Why Corporate Boards Should Include LGBTQ+ People

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INTRODUCTION

Corporate boardrooms sit at the heart of most of society's most consequential decisions but fall far short of the diversity of our society. The current movement toward board diversification aims to remedy the underrepresentation of marginalized groups on corporate boards. More recently, some efforts have included LGBTQ+ people, even though the basis for their inclusion on corporate boards remains largely unstated. This Article examines both the normative and instrumental bases for LGBTQ+ inclusion in board diversity initiatives, articulating unspoken assumptions and linking LGBTQ+ people to the broader inclusion effort. In so doing, it begins to surface the unique issues LGBTQ+ inclusion raises, understanding of which is critical to making any such policies work.

Gay corporate leaders are paradoxically nowhere but everywhere. Openly LGBTQ+ people represent less than 0.3% of Fortune 500 corporate board members[1] (twenty times lower than their 5.6% representation in the total US population).[2] Even so, it is likely that many uncounted closeted directors serve in board roles. For these directors, the fear of exclusion overshadows a prouder existence, and ticking an LGBTQ+ box may feel more like an unwanted disclosure. Heterosexism's

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1. OUT LEADERSHIP, QUORUM: OUT LEADERSHIP'S LGBT+ BOARD DIVERSITY AND DISCLOSURE GUIDELINES 2 (2019), http://www.insurance.ca.gov/diversity/41-ISDGBD/GBDExternal/upload/Quorum-Template-Board-Diversity-Guidelines-2019-Mar.pdf [https://perma.cc/GEJ3-SY29]. It is also worth noting that these leaders are mostly white, like corporate leadership in general. *Id.*

2. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx [https://perma.cc/VTB2-ULHW].

historical power has yet to subside, even though some LGBTQ+ people wield substantial social and economic capital.[3]

Perhaps no corporate leader exemplifies these tensions as much as Tim Cook, the CEO of Apple, does. Cook's identity as a gay man was not widely known when he assumed the top job at Apple in 2011, shortly after Steve Jobs, the founder, had died.[4] But nearly immediately, stories about his sexual orientation surfaced in the press.[5] In the aftermath of Cook's outing, a public debate erupted about whether Cook should come out. Some noted his status as a role model, while others emphasized his privacy,[6] noting that it was not his personal responsibility to represent the broader LGBTQ+ community.[7]

Cook's story underscores both representation's value and the thorny role of closetedness in understanding LGBTQ+ diversity. That one of the most powerful people in the world would feel pressure to hide proves on its own the burden that all LGBTQ+ corporate leaders must face in deciding whether to publicize their identity. While representation matters, counting LGBTQ+ people for diversity purposes requires an exposure of one's privacy that is unique to this group, and uniquely fraught.[8]

3. For example, it was not until January of 2021 that the state of New York eliminated false accusations of homosexuality as grounds for a libel per se lawsuit. *See* Laguerre v. Maurice, 192 A.D.3d 44, 52–53 (N.Y. App. Div. 2020). Under New York law, examples of defamation per se include falsely accusing someone of a heinous crime or having a "loathsome disease." *Id.* at 51. Falsely claiming that someone is homosexual had also been lumped in as something so shameful that it was assumed that target's reputation was injured by it. *See id.* As to the issue of social and economic capital, despite the issue of the closet—or perhaps because of it—some LGBTQ+ people are economically successful and wield enormous social capital, raising the question of whether boardroom access for such individuals requires government intervention at all or can be resolved through the normal workings of market forces. Racial minorities often face additional barriers to entry and that will inevitably prove more challenging for those who are also LGBTQ+.

4. *See* Press Release, Apple, Steve Jobs Resigns as CEO of Apple (Aug. 24, 2011), https://www.apple.com/newsroom/2011/08/24Steve-Jobs-Resigns-as-CEO-of-Apple [https://perma.cc/QWX2-KP36].

5. One story from gossip website Gawker demonstrated the difficulty of disentangling sexuality and sexual identity. As one commentator put it, "Unfortunately, [Gawker] also decided to talk about what types of guys [Cook] was into. When you decide to make someone's sexuality an issue, inappropriate and tasteless are often just around the corner." Erik Sherman, *Why Apple CEO Tim Cook's Sexual Identity Isn't—or Shouldn't Be—News*, CBS News (Aug. 29, 2011), https://www.cbsnews.com/news/why-apple-ceo-tim-cooks-sexual-identity-isnt-or-shouldnt-be-news [https://perma.cc/2QWL-MPLS].

6. *Id.*

7. *Id.*

8. *See* HUMAN RIGHTS CAMPAIGN FOUND., A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE 6 (2018), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/AWorkplaceDivided-2018.pdf [https://perma.cc/M96L-DNPS] (listing dangers that reasons that keep LGBTQ people closeted at work). Some object to diversity efforts in corporate leadership, arguing it may be hard to justify a legal policy meant to help historically marginalized groups being used to benefit a cadre of people that has often had little trouble gaining advantage without government help. We also acknowledge that the dearth of openly LGBTQ+

Moreover, as Tim Cook's example also highlights, the burdens of exclusion and benefits of inclusion fall differently on LGBTQ+ people of different races and genders. One may wonder whether Tim Cook, a white man who, by any standard, enjoys privileges unavailable to most people in the world, is truly burdened by discrimination, and his example shows that he needed no special assistance to attain his role. On the other hand, his fear of coming out demonstrates the continued potency of the closet—if it is so bad for even the most successful, it must fall even more heavily on those with race and gender identities that have historically been shut out of power.

The issue of LGBTQ+ diversity surfaces in the context of a larger debate over racial and gender diversity on corporate boards. The messy set of issues raised by LGBTQ+ identities against the backdrop of the larger debate may make it easier for public actors to leave the rationale for LGBTQ+ inclusion unaddressed. However, we argue that to avoid an explicit discussion of LGBTQ+ diversity on corporate boards would be a mistake for two reasons. First, inclusion mandates require sound rationales, and legitimacy is a crucial consideration. If the questions that such policies might raise remain unasked now, they will surely be asked later, possibly by those acting with less-than-good faith motives. Second, we should clarify *why* we include LGBTQ+ people in corporate equality mandates, because failing to do so will hinder *how* we achieve inclusion. LGBTQ+ inclusion may prove more complex not only because of closetedness, but also because the term itself is an umbrella for numerous different identities and experiences which cannot all be analyzed within a singular universal framework. As the Tim Cook example illustrates, these factors complicate any analysis of how outsiderness and privilege interconnect.

This Article argues that a firm rationale exists for LGBTQ+ inclusion. Despite the past decade of progress on LGBTQ+ legal rights, visible LGBTQ+ representation in corporate boardrooms is virtually nonexistent. Even where they are present, LGBTQ+ people face numerous challenges. Gendered and sexualized notions of boardroom professionalism make it difficult for many LGBTQ+ people to be open about their identity, especially in certain industries.[9] The corporate hierarchy's history of excluding racialized people would undoubtedly

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directors may also be related to the large numbers of LGBTQ+ people whose lives were cut short by the AIDS crisis. Nonetheless, it is unlikely that that AIDS crisis is the predominant explanation, given the low level of representation despite the large numbers of board-eligible LGBTQ+ people alive today.

9. Joshua C. Collins & Jamie L. Callahan, *Risky Business: Gay Identity Disclosure in a Masculinized Industry*, 15 HUM. RES. DEV. INT'L 455, 456 (2012).

aggravate such phenomena for LGBTQ+ people of color. Furthermore, high-level LGBTQ+ executives perceive greater adverse effects from coming out publicly compared with their lower-level counterparts. John Browne, former chief executive of British oil giant BP, made this point emphatically after he resigned following his outing by the tabloids.[10] He noted that "getting board members to volunteer this information will not be easy. From my own experience, and from conversations with other senior business leaders, people at the top of companies are reluctant to come out because they believe that their private life is private and separate from their professional role."[11] These adverse consequences form a vicious circle of a lack of representation.

Such representation is important, however, because sexual orientation and gender identity differences prove meaningful in professional contexts. As with all diversity, these differences are crucial in elite decision-making spaces like corporate boards. Our aim is to engage intellectually, honestly, and curiously with questions about why LGBTQ+ people ought to be included in diversity measures. Our curiosity should not be understood as disagreement. However, the answer to "why" such inclusion is good is so very complex—perhaps even fraught—that policymakers prefer to advance inclusion without explaining why they are doing so or engaging with the difficulties of creating effective regulation.

The relative silence on reasons for LGBTQ+ inclusion stands in stark contrast with the wealth of argumentation for gender and racial board diversity. We break this argumentation into two broad categories, the "business case," dealing with economic rationales for inclusion, and the "normative case," encompassing moral and social justice rationales. The business case embraces arguments that diverse boards lead companies to function better. This set of rationales helped spur Norway to adopt one of the first such initiatives, its pioneering 2003 quota for women on corporate boards.[12] Since then, nearly all the world's leading economies have adopted some provision for including women in corporate governance. It's not just governments, but industry, non-profits and firms accept the idea

10. James B. Stewart, *Among Gay C.E.O.s, the Pressure to Conform*, N.Y. TIMES (June 27, 2014), https://www.nytimes.com/2014/06/28/business/john-browne-former-chief-of-bp-on-being-a-closeted-executive.html.

11. John Browne, *Why Corporate Board Members Should Come Out of the Closet*, FORTUNE (Apr. 19, 2016), https://fortune.com/2016/04/19/lord-john-browne-board-members-lgbt/.

12. *See, e.g.*, Aaron A. Dhir, *What Norway Can Teach the U.S. About Getting More Women into Boardrooms*, ATLANTIC (May 4, 2015), https://www.theatlantic.com/business/archive/2015/05/what-norway-can-teach-the-us-about-getting-more-women-into-boardrooms/392195/; Lauren Hirsch, *The Business Case for Boardroom Diversity*, N.Y. TIMES (Jan. 23, 2021), https://www.nytimes.com/2021/01/23/business/dealbook/diversity-board-directors.html. The law was passed in 2003 and fully implemented in 2008. Norwegian Public Limited Liability Companies Act, § 6-11a (Nor. 2014).

that women's inclusion improves corporate governance.[13] The extensive literature on the business case for inclusion played a crucial role in convincing stakeholders that such inclusion was necessary.[14] As one of us has argued, gender inclusion efforts may have succeeded because of the gender binary's simplicity compared to the complexity of racial groups.[15] More recently, a wealth of research has examined the need for racial diversity on corporate boards, even though arguments for such diversity tend to focus on the lack of inclusion itself rather than fleshing out the "business case."[16] By contrast, the importance of LGBTQ+ diversity remains unexamined in the academic and corporate governance literature.[17] The complexity of LGBTQ+ identity, upon closer inspection, seems to engender numerous complexities that threaten to make inclusion efforts challenging in ways with which diversity advocates have not yet had to grapple.

Although debates on LGBTQ+ legal rights abound, they are mired in culture war debates around book bans and drag queens. It may be that the paucity of attention to substantive questions such as board inclusion creates space for rational evaluation of what a policy should do. LGBTQ+ representation on corporate boards remains low and the absence of examination of LGBTQ+ board representation is consequential. LGBTQ+

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13. *See* Hirsch, *supra* note 12.

14. David A. Katz & Laura A. McIntosh, *Activism and Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 29, 2017), https://corpgov.law.harvard.edu/2017/09/29/activism-and-board-diversity/ [https://perma.cc/5P8G-K5EC].

15. *See* Darren Rosenblum, *Sex Quotas and Burkini Bans*, 92 TUL. L. REV. 469 (2017).

16. *See, e.g.*, Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 19–20 (2011); Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61 (2012) [hereinafter Butler, *All on Board*]; Seletha R. Butler, *"Financial Expert": A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards*, 14 GEO. J. GENDER & L. 1 (2013) [hereinafter Butler, *Financial Expert*]; Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. SOC. JUST. 337 (2012); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011); Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579 (2006); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795 (2005); Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. DAYTON L. REV. 39, 39–40 (2011); Fawn Lee, *Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU*, 36 FORDHAM INT'L L.J. 1471 (2013); Tamara S. Smallman, Note, *The Glass Boardroom: The SEC's Role in Cracking the Door Open So Women May Enter*, 2013 COLUM. BUS. L. REV. 801, 803 (2013).

17. The only article our research uncovered that directly addresses the issue is Alexander M. Nourafshan, *From the Closet to the Boardroom: Regulating LGBT Diversity on Corporate Boards*, 81 ALB. L. REV. 440 (2017). The article makes a valuable contribution advocating for LGBTQ+ diversity. In doing so, the article understandably conflates LGBTQ diversity rationales with those used for diversity more broadly, and this leaves unexamined what we see as the most pressing questions in regard to LGBTQ+ board diversity initiatives, as we discuss in this Article.

inclusion efforts may raise controversies that efforts to include women or minority groups do not. LGBTQ+ persons, as a historically marginalized group, fit within the equity, diversity, and inclusion ("EDI") frameworks, but questions remain: What does it mean to be LGBTQ+? How fixed are these identities, and does that pose questions about who deserves to benefit from such provisions? Do LGBTQ+ people deserve distinct treatment to foster inclusion? How do we disaggregate the different identities included in LGBTQ+ and give proper consideration to intersectional identities? This Article is an initial step toward addressing the unasked questions about LGBTQ+ corporate representation.

This Article proceeds in four parts. Part I explores the contemporary developments regarding LGBTQ+ representation on corporate boards, including major initiatives at the state and federal levels, and trends in private ordering. Part II surveys the major potential bases for supporting inclusion that have been applied generally to multiple marginalized groups. It divides these into business rationales (those that enhance a board's performance and, by extension, the business's performance) and the normative rationales (those that enhance representation and visibility for their own sake). Part III explores how such general rationales for inclusion correspond to LGBTQ+ people and how they do not. This Part argues that rationales for board diversity apply to LGBTQ+ board members as it does to other historically marginalized groups. Part IV discusses the challenges of inclusion, such as the fluidity of LGBTQ+ identity and the questions of privacy that could surface. The Article concludes by briefly delineating several potential avenues for theoretical, qualitative, and quantitative research that ought to be pursued in this area.

I. Board Diversity Initiatives and LGBTQ+ Inclusion

In recent years, state, federal, and private sector actors initiated efforts to diversify corporate board. Our overarching point in this Part is that although several initiatives include LGBTQ+ people in the diversity umbrella, surprisingly little discussion or analysis of *why* they should be included and how their inclusion might raise unique issues exists.

A. U.S. Federal Law

At the federal level, the U.S. Securities & Exchange Commission (SEC) recognized the underrepresentation of certain identity groups in the boardroom in 2009 and, thereafter, introduced a diversity disclosure rule for public reporting companies.[18] The rule requires that public reporting companies describe the board nominating committee's process for identifying and evaluating director nominees, including shareholder-recommended nominees.[19] This rule also asks whether and how the nominating committee or board considers diversity in identifying director nominees.[20] Additionally, companies are required to disclose any policies in place concerning diversity in identifying director nominees and discussing the efficacy and implementation of the policies.[21] This rule significantly strengthened the SEC's commitment to diversifying boards that until that time had suffered from a lack of representation of all identities.[22]

This rule marks some progress but faces limitations. Under the rule, boards are not required to disclose their actual demography.[23] They are only required to self-report whether efforts to increase diversity are in place.[24] Moreover, the SEC did not explicitly define the term "diversity," thereby allowing many companies to freely define diversity in ways that arguably did not relate to demographic characteristics, which was the rule's intent.[25] For example, some companies defined the term "diversity" in terms of experiences, skills, and perspectives but neglected demographic characteristics such as race or gender.[26] The data indicate that the disclosures resulting from the rule have proved superficial, uninformative, and often incomplete.[27] The rule does not appear to have positively influenced the demography of corporate boards.[28] Though it was a positive step for the U.S., scholars highly criticized the rule.[29] In the

18. *See* 17 C.F.R. § 229.407(2)(vi) (2009); Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Speech: Diversity in the Boardroom Yields Dividends (Sept. 10, 2009), https://www.sec.gov/news/speech/2009/spch091009laa.htm [https://perma.cc/FQ3D-C8DB].

19. 17 C.F.R. § 229.407(c)(2).

20. *Id.*

21. *Id.*

22. Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Speech: Board Diversity: Why It Matters and How to Improve It (Nov. 4, 2010), https://www.sec.gov/news/speech/2010/spch110410laa.htm [https://perma.cc/U32X-JZUC].

23. 17 C.F.R. § 229.407(c)(2).

24. *Id*.

25. *Id.*

26. *See* Michelle Harding & Zawadi Lemayian, *SEC Regulation S-K and Board Diversity* (July 31, 2018) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.3223452.

27. *Id.*

28. *Id.*; *see also* ALEXANDRA THORNTON & ANJUNAE CHANDRAN, HOW TO MAKE CORPORATE BOARDS MORE DIVERSE, CTR. AM. PROGRESS (2021), https://www.americanprogress.org/issues/economy/reports/2021/09/29/504200/make-corporate-boards-diverse/ [https://perma.cc/UX6B-4JNU].

29. *See* Mary Jo White, Chair, Sec. Exch. Comm'n, Keynote Address at the International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability (June 27, 2016), https://www.sec.gov/

aftermath of the rule, the former chair called the level of board diversity unacceptable, urging that "CEOs and boards of public companies act aggressively to alter this landscape and to do so quickly." [30]

Nasdaq, one of the country's most important securities exchanges, has started to address this deficiency. Exchanges set requirements for companies that trade on their platforms, subject to the SEC's approval.[31] The exchanges thus provide a potent source of regulation for public companies.[32] On August 6, 2021, Nasdaq obtained SEC approval for a board diversity "comply or disclose" rule for companies trading on its platform.[33] The Nasdaq rule has two principal requirements. First, listed firms must disclose aggregated statistical information about directors' voluntarily self-identified gender, race, and LGBTQ+ status for the current year and (after the first year of disclosure) the prior year (the "Board Diversity Disclosure Rule").[34] Second, companies must either include on their board of directors a certain number of "diverse" directors or publicly disclose why their board does not include them (the "Board Diversity Objective" rule).[35] For the purposes of the rule, "diverse" is defined as "an individual who self-identifies in one or more of the following categories:

news/speech/chair-white-icgn-speech [https://perma.cc/3AGV-VRMJ]; *see also* Molly Petrilla, *The SEC Wants New Rules for Board Diversity—Here's Why That Matters*, FORTUNE (Jan. 29, 2016), https://fortune.com/2016/01/29/sec-rules-board-diversity/ (recounting criticism of the rule by former SEC Chair Mary Jo White).

30. White, *supra* note 29.

31. *See SEC Approves NASDAQ's Board Diversity Disclosure Requirements*, KATTEN (Oct. 19, 2021), https://katten.com/sec-approves-nasdaqs-board-diversity-disclosure-requirements [https://perma.cc/LC2B-LD4T].

32. *See* Paul G. Mahoney, *The Exchange As Regulator*, 83 VA. L. REV. 1453, 1454 (1997) (describing the role of securities exchanges as regulators).

33. *See* Elad Roisman, Comm'r., Statement on the Commission's Order Approving Exchange Rules Relating to Board Diversity (Aug. 6, 2021), https://www.sec.gov/news/public-statement/roisman-board-diversity [https://perma.cc/EK5N-2QT4].

34. *See* Nasdaq Rule 5605(f) (diverse board representation) and 5606 (board diversity disclosure). In addition, the rule makes special provisions for smaller companies and ones with five or fewer directors. Rule 5605(f)(2)(D). Companies with five or fewer directors can satisfy the diversity requirement by having one director who self-identifies as female or an underrepresented minority or LGBTQ+. *Id.* Smaller Reporting Companies (as defined by SEC regulations) can meet the diversity requirement if they have two female directors or one female director and one director who is an underrepresented minority or LGBTQ+. Rule 5605(f)(2)(C). Foreign Issuers can comply with the rule with two female directors or with one female director and one director who is an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity in the country in which the company's executive offices are located, or LGBTQ+. Rule 5605(f)(2)(B); *see also Nasdaq's Board Diversity Rule and What New Companies Listing on Nasdaq Should Know*, NASDAQ 2 (Feb. 18, 2022), https://listingcenter.nasdaq.com/assets/New%20Companies%20Listing%20on%20Nasdaq.pdf [https://perma.cc/4Q8V-9SVC] [hereinafter *What New Companies Should Know*].

35. *What New Companies Should Know*, *supra* note 34, at 1.

Female, Underrepresented Minority, or LGBTQ+."[36] The rule defines LGBTQ+ to include individuals who "self-identify as . . . lesbian, gay, bisexual, transgender, or as a member of the queer community."[37] In addition to these requirements, the Nasdaq rule also provides some listed companies with access to a complimentary board recruiting service, with the intent to allow boards that lack diverse members to access "a network of board-ready diverse candidates."[38]

In addition to federal action at the agency level, Congress has considered taking action, most recently in H.R.1277, the Improving Corporate Governance Through Diversity Act.[39] This law would require certain securities issuers to disclose the racial, ethnic, and gender composition, along with veteran status, of their board and executive officers.[40] H.R. 1277 would also require the disclosure of any plan to promote racial, ethnic, and gender diversity among boards and asks that the SEC establish a Diversity Advisory Group to report on strategies to increase gender, racial, and ethnic diversity among board members.[41]

B. State Law

Several states have also introduced corporate diversity statutes, which would impose demographic requirements on the boards of publicly traded corporations. In 2018, California enacted S.B. 826, a gender diversity law, which required that publicly held companies organized or based in the state increase female board representation to between one and three members, depending on company size.[42] In 2020, California introduced A.B. 979, mandating that public companies headquartered in the state appoint board members from underrepresented communities.[43]

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36. Nasdaq Rule 5605(f)(1). For this purpose, "Underrepresented Minority" means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian, Pacific Islander, or [t]wo or [m]ore [r]aces or [e]thnicities. *Id*.

37. *Id.*

38. Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Release No. 34-92590 (Aug. 6, 2021), https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf.

39. Improving Corporate Governance Through Diversity Act of 2021, H.R.1277, 117th Cong. (2021).

40. *Id.*

41. A similar requirement was included in an earlier bill, Diversity in Corporate Leadership Act of 2019 H.R. 3279, 116th Cong. (2019). That bill would have amended the Securities Exchange Act of 1934 to require issuers to make disclosures on the basis of gender, racial, and ethnic diversity. H.R. 3279 was introduced but not passed during the prior Congress.

42. S.B. 826 § (1)(a), 2017–18 Leg., Reg. Sess. (Cal. 2018); *see also* Christopher J. Riley, *An Equal Protection Defense of SB 826*, CAL. L. REV. ONLINE (July 2020), https://www.californialawreview.org/equal-protection-defense-sb826/.

43. A.B. 979 § 1, Leg., Reg. Sess. (Cal. 2020).

The term "underrepresented communities" initially included only African American, Hispanic, and Native American individuals, but the state later expanded this to include those who self-identified as members of the LGBTQ+ community.[44] A.B. 979 required companies to have at least one director who self-identifies with those groups by the end of 2021, with the requirement scaling up in the next year, depending on board size.[45] As with S.B. 826, A.B. 979 requires the California Secretary of State to track and report compliance but also impose fines for noncompliance.[46] The future of these statutes remains in doubt, as they have been challenged in state[47] and federal[48] courts on equal protection grounds. These decisions were appealed, and the new rules found unconstitutional.[49] Nonetheless, early analysis suggests that these laws have significantly increased board diversity for Californian companies and will likely continue to do so even if they lack the force of law.[50]

Social justice concerns, in part, animated A.B. 979. The Senate Floor Analyses and Assembly Floor Analysis specifically state that in light of the social unrest in 2020, corporations publicly messaged their support for diversity but did not reflect it in their workplaces.[51] Additionally, the statute's authors discussed the benefits of corporate diversity on decision-making, governance, and profits, and the first section of the statute analyzes up-to-date statistics on workplace diversity in the state.[52]

In writing A.B. 979, the California legislature bills cited statistics that stated the majority of those who sat on corporate boards identified as white, overrepresenting their share of the general population.[53] The state cited bias and systemic discrimination as explanations for the lack of

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44. *Id.*

45. *Id.*

46. Fines amount to $100,000 for the first violation and $300,000 for each subsequent violation. *Id.*

47. *See, e.g.*, Crest v. Padilla, No. 19STCV27561 (L.A. Super. Ct. Aug. 6, 2019) (challenging S.B. 826 for violating the California constitution's equal protection clause); Crest v. Padilla, No. 20STCV37513 (L.A. Super. Ct. Sept. 30, 2020) (challenging A.B. 929 on similar grounds).

48. *See* All. for Fair Bd. Recruitment v. Weber, No. 2:21-cv-05644-RGK-RAO (W.D. Cal. July 12, 2021) (challenging S.B. 826 and A.B. 929 on federal constitutional grounds); *see also* Meland v. Padilla, No. 2:19-CV-02288-JAM-AC (E.D. Cal. Apr. 20, 2020); Meland v. Weber, 2021 U.S. App. LEXIS 18378 (9th Cir. 2021).

49. Harold R. Jones, *California Courts Have Found Two Statutes Requiring Diversity in the Makeup of Public Company Board of Directors Unconstitutional*, NAT'L L. REV. (June 1, 2022), https://www.natlawreview.com/article/california-courts-have-found-two-statutes-requiring-diversity-makeup-public-company.

50. Pamela S. Palmer, James H.S. Levine, Howard M. Privette & Samantha K Burdick, *Legal or Not, It's Working: Mandatory Board Diversity for Publicly-Held Companies Headquartered in the Golden State*, PRAC. INSIGHTS COMMENTS., Apr. 7, 2021, 2021 WL 1270015.

51. S. Floor Analysis, Assemb. B. 979, 2019–2020, Reg. Sess., at 5 (Cal. Aug 20, 2020).

52. Assemb. B. 979, 2019–2020 Reg. Sess. § 1 (Cal. 2020).

53. *Id.*

diversity on boards, and in authoring this bill, the legislature sought to "remedy one specific discriminatory outcome by ensuring that corporate boards meet a minimum standard of diversity."[54] Additionally, the bill's authors stated that the failure to capitalize on a range of consumer preferences harms investors, workers, and consumers, with interests being inadequately represented across the board.[55] It is worth noting, however, that despite California defining LGBTQ+ people as underrepresented, California did not give any specific reason for their inclusion.[56] Other affinity organizations provided data to support inclusion, but the bill did not mention the LGBTQ+ community, save in defining "director from an underrepresented community."[57]

Illinois followed in California's footsteps by introducing the Diversity Disclosure Bill in 2019, partly modeled on SB 826.[58] This bill requires that subject companies report diversity-related information to the Illinois Secretary of State yet does not mandate the inclusion of underrepresented minorities on corporate boards.[59] Publicly held domestic and foreign corporations with primary executive offices located in Illinois must disclose a wide variety of data, including racial demographics, policies for appointment, and policies for promoting board diversity.[60] The law requires disclosures about women (without referring to sex identification at birth) and minority persons, defined as those who are Native American, African American, Hispanic, or Pacific Islanders.[61] In the text of the bill, the General Assembly wrote that the fact that women and minorities were nationally underrepresented contributed to the disparity between men's and women's wages.[62] According to a state government analysis, the aim is that diversifying Illinois boards will boost the state's economy, improve opportunities for women and minorities in the workplace, and foster an environment where the business community reflects local demographics.[63]

The Illinois law highlights racial and gender diversity, making it inclusive of transgender women, but does not mention LGBTQ+

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54. Assembly Floor Analysis, *supra* note 51, at 2.
55. *Id.*
56. *Id.*
57. *Id.* at 1, 3 (arguments in support by California Hispanic Chambers of Commerce and Chinese Affirmative Action).
58. H.B. 3394, 101th Gen. Assemb. (Ill. 2019).
59. *Id.* at 3.
60. *Id.* at 3–4.
61. *Id.* at 2–3.
62. *Id.* at 1.
63. MICHAEL W. FRERICHS, OFF. ILL. STATE TREAS., THE INVESTMENT CASE FOR BOARD DIVERSITY (2020).

diversity.[64] Unlike California's statute, there is no diversity mandate; transparency is required, but corporations are not obligated to populate their boards with individuals of diverse identities.[65] The General Assembly addressed this point, stating that the law's purpose is to gather data and study underrepresentation in positions of authority to enact and enforce potential future legislation targeting diversity.[66]

In addition to California and Illinois, at least nine other states have enacted or are considering board diversity legislation.[67] Unlike what California passed, these other states have primarily focused on disclosure laws. In 2017, Colorado adopted a Joint Resolution encouraging "equitable and diverse gender representation on corporate boards," and stated that corporations should have a minimum number of female directors depending on board size.[68] However, the state did not mandate disclosure requirements.[69] As of 2019, Maryland law has required all business entities with corporate headquarters in Maryland to disclose the number and sex ratio of directors.[70] This law covers all corporations, regardless of whether they are publicly traded.[71] Recently, New York enacted a diversity requirement, whereby companies authorized to do business in the state (a significantly broader definition than simply "corporate headquarters") must identify the total number of directors and the number of female directors.[72] In addition, Hawaii, Massachusetts, Michigan, New Jersey, and Washington are considering laws modeled on S.B. 826, with varying penalties, disclosure requirements, and minimum numbers of female directors.[73] Ohio passed a law that encourages the development of approaches to maintaining diversity.[74] Finally,

64. Ill. H.B. 3394.

65. *Id.*

66. *Id.*

67. *See* Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L SCH. F. ON CORP. GOVERNANCE (May 12, 2020), https://corpgov.lawharvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/ [https://perma.cc/G3G9-8SYK] (discussing different state board diversity initiatives).

68. H.R.J. Res. 1017, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

69. *See id.*

70. H.B. 1116, 2019 Reg. Sess. (Md. 2019).

71. *Id.*

72. S. 4278, 2019–2020 Gen. Assemb., Reg. Sess. (N.Y. 2019).

73. *See* Hatcher & Latham, *supra* note 67.

74. H.R Con. Res. 13, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019) ("To encourage equitable and diverse gender representation on the boards and in senior management of Ohio companies and institutions.").

Pennsylvania is considering a resolution that would suggest minimum levels of female board representation.[75]

C. Private Ordering

In addition to legislative and regulatory initiatives, private actors have begun to push for board diversity. In particular, the investor community has become increasingly vocal on this matter. LGBTQ+ advocacy groups have also begun to push for inclusion, though with limited success.

1. Investor Diversity Activism

Alongside the legislative advances just discussed, the investor community has begun to push for board diversity. In 2017, the asset management giant State Street announced it would start voting against new male nominations to boards with no female members.[76] In 2020, the firm again contacted its portfolio companies and made clear it would employ proxy voting at shareholder meetings to make sure companies were setting goals for racial and ethnic representation at the board level.[77] These were not empty words. State Street later added it was ready to employ its proxy voting at shareholder meetings to "hold companies accountable."[78] The same year BlackRock—the world's largest institutional investor and likely the most influential firm in corporate governance—adopted several proposals to improve board gender diversity in the companies whose stock it owned.[79] The company stated that board diversity was "important from a sustainable investment perspective, given that diverse groups have been demonstrated to make better decisions."[80] The following year, Blackrock sent letters to all of its portfolio firms in

75. H.R. Res. 114, Sess. of 2019 (Pa. 2019) ("Encouraging equitable and diverse gender representation on corporate boards and urging more corporate leadership opportunities for women in this Commonwealth by 2021.").

76. Joann S. Lubin & Sarah Krouse, *State Street to Start Voting Against Companies That Don't Have Women Directors*, WALL ST. J. (Mar. 7, 2017), https://www.wsj.com/articles/state-street-says-it-will-start-voting-against-companies-that-dont-have-women-directors-1488862863 [https://perma.cc/6VDT-69DM].

77. Letter from Richard F. Lacaille, Glob. Chief Inv. Off., State St. Glob. Advisors, to Bd. Chairs (Aug. 27, 2020), https://www.ssga.com/library-content/pdfs/global/letterhead_racial_equity_guidance.pdf/ [https://perma.cc/GAD8-3C6A].

78. STATE ST. GLOB. ADVISORS, STEWARDSHIP REPORT 2021 at 67 (2022), https://www.ssga.com/library-content/pdfs/asset-stewardship/asset-stewardship-report-2021.pdf [https://perma.cc/ RC7K-E2KQ].

79. Trevor Hunnicutt, *BlackRock Supports Effort to Boost Number of Women Board Members*, REUTERS (July 13, 2017), https://www.reuters.com/article/us-blackrock-women/blackrock-supports-effort-to-boost-number-of-women-board-members-idUSKBN19Z09C [https://perma.cc/R52V-LYAD].

80. *Id.*

the Russell 1000 index with fewer than two female board members demanding that they explain their lack of diversity.[81] Influential proxy advisor Institutional Shareholder Services (ISS) joined investors in revising its voting policies to recommend that firms following its advice vote against heads of a board's nominating committee if the board had no women or minority members.[82] It is unclear how long the diversity push by asset managers will continue, but for the time being it provides a powerful impetus for inclusion that parallels legal developments.

2. LGBTQ+ Advocacy Initiatives

A number of groups have emerged to support LGBTQ+ board diversity inclusion, including Out Leadership and Out Women. These groups work with policy makers and pressure companies to increase LGBTQ+ diversity in corporate governance while also creating networks of LGBTQ+ business leaders that companies can select as board candidates. For example, Out Leadership created Board Diversity and Disclosure Guidelines to encourage companies to publicly disclose their boards' demographic composition, including gender identity and sexual orientation.[83] Their hope is that companies will integrate these issues into director and office questionnaires that are completed annually by publicly traded companies.[84] In addition, Out Leadership has a board networking group, Quorum, that includes board-interested or current LGBTQ+ directors, with the aim of increasing the numbers of LGBTQ+ directors. Similarly, Out Women maintains a network of senior-level LGBTQ+ women.[85] Their efforts have garnered substantial support from the corporate sector.

In sum, the past several years have seen enormous momentum for greater board diversity. Federal law has implemented disclosure-based reforms to spur greater board diversity, and state law and private actors

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81. *See* Emily Chasan, *BlackRock Asks Companies to Explain Dearth of Women on Boards*, BLOOMBERG (Feb. 2, 2018), https://www.bloomberg.com/news/articles/2018-02-02/blackrock-asks-companies-to-explain-dearth-of-women-on-boards.

82. INSTITUTIONAL S'HOLDER SERVS. GOVERNANCE, UNITED STATES PROXY VOTING GUIDELINES 11–12 (2020), https://www.issgovernance.com/file/policy/latest/americas/US-Voting-Guidelines.pdf [https://perma.cc/ZN8Z-UA56] ("[For companies in the Russell 3000 or S&P 1500 indices,] [g]enerally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the company's board. . . . For companies in the Russell 3000 or S&P 1500 indices, [effective for meetings on or after Feb. 1, 2022] generally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members.").

83. OUT LEADERSHIP, *supra* note 1, at 1.

84. *See id.*

85. *See Out Women in Business*, REACHING OUT, https://reachingoutmba.org/event/out-women-business/ [https://perma.cc/ZPJ2-AVVY].

have pushed a mix of disclosure and quota-based reforms. Proponents of these measures advance a set of broad rationales for them, as we survey in the next Part.[86] However, advocates do not always explicitly tie these rationales to the groups their initiatives cover. This is particularly true in the case of LGBTQ+ people.

II. THE CASE FOR INCLUSION

Assessing efforts to increase LGBTQ+ diversity on corporate boards requires unpacking the arguments for diversity efforts more broadly. A wealth of research exists on director diversity. Much of it highlights diversity's benefits for firms, but some of it raises doubts about the value of broad diversity mandates.[87] We break the justifications for board diversity into two broad categories, namely, the business rationales (or, the functional, performance-based reasons) and the normative rationales (the social justice or moral reasons). These are summarized in this Section.

A. The Business Rationales for Inclusion

The business rationales for inclusion focus on the idea that diverse boards perform better, leading to better performing enterprises. This might be true for several reasons, and some empirical evidence supports this. In this section, we give an overview of the strongest theoretical rationales and summarize the state of the empirical studies. The first group of theoretical rationales concerns the ability of diverse boards to make better decisions.[88] This has been attributed to the fact that people of diverse identities bring a range of different experiences and viewpoints to the table that would not otherwise be considered.[89] The group's members are less afraid to dissent and tend to foster a group dynamic that thwarts groupthink.[90] Moreover, market forces alone will not correct the inefficiencies created by discrimination because of market failures—in particular, the fact that

86. *See infra* Part II. We note that some may question what the purpose of inclusion is in this or any context. The rationales discussed in Part II necessarily incorporate judgments about what those purposes are or what they should be.

87. *See, e.g.*, Kimberly D. Krawiec, John M. Conley, Lissa L. Broome, *The Danger of Difference: Tensions In Directors' Views of Corporate Board Diversity*, 2013 U. ILL. L. REV. 919, 920 (describing a study in which board members were interviewed about diversity and failed to articulate specific benefits of diverse board members).

88. *See* Jared Landaw, *Maximizing the Benefits of Board Diversity: Lessons Learned from Activist Investing*, HARV. L. REV. F. (July 14, 2020), https://corpgov.law.harvard.edu/2020/07/14/maximizing-the-benefits-of-board-diversity-lessons-learned-from-activist-investing/ [https://perma.cc/3SQS-L38N].

89. *Id.*

90. *See id; see also* Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1245 (2003) ("[C]orporate boards are quite homogeneous, consisting mostly of white males, in their mid-fifties, who are predominately Protestant and Republican.").

incumbent corporate managers lack the networks and information needed to find talented diverse board members.[91] We note at the outset that the business rationales for inclusion are controversial. Nonetheless, they have gained traction among leaders in the investment community and are an integral part of the board diversity discussion.

The first set of theoretical rationales tracks a wealth of empirical evidence supporting the idea that diverse groups do thwart groupthink and foster better decision-making.[92] It is not difficult to find examples of homogenous boards making bad decisions. Commentators have remarked on the fact that the board of Theranos, the failed blood testing company,[93] was composed entirely of older, Caucasian, presumably heterosexual men.[94] During its emissions-rigging scandal, Volkswagen board had no women on its management board and only four women on its twenty-person supervisory board, one of whom was the former nanny-mistress of the CEO.[95] The situation was the same for all but one of the seventeen directors of Enron,[96] the fraud-ridden energy company that attributed its

91. 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, 1277 (2020). *See generally* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1957).

92. However, some studies have questioned whether the groupthink hypothesis carries any weight in boardrooms. *See, e.g.*, Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 765 (2011).

93. For example, in Bad Blood, the author recounts a near catastrophe: an episode in which an inspector from Walgreens tries to raise concerns about Theranos after noticing several red flags during a site visit, but the report is ignored by executives, turning a potential disaster for the company into a highly publicized deal between Walgreens and Theranos. *See* JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP 85–91 (2018).

94. *See* Sarah Randazzo, *George Shultz Brought Big Names to Theranos Board*, WALL ST. J. (Nov. 23, 2021), https://www.wsj.com/livecoverage/elizabeth-holmes-trial-theranos/card/george-shultz-brought-big-names-to-theranos-board-BkohXCrIWy7gmFPxVuKh [https://perma.cc/ SMN5-WFVQ].

95. *Members of the Board of Management and Their Appointments*, VOLKSWAGEN, https://annualreport2012.volkswagenag.com/corporategovernance/executivebodies/boardofmanagement.html (list of management appointments as of December 31, 2012). The 2015 Volkswagen scandal revealed that up to 11 million cars worldwide were loaded with illegal software that falsified emissions data. Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay $14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016), http://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html; *see also* Pamela Wasley, *The Theranos Crisis: Where Was The Board?*, FORBES (Apr. 27, 2016), https://www.forbes.com/sites/groupthink/2016/04/27/the-theranos-crisis-where-was-the-board/?sh=2529daf2c58e [https://perma.cc/V8KH-BCGR] (breaking down the elements of groupthink and showing how they applied to Theranos).

96. Leticia Williams, *Senate Report Blames Enron's Board*, CBS MARKETWATCH (July 7, 2002), https://www.marketwatch.com/story/senate-report-concludes-enron-board-ignored-warnings [https://perma.cc/8CFC-74VB]. The sole female member was Wendy Gramm, wife of then-US Senator Phil Gramm. *Id.*

success to corporate leaders who were "the smartest guys in the room."[97] Groupthink has been blamed for the failure of both Theranos's and Enron's boards to heed red flags that should have alerted them to problems before disaster struck. More diversity can mitigate the kind of thinking that characterized those failures in governance.

In a somewhat similar vein, members of marginalized groups might be more resilient and less prone to overconfidence, a behavioral bias that can blind corporate leaders to pitfalls in their companies. This bias is especially acute among people who succeed easily and repeatedly because they tend to attribute success that is outside of their control—for instance, based on luck or assistance—to factors inherent to them or people like them.[98] Members of marginalized groups, according to some research, must often work harder to succeed, are less prone to take success for granted, and are more wary of potential blind spots and other problems that can derail success.[99] The other side of this coin is that those who are accustomed to success can sometimes have an unreasonable aversion to failure, which can undermine an organization's ability to grow, whereas members of marginalized groups may be less afraid of adversity, having faced and overcome more hardships.[100] The representation of historically marginalized groups on corporate boards, such as women, people of color, or LGBTQ+ individuals, can mitigate the risks of these behavioral biases.

Another family of rationales for board diversity relate to the network, expertise, and signaling benefits of diversity, for the board as a body and for the overall company. The reasoning goes that diverse directors provide access to broader networks of people than those accessible to traditional boards.[101] Within the board and executive suite, these networks improve

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97. *See, e.g.*, O'Connor, *supra* note 90, at 1245. The moniker, "the smartest guys in the room" has been widely used to describe Enron's management. *See* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2004).

98. *See* Adam D. Galinsky, Andrew R. Todd, Astrid C. Homan, Katherine W. Phillips, Evan P. Apfelbaum, Stacey J. Sasaki, Jennifer A. Richeson, Jennifer B. Olayon & William W. Maddux, *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective*. 10 PERSP. ON PSYCH. SCI. 742–48 (2015) (concluding from a review of available empirical research that "[h]omogeneous groups run the risk of narrow mindedness and groupthink (i.e., premature consensus) through misplaced comfort and overconfidence," whereas "[d]iverse groups, in contrast, are often more innovative and make better decisions, in both cooperative and competitive contexts").

99. *See id.* at 743.

100. *See* Francesca Gino & Bradley Staats, *Why Organizations Don't Learn*, HARV. BUS. REV., Nov. 2015 at 111, 112.

101. *Cf.* Kenneth J. Arrow, *What Has Economics to Say about Racial Discrimination?*, 12 J. ECON. PERSP. 91, 97 (1998) (explaining how social networks can give companies access to talents and resources they would not otherwise have); *see also* Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits*, 71 ALA. L. REV. 211, 228–29 (2019).

access to information and resources.[102] Diverse directors might expand a company's access to new consumers by bringing an understanding of how to reach minority groups.[103] The presence of diversity within a board of directors might translate into more inclusive policies for underrepresented groups throughout the company.[104] Beyond the boardroom, board diversity is thought to send an inclusive or empathetic signal to employees, making them more productive and more satisfied with work.[105] This can generate better workplace culture, increase acceptance of the corporate mission among employees, and produce higher customer loyalty. These factors, in turn, contribute to a firm's success.

Contrary to the idea that diversity lessens dissent and groupthink, some have argued that forcing diversity on boards leads to increased conflict and decreased collegiality.[106] This may lead boards to make worse decisions or cause directors to stay silent about important topics that would benefit from discussion. Regarding signals for markets and employees, some have argued that customers and employees pay little attention to the boards of directors, and so the performance-related benefits of signaling are likely minimal. Another critique is that forced diversity leads to tokenism, whereby the inclusion of directors from underrepresented groups undermines diversity by essentializing the group and including a small number of individuals who are kept powerless.[107] Perhaps the strongest critique of the theoretical business case for board diversity is that serious doubt exists as to the boards of directors affecting the actual performance of most companies.[108] Numerous studies have concluded that boards do not really do anything important with respect to the vast majority of things a corporation does.[109] Findings like this are, of course, controversial. A number of scholars have noted that boards bring benefits

102. Arun Upadhyay & María del Carmen Triana, *Drivers of Diversity on Boards: The Impact of the Sarbanes-Oxley Act*, 60 HUM. RES. MGMT. 517, 517 (2020) ("The board of directors is a governance body which is tasked with advising the firm's chief executive officer (CEO) and top executives, monitoring them, and providing resources to those executives by using their social networks.").

103. *See* Krawiec, Conley & Broome, *supra* note 87.

104. Steven A. Creek, Kristine M. Kuhn & Arvin Sahaym, *Board Diversity and Employee Satisfaction: The Mediating Role of Progressive Programs*, 44 GRP. & ORG. MGMT. 521, 524 (2019) ("Firms with diverse boards tend to have better career mobility for employees of underrepresented groups.").

105. L.E. Gomez & Patrick Bernet, *Diversity Improves Performance and Outcomes*, 111 J. NAT'L MED. ASS'N. 383, 390 (2019).

106. *See* Broome, Conley & Krawiec *supra* note 92, at 765 ("[R]ace and gender diversity may reduce group cohesion and increase member dissatisfaction and turnover.").

107. *See, e.g.*, James Kristie, *The Power of Three*, 35 DIRS. & BDS. 22 (2011).

108. *See generally* Aaron Burt, Christopher Hrdlicka & Jarrad Harford, *How Much Do Directors Influence Firm Value?*, 33 REV. FIN. STUD. 1818 (2020).

109. *See, e.g.*, *id.* at 1818, 1834.

that may be hard to measure. More importantly, the role of the board has grown in recent years due to evolving case law and regulation.[110] Boards have more responsibility today over the substantive governance of firms than they did twenty years ago, and this trend is likely to continue.[111] This growth of responsibility has not been uniform, however; for instance, boards of public firms subject to federal securities laws incur more duties than those of private companies. Thus, the board's influence (and thereby any affect stemming from board diversity) is likely to vary by company.

Perhaps for these reasons, empirical studies of diversity have produced mixed results, with some linking diversity to quantitative and qualitative measures of firm performance,[112] and others failing to find any such connection or finding evidence of diminished performance. For example, a number of studies examining board composition have found an association between financial metrics such as a company's return on assets and investments and the percentage of women and minorities on the board.[113] Other studies have made similar findings looking at the effect of changes in law. Some studies of Norway's gender diversity mandate, for examples, have found improvements in various measures of financial performance for compliant companies.[114]

Yet another set of studies found evidence of better corporate governance linked to diversity. A study of corporate compliance found that companies with greater female board representation were less likely to have internal control weaknesses (meaning their auditor issued an opinion finding no material weaknesses in the company's financial reporting systems in reviews Sarbanes-Oxley Section 404 required).[115] Others found

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110. Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U.J.L. & BUS. 63, 150–51 (2009) ("In the course of one century, directors have turned from trustees for the community to representatives of the shareholders to agents whose obligations and liabilities have been so limited that all that is left for the court to do in cases involving allegations of breaches of fiduciary duties is to dismiss the suit.").

111. Abhilasha Gokulan, *Increasing Board Diversity: A New Perspective Based In Shareholder Primacy and Stakeholder Approach Models of Corporate Governance*, 96 N.Y.U. L. REV. 2136, 2159 (2021).

112. *See* Butler, *Financial Expert*, *supra* note at 16; Broome, Conley & Krawiec, *supra* note 92, at 761 (stating that most rationales for board diversity are functional, related to firm performance).

113. Niclas L. Erhardt, James D. Werbel & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE 102, 103 (2003).

114. Kenneth Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. ECON. 137 (2012); Heike Mensi-Klabach & Catherine Seierstad, *Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios*, 17 EUROPEAN MGMT. REV. 615, 616 (2020).

115. Yu Chen, John Daniel Eshleman & Jared S. Soileau, *Board Gender Diversity and Internal Control Weaknesses*, 33 ADVANCES ACCT. 11, 12 (2016); *see also* Lawrence J. Abbott, Susan Parker & Theresa J. Presley, *Female Board Presence and the Likelihood of Financial Restatement*, 26 ACC'T HORIZONS 607, 608 (2012).

correlations between diversity and strengthened monitoring,[116] increased likelihood of discussing difficult or sensitive issues,[117] and increased fiscal conservatism with less tolerance of opportunistic behavior.[118]

These empirical studies, however, have been subject to criticism. Many of the studies do not establish a causal relationship between diversity and performance, merely a correlation. It could be that more diverse companies have other policies that heighten their performance. Studies that rely on accounting metrics have been criticized because these metrics are potentially artificial and subject to manipulation. Many of the positive results have been criticized because consulting firms and advocacy organizations issued them, and they were not subject to peer review.[119] Perhaps more problematically, some empirical studies have found no effect or even negative effects from diversity or diversity initiatives on company performance.[120] One recent study of California's board diversity statute found no measurable benefit in terms of financial performance but instead uncovered evidence that stock market investors penalized California firms.[121] On the qualitative side, another study interviewed numerous directors and found that though most expressed support for diversity generally, they struggled to provide specific instances of when diversity helped their boards or provide explanations for why it should be.[122]

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116. Renée Adams & Daniel Ferreira, *Women In the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292 (2009).

117. Morton Huse & Anne Grethe Solberg, *Gender-Related Boardroom Dynamics: How Scandinavian Women Make and Can Make Contributions on Corporate Boards*, 21 WOMEN MGMT REV. 113, 120 (2006); Nancy McInerney-Lacombe, Diana Bilimoria & Paul F. Salipante, *Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 123–39 (Susan Vinnicombe, Val Singh, Ronald J. Burke, Diana Bilimoria & Morten Huse eds., 2008).

118. Chen, Eshleman & Soileau, *supra* note 115, at 12 ; *see also* Kim Ittonen, Johanna Miettinen & Sami Vähämaa, *Does Female Representation on Audit Committees Affect Audit Fees*, 49 Q. J. FIN. & ACCT. 113, 115–19 (2010); Maurice Levi, Li Kai & Frank Zhang, *Director Gender and Mergers and Acquisitions*, 28 J. CORP. FIN. 185, 185 (2014) (finding that "firms with female directors are less likely to make acquisitions and if they do, pay lower bid premia").

119. *See, e.g.*, Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* 3 (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 579/2021, 2021), https://ssrn.com/abstract=3812642 (noting the number of studies that are not peer reviewed).

120. *See id.* at 2 (arguing that "a close look at these studies [showing that board diversity increases value] as well as studies that Nasdaq fails to cite, suggests that increasing board diversity may well reduce investors' returns").

121. Felix von Meyernick, Alexandra Niessen-Ruenzi, Markus Schmid & Steven Davidoff Solomon, *As California Goes, So Goes the Nation? Board Gender Quotas and Shareholders' Distaste of Government Interventions* (European Corp. Governance Inst. Fin. Working Paper No. 785/2021, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303798.

122. *See* Krawiec, Conley & Broome, *supra* note 87.

Thus, the business case for board diversity has many strengths but some serious problems.[123] Members of the investor community have embraced it, as evidenced by investment and voting policies of Blackrock, State Street, and other dominant asset managers that encourage more diversity in the boardroom and executive suite.[124] However, some commentators have concluded from the mixed evidence that the business case is wrong or at best weak.[125] It bears mentioning, however, that the preferences of major asset managers are something of a self-fulfilling prophecy in terms of some measures of firm value. If Blackrock decides to divest from companies that lack diverse boards, that divestment itself will reduce market value for the affected firm. The issue of firm value (and therefore the business case for inclusion) thus becomes a function of the large investors' preferences, regardless of whether diverse directors have any direct influence. The business rationales are consequently becoming more intertwined with the normative ones, described next.

B. Normative Rationales for Inclusion

Normative rationales for inclusion are based on the societal and moral benefit of correcting past exclusion. The most basic of these rationales is that board diversity regulation is the most normatively correct response to remedy years of exclusion of women, minorities, and other underrepresented groups. In other words, board diversity is "the right thing to do" morally and socially. Relatedly, encouraging board diversity provides a signal to members of marginalized communities, both within the firm and outside it, that the firm supports them regardless of any measurable monetary gain from doing so.[126] This resembles the kind of signaling discussed under the business rationales, but its effect is broader because it may improve the societal standing of members of those groups without necessarily affecting the firm's bottom line. For example, having minority members on the board of a Fortune 500 company can counteract negative stereotypes about the minority while also providing a role model for others in the business world and in other lines of work. Diversity initiatives may also send a signal that discrimination is no longer tolerated,

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123. Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 441–43 (2017).

124. Caleb N. Griffin, *Environmental & Social Voting at Index Funds*, 44 DEL. J. CORP. L. 167, 192 (2020).

125. *See* Barzuza, Curtis & Webber, *supra* note 91, at 1277 (arguing that the ambiguous academic record examining board diversity's effect on firm value is one of correlation versus causation).

126. *See* Broome, Conley & Krawiec, *supra* note 92, at 763 (arguing the signaling value of diversity, and that "corporate boards should be more diverse because it is the morally correct outcome").

overtly or implicitly, resulting in a trickle-down effect within the company and outside it. This is worthwhile even if diversity's benefits cannot be quantified or monetized.

As with performance-based rationales, moral- and social-based rationales have been criticized. This criticism is exemplified in a Milton Friedman article stating that the purpose of firms is to make profits, not correct social ills.[127] Moral and social rationales have traditionally been less popular with the business community because of prevailing assumptions about the purpose of a corporation and the structure of organization law that embraces those assumptions.[128] However, in response to public pressure for greater social responsibility, many corporate leaders have recently undergone a shift in their understanding of their duties.[129] Most prominently, The Business Roundtable, an influential corporate advocacy group whose members include the CEOs of the largest companies in the U.S.,[130] published an open letter in 2019 titled "Statement on the Purpose of a Corporation."[131] The letter overturned a prior policy statement that defined a corporation's purpose as maximizing shareholder return.[132] Instead, it defined a corporation's purpose more broadly to include supporting communities and other stakeholders while still generating shareholder value.[133] Some saw the letter as a mere public relations ploy.[134] Nonetheless, the statement can be understood as acknowledging the growing demand for corporate responsibility and thus a growing basis for companies to act in ways that have moral or social justice underpinnings, even if such ways cannot be shown to directly maximize shareholder value. Thus, corporate leaders may now be more

127. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

128. *See* Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 493–94 (2012). Corporation law generally assesses corporate leaders' fiduciary duties in terms of the benefit their actions bring to the firm overall. Gregory Scott Crespi, *Redefining the Fiduciary Duties of Corporate Directors In Accordance with the Team Production Model of Corporate Governance*, 36 CREIGHTON L. REV. 623, 624–25 n.7 (2003). Such benefit is often measured in terms of firm performance and shareholder value. Thus, directors are often keen to frame corporate policies in performance-based terms, stating that policy decisions will have a substantively positive effect on the bottom line.

129. *See, e.g.*, *Statement on the Purpose of Corporation*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/UU9F-U5JS].

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id*.

134. *See* Richard W. Painter, *Board Diversity: A Response to Professor Fried*, 27 STAN. J. L. BUS. & FIN. 173, 207 (2022) (asserting no position but acknowledging "cynical arguments" disfavoring its language); *see also* Luigi Zingales, *Don't Trust CEOs Who Say They Don't Care About Shareholder Value Anymore*, WASH. POST (Aug. 20, 2019), https://www.washingtonpost.com/opinions/2019/08/20/dont-trust-ceos-who-say-they-dont-care-about-shareholder-value-anymore/.

willing to rely on social justice or moral rationales to advance board diversity.

The forgoing overview of these rationales is necessarily brief, and we describe them to set the stage for our analysis below. Clarifying the goals of board diversity policies is the first step to assessing board diversity policies with respect to LGBTQ+ people. We note that in describing these rationales, we do not take a position on which ones are most correct. We take them as a starting point, assuming for the sake of our analysis that they are worthwhile as we apply them to LGBTQ+ board diversity.

III. ASSESSING LGBTQ+ INCLUSION: WHAT FITS AND WHAT DOES NOT

Board diversity policies that include LGBTQ+ people appear to assume without explanation that this group meets the goals of those policies. But exactly how do they do so, and what special features of LGBTQ+ people should be considered? This Part explores those questions, probing how LGBTQ+ people fit into the business and normative cases for board diversity initiatives outlined in the preceding Part. To do so, we first examine the similarities LGBTQ+ individuals have to other diverse groups. Next, we outline unique contributions LGBTQ+ individuals can make to corporate governance, examining both the characteristics that fit within the current diversity initiative framework and those that exist outside of it. This necessitates a discussion of what they bring to the table that fulfills the goals of diversity more broadly, what they do not bring, and what assumptions lump LGBTQ+ people with other diverse groups and homogenize LGBTQ+ issues.

At the outset, we should clarify two simplifying assumptions made for the sake of our analysis which we believe underlie many public conversations about board diversity. The first relates to our definition of "diversity." Society has become ever more attuned to the many perspectives, cultures, and subcultures that exist around us. Some have sought to expand definitions of diversity to include, for instance, geographic diversity, socioeconomic diversity, and diversity based on national origin.[135] The diversity initiatives we are examining define diversity in terms of gender, race, ethnicity, and sexuality.[136] To keep our analysis tractable, we adopt this definition of diversity without considering whether this is the most appropriate way to define the concept.

The second assumption is needed because of a problem the first poses. Attention to issues of diversity has led to a paradox: on the one

135. Harding & Lemayian, *supra* note 26.

136. Chen, Eshleman & Soileau, *supra* note 115.

hand, encouraging diversity inherently forces the categorization of individuals into the cultural constructs they inhabit, namely, gender, race, ethnicity, and sexuality. This categorization, in turn, recognizes distinct characteristics that define different groups. On the other hand, ascribing generalized traits to culturally constructed groups is problematic in its own right. It comes close to stereotyping, potentially creating a danger of enacting racism, sexism, and homophobia. Cognizant of these issues, we examine LGBTQ+ diversity assuming some generalities about LGBTQ+ individuals as a class of persons because it is necessary to conduct a cogent analysis of LGBTQ+ diversity on corporate boards.

This does not mean we think any LGBTQ+ person selected at random has the same traits or should have these traits. As with any group of individual humans, there are bound to be exceptions to generalizations. Despite this, recognizing diversity issues for policy reasons requires making assumptions about a group's defining characteristics that meet a policy's objectives. Nonetheless, certain generalizations are inherently problematic regarding LGBTQ+ people, as we discuss further below.

A. LGBTQ+ and the Functional Rationales for Diversity

How do LGBTQ+ people fit into the rationales behind board diversity policies? We note several core similarities between LGBTQ+ individuals and other marginalized groups that align well with the goals of board diversity. For the purpose of this discussion, we take the goals of diversity initiatives at face value, even though some may be controversial.[137] First, LGBTQ+ individuals fit many of the prime business case rationales in ways that fit with the rationales for other forms of diversity. Second, LGBTQ+ people possess unique characteristics that also fit well with many of the functional rationales.

1. How LGBTQ+ Diversity Fits with Other Forms of Diversity

As we described above in Part II, the business case for diversity generally rests largely on the contributions of diversity to group decision-making, the benefits of diversifying networks, and the business benefits of signaling.[138] There are several reasons to think that LGBTQ+ board members would contribute with respect to these rationales. With respect to group dynamics, LGBTQ+ people can contribute to the kind of diversity that thwarts groupthink and overconfidence, although the point is nuanced and might vary depending on whether board members are open about their identity. This is due to the *ways* in which diversity mitigates groupthink.

137. *See, e.g.*, Broome, Conley & Krawiec, *supra* note 92.
138. *See supra* Part II.

The most obvious way is by bringing in outside perspectives, and ways of thinking about problems. People from different backgrounds can raise issues and help boards see problems or opportunities they may not otherwise see.[139] But diverse group members, by virtue of their presence, also prompt better thinking by the *non-diverse* people in a group.[140] They do so by blunting the lulling influence of social cohesion. At first blush, that might seem like a bad thing. After all, some social cohesion is necessary for a group to accomplish a task.[141] However, too much cohesion lies at the root of groupthink.[142] People naturally seek out and derive pleasure from cohesion, and cohesion is fostered by easy consensus. But easy consensus, despite appearing to be progress, has been shown in numerous studies to foster poor outcomes, especially with respect to nonlinear decisions and creative tasks.[143] In other words, the kind of cohesion and consensus that comes from a strong sense of shared social identity often gives rise to uncritical thinking by groups tasked with solving complex problems. Diversity paradoxically helps groups perform better by ratcheting down cohesion enough to allow for uncomfortable, but productive, disagreement and critique.[144]

Like members of other marginalized groups, LGBTQ+ people can bring the kind of diverse perspectives that mitigate groupthink by virtue of their status as people outside traditional corporate power structures (which we discuss in more detail below). However, there is a caveat. This may be less true (or not true at all) for people who are not open about their LGBTQ+ identity. If someone is intent on hiding their sexuality, they might also be less willing to raise issues based on their experiences or unique viewpoint. More problematically, it is not clear a closeted board

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139. *See* Marleen A. O'Connor, *supra* note 90, at 1245. For a discussion of this phenomenon in the context of dealmaking, see Jeremy McClane, *The Agency Costs of Teamwork*, 101 CORNELL L. R. 1229 (2016).

140. For example, in one experiment, racially diverse and homogenous juries were asked to watch a trial and deliberate over a verdict. In the racially diverse juries, nondiverse jury members were more likely to raise criticisms of the case even without prompting or challenge from others. They were also more likely to consider missing evidence that nondiverse juries failed to. *See* Samuel Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 598 (2006).

141. Leana A. Bouffard & Kathleen A. Fox, *Violent Victimization Vulnerability: Testing a Conceptual Model of Personality, Social, and Community Factors*, 36 DEVIANT BEHAV. 910, 927 (2015).

142. *See generally* IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (1972) [hereinafter VICTIMS OF GROUPTHINK]; LEADERSHIP: UNDERSTANDING THE DYNAMICS OF POWER AND INFLUENCE IN ORGANIZATIONS (Robert P. Vecchio 2d ed., 2007).

143. VICTIMS OF GROUPTHINK, *supra* note 142.

144. Colette van Laar, Belle Derks, Naomi Ellemers & Dennis Bleeker, *Valuing Social Identity: Consequences for Motivation and Performance in Low-Status Groups*, 66 J. SOC. ISSUES 602 (2010).

member would provide an impetus for other board members to think more critically. Sexual identity ranges widely among people who have same-sex contact, as Kinsey highlighted seventy years ago. Many people live straight lives but engage in extensive same-sex sexual conduct. People who are primarily attracted to the same sex but live as straight are closeted. Although their situation demands sympathy because the burdens of heterosexism foster this secretiveness, this choice nonetheless involves deceit. In this sense, closeted directors may even be more likely to try to blend in to avoid raising suspicion about their identity. If that behavior preserves cohesion to the point of silencing dissent, group decision-making may see little or no benefit.[145] Closeted directors nonetheless are likely to share an outsider viewpoint with other LGTBQ+ people, so their contributions to group dynamics should not be wholly discounted. However, openly LGBTQ+ people would be more beneficial to boards.

The same is true for LGBTQ+ people's contribution vis-a-vis other rationales for board diversity. Specifically, LGBTQ+ people have frequently experienced adversity and benefit from the resilience these experiences bring.[146] LGBTQ+ people often have access to broader and different kinds of networks and understandings of their communities.[147] As with other forms of diversity, LGBTQ+ board members provide a signal to others in the organization that might make them more comfortable and therefore more productive.[148] Such signals could also influence those outside the company to do business with the firm, although, as we discuss below, this signal could have the opposite effect for some of society's members.

2. LGBTQ+ Contributions to Governance that Are Different from Other Forms of Diversity

Even if LGBTQ+ people share traits with other marginalized groups, we must question why they deserve specific inclusion policies. Which

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145. It is also possible for openly LGBTQ+ directors, or members of any marginalized group for that matter, to try to preserve social cohesion, and "go along to get along." The groupthink research shows that even when this happens, mere awareness of members' outsider status fosters critical thinking by other group members. *See* VICTIMS OF GROUPTHINK, *supra* note 142; *see also* Aaron K. Chatterji & Michael Wayne Toffel, *Do CEO Activists Make a Difference? Evidence from a Field Experiment* (Harv. Bus. Sch., Working Paper, Paper No. 16-100, 2016), https://dash.harvard.edu/handle/1/26274858 ("Cook's CEO activism increased consumer intentions to purchase Apple products, especially among proponents of same-sex marriage.")

146. Rachel M. Schmitz & Kimberly A. Tyler, *"Life Has Actually Become More Clear": An Examination of Resilience Among LGBTQ Young Adults*, 22 SEXUALITIES 710, 717 (2018).

147. *Id.* at 714–15.

148. Ann H. Huffman, Kristen M. Watrous-Rodriguez & Eden B. King, *Supporting a Diverse Workforce: What Type of Support Is Most Meaningful for Lesbian and Gay Employees?*, 47 HUMAN RES. MGMT. 237, 242 (2008).

characteristics warrant placing them among other groups that have been more marginalized or whose experiences fit better with the goals of diversity? With respect to many of the characteristics discussed in the preceding section, LGBTQ+ people have specific experiences and traits that fit within the general paradigm of "things that make diversity good" but are different enough to meet broader diversity goals in unique ways that would warrant including LGBTQ+ as a separate category under the diversity umbrella.

We discuss three traits unique to LGBTQ+ people: their unique outsider status, self-awareness in performance of gender and sexual identity roles, and unlikelihood to have children. We will then examine the potential ramifications of such traits.

a. A Unique Kind of "Outsider" Identity

A generalizable and largely non-identarian trait is that LGBTQ+ people may bring their "outsiderness" to corporate decision-making. LGBTQ+ people have historically occupied an "outsider" status, excluded from established family structures until the legalization of marriage. This outsider status draws not only on continued widespread discrimination—legal until the recent *Bostock* decision,[149] and still extremely contested—but also on the not-so-distant history of criminalization that the 2003 *Lawrence v. Texas*[150] decision largely ended.[151]

Commentators have observed characteristics that fit this category. Even in tolerant societies, LGBTQ+ people tend to grow up as outsiders even if they resemble their heterosexual counterparts.[152] They are different from individuals who form part of other marginalized groups, who often grow up among others with whom they share many defining characteristics. It has long been observed that gay youth grow up understanding they are different from everyone else around them and often grow up meeting a steady chorus of disapproval about the ways they act and talk, of which they may be only vaguely aware.[153] Facing consistent negative reaction makes these people "wary and distant, more attuned to appearance and its foibles, more self-conscious and perhaps more reflective."[154] These reactions also drive many gay youth to a single-

149. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

150. 539 U.S. 558 (2003).

151. Huffman, Watrous-Rodriguez & King, *supra* note 148.

152. Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1, 9 (2019).

153. *See, e.g.*, ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 195 (1996).

154. *See id.* at 198 (describing how gay children, "feeling distant from their peers, become experts at trying to figure out how to disguise their inner feelings, to 'pass'").

minded focus on achievement, to gain approval and make up for perceived deficiencies.

As a result, LGBTQ+ people may contribute their outsider perspective to the management of the firm in unique and important ways. For instance, many LGBTQ+ people grapple with an inherent, constant, and unavoidable feeling of difference during childhood—a difference from most other kids, and a difference that involves an inability to label the nature of that difference. It is a difference that lesbian and gay people experience differently from transgender people, both situations feature a universal norm of gender and sexuality.

Some have likened LGBTQ+ identity to religious identities. Early lesbian and gay arguments drew this parallel to legitimize recognition of lesbian and gay identity.[155] Though substantial evidence exists that LGBTQ+ identity has a genetic or biological component, like religious identity, it is not always immediately identifiable by others. For many, LGBTQ+ identity has some fluidity and is subject to some self-definition. Didi Herman has drawn linkages between LGBTQ+ diversity and Jewish identity. For both groups, experiencing the exclusions based on a minority status fosters an identity that comes with distinct perspectives.[156]

When one is aware of living outside that norm, one examines oneself critically at every step. If one comes out, one faces constant judgment and exclusion. If one stays in the closet, one is tormented by one's own superego. Whether it is called passing or covering, it carries a high cost. This constant self-awareness may foster some resilience forged by the challenges of social pressures. The LGBTQ+ self-awareness makes a person extraordinarily sensitive to who they are. Indeed, describing a man as "sensitive" sometimes was used to indicate he was gay.[157] The performance of passing as straight or passing as their assigned gender imposes a huge burden on many LGBTQ+ people. This sensitivity could prove extraordinarily valuable in a board setting. This sensitivity may also contribute to the beneficial dynamics that have been documented for other groups but in a different way. LGBTQ+ people live outside of heterosexuality and/or the gender binary and thus may thwart groupthink. They may have access to distinct networks. It may be that for some LGBTQ+ people, their self-awareness teaches them to value honest representations of their skills rather than falling prey to overconfidence.

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155. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 1–4, 24–26 (2000).

156. DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 125–40 (1997).

157. *See* Schmitz & Tyler, *supra* note 146, at 717. Ellen Samuels, *My Body, My Closet: Invisible Disability and the Limits of Coming-Out Discourse*, 9 GLQ: J. LESBIAN & GAY STUD. 233 (2003); ROBERT MCRUER, CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY (2006).

They may take more care in their work, avoiding blind spots and assuming guaranteed success, with some finding it necessary to work harder to succeed. It is equally possible that inclusion will signal to people with other kinds of difference that a firm is an inclusive one.

Some of these things are changing as LGBTQ+ perspectives become more integrated into society. But for the aged cohort of people that would be candidates for corporate boards today, many cohort members grew up in the 1970s and 1980s, shaped by a different era's norms of gender and sexuality.

b. Self-awareness in Performance of Sexuality and Gender Roles

It is imperative to disaggregate sexuality from gender. Sexual orientation may or may not accompany a differently gendered performance. In this sense, gender and sexuality are intertwined but separate. We know that transgender and nonbinary people tend to "fashion" their identities for themselves. Lumping the different identities that make up LGBTQ+ together is problematic in this sense, as we discuss below. But to the extent that members of this group provide a different paradigm of what it means to be male, an additional element to consider is the way in which LGBTQ+ people diversify masculinity. LGBTQ+ people contribute not only as members of their own unique group but also as people who are not cisgender heterosexual men. This latter group, most of them white, compose the overwhelming majority of board members.

Another way LGBTQ+ people can contribute is to support the inclusion of women on boards by disrupting the "old boys' club" ways in which board members sometimes behave among themselves. The default historical culture of the boardroom has been very much that of a men's club—hence the "old boys' club" term.[158] Adding an LGBTQ+ person can play an important role in changing that culture. While including LGBTQ+ people cannot substitute for the inclusion of women, it may supplement diversity initiatives by introducing different viewpoints and decision-making norms and provide visibility to a more diverse set of acceptable performances of gender.

Taken together, these outsider traits may provide LGBTQ+ people with a sense of questioning, curiosity, and even a critical posture toward the status quo. This is a position that may give them different creative problem-solving skills than those of their heterosexual or cisgender peers. In the elite context of a corporate board, where everyone is at some level an insider, this outsider normativity will make a difference.

158. *See, e.g.*, Jena McGregor, *The Boardroom Is Still an Old Boy's Club*, WASH. POST (Sept. 25, 2013), https://www.washingtonpost.com/news/on-leadership/wp/2013/09/25/corporate-boardrooms-are-still-old-boys-clubs/.

Moreover, the widespread exclusion of LGBTQ+ people from basic social structures has clear effects on their ability to ascend the corporate hierarchy. This difficulty matches broader employment discrimination but has a special potency in corporate hierarchies that still reflect long-standing biases. Some lesbians in particular face additional exclusion because of their inability or refusal to obey the rules of the double bind that serves as a gatekeeper for women climbing the corporate ladder. Under the double bind, women must perform their work in a masculine enough fashion to be cognizable to male leaders but also must engage in a gender performance that is feminine enough to not subject them to discrimination for failing to conform to feminine gender norms.[159]

c. Awareness of Performativity and Evolving Repronormativity

Part of what LGBTQ+ people bring is an awareness of the complexity of gender performance. Sex, gender, and sexual orientation are closely intertwined in ways that reinforce each other.[160] The inclusion of women into the corporate leadership space opens up more diverse sex identities, because women often have more diverse gender performances than men do, as one of us has discussed in prior work.[161] Much of the normativity in the corporate elite centers around notions of fit that are highly coded.[162] Including LGBTQ+ may expand notions of what fits, and offer more perspectives with regard to this kind of diversity.

An additional, unique trait to LGBTQ+ people may be different type of repronormativity—the dominant norm that adult humans reproduce.[163] The presumption among heterosexual couples is that they will reproduce, which alters their perspectives and priorities.[164] For many gay couples, this presumption has been reversed, at least until recently. This has played into early articulations of queer, lesbian and gay identity that sat outside of mainstream heterosexual identity. From this angle, some perceive "heteronormative" people as living their lives in ways that conform to socially valuable behaviors, while queers sat (and sit) outside these norms

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159. This long-established and well-documented double bind holds weight over lesbians, affecting them across race, ethnicity, nationality, and class. Cameron Cloar, Comment, *Through the* Price Waterhouse*-Looking Glass: Dominance and Oppression Revealed*, 43 U.S.F. L. REV. 703, 705 (2009).

160. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

161. Darren Rosenblum, *When Does Sex Diversity Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 445–449 (2018).

162. *See id.* at 442.

163. *See, e.g.*, Anna L. Weissman, *Repronormativity and the Reproduction of the Nation-State: The State and Sexuality Collide*, 13 J. GLBT FAM. STUD. 277, 278 (2016).

164. *Id.*

and goals. According to that narrative, they pursue lives that often fail to conform to typical socially acceptable behaviors and activities.[165] Some of this is related to their sexuality, but other elements have involved forming communities with other queer people, whether for political or social engagement.

One distinguishing aspect of queerness used to be the rarity of children among LGBTQ+ couples. A few decades ago, it was more common to have a child from a prior heterosexual relationship than from a current homosexual one. Exceptions abound, surely, as LGBTQ+ people have long engaged in parenting. However, only recently have they begun having children within their same-sex relationships in large numbers, particularly among gay men. Even as LGBTQ+ parenting becomes more normalized, LGBTQ+ people retain a different perspective on the world, one that may focus less on child-rearing (an obviously valuable activity) and more on sustaining the larger community as a whole (also valuable, albeit differently-focused). When they do raise children, they are more likely to do so using assisted reproductive technology or do so in the context of intentional co-parenting.[166] This gives them further perspective on the value of raising a family, for which even reaching step one often requires overcoming tremendous hurdles. To be sure, there are numerous non-LGBTQ+ people who do not have children, either by choice or circumstance. They may have similar experiences with respect to repronormativity. They may not have the same perspective that comes from being steeped in a community where that is the norm.

d. "But-for Gays" and the Creamy Layer

A challenging element with this aspect of LGBTQ+ identity is that as inclusion becomes more common, LGBTQ+ people lose some outsider traits. If we think of queer identity as representing a segment of the LGBTQ+ community that resists conformity, there's an inherent conflict in imagining truly queer people ascending the corporate ladder, which entails the pinnacle of socially (and economically) valuable engagement.

As Ruthann Robson explored in the early 1990s, a "but-for" gay or lesbian was someone who "but for" their sexual orientation would perfectly fit into society. People with good jobs, bank accounts, social, economic, or even political recognition came to some lesbian and gay

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165. Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories"*, 4 LAW & SEXUALITY 84, 108–114 (1994) (discussing ways in which LGBTQ+ people live outside of prevailing social norms). We note that this may change as societal norms change.

166. John Culhane, *For Many Queer Adults, Parenting Still Isn't Part of the Picture*, SLATE (May 24, 2017), https://slate.com/human-interest/2017/05/why-many-lgbtq-people-dont-want-children.html.

people despite their outsider sexual orientation. These people wouldn't face the same kind of discrimination and might not bring the same diversity as LGBTQ+ people.

Some have theorized this as the "creamy layer," a subgroup that, like cream in milk, rises to the top, by matching traits of the dominant group.[167] Eventually this "creamy layer" of "but-for" LGBTQ+ people may take up many of the dedicated positions without bringing the kind of diversity that would be helpful with regard to this group. The extent to which this could be the case is both a distinct feature of LGBTQ+ diversity and a potential challenge to implementing it effectively. In a sense, though, the risk that this "creamy layer" would bring apparent diversity but not functional diversity reveals the need for the other case for diversity—representation.

B. The Normative Case for LGBTQ+ Board Diversity

The normative case for diversity policies applies to LGBTQ+ people in ways that are both similar and unique to other groups. First, like many marginalized groups, openly LGBTQ+ people have historically experienced discrimination in the workplace. LGBTQ+ people have been excluded from societal hierarchies, and the number of LGBTQ+ people in truly elite positions is paltry at best.[168]

A wealth of research shows that rank-and-file workers and corporate leaders alike are uncomfortable being out at work, believing their heterosexual peers will target them for discrimination or harassment.[169] Several studies on hiring practices, whereby recruiters were asked to assess identical resumes on which some indicated LGBTQ+ membership and others did not, found that recruiters systematically discriminated against candidates who openly identified as LGBTQ+.[170] Other studies have found a persistent wage gap between LGBTQ+ workers and their heterosexual counterparts.[171] Others have found large wealth differences

167. Pradipta Chaudhury, *The "Creamy Layer": Political Economy of Reservations*, 39 ECON. & POL. WKLY, 1989, 1989–1990 (2004); *see also* Darren Rosenblum, *California Pioneers New Quotas for People of Color & LGBT People*, FORBES (Oct. 5, 2020), https://www.forbes.com/sites/darrenrosenblum/2020/10/05/california-pioneers-new-quotas-for-people-of-color—lgbt-people/?sh=29370bfa3cc3 [https://perma.cc/3DPV-C4HA].

168. OUT LEADERSHIP, VISIBILITY COUNTS 2022: LGBTQ+ BOARD DIVERSITY: WHAT ARE WE WAITING FOR? 16 (2022), https://outleadership.com/wp-content/uploads/2022/03/OutQUORUM-Report-2022-2.pdf [https://perma.cc/P9MB-J8P9].

169. *Id.*

170. *See* András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC., 586, 587 (2011); *cf.* Nick Drydakis, *Sexual Orientation Discrimination in the United Kingdom's Labour Market: A Field Experiment*, 68 HUM. RELATIONS 1769 (2015); *see also* Ian Burn, *The Relationship Between Prejudice and Wage Penalties for Gay Men in the United States*, 73 ILR REV.: J. WORK & POL'Y 650, 657–60 (2019).

171. Burn, *supra* note 170, at 665–66.

in states with poor LGBTQ+ rights records.[172] It must be noted that cultural acceptance of LGBTQ+ people has shifted over a short timeframe. Recently, the Supreme Court expanded Title VII to include LGBTQ+ discrimination,[173] and one study indicates the stereotypes noted in older studies may be softening.[174] However, at least one recent high-quality study supports the historical findings of wage and attainment gaps, and the weight of the evidence continues to show persistent discrimination against LGBTQ+ individuals by non-LGBTQ+ individuals.[175] Just as other marginalized groups continue to be discriminated against, despite decades of antidiscrimination legislation, the Supreme Court's decision is unlikely to eliminate LGBTQ+ discrimination altogether.

Several reasons for such discrimination exist: the perception LGBTQ+ people are outside a community's moral norms and therefore unworthy of occupying important roles; the perception that gay men possess personality traits or characteristics traditionally associated with women (who have also been outside the power structure); or simply, the lack of common interests, behaviors, or character traits that usually facilitate the formation of social bonds in established hierarchies (as one point of view among heterosexuals has sometimes been phrased, "There's something funny about that one").[176] The exclusion from these hierarchies is shared by many women and minorities, albeit often for different reasons. But these historical exclusions provide a moral, social, or equitable argument for more inclusion today.

For gay men, a distinct but related phenomenon operates. Within the U.S. context, especially in large cities, some presume the stigma against white gay men has dissipated. Therefore, mandating and justifying the inclusion of white gay men may be difficult. Whether this is true elsewhere in society, the corporate elite adhere to extraordinarily exclusionary practices that may still warrant efforts at inclusion. Within large firms, diversity hiring practices at least attempt to preclude discrimination against gay men and in some cases might even favor their inclusion for their "diversity." Yet the elites who run these same organizations operate by entirely different rules.

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172. *See* Marieka Klawitter, *Multilevel Analysis of the Effects of Antidiscrimination Policies on Earnings by Sexual Orientation*, 30 J. POL'Y ANALYSIS & MGMT. 334, 334–36 (2011).

173. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

174. *See* M. Paz Galupo & Courtney A. Resnick, *Experiences of LGBT Microaggressions in the Workplace: Implications for Policy*, *in* SEXUAL ORIENTATION AND TRANSGENDER ISSUES IN ORGANIZATIONS 271 (2016).

175. *See id.* at 271; Burn, *supra* note 170, at 665.

176. Christopher S. Carpenter & Samuel T. Eppink, *Does It Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States*, 84 S. ECON. J. 426, 428 (2017) (finding the first evidence that gay wages have equalized).

For example, take any customer-facing organization. On the floor of any store, you see a range of diverse people of distinct colors, sexes, and even sexual orientations, but the rules at the top are quite distinct, typically reflecting the opposite. To use Cheryl Wade's coinage, in regard to corporate approaches to race, this scenario is "diversity doublespeak."[177] In this world of seven-figure salaries, coming out is verboten. This is highlighted by there being only three LGBTQ+ people who lead major corporations, and one of them—Tim Cook—only came out when a *Gawker* article forced his hand.[178] Being openly gay is, on its own, an element that would preclude one's "fit" within the leadership. The most powerful evidence on this point is the data on minimal number of gay people atop corporate hierarchies.

In an informal interview, a small-firm CEO reported having gone to an interview for a CEO position and having—for the first time in his career—shared that he had a "partner." The interviewer replied that he was "brave" for sharing this information and then promised not to divulge the candidate's LGBTQ+ status. Despite that a gay man with children currently serves in the presidential cabinet,[179] being gay is still seen as a secret to be kept in confidence for would-be corporate executives. The fact that ninety-five percent of Fortune 500 CEOs are male makes it plain to see how prevailing norms of masculinity persist in boardrooms.[180] Gay men, in this sense, not only stand outside traditional masculinity but also threaten to disrupt the heteronormativity that has historically been at the core of corporate governance norms.

Some may object that in a world of diversity and inclusion, this practice of "fit" surely must still be subject to public scrutiny. It is not. Nothing is more secretive than the processes by which a nominating committee of a large corporate board chooses replacement board members or the CEO.[181] Candidates for executive positions regularly involve pseudonyms or numbers to cloak the candidates' identities.[182] The hiring

177. Cheryl L. Wade, "*We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1547 (2004).

178. *See* Hannah Fairbanks, *How Openly LGBTQ+ Fortune 500 CEOs Are Changing the Corporate Game*, RIVETER, https://theriveter.co/voice/openly-lgbtq-fortune-500-ceos-who-will-be-next/ [https://perma.cc/37BM-R3HZ] (listing Jim Fitterling of Dow Chemical and Beth Ford of Land O' Lakes are the others).

179. Libby Cathey, *Pete Buttigieg Makes History as 1st Openly Gay Cabinet Member Confirmed by Senate*, ABC NEWS (Feb. 2, 2021), https://abcnews.go.com/Politics/pete-buttigieg-makes-history-1st-openly-gay-cabinet/story?id=75633503 [https://perma.cc/B3WJ-XVMX].

180. Kimberly A. Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the United States*, 63 WM. & MARY L. REV. 497, 516 ("Women represent just 5 percent of CEOs at Fortune 500 companies.").

181. Rosenblum & Nili, *supra* note 101, at 228–29.

182. *Id.*

process involves extensive meetings to ascertain whether the individual "fits" into the corporate culture.[183] Even in 2021, a male candidate was twelve times more likely to obtain a CEO post than was a female candidate.[184]

As mentioned, the normative case for LGBTQ+ inclusion is both similar to and different from other marginalized groups.

C. Assessing the Diversity Rationales for LGBTQ+ Inclusion

How should one assess these various rationales for LGTBQ+ inclusion? First, before weighing them, it is essential to note the possible objections to the functional arguments discussed above with respect to LGBTQ+ people. One counterpoint to the arguments that LGBTQ+ people possess characteristics that foster better boards is that these characteristics are not exclusive to LGBTQ+ individuals. If these are truly the traits that matter, then why not have diversity aimed at people without children? Or if overcoming adversity is the touchstone of success, many other individuals have likely faced adversity and developed a resilience that would be useful to any organization, let alone a corporation's board of directors. If an understanding of social alienation from a young age creates character traits that make a successful leader, then any person's background revealing the same type of alienation should qualify them for board service. Perhaps LGBTQ+ status is an easy proxy for this bundle of traits that can be more easily assessed than doing so via other methods (although, as we discuss below, this may be problematic).

Moreover, other objections to LGBTQ+ board diversity policies could be applied as well. No empirical evidence shows that LGBTQ+ board members would enhance firm performance. No guarantee exists that network-related benefits of LGBTQ+ board membership will make any difference. With respect to signaling, LGBTQ+ identity can be fraught in ways that other identities are not. For example, some groups may shun a company with LGBTQ+ leadership due to religious or political commitments. It may even be the case that some leaders' same-sex sexual orientation could undermine their ability to project positive leadership perceptions to followers and to successfully mobilize followers to submit to leadership directives.[185] And the overarching objection remains that

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183. *Id.* at 230.

184. *Id.* at 224.

185. Gang Wang, David S. Steffensen Jr., Pamela L. Perrewé, Gerald R. Ferris & Samantha L. Jordan, *Does Leader Same-Sex Sexual Orientation Matter to Leadership Effectiveness? A Four-Study Model-Testing Investigation*, 37 J. BUS. & PSYCH 557, 557 (2021).

there is little evidence that boards themselves do anything to enhance firm value.[186]

Perhaps better justifications reside in moral and social rationales and the features that are found only in queer people but never (or rarely) in others. Identifying what those are requires particularizing traits to a granular degree. The most indisputable is simply the person's identification as LGBTQ+. If the goal of diversity is to mark the end of discrimination, or to provide an example for others, or to signal a certain kind of inclusion at the organization, then only someone identifying as LGBTQ+ will do. This is arguably less about any particular functional benefit that LGBTQ+ people bring and more about the fact of having LGBTQ+ people on a board. All this means the moral and social arguments can more easily sustain objections. They do not require the resolution of empirical debates, and they provide a justification for LGBTQ+ inclusion that is distinct but in harmony with the rationales for other kinds of inclusion. That said, even concluding that there is good reason for LGBTQ+ board inclusion, a number of ways in which LGBTQ+ people are different from other marginalized groups do not fit neatly into the policies that currently exist. Dealing with those differences is the topic of the next Part.

IV. MEETING THE UNIQUE CHALLENGES OF LGBTQ+ BOARD DIVERSITY

This Part investigates the challenges posed by inclusion efforts. Three overarching challenges relate to LGBTQ+ representation on corporate boards. First, problems exist concerning the requirement of LGBTQ+ status disclosure. Second, LGBTQ+ is an umbrella term that encompasses numerous identities and thus can pose difficulties for legislation mandating their inclusion. Third, a focus on LGBTQ+ identity may ignore other socioeconomic and cultural factors.

How do we separate the different experiences of different LGBTQ+ people? Given the diversity among LGBTQ+ people—spanning race, class, gender, nationality, ability, and others—it may be hard to define specific traits. It is also the case that some LGBTQ+ people—Tim Cook, for example—might not seem to have the kind of marginalized life that would warrant a diversity program. Moreover, some LGBTQ+ people are not visibly different from other people. Unlike types of visible diversity, one's LGBTQ+ status can be hidden. This calls into question the value of this kind of diversity for exemplary purposes. It also raises thorny issues

186. Rosenblum & Nili, *supra* note 101, at 221 n.63.

of privacy. Requiring disclosure of sexual identity runs diversity up against privacy. These issues are further discussed in this Section.

A. Problems with Requiring the Disclosure of LGBTQ+ Status

LGBTQ+ as a category of diversity for board purposes is problematic in several respects. First, LGBTQ+ affiliation is not always easily ascertainable. For instance, not all gay people are "out of the closet," and not all transgender people are open about their transition. A core feature of LGBTQ+ identity that separates it from other marginalized groups, in both good and bad ways, is that a person's membership in the group is not always obvious or publicly known. Moreover, it is not clear that such issues are always appropriate for public ascertainment. A person's membership in this group touches on issues of privacy because LGBTQ+ identity is defined in many ways by a person's intimate life. This fact lies at odds with a diversity requirement that demands publicity and disclosure.

Therefore, many would argue that requiring disclosure of LGBTQ+ status is problematic. Yet if mandating LGBTQ+ inclusion on boards serves as a signaling function, then identity status must be disclosed to serve that goal. Admittedly, having a requirement, regardless of justification, would probably entail disclosure—how else would the company show it is living up to the requirement? If it were simply to meet a stock exchange rule, then including the information in the member's bio in regulatory filings would be satisfactory. If the point is about heraldry, then arguably greater publicizing of the person's sexual identity would be warranted, perhaps even required. This may deter, or even exclude, some members of the community who do not want to make their sexual lives the subject of publicity. This may be a minor factor, but consider the example of a trans man who wants to live his life as a man and not be continually called upon to recount his past or explain his journey and transition. Although this person's choices and preferences may align with those of other trans employees or stockholders, the diversity rule would select individuals who are much more vocal or even confrontational about their experiences. This might mean that trans members of a board might exhibit traits that are less representative of company stakeholders who would identify as part of the same group.

There are also potentially perverse legal consequences of recognizing LGBTQ+ status as important for company performance. For example, if the law recognizes the materiality of LGBTQ+ identity as part of diversity, and diversity has a presumed connection with company value, does this mean that someone who trades stock knowing about a closeted director has traded on material nonpublic information?[187] Such a conclusion could create an unexpected basis for insider trading liability or, at the very least, create awkward disclosure issues for public issuers.

Understanding how LGBTQ+ people could be better included in corporate governance requires understanding the bases for their current exclusion. Corporate structures, created primarily by cisgender heterosexual men, reflect culturally heteronormative values and, intentionally or not, can result in the product of a deeper hostility toward those with LGBTQ+ identities. While an increasing number of firms promote inclusivity, the "old boys' club" culture of corporate leadership has deep roots. Further, openly LGBTQ+ people may select themselves out of advancement up the corporate hierarchy because of this long history of exclusion, thus depriving firms of the benefits of LGBTQ+ diversity on their boards. All these factors make disclosure fraught. However, it is difficult to square the justifications for inclusion, much less create a workable policy, unless disclosure is required. This will necessitate further consideration of the issues raised here.

B. Diversity of Individuals Within the LGBTQ+ Umbrella

As we have already discussed, the LGBTQ+ umbrella encompasses several different kinds of sexual minorities and identities. Above we discussed why this is difficult for fitting LGBTQ+ into the prevailing diversity rationales. Here we explain why this creates challenges for implementing diversity initiatives.

Members of the broader group may share some common characteristics, but they are also different in important ways. If signaling is the point, then it is far from clear that the "LGBTQ+" label would provide the same signal to every member of the group. If characteristics are inherent to members of the groups, then those characteristics also might vary. For example, a gay man has a very different experience than a trans person. They both face obstacles but different kinds and with different degrees of severity. To the extent resilience forged by adversity is a trait that LGBTQ+ members contribute, gay and trans people may not all possess it to the same degree.

Lesbian, Gay, Bisexual, and Transgender people all have identities that reflect a distinct framework for identity, one that does not neatly fit the established paradigms of race and sex. Both identities usually involve traits that affect one's phenotype, rendering them visibly identifiable. By contrast, many LGB people and some TQ+ as well may not be visibly identifiable. They may "pass" (to use a term often used in the racial

187. *See* 15 U.S.C. § 78j (2022); 17 C.F.R. § 240.10b-5 (2022).

context) for straight. Adding to this lack of a clear extrinsic identity framework, many organizations do not collect data on sexual orientation or even on transgender identity. In those contexts, whether one is L, G, B, or T depends on the person's own self-identification. Self-identification raises the prospect that an individual may choose to keep private one of these elements of their own identity. This "closet option" excludes most people of color or women, or even some LGBTQ+ people who cannot pass because of their phenotype or gender performativity.

Because of this self-identification element, LGBTQ+ people may constitute an "officially unidentifiable" identity, which may raise some additional issues regarding firms assessing who on their staff, or among a pool of candidates, is LGBTQ+. The need for self-identification puts firms in a distinct bind, as they must pose questions that might invoke privacy concerns for some of the people who would be identified. Imagine, for instance, if a Black person had the ability to "pass," how tempting it would be to do so given the massive structural exclusions among corporate elites. That helps clarify the pressure that keeps leaders like Tim Cook or Peter Thiel in the closet. Some individuals may want to get ahead without disclosing intimate details about their private lives, and such a desire is valid in its own right and should be considered in managing LBGTQ+ inclusion.

Sexual and gender identity also exists on a continuum, and this contributes to the unidentifiability of lesbians and gay men. Many people who are not lesbian or gay engage in same-sex sexual activity. Likewise, many people may be gender fluid or nonconforming in ways that may be harder to categorize. Fluidity is a particularly important component, particularly for bisexual people but also for gender-fluid people, who may sometimes fit in an "underrepresented group," and other times, may not.

LGBTQ+ is a broad grouping.[188] Various identities under that umbrella fit the rationales of diversity initiatives differently. There may be reasons it is more efficient to create a rule that lumps these groups together. Nonetheless, as acceptance grows in broader society, it will become more important to assess the needs of each group on its own terms. For example, although a handful of gay men hold board positions, it seems likely people who are transgender, or nonconforming or gender fluid, find themselves excluded from elite jobs entirely. There is no evidence of any transgender, non-binary, or gender-fluid board member on any Fortune 500 company board. Similarly, no evidence exists of any C-suite executive who is transgender, non-binary, or gender fluid.

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188. The breadth of LG identity surfaced in Darren Rosenblum's *Queer Intersectionality*. *See* Rosenblum, *supra* note 165, at 100–08.

For the time being, it may be sufficient to use the LGBTQ+ umbrella for diversity efforts. The LGBTQ+ rights movements have demonstrated the success of this approach, and for now, it makes sense. Eventually, however, a board diversity policy that accomplishes any of the goals described above will need to account for different groups under the umbrella. Broadly speaking, any group included in LGBTQ+ would fit the rationales of diversity policy. But the strength of those rationales might differ depending on the subgroup. For example, rationales based on righting current or past discrimination might seem more forceful for transgender people, given a recent raft of legislative proposals singling them out.[189] In a similar vein, rationales based on group dynamics might be better served by including more marginalized people. For instance, if outsider status is a virtue in the boardroom, transgender or gender-fluid people bring more difference in perspective than do gays or lesbians. Regardless, each different identity under the LGBTQ+ umbrella requires special consideration and can add to a firm in different and important ways.

C. Intersectionality and the Effect of Cultural and Socioeconomic Factors on Identity

Intersectionality introduces additional complexities alongside those elided by the LGTBQ+ umbrella. Intersectionality refers to the fact that people can have multiple social identities that contribute to marginalization.[190] For example, a gay African American woman can experience sexism, racism, and sexual orientation discrimination and has a different experience in many respects than someone with one or two of those identities. A thorough examination of the rationales for LGBTQ+ board diversity policies might be aided by exploring how those rationales fit for a multitude of intersectional identities. There is not space in this article for such an undertaking, and we are not convinced we could effectively do it even if we attempted it. We suspect, however, that if we examined intersectional identities using the various justifications for board diversity described above, we would find that most rationales would fit as well or better for board members with intersectional identities as for those without.

189. Some examples include "bathroom bills" barring transgender people from using bathrooms of their choice, like those proposed or enacted in Alabama, Kentucky, North Carolina, and Texas. Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 3–4 (2017).

190. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEG. FORUM. 139, 139–50 (1989).

Where does that leave us with respect to the real complications posed by disaggregating LGBTQ+ and accounting for intersectionality? First, we note that both issues raise some common questions in terms of board diversity. Second, questions of administrability of a rule that attempts to take these various subgroupings into account arise. Commercial enterprises may not be terribly adept at drawing distinctions among identities that are perhaps more fluid than rigid categorical groupings would suggest. Moreover, the benefits of disaggregating different identities would have to be weighed against the costs of doing so. It may prove valuable to include different subgroups in a board diversity matrix, and future iterations of such matrices may include such information. However, it is also possible that, for now at least, an umbrella category will accomplish the goal of promoting diversity among all parts of the LGBTQ+ spectrum without the need to decide which categories need to be counted and how they should be counted.

Additionally, although it may be useful to examine how the justifications for board diversity policy apply to the subgroups inevitably included in the LGBTQ+ category, it may prove difficult and even counterproductive to attempt to do so. Even if diversity can generally be shown to be a good thing in corporate boardrooms, requiring each subgroup to individually justify its inclusion can prove quixotic for several reasons. The dearth of data on LGBTQ+ board members is even more pronounced with respect to Bi, Trans, and Queer individuals, and the data problem is compounded for intersectional identities. Moreover, given the noisy empirical background, one might erroneously confuse the inability to draw clear connections between different identities and benefits for boards with the conclusion that no such benefits exist. Those in power might misunderstand the inherent problem that there is a lack of good evidence or no clear analytical framework for categorizing some groups that are difficult to categorize. Thus, we raise the disaggregation of the LGBTQ+ grouping and the issue of intersectionality as additional complications for board diversity initiatives that are likely to become more pronounced over time, even if they may not be the most pressing ones today.

Finally, cultural and socioeconomic differences complicate these identities. Lesbians and gay men comprise many racial, ethnic, class, and gender groups and, therefore, face multiple levels of discrimination. Respecting the unique ways in which women, racialized groups, poor people, people with disabilities, and other disadvantaged and marginalized groups face anti-lesbian and gay discrimination requires consideration of their different interests as part of the overall need for inclusion.

CONCLUSION

This Article engages the relatively unexplored topic of inclusion of LGBTQ+ people in corporate hierarchies. Although further research could establish more clearly the specific nature of the difference LGBTQ+ people bring to corporate governance, we argue the evidence of widespread discrimination highlights the need for inclusive measures.

We also demonstrate that the inclusion of LGBTQ+ people in broader diversity measures entails some challenges. LGB and some T people can—whether because of social or economic pressure or internalized homophobia or transphobia—remain in the closet and pass for straight or cisgendered. This form of "passing" suggests that this inclusion story may not be as neat as it is for other underrepresented groups. We also note that the complexity and even fluidity of the continuum of lesbian, gay, bisexual, and transgender play a role in inclusion.

Nonetheless, LGBTQ+ continue to experience substantial exclusion in socioeconomic terms, an exclusion that evidences how they would bring an outsider perspective to corporate governance, one that would provide genuine diversity in decision-making on issues of strategy and, not incidentally, future hires for the executive and the board.

A need for more research remains. Given the complexity of these identities, the research will pose challenges and even dilemmas for researchers as they determine the appropriate method to use to conduct research. Quantitative work may hold its usual allure in providing policy guidance with hard numbers. But it may prove difficult to obtain clear data with the "noisy" aspects of LGBTQ+ identity.

Qualitative research may prove more fruitful in establishing the nature of exclusions and the value of inclusion. But qualitative research holds its own challenges. Given the secrecy surrounding elite hiring processes and even in the objective notion of "fit" itself, it may prove daunting for researchers to understand fully how heterosexual, cisgender men might sincerely feel about LGBTQ+ inclusion. As with much empirical research, additional research may create new avenues of inquiry that may provide greater clarity on how LGBTQ+ individuals can contribute to corporate governance.

The paucity of data on LGBT+ inclusion, combined with the predominant closetedness of corporate elites, reveals challenges, not just for inclusion, but for scholars as well. Empirical data would provide more definitive understanding about the business case for LGBT+ inclusion. We have tried to present an evenhanded analysis of these issues. However, we also want to underscore the presumptive validity of the normative case, which should hold more valence in a policy context. While it too requires elaboration, one of the most salient features of the corporate elite is that

LGBTQ+ people face widespread and baseless exclusion. Finding a way to include them will create an opportunity for a private sector that promotes leaders regardless of their gender or sexual orientation. Creating inclusion will not only be the just result but also a better result for the corporate world.