SOCIAL MOVEMENTS, DIVERSITY, AND CORPORATE SHORT-TERMISM

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ABSTRACT

Social movements like #MeToo and #BlackLivesMatter, powered by social media, have given rise to heightened corporate activism on social issues. They have also drawn attention to the importance of addressing diversity issues for the workforce rather than simply at the board or management level. This Article argues that the focus on such social issues is desirable, and indeed necessary; however, myopic responses to social media pressures can be counterproductive. Instead, this Article proposes that corporate decisions and actions should be geared towards addressing issues that help the companies' stakeholders in the long term. Further, it argues that long-term policies that improve corporate culture will ultimately bear results because employees cannot be won over by mere virtue-signalling or short-term policies.

INTRODUCTION

Social movements like #MeToo and #BlackLivesMatter, powered by social media, have given rise to heightened corporate activism on social issues. They have also drawn attention to the importance of addressing diversity issues for the

workforce rather than simply at the board or management level. This Article argues that the focus on such social issues is desirable, and indeed necessary; however, myopic responses to social media pressures can be counter-productive. Instead, this Article proposes that corporate decisions and actions should be geared towards addressing issues that help the companies' stakeholders in the long term. Further, it argues that long-term policies that improve corporate culture will ultimately bear results because employees cannot be won over by mere virtue-signalling or short-term policies. Besides, both negative and positive information about firm culture will ultimately make its way out, especially through employee output either on social media or on anonymous forums like Glassdoor surveys, thus affecting corporate reputation. Apart from proposing measures that companies might adopt to address issues of harassment and discrimination, this article also advocates the use of flexible work options and argues that COVID-19 lockdowns might have already shown that "working from home" is indeed possible.

This Article contributes to the nascent strand of literature on the impact of social movements that use social media on corporate governance,[1] and further builds upon it by flagging the issue of corporate short-termism on social justice issues as a concern. This Article further contributes to the literature on diversity in corporations by identifying solutions that will bring sustained improvement to diversity in the entire workforce (as compared to diversity efforts focused solely against the board of directors, which have been the subject of recent laws[2] and shareholder activism[3]).

Employees, customers, suppliers, and creditors are usually considered the stakeholders of a corporation. However, society more generally may also be considered a stakeholder because of the overall significance of corporations, particularly bigger ones.[4] It would thus appear that social movements (society coming together "on the basis of shared collective identities" and beliefs to "engage in political or cultural conflicts" via "networks of informal interactions"[5]) represent the collective voice of this stakeholder group.

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1. Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 451 (2019); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535 (2018); Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913 (2021). This Article will consider and build upon this literature.

2. S.B. 826, Reg. Sess. (Cal. 2018); A.B. 979, Reg. Sess. (Cal. 2020). Both bills amended the California Corporations Code. *See* Darren Rosenblum, *California Dreaming*, 99 B.U. L. REV. 1435 (2019), discussing California's board diversity quotas.

3. Michal Barzuza, *Proxy Access for Board Diversity*, 99 B.U. L. REV. 1279 (2019).

4. There are different views on who is to be included as a stakeholder. While I have already adopted an expansive idea of stakeholders, some scholars also include the government within the meaning of the term. Alex Edmans, for instance, writes: "A company . . . serves not only investors, but also colleagues, customers, suppliers, colleagues, the environment, communities, and the government." Presumably, "communities" conveys the same meaning as the term society. *See* ALEX EDMANS, GROW THE PIE 20 (2020).

5. *See* Mario Diani, *The Concept of Social Movement*, 40 SOC. REV. 1 (1992).

In recent times, we have had social movements regarding race (#BlackLivesMatter) and gender (#MeToo[6]), both of which were amplified by social media as indicated by the hashtags prefixing the two terms. These two movements have alerted corporations in the U.S. (where each of these movements originated) and elsewhere[7] about the importance of sexual misconduct, racial equality, and ancillary social justice issues. These movements are, amongst other things, powered by millennial and Gen Z users who are (or at least a section of them are[8]) comfortable sharing views and experiences on social media, and who place a premium on social issues.[9] Whether as consumers, investors, employees, or simply individuals with opinions, these generations are making themselves heard on what is known in the corporate governance world as environment, social, and governance (ESG) issues. A survey conducted in 2013 noted that 66% of U.S. millennials believed that it was their responsibility to communicate views publicly after a negative experience with a brand.[10] In a 2018 survey which asked American consumers about what attracted them to a brand, respondents listed the major factors as: transparency about how the business treats its employees and where it sources its materials from (66% of respondents), following through on its promises (66%), and standing up for societal and cultural issues (50% of the respondents).[11] Even beyond modifying their choices as consumers, millennials and Gen Zers are using social media to express their opinions about these issues and to directly target corporations about their ESG practices, including diversity issues. COVID-19 and the consequent lockdowns around the world have further increased the use of online communication channels, including channels for discussions about and against corporations.[12] Such online activism has impacted corporate behaviour with many large corporations viewing the need to engage in social activism as

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6. An associated movement is #TimesUp. This article will simply refer to #MeToo as the bigger umbrella movement.

7. *See, e.g.*, Nassim Khadem, *AMP's 'MeToo' Moment Raises Bigger Questions for Corporate Australia About Sexual Harassment*, ABC NEWS (Aug. 25, 2020, 4:41 AM), https://www.abc.net.au/news/2020-08-25/amp-sexual-harassment-metoo-corporate-culture/12589602.

8. *See generally infra* notes 93–95.

9. *See* Sandeep Gopalan & Akshaya Kamalnath, *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials*, 10 NW. J.L. & SOC. POL'Y 34, 109–20 (2015) (discussing the rise of millennials and a discussion on their preferences); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Power of Retail Investors*, 22 NEV. L.J. 51, (discussing both millennials and Gen Zers). *See generally* Michal Barzuza, Quinn Curtis, & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

10. *Engaging Tomorrow's Consumers*, ACCENTURE (2013), http://www.accenture.com/Site CollectionDocuments/PDF/Accenture-EngagingConsumers-Infographic.pdf.

11. *From Me to We: The Rise of the Purpose-Led Brand*, ACCENTURE (Dec. 5, 2018) https://www.accenture.com/_acnmedia/Thought-Leadership-Assets/PDF-5/Accenture-The-rise-of-the-purpose-led-brand-Accenture-Strategy.pdf.

12. Sally Wheeler, *What Have We Learned About the Corporate Sector in Covid-19?*, *in* PANDEMIC LEGALITIES LEGAL RESPONSES TO COVID-19 – JUSTICE AND SOCIAL RESPONSIBILITY 155, 168 (Dave Cowan & Ann Mumford eds., 2021) (noting that collective action

a cost of doing business.[13] For instance, recently many corporations put out statements in support of the #BlackLivesMatter movement and diversity more generally in response to protests and activism both in real time and online.[14]

To be clear, activism and social movements aimed at corporations are not a new social media phenomenon. Corporations have been aware of the importance of stakeholders and some firms have supported social issues in the past.[15] For example, corporations responded to equal opportunity for racial minorities in the 1960s and 70s and LGBTQ rights in the 1980s and 90s.[16] In most cases, such support from corporations was a result of social movements targeting corporations on these issues.[17] As American economist Tyler Cowen has pointed out, while a small baker may refuse to sell to some customers, big corporations cannot survive by only catering to one type of customer.[18] Ultimately, a much larger percentage of corporations are responding to social movements now because of the pressure these movements have gathered from younger generations' preferences and the expression of those preferences on social media.

In fact, corporations are not only responding to social movements but also trying to proactively engage in speech or conduct indicating their support of these and even older movements like LGBTQ+ rights. In many cases, responses do not go beyond supportive public statements. However, some companies have taken more concrete steps and even attempted to become part of the social movements themselves, for example by firing employees that became the target of activists' complaints. Corporations today feel compelled to respond quickly to social movements.

The remainder of this Article proceeds as follows. Part I examines the responses to #MeToo and suggests mechanisms that could provide lasting change to address sexual misconduct in companies and thus foster gender diversity in the workforce. Part II discusses responses to #BlackLivesMatter and then shows how the mechanism suggested to address #MeToo could be extended to address racial equality issues within the corporation as well. Part III addresses the issue of corporate short-termism in response to social movements and proposes that

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might become more prevalent "during a time of limited movement," e.g., the government mandated lockdowns in the wake of COVID-19).

13. Michael Peregrine, *How Companies Engage With Social Activism*, FORBES (Apr. 6, 2021, 7:00 AM), https://www.forbes.com/sites/michaelperegrine/2021/04/06/corporate-leadership-faces-ever-evolving-social-justice-concerns/?sh=754fcfa57c4d; *see also* Lin, *supra* note 1, at 1546 ("The broad reach and deep impact of social activism powered by new information technology means that businesses are frequently engaged in social issues whether they want to be or not.").

14. *See* discussion *infra* Part II.

15. *See generally* CARLOS A. BALL, THE QUEERING OF CORPORATE AMERICA: HOW BIG BUSINESS WENT FROM LGBTQ ADVERSARY TO ALLY (2019); Lin, *supra* note 1, at 1540–44. Both Ball and Lin describe how corporations have played both the role of antagonists to social movements in which case they were the targets of social activism and the role of supporters of social movements.

16. Lin, *supra* note 1, at 1541–44.

17. *Id*.

18. TYLER COWEN, BIG BUSINESS – A LOVE LETTER TO AN AMERICAN ANTI-HERO 5–6 (2019).

companies take the longer view. Part IV briefly discusses some long-term barriers to diversity that need to be addressed. Part V concludes.

I. #MᴇTᴏᴏ

Although the term was originally coined by Tarana Burke in 2006, the social media version of the movement started as a reaction to sexual harassment in the entertainment industry in 2017 with publication of the news about Harvey Weinstein's history of sexual misconduct.[19] From there, the movement had ripple effects across industries with victims of harassment sharing their experiences in every sector. It took companies out of a compliance mindset, where the goal was simply to avoid liability, to one where the reputational fallout of such incidents, irrespective of legal liability, had to be considered.[20] Again, social media has a role to play in empowering women to speak up and thus increasing the reputational costs of stakeholder dissatisfaction.[21] Even before #MeToo, social media incentivized businesses to act honestly or alternatively render an apology when some misconduct is uncovered, rather than face reputational penalties.[22] With #MeToo gaining steam, it was not going to be enough to apologize without meaningfully changing corporate practices and culture that allowed such behaviour. #MeToo resulted in a number of executives getting fired or demoted.[23] Representations were introduced in merger agreements to provide recourse to bidder firms in the event that sexual misconduct was discovered after the deal was closed.[24] Another consequence of the movement has been that corporations have started including a #MeToo termination option in CEO employment contracts.[25] Thus conduct relating to sexual harassment, discrimination, and violations of company policies could trigger "termination for cause."[26] Further, some authors have argued that Delaware courts might become more sympathetic to sexual harassment claims.[27]

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19. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html.

20. *See generally* Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 UC DAVIS L. REV. 1913, 1915 (2021).

21. *See* Terry Morehead Dworkin & Cindy A. Schipani, *The Role of Gender Diversity in Corporate Governance*, 21 U. PA. J. BUS. L. 105, 126–27 (2018).

22. COWEN, *supra* note 18, at 39.

23. Lance Lambert, *Exclusive: #MeToo Pushes CEO Firings to a 15-Year High*, FORTUNE (Nov. 6, 2019) https://fortune.com/2019/11/06/ceo-firings-hits-15-year-high-me-too/.

24. *See generally* Miazad, *supra* note 20.

25. Rachel Arnow-Richman, James Hicks, & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of "MeToo Termination Rights" in CEO Contracts*, 98 IND. L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787232.

26. *Id.* (noting that these clauses may be meant to signal the company's stance against such conduct, both to the executives in question and to the public since these contracts are publicly available).

27. Ann Lipton, *Capital Discrimination*, 59 HOUS. L. REV. 843 (2022) (citing Marchand v. Barnhill, 212 A.3d 805 (2019)). Lipton notes that Delaware has recently begun to look more favorably on claims that boards had ignored or encouraged illegal conduct. *See, e.g.*, *In re* Clovis Oncology Derivative Litigation, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); *see also* Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 Wash. U. L. REV. 1857 (2021). Shapira attributes the shift to the fact that

The movement has also fed investor views. A study conducted by Billings, Klein, and Shi to test the market reaction to the #MeToo movement found that firms received abnormal positive returns if they have what the authors term as "inclusive cultures," meaning that they hired women directors in the period preceding the #MeToo movement and even the push from institutional investors to hire women directors.[28] These same firms did not receive abnormal positive returns during "placebo dates," i.e. time periods that did not coincide with major events of the #MeToo movement.[29] The authors of the study infer, based on their results, that as a consequence of the #MeToo movement, firms with all-male boards are deemed by the market to be more exposed to the risk of sexual misconduct revelations than those with a critical mass of women on the board.[30] While a critical mass (at least three) of women on boards might not necessarily prevent sexual misconduct with the firm, the converse might be true. Firms with cultures that prevent sexual misconduct and other forms of misconduct are able to attract and retain women in positions of power, including on the board of directors.

The role of firm culture in preventing and addressing issues of sexual harassment and also other workforce issues (racial discrimination, bullying, etc.) is important. While Billings, Klein, and Shi used firms that hired women directors in the absence of pressure to do so as an indicator of an inclusive culture, it is useful to think about the specific steps corporations may take to build such a culture. How can a firm prevent the risk of sexual harassment or other workforce issues (bullying, racial discrimination, etc.)? A rich source of ideas on this question is the report containing the recommendations of Eric Holder, who had been appointed by Uber to investigate an employee's sexual harassment claims.[31] Holder's brief from Uber was to deal with three issues: the company's workplace environment as it related to the employee's allegations of discrimination,

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the interpretation of Section 220, which "grants shareholders a qualified right to inspect the company's books and records" has been liberalised by Delaware courts. *Id.* at 1859. "The courts now order provision of not just formal documents such as board minutes, but also informal electronic communications such as private emails or LinkedIn messages between directors. Armed with such newfound pre-filing discovery powers, shareholders and their attorneys can use the internal documents to plead with particularity facts that implicate directors' mental state and awareness, thereby overcoming the once insuperable *Caremark* pleading hurdle. Plaintiffs can now more easily show that the board never even discussed a critical compliance issue, or knew about critical problems but chose to ignore them." *Id.*

28. Mary Brooke Billings, April Klein & Yanting (Crystal) Shi, *Investors' Response to the #MeToo Movement: Does Corporate Culture Matter?* (NYU Stern Sch. of Bus. & Eur. Corp. Governance Inst., Finance Working Paper No. 764/2021, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3466326.

29. *Id.*

30. *Id.*

31. Ms. Susan Fowler had made these claims via a blog post. COVINGTON RECOMMENDATIONS (2017), https://www.cnbc.com/2017/06/13/eric-holder-uber-report-full-text.html (hereinafter *The Holder Report*).

harassment, and retaliation; its policies and practices in this regard; and steps Uber could take to uphold its commitment to a diverse and inclusive workplace.[32]

Holder's report states at the outset that "diversity is generally viewed as focusing on the presence of diverse employees based on religion, race, age, sexual orientation, gender, and culture."[33] Thus, the Report echoes the popular understanding of diversity as being limited to demographics, though it does not limit itself to gender. The Report also highlights the importance of inclusion and retention policies to complement diversity efforts. Some aspects of the Report are helpful when thinking about best practices for all organizations. These are critically assessed below under the following three categories (i) harassment, discrimination, and employee relations; (ii) board oversight; and (iii) training.

A. HARASSMENT, DISCRIMINATION, AND EMPLOYEE RELATIONS

On the issue of harassment and discrimination, the Report said that Uber should adopt a zero-tolerance policy for substantiated complaints of harassment and discrimination against employees, even high-performing ones.[34] Further, it recommended that all policies must be applied evenly and that no special treatment should be given based on level, tenure, and past performance of the employee.[35] This is consistent with Netflix' famous statement of company culture which says that "brilliant jerks" will not be tolerated in the company.[36]

The Holder Report further recommended that barriers for employees to transfer to another team within the company must be removed and must not be tied to performance.[37] The Report went on to specify that human resources staff are to review transfer requests and decisions in order to evaluate if such requests are a result of hostile or divisive environments and if they are being blocked for improper reasons.[38] The report also suggested tracking both harassment complaints and transfer requests to identify patterns and underlying problems.[39]

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32. Polina Marinova, *10 Things You Need to Know About Eric Holder's Uber Report,* FORTUNE (June 14, 2017, 11:39 PM), http://fortune.com/2017/06/13/uber-internal-investigation-results-public/; Oliver Staley, *The Official Recommendations for Reforming Uber Describe the Perfect Modern Company*, QUARTZ (June 14, 2017), https://qz.com/1005316/eric-holders-recommendations-for-uber-describe-the-perfect-modern-company/. For a more detailed discussion of these recommendations, *see* Akshaya Kamalnath, *Corporate Diversity 2.0: Lessons from Silicon Valley's Missteps*, 20 OR. REV. INT'L L. 113 (2018).

33. *The Holder Report*, *supra* note 32, at ¶I.D.

34. *Id.* at ¶ VIII.A.

35. *Id.* at ¶ VIII.I.

36. *Netflix Culture*, NETFLIX JOBS, https://jobs.netflix.com/culture (last visited Aug. 8, 2021) ("Our view is that brilliant people are also capable of decent human interactions, and we insist upon that. When highly capable people work together in a collaborative context, they inspire each other to be more creative, more productive and ultimately more successful as a team than they could be as a collection of individuals.").

37. *The Holder Report*, *supra* note 31, at ¶ VIII.D.

38. *Id.*

39. *Id.*

Even beyond harassment at the hands of "brilliant jerks," there could be trouble-makers who get away with bad behaviour because they belong to an "in-group" within the firm. A study titled the Good Finance Framework published in 2021 based on interviews of 44 women working in financial and professional services, is informative in this regard.[40] A number of interviewees mentioned office politics as a major barrier to getting ahead, particularly as they moved up the ladder.[41] Channels to report such behaviour, complemented with tracking such reports to identify patterns, as suggested in the Holder report, can even be helpful in such cases.

B. BOARD OVERSIGHT

The Holder Report stressed the need to involve the board and senior management in issues of workforce diversity. It recommended that the board create an Ethics and Culture Committee to oversee issues pertaining to diversity and ethical business practices.[42] This committee would oversee senior management responsible for ethics, compliance, human resources, and risk.[43] Further, the committee could introduce metrics to establish and monitor compliance with Uber's values regarding diversity and inclusion.[44] The Report also recommended that a member of the senior management team be responsible for giving effect to this committee's recommendations.[45]

Additionally, it recommended that Uber's audit committee oversee the compliance efforts of the company to ensure that significant compliance and harassment issues could be brought to the committee without going through the CEO.[46] Where necessary, the audit committee could also oversee the response to such issues, including any potential investigations.[47] This recommendation is significant because it brings harassment issues under the purview of the audit committee, which is responsible for overseeing the financial reporting process, risk management, internal controls, and compliance with laws and regulations. The media coverage of harassment claims against powerful people in the #MeToo climate has made this a high priority issue, and it is therefore pertinent to make the audit committee ultimately responsible for such matters.

Since the #MeToo movement has shown the reputational and financial consequences of corporations not acting to address issues of harassment and

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40. Grace Lordan, *The Good Finance Framework*, WOMEN IN BANKING & FINANCE, THE INCLUSION INITIATIVE AT LONDON SCHOOL OF ECONOMICS, THE WISDOM COUNCIL (June, 2021), https://www.wibf.org.uk/images/uploads/documents/WIBF_ACT_Good_Finance_Framework_Report.pdf.

41. *Id.*

42. *The Holder Report*, *supra* note 31, at ¶II.C.

43. *Id.*

44. *Id.*

45. *Id.* at ¶ II.E.

46. *Id.* at ¶ III.A.

47. *Id.*

discrimination, companies should be looking to adopt such best practices whether or not they are required to by law.

C. TRAINING

The Holder Report recommended training for leadership, management, human resources, and other employees with respect to conducting interviews and handling of complaints regarding harassment, discrimination, and retaliation.[48] This is a useful recommendation that could also be adopted for complaints regarding other workforce issues. Such training could also include how to address situations where an employee finds that a group of colleagues are engaged in some misconduct. Imagine an employee at Volkswagen (prior to the emissions scandal publicly coming to light) having made such a complaint and the issues being taken seriously and addressed–it could have helped the company avoid both financial and reputational losses.[49] The Holder Report explained that such training was meant to ensure inclusive leadership, combat implicit bias, and encourage a culture of openness where employees feel comfortable proposing different ideas.[50]

Human Resources personnel, being the first point of contact along the reporting line for harassment complaints, also need to be adequately trained. The Holder Report recommends that such training should include proper investigation of complaints regarding harassment, discrimination and/or retaliation, and appropriate documentation of such complaints and resulting investigations.[51] Most importantly, the Report recommends that personnel should be trained to identify when incidents should be escalated and brought to the notice of the company's legal team.[52]

The reporting process itself could be strengthened by creating multiple avenues for complaints; to give employees alternative options in case they fear retaliation through any one avenue.[53] Examples could be reporting to the immediate manager and to human resources. Again, the Report recommends that protocols for escalating and tracking complaints are set for both human resources personnel and managers.[54]

Ultimately, while some of the Holder Report's recommendations on training might be worthwhile (for instance, training Human Resources personnel about what issues to escalate), training relating to diversity and bias is more controversial. A study by Chang et al. found that diversity training had a positive impact in terms of employees acknowledging their biases and expressing support; yet it did

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48. *Id.* at ¶ V.A.
49. *See* John Armour, *Volkswagen's Emissions Scandal: Lessons for Corporate Governance? (Part 1)*, OXFORD BUSINESS LAW BLOG (May 17, 2016), https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/volkswagen%E2%80%99s-emissions-scandal-lessons-corporate-governance-part-1.
50. *The Holder Report*, *supra* note 31, ¶V.A.
51. *Id.* at ¶ V.B.
52. *Id.*
53. *Id.* at ¶ VI.C.
54. *Id.* at ¶ VI.D.

not actually change their behaviour.[55] The authors of the study therefore caution against relying on diversity training as a silver bullet and instead suggest using it in conjunction with other mechanisms.

D. CORPORATE AND EMPLOYEE RESPONSES TO #MeToo

The solutions discussed above have largely focused on providing multiple reporting channels to facilitate the handling of workforce issues within the board's risk management framework. Ultimately, they also have a theme of pivoting the culture of the company to one where wrong-doing of any sort will not be tolerated and where employees can have their concerns heard and addressed.

In 2018, a memorandum of the law firm Wachtell, Lipton, Rosen & Katz suggested that many corporate boards had indeed started to focus on issues of sexual harassment, corporate culture and gender diversity. Institutional investors had also begun to become active on these issues by 2018.[56] The activism has only grown and expanded since then. However, changing a company's culture is not a quick and easy task and each corporation has to tailor changes to its business and circumstances. Even beyond introducing the programs and mechanisms discussed above, it is important for the board and senior executives to set the right tone at the top,[57] to reassure employees about the genuineness of such programs.

Further, while #MeToo has brought about change to the extent that corporate leadership takes discrimination and harassment seriously, it has not addressed the issue of implicit bias, unconscious attitudes towards women, people of colour, and other minority groups, which also stand in the way of workplace equality. Men have traditionally been seen as having leadership qualities while women tend to be perceived as more nurturing.[58] This is the same sort of stereotype that has fed the business benefits justifications for needing to appoint more women directors. Researchers have noted that mentoring and networking tend to help women overcome barriers created by such implicit bias and gain leadership positions.[59] For instance, at the recruitment level, doubts about the suitability of a

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55. Edward H. Chang et al., *Does Diversity Training Work the Way It's Supposed To?*, HARV. BUS. REV. (July 9, 2019), https://hbr.org/2019/07/does-diversity-training-work-the-way-its-supposed-to.

56. David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2018), https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/.

57. Julie Walsh, *Setting the Tone at the Top*, 29 LAWNOW 27 (2005) ("Organizations whose management and board espouse a culture of integrity, high ethical standards and compliance help to create a well governed company, with a strong and positive tone at the top"). *See also* Alfredo Contreras, Aiyesha Dey & Claire Hill, *Tone at the Top and the Communication of Corporate Values: Lost in Translation*, 43 SEATTLE U. L. REV. 497 (2020).

58. Cindy A. Schipani, Terry M. Dworkin, Devin Abney, *Overcoming Gender Discrimination in Business: Reconsidering Mentoring in the Post #Me-Too and Covid-19 Eras*, 23 U. PA. J. BUS. L. 1072, 1083 (2021).

59. Cindy A. Schipani, Terry M. Dworkin, Angel Kwolek-Folland & Virginia G. Maurer, *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L & POL'Y 89 (2009).

candidate for a board or C-Suite role might be countered by a recommendation from a male mentor or champion who belongs to the similar professional/social circles as the people of the hiring team. From the perspective of women who are qualified but might hesitate to put their hands up for leadership positions, mentors and champions play a significant role. Margaret Keane, the first CEO of Synchrony, has shared that as a middle manager at General Electric Co. in 1996, she had felt nervous about presenting to the then CEO of the company.[60] However, she credits her then immediate boss Mike Neal's encouragement and championship for being able to take on the CEO role at Synchrony Financial just before it began separating from General Electric.[61] She also mentions others who helped deal with issues like "work blunders" and "uncooperative colleagues."[62] One such helpful colleague, Rick Hartnack, former nonexecutive board chairman of Synchrony Financial, tutored her about how to get the most out of fellow board members.[63] Such informal advice is just as important as championing a woman to get the leadership position.[64] Ms. Keane says that she was the only woman in the room in most of her leadership positions.[65] Since there is a dearth of women in senior executive and board positions, the role of male mentors and helpful male colleagues is especially important.

Men have reported that in light of #MeToo they have become fearful of taking on mentoring roles for women or even simply interacting with women. Of course, the counter argument to this is that #MeToo has simply filtered out bad actors from interacting with women. A 2018 survey reported that 60% of male managers in the U.S. were uncomfortable participating in a common work activity with a woman, such as mentoring, working alone, or socializing together.[66] This was a 32% jump from statistics reported a year ago.[67] Similarly, in the UK, a 2019 survey found that 40% of male managers were uncomfortable participating in a common work activity with a woman, including mentoring, working alone, or socialising together.[68] That was a 33% jump from how they felt before the media reports of sexual harassment.[69] In practical terms, this means that men would prefer to hire men and women would prefer to hire women.[70] This would

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60. Joann S. Lublin, *Synchrony's Margaret Keane Credits These Advisers With Helping Her Reach the Top*, WALL ST. J. (Aug., 14, 2021), https://www.wsj.com/articles/synchrony-margaret-keane-personal-board-11628885375?mod=searchresults_pos2&page=1.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* Key Findings, LEAN IN, https://leanin.org/sexual-harassment-backlash-survey-results#key-finding-1 (last visited Apr. 24, 2022).

67. *Id.*

68. *Id.*

69. *Id.*

70. Schipani, Dworkin & Abney, *supra* note 58, at 1088.

disproportionately disadvantage women because there are fewer women in hiring positions.

Even beyond this, the movement, and responses to the movement, have resulted in a heightened awareness regarding one's identity group, and consequently, a heightened bias in favour of members of their own group. This is concerning for many reasons. First, equality within corporations will only be possible when male colleagues (or other members of dominant groups) join the effort.[71] Second, splitting up the workforce into groups that distrust each other is unhelpful to both employees and to the firm which relies on employees being able to work effectively together.

Solutions on the lines of formal mentoring programs being instituted, scheduling meetings in public places, etc. have been suggested.[72] However, the underlying problem of distrust and fear that seems to have been an unintended consequence of #MeToo ought to be addressed.[73] As a longer-term solution, Schipani, Dworkin, and Abney have proposed that junior men should be mentored by senior women.[74] They suggest that senior women will not fear that there will be a perception of impropriety while interacting with junior men.[75] With the caveat that this proposal implicitly assumes that women will not assume positions of power like men have, the proposal is a useful one. It has the potential to encourage interactions across the groups and hopefully erase the fault lines in the longer term. This proposal also avoids the problems of diversity training which engenders defensiveness and feelings of being targeted in men (or, more generally, members of the dominant group) as discussed earlier. Rather, it will normalise interactions between men and women, and even help the junior men confront their implicit biases in an informal setting.[76] Research suggests that interacting with individuals helps reduce stereotyping based on group identity.[77] In the long term, as these junior men go on to hold more senior positions, their decision-making will be less biased against women.

In conjunction with the "women mentors" proposal, Schipani, Dworkin and Abney suggest including women in both hiring and promotion committees. The mentoring relationships will help the committee promote qualified individuals.[78]

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71. Debora L. Spar, *Good Fellows: Men's Role & Reason in the Fight for Gender Equality*, 149 DAEDALUS 222, 227 (2020) https://www.amacad.org/publication/good-fellows-mens-role-reason-fight-gender-equality.

72. Cindy A. Schipani & Terry Morehead Dworkin, *The Need for Mentors in Promoting Gender Diverse Leadership in the #MeToo Era*, 87 GEO. WASH. L. REV. 1272, 1295-96 (2019).

73. *Id.*

74. Schipani, Dworkin & Abney, *supra* note 58, at 1092–93.

75. *Id.* at 23.

76. *Id.* at 24–25.

77. Zaid Jilani, *How to Beat Stereotypes by Seeing People as Individuals*, GREATER GOOD MAG. (Aug. 28, 2019), https://greatergood.berkeley.edu/article/item/how_to_beat_stereotypes_by_seeing_people_as_individuals.

78. Schipani, Dworkin & Abney, *supra* note 58, at 28.

Such a system could prevent "brilliant jerks",[79] from being promoted since the more senior women will not fear the repercussions of reporting bad behaviour on the part of junior men. In a book written for investment management firms, authors Carr and Dudley suggested a data-based approach where firms periodically review the percentage of women versus men hired and promoted to examine whether the hiring and promotion processes reflected implicit bias.[80] This suggestion can be adopted by other organizations as well. Another aspect that suggests implicit bias seems to be the terminology used in advertising positions. Kjerstin Braathen, the chief executive of DNB in Norway has noted that some phrasing in job advertisements might appeal to men rather than to women.[81] Similarly, Vodafone was reportedly able to hire more women as a result of removing 'macho jargon' from job adverts.[82]

Not all the ideas discussed above will be relevant for every company. However, firms that genuinely aim to create inclusive cultures which not only eliminate overt discrimination and harassment but also implicit bias and the resulting barriers created for women will try to think of innovative solutions like these to combat implicit bias. These measures will bear dividends in the long term, if not immediately.

II. #BLACKLIVESMATTER

After the #MeToo movement had decelerated, 2020 saw the #BlackLivesMatter (BLM) become a prominent corporate governance movement. Despite the BLM having been formed in 2013,[83] the movement only caught corporate attention after the deaths of George Floyd and Breonna Taylor and the protests that followed.

To give some context to corporate responses to BLM in 2020, it is worth mentioning that the business community had already been steered in the direction of social justice issues by the Business Roundtable, a group of nearly 200 CEOs of America's largest corporations, and other market actors. The Business Roundtable had issued a statement on the purpose of the corporation in 2019, which addressed long-term shareholder values.[84] Although the statement began by reinforcing a belief in the free market system, it went on to make "a fundamental commitment to all stakeholders."[85] This was then further elaborated on by

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79. Netflix Culture, *supra* note 36.

80. ELLEN CARR & KATRINA DUDLEY, UNDIVERSIFIED: THE BIG GENDER SHORT IN INVESTMENT MANAGEMENT, 36-38 (2021).

81. Richard Milne, *Why Banks Must 'Own' Their Diversity Agenda*, FIN. TIMES (Nov. 17, 2020), https://www.ft.com/content/d1190611-5989-4eef-ba11-157deb988772.

82. Jane Bird, *How the Tech Industry Is Attracting More Women*, FIN. TIMES (Mar. 9, 2018), https://www.ft.com/content/d5d6035a-f63e-11e7-a4c9-bbdefa4f210b.

83. *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/#:~:text=In%202013%2C%20three%20radical%20Black,Trayvon%20Martin's%20murderer%2C%20George%20Zimmerman (last visited Mar. 21, 2022).

84. *Statement on The Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf.

85. *Id.*

stressing a commitment to customers, employees, suppliers, communities, and finally, "long-term value" for shareholders.[86] It is against this backdrop of having articulated a commitment to stakeholders and activism from institutional investors on stakeholder issues that corporate America's reaction to the BLM after the events in 2020 should be assessed. The Business Roundtable statement was heavily influenced by Lary Fink's open letter in 2019. Larry Fink, the head of Blackrock, one of the largest institutional investors, wrote to the CEOs of companies in which Blackrock invests urging them to run their businesses "with a purpose."[87] The letter identified challenges of the time, including stagnant wages, excessive nationalism, the danger of losing jobs to technology etc., which Fink argued required a move away from the pursuit of short-term shareholder returns.[88] This, according to Fink, should be what drives businesses to create value for stakeholders other than shareholders. For instance, he said[89]:

> *"...companies must embrace a greater responsibility to help workers navigate retirement, lending their expertise and capacity for innovation to solve this immense global challenge. In doing so, companies will create not just a more stable and engaged workforce, but also a more economically secure population in the places where they operate."*

The BLM movement, having initially re-started in 2020 in the form of protests aimed at addressing racism in the criminal justice system, eventually moved on to other areas, including corporations. Since this came in the context of #MeToo, institutional investor activism regarding the importance of stakeholders, and a reiteration of this focus on stakeholders by the Business Roundtable, corporations were quick to signal their support for BLM by making public statements. However, there were other, more tangible, responses too. Yet even amongst these, not all promised long-term solutions for the problem of racism within corporations. The responses can broadly be categorised into (1) those that were aimed at engaging various external stakeholders of the company, and (2) those that were aimed specifically at engaging employees. The discussion below will assess each of these two categories in turn.

A. ENGAGING STAKEHOLDERS

As an immediate reaction, a number of corporations made public statements in support of BLM. For instance, Amazon shared an essay on social media about what it was like to maintain professionalism amid racial trauma and encouraged

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86. *Id.*

87. Larry Fink, *Purpose & Profit*, BLACKROCK (2019), https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter.

88. *Id.*

89. *Id.*

employees of the company to take time to read the essay.[90] Such statements of support without follow-up actions were met with snarky comments on social media like "open your purse."[91] Eventually, firms including Amazon did so and made donations to organizations like the National Association for the Advancement of Coloured People.[92]

Some corporations took specific measures to address concerns of the consumer base. For instance, Walmart, Walgreens, and CVS announced that they would stop placing African-American beauty products in anti-theft cases.[93] Other corporations have attempted to engage Black suppliers. For instance, Sephora committed to devoting 15 percent of its shelf space to products from Black-owned businesses.[94] An example that addresses both customers and suppliers is that of Netflix adding a BLM genre to its service, to showcase the work of Black creators and Black history.[95]

A number of companies employed advertisements channelling the BLM movement to engage with consumers and with society more generally. For example, Procter & Gamble released an advertisement titled "The Choice," calling on white Americans to become allies, advocates, and activists in ending racial inequality.[96] Another company, Papa John's, released an advertisement, "Making A Difference," which ended with a quick mention of the brand's charitable contributions towards fighting racial injustice (among other causes).[97] Reactions to such advertisements and public statements from companies about their support for BLM have been mixed. While some ads were well-received, in other cases social media users criticized companies for making these statements and

90. Jeff Bezos (@jeffbezos), INSTAGRAM (May 30, 2020), https://www.instagram.com/p/CAzG5h8nWg5/; *see also* Levi Sumagaysay, *Companies Declared 'Black Lives Matter' Last Year, and Now They're Being Asked to Prove It*, MARKET WATCH (Mar. 6, 2021, 4:34 PM), https://www.marketwatch.com/story/companies-declared-black-lives-matter-last-year-and-now-theyre-being-asked-to-prove-it-11614972986.

91. Terry Nguyen, *Consumers Don't Care About Corporate Solidarity. They Want Donations*, VOX (June 3, 2020), https://www.vox.com/the-goods/2020/6/3/21279292/blackouttuesday-brands-solidarity-donations (The phrase was coined by a TikTok user and later went viral.).

92. For instance, Amazon donated $10 million to the NAACP and other groups supporting justice and equity. *See* Sumagaysay, *supra* note 90.

93. *Walmart, CVS, and More to Stop Locking Up Beauty Products for Black People*, DAZED BEAUTY (June 15, 2020), https://www.dazeddigital.com/beauty/head/article/49521/1/walmart-cvs-and-more-to-stop-locking-up-beauty-products-for-black-people.

94. Jemima McEvoy, *Sephora First to Accept '15% Pledge', Dedicating Shelf-Space to Black-Owned Businesses*, FORBES (June 10, 2020, 7:24 PM), https://www.forbes.com/sites/jemimamcevoy/2020/06/10/sephora-first-to-accept-15-pledge-dedicating-shelf-space-to-black-owned-businesses/?sh=606292574b02.

95. Todd Spangler, *Netflix Launches 'Black Lives Matter' Collection of Movies, TV Shows, and Documentaries*, VARIETY (June 10, 2020, 6:20 AM), https://variety.com/2020/digital/news/netflix-black-lives-matter-collection-1234630160/.

96. Simon Gwynn, *Ad Industry Says Brands Should Speak Out About Black Lives Matter*, CAMPAIGN US (June 12, 2020), https://www.campaignlive.com/article/ad-industry-says-brands-speak-black-lives-matter/1686233.

97. Ace Metrix, *Black Lives Matter Themed Ads See Success*, ACE METRIX: AN ISPOT.TV COMPANY (July 14, 2020), https://www.acemetrix.com/insights/blog/black-lives-matter-themed-ads-see-success/.

advertisements without effecting change within their own companies. In some cases, the criticism was not particularly well-informed. Saatchi & Saatchi's BLM statement on Instagram received a comment about the ad firm's lack of diversity in its top leadership team despite its global head, Magnus Djaba, being Black.[98]

However, there was also informed criticism from media commentators, scholars, and—most importantly—employees calling for corporations to clean house before making public statements. An article in the Harvard Business Review rightly noted that many employees were experiencing "statement fatigue," referring to companies that made statements without taking action.[99] The article quoted a tech company employee saying it was "ironic that senior leadership prioritized their public image when internally they dismissed or ignored the very Black voices that they claimed to care about."[100] This is not an isolated instance of employees feeling that the public stance of companies is not being reflected internally. A prominent example is that of Adidas, which was criticised by Black employees.[101] After Adidas' initial statement in support of #BlackLivesMatter, many employees posted on social media " detailing their experiences with discrimination in the workplace and arguing that the company's words — its public anti-discrimination stance — did not match its actions."[102] Adidasresponded with a social media post referencing its employees: "We've celebrated athletes and artists in the Black community and used their image to define ourselves culturally as a brand, but missed the message in reflecting such little representation within our walls." While some employees were satisfied with this statement, others were of the opinion that the company should have acknowledged the internal discrimination and apologised to its employees.[103] Instead, Adidas eventually announced diversity hiring goals.[104] It is true that both statements and tangible actions – whether in the form of donations, advertisements, or working with Black suppliers – do not address deeper issues of diversity within the corporation. Despite this, a relevant point to note is that the firm's commitment to Black customers or suppliers can have a positive impact on a diverse workforce, particularly Black employees, to the extent that it signals a commitment to fight racism. However, it will not have any impact, and sometimes can even have a negative impact as shown in the examples above, if companies do not follow up such actions with internal measures.

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98. Tom Braithwaite, *How Companies Decided That Black Lives Matter*, FIN. TIMES (June 5, 2020), https://www.ft.com/content/6bd46c48-ee90-42b8-af70-78d949025c1d.

99. Erin Dowell & Marlette Jackson, *"Woke-Washing" Your Company Won't Cut It*, HARV. BUS. REV. (July 27, 2020), https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it.

100. *Id.*

101. Julie Creswell & and Kevin Draper, *Adidas Pledges to Increase Diversity. Some Employees Want More.*, N.Y. TIMES (Aug. 14, 2020), https://www.nytimes.com/2020/06/10/business/adidas-black-employees-discrimination.html.

102. *Id.*

103. *See id.*

104. *Id.*

B. ENGAGING EMPLOYEES

In terms of issues relevant to workforce diversity, some companies pledged to appoint Black directors while others announced efforts to diversify the workforce more broadly. Reddit is notable in that one of its board members (and its co-founder) Alexis Ohanian resigned from the board and asked to be replaced by a Black person. The company then announced that Michael Seibel, Y. Combinator's CEO, would take Ohanian's place.[105] While this resulted in one Black person being appointed to Reddit's board, it does not seem like a long-term solution to the issue of appointing and then retaining diverse employees. Unless Reddit follows this up with specific mechanisms targeted at the workforce, this will just be a one-off reaction to the BLM movement. A number of companies came together in September 2020 to launch "The Board Challenge," which calls on companies to "pledge" to appoint at least one Black director within the next year.[106] While this may be a good start, simply pledging to appoint one Black director does not indicate a concrete plan for diversifying the entire workforce, and then retaining diverse employees (which is just as important as diversifying the board).[107]

Some corporations have looked deeper and sought to improve their workforce diversity. For example, Adidas (which also owns Reebok) announced that it would fill at least thirty percent of all new positions in the U.S. at Adidas and Reebok with Black and Latinx people. The company also stated it would be announcing a target aimed at increasing representation of Black and Latinx people within its workforce in North America.[108] In June 2021, the company reported on its progress in this regard, noting that about 30 percent of all positions had indeed been filled by Black or Latinx people. It also announced as new target that at least fifty percent of new hires for all open positions were to be filled with diverse candidates (in terms of gender, sexual orientation, disability, veteran, etc). Further, Adidas said that the company was targeting twenty to twenty-three percent Black and Latinx employee representation in corporate roles by 2025, and twelve percent in leadership positions

105. Nick Statt, *Reddit Names Y Combinator CEO Michael Seibel as Alexis Ohanian's Replacement*, VERGE (June 10, 2020, 5:00 AM), https://www.theverge.com/2020/6/10/21285835/reddit-board-replacement-alexis-ohanian-michael-seibel-y-combinator.

106. *About Us*, THE BOARD CHALLENGE, https://theboardchallenge.org/about-us/ (last visited Aug. 8, 2021).

107. Pippa Stevens, *Companies Are Making Bold Promises About Greater Diversity, But There's A Long Way To Go,* CNBC (June 11, 2020), https://www.cnbc.com/2020/06/11/companies-are-making-bold-promises-about-greater-diversity-theres-a-long-way-to-go.html (Pointing out that although improvements were being made in the realm of board diversity, statistics showed lack of progress in the wider workforce. "According to data from human resources consulting company Mercer, 64% of workers in entry level positions are white. In the top executive ranks, however, 85% of positions are held by whites, demonstrating the promotion gap that minorities face."); *see also* Cindi Howson, *To Make Real Progress on D&I, Move Past Vanity Metrics,* HARV. BUS. REV. (May 21, 2021), https://hbr.org/2021/05/to-make-real-progress-on-di-move-past-vanity-metrics (noting that it is important to track data across all levels of the organization and to be transparent about the findings).

108. *Message From the Adidas Board: Creating Lasting Change Now*, ADIDAS (June 9, 2020), https://www.adidas-group.com/en/media/news-archive/press-releases/2020/message-adidas-board-creating-lasting-change-now/.

in the U.S. by that time.[109] Companies like Salesforce and Snap Inc. have, apart from announcing similar diversity targets for their respective workforces, made their diversity data available to the public.[110]

Indeed, releasing such data makes it possible for institutional investors to engage more substantially with corporations on the issue of diversity, as Martinez and Fletcher have argued.[111] However, numerical disclosures are not the most effective tool to effect serious change. In fact, since disclosures open companies up to criticism, they incentivise manipulation. Even honest companies might not address systemic issues holding their employees back because their diversity resources have been expended on measuring, disclosing, and then responding to investor pressure to increase numerical representation.[112] A company that has already invested a great deal in measuring and messaging data to reduce reputational costs is unlikely to invest further resources to effect real change.

Some companies have committed to diversifying leadership positions. Uber aims to double the number of Black employees in leadership positions by 2025.[113] Pepsico declared its goal to increase Black managerial representation by thirty percent, and to more than double business with B lack-owned suppliers.[114] What measures will be taken to achieve these goals is not clear from the announcements.

While hiring more Black employees may be a better response for companies that do not have a diverse workforce, and setting targets to have more diverse candidates in leadership positions is the appropriate next step, as pointed out earlier, a mere focus on numbers is usually unhelpful. To achieve true diversity, it is important that there is an inclusive culture, as discussed earlier in the context of #MeToo, to ensure that Black members of the workforce are able to contribute

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109. *Fact Sheet: Progress on Creating Lasting Change Now,* ADIDAS (June 2, 2021), https://www. adidas-group.com/en/media/news-archive/factsheet/2021/fact-sheet-progress-creating-lasting-change-now/.

110. *See, We Believe in Equity for All,* SALES FORCE, https://www.salesforce.com/company/equality/ (last visited Aug. 9, 2021); Sarah Frier & Bloomberg, *Snap Unveils Diversity Numbers, Plans to Double Women and Minorities on Staff*, FORTUNE (July 29, 2020, 1:55 AM), https://fortune.com/2020/07/29/ snap-diversity-numbers-double-women-minorities/.

111. Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. FORUM 869, 869 (2021).

112. Alison Taylor, *More Disclosure is Not the Answer to Corporate Diversity Shortfalls*, QUARTZ AT WORK (June 30, 2021), https://qz.com/work/2027020/disclosure-is-not-the-answer-to-corporate-diversity-shortfalls/?utm_term=mucp ("With so much energy focused on gathering and reporting overwhelming amounts of data, people are too busy arguing over its accuracy and relevance, or manipulating it to get better ratings, and spending less time pressing for actual change.").

113. Lizette Chapman & Bloomberg, *Uber Pledges to Double Company's Black Leadership by 2025*, FORTUNE (July 17, 2020, 7:39 PM), https://fortune.com/2020/07/17/uber-double-black-leadership-2025/ #:~:text=Uber%20Technologies%20Inc.,a%20blog%20post%20on%20Friday.

114. Richard Feloni & Yusuf George, *These Are the Corporate Responses to the George Floyd Protests That Stand Out*, JUST CAPITAL (June 30, 2020), https://justcapital.com/news/notable-corporate-responses-to-the-george-floyd-protests/; *see generally Pepsico's Racial Equality Journey – Black Initiative,* PEPSICO. https://www.pepsico.com/about/diversity-and-engagement/racial-equality-journey-black-initiative (last visited Aug. 9, 2021).

without barriers. The Holder Report's recommendations on employee relations, board oversight of issues pertinent to the well-being of diverse employees, and training of HR and managerial staff to ensure that appropriate matters are escalated and addressed are a useful framework for companies to adopt in the context of Black employees as well. These practices are time- and resource-intensive, which probably explains why very few companies have gone down this path. More innovative solutions (as discussed in the context of #MeToo) like appointing mentors who are senior women, or in this context, senior employees of colour to junior members of the dominant (white) group, will be helpful in addressing implicit bias in the long-term.

A small number of companies have indeed taken steps that might suggest an interest in more long-term measures. DoorDash announced that it was creating a "Dashers of Color Council," a formal group to advise the company on issues facing the Black community in the organisation. It also stated that it would collaborate with experts to identify ways to combat bias on its platform.[115] This was in addition to other steps including a partnership with Kiva to match up to $150,000 in crowdsourced loans for Black business owners. The company also launched a "black-owned" tag for restaurants participating on DoorDash, offering $0 delivery fees from those establishments, as well as zero commission fees for thirty days for new Black-owned restaurants that sign up for its platforms.[116] PricewaterhouseCoopers (PwC) created a Diversity and Inclusion (D&I) Partner Advisory Council and announced that it would also be creating a D&I Staff Advisory Council.[117] While the former is a leadership committee that would consider diversity and inclusion issues, the latter would have employees from different levels of the hierarchy on the council, which would ensure that "staff from all levels and backgrounds will have a seat at the table to help build our plan, analyse the hundreds of suggestions that have been shared, and make decisions that impact their lives and wellbeing at the firm."[118] Staff involvement would have the potential to bring employee concerns to themanagement of that organization. This could have a genuine impact if management then acts to address these concerns. Even prior to BLM, PwC had deliberately focused on diversity over the past three years, and tripled hires from Historically Black Colleges and Universities.[119] Additionally, General Motors created an Inclusion Advisory

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115. Tony Xu, *Standing Together for Justice*, DOORDASH (June 3, 2020), https://blog.doordash.com/standing-together-for-justice-dc98cf164b7b.

116. *Introducing New Initiatives to Support Black-Owned Businesses on DoorDash and Caviar*, DOORDASH (July 8, 2020), https://blog.doordash.com/introducing-new-initiatives-to-support-black-owned-businesses-on-doordash-and-caviar-6b2b7cb4586c; Tatum Hunter, *These Companies Took Action in Support of #BlackLivesMatter*, BUILT IN (June 2, 2021), https://builtin.com/diversity-inclusion/companies-that-support-black-lives-matter-social-justice.

117. PWC, *What PWC Is Doing to Stand Up Against Racism*, https://www.pwc.com/us/en/press-releases/what-pwc-is-doing-to-stand-up-against-racism.html (last visited Aug. 9, 2021).

118. *Id.*

119. Nicholas Wyman, *How Cisco and PwC Turned Their Diversity Efforts into Measurable Results*, HR MORNING (Aug. 4, 2020), https://www.hrmorning.com/articles/improving-diversity/.

Board, consisting of eleven internal and external leaders to guide the company in improving inclusion and diversity.[120] The stated role of the Inclusion Advisory Board is to "consult with GM's Senior Leadership Team with the long-term goal of inspiring the company to be the most inclusive in the world."[121] Among the pro-diversity actions GM says it has taken since then, internal culture is addressed in what GM calls "Be Inclusive." GM describes this as follows[122]:

> This behavior involves creating moments every day that value backgrounds, opinions and ideas that may be different than a person's own. It also means creating opportunities where everyone can speak up and be heard, have active dialogue, be curious and value differences.

GM then goes on to explain what this means in practice[123]:

> Ways we are living this behavior include opening meetings with an inclusion message, in much the same way we open with a safety message. We also are encouraging employees to recognize others who model this behavior through our GM employee recognition system. We have added self-paced learning on DEI topics for employees to access for personal growth. We have additional materials designed to help leaders better understand and discuss these complex matters with their teams.

Some of this sounds promising. Obviously, real inclusion will come when the "inclusion message" at the start of the meeting translates into all participants being able to freely voice their views in that meeting, even when different from views expressed by most senior ranking members in the room. Similarly, while employees recognizing others who model inclusive behaviour sounds good in principle, the nuts and bolts of how something like that works in practice will be important.

Overall, while the constitution of diversity bodies with the sorts of aspirations highlighted in the two examples above would suggest that the companies are keen to reduce barriers for B lack and other diverse employees, we will have to wait and see what sorts of measures they take and how sustained the efforts will be.

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120. *Inclusion Advisory Board,* GM, https://www.gm.com/our-company/leadership/inclusion-advisory-board.html (last visited Aug. 9, 2021); Kalea Hall, *GM Names Members of New Inclusion Advisory Board*, DETROIT NEWS (June 22, 2020, 5:17 PM), https://www.detroitnews.com/story/business/autos/general-motors/2020/06/22/gm-names-members-newly-formed-inclusion-advisory-board/3236091001/.

121. *Creating an Inclusive Culture,* General Motors, https://www.gmsustainability.com/material-topics/fostering-diversity-equity-and-inclusion/creating-an-inclusive-culture.html (last visited Apr. 24, 2022).

122. *Id.*

123. *Id.*

Hiring diversity officers and related positions also increased by fifty percent in response to BLM. Interestingly, such jobs had been slashed in the wake of the Covid-19 pandemic, which began a few months before the BLM protests in the U.S. The sudden uptick in postings after BLM indicates that companies were responding to the backlash from their public support of BLM. In one glaring example, Thumbtack, which laid off its diversity and inclusion lead due to the impact of the pandemic, sought to hire a new lead just two months later.[124] So even companies that saw the position as one which could be sacrificed in an economic crunch seem to have hired diversity officers. However, hiring a diversity officer is not a solution unless the person appointed to the role is given both authority and resources to effect change. As Roianne Nedd, global head of inclusion and diversity at a management consultancy firm warns, "if they do not force their workplaces to reckon with hard truths, diversity executives become glorified event planners."[125] For this, the mandate of the diversity officer should obviously go beyond organizing diversity events. They should be allocated the budget required to address diversity issues. At the same time, they should have the support of the board and the CEO to effect change.

Even beyond the statements of support about BLM, donations, BLM related ads, and measures like working with Black suppliers, hiring diversity officers, and diversifying the workforce, companies have come to realise that millennials and Gen Zers expect them to take a public stand on political issues. Such corporate political activism, which has come to be known as woke capitalism[126], has become more pronounced after BLM. However, there is also a dark side to such activism as I will discuss in the section below.

III. CORPORATE ACTIVISM AND SHORT-TERMISM

Corporate activism on political issues might have a positive impact. However, increased pressure via social media by members of society seems to be pushing companies to take hasty decisions aimed at calming the social media backlash without consideration of long-term consequences.

To first consider the positive implications, corporate activism in response to social media pressure could result in ethical conduct and support for social justice issues because, as the examples discussed above indicate, mere signalling without

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124. Jenna McGregor, *Diversity Job Openings Fell Nearly 60% After the Coronavirus. Then Came the Black Lives Matter Protests*, WASH. POST (July 15, 2020), https://www.washingtonpost.com/business/2020/07/15/diversity-jobs-coronavirus-george-floyd-protests/.

125. Taylor Nicole Rogers, *Black Lives Matter Ushers in New Era for Diversity Officer*, FIN. TIMES (Jan. 27, 2021), https://www.ft.com/content/0147a2af-3c3d-4e05-9463-8b91d221e9be.

126. This phrase has gained usage from both sides of the political spectrum. *See* Stefan J. Padfield, *Corporate Governance and the Omnipresent Specter of Political Bias*, 104 MARQ. L. REV. 47, 76–77 (2020). Padfield says that the term woke has found a broad application. Although Sharfman and Moore have argued that the phrase "woke capitalism" should be retired because it is meaningless, its wide adoption means that the phrase is here to stay. *See* Bernard Sharfman and Marc Moore, *The Corrupting Influence of the Term 'Woke Capitalism'*, REAL CLEAR MARKETS (July 14, 2021), https://www.realclearmarkets.com/articles/2021/07/14/the_corrupting_influence_of_the_term_woke_capitalism_785334.html.

supporting actions will be called out. Insincere corporations will be publicly shamed, after which they will respond with corrective behaviour. Further, social movements can benefit from corporate resources. In turn, corporations could be rewarded with enhanced value both by investors and consumers that see the corporation's actions align with their views.[127]

However, a closer examination might reveal possible negative consequences. It is not certain that corporate hypocrisy with respect to social justice issues will be identified and called out. Social media users are not necessarily investigating individual corporations in detail. Tweets or posts that go viral are not always the most informed ones. In fact, the identity of the author is immaterial. Sometimes the post may be factually incorrect. Millennials and Gen Zers distrust corporations and financial institutions, particularly after the global financial crisis, because of popular issues like income inequality and growing CEO compensation figures.[128] All of this might taint some of their assessments of corporate actions. Even assuming that corporate hypocrisy is appropriately identified and results in social media pressure for course correction, in most cases the response is only aimed at quelling the backlash in the short- term without long-term measures.

One example of a knee-jerk reaction is that of Apple firing Antonio Garcia-Martinez, who had been hired as an advertising technology engineer just a month earlier, because of what it termed as "discriminatory behaviour" on his part.[129] According to Garcia-Marinez, there was no discriminatory behaviour. Instead, his firing was the result of an outcry over a passage in his non-fiction book which is reproduced below[130]:

> Most women in the Bay Area are soft and weak, cosseted and naive despite their claims of worldliness, and generally full of shit. They have their self-regarding entitlement feminism, and ceaselessly vaunt their independence, but the reality is, come the epidemic plague or foreign invasion, they'd become precisely the sort of useless baggage you'd trade for a box of shotgun shells or a jerry can of diesel.

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127. *See* Lin, *supra* note 1, at 1574–82.

128. *The Deloitte Global 2021 Millennial and Gen Z Survey*, DELOITTE (2021), https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html (Less than half of millennials and Gen Zers surveyed see business as a source of good in society. This negative view of business is largely influenced by the financial crisis). *See* Tunku Varadarajan, *Can Vivek Ramaswamy Put Wokeism Out of Business?*, WALL ST. J. OP. (June 25, 2021, 3:33 PM), https://www.wsj.com/articles/can-vivek-ramaswamy-put-wokeism-out-of-business-11624649588?mod=searchresults_pos8&page=1 ("By the end of the crisis, Americans 'were actually pretty jaded with respect to capitalism. Corporations were the bad guys. The old left wanted to take money from corporations and give it to poor people'.").

129. Tim Higgins, *Former Apple Engineer Accuses Company of Defamatory Statements Over Dismissal*, WALL ST. J. (May 14, 2021, 10:06 PM*)*, https://www.wsj.com/articles/former-apple-engineer-accuses-company-of-defamatory-statements-over-dismissal-11621044377.

130. Matt Taibbi, *On the Hypocrites at Apple Who Fired Antonio Garcia-Martinez*, TK NEWS BY MATT TAIBBI (May 14, 2021), https://taibbi.substack.com/p/on-the-hypocrites-at-apple-who-canceled?fbclid=IwAR2EvNdCVrCyIvfEI-mY436ESGSnFL3VkH9C14eFbbFHvGDUu9zdkomIdaE.

Nearly 2,000 Apple employees signed an internal petition criticizing Garcia-Marinez's hiring based on this passage.[131] Many employees had also criticised the hire on social media.[132] For his part, Garcia-Martinez has been contrite. The Wall Street Journal reported that Garcia-Marinez said the book "is not me now, it wasn't even me then" and that he "was trying to create a style in my naive, first-time book writer sort of way, which in retrospect, I think was a mistake and I regret much of it."[133] So not only was there no workplace misconduct as was implied in Apple's statement, but Garcia-Marinez has also expressed contrition for that passage. Further, Apple sought Garcia-Martinez out rather than the latter applying for the job, and knew of Garcia-Martinez' book when he was hired, as is evident from the fact that they questioned his referees about it.[134] Since Apple chose to hire him well aware of the book, his firing implies that the company was now merely trying to prevent social media outrage. The incident could have been used as a chance to have internal discussions about why Garcia-Marinez's statement was problematic and how such generalizations can be harmful.[135] Instead, by firing the employee for a past action, Apple seems to have simply reacted to the social media outcry. Cuban-American Garcia-Marinez notes that the action is ironic because he is, in his own words, one of the few people of colour who had risen to a senior level.[136] Ultimately, Garcia-Marinez's identity should not matter regarding whether the behaviour in question warranted the firing. However, as one columnist has said, the move seems to be an effort to protect Apple's " brand and bottom line" rather than to protect its employees.[137] I will qualify that assessment and add that Apple's brand and bottom line in the near-term was being prioritised. The incident is likely to further mark out the fault lines between men and women in the workplace, which as discussed above in the context of #MeToo, is not good for equality in the firm.

The Apple incident is not an isolated example of firms coming under pressure to make a quick decision without a view to long-term improvements. Firms that started disclosing diversity metrics after BLM might also fall under this category if they did not complement such disclosures with a more sustained focus on creating a firm culture that values diversity. This pattern is reminiscent of the kind of myopic decision-making that has been criticised in the context of investor

131. Shirin Ghaffary, *How Angry Apple Employees' Petition Led to a Controversial New Hire's Departure*, VOX (May 13, 2021), https://www.vox.com/recode/2021/5/13/22435266/apple-employees-petition-controversial-antonio-garcia-martinez-new-hire-departure.

132. Tyler Sonnemaker, *Apple Engineer Leaves Company After Employees Speak Out About His 'Misogynistic' Past Comments*, BUS. INSIDER AUSTL. (May 13, 2021), https://www.businessinsider.com.au/apple-employees-speak-publicly-about-misogynistic-hire-2021-5?r=US&IR=T.

133. Higgins, *supra* note 129.

134. Jemima Kelly, *What Happens When Virtue-Signalling Enters Corporate Life*, (May 20, 2021) FIN. TIMES, https://www.ft.com/content/a01eed6c-966d-4e99-9700-f15d4c022617.

135. Akshaya Kamalnath, *Apple and Diversity*, HITCHHIKER'S GUIDE TO CORP. GOVERNANCE (May 16, 2021), https://corporatelawacademic.wordpress.com/2021/05/16/apple-diversity/.

136. Kelly, *supra* note 134.

137. *Id.*

activism. The conventional narrative in that context is that activist investors (typically, institutional investors like hedge funds) pressure management to maximise profits in the short-term and prevent the corporation from pursuing long-term goals that benefit all stakeholders.[138] This view of investor activism is also expressed in the context of allowing founders of innovative companies to have higher voting rights attached to their shares, so that they are able to realise their vision of the company without investor pressure to maximise short- term returns.[139] Similarly, when companies play to the gallery and make decisions to address social media criticism in the moment, while they might make temporary reputation gains, they also open themselves up to more serious future issues.

In some cases, even temporary gains do not materialise because issues may be divisive enough to result in backlash no matter which side the company takes.[140] Further, social media trends do not always accurately reflect society's preferences. Social influence or peer influence on social media tends to cause " herding" i.e., the tendency to follow others.[141] A few " influencers" on these networks are responsible for starting trends, and these influencers are not necessarily well-informed or objective when evaluating issues.[142] Further, people who do not agree with the popular view tend to censor themselves.[143] According to a recent study, urbanites and well-educated individuals are more inclined to self-censor.[144] This would imply that the most well-informed and studied views are not part of the social media outrage. Further, a survey conducted by the Cato Institute found that over 50 percent of respondents (people across all age groups) said that the political climate prevented them from saying what they believed because others

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138. Mark R. DesJardine & Rodolphe Durand, *Disentangling the Effects of Hedge Fund Activism on Firm Financial and Social Performance*, 41 STRATEGIC MGMT. J. 1054-1082 (2020). The article finds that the benefits of hedge fund activism are shareholder centric and short-lived. These benefits however come at 'a mid- to long-term cost to other stakeholders, captured by decreases in operating cash flow, investment spending, and social performance'.

139. *See, e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 590 (2016).

140. Marianne M. Jennings, *The Social Responsibility of Business Is Not Social Responsibility: Assume That There Are No Angels and Allow the Free Market's Touch of Heaven*, 16 BERKELEY BUS. L.J. 325, 404–05 (2019).

141. SINAN ARAL, THE HYPE MACHINE: HOW SOCIAL MEDIA DISRUPTS OUR ELECTIONS, OUR ECONOMY, AND OUR HEALTH AND HOW WE MUST ADAPT 225–30 (Penguin Random House, 2020).

142. *Id*. at 250–53.

143. Eileen Brown, *Here's Why More US Employees Self-Censor Social Media Posts*, ZD NET (Oct. 11, 2019, 2:09 PM), https://www.zdnet.com/article/heres-why-more-us-employees-self-censor-social-media-posts/ (noting that 36% of the employees surveyed said that they avoided posting about political feelings on social media). *See also* James Vincent, *The 'Spiral of Silence': How Social Media Encourages Self-Censorship Online*, INDEPENDENT (Aug. 27, 2014, 9:59 AM), https://www.independent.co.uk/life-style/gadgets-and-tech/spiral-silence-how-social-media-encourages-self-censorship-online-9693044.html?; Alexis C. Madrigal, *71% of Facebook Users Engage in 'Self-Censorship'*, ATLANTIC (Apr. 16, 2013), https://www.theatlantic.com/technology/archive/2013/04/71-of-facebook-users-engage-in-self-censorship/274982/.

144. James L. Gibson & Joseph L. Sutherland, *Keeping Your Mouth Shut: Spiraling Self-Censorship in the United States* (June 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647099.

might find their views offensive.[145] This would indicate that social media activism is not indicative of even a majority of millennials and Gen Zers. To add to this, the online crowd's numbers are sometimes inflated by the use of bots, and companies making decisions regarding responses to social media controversies usually do not have time to verify this or other risks involved.[146]

Considering the above problems, it would be prudent for firms to assess decisions with the goal of achieving sustained change, rather than simply aiming to assuage social media outrage. Since social media reactions will often involve a number of individuals without a real stake in the firm, for matters of diversity it may be more useful to primarily focus on addressing employee concerns. A company that simply takes a virtuous stand in public without solving internal issues might further alienate employees. This is not to say that other stakeholders, like suppliers, are unimportant. Companies like Netflix and Sephora that are aiming to promote B lack suppliers (or content creators in the case of Netflix) might indeed help empower B lack artists and entrepreneurs.[147] The concern is when the corporate decision is aimed at signalling virtue to the online crowd without changing how the company works with stakeholders on a daily basis.

The forces behind these social movements – generational preferences and social media – are here to stay.[148] While #MeToo seems to have resulted in important improvements like specific representations in merger agreements and in termination clauses of employment agreements, a cultural shift can be brought about only by incorporating measures of the sort outlined in the Holder Report. Many of these measures will address issues for other diverse individuals, whether B lack and Latinx members, people with different views, or any other facet of diversity. Such measures will bear rewards over a period of time by ensuring that misconduct of any sort can be addressed ex ante, and by promoting talented employees.

Beyond working on improving firm culture, boards and management should be prepared for social media activism on various issues. While these external pressures cannot be controlled, companies can control their own conduct. Clearly stating some guiding ethical principles and acting accordingly will be important

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145. Cato Institute, *Cato Institute Summer 2020 National Survey* (2020), https://www.cato.org/sites/cato.org/files/2020-07/Crosstabs_Political%20Climate_0.pdf.

146. Jennings, *supra* note 140, at 405–06. Jennings argues that social media outrage may not necessarily be the "work of angels" in light of how bots may be used on social media to run up numbers on an issue.

147. *See* CAROL FULP, SUCCESS THROUGH DIVERSITY: WHY THE MOST INCLUSIVE COMPANIES WILL WIN 142 – 160, (Beacon Press, Boston 2018). Fulp discusses the importance of engaging with diverse suppliers.

148. *But see* Zaid Jilani, *The End of "Cancel Culture"?*, PERSUASION (July 23, 2021) https://www.persuasion.community/p/the-end-of-cancel-culture. A poll by Morning Consult found that Cancel Culture (publicly shaming people with different views) was unpopular amongst a majority of all the generations. Based on this, Jilani wonders if cancel culture might have already peaked. The poll results do not support this inference because a small but vocal minority seems to be driving these social media movements, thereby resulting in the unfortunate consequence of cancel culture.

in an environment where corporate actions are susceptible to online criticism that can prove costly. Such statements of what social issues the corporation will prioritise and address will be firm-specific.[149] One way of figuring out what matters to the important stakeholder group of employees is by conducting anonymous employee surveys and then channelling the results into decision-making. Take the example of SkyUp Airlines, a Ukrainian Airline which announced in October 2021 that it would replace the old uniform for flight attendants with a comfortable alternative that includes trainers instead of high heels. This decision was based on a survey which revealed that female employees were fed up with the previous uniform of tight blouses, pencil skirts, and high heels.[150] Such tailored solutions would allow companies to distinguish themselves from their competitors. The competition could even lead to innovative solutions to social problems. Fulp proposes doing this by means of the Company Code and Mission Statement.[151] A predetermined set of principles, whether contained in the Company Code Mission Statement, or some other policy document that consolidates the company's position on behaviour that is desirable and undesirable and the consequences that will follow, can help the company take decisions consistently rather than in response to a social media storm. This still may not prevent antagonising some people who are not well-informed and whose views may be coloured by their distrust of corporations. However, in the long-run those stakeholders that regularly interact with the corporation, employees, and suppliers, will spread positive information about the company.

From the perspective of social movements, it is more helpful to their broader causes if corporations genuinely work towards the goals sought rather than simply bowing to social media pressure. Insincere corporate social justice initiatives are not uncommon and have come to be known as woke-washing (similar to greenwashing in the context of environmental action).[152] Fan argues that

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149. Sally Wheeler, drawing from Aristotle's virtue ethics principles, proposes that corporations set their own standards for contributions to society against the backdrop of accumulated choices of other individuals in the community. In her conception, corporations are treated as individuals while superimposing the virtue ethics model on corporate behaviour. *See* SALLY WHEELER, CORPORATIONS AND THE THIRD WAY 85 (Bloombury Publishing 2002).

150. Zhanna Bezpiatchuk, *Budget Ukrainian Airline Swaps High Heels for Trainers*, BBC NEWS (Oct. 3, 2021), https://www.bbc.com/news/world-europe-58755872.

151. FULP, *supra* note 147, at 168–74 (proposing to do this by means of the Company Code and Mission Statement). *See also* Lin, *supra* note 1, at 1601 (proposing that companies establish protocols for how they should respond to pressing social activism in a manner that will "enhance firm value while minimizing bad publicity, reputational damage, and economic harm to the company").

152. Dowell & Jackson, *supra* note 99. A particularly ridiculous example of an insincere attempt to take a pro-social stand is that of a company (Lululemon) promoting anti-capitalist workshops. After some social media outrage over the incongruity of a company that sold pricey clothing hosting events with "anti-capitalism" themes, Lululemon deleted the posts in question. The episode is another example of corporations attempting to play to the gallery (on social media) without putting much thought into possible negative impacts on the company. *See* Melissa Lopez-Martinez, *Lululemon Faces Backlash for Promoting Workshop to 'Resist Capitalism*, CTV NEWS (Sept. 12, 2020, 1:14 PM), https://www.ctvnews.ca/lifestyle/lululemon-faces-backlash-for-promoting-workshop-to-resist-capitalism-1.5102303.

corporations, like social movements, can play a role in reorienting the law to address evolving social understandings.[153] This seems to be true when one considers some of the changes brought by #MeToo. However, if companies do not undertake sustained efforts to retain and promote diverse candidates, the gains of the movement (like #MeToo representations) could eventually fall away.[154]

IV. LONG-TERM ISSUES

Since the focus of this article has been on corporate responses to social movements vis-à-vis diversity, the discussion thus far has focused on #MeToo and BLM, which have brought up issues of harassment and discrimination. Because these two movements focused on the lack of diversity in company leadership and the workforce more generally, this article has also discussed unconscious bias, which is a significant barrier that diverse employees and executives face.

Another major barrier faced by women in particular is the societal expectation that they undertake care responsibilities. Although the issue is an old one and has not been the main focus of the social movements discussed thus far in this article, it is an essential element of the diversity conversation. Incidentally, Covid-19 and consequent lockdowns which brought the issue into sharp focus might have shown us that it is not unsolvable.The lockdowns have required all employees to work from home for a period of time. Despite missing out on face-to-face interactions, corporate managers saw that flexible working was possible. Although women have faced more burdens during the pandemic because of child care becoming unavailable, the Covid-19 experience might help some companies provide flexible work options to all employees when needed. A McKinsey survey notes that some companies are already doing this in order to tap into the pool of employees who could not move to "superstar cities" because of family or commitments.[155] For companies to ensure that talented employees will feel comfortable opting for remote or flexible work arrangements, it is important that the employees have the same access to promotion and other opportunities as those who are working in-person. This is an important area where firms should consider internal innovations that set them apart from others. Although this is not an issue that has been caught in the #MeToo movement, it is a long-term barrier that women (and some others based on their circumstances) have faced. The pandemic may have highlighted the need for remote work options as pertinent to all

153. Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9(2) HARV. BUS. L. REV. 441, 451 (2019).

154. *Id.* at 488–89. Fan speculates, in the context of corporate activism against the Muslim ban (referring to former US President, Donald Trump's Executive Order No. 13769 'Protecting the Nation from Foreign Terrorist Entry into the United States'), the support of tech companies waned as the movement continued either because of decreasing public interest or because of companies' moving on to other pressing matters.

155. Susan Lund et al., *The Future of Work After COVID-19*, MCKINSEY GLOB. INST. (2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19.

employees rather than just women, and that might give it the necessary impetus. Efforts to diversify the workforce should take steps to address this barrier.

Women tend to drop out of the workforce, not only due to child care responsibilities but also later during menopause. While the former point has been discussed widely, the latter point has been given little attention. A 2019 survey conducted by BUPA and the Chartered Institute for Personnel and Development found that 900,000 women in the UK left their jobs due to menopause related symptoms.[156] In response, the UK government has launched an inquiry in July 2021 to see how this could be addressed.[157]

Viv Groskop points at another simple issue that is not restricted to women or minorities. She talks about "hierarchy" itself becoming a source of workplace toxicity when an employee is expected to respond to their superior's email at all hours even when there is no urgency, just to reinforce the superior's weak sense of authority.[158] Although Groskop says that #MeToo and BLM show a resistance to hierarchy, these movements and social media storms don't directly address the broader issue of hierarchy enabling toxic work cultures. Certain types of employees (younger people, those belonging to racial minorities, women, those who might have disagreed with their superior's views) may be more vulnerable to hierarchical issuesbecause they are not seen as part of the in-group. However, the existence of hierarchical practices are likely to contribute to the overall work culture in the firm.

The issues discussed here are examples of important concerns that do not get picked up by social movements. Thus, companies should first focus on figuring out problems relevant to their workforce and then come up with policies and programs geared towards solutions that can change the culture in the long-term. This will help attract and retain a diverse workforce. Ultimately, this is more helpful than reliance on what the media and more general conversation on social media is focused on, on any given day.

V. CONCLUSION

The social movements discussed above signify, to a certain extent, a shift in power from institutional investors to members of the general public, in terms of being able to push corporations on ESG issues, and particularly diversity. It also points to a new age where stakeholders (including members of society who might never have directly interacted with the company) are able to communicate, cooperate, and coordinate with each other on specific issues via social media. In other

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156. Ashleigh Webber, *Swathes of Women Taking Long-term Leave for Female Health Symptoms* (Dec. 5, 2019), https://www.personneltoday.com/hr/swathes-of-women-taking-long-term-leave-for-female-health-symptoms/.

157. *An Invisible Cohort: Why Are Workplaces Failing Women Going Through Menopause?*, UK PARLIAMENT (July 23, 2021), https://committees.parliament.uk/committee/328/women-and-equalities-committee/news/156760/an-invisible-cohort-why-are-workplaces-failing-women-going-through-menopause/.

158. Viv Groskop, *Hierarchy Matters at Work, So Why Aren't We Talking About It?*, FIN. TIMES (Aug. 15, 2021), https://www.ft.com/content/7116b638-3e96-47c3-b26a-1e6f78ea0bdc.

words, they are able to overcome the classic collective action problem.[159] Because of these forces, corporations have been compelled to countenance significant social justice issues including diversity. This article has described corporate responses meant to appease the online crowd rather than to initiate real change, and argued instead that long-term change should be prioritised. The social movements described here might also have contributed to legislation on diversity in corporations, and to shareholder activism on the issue. Further, while both #MeToo and #BLM have resonated internationally, their impact on business behaviour and on legal reform might be less pronounced than in the U.S.

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159. *See* Aral, *supra* note 141, at 260–67 (discussing how social media helps overcome the classic collective action problem in various contexts).