https://perma.cc/P7DK-H3NG].

Alternatively, Zebras Unite, an advocacy organization, is "focused on encouraging a more ethical industry with greater gender and racial diversity."[409] For them, this may mean eschewing venture capital investments entirely and, along with it, the necessity to fashion a board that includes venture capitalists' input.[410]

Cultivating more novice women investors is another tactic that is gaining popularity.[411] There are several individuals who have been working on constructing an "alternative funding universe for women."[412] One such person is Trish Costello, the former chief executive officer of Kauffman Fellows, a leadership program focused on startup financing.[413] After leaving Kauffman in 2013, she founded Portfolia, where women who invest $10,000 become a limited partner of Portfolia and get access to the entire funding process.[414] Another business, Pipeline Angels, provides training to new female investors.[415] In the process, they are creating their "own brand of women [venture capitalists] who are not anything like those you would normally create on Sand Hill Road."[416]

The problem with women-founded venture capital firms, however, is the lack of scalability.[417] "Each investment partner can do only so many deals and sit on only so many boards. With few female [venture capitalists] to begin with, there simply aren't enough women with the experience, connections, and desire to raise their own funds."[418] It would take $50 billion to level the playing field for female entrepreneurs across the various stages of venture capital.[419] As of November 2016, early-stage, female-focused financing efforts numbered about two dozen, representing approximately $100 million in annual funding.[420] Furthermore, even as women-led startups are increasingly funded by inclusion-focused mainstream investors, angels, and investment groups, they are not receiving the large investments their male counterparts are.[421]

409. Erin Griffith, *More Start-Ups Have an Unfamiliar Message for Venture Capitalists: Get Lost*, N.Y. TIMES (Jan. 11, 2019), https://www.nytimes.com/2019/01/11/technology/start-ups-rejecting-venture-capital.html. As of January 2019, it had 40 chapters and 1,200 members worldwide. *Id.*

410. *Id.*

411. Weisul, *supra* note 48.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. Abeyta, *supra* note 289.

Another not-yet-viable way to tackle the problem of the lack of women as founders or on the executive team is to have venture capitalists invest in startups without having a traditional pitch. Social Capital, sold itself as "capital-as-a-service" when it launched in October of 2017.[422] The self-serve platform ideally would work like this: entrepreneurs complete a questionnaire and submit data for figures such as revenue.[423]

Unfortunately, the firm underwent significant turmoil due to a mass exodus by employees and contention with its limited partners, who were not consulted before the platform was launched.[424] Although this model was not successful, it still provides valuable insight into ways in which a firm could do something different. If this kind of firm could succeed in supporting more women founders, it could potentially increase the number of women on private company boards, as typically there is at least one founder appointed to represent the common stock stockholders on the boards of venture capital-backed companies.

Sarah Kunst is forging another new model of investment, known as the scout model, with her fund Cleo Capital.[425] While it is currently still unclear how this model would work, it could "provide more women with a taste of what it takes to make it as an investor, an important step to growing the ranks of women in VC.[426]

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422. Ashley Carroll, *Capital-as-a-Service: A New Operating System for Early Stage Investing*, MEDIUM (Oct. 25, 2017), https://medium.com/social-capital/capital-as-a-service-a-new-operating-system-for-early-stage-investing-6d001416c0df [https://perma.cc/5Y5K-M4XW]. According to Ashley Carroll, who oversaw the project as the partner in charge, there were to be "[n]o hoops, no $7 artisanal coffee chats, no designer pitch decks, no bias, no politics . . . ." *Id.*

423. Connie Loizos, *Social Capital Has Started Investing in Startups, Sight Unseen*, TECHCRUNCH (Oct. 25, 2017) [hereinafter Loizos, *Social Capital*], https://techcrunch.com/2017/10/25/social-capital-has-started-investing-in-startups-sight-unseen/ [https://perma.cc/RHC8-CCCV]; *see also* Polina Marinova, *Venture Capitalist Challenges His Peers to Not Be 'F**king Scumbags'*, FORTUNE (Nov. 15, 2017), http://fortune.com/2017/11/15/social-capital-venture-harassment/ [https://perma.cc/R9BQ-HNGM]. This data-oriented approach initially led to investments in companies where 42% of the chief executive officers were female and a majority were non-white. Loizos, *Social Capital*, *supra*; Marinova, *supra*.

424. Polina Marinova, *Term Sheet -- Wednesday September 26*, FORTUNE (Sept. 26, 2018), http://fortune.com/2018/09/26/term-sheet-wednesday-september-26/ [https://perma.cc/HZA7-HQMT]. Social Capital founder Chamath Palihapitiya fired most of its remaining staff after a large number left over the prior few months, and has since become a "technology holding company" rather than a venture firm. *Id.*; Danny Crichton & Arman Tabatabai, *The Death of Once High-Flying VC Funds*, TECHCRUNCH (Sept. 25, 2018), https://techcrunch.com/2018/09/25/the-death-of-once-high-flying-vc-funds/ [https://perma.cc/5PPK-L48N]. Much of the tension with Social Capital's limited partners was due to a lack of consultation with them prior to launching his new platform. Polina Marinova, *Term Sheet -- Friday September 21*, FORTUNE (Sept. 21, 2018), http://fortune.com/2018/09/21/term-sheet-friday-september-21/ [https://perma.cc/T8TS-VWU2].

425. Kristen Bellstrom, *US Open, Sloane Stephens, Lauryn Hill: Broadsheet Aug. 28*, FORTUNE (Aug. 28, 2018), http://fortune.com/2018/08/28/us-open-sloane-stephens-lauryn-hill-broadsheet-aug-28/ [https://perma.cc/5AM6-T2EU].

426. *Id.*

Providing educational programs about the industry would also be helpful to promote gender diversity. Nisha Dua, a partner in BBG Ventures,[427] founded #BUILTBYGIRLS.[428] This movement gives young women the opportunity to participate in the tech-enabled economy by "teach[ing] girls the fundamentals of venture capital" through both offline and online programs.[429]

On a broad level, mentoring programs to help women succeed as leaders or expand the networks of female entrepreneurs may be advantageous.[430] Female venture capitalists are banding together to come up with their own solutions to the seemingly intractable problem of the paucity of female founders getting funded. One solution is the "Female Founder Office Hours"[431]—the first one was scheduled for November 30, 2017 in San Francisco.[432] It began with a talk about fundraising tactics and segued into individual sessions with high profile female venture capitalists.[433] "[Venture capitalists] and entrepreneurs say that more female investing partners has a trickle-down effect: Women venture capitalists are more likely to serve as role models to female entrepreneurs and identify potential in businesses that target women."[434]

In order for gender diversity to become a reality, women also need "real male allies."[435] Researchers found in one management study that the reason why top-level leaders are disproportionately white men is, in part, due to the fact that female and ethnic minority leaders who champion diversity-valuing behavior are penalized for doing so.[436] Male allies are inhibited from speaking up for gender equity by such

427. See *supra* Section IV.C for an overview of BBG Ventures.

428. *Team*, BBG VENTURES, http://www.bbgventures.com/team/ [https://perma.cc/J7TR-LWQX].

429. *Id.*

430. *See generally* JMG CONSULTING & WYCKOFF CONSULTING, *supra* note 45.

431. Claire Zillman, *Top Women Investors Are Answering the VC Boys' Club with One of Their Own*, FORTUNE (Nov. 13, 2017), http://fortune.com/2017/11/13/women-venture-capital-female-founders/ [https://perma.cc/5TDV-2NQJ].

432. *Id.*

433. The big names include Jess Lee of Sequoia and Aileen Lee of Cowboy Ventures, among others. *Id.*

434. Lizette Chapman & Sarah McBride, *Sequoia Capital Hires Yahoo's Jess Lee as First Woman U.S. Investing Partner*, BLOOMBERG. (Oct. 20, 2016, 8:00 AM), https://www.bloomberg.com/news/articles/2016-10-20/sequoia-capital-hires-yahoo-s-jess-lee-as-first-woman-u-s-investing-partner.

435. David G. Smith & W. Brad Johnson, *Lots of Men Are Gender-Equality Allies in Private. Why Not in Public?*, HARV. BUS. REV. (Oct. 13, 2017), https://hbr.org/2017/10/lots-of-men-are-gender-equality-allies-in-private-why-not-in-public [https://perma.cc/YF8J-ZG6U].

436. David R. Hekman et al., *Does Diversity-Valuing Behavior Result in Diminished Performance Ratings for Non-White and Female Leaders?*, 60 ACAD. MGMT. J. 771 (2017).

phenomena as the bystander effect,[437] conformity[438] and psychological standing.[439] However, championing diversity efforts do not appear to impact males' professional trajectories.[440]

A recent study that analyzed data from 1,069 firms across 35 countries and 45 industries found that "gender diversity relates to more productive companies, as measured by market value and revenue, *only* in contexts where gender diversity is viewed as 'normatively' accepted."[441] Therefore, if the high technology industry in the United States views gender diversity as normatively acceptable it logically follows that it will help with companies' productivity. This is yet another reason why having women at every part of the innovation ecosystem, including at the board level, is important.

V. CONCLUSION

The lack of women serving on the boards of directors in venture capital-backed private companies is a serious problem. It is a problem that has its roots in the low number of women founders and women investment partners in venture capital firms. Board members are primarily drawn from the ranks of founders and investors and those same individuals will look to their business and social networks to determine who the independent directors should be. Ultimately, it is better to begin with the fundamental tenet that startup boards should be diverse from day one in the lifecycle of a company, as there is an innovation imperative for having gender diversity on a board. If a company fails to address corporate governance issues until it goes public, the company culture will have calcified, and the tone at the top will be difficult, if not impossible, to change.

Tackling issues related to gender diversity are daunting and seemingly insurmountable. However, incremental progress can be made by using a combination of the legal, business, and cultural strategies outlined above so that over time having no women or only one woman on a private company board is the exception and not the

437. Smith & Johnson, *supra* note 434.

438. *Id.*; Christopher Kilmartin et al., *A Behavior Intervention to Reduce Sexism in College Men*, 32 GEND. ISSUES 97 (2015).

439. Smith & Johnson, *supra* note 434.

440. Despite the lesser effects, cultivating males may be increasingly difficult as some male leaders may eschew mentoring women in light of the #MeToo movement. *See* Claire Zillman & Emma Hinchliffe, *Hope Hicks, Ginni Thomas, UAE Awards: Broadsheet January 29*, FORTUNE (Jan. 29, 2019), http://fortune.com/2019/01/29/hope-hicks-ginni-thomas-uae-awards-broadsheet-january-29/ [https://perma.cc/6Z6B-C7FX].

441. Claire Zillman, *Katy Perry Shoe, Katie Couric Book, Diversity Research: Broadsheet for February 13*, FORTUNE (Feb. 13, 2019) (internal quotation marks omitted), http://fortune.com/2019/02/13/katy-perry-shoe-katie-couric-book-diversity-research-broadsheet-for-february-13/ [https://perma.cc/Q97V-7JYK]. "Normatively" here means a "widespread cultural belief that gender diversity is important." *Id.* (internal quotation marks omitted).

norm. Now is the moment where more systemic change can occur, as frequent media reports have made public the prevalence of sexism and sexual harassment in venture capital and other industries. By capitalizing on this moment where all eyes are focused on the disparate treatment of women across many different industries, the implementation of sound corporate governance policies that include women leaders has the possibility of becoming the new normal. And then, perhaps in the not-too-distant future, it will become commonplace to see women at the helm of venture capital-backed companies, as partners in venture capital firms, and as members of the board of directors of private companies.