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ARTICLES

SEXUAL HARASSMENT AND CORPORATE LAW

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The #MeToo movement has shaken corporate America in recent months, leading to the departures of several high-profile executives as well as sharp stock price declines at a number of firms. Investors have taken notice and taken action: Shareholders at more than a half dozen publicly traded companies have filed lawsuits since the start of 2017 alleging that corporate fiduciaries breached state law duties or violated federal securities laws in connection with sexual harassment scandals. Additional suits are likely in the coming months.

This Article examines the role of corporate and securities law in regulating and remedying workplace sexual misconduct. We specify the conditions under which corporate fiduciaries can be held liable under state law for perpetrating sexual misconduct or allowing it to occur. We also discuss the circumstances under which federal securities law requires issuers to disclose allegations against top executives and to reveal settlements of sexual misconduct claims. After building a doctrinal framework for analyzing potential liability, we consider the strategic and normative implications of using corporate and securities law to address workplace sexual misconduct. We conclude that corporate and securities law can publicize the scope and severity of sexual harassment, incentivize proactive and productive interventions by corporate fiduciaries, and punish individuals and entities that commit, conceal, and abet sexual misconduct in the workplace. But we also address the potential discursive and distributional implications of using laws designed to protect shareholders as tools to regulate sexual harassment. We end by

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emphasizing the promise—as well as the pitfalls—of using corporate law as a catalyst for organizational and social change.

INTRODUCTION

The year 2017 marked an inflection point in the evolution of social norms regarding sexual misconduct. While victims of workplace sexual harassment and sexual assault had long suffered in silence, the surfacing of serious sexual misconduct allegations against Hollywood producer Harvey Weinstein in October 2017 encouraged many more victims to tell their personal stories of abuse. Within months, a long list of celebrities and public figures faced allegations of sexual misconduct, including actors Ben Affleck, Dustin Hoffman, and Kevin Spacey; broadcasters Matt Lauer and Charlie Rose; comedian Louis C.K.; journalists Ryan Lizza and Mark Halperin; singer Nick Carter; radio personalities Garrison Keillor and Tavis Smiley; and politicians such as Congressman John Conyers, Senator Al Franken, and failed senatorial candidate Roy Moore.[1] What began as the "#MeToo moment" quickly grew into a #MeToo movement that shows no signs of losing steam.[2]

It did not take long for sexual harassment allegations to reach corporate boardrooms. Even before the Weinstein allegations emerged, a number of high-profile chief executives had resigned in recent years amid allegations of sexual harassment, including Mark Hurd of Hewlett Packard,[3] Dov Charney of American Apparel,[4] Roger Ailes of Fox News,[5] Mark Light of Signet Jewelers,[6] Kris Duggan of the enterprise software

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1. See Samantha Cooney, Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein, Time (Nov. 9, 2017), http://time.com/5015204/harvey-weinstein-scandal (on file with the *Columbia Law Review*) (last updated Sept. 17, 2018).

2. See Monica Akhtar, #MeToo: A Movement or a Moment?, Wash. Post (Nov. 9, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/11/09/metoo-a-movement-or-a-moment/ (on file with the *Columbia Law Review*).

3. Ben Worthen & Pui-Wing Tam, H-P Chief Quits in Scandal, Wall St. J. (Aug. 7, 2010), https://www.wsj.com/articles/SB10001424052748703309704575413663370670900 (on file with the *Columbia Law Review*).

4. See Shane Ferro, American Apparel Lawsuit Is 'Mother of All Sexual Harassment Cases,' Judge Says, HuffPost (Oct. 9, 2015), https://www.huffingtonpost.com/entry/american-apparel-lawsuit-dov-charney-sexual-harassment_us_5617c6dce4b0082030a2067d [https://perma.cc/NF3V-CK6W].

5. Emily Steel & Michael S. Schmidt, More Trouble at Fox News: Ailes Faces New Sexual Claims and O'Reilly Loses Two Advertisers, N.Y. Times (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/business/media/fox-news-roger-ailes-harassment-suit.html (on file with the *Columbia Law Review*).

6. See Drew Harwell, Signet Jewelers CEO, at Center of Gender-Discrimination Case, Retires for 'Health Reasons,' Wash. Post (July 17, 2017), https://www.washingtonpost.com/

company BetterWorks,[7] and Mike Cagney of the online lender SoFi.[8] And since Weinstein's departure from his film production firm, the cascade of CEO resignations and leaves of absence related to sexual misconduct has continued.[9] Meanwhile, several high-profile executives below the CEO level at firms such as Amazon Studios,[10] Fidelity Investments,[11] Morgan Stanley,[12] NPR,[13] and the Walt Disney Company[14] have left their jobs after sexual harassment allegations against them surfaced.

These scandals have caught the attention of shareholders and plaintiffs' lawyers. From the start of 2017 through August 2018,

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news/business/wp/2017/07/17/signet-jewelers-ceo-mark-light-at-the-center-of-a-sprawling-gender-discrimination-case-out-for-health-reasons (on file with the *Columbia Law Review*).

7. See Lizette Chapman, BetterWorks CEO Resigns Amid Sexual Harassment Lawsuit, Bloomberg Tech. (July 26, 2017), https://www.bloomberg.com/news/articles/2017-07-26/betterworks-ceo-duggan-resigns-amid-sexual-harassment-lawsuit (on file with the *Columbia Law Review*).

8. See Katie Benner & Nathaniel Popper, Chief Executive of Social Finance, an Online Lending Start-Up, to Step Down, N.Y. Times (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/technology/sofi-mike-cagney-sexual-harassment.html (on file with the *Columbia Law Review*). In addition, Uber founder Travis Kalanick resigned as CEO of the ride-sharing service amid allegations that he tolerated a toxic work environment and widespread sexual harassment at the company. See Mike Isaac, Uber Founder Travis Kalanick Resigns as C.E.O., N.Y. Times (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html (on file with the *Columbia Law Review*).

9. See, e.g., Marco della Cava, Hyperloop Cofounder Pishevar Takes Leave After Harassment Allegations, USA Today (Dec. 5, 2017), https://www.usatoday.com/story/tech/2017/12/05/hyperloop-cofounder-pishevar-takes-leaves-after-harassment-allegations/923730001 [https://perma.cc/C2MJ-EA7M]; Fenway Health CEO Quits over Sexual Harassment Claims Against Doctor, Modern Healthcare (Dec. 11, 2017), http://www.modernhealthcare.com/article/20171211/NEWS/171219983 [https://perma.cc/34PG-2J8T].

10. See John Koblin, Roy Price Quits Amazon Studios After Sexual Harassment Claim, N.Y. Times (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/business/media/roy-price-amazon-studios.html (on file with the *Columbia Law Review*); Olivia Zaleski, Two Executives Depart Amazon's Audible Unit After Harassment Probe, Seattle Times (Dec. 5, 2017), https://www.seattletimes.com/business/amazon/two-executives-depart-amazons-audible-unit-after-harassment-probe (on file with the *Columbia Law Review*).

11. Kirsten Grind et al., Star Fidelity Manager Gavin Baker Fired over Sexual Harassment Allegations, Wall St. J. (Oct. 12, 2017), https://www.wsj.com/articles/star-fidelity-manager-gavin-baker-fired-over-sexual-harassment-allegations-1507841061 (on file with the *Columbia Law Review*).

12. Marwa Eltagouri, Former Congressman Harold Ford Jr. Fired by Morgan Stanley over Inappropriate Behavior, Company Says, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/news/business/wp/2017/12/07/former-congressman-harold-ford-jr-fired-by-morgan-stanley-over-inappropriate-behavior-company-says (on file with the *Columbia Law Review*).

13. David Folkenflik, NPR's Sexual Harassment Scandal, NPR (Nov. 5, 2017), https://www.npr.org/2017/11/05/562188679/nprs-sexual-harassment-scandal (on file with the *Columbia Law Review*).

14. Brooks Barnes, John Lasseter, a Pixar Founder, Takes Leave After 'Missteps,' N.Y. Times (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/business/media/john-lasseter-pixar-disney-leave.html (on file with the *Columbia Law Review*).

shareholders at eight publicly traded firms—Signet Jewelers, Twenty-First Century Fox, Liberty Tax, Wynn Resorts, National Beverage, CBS, Papa John's, and Nike—filed lawsuits against corporate directors and officers on grounds related to reported sexual misconduct at those companies.[15] First, in March and April 2017, shareholders at Signet Jewelers filed a series of class action lawsuits alleging that the company, its CEO, and other current and former officers violated federal securities law by misleading investors about a culture of sexual harassment at the firm.[16] Those claims have since been consolidated in the federal district court for the Southern District of New York, and a motion to dismiss the consolidated class action complaint is now fully briefed and pending decision.[17] Second, after the departures of CEO Roger Ailes and broadcaster Bill O'Reilly from Fox News, shareholders filed a derivative action against the late Ailes's estate and against directors of parent company Twenty-First Century Fox alleging that the defendants had breached their fiduciary duties by allowing sexual harassment to run rampant at the network.[18] That suit settled on the same day it was filed in November 2017 for $90 million plus an agreement by the network to establish a panel of advisors tasked with improving the work environment at Fox News.[19] Third, a Philadelphia-based pension fund filed a derivative lawsuit against Liberty Tax and its former CEO, John Hewitt, in December 2017 after news reports revealed that Hewitt had carried on

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15. See infra section II.A.

16. For the most recent complaint in the case as of this writing, see Fifth Amended Class Action Complaint for Violations of the Federal Securities Laws, In re Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728-JMF (S.D.N.Y. filed Mar. 22, 2018) [hereinafter *Signet Jewelers* Complaint]. For earlier pleadings, see Second Amended Class Action Complaint for Violations of Federal Securities Law, Dube v. Signet Jewelers Ltd., No. 1:16-cv-06728-JMF (S.D.N.Y. filed Apr. 3, 2017); Complaint for Violation of the Federal Securities Laws, Irving Firemen's Relief & Ret. Sys. v. Signet Jewelers Ltd., No. 1:17-cv-02845 (S.D.N.Y. filed Mar. 28, 2017); Class Action Complaint for Violations of Federal Securities Laws, Mikolchak v. Signet Jewelers Ltd., No. 3:17-cv-00923 (N.D. Tex. filed Mar. 31, 2017) [hereinafter *Mikolchak* Complaint] (transferred to the Southern District of New York by Order Granting Agreed Motion to Transfer Venue, *Mikolchak*, No. 3:17-cv-00923-B (filed Apr. 17, 2017)).

17. See Order, *In re Signet Jewelers*, No. 1:16-cv-06728 (JMF) (filed Mar. 20, 2018) [hereinafter *Signet Jewelers* Order].

18. See Verified Derivative Complaint at 1–2, City of Monroe Emps.' Ret. Sys. v. Murdoch, No. 2017-0833 (Del. Ch. filed Nov. 20, 2017) [hereinafter *Murdoch* Complaint].

19. See Stipulation & Agreement of Settlement, Compromise, & Release at 26–28, *Murdoch*, No. 2017-0833-AGB (filed Nov. 20, 2017) [hereinafter *Murdoch* Settlement]. After Roger Ailes left Fox News, the U.S. Attorney's Office for the Southern District of New York also opened an investigation into whether the network's parent company, Twenty-First Century Fox, had violated federal securities law by misreporting settlement payments that it made to Ailes's accusers. See Joe Flint & Michael Rothfeld, Scope of Federal Probe into Fox News Broadens, Wall St. J. (May 4, 2017), https://www.wsj.com/articles/scope-of-federal-probe-into-fox-news-broadens-1493938947 (on file with the *Columbia Law Review*). No charges have been filed publicly in the several months since news of the investigation emerged.

sexual relationships with several female employees and diverted company resources to his romantic liaisons.[20] Fourth, three pension funds filed derivative actions against Wynn Resorts in Nevada state court alleging breaches of fiduciary duty by the company's directors and officers after a *Wall Street Journal* report in January 2018 revealed a decades-long pattern of sexual harassment by CEO Steve Wynn.[21] Fifth, in July 2018, shareholders at National Beverage Corp., the maker of LaCroix sparkling water, sued the company and its CEO, Nick Caporella, alleging that the firm had made materially false and misleading statements that concealed Caporella's sexual harassment of pilots on a corporate jet.[22] Sixth, in August 2018, a CBS Corporation shareholder brought a class action against the media company, CEO Leslie Moonves, and another corporate officer in federal court in New York accusing the company of covering up sexual misconduct allegations involving Moonves.[23] Seventh, a shareholder sued pizza chain Papa John's, its founder John Schnatter, and two corporate officers in federal court in New York that same month for allegedly violating federal securities laws by—among other things—failing to disclose Schnatter's reported pattern of sexual harassment

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20. See Verified Stockholder Derivative Complaint at 1, Asbestos Workers' Phila. Pension Fund ex rel. Liberty Tax v. Hewitt, No. 2017-0883 (Del. Ch. filed Dec. 11, 2017) [hereinafter *Liberty Tax* Complaint]; Kimberly Pierceall, Ex-CEO of Liberty Tax Likely Had Sex in His Office and Dated Employees, Report Says, Virginian-Pilot (Nov. 9, 2017), https://pilotonline.com/business/consumer/article_90141e98-cf88-56a8-afcd-e1170fef68c6.html [https://perma.cc/YLZ7-5M47] [hereinafter Pierceall, Ex-CEO of Liberty Tax].

21. Verified Stockholder Derivative Complaint at 5, DiNapoli ex rel. Wynn Resorts Ltd. v. Wynn, No. A-18-770013-B (Nev. Dist. Ct. filed Feb. 22, 2018); Verified Stockholder Derivative Complaint at 1–3, Norfolk Cty. Ret. Sys. ex rel. Wynn Resorts, Ltd. v. Wynn, No. A-18-769062-B (Nev. Dist. Ct. filed Feb. 6, 2018) [hereinafter *Wynn* Complaint]; Verified Stockholder's Derivative Complaint for Damages & Equitable Relief at 3, Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund ex rel. Wynn Resorts v. Wynn, No. A-18-769630-B (Nev. Dist. Ct. filed Feb. 15, 2018); see also Alexandra Berzon et al., Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn, Wall St. J. (Jan. 27, 2018), https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953 (on file with the *Columbia Law Review*).

22. See Class Action Complaint at 4, Luczak v. Nat'l Beverage Corp., No. 0:18-cv-61631-KMM (S.D. Fla. filed July 17, 2018) [hereinafter *Luczak* Complaint]; Press Release, Bronstein, Gerwitz & Grossman, LLC, Bronstein, Gewirtz & Grossman, LLC Notifies Investors of Class Action Against National Beverage Corp. (FIZZ) and Lead Plaintiff Deadline (July 18, 2018), https://www.prnewswire.com/news-releases/shareholder-alert—bronstein-gewirtz–grossman-llc-notifies-investors-of-class-action-against-national-beverage-corp-fizz-and-lead-plaintiff-deadline–september-17-2018-300682796.html [https://perma.cc/X5WD-VLHH] [hereinafter Bronstein Press Release]; Press Release, Pomerantz LLP, Pomerantz Law Firm Reminds Shareholders with Losses on Their Investment in National Beverage Corp. of Class Action Lawsuit and Upcoming Deadline (Aug. 9, 2018), https://www.marketwatch.com/press-release/shareholder-alert-pomerantz-law-firm-reminds-shareholders-with-losses-on-their-investment-in-national-beverage-corp-of-class-action-lawsuit-and-upcoming-deadline–fizz-2018-08-08 [https://perma.cc/LFU8-PN4E] [hereinafter Pomerantz Press Release].

23. Class Action Complaint at 1–3, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. filed Aug. 27, 2018) [hereinafter *Samit* Complaint].

while he was CEO.[24] And as August 2018 drew to a close, Nike shareholders filed a derivative action in Oregon state court alleging that directors and officers at the world's largest supplier of athletic shoes and apparel had breached their fiduciary duties and wasted corporate assets by fostering a "'boys' club' culture" that "resulted in the bullying, sexual harassment, and gender discrimination of [Nike]'s female employees" while impairing the company's "reputation and goodwill."[25]

These eight cases do not mark the first time that publicly traded corporations and their directors and officers have faced shareholder lawsuits arising out of workplace sexual misconduct. Sex scandals at the pharmaceutical company ICN (now Valeant),[26] the tech giant Hewlett-Packard,[27] the clothing brand American Apparel,[28] and the executive search firm CTPartners[29] have led to shareholder suits in the past. The #MeToo movement will likely lead to many more such claims, raising important doctrinal questions for scholars and practitioners of corporate and securities law that the existing academic literature has yet to address. First, under what conditions will directors and officers be held liable to shareholders under state corporate law for perpetrating sexual misconduct or allowing it to occur at their firms? And second, under what conditions do federal securities laws require publicly traded companies to disclose the fact that top executives have been accused of sexual misconduct or that corporate funds have been used to settle harassment claims? While we can glean some insights from the outcomes of past cases, these questions remain fundamentally unresolved.

For scholars and activists focused on fighting sexual misconduct, the specter of fiduciary and securities fraud liability in cases of workplace sexual misconduct also raises questions with strategic and normative dimensions. Is it wise to utilize corporate and securities law as tools to address sexual harassment, or would the #MeToo movement be better advised to focus its energy on alternative legal and political mechanisms? According to one view, any development that leads corporate directors and officers to devote more attention to sexual misconduct at their firms should be welcomed. At the same time, the use of corporate and securities law to regulate workplace-based sexual misconduct has potential discursive and distributional implications that require careful consideration before these tools are widely deployed.[30] And looming are legitimate concerns about the potential for liability to backfire in ways

24. Class Action Complaint at 2, Danker v. Papa John's Int'l, Inc., No. 1:18-cv-07927 (S.D.N.Y. filed Aug. 30, 2018) [hereinafter *Danker* Complaint].

25. Complaint at 4, 60–61, Stein v. Knight, No. 18CV38553 (Or. Cir. Ct. filed Aug. 31, 2018) [hereinafter *Stein* Complaint].

26. See infra section II.A.1.

27. See infra section II.A.2.

28. See infra section II.A.3.

29. See infra section II.A.4.

30. See discussion infra sections III.B–.C.

that ultimately work to the disadvantage of the (primarily female) employees who are most likely to be the victims of harassment.

Our observations regarding the legal merits as well as the strategic and normative implications of these types of lawsuits are necessarily tentative. Our primary aim in this Article is to advance a conversation among scholars, practitioners, and activists regarding the legal duties of corporate fiduciaries to prevent, respond to, and disclose the occurrence of workplace-based sexual misconduct. To facilitate this conversation, we provide the first detailed analysis of how claims by shareholders against corporate fiduciaries who have committed, tolerated, or concealed sexual misconduct at their firms might fit within existing legal frameworks. We also analyze the benefits and costs of using corporate and securities law as tools in the fight against workplace-based sexual misconduct. While the viability and desirability of shareholder lawsuits in cases of sexual misconduct will become clearer if and as more such cases arise, the one claim we can make confidently at this point is that corporate law will—as it always has—continue to reflect evolving social norms.[31] The social transformation sparked by the #MeToo movement will be no exception.

Our Article proceeds in three parts. Part I explains how areas of law other than corporate and securities law—most significantly, Title VII of the Civil Rights Act of 1964—have historically addressed workplace-based sexual misconduct. We take stock of Title VII's successes while highlighting its shortcomings and identifying the voids that corporate and securities law can potentially fill.

Part II considers recent reports of sexual harassment from the perspectives of corporate and securities law. (From now on, we will use the term "corporate law" to refer to state laws addressing the fiduciary duties of corporate directors and officers as well as federal laws regarding the obligations of publicly traded corporations to disclose information to existing shareholders and potential investors.[32]) We use the handful of

31. On the relationship between corporate law and social norms, see generally Melvin A. Eisenberg, Corporate Law and Social Norms, 99 Colum. L. Rev. 1253, 1254–55 (1999) (asserting that "even social norms that do not impose obligations play important roles in the law, and . . . belief-systems that result from new information and reasoned persuasion play a fundamental role in the origin and adoption of social norms"); Edward B. Rock & Michael L. Wachter, Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation, 149 U. Pa. L. Rev. 1619, 1621–22 (2001) (arguing that corporate law "should be understood as protecting and perfecting" the choice of replacing "legal governance of relations with nonlegally enforceable governance mechanisms (what are sometimes called 'norms')").

32. We are cognizant that this space-saving construction entangles us in a debate over whether federal securities law should be considered a species of corporate law. See James J. Park, Reassessing the Distinction Between Corporate and Securities Law, 64 UCLA L. Rev. 116, 118 & nn.2–5 (2017) (collecting sources); id. at 120 (arguing that the "better way of framing the difference between securities and corporate law" is to say that "securities law protects the investor while he is a trader, and corporate law protects the investor while he is an owner"). The definitional debate often has ideological overtones: As Professor James Park notes, those who argue that "securities law is just a federal version of corporate law"

already-filed shareholder claims arising out of CEO sexual harassment as jumping-off points to analyze the potential liability of corporations, as well as their directors and officers, after sexual misconduct at a firm is revealed.[33] We identify various legal arguments available to shareholders who seek to hold directors and officers responsible for sexual misconduct at corporations where those directors and officers serve, and we conclude that in some instances, corporate fiduciaries will be liable to shareholders for committing, enabling, or failing to prevent workplace-based sexual misconduct at their companies. While we do not believe that publicly traded companies have an affirmative duty to disclose sexual harassment claims in most cases, we specify the circumstances under which companies might be held liable under federal securities statutes for misleading statements regarding workplace sexual misconduct. We also outline strategies for board members who seek to reduce the incidence of sexual harassment at their firms and to contain the fallout when harassment does occur. And finally, we describe other options available to shareholders who seek to use their voice within portfolio companies to catalyze lasting organizational change.

In Part III, we step back from the legal questions of *whether* and *when* corporations and their fiduciaries will face liability in connection with workplace-based sexual misconduct and consider *why* corporate law should be invoked in these circumstances. We anticipate and address several arguments against the use of corporate law as a tool to regulate and remedy sexual harassment and sexual assault. One such argument is that using corporate law to deter workplace-based sexual misconduct distracts and detracts from the principal purposes of these areas of law: to

generally believe that federal regulation of corporate governance "should be expanded," while those who argue for a distinction between corporate and securities law generally want to restrict the scope of federal intervention. Id. at 118. For present purposes, we take no position in that debate. We clump corporate and securities law together for the entirely nonideological purpose of avoiding awkward and cumbersome sentence constructions in the pages that follow.

33. See infra section II.A.

maximize shareholder value,[34] protect investors,[35] and promote the efficient allocation of capital.[36] A second objection is nearly the mirror image of the first: Focusing on the ways in which workplace-based sexual misconduct harms shareholders will divert attention from much more significant harms to victims.[37] A third concern is distributional: Reliance on corporate law in the fight against workplace-based sexual misconduct will do more to protect potential victims in high-paying professional positions—who are more likely to interact with the executives of publicly traded companies—than to protect the millions of manufacturing and service-industry workers who face harassment on a regular basis.[38] A fourth concern focuses on the potential for backlash, and in particular, the possibility that high-ranking men will respond to the risk of litigation by effectively excluding female employees from corporate inner circles.[39] We take all of these objections seriously, though we nonetheless conclude that corporate law can play a productive role in reducing the incidence of sexual harassment and sexual assault at and beyond publicly traded companies.

We end by situating the conversation over corporate law and workplace-based sexual misconduct within the broader context of the debate over corporate governance and social responsibility. From one perspective, the use of corporate law to combat workplace-based sexual misconduct is part and parcel of a broader phenomenon of extending corporate law to reach the social concerns of the day—ranging from gender diversity in the boardroom[40] to genocide in the Democratic

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34. See, e.g., Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

35. See What We Do, SEC, https://www.sec.gov/Article/whatwedo.html [https://perma.cc/C8MC-GYSY] (last visited July 26, 2018) ("Congress established the Securities and Exchange Commission in 1934 to enforce the newly-passed securities laws, to promote stability in the markets and, most importantly, to protect investors.").

36. See Franklin Allen, Stock Markets and Resource Allocation, *in* Capital Markets and Financial Intermediation 81, 81–108 (Colin Mayer & Xavier Vives eds., 1993); Jeffrey Wurgler, Financial Markets and the Allocation of Capital, 58 J. Fin. Econ. 187, 188–89, 210–12 (2000).

37. See infra sections III.B–.C.

38. See, e.g., Danielle Paquette, The Industries with the Worst Sexual Harassment Problem, Wash. Post (Nov. 24, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/24/the-industries-with-the-worst-sexual-harassment-problem (on file with the *Columbia Law Review*) (noting that women who work in restaurants and clothing stores tend to "encounter more predatory behavior than" those in "higher-paying fields").

39. See, e.g., Melinda Newman, Why the #MeToo Movement Could Have Chilling Effect for Women in Music Industry, Billboard (Dec. 14, 2017), https://www.billboard.com/articles/business/8070562/metoo-movement-women-music-industry-impact [https://perma.cc/W8UQ-BHWR].

40. See David A. Katz & Laura A. McIntosh, Gender Diversity on Boards: The Future Is Almost Here, Harvard Law Sch. Forum on Corp. Governance & Fin. Regulation (Mar.

Republic of the Congo[41] to global greenhouse gas emissions.[42] From another vantage point, corporate law concepts such as "shareholder value" and "materiality" necessarily reflect changing perceptions among corporate stakeholders and society at large.[43] In this latter view, it is not just that corporate law is being deployed to advance the aims of the #MeToo movement; it is also that the #MeToo movement has revealed (or reinforced our understanding) that widespread sexual harassment stands as an obstacle to the efficient allocation of human and financial capital.

I. The Regulation of Sexual Harassment Before #MeToo

Our analysis begins with a brief history of the concept of sexual harassment in American law and an overview of the statutes and judicial doctrines that address it. For the past several decades, Title VII of the Civil Rights Act of 1964 has been the most important legal tool in the fight against sexual harassment, and it no doubt will continue to play a central role in the #MeToo era. Yet as this Part illustrates, the size and scope of remedies for sexual harassment under Title VII are limited in significant ways. These limits motivate the search for alternative mechanisms to regulate and redress sexual harassment.

A. *Defining Terms*

The concept of "sexual harassment" first emerged in the legal and lay lexicons relatively recently, though harassment on the basis of sex in and beyond the workplace is, of course, not a new phenomenon. As Figure 1 illustrates, the term only came into widespread use starting in the 1970s, with a sharp increase in attention in the 1990s amid high-profile scandals involving Supreme Court nominee (later Justice) Clarence Thomas and President Bill Clinton. (Presumably we would see another abrupt uptick if the data extended to 2017.)

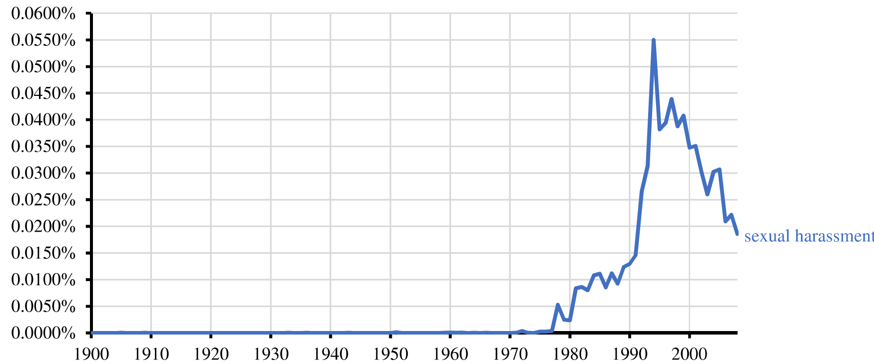
25, 2016), https://corpgov.law.harvard.edu/2016/03/25/gender-diversity-on-boards-the-future-is-almost-here/ [https://perma.cc/ND8L-Z73D].

41. See David M. Lynn, The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues, 6 J. Bus. & Tech. L. 327, 328 (2011).

42. See J. Kevin Healy & Jeffrey M. Tapick, Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem, 29 Colum. J. Envtl. L. 89, 93 (2004).

43. Oliver Hart & Luigi Zingales, Companies Should Maximize Shareholder Welfare Not Market Value 6 (European Corp. Governance Inst., Finance Working Paper No. 521/2017, 2017), https://ssrn.com/abstract=3004794 (on file with the *Columbia Law Review*).

FIGURE 1: FREQUENCY OF THE PHRASE "SEXUAL HARASSMENT" IN GOOGLE BOOKS ARCHIVE, 1900–2008[44]



The feminist author and activist Lin Farley was one of the first to formulate a definition of "sexual harassment." In a 1975 survey distributed to women at Cornell University and to public employees in Binghamton, New York, Farley defined "sexual harassment" as "[a]ny repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find objectionable or offensive and causes you discomfort on your job."[45]

Understandings of sexual harassment have evolved since Farley coined the term forty years ago. First, while Farley's focus was on the harassment *of* women *by* men, the consensus view today is that individuals of any gender can be victims or perpetrators of sexual harassment.[46] This Article generally uses masculine and feminine pronouns to describe the perpetrator and victim roles, respectively, but our word usage is not intended to ignore the experiences of male harassment victims or harassment victims who identify as genderqueer.

44. Google Books Ngram Viewer, https://books.google.com/ngrams/graph?content=sexual+harassment&year_start=1900&year_end=2009&corpus=15&smoothing=0&share=&direct_url=t1%3B%2Csexual%20harassment%3B%2Cc0 [https://perma.cc/UH45-AWF5] (last visited Aug. 29, 2018) (graphing trends in the use of the phrase "sexual harassment" between 1900 and 2008).

45. Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job 20 (1978).

46. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964); Casiano v. AT&T Corp., 213 F.3d 278, 285 (5th Cir. 2000) ("The law is well settled that sexual harassment of an employee by a supervisor is not confined to instances involving male supervisors and female subordinates; it can occur in the female supervisor-male subordinate context. It can even occur in the same-sex context.").

Second, the Equal Employment Opportunity Commission (EEOC)[47] and two federal courts of appeals[48] have taken the position that "sexual harassment" includes harassment on the basis of sexual orientation. Several other circuits,[49] as well as the Trump Administration Justice Department,[50] have adopted the opposite view. The Supreme Court so far has declined to weigh in on the subject,[51] but a petition for a writ of certiorari that presents this precise question remained pending as of this writing.[52]

Understandings of sexual harassment have broadened in other respects as well. The consensus today is that objectionable or offensive conduct need not be "repeated" to constitute sexual harassment.[53] Moreover, courts have said that "sexual harassment" includes harassment on the basis of sex even when it does not "take the form of sexual advances or of other incidents with clearly sexual overtones."[54] What matters is that the harassment is discriminatory on the basis of sex, not that it is sexual.[55] Therefore, a physically aggressive but not explicitly sexual act by a male supervisor against a female employee may be actionable under Title VII.

Two additional observations about the definition of sexual harassment are worth noting. First, Farley's definition of sexual harassment is limited to harassment "on the job." As discussed below, the evolution of the concept of sexual harassment in American law has occurred primarily in the context of employment discrimination law, and so workplace incidents have been the focus.[56] Second, Farley's definition of sexual

47. See Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *6 (E.E.O.C. July 15, 2015).

48. See Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc).

49. See, e.g., *Zarda*, 883 F.3d at 155 n.25 (Lynch, J., dissenting) (collecting cases from various circuits holding that sexual orientation discrimination is not within the purview of Title VII); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255–57 (11th Cir. 2017).

50. See Alan Feuer, Justice Department Says Rights Law Doesn't Protect Gays, N.Y. Times (July 27, 2017), https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html (on file with the *Columbia Law Review*) (describing the Justice Department's amicus brief in the *Zarda* case arguing that Title VII does not bar discrimination based on sexual orientation).

51. See *Evans*, 850 F.3d 1248, cert. denied, 138 S. Ct. 557 (2017) (mem.).

52. See Petition for Writ of Certiorari at i, Altitude Express, Inc. v. Zarda, No. 17-1623 (U.S. filed May 29, 2018) (presenting the question of "[w]hether the prohibition in Title VII . . . against discrimination 'because of [] sex' encompasses discrimination based on an individual's sexual orientation" (quoting 42 U.S.C. § 2000e-2(a)(1) (2012))).

53. See Margaret A. Crouch, The "Social Etymology" of 'Sexual Harassment,' 29 J. Soc. Phil. 19, 20 (1998) (noting that some instances of sexual behavior are "so severe that one occurrence [is] sufficient to constitute sexual harassment").

54. McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985); accord Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (quoting and following *McKinney*).

55. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

56. See infra sections I.B–.C (discussing the evolution of sexual harassment as sex discrimination and resulting employer liability).

harassment includes objectionable or offensive physical contact—and thus would encompass sexual assault as well. Sexual assault can thus be considered an extreme form of sexual harassment rather than a separate category.[57] In the succeeding pages, we will use the phrase "sexual harassment" with the understanding that some of the incidents described also rise to the level of assault.

The feminist scholar and Professor Catharine MacKinnon further articulated the concept of sexual harassment in her now-classic 1979 book *Sexual Harassment of Working Women: A Case of Sex Discrimination.*[58] MacKinnon drew a distinction between "quid pro quo" sexual harassment and sexual harassment as a "persistent *condition of work*."[59] Quid pro quo sexual harassment involves, as the name suggests, cases in which "sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity."[60] Sexual harassment as a condition of work is "[l]ess clear, and undoubtedly more pervasive": It encompasses harassment that "simply makes the work environment unbearable."[61] As MacKinnon describes:

> Unwanted sexual advances, made simply because she has a woman's body, can be a daily part of a woman's work life. She may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally taken advantage of at work—but never promised or denied anything explicitly connected with her job.[62]

What MacKinnon referred to as "condition of work" sexual harassment is today more commonly known as "hostile work environment" sexual harassment. Her taxonomy of harassment—and specifically, the distinction between "quid pro quo" and "hostile work environment" sexual harassment—has gained wide acceptance, including by the EEOC and the Supreme Court.[63] But the road to legal recognition has been long and winding. The following section briefly charts that path.

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57. See Angie Andera, Here's the Real Difference Between Sexual Harassment & Sexual Assault, Women.com (Oct. 23, 2017), https://www.women.com/angie/lists/what-is-the-difference-between-sexual-harassment-and-assault-assault [https://perma.cc/K6W8-LEPP].

58. Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

59. Id. at 32.

60. Id.

61. Id. at 40.

62. Id.

63. See, e.g., Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–52 (1998); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2017). MacKinnon's view that sexual harassment can occur only "in the context of a relationship of unequal power" is not as uniformly accepted. Compare MacKinnon, supra note 58, at 1–2 ("Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power."), with Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 Yale L. & Pol'y Rev. 333, 335 (1990) ("Incorporating abuse of power into the definition . . . seems unduly limiting.").

B. *Sexual Harassment as Sex Discrimination*

The primary legal mechanism for regulating and remedying sexual harassment in the workplace is Title VII of the Civil Rights Act of 1964. That statute provides that:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[64]

According to a persistent myth, the word "sex" was added to Title VII at the last minute by a Virginia congressman who opposed civil rights for African Americans and sought to scuttle the bill by broadening it to cover gender.[65] In fact, the addition of sex discrimination to the list of prohibited practices was the result of a concerted lobbying effort by a national women's organization with the support of female lawmakers in the House and Senate.[66] The success of this effort did not, however, translate immediately into the legal recognition of sexual harassment as a proscribed behavior.

Beyond its prohibition on employment discrimination, the 1964 Act also created a new administrative agency, the EEOC, which was tasked with drafting regulations and enforcing the civil rights law.[67] To bring a claim under Title VII, an employee generally must file a charge with the EEOC no more than 180 days after the time that the alleged discrimination occurred.[68] (The period for filing a charge is extended to 300 days when a state or local agency enforces an overlapping employment discrimination law.[69]) If the EEOC finds in favor of the employee, it first seeks to settle the charge with the employer,[70] and if that fails, the commission can sue the employer in federal court.[71] If the commission decides not to file a lawsuit, it will issue a "right-to-sue" letter indicating that the employee has 90 days from receipt of the letter to bring a lawsuit in federal court.[72] Alternatively, if the EEOC makes a "no probable cause" determination or dismisses the charge due to procedural irregularities, it will also send the employee a "dismissal and notice of

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64. 42 U.S.C. § 2000e-2(a) (2012).

65. Rachel Osterman, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 Yale J.L. & Feminism 409, 412–15 (2009).

66. Id.

67. Id. at 416.

68. 29 C.F.R. § 1601.13.

69. Id. Note that if there is a continuous pattern of harassment, the statute of limitations period runs from the last incident. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

70. 29 C.F.R. § 1601.24.

71. Id. §§ 1601.27, .29.

72. Id. § 1601.19.

rights" that informs the employee of his or her right to sue within 90 days.[73]

From the outset, sex discrimination claims constituted a significant portion of the EEOC's case load. In 1966, the first year that records were kept, 33.5% of charges filed with the EEOC were sex discrimination claims.[74] (In 2016, the figure was a slightly lower but still substantial 29.4%.[75]) Yet, for the first dozen years after the passage of Title VII, neither the EEOC nor the federal courts recognized sexual harassment as a form of actionable sex discrimination.

The experience of Adrienne Tomkins illustrates the attitudes toward sexual harassment in the early years of Title VII. Tomkins was a secretary at Public Service Electric and Gas Co. (PSE&G) in Newark, New Jersey, in the early 1970s.[76] In October 1973, her male supervisor suggested that she should have lunch with him in a restaurant near their office to discuss a potential promotion.[77] At lunch, according to Tomkins, the supervisor told her that she should have sex with him if she wanted to continue their working relationship.[78] When she sought to leave the restaurant, the supervisor physically restrained her and told her that no one at PSE&G would help her if she complained about the incident.[79] Tomkins did complain—and was transferred to an inferior position in another department before being fired in January 1975.[80]

Tomkins filed a charge with the EEOC, which found no probable cause—thus allowing her to sue in federal court.[81] The district court dismissed Tomkins's claim that her supervisor's conduct was actionable under Title VII (though it allowed her to pursue a claim against PSE&G for her firing). As the district court judge in Tomkins's case wrote:

> The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. . . . It is not, however, sex discrimination within the meaning of Title VII even when the purpose is sexual. . . . "The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions." . . . If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either

73. Id. § 1601.18.

74. Shaping Employment Discrimination Law, EEOC, www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html [https://perma.cc/934J-SNH4] (last visited July 27, 2018).

75. Charge Statistics, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/YGA4-UMQB] (last visited July 27, 2018).

76. Tomkins v. Pub. Serv. Elec. & Gas Co. (*Tomkins I*), 422 F. Supp. 553, 555 (D.N.J. 1976), rev'd, 568 F.2d 1044 (3d Cir. 1977).

77. Tomkins v. Pub. Serv. Elec. & Gas Co. (*Tomkins II*), 568 F.2d at 1045.

78. Id.

79. Id.

80. Id. at 1046; *Tomkins I*, 422 F. Supp. at 555.

81. *Tomkins I*, 422 F. Supp. at 555.

> sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.[82]

The attitude toward sexual harassment expressed by the district judge in Tomkins's case will likely strike most modern readers as antediluvian. Indeed, even by the time of the district court decision, the tide was turning. Five months earlier, a federal district court in Washington, D.C., held that "retaliatory actions of a male supervisor, taken because a female employee denied his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII."[83] The court explained that "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[84] The next year, the D.C. Circuit held in *Barnes v. Costle* that an employer was liable for sex discrimination under Title VII when a supervisor fired an employee after she refused his sexual advances.[85] And in 1980, the EEOC, for the first time, issued guidelines that defined sexual harassment as a form of sex discrimination.[86] Significantly, the 1980 guidelines recognized both quid pro quo sexual harassment and hostile work environment sexual harassment as unlawful employment practices under Title VII.[87]

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82. Id. at 556–57 (quoting Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976)). For other early cases holding that sexual harassment did not constitute sex discrimination, see *Miller*, 418 F. Supp. at 236 (N.D. Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977).

83. Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976), vacated sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (reversing the district court for procedural reasons).

84. Id. at 657–58.

85. 561 F.2d 983, 993–95 (D.C. Cir. 1977).

86. According to the EEOC guidelines:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Final Amendment to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R § 16044.11(a) (2017)).

87. See id.

C. *Employer Liability for Sexual Harassment*

While the EEOC guidelines were quickly embraced by lower federal courts,[88] it was not until 1986, in *Meritor Savings Bank v. Vinson*, that the Supreme Court explicitly recognized sexual harassment as a form of sex discrimination under Title VII.[89] *Vinson* marked a victory for feminist scholars and activists who had been arguing for years that sexual harassment is sex discrimination. At the same time, the decision dealt a setback to efforts to hold employers liable for harassment of their employees.

The plaintiff in that case, Mechelle Vinson, worked as a teller and later an assistant branch manager at a bank in Washington, D.C. According to Vinson's account, the bank's male branch manager invited her out to dinner relatively early in her four-year career at the bank and suggested that they have sex at a nearby motel.[90] Vinson said that she initially refused but later acquiesced out of fear that she would otherwise lose her job.[91] According to Vinson's account, the branch manager "thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours," and the two had intercourse forty or fifty times.[92] Vinson also said that the branch manager "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[93] She said that she broke off the relationship when she "started going with a steady boyfriend," and she was fired the following year.[94] She subsequently sued the bank and the branch manager under Title VII, lost in district court,[95] but prevailed upon the D.C. Circuit to reverse the district court's decision.[96] Hers was the first sexual harassment claim to reach the Supreme Court after the EEOC issued its 1980 guidelines.

The Supreme Court unanimously held that hostile work environment sexual harassment constitutes sex discrimination under Title VII.[97] It added that such conduct is actionable if the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment

88. See, e.g., Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 942–44 (D.C. Cir. 1981).

89. Meritor Sav. Bank v. Vinson (*Vinson III*), 477 U.S. 57 (1986).

90. Id. at 60.

91. Id.

92. Id.

93. Id.

94. Id.

95. Vinson v. Taylor (*Vinson I*), No. 78-1793, 1980 WL 100, at *8–9 (D.D.C. Feb. 26, 1980).

96. Vinson v. Taylor (*Vinson II*), 753 F.2d 141, 142 (D.C. Cir. 1985).

97. *Vinson III*, 477 U.S. at 66.

and create an abusive working environment.'"[98] And it said that Vinson's allegations—"which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for 'hostile environment' sexual harassment."[99] The Court also rejected the notion that Vinson's "voluntary" submission to intercourse with the branch manager vitiated her sexual harassment claim.[100] "The correct inquiry," according to the Court, "is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[101]

The Justices were sharply divided, however, on the question of when an employer can be held liable for hostile work environment sexual harassment. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, said that employers should be strictly liable when a supervisor sexually harasses an employee under his supervision.[102] As Justice Marshall argued, "[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates."[103] Compelling as that argument may be, it failed to win the day. A five-member majority concluded instead that employers are not "always automatically liable for sexual harassment by their supervisors."[104] At the same time, the majority rejected the bank's argument that an employer should be immune from liability whenever it has a policy against discrimination and the victim fails to invoke an available grievance procedure.[105]

In the dozen years that followed *Meritor*, federal courts adopted conflicting standards for determining employer liability when sexual harassment was perpetrated by a supervisor,[106] prompting the Supreme Court to take up the question again in two companion cases decided in 1998. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court held that employers are automatically liable "[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands."[107] A tangible employment action, the Court said, is one that "constitutes a significant change in

98. Id. at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

99. Id.

100. Id. at 68.

101. Id.

102. Id. at 78 (Marshall, J., concurring in the judgment).

103. Id. at 76–77.

104. Id. at 72 (majority opinion).

105. Id.

106. Scott B. Goldberg, Comment, Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII, 143 U. Pa. L. Rev. 571, 572–74 (1994).

107. *Ellerth*, 524 U.S. 742, 753 (1998); see also *Faragher*, 524 U.S. 775, 807 (1998).

employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[108] In the absence of a tangible employment action, employers may assert a two-prong affirmative defense, which operates as a bar to liability or damages. The Court explained (using identical language in both decisions):

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action . . . .[109]

This affirmative defense—now known as the *Faragher–Ellerth* defense—is tailored to cases of harassment by supervisors, whereas employers can more easily escape liability when the harasser is a coworker. In such cases, employer liability is governed by a negligence standard, which means that employers can be held liable only when they knew or should have known of the harassment but failed to take prompt and effective remedial action.[110]

At the same time as it limited the range of circumstances under which supervisor and coworker harassment would be imputed to an employer, the Court in *Faragher* preserved an island of strict liability for a "class of an employer organization's officials who may be treated as the organization's proxy."[111] The Court did not fully define the contours of that class, but it said that a company's president was "indisputably" within the category.[112] It also approvingly cited lower court decisions recognizing strict liability when the harasser is an owner, proprietor, partner, or corporate officer,[113] or a supervisor "hold[ing] a sufficiently high position 'in the management hierarchy of the company for his actions to be

108. *Ellerth*, 524 U.S. at 761.

109. Id. at 765; see also *Faragher*, 524 U.S. at 807–08.

110. See *Faragher*, 524 U.S. at 799 (noting that lower courts have "uniformly judg[ed] employer liability for coworker harassment under a negligence standard"); see also 29 C.F.R. § 1604.11(d) (2017).

111. See *Faragher*, 524 U.S. at 789; see also *Ellerth*, 524 U.S. at 758 (recognizing that under agency law principles, a corporation is liable for torts committed by an employee outside the scope of employment "where the agent's high rank in the company makes him or her the employer's alter ego").

112. See *Faragher*, 524 U.S. at 789 (citing Harris v. Forklift Sys., 510 U.S. 17, 19 (1993)).

113. See id. at 790 (citing Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983)).

imputed automatically to the employer.'"[114] Lower courts have applied this last rule—known as the alter ego doctrine—in cases involving high-ranking corporate officials below the officer level.[115] Beyond evidence of high rank, the key to proving that strict liability is appropriate is to show that the employee exercised "exceptional authority and control" within the organization.[116]

In sum, companies can expect to be held strictly liable for harassment by high-ranking corporate officials with substantial control over corporate affairs. For supervisory harassment at lower levels, the employer will escape liability if it can successfully invoke the *Faragher–Ellerth* defense. And for harassment by employees that lack supervisory authority, the employer will be liable only if it was negligent in responding to such harassment.

D. *Title VII's Shortcomings*

The Title VII regime has advanced the effort to eradicate sexual harassment from the workplace, though it falls far short of achieving that end goal. On the one hand, Title VII provides a path for victims to seek redress, as well as incentives for companies to create policies and procedures designed to root out and respond to harassment. On the other hand, the regime has features that limit its effectiveness as a tool for vindicating the rights of harassed employees. This section considers some of these limitations.

1. *Capped Damages.* — The Civil Rights Act of 1964 allowed victims of discrimination to recover only injunctive relief and restitution for economic injuries, such as lost wages.[117] Twenty-five years later, Congress gave courts the power to award both compensatory and punitive damages to victims of employment discrimination under the Civil Rights Act of 1991.[118] The availability of such damages was not unlimited, however. Proponents of tort reform insisted on statutory caps on damage awards

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114. Id. at 789–90 (quoting Torres v. Pisano, 116 F.3d 625, 634–35 & n.11 (2d Cir. 1997)).

115. See Townsend v. Benjamin Enters., 679 F.3d 41, 53–55 (2d Cir. 2012) (leaving for the jury the question of whether alter ego liability applies in the case of a vice president who "exercised a significant degree of control over corporate affairs" and whose family held all corporate shares); Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232–33 (10th Cir. 2000) (holding an alter ego liability jury instruction appropriate in the case of a senior vice president of consumer lending who had hiring, firing, and supervisory authority over employees in one department, retained ultimate authority to disapprove all consumer loans, and reported directly to the president).

116. Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011).

117. Susan M. Mathews, Title VII and Sexual Harassment: Beyond Damages Control, 3 Yale J.L. & Feminism 299, 299 (1991).

118. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (codified as amended at 42 U.S.C. § 1981a (2012)).

based on the size of the company.[119] The level of these caps has not been altered since the 1991 Act went into effect, which means that today, the largest companies—those that have more than 500 employees—cannot be obligated to pay amounts greater than $300,000 to a victim of sexual harassment, no matter how egregious the violation.[120]

These caps have been subject to much criticism. In fact, less than a week after President Bush signed the Civil Rights Act of 1991 into law, Democratic and Republican Senators introduced bills to lift the damages caps.[121] Critics argue that the caps pose a deterrence problem, in addition to a compensation problem. The caps fail to incentivize action by employers because employers understand that employees are unlikely to report harassment, and when employees do report, they will be able to recover only limited damages. As for the undercompensation concern, the caps are too low to capture the full vocational, reputational, and emotional harms suffered by victims in the most severe cases. Nonetheless, efforts to raise the caps since 1991 have proven unsuccessful.[122]

2. *180-Day Limitation Period.* — In addition to capped damages, Title VII provides that victims of sexual harassment must file charges containing their allegations with the EEOC within 180 days from the date of the alleged harm, or 300 days if the victim also files a charge with a state or local agency.[123] This period of limitations is shorter than that which governs most civil actions, including torts and breach of contract,[124] and also much shorter than the limitations period for other antidiscrimination laws.[125]

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119. See Statement of President Bush upon Signing S. 1745, reprinted in 1991 U.S.C.C.A.N. 768, 769 (Nov. 21, 1991). The President stated that the Civil Rights Act of 1991 "adopts a compromise under which 'caps' have been placed on the amount [of compensatory and punitive damages] that juries may award." Id.

120. 42 U.S.C. § 1981a(b)(3)(D).

121. On November 26, 1991, Senator Orrin Hatch introduced the Employee Equity and Job Preservation Act of 1991, which would have lifted the cap for all but the smallest employers. 137 Cong. Rec. 35,060 (1991). On that same day, Senator Ted Kennedy introduced the Equal Remedies Act of 1991, which would have done away with all damages caps for victims of discrimination. Id. at 35,098.

122. See Lynn Ridgeway Zehrt, Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination, 25 Yale J.L. & Feminism 249, 250–51 (2014).

123. 42 U.S.C. § 2000e-5(e)(1).

124. See, e.g., N.Y. C.P.L.R. 213 (McKinney 2018) (providing that the statute of limitations for breach of contract is six years); Wultz v. Bank of China Ltd., 306 F.R.D. 112, 117 (S.D.N.Y. 2013) (relying on the one-year statute of limitations for intentional torts).

125. See, e.g., 42 U.S.C. § 1981; Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369, 382 (2004) (holding that 28 U.S.C. § 1658's four-year statute of limitations governs § 1981 claims of racial discrimination). In 1990, Congress tried to expand the limitations period to two years in the Civil Rights Act of 1990, but the bill was vetoed by the first President Bush. See Donald R. Livingston, ABA Section of Labor & Employment Law, 10th Annual Conference: The Civil Rights Act of 1991, Twenty-Five Years After (Nov. 9, 2016), https://

For victims of supervisory harassment, the *Faragher–Ellerth* defense imposes even more stringent reporting obligations. Recall that employers satisfy the second prong of that defense by showing that the plaintiff-employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[126] And some courts consider even relatively minor delays in reporting to be "unreasonabl[e]."[127] For example, one court found a delay as short as seven days to be unreasonable.[128]

This truncated reporting period imposes substantial hurdles for victims of harassment, many of whom may not realize right away that they have suffered harassment. Even when victims are fully aware of the nature of the harm, victims are often reluctant to file a complaint. Indeed, as the #MeToo movement has made clear, many victims of sexual harassment do not go public with their claims for months or even years. There are a few explanations as to why: Harassed employees may fear that their claim will not be believed or taken seriously,[129] may worry about social and professional retaliation,[130] or may harbor doubts about the confidentiality of internal grievance procedures.[131] In addition, the consequences of an investigation may be unknown or unsatisfactory to

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www.americanbar.org/content/dam/aba/events/labor_law/2016/11/annual/papers/16b.authcheckdam.pdf [https://perma.cc/AK7Y-RDH8].

126. Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); see also Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998).

127. *Burlington Indus.*, 524 U.S. at 765.

128. See Marsicano v. Am. Soc'y of Safety Eng'rs, No. 97-C7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998). Other courts have found delays of about two months unreasonable. See Pinkerton v. Colo. Dep't of Transp., 563 F.3d 1052, 1063 (10th Cir. 2009) (finding a reporting delay of approximately two months unreasonable); Thornton v. Fed. Express Corp., 530 F.3d 451, 458 (6th Cir. 2008) (same); Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1277, 1290–91 (11th Cir. 2003) (finding a reporting delay of approximately two and a half months unreasonable). Notably, although longer than seven days, two months is still significantly shorter than the 180-day limit set out in the statute.

129. Mindy E. Bergman et al., The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment, 87 J. Applied Psych. 230, 234 (2002) (discussing the prevalence of "organizational minimization," which occurs when employee complaints are minimized or not taken seriously); Louise F. Fitzgerald et al., Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment, 51 J. Soc. Issues, Winter 1995, at 117, 122 (1995) (discussing reasons women don't report harassers, including fear of retaliation, of not being believed, or of hurting one's career).

130. Lilia M. Cortina & Vicki J. Magley, Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace, 8 J. Occupational Health Psych. 247, 255 (2003) (finding that 75% of employees who spoke out against workplace sexual assault faced some form of retaliation).

131. Victims frequently identify the lack of confidentiality as a justification for forgoing an internal grievance procedure. Edward J. Costello Jr., The Mediation Alternative in Sex Harassment Cases, Arb. J., Mar. 1992, at 16, 17 ("[N]o matter how stringent the 'confidentiality' requirements are, some co-workers will learn about the complaint as part of their jobs.").

employees, further discouraging reporting.[132] Regardless of the reason, the fact remains that victims of harassment only rarely report harassment. For those who do, the window on a Title VII claim often will have closed already.[133]

3. *No Individual Liability*. — The text of Title VII generated uncertainty as to whether supervisors could be held liable for sexual harassment in an individual capacity. The statute makes it "an unlawful employment practice for an *employer* . . . to discriminate against any individual . . . because of such individual's . . . sex,"[134] and it defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and *any agent of such a person*."[135] A few federal courts interpreted that language to mean that a supervisor who commits sexual harassment can be held liable in his individual capacity so long as he is an agent of an employer with at least fifteen employees.[136] The consensus view among the circuits today, however, is that Title VII does not impose individual liability on

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132. Zoe Ridolfi-Starr, Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response, 125 Yale L.J. 2156, 2160–61 (2016); see also Select Task Force Meeting of June 15, 2015—Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Written Testimony of Mindy Bergman, EEOC (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_bergman.cfm [https://perma.cc/V27L-P5C4] (making the point that "reporting is a gamble that is not worth taking in terms of individual well-being" in part because "remediating the situation [does] not make the person whole—that is, [does] not overcome the damage caused by harassment"). Psychological research confirms that victims view reporting sexual harassment as the least desirable response available to them. Fitzgerald et al., supra note 129, at 121. One study identifies the most common internally focused responses as endurance (ignoring the harassment), denial (pretending it is not happening), reattribution (reinterpreting the situation so it is not defined as harassment), illusory control (blaming oneself), and detachment (separating from the harasser or situation). Id. at 120. Common externally focused responses include avoidance of the harasser or situation, appeasement (putting off the harasser without direct confrontation), and social support (talking to friends or coworkers about the harassment). Id. The most infrequent response "is to seek institutional/organizational relief," since "[v]ictims apparently turn to such strategies as a last resort when all other efforts have failed." Id. at 121.

133. See Joanna L. Grossman, The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law, 26 Harv. Women's L.J. 3, 21–22 (2003) (describing how courts are generally unsympathetic to reporting delays). One study found that gender-harassing conduct was almost never reported, unwanted physical touching was formally reported only 8.3% of the time, and sexually coercive behavior was reported by only 33.3% of victims who experienced it. Kimberly A. Lonsway et al., Sexual Harassment in Law Enforcement: Incidence, Impact, and Perception, 16 Police Q. 177, 185–86 tbl.1 (2012).

134. 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

135. Id. § 2000e(b) (emphasis added).

136. See Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), rev'd in part on other grounds, aff'd in part, 900 F.2d 27 (4th Cir. 1990) (en banc); Ruffino v. State St. Bank & Tr. Co., 908 F. Supp. 1019, 1047–48 (D. Mass. 1995).

supervisors.[137] These courts have emphasized that Congress exempted employers with fewer than fifteen employees from the statute and imposed a sliding scale of damages based on the employer's size, with no reference to damages awarded against an individual supervisor. Whatever the merits of that view, individuals who commit sexual harassment generally will be immune from personal liability under Title VII.

The fact that individual harassers cannot be held liable under Title VII no doubt weakens the statute's deterrent effect. Yet for two reasons, it would be a mistake to place too much emphasis on the lack of individual liability. First, even if individual supervisors were exposed to Title VII liability, they would in many cases be shielded by insurance or indemnification arrangements and so might never pay a judgment out of pocket. Second, even in the absence of individual liability under Title VII, employers can shift liability to individual supervisors by contract. Indeed, Harvey Weinstein's contract with the Weinstein Company reportedly did just that: It required Weinstein himself to reimburse the company for settlements or judgments arising out of sexual harassment and other misconduct.[138]

4. *Class Certification.* — Class action lawsuits have always played an important role in the employment discrimination context. In many cases, employees cannot afford to file individual cases or may fear retaliation for doing so. Resolving instances of discrimination on an incident-by-incident basis also makes it less likely that employees will come forward because it isolates individual victims rather than facilitating the sort of collective action that has been the hallmark feature of "#MeToo."[139] By contrast, the class action vehicle permits employees to band together, which not only encourages participation but also provides financial incentives for lawyers to represent them. Moreover, class plaintiffs may be able to seek injunctive or declaratory relief—relief that may be unavailable in individual cases—which may in turn serve to transform corporate practices.

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137. See Fantini v. Salem State Coll., 557 F.3d 22, 28–31 (1st Cir. 2009); Smith v. Amedisys Inc., 298 F.3d 434, 448–49 (5th Cir. 2002); Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180 (4th Cir. 1998); Wathen v. Gen. Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077–78 (3d Cir. 1996) (en banc); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1314–15 (2d Cir. 1995); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995); Smith v. St. Bernards Reg'l Med. Ctr., 19 F.3d 1254, 1255 (8th Cir. 1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991).

138. See Harvey Weinstein's Contract Allowed for Sexual Harassment, TMZ (Oct. 12, 2017), http://www.tmz.com/2017/10/12/weinstein-contract-the-weinstein-company-sexual-harassment-firing-illegal [https://perma.cc/Q6J8-4RDP].

139. See, e.g., Tristin K. Green, The Future of Systemic Disparate Treatment Law, 32 Berkeley J. Emp. & Lab. L. 395, 418–22 (2011) (describing the benefits of conceptualizing discrimination collectively versus focusing on the "insular individual").

Despite the potential benefits of the class action mechanism, recent judicial decisions have made it much more difficult for employees to bring class action lawsuits alleging workplace discrimination. The most significant of these cases is the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, which involved a class of 1.5 million Walmart employees who claimed that the company's pay practices discriminated against women in violation of Title VII.[140] In a 5-4 ruling, the Supreme Court held that the Walmart employees could not pursue their claims as a class action.[141] According to Justice Scalia's opinion for the majority, class claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[142] Because the plaintiff-employees' allegations involved different sets of facts surrounding their individual employment decisions, the majority reasoned that it could not say whether examining the claims would produce a common answer to the discrimination question.[143]

The *Dukes* decision inspired outrage from commentators who predicted that the ruling would hinder, or even foreclose, employees' use of the class action as a tool for redress.[144] And in some ways, these concerns have been realized: In the past few years, courts have used the decision to subject plaintiffs to heightened scrutiny at the class certification stage, requiring them to develop a detailed and nuanced factual record as a prerequisite to certification.[145] The *Dukes* decision does not, however, put the class action mechanism out of reach for all victims of sexual harassment. Some district courts have allowed plaintiffs to proceed as a class with respect to some common issues—such as whether an employer's practices create a hostile work environment for female employees—while deferring damages questions to individual trials.[146] In other cases, employees have been able to surmount the new

140. 564 U.S. 338, 343 (2011).

141. Id. at 367.

142. Id. at 350.

143. Id. at 352.

144. See, e.g., Suzette M. Malveaux, How Goliath Won: The Future Implications of *Dukes v. Wal-Mart*, 106 Nw. U. L. Rev. Colloquy 34, 37 (2011), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1054&context=nulr_online [https://perma.cc/6ASC-ZUGX] ("The *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination. By redefining the class certification requirements for employment discrimination cases . . . the Court compromises employees' access to justice.").

145. Katherine E. Lamm, Work in Progress: Civil Rights Class Actions After *Wal-Mart v. Dukes*, 50 Harv. C.R.-C.L. L. Rev. 153, 166 (2015).

146. See, e.g., Sellars v. CRST Expedited, Inc., 321 F.R.D. 578, 609 (N.D. Iowa 2017); see also Gerald L. Maatman, Jr., John S. Marrese & Christopher M. Cascino, Court Uses Novel Issue Certification Device to Sidestep Individualized Issues Otherwise Precluding Class Certification, Seyfarth Shaw: Workplace Class Action Blog (Apr. 9, 2017), https://

certification threshold.[147] And even when the class action mechanism is unavailable, harassment victims may use nonclass joinder procedures so that they can litigate their claims collectively.[148]

5. *Arbitration.* — A final obstacle facing employees who seek to sue their employers for sexual harassment is the frequent presence of arbitration clauses in employment contracts. By 2017, more than half of nonunion private-sector employees were subject to contractual provisions that require them to bring workplace-related claims in arbitration proceedings rather than in court.[149] And in 2018, a sharply divided Supreme Court held in *Epic Systems Corp. v. Lewis* that the Federal Arbitration Act requires lower courts to enforce individual arbitration provisions in employment agreements.[150] While the *Epic Systems* case involved claims under the Fair Labor Standards Act, the Court's decision applies squarely to employment discrimination claims as well. According to Justice Gorsuch's majority opinion, the *Epic Systems* decision applies to "any disputes" between employers and employees.[151]

In practice, the decision in *Epic Systems* means that employers can require workers—as a condition of employment—to waive their right to sue and to agree that any employment-related claims will be pursued in one-on-one arbitration. While some employees will still prevail in the arbitral forum, their prospects are rather bleak: Employee win rates and damages awards are significantly lower in arbitral proceedings than in federal and state court.[152] And arbitration clauses not only complicate employees' ability to vindicate their rights in court but also make it more difficult for others to learn about employee harassment, as most arbitration proceedings are subject to confidentiality requirements.[153]

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www.workplaceclassaction.com/2017/04/court-uses-novel-issue-certification-device-to-sidestep-individualized-issues-otherwise-precluding-class-certification [https://perma.cc/8X2P-S52D] (describing how *Sellars* "is part of a trend").

147. See, e.g., Leyva v. Medline Indus., 716 F.3d 510, 514–16 (9th Cir. 2013) (certifying a class of employees bringing wage and hour claims even though each class member's damages were different, because the evidence suggested that the employer could calculate the information in a computer database).

148. See Fed. R. Civ. P. 20(a)(1) (permitting joinder if: "(A) [plaintiffs] assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action").

149. Alexander J.S. Colvin, Econ. Policy Inst., The Growing Use of Mandatory Arbitration 1–2 (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf [https://perma.cc/HSR8-793J].

150. 138 S. Ct. 1612, 1619 (2018).

151. Id.

152. Katherine V.W. Stone & Alexander J.S. Colvin, Econ. Policy Inst., The Arbitration Epidemic 20 tbl.1 (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/P539-FU5E].

153. Myriam Gilles, Pound Civil Justice Inst., The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement, Forced Arbitration and the Fate of the 7th Amendment: The Core of America's Legal System at Stake? 17, 31–33 (2015), http://www.

While the Supreme Court has held that an arbitration clause in an employment contract does not affect the EEOC's right to seek remedies for job discrimination,[154] the spread of arbitration provisions has the potential to substantially reduce the efficacy of private enforcement of employment discrimination laws.

E. *Beyond Title VII*

To summarize so far, Title VII allows victims of sexual harassment to seek injunctive relief as well as compensatory and punitive damages, but such relief is limited by damages caps, and the lack of individual liability dulls the deterrence effect of Title VII. Meanwhile, strict statutes of limitations, constraints on the class action mechanism in federal court, and the increasing prevalence of arbitration clauses make it harder for employees to have their claims heard. Partly as a result, victims of sexual harassment have turned to other areas of law—including state human rights and tort law—as potential avenues for redress.

Several jurisdictions—including California, the District of Columbia, New Jersey, New York City, and West Virginia—have enacted human rights laws that allow for uncapped compensatory and punitive damages as well as individual liability in cases of sexual harassment and other forms of employment discrimination.[155] Many state and local human rights statutes also allow for more generous limitations periods than federal law does. New York, for example, does not require employees to file a claim with the state human rights agency before bringing a lawsuit,[156] and the statute of limitations under the New York state and city human rights laws is three years from the date of harassment.[157] Thus, anchor Gretchen Carlson could (and did[158]) sue Roger Ailes for violating the New York City Human Rights Law without first filing a claim with an administrative agency, ultimately obtaining a settlement from Fox News

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poundinstitute.org/sites/default/files/2014PoundReport.pdf [https://perma.cc/F54S-QND4] (noting that arbitral proceedings normally require "the promise of complete confidentiality").

154. EEOC v. Waffle House, Inc., 534 U.S. 279, 295–96 (2002).

155. See Barry A. Hartstein, Morgan, Lewis & Bockius LLP, 50 Ways from Sunday—Can a Corporation Have a Successful Nationwide Policy that Is Consistent with State and Local Laws? 14, 31, 88, 144 (2009), http://apps.americanbar.org/labor/eeocomm/mw/Papers/2009/data/papers/19.pdf [https://perma.cc/7R7N-8DD6].

156. See id. at 97.

157. N.Y. C.P.L.R. 214 (McKinney 2018); see also Eric M. Baum, Statute of Limitations for Sexual Harassment Claims, Eisenberg & Baum, LLP (Apr. 17, 2016), https://www.eandblaw.com/employment-discrimination-blog/2016/04/07/statute-limitations-sexual-harassment-claims [https://perma.cc/8ZHX-4DAD].

158. See Complaint at 7, Carlson v. Ailes, No. L-5016-16 (N.J. Super. Ct. filed July 6, 2016).

for $20 million[159] that far exceeded what would have been available under Title VII.[160]

Sexual harassment victims have also registered some victories in tort law actions against perpetrators—specifically on claims of assault, battery, and intentional infliction of emotional distress.[161] However, assault and battery claims require either reasonable apprehension of immediate harmful or offensive conduct (assault)[162] or actual contact (battery),[163] thus providing no remedy in cases in which harassment takes a nonphysical form. Moreover, emotional distress claims tend to succeed only in the most egregious circumstances.[164] As two practitioners note, "Most courts recognize that ordinary employment suits involving sexual discrimination will not establish a cause of action for intentional infliction of emotional distress."[165] Even when tort law claims against perpetrators of sexual harassment succeed, courts will often hold that the perpetrator's "purely personal" motives place his actions outside the scope of employment, thus preventing the plaintiff from holding the employer liable on a respondeat superior theory.[166]

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159. See Michael M. Grynbaum & John Koblin, Fox Settles with Gretchen Carlson over Roger Ailes Sexual Harassment Claims, N.Y. Times (Sept. 6, 2016), https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html (on file with the *Columbia Law Review*).

160. Compare with supra section I.D.1, which discusses the damages caps that limit recovery under Title VII.

161. See, e.g., Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1019 (10th Cir. 1997) (noting that the jury found in favor of the plaintiff on battery and intentional infliction of emotional distress claims). When harassment takes the form of assault or battery, victims also may be able to seek redress under criminal law. But despite decades of reform, the criminal justice system often fails victims of sexual assault. See Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 17 (1998) ("The legislative changes inspired by the feminist antirape movement accomplished very little."); Bennett Capers, Real Rape Too, 99 Calif. L. Rev. 1259, 1305–06 (2011) ("The simple fact is that rape reforms over the last thirty years have not had the effect feminists desired.").

162. Assault, Black's Law Dictionary (10th ed. 2014).

163. Battery, Black's Law Dictionary, supra note 162.

164. See, e.g., Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 611, 613–14 (5th Cir. 1999). In *Skidmore*, the court found sufficient evidence to support a verdict against the supervisor for intentional infliction of emotional distress when the employee testified that the supervisor harassed her with constant sexual remarks, invited her to his house for a "hot body oil massage," told her to undress so he could lick her from head to toe, asked her to leave her husband and have his child, followed her after work, asked her to go to Las Vegas with him, and sometimes came up behind her and licked or kissed her face or neck. Id.

165. Jessica Stender & Roberta Steele, ABA Section Labor & Employment Law—2009 Labor and Employment Law CLE Conference: Employment Torts 2 (on file with the *Columbia Law Review*).

166. See, e.g., Cornwall v. Nat'l Westminster Bank, No. 0026078/1994, 1996 NYLJ LEXIS 2505, at *24 (N.Y. Sup. Ct. Sept. 17, 1996) ("Where, as here, a tort is committed by an employee for purely personal motives unrelated to the furtherance of the employer's business there is no basis for respondeat superior liability.").

Notably, none of these regimes—Title VII,[167] state human rights law, or tort law—provides a remedy to the shareholders who are (at least arguably) indirect victims of sexual harassment in the corporate setting. And yet persistent harassment at a firm may impair profitability in a number of ways. Most obviously, expenses associated with litigation—including legal fees, settlements, and judgments—damage a company's bottom line.[168] Second, negative publicity associated with sexual harassment scandals may harm a company's reputation.[169] Third, sexual harassment potentially interferes with a company's ability to hire and retain talented employees who are repelled by the hostile work environment.[170] Fourth, harassment may impede the productivity of employees—both victims and those who try to steer clear of settings where they might be victimized.[171] In a handful of cases, shareholders have turned to state corporate law and federal securities law to redress these indirect harms. The next Part discusses those efforts.

II. Liability for Harassment Under Corporate and Securities Laws

The first shareholder lawsuit arising out of workplace sexual misconduct came long before the Harvey Weinstein scandal made "#MeToo" a household hashtag. In November 1998, a shareholder of the pharmaceutical manufacturer ICN filed a derivative action in Delaware court asserting breach of fiduciary duty claims against the firm's CEO and other directors stemming from the CEO's harassment of female employees.[172] That suit ultimately failed (for reasons we discuss in this Part), but it was a harbinger of things to come. Since the ICN suit, at least eleven more companies—American Apparel, Hewlett-Packard, CTPartners, Signet Jewelers, Twenty-First Century Fox, Liberty Tax, Wynn Resorts, National Beverage, CBS, Papa John's, and Nike—have faced shareholder lawsuits linked to sexual harassment by top executives. We expect this list to grow in the coming months and years. In this Part, we rely on the facts of these suits to develop a general framework for evaluating future claims under state corporate law and federal securities statutes arising out of workplace sexual misconduct.

167. See Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 176–77 (2011) ("If any person injured . . . by a Title VII violation could sue, absurd consequences would follow . . . . [A] shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence.").

168. See infra notes 490–492 and accompanying text.

169. See infra notes 500–501 and accompanying text.

170. See infra notes 415, 493–495 and accompanying text.

171. See infra notes 471, 502–503 and accompanying text.

172. See White v. Panic (*Panic I*), 793 A.2d 356, 358–59 (Del. Ch. 2000), aff'd, 783 A.2d 543 (Del. 2001).

A. *Canaries in the Coal Mine?*

1. *ICN.* — Valeant Pharmaceuticals International made headlines—and enemies—in 2015 when the firm more than quadrupled, overnight, the per-tablet price of a drug that treats liver disease.[173] But this was not the first time that the company became enmeshed in controversy. In July 1998, when Valeant still went by the name ICN Pharmaceuticals, the firm was the focus of a *U.S. News & World Report* cover story that detailed allegations of sexual harassment against then-CEO Milan Panic.[174] Six women told *U.S. News* of repeated incidents in which Panic propositioned them, groped them, or forcibly kissed them.[175] The board, according to one member, "knew nothing of [the] alleged harassment" for years, until one of Panic's victims filed suit.[176] Even after learning that Panic was accused of sexual harassment, they kept him on at the company and continued to compensate him handsomely.[177]

The *U.S. News* story prompted an ICN shareholder, Andrew White, to file a derivative action against the company, Panic, and fourteen other board members.[178] According to White's complaint, ICN board members made a concerted effort to cover up Panic's misconduct by requiring employees to submit grievances to confidential arbitration.[179] The company guaranteed a $3.5 million loan to Panic so that he could settle a paternity suit, and the only collateral that Panic posted was out-of-the-money stock options.[180] The complaint also suggested that the board had made additional payments to settle harassment claims against Panic, though the complaint lacked any further details regarding the amount or nature of these settlements.[181]

The Delaware Chancery Court dismissed White's complaint on the grounds that White had not made out a case for "demand excusal."[182] We discuss the criteria for demand excusal at greater detail below,[183] but for

173. See Andrew Pollack & Sabrina Tavernise, Valeant's Drug Price Strategy Enriches It, but Infuriates Patients and Lawmakers, N.Y. Times (Oct. 4, 2015), https://www.nytimes.com/2015/10/05/business/valeants-drug-price-strategy-enriches-it-but-infuriates-patients-and-lawmakers.html (on file with the *Columbia Law Review*).

174. Miriam Horn, Sex and the CEO, U.S. News & World Rep., July 6, 1998, at 32. ICN Pharmaceuticals Inc. changed its name to Valeant Pharmaceuticals International Inc. in 2003. Jonathan D. Rockoff, Valeant Pharmaceuticals to Change Its Name to Bausch Health, Wall St. J. (May 8, 2018), https://www.wsj.com/articles/valeant-pharmaceuticals-to-change-its-name-to-bausch-health-1525752878 (on file with the *Columbia Law Review*).

175. Horn, supra note 174, at 32, 34.

176. Id. at 32, 35.

177. Id. at 32.

178. *Panic I*, 793 A.2d 356, 359 (Del. Ch. 2000).

179. Id. at 363.

180. White v. Panic (*Panic II*), 783 A.2d 543, 548 (Del. 2001).

181. *Panic I*, 793 A.2d at 368–69.

182. Id. at 368.

183. See infra notes 332–361 and accompanying text.

now, the key point is that the court considered the board to be capable of deciding whether to sue Panic on the corporation's behalf.[184] The Delaware Supreme Court affirmed, noting the "sparse" nature of the allegations against the board.[185] But despite that outcome, the shareholder suit served as a warning that corporate directors and officers could face fiduciary duty liability for engaging in or abetting workplace-based sexual misconduct.

2. *Hewlett-Packard.* — In the years following *Panic*, several corporate boards took action against CEOs accused of sexual harassment or other questionable sexual conduct. Boeing's board asked CEO Harry Stonecipher to step down in 2005 after learning that he had an affair with a subordinate.[186] Sara Lee Corp.'s chairman and CEO, Steven McMillan, resigned that same year after allegations that he offered a woman a job at the company on the condition that she have sex with him led to a settlement.[187] The board of the hotel chain Starwood ousted its CEO in 2007 after he sent sexually suggestive emails and text messages to a female employee.[188] The board of Hewlett-Packard fired CEO Mark Hurd in 2010, reportedly because board members believed that Hurd had lied to them about an affair with a former Hewlett-Packard contractor.[189] The CEO of the medical device manufacturer Stryker, Stephen MacMillan (not to be confused with the Sara Lee chief of a similar name), was reportedly "forced out partly because certain board members became bothered by his handling of a relationship" with a former female employee.[190] The insurance company Highmark fired CEO Kenneth Melani in April 2012 after he got into a fight with the husband of a female employee with whom Melani had carried on an affair.[191] That same month, Best Buy forced out CEO Brian Dunn

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184. See id. at 367–71.

185. *Panic II*, 783 A.2d at 552.

186. Renae Merle, Boeing CEO Resigns over Affair with Subordinate, Wash. Post (Mar. 8, 2005), https://www.washingtonpost.com/archive/politics/2005/03/08/boeing-ceo-resigns-over-affair-with-subordinate/199b6a6b-9883-457d-991b-ea23840b1fe2 (on file with the *Columbia Law Review*).

187. Susan Chandler, CEO Indiscretions No Longer Overlooked by Boards, Chi. Trib. (Mar. 8, 2005), http://articles.chicagotribune.com/2005-03-08/business/0503080224_1_harry-stonecipher-female-boeing-executive-philip-condit (on file with the *Columbia Law Review*).

188. Marcus Baram, Misconduct in the Corner Office, ABC News (Apr. 11, 2007), http://abcnews.go.com/Business/story?id=3027563&page=1 [https://perma.cc/XN5D-Q892].

189. Robert A. Guth, Ben Worthen & Justin Scheck, Accuser Said Hurd Leaked an H-P Deal, Wall St. J. (Nov. 6, 2010), https://www.wsj.com/articles/SB10001424052748703805704575594343622319312 (on file with the *Columbia Law Review*).

190. Joann S. Lublin & Christopher Weaver, CEO Sought Nod for Romance, Wall St. J. (May 23, 2012), https://www.wsj.com/articles/SB10001424052702304791704577420681311173856 (on file with the *Columbia Law Review*).

191. Paula Reed Ward, Former Highmark CEO Sues for $32 Million over Firing, Pittsburgh Post-Gazette (Sept. 3, 2015), http://www.post-gazette.com/business/healthcare-

because of what an audit committee report later described as "an extremely close personal relationship with a female employee that negatively impacted the work environment."[192]

The Best Buy incident demonstrated that the fallout from a CEO's workplace misconduct could extend to board members as well. Following Dunn's departure as CEO, the chairman of the company's board, Richard Schulze, resigned when an internal investigation revealed that he knew about Dunn's relationship with the female employee but did not report it to the rest of the board.[193] Schulze did, however, return to the company the following year as "chairman emeritus,"[194] raising questions as to whether board members who abet sexual misconduct by corporate executives would in fact bear significant costs.

Most of the CEO departures listed above did not result in shareholder lawsuits. At least one, however, did: In 2012, a pension fund for cement and concrete workers filed a class action complaint in the federal district court for the Northern District of California against Hewlett-Packard and Hurd for violating section 10(b) of the Securities Exchange Act of 1934[195] (and specifically, the SEC's Rule 10b-5, which applies to untrue statements of material fact and material omissions[196]). The complaint alleged that Hewlett-Packard's "Standards of Business Conduct"—which emphasized, among other elements, that the company "refus[ed] to tolerate harassment"—was itself materially misleading, and that the company's failure to disclose Hurd's misconduct constituted a material omission.[197]

The district court dismissed the shareholders' complaint, and a Ninth Circuit panel unanimously affirmed.[198] In the panel's view, Hewlett-Packard's business conduct policy was "transparently aspirational" and "did not reasonably suggest that there would be no violations of the

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business/2015/09/03/Former-Highmark-CEO-sues-insurer-for-32-million/stories/201509030183 (on file with the *Columbia Law Review*).

192. Erin Carlyle, Best Buy CEO Brian Dunn Gets $6.6 Million Severance Package After "Friendship" with 29-Year-Old Employee, Forbes (May 14, 2012), https://www.forbes.com/sites/erincarlyle/2012/05/14/best-buy-ceo-brian-dunn-gets-6-6-million-severance-package-after-friendship-with-29-year-old-employee/#11bca5615924 [https://perma.cc/5Y6W-HDMM].

193. Stephanie Clifford, Chairman of Best Buy Resigns After an Internal Audit, N.Y. Times (May 14, 2012), http://www.nytimes.com/2012/05/15/business/chairman-of-best-buy-to-step-down.html (on file with the *Columbia Law Review*).

194. Schulze Returns to Best Buy as Chairman Emeritus, Omaha World-Herald (Mar. 25, 2013), http://www.omaha.com/money/schulze-returns-to-best-buy-as-chairman-emeritus/article_c6cfaeee-4317-517f-86ea-f03b9139ad0e.html [https://perma.cc/LT4E-3YVT].

195. 15 U.S.C. § 78i (2012).

196. 17 C.F.R. § 240.10b-5(b) (2018).

197. Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co. (*H-P II*), 845 F.3d 1268, 1273–75 (9th Cir. 2017).

198. Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co. (*H-P I*), 52 F. Supp. 3d 961, 964 (N.D. Cal. 2014), aff'd, 845 F.3d 1268.

[policy] by the CEO or anyone else."[199] The Ninth Circuit also remarked in a footnote that it was "somewhat perplexed" by the shareholders' theory of the case.[200] According to the court: "It appears that HP's ethics and compliance policies worked. Hurd did not live up to HP's standards; HP became aware of Hurd's ostensible misconduct; HP quickly launched an investigation, confirming the misconduct; and Hurd resigned."[201]

Not only did Hewlett-Packard avoid liability, but Hurd escaped from the episode largely unscathed. Hurd left Hewlett-Packard with a $40 million severance package[202] and now makes roughly that amount each year as CEO of Oracle.[203] If Hurd's ouster suggested that the heads of publicly traded companies would face serious reputational consequences for inappropriate sexual behavior, the long-term outcome sent precisely the opposite message.

3. *American Apparel.* — Even as other prominent executives lost their jobs over sexual harassment, American Apparel's Dov Charney, who founded the clothing company in 1989,[204] managed to hold onto his CEO title notwithstanding a well-publicized record of sexual harassment allegations. In 2004, Charney reportedly masturbated in front of a reporter for *Jane* magazine who was writing a profile of him.[205] In 2005, three female former employees sued him for sexual harassment,[206] with another female employee filing a complaint with the EEOC against Charney the

199. *H-P II*, 845 F.3d at 1278.

200. Id. at 1277 n.3.

201. Id.

202. See Julie Bort, A Rare Glimpse Inside the Life and Mind of Oracle CEO Mark Hurd, Bus. Insider (Jan. 25, 2015), http://www.businessinsider.com/inside-the-mind-of-oracle-ceo-mark-hurd-2015-1 [https://perma.cc/3YUV-TVVR]. Hurd's generous severance package itself became the subject of a shareholder suit; two years after Hurd's termination, a group of shareholders sued the board, alleging that the voluntary decision to award Hurd a severance package constituted corporate waste. See Zucker v. Andreessen, No. 6014-VCP, 2012 WL 2366448, at *1 (Del. Ch. June 21, 2012). Even though Hurd's employment contract did not entitle him to any severance payment upon termination, the Court of Chancery concluded that the plaintiffs had not met the high bar for pleading waste because Hurd provided some consideration for the severance payment, including a commitment to participate in succession planning. Id. at *8.

203. See Adam Lashinsky, The Redemption of Oracle's Mark Hurd, Fortune (June 8, 2015), http://fortune.com/2015/06/08/redemption-of-mark-hurd-oracle [https://perma.cc/5P5D-KNAY]; Gabrielle Solomon, 10 Top-Paid CEOs, CNN Money (May 31, 2017), http://money.cnn.com/gallery/news/companies/2017/05/31/top-paid-ceos/6.html [https://perma.cc/PP4E-7F9P].

204. Bourree Lam, Goodbye, American Apparel, Atlantic (Jan. 14, 2017), https://www.theatlantic.com/business/archive/2017/01/american-apparel-gildan/513128/ [https://perma.cc/88VZ-FFUP].

205. Jaime Wolf, And You Thought Abercrombie & Fitch Was Pushing It?, N.Y. Times Mag. (Apr. 23, 2006), http://www.nytimes.com/2006/04/23/magazine/and-you-thought-abercrombie-fitch-was-pushing-it.html (on file with the *Columbia Law Review*).

206. Id.

following year.[207] In 2010, the EEOC found the company liable for discriminating against women "as a class" by "subjecting them to sexual harassment."[208] Five more female employees filed harassment lawsuits against Charney the following year.[209] All the while, American Apparel's board left Charney in charge.

In 2010, shareholders of American Apparel filed a derivative action against Charney, the company, its chief financial officer, and several current and former directors alleging (among other claims) breaches of fiduciary duties related to sexual harassment at the company.[210] A federal district court in the Central District of California dismissed the complaint, relying heavily on the Delaware Supreme Court's decision in *White v. Panic*.[211] The court acknowledged that "[t]he complaint here is more specific than the pleading in *White*," and that "the reports documenting Charney's sexual proclivities and the company's unconventional work environment support an inference that the directors knew or should have known that there was possible cause for concern."[212] The court further noted that the EEOC's finding of sexual harassment at the company "lends some credibility to plaintiffs' claims."[213] Nonetheless, the court concluded that the "plaintiffs have not pled particularized facts indicating that the board failed to act despite actual or constructive knowledge of problems with the company's work environment."[214] As in *Panic*, the plaintiffs' failure to disqualify the directors meant that the decision whether to sue Charney was left to the board.[215]

Charney's remarkable run at American Apparel finally ended in June 2014, when the board ousted him as CEO after an internal investigation revealed that he had—among other infractions—allowed an employee to post naked photos on the internet of a former American Apparel employee who had sued Charney for sexual harassment.[216] One month later, two American Apparel shareholders filed fresh derivative

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207. Laura M. Holson, He's Only Just Begun to Fight, N.Y. Times (Apr. 13, 2011), http://www.nytimes.com/2011/04/14/fashion/14CHARNEY.html (on file with the *Columbia Law Review*).

208. Id.

209. Id.

210. In re Am. Apparel S'holder Derivative Litig., No. CV 10-06576 MMM (RCx), 2012 WL 9506072, at *1, *25 (C.D. Cal. July 31, 2012).

211. Id. at *28–29 (discussing *Panic II*, 783 A.2d 543 (Del. 2001)).

212. Id. at *29.

213. Id. at *30.

214. Id. at *29.

215. See supra note 182 and accompanying text (discussing *Panic I*); infra section II.B.1 (describing why plaintiffs must disqualify directors to have standing to bring a derivative suit).

216. Elizabeth A. Harris, American Apparel Ousts Its Founder, Dov Charney, over Nude Photos, N.Y. Times (June 21, 2014), https://www.nytimes.com/2014/06/22/business/in-firing-dov-charney-american-apparel-cites-posting-of-naked-pictures.html (on file with the *Columbia Law Review*).

actions against the company, Charney, and former and current directors, but these claims were also unsuccessful.[217] According to the district court, the cascade of sexual harassment claims against Charney abated after 2011 and so "the Board may reasonably have believed that Charney's alleged sexual proclivities were no longer a significant issue for the Company."[218] Once the new allegations regarding the posting of naked photos emerged, the directors "did take action for precisely the reasons Plaintiffs assert they should have."[219]

The Ninth Circuit again affirmed the district court's decision, this time without a published decision.[220] American Apparel, meanwhile, continued to suffer reputationally and financially. The company has twice filed for bankruptcy since Charney's departure.[221]

4. *CTPartners.* — Around the same time American Apparel tumbled toward bankruptcy, the executive search firm CTPartners saw a sexual harassment scandal spell its ultimate demise. In December 2014, the *New York Post* accused CTPartners of being "a den of discrimination where women are stripped of profitable accounts, held to a higher standard than their male colleagues and subjected to lewd behavior."[222] According to the *New York Post* article, which cited a confidential EEOC complaint, one male partner in the firm's hedge fund practice "called himself 'daddy'" and told a female employee that "he wanted to spank her."[223] When the female employee complained to the vice chairman, the vice chairman allegedly "dismissed the matter due to a 'language barrier,' even though [the hedge fund partner]'s first language is English."[224] The *New York Post* article also said that the company's chairman and CEO "ripped off his clothes . . . during a drunken party at his Florida home" in front of other employees of the firm in 2012 and that employees had lodged at least a dozen separate sexual harassment complaints the same year.[225]

217. In re Am. Apparel, Inc. 2014 Derivative S'holder Litig., No. CV-14-05230-MWF (JEMx), 2015 WL 12724070, at *1 (C.D. Cal. Apr. 28, 2015), aff'd, 696 F. App'x 848 (9th Cir. 2017).

218. Id. at *20.

219. Id. at *17.

220. *In re Am. Apparel*, 696 F. App'x at 848.

221. Nathan Boomey, American Apparel Topples into Bankruptcy Again, USA Today (Nov. 14, 2016), https://www.usatoday.com/story/money/2016/11/14/american-apparel-chapter-11-bankruptcy/93788450 [https://perma.cc/YJQ3-FAK9].

222. Kevin Dugan, Wall Street Recruiters Had Boozy Naked Romps: Complaint, N.Y. Post (Dec. 8, 2014), https://nypost.com/2014/12/08/complaint-claims-executives-held-boozy-naked-boys-club-romps [https://perma.cc/Z7WQ-PW8B].

223. Id.

224. Id.

225. Id.

On the day that the *New York Post* published its report, CTPartners's stock price dropped nearly 25%.[226] The following year, two shareholders filed class action complaints alleging that the company had violated federal securities laws in connection with the sexual harassment scandal.[227] Specifically, the plaintiffs argued that the company's statements about its culture of honest and ethical conduct and its commitment to diversity and inclusiveness were inaccurate, that its statements trumpeting its low voluntary turnover rate among employees were misleading, and that the company's failure to disclose the "true nature" of its work environment ran afoul of its affirmative disclosure obligations.[228]

In March 2016, a federal district court in the Southern District of New York granted CTPartners's motion to dismiss the plaintiffs' complaint.[229] According to the court, the company's statements regarding its corporate culture amounted to "immaterial puffery," and its statements regarding its low turnover rate were neither false nor misleading.[230] The court also concluded that the company had no affirmative duty to disclose sexual harassment claims under federal securities laws.[231] But even though it escaped liability, the consequences for CTPartners were devastating: Just over six months after the *New York Post* article, the firm ceased its operations[232] and was set to file for Chapter 11 bankruptcy protection.[233] A Chicago-based rival purchased some of the company's assets, but the company's shareholders emerged emptyhanded.[234]

5. *Signet Jewelers.* — Before 2017, Signet Jewelers was best known for its various diamond jewelry retail brands—Jared, Kay, Sterling, and Zales—which dotted malls across the world. In February 2017, however, the company captured headlines for less resplendent reasons: The

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226. Lawrence Delevingne, Headhunter Stock Drops 24% on Sex Bias Complaint, CNBC (Dec. 10, 2014), https://www.cnbc.com/2014/12/10/headhunter-ctpartners-stock-drops-24-on-sex-bias-complaint.html [https://perma.cc/X4YC-FLBT].

227. Complaint, Zinno v. CTPartners Exec. Search Inc., 173 F. Supp. 3d 12 (S.D.N.Y. 2016) (No. 15 CV 1476); Amended Complaint, Lopez v. CTPartners Exec. Search Inc., 173 F. Supp. 3d 12 (S.D.N.Y. 2016) (No. 1:15-cv-1476-PAE).

228. *Lopez*, 173 F. Supp. 3d at 26–38.

229. Id. at 44.

230. Id. at 25.

231. Id. at 33–34.

232. Press Release, CTPartners Exec. Search Inc., CTPartners Executive Search (CTP) Announces Notice of Default Receipts from JPMogan [sic], Phoenix Life Insurance (June 29, 2015), https://www.streetinsider.com/Corporate+News/CTPartners+Executive+Search+(CTP)+Announces+Notice+of+Default+Receipts+from+JPMogan,+Phoenix+Life+Insurance/10686419.html [https://perma.cc/2TG2-5FS9].

233. Kevin Dugan, Troubled CTPartners Set to File for Bankruptcy, N.Y. Post (June 28, 2015), https://nypost.com/2015/06/28/troubled-ctpartners-set-to-file-for-bankruptcy/ [https://perma.cc/6B9A-A2E6].

234. See Claire Bushey, DHR International Sweeps Up Parts of Scandal-Plagued Rival, Crain's Chi. Bus. (June 23, 2015), http://www.chicagobusiness.com/article/20150623/NEWS04/150629945/dhr-international-sweeps-up-parts-of-scandal-plagued-rival [https://perma.cc/MG8G-S9A5].

company—according to a *Washington Post* exposé based on arbitration documents obtained by the newspaper—had developed "a corporate culture that fostered rampant sexual harassment and discrimination."[235] The documents included declarations from approximately 250 employees who said that women at the company "were routinely groped, demeaned and urged to sexually cater to their bosses to stay employed."[236] The *Washington Post* further reported allegations that "top male managers . . . dispatched scouting parties to stores to find female employees they wanted to sleep with, laughed about women's bodies in the workplace, and pushed female subordinates into sex by pledging better jobs, higher pay or protection from punishment."[237] The list of executives included the company's CEO, Mark Light.[238]

Sexual harassment claims against Signet had been pending for nearly a decade by the time that the *Washington Post* story broke, but because these claims were pursued through a confidential arbitration process, shareholders did not know about the nature or the extent of the allegations.[239] The *Washington Post* story changed all of that, and—unsurprisingly—Signet's share price plummeted: The stock dropped more than 12% in a single day.[240] The company criticized the *Washington Post* report as "distorted and inaccurate,"[241] but that did little to mitigate the damage. The stock continued to decline throughout the 2017 calendar year.[242]

Litigation soon ensued. Several groups of shareholders brought lawsuits against the company under federal securities laws, and those lawsuits have since been transferred to the Southern District of New York and consolidated into a single class action.[243] The first suit—a class action

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235. Drew Harwell, Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company, Wash. Post (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html (on file with the *Columbia Law Review*).

236. Id.

237. Id.

238. Id.

239. Id.

240. Lauren Thomas, This Jewelry Brand's Stock Plummets After Sexual Harassment Allegations Surface, CNBC (Feb. 28, 2017), https://www.cnbc.com/2017/02/28/signet-jewelers-stock-drops-as-sexual-harassment-allegations-surface.html [https://perma.cc/3XX6-9T36].

241. Press Release, Signet Jewelers Ltd., Sterling Jewelers Statement on Ongoing Arbitration (Feb. 28, 2017), http://www.signetjewelers.com/investors/news-releases/news-release-details/2017/Sterling-Jewelers-Statement-on-Ongoing-Arbitration/default.aspx [https://perma.cc/5AF8-PYNZ].

242. Ezequiel Minaya & Joann S. Lublin, Signet Jewelers CEO to Retire, Citing Health Reasons, Wall St. J. (July 17, 2017), https://www.wsj.com/articles/signet-jewelers-ceo-to-retire-citing-health-reasons-1500331835?mod=mktw (on file with the *Columbia Law Review*) (noting that Signet Jewelers stock had declined "35% over the past 12 months").

243. See, e.g., *Signet Jewelers* Order, supra note 17 (consolidating three of the lawsuits); see also *Signet Jewelers* Complaint, supra note 16.

complaint filed in federal district court at the end of March 2017—seized on statements made by the company between 2013 and 2016 acknowledging the existence of employment discrimination claims but denying all allegations.[244] The complaint also quoted a press release announcing Light's appointment as CEO that trumpeted his "meticulous approach to operational details," his "valuable attributes," and the board's "confiden[ce] that Mark is the right person to lead the Company forward."[245] The complaint asserted violations of section 10(b) of the Securities Exchange Act as well as section 20(a),[246] which imposes joint and several liability on controlling persons who aid and abet securities law violations.[247]

The fifth and most recent amended class action complaint in the Signet litigation fleshes out the federal securities fraud claims against Signet and its current and former senior executives in much greater detail. According to the complaint, "a pervasive culture of sexual harassment existed at Signet," which the company's senior executives undoubtedly knew about because they "actively participated in it."[248] The complaint goes on to allege that this "culture of sexual harassment" poses an especially severe risk to Signet's business "because Signet's key product—diamond bridal jewelry—was meant for women," and because "'trust' was essential to its sales model."[249] The consolidated case has not yet been resolved; however, a motion to dismiss has been fully briefed, with a decision expected in the coming months.[250]

6. *Fox News.* — While the Signet shareholder litigation slowly moves forward, one subsequently filed shareholder lawsuit related to workplace sexual misconduct has already produced a favorable outcome for plaintiffs. In November 2017, a pension fund for public employees of the City of Monroe, Michigan, and several other shareholders of Twenty-First Century Fox, Inc., filed a derivate action in Delaware court arising out of a sexual harassment scandal at Fox News.[251] The defendants include the estate of the late Fox News CEO Roger Ailes, Twenty-First Century Fox's controlling shareholder Rupert Murdoch, and several members of the

244. *Mikolchak* Complaint, supra note 16, at 6–17.

245. Id. at 8–9 (emphasis omitted) (quoting Press Release, Signet Jewelers Ltd., Signet Announces New CEO (Oct. 14, 2014), https://www.signetjewelers.com/investors/news-releases/news-release-details/2014/Signet-Announces-New-CEO/default.aspx [https://perma.cc/NNK2-3N4Z]).

246. Id. at 25–28.

247. Securities Exchange Act, 15 U.S.C. §§ 78i, 78t(a) (2012).

248. *Signet Jewelers* Complaint, supra note 16, at 8.

249. Id.

250. See Defendant's Notice of Motion to Dismiss the Fifth Amended Class Action Complaint at 1, In re Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728-JMF (S.D.N.Y. filed Mar. 30, 2018); *Signet Jewelers* Order, supra note 17, at 1–2.

251. *Murdoch* Complaint, supra note 18.

Twenty-First Century Fox board.[252] The complaint alleged that Ailes had "sexually harassed female employees and contributors with impunity for at least a decade" before his July 2016 departure from the company,[253] that Murdoch and others at Twenty-First Century Fox allowed Fox News anchor Bill O'Reilly to harass several female employees,[254] and that the company paid over $55 million to settle claims of sexual harassment and racial discrimination.[255] Beyond the costs incurred in defending and settling sexual harassment claims, the complaint cited multiple other harms to the company arising out of its failure to restrain Ailes and O'Reilly, among them: the possibility that U.K. regulators would block a proposed acquisition of the pay-TV platform Sky;[256] a drop in advertising revenue and ratings;[257] and the "loss of high profile talent," including anchors Megyn Kelly, Greta Van Susteren, and Gretchen Carlson, who left the network in the wake of the harassment scandal.[258]

Twenty-First Century Fox did not contest the plaintiffs' claims. Instead, it promptly entered into a settlement in which it agreed to trigger a $90 million payment from its insurers, as well as insurers representing Ailes's estate.[259] The settlement also provided for a payment of attorneys' fees to the plaintiffs' counsel,[260] as well as the establishment of a "Workplace Professionalism and Inclusion Council" tasked with strengthening reporting, bolstering sexual harassment–related training, and helping to recruit and promote the advancement of women and minorities.[261]

The Twenty-First Century Fox settlement led one corporate governance expert to predict that "[w]e'll see a lot more derivative lawsuits and share price lawsuits over sexual harassment cases in coming months."[262] We share that expectation, though the failure of the earlier suits against ICN, Hewlett-Packard, and American Apparel also suggests that such

252. Id. at 1.

253. Id. at 3.

254. Id. at 3–4.

255. Id. at 5.

256. Id. at 47–48.

257. Id. at 49.

258. Id. at 50.

259. Emily Steel, Fox Establishes Workplace Culture Panel After Harassment Scandal, N.Y. Times (Nov. 20, 2017), https://www.nytimes.com/2017/11/20/business/media/fox-news-sexual-harassment.html (on file with the *Columbia Law Review*).

260. *Murdoch* Settlement, supra note 19, at 27–28.

261. Exhibit A to Stipulation & Agreement of Settlement, Compromise, & Release at 3, 10–11, City of Monroe Emps.' Ret. Sys. v. Murdoch, No. 2017-0833-AGB (Del. Ch. filed Nov. 20, 2017) [hereinafter *Murdoch* Settlement Exhibit A].

262. Anousha Sakoui & Christie Smythe, Fox News Creates Workplace Council to Settle Harassment Suit, Bloomberg (Nov. 20, 2017) (quoting Kirk O. Hanson, Executive Director of the Markkula Center for Applied Ethics at Santa Clara University), https://www.bloomberg.com/news/articles/2017-11-20/fox-agrees-to-workplace-council-to-settle-harassment-litigation (on file with the *Columbia Law Review*).

claims face substantial hurdles. What the Twenty-First Century Fox settlement certainly illustrates is that shareholder lawsuits against corporations and their directors and officers arising out of workplace sexual misconduct deserve serious attention and, despite the failure of earlier actions, are potentially viable under certain circumstances.

7. *Liberty Tax*. — The ink on the Twenty-First Century Fox settlement had barely dried when Liberty Tax became the next company caught up in a derivative action arising out of CEO sexual misconduct. In December 2017, a Philadelphia-based pension fund filed a derivative action against Liberty Tax and its controlling shareholder and former CEO, John Hewitt, alleging that Hewitt had breached his duty of loyalty to the company in his capacity as officer and director.[263] "Even by the standards of the recent deluge of sexual misconduct revelations, the situation at Liberty is shocking," the complaint charged.[264] By February 2018, a second CEO would be ousted from the company as Liberty Tax's stock price continued to tumble amid scandal.[265]

The problems at Liberty Tax started long before 2017, though they only came to light in the second half of that year.[266] In July, the company's ethics hotline reportedly received a call from employees who said they overheard then-CEO Hewitt having sex in his office.[267] This was not the first complaint against the CEO: The company paid $500,000 to three former employees in December 2015 to settle a hostile work environment claim apparently arising out of Hewitt's noisy sexual activity.[268] This time, though, the complaint prompted the company's audit committee to hire an outside law firm, Skadden, Arps, Slate, Meagher & Flom LLP, to conduct an investigation of the claim.[269] According to news reports, Skadden's probe revealed that Hewitt had engaged in a romantic relationship with at least one employee—and possibly as many as ten others—and had used company resources to provide favors to several of his romantic partners.[270] In one case, Hewitt apparently allowed a female sales associate whom he was dating to buy a Liberty Tax franchise with no money down and then—when the relationship ended—arranged for the company to buy back the franchise for nearly double the purchase price, in addition to paying the woman a total of $220,000 in cash and stock.[271]

263. See *Liberty Tax* Complaint, supra note 20, at 1–4.

264. Id. at 1.

265. See Kimberly Pierceall, Liberty Tax Fires CEO Mid-Tax Season, 6 Months After Firing Founder John Hewitt, Virginian-Pilot (Feb. 19, 2018), https://pilotonline.com/business/consumer/article_aca42b52-4d4e-5a22-88ed-bddaa49a22e0.html [https://perma.cc/N2SQ-TE36] [hereinafter Pierceall, Liberty Tax Fires CEO Mid-Tax Season].

266. See Pierceall, Ex-CEO of Liberty Tax, supra note 20.

267. *Liberty Tax* Complaint, supra note 20, at 11.

268. Id.

269. Id.

270. Id.

271. Id.

Remarkably, according to a Liberty Tax board member who subsequently resigned, Hewitt continued to engage in the same behavior even while the Skadden investigation was ongoing.[272] In September, the board voted to terminate Hewitt, paid him more than $800,000 in severance, and began to negotiate to repurchase his controlling stake in the company.[273] When news of this dramatic turmoil became public, Liberty Tax's stock price dropped by over 15%.[274]

Notwithstanding his firing and the fall in Liberty Tax's share price, Hewitt was not prepared to cede control of the company that he founded without a fight. As a result of the company's dual-class structure, Hewitt retained the power to choose five of the company's nine directors, and he has made himself one of the five.[275] His majority control over the board effectively allowed him to choose the company's CEO, and in February 2018, he caused the new CEO to be replaced by one of his own hand-picked board members.[276]

Meanwhile, the Philadelphia-based pension fund's derivative action against Hewitt moved forward in the Delaware Court of Chancery. The complaint alleged, among other things, that Hewitt breached his fiduciary duty to Liberty Tax by "direct[ing] the Company to expend resources and assets to . . . further his sexual relations with employees and/or franchisees of the Company at the expense of the Company."[277] While Chancellor Andre Bouchard declined to order accelerated discovery at a January hearing, he reportedly said at the hearing that "[t]he complaint clearly, in my view, states a sufficiently colorable claim that Hewitt breached his fiduciary duty by engaging in conduct that led to his termination," and "neither Hewitt nor Liberty argues to the contrary in their papers in any meaningful sense, nor do [I] think they could do so."[278]

As of this writing, the pension fund action against Hewitt was still pending in the Delaware Chancery Court,[279] but Hewitt's tenure at Liberty Tax had come to an inglorious end. In July 2018, Hewitt agreed

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272. Letter from John Garel to Board of Directors, Liberty Tax, Inc. 1 (Nov. 10, 2017), https://www.sec.gov/Archives/edgar/data/1528930/000117184317006901/exh_991.htm [https://perma.cc/2V8H-WYVV].

273. Id.; see also, Pierceall, Ex-CEO of Liberty Tax, supra note 20.

274. See *Liberty Tax* Complaint, supra note 20, at 15.

275. See Kimberly Pierceall, "Mr. Hewitt's Conduct . . . Has Left Me in a Very Difficult Position": 4th Liberty Board Member Leaves, Virginian-Pilot (Nov. 13, 2017), https://pilotonline.com/business/stocks/article_0abfca83-01b5-5798-8d1b-2811fbfca720.html [https://perma.cc/BY7Y-ZUFC] [hereinafter, Pierceall, Mr. Hewitt's Conduct].

276. See Pierceall, Liberty Tax Fires CEO Mid-Tax Season, supra note 265.

277. *Liberty Tax* Complaint, supra note 20, at 25–26.

278. Jeff Montgomery, Chancellor Won't Expedite Liberty CEO Misconduct Suit, Law360 (Jan. 16, 2018), https://www.law360.com/articles/1002175/chancellor-won-t-expedite-liberty-ceo-misconduct-suit (on file with the *Columbia Law Review*).

279. See Docket for Asbestos Workers' Phila. Pension Fund ex rel. Liberty Tax v. Hewitt, No. 2017-0883 (Del. Ch. filed Dec. 11, 2017) (last updated Aug. 2, 2018) (Bloomberg, Docket Search, Del. Ch.).

to sell all of his shares and sever ties with the firm after its auditor quit and the Nasdaq exchange moved to delist Liberty Tax.[280] Liberty Tax's stock price rose by more than 25% at the news of Hewitt's departure.[281] The episode serves as one more illustration that in the era of #MeToo, even controlling shareholders are no longer invincible.

8. *Wynn Resorts.* — One of the latest publicly traded companies to emerge as the subject of a serious sexual harassment scandal is Wynn Resorts, a developer and operator of high-end hotels and casinos.[282] In late January 2018, the *Wall Street Journal* published a report corroborated by "dozens" of sources who described a "decades-long pattern of sexual misconduct" by the company's founder and longtime CEO, Steve Wynn.[283] One massage therapist who worked at Wynn's Las Vegas spa told the *Journal* that Wynn regularly instructed her to touch his genitals and at one point asked her to perform oral sex.[284] Several other female employees said that Wynn frequently wore such short shorts that he would expose himself to them when he sat down.[285] Another said that Wynn grabbed her waist and told her to kiss him.[286] A former manicurist at a Wynn-owned hotel said that Wynn forced her to have sex with him.[287] The manicurist reportedly complained to the company's human resources department and later settled claims against Wynn for $7.5 million.[288]

News of the allegations against Wynn caused the company's share price to plunge, dropping 10% in one day.[289] In response, the Wynn Resorts board formed a special committee to investigate the allegations.[290] Gambling authorities in Macau and Nevada also opened investigations.[291] Two weeks later, Wynn resigned.[292]

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280. See Anders Melin, Liberty Tax Soars After Founder Involved in Sex Scandal Agrees to Leave Firm, Bloomberg News: Accounting Today (July 24, 2018), https://www.accountingtoday.com/articles/liberty-tax-soars-after-founder-john-hewitt-involved-in-sex-scandal-agrees-to-leave-firm (on file with the *Columbia Law Review*).

281. Id.

282. See Berzon et al., supra note 21.

283. Id.

284. Id.

285. Id.

286. Id.

287. Id.

288. Id.

289. *Wynn* Complaint, supra note 21, at 20.

290. Id. at 20–22; Todd Prince, Wynn Resorts Finishes Sexual Harassment Investigation of Steve Wynn, Las Vegas Rev.-J. (Aug. 7, 2018), https://www.reviewjournal.com/business/casinos-gaming/wynn-resorts-finishes-sexual-harassment-investigation-of-steve-wynn/ [https://perma.cc/UA64-NCMP].

291. Prince, supra note 290.

292. Maggie Astor & Julie Creswell, Steve Wynn Resigns from Company amid Sexual Misconduct Allegations, N.Y. Times (Feb. 6, 2018), https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html (on file with the *Columbia Law Review*).

The same day as Wynn's resignation, the Norfolk County Retirement System, a Massachusetts pension plan that owns shares in Wynn Resorts, filed a derivative suit in Nevada state court against Wynn, the company's general counsel, and the board of directors.[293] The suit alleges that Wynn's ex-wife, herself a former board member, told "a representative of the Board" in 2009 about the settlement with the manicurist,[294] and that the board knew about the settlement and other allegations against Wynn by 2015.[295] Nonetheless, board members "failed to act and continued to support and recommend to the stockholders Mr. Wynn's continued leadership and compensation," according to the complaint.[296] The pension-plan plaintiff asserted claims of breach of fiduciary duty and unjust enrichment against Wynn himself, the general counsel, and the nine members of the board.[297]

Despite the seriousness of the allegations against Wynn and the board, shareholders face a particularly high hurdle—unlike ICN, American Apparel, Twenty-First Century Fox, and Liberty Tax, which are incorporated in Delaware, Wynn Resorts is a Nevada corporation.[298] Nevada law is generally considered to be less friendly to shareholder-plaintiffs than Delaware law.[299] In Nevada, the default rule is that directors and officers of Nevada corporations may be held liable to shareholders only if their behavior was so egregious that it involved both a breach of fiduciary duty *and* "intentional misconduct, fraud or a knowing violation of law."[300] While Wynn's alleged conduct appears to be both inten-

293. *Wynn* Complaint, supra note 21.

294. Id. at 15.

295. Id. at 12.

296. Id.

297. Id. at 34–39. The same law firm that represents the Norfolk County Retirement System filed a second derivative action a week later on behalf of a Pennsylvania-based fund that manages pension plans of construction industry workers. Press Release, Eglet Prince, Eglet Prince Has Filed a Second Stockholder Derivative Complaint in Las Vegas Against Steve Wynn and Wynn Resorts Board of Directors (Feb. 16, 2018), https://www.prnewswire.com/news-releases/eglet-prince-has-filed-a-second-stockholder-derivative-complaint-in-las-vegas-against-steve-wynn-and-wynn-resorts-board-of-directors-300600198.html [https://perma.cc/A93E-PAZ2].

298. See *Wynn* Complaint, supra note 21, at 3. Signet Jewelers is incorporated in Bermuda, which presumably is the reason the plaintiffs in the Signet Jewelers case are suing under federal securities law (which applies to U.S.-listed companies regardless of legal domicile) and not bringing a derivative action. See Delian Naydenov, 3 Companies Calling Bermuda Home, Seeking Alpha (Oct. 17, 2013), https://seekingalpha.com/article/1751872-3-companies-calling-bermuda-home [https://perma.cc/WAG8-GYKU].

299. See, e.g., Michal Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 98 Va. L. Rev. 935, 941 (2012); Jens Dammann, How Lax Is Nevada Corporate Law? A Response to Professor Barzuza, 99 Va. L. Rev. In Brief 1, 10 (2013), http://www.virginialawreview.org/sites/virginialawreview.org/files/Dammann_BarzuzaResponse.pdf [https://perma.cc/ZN49-86DV] (disagreeing with Barzuza's claim that Nevada is a "liability-free jurisdiction" but acknowledging that Delaware's approach to director and officer liability is "more stringent" than Nevada's).

300. Nev. Rev. Stat. § 78.138(7) (2017).

tional and a knowing violation of law, shareholders may have difficulty establishing the liability of board members who ignored Wynn's pattern of harassment or allowed it to continue.

9. *Additional Cases.* — While this Article was in the late phase of the editing process, shareholders at four more firms filed lawsuits alleging violations of federal securities law and state corporate law in connection with workplace sexual misconduct. In July 2018, after the *Wall Street Journal* reported that former pilots employed by National Beverage Corp. had accused CEO Nick Caporella of inappropriately touching them on multiple trips in the cockpit of a corporate jet,[301] shareholders sued the company and Caporella for allegedly making materially false and misleading statements that concealed Caporella's pattern of harassment.[302] The next month, after the *New Yorker* magazine revealed that six women had accused CBS Corp. CEO Leslie Moonves of sexual harassment and intimidation,[303] the media conglomerate was hit with a lawsuit in federal court in New York for securities fraud.[304] Days later, a shareholder at the pizza chain Papa John's filed a class action against the company, its founder John Schnatter, and two of its current officers in federal court in New York alleging similar securities law violations.[305] That class action followed a report in *Forbes* revealing confidential settlements of at least two sexual harassment lawsuits filed against Schnatter while he was the Papa John's CEO.[306] Finally, shareholders at Nike sued the shoemaker and more than a dozen of its directors and officers in Oregon state court

301. See Jennifer Maloney & Mark Maremont, Billionaire Behind LaCroix Accused of Improper Touching by Two Pilots, Wall St. J. (July 3, 2018), https://www.wsj.com/articles/billionaire-behind-lacroix-accused-of-improper-touching-by-two-pilots-1530648681 (on file with the *Columbia Law Review*).

302. See *Luczak* Complaint, supra note 22 at 3–4, 6–9; Bronstein Press Release, supra note 22; Pomerantz Press Release, supra note 22.

303. Ronan Farrow, Les Moonves and CBS Face Allegations of Sexual Misconduct, New Yorker (Aug. 6, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct (on file with the *Columbia Law Review*). Moonves resigned a few weeks later. Keach Hagey & Joe Flint, CBS Chief Leslie Moonves Steps Down Amid Sexual Misconduct Allegations, Wall St. J. (Sept. 9, 2018), https://www.wsj.com/articles/cbs-ceo-leslie-moonves-expected-to-resign-1536525335 (on file with the *Columbia Law Review*).

304. See *Samit* Complaint, supra note 23, at 1–2 (alleging that CBS failed to disclose that Moonves engaged in sexual harassment despite "purport[ing] to maintain 'standards for ethical conduct that are expected of all directors and employees of the Company'" in its SEC filings (emphasis omitted)).

305. See *Danker* Complaint, supra note 24, at 1–2. The complaint alleges that "Papa John's executives, including Defendant Schnatter, [] engaged in a pattern of sexual harassment and other inappropriate workplace conduct at the Company" and that, because the company's "Code of Ethics" was inadequate to prevent sexual misconduct that would foreseeably harm the business, "Papa John's public statements were materially false and misleading at all relevant times." Id. at 2.

306. Noah Kirsch, The Inside Story of Papa John's Toxic Culture, Forbes (July 19, 2018), https://www.forbes.com/sites/forbesdigitalcovers/2018/07/19/the-inside-story-of-papa-johns-toxic-culture [https://perma.cc/6UUM-JE9g].

for allegedly breaching their fiduciary duties by allowing rampant sexual harassment at the company.[307]

The early stage of these cases makes any predictions as to their outcomes perilous. What we can say with considerable confidence is that the National Beverage, CBS, Papa John's, and Nike lawsuits are unlikely to be the last of the shareholder actions arising from workplace sexual misconduct at publicly traded companies. In the following section, we turn from the facts of these already-filed claims to the legal framework that will determine whether and when shareholder-plaintiffs can prevail.

B. *The Legal Framework*

What remedies are available to investors in the wake of sexual misconduct at the firms in which they own shares? This section takes stock of the legal tools that shareholder-plaintiffs potentially can utilize. We focus in particular on the corporate law of Delaware, where more than 66% of Fortune 500 firms are incorporated,[308] and on federal securities laws applicable to publicly traded companies.

1. *Fiduciary Duties Under Corporate Law.* — Corporate fiduciaries—the officers who manage company operations, as well as directors who wield final decisionmaking authority—exercise control over the company on behalf of the shareholders who are its owners. To protect the owners, corporate law subjects officers and directors to the fiduciary duties of care and loyalty. If those fiduciary duties are violated, shareholders may band together to bring a derivative suit against the corporation.[309]

The duty of care mandates that corporate fiduciaries exercise informed business judgment in their stewardship of the company.[310] Essentially, the duty of care requires directors and officers to act with information that is "reasonably available" to them and to "proceed with a critical eye" in assessing such information in order to protect the interests of the corporation and its shareholders.[311] The duty of care does not,

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307. See *Stein* Complaint, supra note 25, at 60–63 (alleging breach of the duty of loyalty, corporate waste, and unjust enrichment due to Nike's directors' perpetuation of a hostile work environment and approval of excessive executive compensation packages).

308. Jeffrey W. Bullock, Sec'y of State, Delaware Division of Corporations 2015 Annual Report 1 (2015), https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf [https://perma.cc/V2TK-SBCD].

309. Because a derivative suit alleges a harm to the corporation, it belongs to the corporation. As such, the shareholders must first make a demand on the directors to take on the litigation, unless such actions would be futile because of a conflict of interest. See Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984). If the shareholders are permitted to proceed with their action, they will be entitled to reimbursement for the expenses associated with the claim. See Ralph C. Ferrara, Kevin T. Abikoff & Laura Leedy Gansler, Shareholder Derivative Litigation: Besieging the Board § 14.06 (2005). However, any proceeds from the action will be remitted to the corporation. See id.

310. See Leo E. Strine, Jr. et al., Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, 98 Geo. L.J. 629, 654 & n.76 (2010).

311. Smith v. Van Gorkom, 488 A.2d 858, 872–74 (Del. 1985).

however, mean that Delaware courts will second-guess every business decision that directors or officers make. Under the "business judgment rule," Delaware courts will defer to any decision that can be attributed to some rational corporate purpose unless that decision was grossly negligent or made in bad faith.[312]

In addition, corporations can indemnify directors or officers for expenses incurred in defending against allegations of the breach of the duty of care, so long as the director or officer "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."[313] Finally, Delaware (like most other states[314]) allows corporations to adopt a charter provision that exculpates directors from liability for breaches of the duty of care, though Delaware's exculpation does not apply to officers.[315]

The duty of loyalty, by contrast, has traditionally been immutable under Delaware law.[316] The duty of loyalty requires fiduciaries to "exercise their authority in a good-faith attempt to advance corporate purposes."[317] At its core, the duty of loyalty prohibits fiduciaries from putting their own interests ahead of those of the shareholders. Decisions regulated by the duty of loyalty—such as transactions between the company and directors—do not receive business judgment protection.[318]

312. The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812.

313. Del. Code tit. 8, § 145(a) (2018).

314. See William T. Allen & Reinier Kraakman, Commentaries and Cases on the Law of Business Organization 229, 246 (5th ed. 2016).

315. See Del. Code tit. 8, § 102(b)(7) (empowering corporations to eliminate "the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director"). Likewise, a corporate officer who is also a director would not be eligible for exculpation for duty breaches committed as an officer. Chen v. Howard-Anderson, 87 A.3d 648, 686 (Del. Ch. 2014).

316. Two caveats are necessary. First, since 2000, Delaware has granted corporations a statutory right to waive a crucial part of the duty of loyalty: the corporate opportunities doctrine. Other states have since followed Delaware's lead, similarly permitting firms to execute "corporate opportunity waivers." Since inception, hundreds of corporations have adopted waivers. See Gabriel Rauterberg & Eric Talley, Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers, 117 Colum. L. Rev. 1075, 1079 (2017).

Second, this analysis does not apply to the limited liability corporation (LLC), which is able to restrict or eliminate officer fiduciary duties in its LLC agreement, including the duty of loyalty. See Del. Code tit. 6, § 18-1101(c) (2018); Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 856 (Del. Ch. 2012) ("LLC agreements may displace fiduciary duties altogether or tailor their application, by substituting a different form of review.").

317. Allen & Kraakman, supra note 314, at 229.

318. See Continuing Creditors' Comm. of Star Telecomm., Inc. v. Edgecomb, 385 F. Supp. 2d 449, 462 (D. Del. 2004) ("If a defendant does not breach his duty of loyalty to

Moreover, the Delaware statute that enables corporations to adopt charter provisions that limit the liability of directors explicitly excludes the duty of loyalty from its reach.[319]

Two types of duty of loyalty violations are especially relevant to board members in cases of corporate sexual misconduct. First, Delaware courts have explained that "[i]llegal corporate conduct is not loyal corporate conduct."[320] Thus, a director who "consciously caus[es] the corporation to violate the law"—say, by enabling sexual harassment that violates Title VII—thereby breaches the duty of loyalty and "could be forced to answer for the harm he has caused."[321] To be sure, even this seemingly straightforward rule is uncertain at the edges. The American Law Institute's *Principles of Corporate Governance* suggests that "noncompliance with law may be justified under the concept of necessity in extraordinary situations where compliance would inflict substantial harm on third parties, and noncompliance would not."[322] Moreover, a "de minimis" principle may apply:[323] Professor Stephen Bainbridge has observed that "[i]f a package delivery firm told its drivers to illegally double-park, so as to speed up the delivery process, for example, it is hardly clear that liability should follow."[324]

Second, directors can be held liable for breach of the duty of loyalty when they fail to exercise oversight of a corporation—but only when their failure is "sustained or systematic."[325] This line of precedent originated from the Delaware Chancery Court's 1996 decision, *In re Caremark*

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the company, he is permitted to rely on the business judgment rule . . . ." (citing Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001))).

319. See Del. Code tit. 8, § 102(b)(7) (precluding a corporate charter from eliminating or limiting director liability "[f]or any breach of the director's duty of loyalty to the corporation or its stockholders"). However, a small number of states have departed from this rule. Nevada, for example, holds itself out as a "liability-free" jurisdiction for managers. See Barzuza, supra note 299, at 947–58. Under Nevada law, the default rule provides for no liability for a breach of the duty of loyalty absent "intentional misconduct, fraud or a knowing violation of law." Nev. Rev. Stat. § 78.138(7) (2017).

320. In re Goldman Sachs Grp., Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *20 (Del. Ch. Oct. 12, 2011); see also Guttman v. Jen-Hsun Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.").

321. Desimone v. Barrows, 924 A.2d 908, 934 (Del. Ch. 2007).

322. Principles of Corporate Governance: Analysis and Recommendations § 2.01 (Am. Law Inst. 2018).

323. Id.

324. Stephen Bainbridge, Can Directors of Corporations Be Held Liable to Shareholders when the Corporation Breaks the Law?, ProfessorBainbridge.com (Oct. 6, 2015), http://www.professorbainbridge.com/professorbainbridgecom/2015/10/can-directors-of-corporations-be-held-liable-to-shareholders-when-the-corporation-breaks-the-law.html [https://perma.cc/VS9J-8H46].

325. Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 364 (Del. 2006) (quoting In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996)).

International Inc. Derivative Litigation.[326] In that case, Caremark, a healthcare corporation, was indicted on various federal charges related to illegal kickbacks.[327] Caremark ultimately pleaded guilty to mail fraud and paid more than $250 million to settle civil claims arising out of its alleged kickback scheme.[328] Following that litigation, shareholders filed five derivative suits against Caremark's board of directors, seeking to hold the directors liable for Caremark's losses. The parties eventually settled, but in approving the settlement, Chancellor William Allen expounded on the responsibility of corporate boards: "[L]iability to the corporation for a loss may be said to arise from an unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss."[329] Chancellor Allen concluded that the board of directors has "a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists," and furthermore, a "failure [to maintain such a system] under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."[330]

Although the fiduciary duty at issue in the original *Caremark* decision was the duty of care, the *Caremark* doctrine has since been recast under the duty of loyalty,[331] meaning that such claims are safe from exculpation under section 102(b)(7).[332] This does not mean, however, that it is easy for plaintiffs to prevail on a *Caremark* theory: As Chancellor Allen put it, a claim that directors are subject to personal liability for oversight failures is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[333] To prevail on a *Caremark* claim, the plaintiffs must either show "that the directors 'utterly failed to implement any reporting or information system or controls,'"[334] or "that the board knew of evidence of corporate misconduct—the proverbial 'red flag'—yet acted in bad faith by consciously disregarding its duty to address that misconduct."[335]

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326. 698 A.2d 959.

327. Id. at 960.

328. Id. at 960–61.

329. Id. at 967 (emphasis omitted).

330. Id. at 970.

331. Guttman v. Jen-Hsun Huang, 823 A.2d 492, 506 (Del. Ch. 2003) ("Although the *Caremark* decision is rightly seen as a prod towards the greater exercise of care . . . , the opinion articulates a standard for liability for failures of oversight that requires a showing that the directors breached their duty of loyalty by failing to attend to their duties in good faith.").

332. Del. Code tit. 8, § 102(b)(7) (2018).

333. *In re Caremark*, 698 A.2d at 967.

334. Horman v. Abney, No. 12290-VCS, 2017 WL 242571, at *7 (Del. Ch. Jan. 19, 2017) (quoting Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006)).

335. Id. (internal quotation marks omitted) (quoting Reiter ex rel. Capital One Fin. Corp. v. Fairbank, No. 11693-CB, 2016 WL 6081823, at *8 (Del. Ch. Oct. 18, 2016)).

In addition to problems of proof, a potential plaintiff faces limitations related to standing. Regardless of the form that a derivative action takes, the suit always must allege a harm to the corporation. As such, the lawsuit belongs to the corporation. This means that a shareholder will lack standing to bring a derivative suit unless the shareholder has demanded that the directors pursue the corporate claim or shows that demand would be futile.[336] The latter path is the most likely to be successful for shareholders, as the board's decision to litigate the case or let it fall by the wayside will be respected "[e]xcept in extraordinary cases."[337]

Delaware case law provides two different frameworks for assessing when a plaintiff alleging "demand futility" has standing to assert a derivative claim. The first (the *Aronson* test)[338] applies when the derivative suit challenges a decision made by the same board that would be asked to consider the plaintiff's demand.[339] The second—announced in *Rales v. Blasband*—applies "where the board that would be considering the demand did not make a business decision which is being challenged in the derivative suit."[340] This could be the case if: (1) a majority of the board has been replaced since the time of the decision under attack, (2) the suit does not attack a specific decision, or (3) the decision under attack was made by the board of a different company (for example, prior to an acquisition).[341]

To illustrate: Imagine that the board approves the use of corporate funds to settle a sexual harassment claim against the CEO and that a majority of the current directors were board members at the time of the original decision. In this case, *Aronson* would supply the applicable test for demand futility. That test is two-pronged, and establishing one prong will suffice for demand futility.[342] The first prong asks whether the shareholders' complaint creates a "reasonable doubt" that "the directors are disinterested and independent."[343] Delaware courts consult a range of factors when considering whether directors meet this standard.[344] Close

336. See Spiegel v. Buntrock, 571 A.2d 767, 773 (Del. 1990) (citing Del. Ch. Ct. R. 23.1).

337. Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1343 (7th Cir. 1990) (summarizing Delaware's demand doctrine), rev'd on other grounds, 500 U.S. 90 (1991).

338. See Aronson v. Lewis, 473 A.2d 805, 814–15 (Del. 1984).

339. See Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993) ("The essential predicate for the *Aronson* test is the fact that a decision of the board of directors is being challenged in the derivative suit." (emphasis omitted)).

340. Id. at 933–34.

341. Id. at 934.

342. *Aronson*, 473 A.2d at 814–15.

343. Id. at 814.

344. See Harris v. Carter, 582 A.2d 222, 229 (Del. Ch. 1990) ("[N]o single factor—such as receipt of directorial compensation; family or social relationships; approval of the transaction attacked; or other relationships with the corporation (*e.g.*, attorney or banker)—may itself be dispositive in any particular case.").

family connections are generally disqualifying.[345] Other ties—including financial entanglements and social relationships—are also relevant to the judicial inquiry into disinterestedness and independence.[346]

Aronson's second prong, as originally articulated, asks whether the "particularized facts alleged" by the shareholder-plaintiffs create a reasonable doubt that "the challenged transaction was . . . the product of a valid exercise of business judgment."[347] "In simple terms," according to then-Vice Chancellor Strine, this "second prong of *Aronson* can be said to fulfill two important integrity-assuring functions."[348] One is the concern that even a "putatively independent" board will exhibit bias against shareholder-plaintiffs.[349] Thus, *Aronson* allows a derivative action to go forward if the plaintiff can show "that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests."[350] This might occur if the board "intentionally breaks the law," or "intentionally acts with a purpose other than that of advancing the best interests of the corporation," or "intentionally fails to act in the face of a known duty to act."[351] The other concern addressed by *Aronson*'s second prong is one that arises when "a derivative suit demand asks directors to authorize a suit against themselves."[352] Thus, the *Aronson* framework excuses demand when the derivative complaint alleges claims against the directors and "the threat of liability to the directors . . . is sufficiently substantial to cast a reasonable doubt over their impartiality."[353] When the corporation has adopted a charter provision pursuant to section 102(b)(7) that exculpates directors from duty of care liability, demand will be excused if the plaintiffs can show that a majority of the board "faces a substantial likelihood of liability" for "non-exculpated" (or, duty of loyalty) claims.[354]

To sum up so far: *Aronson* asks (1) whether a majority of the directors are "disinterested and independent," and if so, (2) whether a majority of the directors might nonetheless be disqualified (a) because the decision under attack in the derivative suit was especially "egregious or

345. See In re Oracle Corp. Derivative Litig., 824 A.2d 917, 937–38 (Del. Ch. 2003) (Strine, V.C.) (noting that "if two brothers were on a corporate board" and a "derivative action is filed targeting a transaction involving one of the brothers," then it is "easy" to conclude that the other brother would not be "disinterested and independent").

346. See id. at 938–39.

347. *Aronson*, 473 A.2d at 814.

348. Guttman v. Jen-Hsun Huang, 823 A.2d 492, 500 (Del. Ch. 2003).

349. See id.

350. Lenois v. Lawal, No. 11963-VCMR, 2017 WL 5289611, at *10 (Del. Ch. Nov. 7, 2017) (internal quotation marks omitted) (quoting *Panic II*, 783 A.2d 543, 554 n.36 (Del. 2001)).

351. Id. (internal quotation marks omitted) (quoting In re Goldman Sachs Grp., Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *13 (Del. Ch. Oct. 12, 2011)).

352. *Guttman*, 823 A.2d at 500.

353. Id.

354. See *Lenois*, 2017 WL 5289611, at *2, *14 (collecting cases).

irrational," or (b) because a majority of the directors themselves face a "substantial likelihood" of liability for nonexculpated claims. But *Aronson* applies only when a majority of the current board participated in the decision being challenged. Thus, if the board approves the use of corporate funds to settle a sexual harassment claim against the CEO but a majority of the board turns over before a derivative action is filed, *Rales* rather than *Aronson* would govern the question of demand excusal. Likewise, if the derivative complaint alleged a *Caremark* violation (that is, a failure to act in the face of red flags), then there would be no specific decision under attack, so *Rales* rather than *Aronson* would apply.[355] The *Rales* test involves a "singular inquiry":[356] whether the allegations "create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[357] As a practical matter, this ends up looking a lot like prongs (1) and (2)(b) of *Aronson*. Courts applying the *Rales* test ask whether a majority of the directors "can act independently" of the defendants in the derivative action or whether a majority of the directors "face a 'substantial likelihood' of personal liability."[358] Again, demand will be excused if a majority of the board is biased by factors such as familial, financial, professional, and social ties or faces a real risk of personal liability for nonexculpated claims.

Finally, even if demand would be excused under the *Aronson* or *Rales* tests, a board nonetheless can cause a derivative action to be dismissed by using a so-called special litigation committee (SLC) composed of disinterested and independent directors who make up a minority of the board.[359] The SLC must make "an objective and thorough investigation of the derivative suit," and if it concludes that the suit should be dismissed, the committee can file a motion supported by a "thorough written record of the investigation and its findings and recommendations."[360] If that decision is challenged, the court will engage in a two-step review of the SLC's recommendation. At the first step, the court will consider whether the committee "was independent and showed reasonable bases for good faith findings and recommendations."[361] While boards generally enjoy a presumption of independence in the demand-excusal context, the Delaware Supreme Court has said that "the SLC has the burden of establishing its own independence by a yardstick that must be 'like

355. City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47, 55 (Del. 2017); Okla. Firefighters Pension & Ret. Sys. v. Corbat, No. 12151-VCG, 2018 WL 1254958, at *2 (Del. Ch. Mar. 12, 2018).

356. *Guttman*, 823 A.2d at 501.

357. Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).

358. *Guttman*, 823 A.2d at 501 (quoting *Rales*, 634 A.2d at 936).

359. Minor Myers, The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation, 84 Ind. L.J. 1309, 1310 (2009).

360. Zapata Corp. v. Maldonado, 430 A.2d 779, 788 (Del. 1981).

361. Id. at 788–89.

Caesar's wife'—'above reproach.'"[362] If the SLC can satisfy this high standard and show that it carried out the required investigation, then the court will proceed to the second step and decide whether the SLC's motion to dismiss should be granted.[363] The question for the court at this second step is "whether the SLC's recommended result falls within a range of reasonable outcomes" that a disinterested, independent, and informed director could accept.[364] This second step provides an opportunity for the court to conduct a substantive review of the SLC's conclusion and to keep alive a meritorious derivative suit over the objections of even an independent SLC.[365]

2. *Securities Law.* — Aside from the corporate law of a company's state of incorporation, publicly traded companies are governed by federal (as well as state[366]) securities law. In some instances, federal securities laws saddle public companies with affirmative duties to disclose certain information to shareholders.[367] Perhaps most significantly, section 13(a) of the Securities Exchange Act of 1934 provides that every issuer of a security on a national securities exchange must file annual reports with the SEC in accordance with the Commission's rules and regulations, as well as file "such information and documents . . . as the Commission shall require" in order to keep the issuer's registration statement "reasonably current."[368] For present purposes, the most important set of SEC rules defining the affirmative disclosure duties of public companies is found in Regulation S-K.[369]

Even when there is no affirmative duty to disclose, Rule 10b-5 under the Securities Exchange Act of 1934 makes it unlawful for a company to utter "any untrue statement of material fact" in connection with a securities transaction and "to *omit* to state a material fact" that is necessary to render another statement "not misleading."[370] An omission is "material,"

362. Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1055 (Del. 2004) (quoting Lewis v. Fuqua, 502 A.2d 962, 967 (Del. Ch. 1985)).

363. *Zapata*, 430 A.2d at 789.

364. In re Primedia, Inc., 67 A.3d 455, 468 (Del. Ch. 2013).

365. *Zapata*, 430 A.2d at 789.

366. In addition to the SEC, which regulates and enforces the federal securities laws, each state has its own securities regulator who enforces "blue sky" laws that govern securities sold within each state. See State Securities Regulators, SEC, https://www.sec.gov/fast-answers/answersstatesecreghtm.html [https://perma.cc/7D5M-D26K] (last visited July 27, 2018). Although this Article focuses on federal securities law, we note that states may have the power to bring actions against securities violators under their own laws. Id.

367. As just one example, Regulation FD requires companies to disclose material information to the public at the same time as it is disclosed to investors. See 17 C.F.R. § 243.100 (2018).

368. 15 U.S.C. § 78m (2012); cf. id. § 78l(a) (requiring a registration for securities to be traded on national securities exchange).

369. 17 C.F.R. pt. 229.

370. Id. § 240.10b-5 (emphasis added).

according to the Supreme Court, if "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[371]

The distinction between a Regulation S-K violation and a Rule 10b-5 violation is meaningful for enforcement purposes. The SEC can bring an enforcement action under either Regulation S-K or Rule 10b-5, but circuits are split as to whether there is a private right of action for a Regulation S-K violation.[372] By contrast, the Supreme Court has recognized a private right of action under Rule 10b-5,[373] meaning that investors can recover damages from public companies and individual officers for violations of the rule.[374] To be sure, there are still high hurdles to recovery under Rule 10b-5: Among others, a Rule 10b-5 plaintiff will always have to prove that the defendant acted "with a wrongful state of mind,"[375] and in her complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[376] As we shall see, there may be circumstances in which a Regulation S-K violation also gives rise to a Rule 10b-5 violation, though it is clear that not every Regulation S-K violation can support a private action.

A number of affirmative disclosure obligations under Regulation S-K are conceivably relevant to companies facing sexual harassment claims. For example, Item 103 of Regulation S-K mandates disclosure of "any material legal proceedings" currently pending against a company, as well as "any such proceedings known to be contemplated by governmental authorities."[377] However, several courts have held that Item 103 does not

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371. Piper v. Chris-Craft Indus., 430 U.S. 1, 50 (1977) (internal quotation marks omitted) (quoting TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976)). The materiality standard is often assessed relative to the size of the firm. See George S. Georgiev, Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation, 64 UCLA L. Rev. 602, 625–27 (2017). Thus, for large firms, the materiality threshold is much higher. Id. This standard therefore provides a safety net for companies that fail to disclose information that would certainly rise to the level of materiality at smaller firms, leading to "materiality blindspots." Id.

372. See Srebnik v. Dean, No. 05-cv-01086-WYD-MJW, 2006 WL 2790408, at *2–3 (D. Colo. Sept. 26, 2006) (collecting cases); Linda L. Griggs, John J. Huber & Christian J. Mixter, When Rules Collide—*Leidos*, the Supreme Court, and the Risk to the MD&A, Bloomberg L. (Sept. 22, 2017), https://www.bna.com/rules-collideleidos-supreme-n73014470276 (on file with the *Columbia Law Review*) (overviewing the statutory and regulatory scheme).

373. Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

374. See Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) (reaffirming the private right of action).

375. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

376. 15 U.S.C. § 78u-4(b)(2)(A) (2012).

377. 17 C.F.R. § 229.103 (2018). Relatedly, accounting rules require the disclosure of any "loss contingency"—"an existing condition, situation, or set of circumstances involving uncertainty as to possible gain (gain contingency) or loss (loss contingency) to an entity that will ultimately be resolved when one or more future events occur or fail to occur." See Fin. Accounting Standards Bd., Contingencies (Topic 450): Disclosure of

require a company to disclose the mere fact that it is under investigation by federal and state authorities,[378] although misleading statements about the investigation are of course actionable under Rule 10b-5.[379] Moreover, Regulation S-K specifically states that "[n]o information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10[%] of the current assets" of the company and its subsidiaries.[380] An aggregation rule requires companies to count all proceedings that "present[] in large degree the same legal and factual issues" toward that 10% threshold,[381] but even so, the 10% rule means that most damages claims against large publicly traded companies will not need to be disclosed under Item 103.

Item 303 of Regulation S-K imposes a broader—and more amorphous—disclosure duty on public companies. It requires disclosure of, among other information, "any known trends or uncertainties that have had or that the [company] reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[382] This expansive disclosure mandate has been the source of much litigation and is now the subject of an important circuit split. The Second Circuit has held that a public company's failure to make an Item 303 disclosure of a material fact can give rise to liability under Section 10(b) and Rule 10b-5,[383] because "[d]ue to the obligatory nature" of Regulation S-K, "a reasonable investor would interpret the absence of an Item 303 disclosure to imply the nonexistence of 'known trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations.'"[384] On this view, the omission of material trends

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Certain Loss Contingencies 52 (2010), https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176157116458&acceptedDisclaimer=true [https://perma.cc/B6VU-HEM8]. Pending or threatened litigation is one example and must be disclosed if it can result in a "material loss." Id. at 50–54.

378. See City of Westland Police & Fire Ret. Sys. v. MetLife, Inc., 928 F. Supp. 2d 705, 718 (S.D.N.Y. 2013) (finding no obligation to disclose the fact that authorities in approximately thirty states are investigating an insurance company for violating unclaimed property laws); Richman v. Goldman Sachs Grp., 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012) (finding no obligation to disclose an SEC "Wells Notice" informing a company that the agency may bring a civil action); see also David M. Stuart & David A. Wilson, Disclosure Obligations Under the Federal Securities Laws in Government Investigations, 64 Bus. Law. 973, 982 (2009) ("An investigation on its own is not a 'pending legal proceeding' until it reaches a stage when the agency or prosecutorial authority makes known that it is contemplating filing suit or bringing charges.").

379. See Menaldi v. Och-Ziff Capital Mgmt. Grp., 164 F. Supp. 3d 568, 584 (S.D.N.Y. 2016).

380. 17 C.F.R. § 229.103.

381. Id.

382. Id. § 229.303.

383. Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 101–04 (2d Cir. 2015).

384. Id. at 102 (alterations in original) (quoting 17 C.F.R. § 229.303(a)(3)(ii)).

or uncertainties from an Item 303 disclosure makes the rest of the company's annual report misleading. The Ninth Circuit has rejected this view and held that a company's failure to comply with Item 303 is not actionable under Rule 10b-5.[385] The Supreme Court granted certiorari in March 2017 to resolve this split,[386] but dismissed the case after the parties informed the Court they had reached a settlement.[387] In the meantime, uncertainty regarding the consequences of Item 303 noncompliance lingers.

Finally, Item 402 under Regulation S-K requires each public company to publish details on compensation paid to its CEO, CFO, and the three other most highly paid individuals.[388] The required disclosure includes "perquisites,"[389] and the SEC has a history of investigating and charging companies that fail to disclose perquisites and benefits for top executives. For example, in 2004, General Electric (GE) settled SEC charges after divorce papers revealed that GE's former CEO Jack Welch had received perquisites and benefits—including a luxury Manhattan apartment, a chauffeured limousine, and unlimited access to a GE aircraft for personal use—far in excess of those disclosed to GE's shareholders.[390] In April 2005, the SEC sued Tyson Foods, as well as the company's CEO Don Tyson, for its failure to disclose various perquisites Tyson received, including the personal use of company-owned homes in the English countryside and on the western coast of Mexico as well as oriental rugs, expensive antiques, and free lawn care.[391] In settling those charges, the SEC required Don Tyson to reimburse the company for over $1 million in expenses.[392] A year later, in April 2006, Tyco International reached a settlement with the SEC for, among other things, its failure to disclose lavish perquisites it had given to its CEO, Dennis Kozlowski, including a $6,000 shower curtain and a $15,000 "dog umbrella stand."[393]

385. In re NVIDIA Corp. Sec. Litig., 768 F.3d 1046, 1054–56 (9th Cir. 2014).

386. Leidos, Inc. v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (mem.).

387. Leidos, Inc. v. Ind. Pub. Ret. Sys., 138 S. Ct. 2670 (2018) (mem.); see also Andrew Chung, U.S. Top Court Drops Leidos Contracting Fraud Case After Settlement, Reuters (Oct. 17, 2017), https://www.reuters.com/article/us-usa-court-securities/u-s-top-court-drops-leidos-contracting-fraud-case-after-settlement-idUSKBN1CM2C0 [https://perma.cc/CY6J-HBNG].

388. Executive Compensation, 17 C.F.R. § 229.402 (2018).

389. Id.

390. Press Release, SEC, General Electric Settles SEC Action for Disclosure Failures in Connection with Its Former CEO's Benefits Under His Employment and Retirement Agreement (Sept. 23, 2004), https://www.sec.gov/news/press/2004-135.htm [https://perma.cc/QMK5-LZTB].

391. Deborah Solomon, In SEC Complaint, Tale of Chicken Mogul Feathering His Nest, Wall St. J. (Apr. 29, 2005), https://www.wsj.com/articles/SB111470683583119695 (on file with the *Columbia Law Review*).

392. Id.

393. Press Release, SEC, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud (Apr. 17, 2006), https://www.sec.gov/news/

In response to these and other high-profile enforcement actions, the SEC significantly expanded the perquisite disclosure requirement by lowering the threshold that triggers disclosure from $50,000 to $10,000.[394] The SEC also mandated a new table to identify and quantify any perquisite exceeding $10,000.[395] But while a failure to disclose a perquisite in excess of $10,000 would violate Item 402, it is not clear that this would lead to liability under Rule 10b-5 (and thus, a private right of action for investors). Recall that Rule 10b-5 applies to *material* facts and omissions.[396] Thus, the fact that a company gave its CEO a $20,000 oriental rug would need to be disclosed under Item 402, but without other damning facts, it would be difficult to show that the company's failure to reveal that fact would be material to shareholders and potential investors.

However, Rule 10b-5 also governs other types of public statements, even those that are voluntary. For example, Apple became the subject of an SEC investigation after its then-CEO, Steve Jobs, told the public in January 2009 that his gaunt appearance was the result of a hormone imbalance, whose remedy would be "relatively simple and straightforward."[397] That disclosure, which most likely was *not* mandated by SEC rules,[398] drove Apple's stock price up by 4%. Nine days later, Jobs characterized his health problem as "more complex" and publicly announced that he would take five months off to recover,[399] and in April 2009, Jobs underwent a liver transplant that he initially kept secret.[400] These events prompted the SEC to open an investigation to determine whether the January 5 statements were misleading.[401] The SEC probe did not yield charges against Apple or against Jobs, who died of cancer in 2011,[402] and

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press/2006/2006-58.htm [https://perma.cc/2Z6Q-LQCY]; Tyco Int'l, Current Report (Form 8-K) (Sept. 10, 2002).

394. See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,176 (Nov. 7, 2006) (codified at 17 C.F.R. pts. 228–229).

395. Id.

396. See supra note 196 and accompanying text.

397. Nicholas Carlson, Steve Jobs' Health Likely Caused Him to Skip Macworld, Bus. Insider (Jan. 5, 2009), http://www.businessinsider.com/2009/1/steve-jobs-addresses-his-health-in-open-letter-aapl [https://perma.cc/ZR9S-GV8K].

398. See Patricia Sánchez Abril & Ann M. Olazábal, The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law, 46 Hous. L. Rev. 1545, 1590–604 (2010) (examining whether securities law requires CEOs to disclose personal information and concluding that "securities law does not operate to require most personal CEO disclosures").

399. Nicholas Carlson, SEC Investigates Apple, Jobs, Bus. Insider (July 8, 2009), http://www.businessinsider.com/apple-steve-jobs-undergo-sec-investigation-2009-7 [https://perma.cc/8TMV-ZSXK].

400. Yukari Iwatani Kane & Joann S. Lublin, Jobs Had Liver Transplant, Wall St. J. (June 20, 2009), https://www.wsj.com/articles/SB124546193182433491 (on file with the *Columbia Law Review*).

401. See Carlson, supra note 399.

402. See Walter Isaacson, Steve Jobs 481 (2015) (noting that "[t]he SEC investigation ended up going nowhere").

it is not clear whether Apple or Jobs was fully aware of Jobs's health problems at the time of his initial statement. The episode nonetheless illustrates that a public company puts itself at risk of liability under federal securities laws if it makes untrue or incomplete statements about its CEO that mislead investors into thinking that the CEO will remain in that post much longer than is indeed likely.

In some circuits, courts interpret Rule 10b-5 to impose liability not only for statements that are false and misleading at the time that they are made but also for those that have become misleading over time. For example, the Second Circuit has said that a "duty to update opinions and projections may arise" under Rule 10b-5 "if the original opinions or projections have become misleading as the result of intervening events," though that court cautioned that the duty depends upon whether the prior statements are "definite" or merely aspirational.[403] In one Second Circuit case, a company that had contracted with the U.S. Postal Service announced that it had reached an "agreement in principle" with the Postal Service to amend its contract, but the company did not correct that disclosure once it became clear that the Postal Service would not accede to the amendment.[404] The Second Circuit held that the company could be held liable under Rule 10b-5 and allowed a shareholder lawsuit to proceed beyond the motion to dismiss stage.[405]

Other courts have acknowledged a duty to update under limited conditions. For example, the Third Circuit has held that the duty to update applies in "narrow circumstances" involving "fundamental corporate changes such as mergers, takeovers, or liquidations, as well as when subsequent events produce an 'extreme' or 'radical change' in the continuing validity of the original statement."[406] By contrast, the Seventh Circuit maintains that there is *no* "duty to update" a "forward-looking statement" that "because of subsequent events becomes untrue."[407]

To sum up so far: Publicly traded companies can be held liable to investors for untrue statements of material fact and for material omissions. These companies also face affirmative duties to disclose under Regulation S-K, but the failure to comply with that regulation will not always lead to liability to investors. Publicly traded companies are also subject to a "duty to update" in some—but not all—jurisdictions. The following section discusses how these obligations and principles of state corporate law intersect with sexual harassment cases.

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403. In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993).

404. Ill. State Bd. of Inv. v. Authentidate Holding Corp., 369 F. App'x 260, 263 (2d Cir. 2010).

405. Id. at 263, 265.

406. City of Edinburgh Council v. Pfizer, Inc., 754 F.3d 159, 176 (3d Cir. 2014) (quoting United States v. Schiff, 602 F.3d 152, 170 (3d Cir. 2010)).

407. Stransky v. Cummins Engine Co., 51 F.3d 1329, 1332 (7th Cir. 1995).

C. *The Potential for Liability*

Under what circumstances will the legal framework outlined above support successful shareholder actions against corporations and corporate fiduciaries following revelations of sexual misconduct? The answer varies across four categories of shareholder claims. First and most straightforwardly, fiduciaries violate the duty of loyalty when they engage in harassment themselves.[408] Second, corporate fiduciaries who fail to monitor harassment at their firms may be liable in certain circumstances under a *Caremark* theory.[409] Third, corporate fiduciaries who are aware of harassment but fail to react—or who affirmatively enable harassment to continue—may be sued for breach of the duties of care and loyalty, though this is perhaps the category in which the doctrinal case for liability is weakest.[410] Fourth and finally, corporations and their officers and directors face potential liability under the federal securities statutes when they make inaccurate or misleading statements regarding workplace sexual misconduct.[411] In this section, we discuss the factors that determine whether courts will find defendants liable under each of these theories.

1. *Corporate Fiduciary as Harasser.* — Our analysis begins with perhaps the most obvious claim: an action against a corporate fiduciary who engages in misconduct himself or herself. The Weinstein case is the most widely publicized (and among the most egregious) examples of the corporate fiduciary as harasser, but Weinstein is not alone in this regard.[412] The cases of Mark Hurd at Hewlett-Packard, Dov Charney at American Apparel, and—more recently—Travis Kalanick at Uber, Roger Ailes at Fox News, Mark Light at Signet Jewelers, John Hewitt at Liberty Tax, and Steve Wynn of the Wynn Resorts casino chain all appear to fall within this first category. As we shall see, the corporate-fiduciary-as-harasser fact pattern will be the one in which liability is most likely.

Whether framed as a violation of the duty of care that lies outside the protections of the business judgment rule or as a violation of the duty of loyalty, sexual harassment by a corporate officer almost certainly constitutes a breach of fiduciary duty. When a fiduciary "intentionally acts with a purpose other than that of advancing the best interests of the corporation,"[413] the fiduciary's bad-faith conduct can be the basis for liability. And a CEO or other corporate officer who uses a position of power to harass, intimidate, or assault employees clearly acts for a purpose other

408. See discussion supra notes 316–321 and accompanying text.
409. See discussion supra notes 325–335 and accompanying text.
410. See discussion supra notes 309–335 and accompanying text.
411. See discussion supra notes 366–407 and accompanying text.
412. See supra section II.A.
413. In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006).

than that of advancing the company's interests.[414] The consequences for the firm go well beyond the risk of liability: Sexual harassment in the workplace potentially damages employee morale, drives talented individuals away from the firm, and endangers the company's reputation.[415]

One daunting obstacle remains, however. As noted above, a shareholder-plaintiff bringing a derivative action must show demand futility or else must allow the board to decide whether to bring suit.[416] When the allegation is that an officer violated his fiduciary duty by committing sexual harassment, the shareholder derivative action challenges the conduct of the officer rather than a decision of the board, and so *Rales* rather than *Aronson* supplies the applicable framework for evaluating demand futility.[417] Under *Rales*, demand will be excused if shareholders can show that a majority of the board is not disinterested and independent or if it can show that board members face a substantial likelihood of personal liability (for example, on account of *Caremark* violations arising from a failure to monitor a sexual-harasser CEO).[418] The pension-fund plaintiff in the Twenty-First Century Fox case pursued both approaches,[419] and the plaintiffs in the Liberty Tax and Wynn lawsuits are following the same two-pronged strategy.[420] Insofar as plaintiffs seek to show lack of independence, the outcome of the demand-excusal inquiry will depend on company- and director-specific factors that are no different in the sexual harassment context than in any other. Insofar as plaintiffs seek to show a substantial likelihood of director liability, then the question of demand excusal in corporate-fiduciary-as-harasser cases will overlap with the questions of director liability in the corporate-fiduciary-as-monitor and corporate-fiduciary-as-enabler contexts. We turn first to the failure-to-monitor line of argument and then consider when and whether corporate fiduciaries might be held liable for enabling harassment to occur at their companies.

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414. While we know of no Delaware precedent precisely on point, a state appellate court in Massachusetts has concluded that an officer's sexual harassment of an employee can constitute a breach of fiduciary duty. See Prozinski v. Ne. Real Estate Servs., 797 N.E.2d 415, 423–24 (Mass. App. Ct. 2003) (holding that when an officer "allegedly embarked on a course of sexual harassment of [a] receptionist," his "placement of his own interests above those of the company he served could be found by a fact finder to constitute an act of disloyalty").

415. Eliza Anyangwe, Sexual Harassment: The Hidden Costs for Employers, Fin. Times (Mar. 14, 2018), https://www.ft.com/content/af64eea0-207f-11e8-8d6c-a1920d9e946f (on file with the *Columbia Law Review*); see also Barry S. Roberts & Richard A. Mann, Sexual Harassment in the Workplace: A Primer, 29 Akron L. Rev. 269, 271–72 (1996).

416. See supra note 336 and accompanying text.

417. See supra notes 338–341 and accompanying text.

418. See Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).

419. *Murdoch* Complaint, supra note 18, at 52–65.

420. *Liberty Tax* Complaint, supra note 20, at 22–25; *Wynn* Complaint, supra note 21, at 23–33.

2. *Corporate Fiduciary as (Failed) Monitor.* — Under some circumstances, shareholders may be able to hold directors liable under a *Caremark* theory for failing to monitor sexual harassment at their firms. Since *Caremark* claims now sound in the duty of loyalty, exculpation clauses enacted pursuant to section 102(b)(7) would not immunize directors, making the *Caremark* line of argument especially appealing for plaintiffs.[421] Moreover, a substantial likelihood of *Caremark* liability will render a director conflicted for purposes of evaluating demand futility. Thus, *Caremark* claims against directors can enable shareholders to pursue derivative actions against CEOs or other officers who engage in harassment themselves.

While *Caremark* claims rarely succeed, the Weinstein Company directors' conduct is one of the few situations in which *Caremark* liability would be likely if shareholders were to sue. In October 2017, eighty-seven women—all of whom were employees or potential employees of the Weinstein Company—came forward with allegations of sexual misconduct against Weinstein, the Company's CEO.[422] The alleged incidents extended as far back as 1984, and many came after Weinstein and his brother Bob broke away from Miramax Films in 2005 and founded the Weinstein Company.[423] Several of the accusations resulted in legal settlements in which Weinstein's accusers agreed to confidentiality clauses that barred them from speaking about their experiences.[424] Immediately after the allegations came to light, the board professed ignorance, saying that the allegations came as an "utter surprise."[425]

Delaware courts have said that *Caremark* liability may arise when "red flags . . . are either waved in one's face or displayed so that they are visible to the careful observer."[426] For the Weinstein Company board, red flags flew all around. Harvey Weinstein's unwanted sexual advances had become such an "open secret" in the entertainment industry that the television show *30 Rock* joked about Weinstein's misconduct in a 2012 episode[427] and the comedian Seth MacFarlane alluded to Weinstein's

421. See supra notes 331–335 and accompanying text.

422. Lila Thulin, A Complete List of Sexual Assault and Harassment Allegations Against Harvey Weinstein, Slate (Oct. 31, 2017), http://www.slate.com/blogs/the_slatest/2017/10/10/a_list_of_sexual_assault_and_harassment_allegations_against_harvey_weinstein.html [https://perma.cc/H2EK-45JL].

423. See Daniel Hemel & Dorothy Lund, It May Not Matter What the Weinstein Company Knew, Atlantic (Oct. 14, 2017), https://www.theatlantic.com/business/archive/2017/10/harvey-weinstein-company-legal-consequences/542838 [https://perma.cc/2BLE-CZRY].

424. Id.

425. Id.

426. In re Citigroup Inc. S'holder Litig., No. 19827, 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003), aff'd sub nom. Rabinovitz v. Shapiro, 839 A.2d 666 (Del. 2003).

427. See Jacob Stolworthy, 30 Rock Joke Referenced Harvey Weinstein Allegations in 2012, Independent (Oct. 11, 2017), http://www.independent.co.uk/arts-entertainment/films/

behavior at the Oscars the following year.[428] A female executive circulated a memo in 2015 that, according to the *New York Times*, informed directors that Weinstein had created a "toxic environment for women" at the company.[429] Board members also reportedly approved a contract with Weinstein in 2015 that expressly contemplated the possibility of further claims against the producer and protected him from termination—all without dipping into his personnel file themselves.[430] In other words, the board's statement professing ignorance in the face of serious red flags only strengthens a potential *Caremark* claim, as it indicates that the board failed for years to respond to warning signs indicating that Weinstein posed a serious risk to employees and the company.

Why has a shareholder suit not come, in spite of the strength of the facts supporting the *Caremark* claim? The likely answer is that the Weinstein Company is a Delaware LLC, which means that the company can waive fiduciary duties for officers and directors in the operating agreement.[431] Because these documents need not be made public, we cannot be sure whether the Weinstein Company has adopted a waiver, nor can we know exactly how often LLCs choose to waive such duties. What we can say is that the rise in LLCs and other "uncorporations" may affect the availability of the shareholder suit as a tool for redress following harassment allegations.[432]

For Delaware corporations like Twenty-First Century Fox, however, the duty of loyalty is unwaivable. And the allegations in the Fox News complaint, if substantiated, strongly indicate that shareholders would prevail in their *Caremark* claim on the grounds that the board failed to respond to red flags indicating that a toxic work environment existed at the news network. These red flags include a 2004 sexual harassment law-

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news/harvey-weinstein-sexual-assault-allegations-30-rock-reference-tina-fey-jenna-entourage-oscars-a7995091.html [https://perma.cc/JHV6-4SYR].

428. Maya Oppenheim, Seth MacFarlane Made Joke About Harvey Weinstein and Women at 2013 Oscars, Independent (Oct. 11, 2017), http://www.independent.co.uk/arts-entertainment/films/news/seth-macfarlane-harvey-weinstein-joke-oscars-2013-women-sexual-harassment-allegations-a7994506.html [https://perma.cc/4DTK-SNES].

429. Jodi Kantor & Meghan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, N.Y. Times (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (on file with the *Columbia Law Review*).

430. See Harvey Weinstein's Contract Allowed for Sexual Harassment, supra note 138.

431. See supra note 316.

432. See generally Larry E. Ribstein, The Rise of the Uncorporation 1 (2010) (using the term "uncorporation" to refer to forms of business other than corporations, principally general or limited partnerships and LLCs, and considering the importance of their increasing popularity); Rodney D. Chrisman, LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006, 15 Fordham J. Corp. & Fin. L. 459, 459–60 (2010) (reviewing the number of LLCs formed each year between 2004 and 2007 and concluding that the LLC "is now undeniably the most popular form of new business entity in the United States").

suit by a Fox News producer against anchor Bill O'Reilly;[433] a 2006 settlement of an EEOC lawsuit against a Fox vice president;[434] a 2011 settlement of a sexual harassment lawsuit against Ailes by a former employee;[435] and a 2014 biography of Ailes, *The Loudest Voice in the Room*, which included multiple accounts of sexual harassment perpetrated by Ailes.[436] But despite these and other red flags, there is no evidence that the board investigated or responded to sexual harassment issues at the company until former anchor Gretchen Carlson sued Ailes in July 2016.[437] Although the settlement of the shareholder derivative action prevented the court from resolving loyalty claims against Fox fiduciaries, the board's failure to monitor its CEO and employees in its most important business units, implement sexual harassment prevention protocols, and investigate red flags might well have been sufficient for liability under *Caremark*.[438]

To be sure, not every case of sexual harassment by a corporate officer will lead to *Caremark* liability for directors. While the plaintiff in *White v. Panic* chose not to pursue a *Caremark* theory,[439] the Chancery Court nonetheless noted that a *Caremark* claim would not have been possible because the board had indeed responded to the CEO's harassment.[440] Among other steps, the board formed a special committee in 1995 to review sexual harassment claims against the CEO and hired out-

433. Emily Steel & Michael S. Schmidt, Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up, N.Y. Times (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html (on file with the *Columbia Law Review*). The company also protected O'Reilly from termination because of sexual harassment, specifying that termination for harassment was "expressly limited to a final, non-appealable judgment by a court of law finding that Performer sexually harassed an employee of Fox." This contractual protection meant that when O'Reilly was finally fired, he was entitled to a $25 million severance payment. See *Murdoch* Complaint, supra note 18, at 31, 44.

434. Fox News Agrees to Settlement of Sex Discrimination Suit, Wash. Post (Aug. 1, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073101122.html (on file with the *Columbia Law Review*).

435. Emily Jane Fox, Report: Fox News Allegedly Paid $13.5 Million Settlement to Woman Claiming Roger Ailes Sexually Harassed Her, Vanity Fair (July 29, 2016), https://www.vanityfair.com/news/2016/07/fox-news-allegedly-paid-dollar315-million-to-woman-roger-ailes-sexually-harassed-her [https://perma.cc/E75Z-6M62].

436. See Emily Crockett, Here Are the Women Who Have Publicly Accused Roger Ailes of Sexual Harassment, Vox (Aug. 15, 2016), https://www.vox.com/2016/8/15/12416662/roger-ailes-fox-sexual-harassment-women-list [https://perma.cc/2C43-MGXH].

437. See *Murdoch* Complaint, supra note 18, at 5.

438. See Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 362 (Del. 2006); In re Lear Corp. S'holder Litig., 967 A.2d 640, 654–55 (Del. Ch. 2008).

439. See *Panic II*, 783 A.2d 543, 551–52 (Del. 2001) ("Although the derivative complaint includes allegations that seem designed to support a 'failure to supervise' claim, the plaintiff has elected not to pursue such a claim in the Court of Chancery or in this Court." (footnote omitted)).

440. See *Panic I*, 793 A.2d 356, 371 (Del. Ch. 2000), aff'd, 783 A.2d 543 (Del. 2001).

side counsel to investigate the allegations.[441] Whether or not those steps were adequate, they amount to more than the "utter failure" of oversight that characterizes a *Caremark* violation.[442]

Even more troubling from a potential plaintiff's perspective is the rejection of *Caremark* liability in the *American Apparel* case. Recall that CEO Dov Charney's sexual misconduct was well documented many years before the EEOC's 2010 finding against the company.[443] Charney's masturbation in front of a female journalist had been reported in the *New York Times* as early as 2006.[444] But the district court in the *American Apparel* case concluded that "the bare allegation that Charney's sexual proclivities were widely known [was] insufficient to support a lack of oversight claim."[445] The fact that these allegations were supported by "multiple sources"—including articles in reputable newspapers—apparently left the court unmoved.[446]

Only six years have elapsed since *American Apparel*, so it is difficult to dismiss the case as an artifact of a bygone era. The judge in that case, Margaret Morrow, a Clinton appointee, was the first female president of the State Bar of California,[447] and it would be presumptuous to claim that she was insensitive to the plight of women in the workplace. Even so, societal attitudes toward allegations of sexual harassment have changed dramatically in the short time since that case was decided.[448] We expect that a court confronted with the same facts today would consider the reports of Charney's masturbation in front of a female journalist as well as the series of sexual harassment claims against him and the company to be just the sort of "red flags" that require a board to investigate further. The fact that Twenty-First Century Fox chose not to contest the claims against its board members—and that Twenty-First Century Fox's insurer agreed to pay out on these claims—arguably indicates that sophisticated actors share our impression of the viability of *Caremark* claims in a post-Weinstein world.

3. *Corporate Fiduciary as Enabler.* — Aside from arguing that board members have breached their fiduciary duties by failing to monitor sexu-

441. Id. at 368.

442. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

443. See supra notes 205–209 and accompanying text.

444. See Holson, supra note 207.

445. In re Am. Apparel Inc. S'holder Derivative Litig., No. CV 10-06576 MMM (RCx), 2012 WL 9506072, at *29 (C.D. Cal. July 31, 2012).

446. See id. at *28–34.

447. See Henry Weinstein, 2 Lawyers Urged for Federal Bench, L.A. Times (Sept. 23, 1995), http://articles.latimes.com/1995-09-23/local/me-48941_1_los-angeles-lawyers [https://perma.cc/SZV6-Q2F2].

448. See Chris Jackson, Ipsos, American Attitudes on Sexual Assault 1 (Dec. 12, 2017), https://www.ipsos.com/sites/default/files/ct/news/documents/2017-12/npr_sexual_harassment_topline_12_2017.pdf [https://perma.cc/T8MG-MHZM] (finding that "[t]hree quarters of Americans (74%) say that five years ago, a woman who reported being sexually harassed was risking her career, but only 44% agree that is the case now").

al misconduct, shareholders may also attack the board for *enabling* harassment to continue. We can foresee at least two scenarios in which such claims might arise: when the board approves contract terms that protect a CEO or corporate officer from the consequences of sexual misconduct and when the board approves the use of corporate funds to settle sexual harassment claims or to indemnify the perpetrator.

Start with the scenario in which board members approve provisions in the contracts of CEOs and corporate officers that shield those individuals from the consequences of sexual misconduct. Such provisions arguably existed in the extension of Harvey Weinstein's contract, which was approved by the Weinstein Company's board in 2015. According to a complaint filed by the New York State Attorney General in an effort to block the Weinstein Company's sale, the contract extension permitted the board to terminate Weinstein for violating the company's code of conduct only if the violation was "willful" *and* both a majority of the board and Weinstein's brother and co-CEO, Bob Weinstein, determined that the misconduct had "caused serious harm to the company."[449] The contract extension also imposed escalating penalties on Weinstein that would apply if the company had to make a payment arising from his misconduct, but no such penalties if Weinstein bore the cost of such a claim himself.[450] According to the New York State Attorney General, the contract extension effectively allowed Weinstein to "continue engaging in sexual harassment and misconduct with impunity, provided that he paid the costs of any settlements" (and provided that he complied with certain confidentiality provisions in the agreement).[451]

Could a shareholder successfully argue that the board's approval of such a contract constitutes a breach of fiduciary duty? Recall that duty of care claims against directors will likely be subject to exculpation under section 102(b)(7).[452] In most cases, therefore, shareholder-plaintiffs will be better off pursuing a duty of loyalty claim. We can imagine two paths that a shareholder-plaintiff might take in this scenario. The first—and least promising—is to argue that by approving the contract, the board

449. Petition at 30, People v. Weinstein Co., No. 450293/2018 (N.Y. Sup. Ct. filed Feb. 11, 2018), https://ag.ny.gov/sites/default/files/weinstein_company.pdf [https://perma.cc/YGH2-DCJV].

450. Id. at 31.

451. Id. In a surprising coda to the Weinstein case, New York State Attorney General Eric Schneiderman, who brought the lawsuit seeking to stop the Weinstein Company's sale, was himself accused of sexual assault by four women in May 2018 and resigned hours later. See Danny Hakim & Vivian Wang, Eric Schneiderman Resigns as New York Attorney General amid Assault Claims by 4 Women, N.Y. Times (May 7, 2018), https://www.nytimes.com/2018/05/07/nyregion/new-york-attorney-general-eric-schneiderman-abuse.html (on file with the *Columbia Law Review*); Jane Mayer & Ronan Farrow, Four Women Accuse New York's Attorney General of Physical Abuse, New Yorker (May 7, 2018), https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse (on file with the *Columbia Law Review*).

452. See supra notes 312–315 and accompanying text.

consciously caused the company to violate the law.[453] Remember that under the alter ego doctrine, sexual harassment by a corporate officer is imputed to the employer;[454] thus, Weinstein's sexual harassment caused the company to be in violation of Title VII. The challenge would be to show that the board—by approving the contractual provision described in the New York State Attorney General's complaint—consciously caused Weinstein to commit sexual harassment. This may stretch the bounds of the concept of causation too far. However, a shareholder-plaintiff may be able prevail nonetheless by showing that the directors' business strategy purposefully skirted the law. If the board made the determination that a top executive was harassing employees but that the best course of action for the company was to deliver contractual protections that would allow the harasser to continue his or her illegal behavior, that conduct would almost certainly constitute the kind of conscious violation of Title VII necessary to sustain a *Caremark* claim.[455]

The second and related line of argument returns to the *Caremark* standard but this time focuses on the first prong: that "the directors utterly failed to implement any reporting or information system or controls."[456] For example, the Weinstein Company board effectively ceded its ability to control Weinstein's conduct to the producer's brother, who had veto power over any decision to fire the producer for misconduct. To be sure, the strict formalist might argue that the board did not fail to implement *any* controls, as control by the producer's brother—himself a board member—still amounted to *some* control. But while it does not fit neatly into the typical *Caremark* fact pattern, the Weinstein case might well constitute the sort of utter failure of oversight that *Caremark* covers.

A second scenario in which shareholders might seek to hold board members liable for enabling sexual misconduct arises when the board approves the use of corporate funds to settle sexual harassment claims against a CEO or other officers without demanding that the officer reimburse the firm. For example, ICN allegedly paid $3.5 million to settle eight sexual harassment lawsuits against CEO Milan Panic and guaranteed a bank loan to Panic so that he could settle a paternity suit brought by a former employee.[457] American Apparel reportedly paid more than $3 million to settle claims involving CEO Dov Charney.[458] Twenty-First

453. See supra notes 320–321.

454. See supra notes 111–116 and accompanying text.

455. See In re Massey Energy Co., No. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011) ("Delaware law does not charter law breakers. . . . [A] fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.").

456. Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

457. *Panic II*, 783 A.2d 543, 548 & n.7 (Del. 2001).

458. See Lauren Weber, American Apparel Ordered to Pay Over $3 Million in Arbitration, Wall St. J. (June 9, 2015), https://www.wsj.com/articles/american-apparel-

Century Fox allegedly paid more than $55 million to settle sexual harassment and discrimination claims against Roger Ailes and other Fox News executives.[459] The board of online lender SoFi appears to have approved a $75,000 settlement paid to a departing female employee who received sexually explicit text messages from Mike Cagney, but the board kept Cagney as CEO for roughly five more years.[460] In cases such as those, shareholders might argue that board members breached their fiduciary duty of care by allowing the CEO—in effect—to expend corporate funds in pursuit of personal gratification.

The Delaware Supreme Court's decision in *White v. Panic*, however, casts doubt on the viability of such claims. There, the court said that "the plaintiff has not pleaded facts indicating that the challenged settlements were anything other than routine business decisions in the interest of the corporation."[461] Instead, "the alleged settlements, in which neither Panic nor ICN admitted wrongdoing, are consistent with a desire to be rid of strike suits and to avoid the cost of protracted litigation."[462] Accordingly, the court concluded that the plaintiff in *White* had failed to rebut the business judgment presumption applicable to his duty of care claims against ICN's directors (and thus could not get beyond the demand requirement in order to bring a claim against Panic).[463] That decision is particularly ominous for shareholder-plaintiffs in cases in which corporate directors are shielded from duty of care liability by section 102(b)(7) exculpation elections.

Nonetheless, there are at least two ways in which board approval of sexual harassment settlements might advance a shareholder-plaintiff's cause. First, when it appears that the board has essentially written a blank check to a CEO that allows him to engage in sexual harassment and charge the costs to the corporation, then the argument that the directors are not disinterested and independent may seem stronger. While it seems unlikely that approval of settlements, standing alone, would disqualify a board at the demand-excusal stage, this is one fact that may weigh in favor of allowing a derivative action to proceed over the board's objection. Second, when a board approves the settlement of sexual harassment claims against a CEO without undertaking a thorough investigation of

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ordered-to-pay-over-3-million-in-arbitration-1433891690 (on file with the *Columbia Law Review*).

459. See *Murdoch* Complaint, supra note 18, at 5, 25.

460. See James Rufus Koren, CEO Resignation, Sexual Harassment Suit Could Delay SoFi's Bank Plans, L.A. Times (Sept. 12, 2017), http://www.latimes.com/business/la-fi-cagney-sofi-20170911-story.html (on file with the *Columbia Law Review*); Nathaniel Popper & Katie Benner, 'It Was a Frat House': Inside the Sex Scandal that Toppled SoFi's C.E.O., N.Y. Times (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/technology/sofi-chief-executive-toxic-workplace.html (on file with the *Columbia Law Review*).

461. *Panic II*, 783 A.2d at 553.

462. Id.

463. Id.

those allegations, then the case for *Caremark* liability gains steam. It is hard to imagine a more obvious "red flag" than the fact that an officer's alleged misconduct has begun to cost the company financially.

To sum up: Any case against corporate fiduciaries as *enablers* of sexual harassment is likely to encounter several obstacles, the most significant of which is that exculpatory provisions generally require shareholder-plaintiffs to go beyond showing that a director breached the duty of care. Even so, boards that approve contract provisions that protect CEOs or other corporate officers from the consequences of harassment or that approve the use of corporate funds to settle sexual harassment claims expose themselves to the possibility of *Caremark* liability in some cases. Such approvals may also strengthen the plaintiff's hand at the demand-excusal stage.

Finally, it is worth noting that the best legal strategy for board members in cases of CEO sexual harassment might be in tension with the optimal public relations approach. If the board avers that it was aware of sexual harassment claims against the CEO but made a business judgment to address the matter internally, then shareholder-plaintiffs will face difficulty in proving that the decision was not just a violation of the duty of care but also a duty of loyalty breach. In many circumstances, however, we expect that board members will respond as the Weinstein Company board did—by contending that the allegations came as an "utter surprise."[464] The problem with this defense, however, is that it tees up a *Caremark* claim quite nicely: If the board remained unaware of repeated sexual harassment allegations against a CEO, then that raises questions about the adequacy of its internal monitoring system and suggests that it may have consciously ignored red flags. Professing ignorance may seem like an attractive response for board members seeking to absolve themselves in the eyes of the public, but it also may place them on the wrong side of Delaware law.

4. *Material Misstatements and Omissions.* — So far our analysis of potential liability has focused on state corporate law—and in particular, the law of Delaware. A fourth and final category of potential liability arises under federal securities law. We focus here on two ways in which publicly traded companies might run afoul of federal securities law: when the failure to reveal sexual harassment amounts to a breach of an affirmative duty to disclose and when the company makes misleading statements connected to sexual misconduct.

We begin with the possibility of an affirmative duty to disclose sexual harassment. Only in rare circumstances will such a duty arise under Item 103 of Regulation S-K, which addresses disclosure of material legal proceedings. As noted above, in very few cases will damages claims alleging

464. See Mike Fleming Jr., Weinstein Company Board Declares: We Had No Idea, Deadline Hollywood (Oct. 10, 2017), http://deadline.com/2017/10/weinstein-company-board-we-had-no-idea-1202186015 [https://perma.cc/M3KX-6XM8].

sexual harassment—alone or in combination—exceed 10% of corporate assets and thus need to be disclosed under Item 103.[465] Of course, a company may voluntarily disclose legal proceedings under Item 103, but such disclosures should be crafted carefully. In one instance, the EEOC found "reasonable cause" to believe that an employer violated Title VII when its annual 10-K filing revealed the name of a former employee with a pending sexual harassment claim against the company and characterized the claim as "meritless."[466] The Seventh Circuit agreed that the disclosure "constituted a materially adverse employment action" because it "might be negatively viewed by future employers" and dismissed the employer's contention that the disclosure was necessary to comply with SEC regulations.[467] In other words, the argument that Item 103 mandates disclosure of sexual harassment claims is—as the Seventh Circuit seemed to recognize—questionable at best.

Item 303 of Regulation S-K, which in relevant part requires public companies to disclose "known trends or uncertainties that . . . the company reasonably expects will have a material . . . unfavorable impact on . . . income from continuing operations,"[468] is an uncertain foundation for liability as well. Recall that the federal courts of appeals are split as to whether a company or its officers can ever be held liable to shareholders for Item 303 noncompliance, and that the Second Circuit is friendlier toward Item 303 claims than several of its sister circuits.[469]

In the *CTPartners* case, a federal district court in the Southern District of New York nonetheless rejected shareholders' Item 303-based claims against the company and its top executives. According to the court:

> Plaintiff's thesis that the executives' boorish behavior would ultimately impact the bottom line . . . requires one to have foreseen, essentially, that this behavior would be scandalously revealed, as it was in the *New York Post*, and provoke such executive suite turbulence so as to impair the Company's financial condition or operational results. Except with the benefit of hindsight, that scenario was speculative and conjectural.
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> . . . .
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> . . . Indeed, plaintiff himself alleges that [the CEO's] "naked romps" and other forms of employment discrimination were a "long-standing" practice and implicitly concedes that, prior to the *Post*'s exposé, they had had no impact on the Company's operation.[470]

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465. See supra notes 380–381 and accompanying text.

466. Greengrass v. Int'l Monetary Sys., Ltd., 776 F.3d 481, 485, 487 (7th Cir. 2015).

467. Id. at 485–87.

468. 17 C.F.R. § 229.303 (2018).

469. See supra notes 372–387 and accompanying text.

470. Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp. 3d 12, 34–35 (S.D.N.Y. 2016) (citations omitted).

The district court's analysis appears to rest on two premises: first, that executives of CTPartners reasonably could have believed that allegedly rampant sexual misconduct at the company would remain under wraps, or if it were disclosed, would not materially affect the firm's bottom line; and second, that sexual misconduct at the firm had no impact on the bottom line in the absence of disclosure.

In the wake of the Weinstein revelations and the rise of #MeToo, both premises are questionable. As more and more companies see their reputations tarnished and their stock prices plummet in the wake of sexual harassment revelations, the proposition that a company can keep these problems private—or avoid long-term consequences if sexual misconduct becomes public—grows ever less likely. And the idea that sexual harassment affects a firm's bottom line only if it is publicly exposed seems dubious today. A growing body of research shows that—aside from the direct costs of litigation and liability—sexual harassment results in higher rates of absenteeism and employee turnover as well as lower productivity.[471] This is especially likely to be true at a professional services firm such as CTPartners, whose principal asset was its store of human capital. Note as well that the *CTPartners* decision is not binding on other district courts (or even in other cases within the Southern District of New York[472]), and there are a number of reasons why other district courts might choose not to follow *CTPartners* in a future case.

A last line of attack against a company that fails to disclose facts related to corporate sexual misconduct would be that insofar as the company has paid to settle sexual harassment claims against a CEO, CFO, or any of its other three highest paid employees, such a payment qualifies as a "perquisite" that must be disclosed under Item 402.[473] According to SEC guidance, "an item is a perquisite if it confers a direct or indirect benefit that has a personal aspect," unless it "is integrally and directly related to the performance of the executive's duties" or is "generally

471. See Robert H. Faley et al., Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army, 13 J. Bus. & Psychol. 461, 462–64, 474–76 (1999) (reviewing literature and using data from the U.S. Army to shed further light on productivity- and transfer-related costs); Heather McLaughlin et al., The Economic and Career Effects of Sexual Harassment of Working Women, 31 Gender & Soc'y 333, 351–53 (2017) (documenting productivity and turnover costs); Colleen Ammerman & Boris Groysberg, Why Sexual Harassment Persists and What Organizations Can Do to Stop It, Harv. Bus. Rev. (Dec. 21, 2017), https://hbr.org/2017/12/why-sexual-harassment-persists-and-what-organizations-can-do-to-stop-it (on file with the *Columbia Law Review*) (reviewing the literature and concluding that "[s]exual harassment is not a women's problem but a threat to companies' health").

472. See, e.g., ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 547 F.3d 109, 112 (2d Cir. 2008) ("District court decisions, unlike the decisions of States' highest courts and federal courts of appeals, are not precedential in the technical sense . . . .").

473. See 17 C.F.R. § 229.402; supra notes 388–395 and accompanying text.

available on a non-discriminatory basis to all employees."[474] Assuming that a company does not indemnify all of its employees against sexual harassment claims, would a payment to shield a CEO or other top officer from personal liability qualify as a "perquisite" under Item 402? Certainly, if a company paid $10,000 or more to provide sexual gratification to its CEO through other means, that payment would need to be disclosed under SEC regulations.[475] Arguably the outcome should be no different if the company—in effect—allows its CEO to seek sexual pleasure through the harassment of employees and then pays to clean up the resulting legal mess. But there is no precedent precisely on point, and so the SEC or a federal court that adopted this theory of liability would be breaking new ground. Recall, too, that while the SEC can enforce Regulation S-K on its own, a shareholder-plaintiff would still have to show that the failure to disclose such a payment on a Form 10-K renders the company's filings actionably misleading under Rule 10b-5.[476]

A more promising path from the perspective of a potential shareholder-plaintiff is to attack specific statements that a publicly traded company makes with regard to sexual harassment on the grounds that those statements are inaccurate or misleading. On this point, the Ninth Circuit's decision in *Hewlett-Packard* provides helpful guidance. There, the court held that Hewlett-Packard's standards of business conduct—which committed the company to "high ethical standards"—were "aspirational" and therefore not capable of being "objectively false."[477] According to the court, "The promotion of ethical conduct at HP did not reasonably suggest that there would be no violations of the [standards of business conduct] by the CEO or anyone else."[478] But the court also added that "[t]he analysis would likely be different" if the company "continued the conduct that gave rise to the [initial] scandal while claiming it had learned a valuable lesson in ethics."[479] Put another way, one incident of misconduct does not render a company's code of ethics misleading, but a company that continues to trumpet its ethical leadership despite knowledge of rampant misbehavior might subject itself to liability under section 10(b) and Rule 10b-5.

The district court decision in *CTPartners* discussed above[480] is consistent with this view. There, the court held that statements in a company's code of conduct are "quintessentially the sort of puffery about 'corporate reputation, integrity, and compliance with ethical norms' that

474. See Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,176 (Sept. 8, 2006).

475. See id.

476. See supra notes 372–376 and accompanying text.

477. Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268, 1275–77 (9th Cir. 2017).

478. Id. at 1278.

479. See id.

480. See supra notes 222–234 and accompanying text.

define the category."[481] But again, this holding does not imply that companies have carte blanche to hide known sexual harassment allegations behind positive statements about the company. What it does mean is that shareholder-plaintiffs (or the SEC, in an enforcement action) will have to identify a specific statement that is more than merely aspirational and that rises to the level of being materially false or misleading.

Signet Jewelers provides an example of a company that may well face liability under Rule 10b-5 for misrepresentations of material facts related to corporate sexual misconduct. Probably the strongest securities fraud claims in the Signet lawsuit relate to the company's statements regarding ongoing arbitration in an employment discrimination lawsuit. Even after the exposure of hundreds of sworn employee declarations alleging sexual misconduct in an EEOC suit, the company continues to say in its quarterly and annual filings that the claims allege "that [the company's] U.S. store-level employment practices are discriminatory as to compensation and promotional activities with respect to gender."[482] That is literally true as a description of the initial claims, but since March 2008, the plaintiffs' allegations have expanded far beyond "store-level employment practices."[483] As the arbitrator overseeing the class action said in her opinion certifying the class, the plaintiffs now allege "a corporate culture of gender bias at [Signet], based upon evidence of numerous instances of inappropriate sexual conduct demeaning to women by executives and managers from the CEO down."[484] Once the company learned of the extent of the allegations, it was surely misleading to continue to characterize them as related to "store-level employment practices." And given the sharp decline in Signet's stock price following disclosure of these allegations,[485] it will be difficult for Signet to convince a court or jury that the omitted facts fall short of the materiality threshold.

In sum, the viability of securities law claims against companies that fail to disclose the extent of corporate sexual misconduct will be case specific. The SEC, which can bring an enforcement action based on a bare Regulation S-K violation,[486] is likely to have more success than private plaintiffs, who must prove that the company's statements or omissions rise to the Rule 10b-5 level.[487] Moreover, aspirational statements about corporate ethics are less likely to lead to liability than inaccurate

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481. Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp. 3d 12, 28 (S.D.N.Y. 2016) (quoting City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014)).

482. See, e.g., Signet Jewelers Ltd., Quarterly Report (Form 10-Q) 27 (June 12, 2018).

483. See *Signet Jewelers* Complaint, supra note 16, at 61–99.

484. See Class Determination Award at 3, Jock v. Sterling Jewelers, Case No. 11-20-0800-0655, (Am. Arb. Ass'n 2015), https://www.cohenmilstein.com/sites/default/files/media.5300.pdf [https://perma.cc/HX4X-CURD].

485. See supra note 242 and accompanying text.

486. See supra note 372 and accompanying text.

487. See supra notes 373–374 and accompanying text.

specific statements about ongoing litigation; similarly, even misleading or false statements may not qualify as material if they pertain to a tiny percentage of the firm's total assets or leave the company's stock price unchanged.[488] Certainly not every instance of corporate sexual misconduct will lead to liability under federal securities law, but the pending *Signet Jewelers* case underscores the fact that securities law may provide a means for shareholders to win redress in some cases.

5. *Damages.* — So far, we have argued that corporations and their officers and directors will—under certain circumstances—be held liable for engaging in, enabling, and concealing sexual misconduct. But of course, the *amount* of damages matters as well as the fact of liability. We anticipate at least five ways in which plaintiffs can show that sexual misconduct has caused financial harm to the firms in which they hold shares.

First, and most obviously, plaintiffs can point to the direct costs of litigation related to sexual harassment, including judgments and settlements paid with corporate funds as well as associated attorneys' fees. In some cases, the CEO or other corporate officer will be required to reimburse the company for these costs,[489] but in other instances, liability and litigation expenses will hit the firm's bottom line. As noted above, Fox paid $20 million to settle anchor Gretchen Carlson's lawsuit against former CEO Roger Ailes,[490] and the company allegedly has paid more than $55 million in total to settle harassment claims.[491] These large sums (larger still when fees are factored in) help to explain the $90 million figure for which Fox settled the shareholder derivative action against it in November 2017.[492]

Second, sexual harassment is a significant cause of employee turnover. One survey of female law firm associates found that if a woman reported that she had "[e]xperienced or observed sexual harassment" from male supervisors or colleagues, it "increase[d] the likelihood that the respondent reported an intention to quit her current workplace within two years by over 25%."[493] Higher turnover rates result in direct outlays (for recruiting, hiring, training, and integrating new employees) as well as indirect

488. For an overview of what is generally considered material in the securities fraud context, see Amanda Rose, The "Reasonable Investor" of Federal Securities Law, Harv. L. Sch. F. on Corp. Gov't and Fin. Reg. (Oct. 13, 2016), https://corpgov.law.harvard.edu/2016/10/13/the-reasonable-investor-of-federal-securities-law/ [https://perma.cc/JF6W-J38J]; see also supra notes 380, 477 and accompanying text.

489. See Hemel & Lund, supra note 425 (noting that Harvey Weinstein's contract required him to reimburse the Weinstein company for any sexual harassment related settlements).

490. See Grynbaum & Koblin, supra note 159.

491. See *Murdoch* Complaint, supra note 18, at 5.

492. See *Murdoch* Settlement, supra note 19, at 21, 27–28.

493. David N. Laband & Bernard F. Lentz, The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers, 51 Indus. & Lab. Rel. Rev. 594, 604 (1998).

costs (including interruptions in production and—potentially—a decline in morale among remaining employees).[494] Plaintiffs can rely on an extensive literature in the fields of management and organizational behavior to estimate the effects of increased turnover on financial performance.[495]

Third, revelations of sexual misconduct can lead to regulatory consequences for firms. For example, the *Wall Street Journal* report documenting Wynn Resorts CEO Steve Wynn's decades-long pattern of sexual misconduct triggered regulatory investigations in three different jurisdictions: Macau, Massachusetts, and Nevada.[496] Of particular concern is the probe in Massachusetts, where Wynn Resorts is building a $2.4 billion property on Boston Harbor.[497] Massachusetts Governor Charlie Baker has stated that he does not believe that Wynn Resorts would meet the state Gaming Commission's suitability standard if the allegations against Wynn are true.[498] And while the Gaming Commission, not the governor, is the final decisionmaker regarding suitability, the commission has said it will continue to investigate Wynn Resorts even after its founder's resignation from the firm.[499] If corporate sexual misconduct leads to the loss of an identifiable business opportunity as a result of regulatory action, then the associated costs might be added to the award against a liable fiduciary.

Fourth, corporate sexual misconduct often will have reputational ramifications for companies. The extent of the damage will depend upon the nature of the business. As noted above, Signet Jewelers acknowledges that trust is essential to the company's business model,[500] and the reputational consequences of sexual harassment may be particularly acute for a company with a primarily female customer base. The reputational consequences of harassment also may lead current or potential business partners to disassociate themselves from a firm: For example, after revela-

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494. See Aharon Tziner & Assa Birati, Assessing Employee Turnover Costs: A Revised Approach, 6 Hum. Resource Mgmt. Rev. 113, 116 (1996).

495. For an overview, see generally Julie I. Hancock et al., Meta-Analytic Review of Employee Turnover as a Predictor of Firm Performance, 39 J. Mgmt. 573 (2013).

496. *Wynn* Complaint, supra note 21, at 19–20.

497. Id. at 21.

498. See Tori Bedford, Baker: 'I'm Not the Decision-Maker' on Casino Mogul Steve Wynn, WGBH News (Jan. 29, 2018), https://news.wgbh.org/2018/01/29/boston-public-radio-podcast/baker-im-not-decision-maker-casino-mogul-steve-wynn [https://perma.cc/3FQG-WE9U] (noting that when asked whether Wynn would meet the commission's standard if the allegations proved true, Baker responded: "God, no").

499. Mark Arsenault, Despite Wynn's Ouster, State Gaming Panel's Probe Will Go On, Bos. Globe (Feb. 7, 2018), https://www.bostonglobe.com/metro/2018/02/07/gaming-commission-investigation-continue-despite-wynn-ouster/15OXc4MSFTXtShpvgLlGtI/story.html (on file with the *Columbia Law Review*).

500. Facets of 2017: Annual Report, Signet Jewelers (Mar. 16, 2017), https://s2.q4cdn.com/912924347/files/2017ar/index2.html (on file with the *Columbia Law Review*) (noting that "trust is the most important factor in why people buy jewelry where they do").

tions of sexual misconduct by Harvey Weinstein emerged, Amazon Studios called off a $160 million project to coproduce a series starring Robert DeNiro and Julianne Moore with the Weinstein Company; Apple canceled a series on Elvis Presley that it had planned to purchase from the firm; and the publisher Hachette ended an arrangement with the Weinstein Company's book publishing unit.[501] Again, damages will be easier for plaintiffs and courts to quantify when sexual harassment leads to the loss of identifiable business opportunities.

Fifth, and finally, sexual harassment has undeniable but difficult-to-quantify effects on productivity at a firm. The most obvious productivity consequences are for victims, who often become less motivated and more likely to miss work or take sick leave.[502] But the productivity losses associated with sexual harassment are not limited to the victim: Several studies have found "ambient effects" on others in the same workgroup, with harassment leading to lower morale and lower output across the board.[503] This may be the most difficult component of damages for plaintiffs to quantify, though data on absenteeism rates and comparisons to other teams at the same firm may shed some light on the magnitude of productivity harms.

Often, plaintiffs will be able to look to market reactions in order to estimate the effect of sexual harassment on firm value. A sharp decline in stock price on the day that evidence of sexual misconduct becomes public is an indication—albeit an imperfect one—of the effect of misconduct on firm value.[504] This measure is especially common in securities fraud litigation, though the methodology is vulnerable to misinterpretation if applied without care. The key point for present purposes is that stock price drops at CTPartners,[505] Signet Jewelers,[506] Liberty Tax,[507] and Wynn Resorts[508] in the wake of sexual harassment revelations—along with

501. Meg James, Amazon Studios Cuts Ties with Weinstein Co. Following Harvey Weinstein Sex Scandal, L.A. Times (Oct. 13, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-amazon-cuts-ties-weinstein-co-20171013-story.html (on file with the *Columbia Law Review*).

502. See Chelsea R. Willness, Piers Steel & Kibeom Lee, A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment, 60 Personnel Psychol. 127, 137 (2007) (collecting studies).

503. See id. at 149 (reporting results of meta-analysis); see also Theresa M. Glomb et al., Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences, 71 Organizational Behav. Hum. Decision Processes 309, 323 (1997) (noting that "just being exposed to ambient sexual harassment in their work group results in negative outcomes," even for employees that did not experience harassment themselves).

504. See Baruch Lev & Meiring de Villiers, Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis, 47 Stan. L. Rev. 7, 9 (1994) (describing the traditional method for calculating damages in securities fraud litigation).

505. See supra note 226 and accompanying text.

506. See supra note 240 and accompanying text.

507. See supra note 274 and accompanying text.

508. See supra note 289 and accompanying text.

scholarly research regarding the effects of sexual misconduct on workplaces—point toward the conclusion that the costs of sexual harassment extend far beyond direct liability and litigation-related expenses. While the measure of damages will vary from case to case, we anticipate that awards may be quite substantial in certain circumstances.

D. *What Boards Can Do*

Our analysis up to this point has approached the problem of corporate sexual misconduct from the perspective of potential plaintiffs. Here, we switch sides and consider the problem from the perspective of corporate board members. What can boards do to reduce the risk of sexual harassment at their firms and to contain the fallout if and when harassment does occur?

Potential interventions fall into two general categories: ex ante and ex post. By "ex ante," we refer to steps that boards can take before an incident of sexual harassment comes to their attention. By "ex post," we refer to ways in which boards can and should respond to harassment once it happens. Our hope is that proactive ex ante steps will obviate the need for ex post responses. Realistically, though, we recognize that even a firm that implements the very best practices might not be able to eradicate harassment from its ranks.

Within the category of ex ante measures, the first step is arguably the most obvious: Talk about it. Surprisingly, very few corporate boards have done even that. A 2017 survey of private and public company directors found that 77% of boards "had not discussed accusations of sexually inappropriate behavior and/or sexism in the workplace."[509] Acknowledging that sexual harassment is a potential business risk marks the beginning of the process of putting a prevention strategy in place.

Second, boards should take stock of their companies' past responses to sexual harassment claims. Beth Boland, a litigator at the law firm Foley & Lardner LLP, has suggested that boards should "ask for a report of all sexual harassment complaints and outcomes, with a particular eye toward identifying any repeat offenders within the company's ranks—and if those offenders are still with the company, demand a detailed explanation why."[510] This strikes us as a sensible approach for corporate boards. According to research by Dr. Michael Housman and Professor Dylan Minor, who examined data on more than 50,000 workers across eleven

509. theBoardlist, Corporate Boards Aren't Preparing for Sexual Harassment and Gender Discrimination Issues, Medium (Oct. 24, 2017), https://medium.com/@theBoardlist/corporate-boards-arent-preparing-for-sexual-harassment-and-gender-discrimination-issues-24ba425d6497 [https://perma.cc/QX3T-BU2F].

510. Beth I.Z. Boland, How Corporate Boards Can Curtail Sexual Harassment, Bos. Globe (Nov. 21, 2017), https://www.bostonglobe.com/opinion/2017/11/21/how-corporate-boards-can-curtail-sexual-harassment/3PbCNjKYZCsJiMhahOGRxN/story.html (on file with the *Columbia Law Review*).

firms to assess the effects of sexual harassment, workplace violence, and other "egregious" violations of company policies, so-called toxic workers—the ones who engaged in these behaviors—tended to be more productive than the average employee but generated negative effects on profitability that far exceeded their contributions.[511] In other words, keeping toxic workers on board tends to be a poor business decision even when those workers themselves are top performers, and boards should ask tough questions of managers that choose to retain repeat offenders.

Third, boards should demand that management implement mandatory sexual harassment training for workers at all levels. A 2017 survey by the Association for Talent Development found that 71% of employers "offered" sexual harassment prevention training.[512] It is not clear that "offered" means "required," and in any event, that figure suggests that a substantial minority of employers provide no sexual harassment prevention training at all. While there is of course a nontrivial opportunity cost of mandatory training that takes workers away from their tasks for several hours, the potential benefits for organizations are substantial. Training appears to affect attitudes (though this of course depends on the content of the training program): For example, one study of federal employees found that male employees who undergo training are significantly more likely to identify gestures, remarks, and touching as sexual harassment than their untrained colleagues.[513] Moreover, courts have recognized the existence of a training program as a factor affecting whether an employer will be held liable for harassment.[514] Training thus serves the dual purposes of prevention and loss mitigation.

Boards should also consider how best to enhance the effectiveness of their training programs, such as by emphasizing bystander intervention,

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511. See Michael Housman & Dylan Minor, Toxic Workers 3 (Harvard Bus. Sch. Working Paper No. 16-057, 2015), http://www.hbs.edu/faculty/Publication%20Files/16-057_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf (on file with the *Columbia Law Review*).

512. Megan Cole, 71 Percent of Organizations Offer Sexual Harassment Prevention Training, Ass'n for Talent Dev. (Nov. 13, 2017), https://www.td.org/insights/71-percent-of-organizations-offer-sexual-harassment-prevention-training [https://perma.cc/8RXA-9U7K].

513. See Heather Antecol & Deborah Cobb-Clark, Does Sexual Harassment Training Change Attitudes? A View from the Federal Level, 84 Soc. Sci. Q. 826, 833 (2003). For a review of other studies generally finding that training increases awareness of and sensitivity to harassment, see Zachary T. Kalinoski et al., A Meta-Analytic Evaluation of Diversity Training Outcomes, 34 J. Organizational Behav. 1076, 1090–93 (2013).

514. Michael T. Zugelder, Paul J. Champagne & Steven D. Maurer, An Affirmative Defense to Sexual Harassment by Managers and Supervisors: Analyzing Employer Liability and Protecting Employee Rights in the United States, 18 Emp. Resps. & Rts. J. 111, 117 (2006); see also Setser v. Idaho Home Health & Hospice/LHC Grp., No. 4:12-CV-00444-EJL-REB, 2014 WL 970041, at *8 (D. Idaho Mar. 12, 2014) (considering employee training as a factor affecting whether an employer satisfies the first prong of the *Farragher–Ellerth* test); Sackett v. ITC Deltacom, Inc., 374 F. Supp. 2d 602, 612–13 (E.D. Tenn. 2005) (considering employee training as a factor affecting availability of punitive damages for Title VII violations).

which teaches employees how to intervene when they witness harassment.[515] To further instill the message that sexual harassment training should be taken seriously, boards can require that managers from the CEO on down actively participate in these trainings.

Fourth, boards should review their companies' procedures for handling complaints. One clear lesson that has emerged from the scandals of the past several months is that "hotlines" are not enough: Simply establishing a telephone number that employees can call to report harassment does not ensure that the hotline will be used or that complaints will be addressed. For example, Twenty-First Century Fox said after allegations against Bill O'Reilly emerged in 2017 that no employee had ever lodged a hotline complaint against the host.[516] But according to former employees of the company, Fox made no efforts to publicize the existence of the hotline, which was staffed by third-party operators who had no knowledge of company culture.[517] A more promising strategy is to appoint an organizational ombudsperson who receives anonymous and nonanonymous complaints, works with supervisors to address those complaints, and has the authority to report directly to the board in the event that complaints involve corporate officers or that management responses appear inadequate.[518] By ensuring that serious allegations of sexual misconduct are quickly brought to their attention, board members can reduce their own exposure to the risk of *Caremark* liability.

Fifth, boards should ensure that company policies specify meaningful consequences for employees who engage in harassment, perhaps even specifying these consequences in contracts with top executives. For example, companies could use "morals clauses" that clearly give the board the right to unilaterally terminate an executive who engages in sexual harassment or other misconduct.

However, "zero tolerance" policies that promise the termination of all harassers are not a panacea: As some commentators have suggested, these policies sometimes may deter victims from reporting low-level harassment (such as a single crude joke) that might seem like it should fall

515. EEOC, Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic 57–58 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/9HZU-8RXY].

516. Noam Scheiber, Anonymous Harassment Hotlines Are Hard to Find and Harder to Trust, N.Y. Times (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/business/media/fox-sexual-harassment-hotline-bill-oreilly.html (on file with the *Columbia Law Review*).

517. Id.

518. On the potential utility of an organizational ombudsperson in responding to sexual harassment complaints, see Sarah Kessler, Corporate Sexual Harassment Hotlines Don't Work. They're Not Designed to, Quartz at Work (May 2, 2017), https://work.qz.com/971112/corporate-sexual-harassment-hotlines-dont-work-theyre-not-designed-to [https://perma.cc/9QP2-5V8F].

short of a fireable offense.[519] Boards should instead empower managers to impose a range of sanctions—from reprimands to bonus reductions to outright termination—with rapidly escalating penalties for repeat offenders. Boards also should ensure that employment contracts with CEOs and other corporate officers do not provide blanket indemnification for sexual harassment claims.[520] One reasonable approach is to state that if a corporate officer is accused of sexual harassment, the officer will have to pay any judgment or settlement and associated litigation expenses out of pocket unless the board specifically votes to indemnify.

Finally, we think that proactive boards should prioritize gender diversity when selecting new members and choosing a CEO, perhaps implementing a version of the "Mansfield Rule," which requires that at least 30% of the candidates considered for leadership and governance roles are women or people of color.[521] (The rule—adopted by dozens of law firms and corporate legal departments since its emergence in 2017—is named for Arabella Mansfield, the first woman admitted to practice law in the United States.[522]) Boards should encourage management to make gender diversity a priority in selecting lower-level supervisors as well. Several studies have found that female employees with male supervisors are more likely to report harassment than female employees with female supervisors.[523] And beyond any claim about the direct effect of gender diversity on harassment, we think that an increasing awareness of the prevalence of harassment should affect the meritocratic assessment of candidates for executive and board positions. Indeed, even if one rejects all claims about the intrinsic or instrumental value of gender diversity, the #MeToo movement still should inform hiring decisions insofar as it sheds light on the pervasiveness of sexual harassment in the workplace and thus reveals the hurdles that female candidates for executive and board positions have likely had to overcome.[524]

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519. See Olivia Goldhill, "Zero Tolerance" Sexual Harassment Policies Are Terrible for Women, Quartz (Nov. 10, 2017), https://qz.com/1125385/zero-tolerance-sexual-harassment-policies-are-terrible-for-women [https://perma.cc/6ESC-ZM3G].

520. On the prevalence of indemnification clauses in CEO contracts, see Stewart J. Schwab & Randall S. Thomas, An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain for?, 63 Wash. & Lee L. Rev. 231, 254 n.36 (2006).

521. See Ellen McGirt, How Lawyers Are Working to Change Their Industry's Diversity Problem, Fortune (Aug. 30, 2017), http://fortune.com/2017/08/30/the-mansfield-rule-lawyers-diversity/ [https://perma.cc/UC8Y-SMCE].

522. Id.

523. See Myrtle P. Bell, Mary E. McLaughlin & Jennifer M. Sequeira, Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents, 37 J. Bus. Ethics 65, 69 (2002) (collecting studies).

524. For analogous arguments in the context of race-based affirmative action, see Jerry Kang & Mahzarin R. Banaji, Fair Measures: A Behavioral Realist Revision of "Affirmative Action," 94 Calif. L. Rev. 1063, 1098–101 (2006); Daniel Hemel, An Exam-Grading Hypothetical for Affirmative Action's Supreme Court Test, Univ. of Chi. Law Sch. Faculty Blog (Dec. 8, 2015), http://uchicagolaw.typepad.com/faculty/2015/12/an-exam-grading-hypothetical-for-affirmative-actions-supreme-court-test.html [https://perma.cc/3XUS-X359].

These measures, of course, will not reduce the incidence of sexual harassment to zero at any organization of sufficient size. Yet even ex post (in other words, after a harassment allegation comes before a corporate board), directors can still take meaningful steps to avoid liability. Five measures in particular deserve mention.

First, if confronted with allegations that corporate officers engaged in sexual harassment or that harassment at the company is widespread, boards should hire outside counsel to conduct a thorough investigation of the claims. Recall that the fact that the ICN board had conducted such an investigation contributed to the Chancery Court's conclusion in *Panic* that the directors had lived up to their *Caremark* duties.[525] In general, board members will face liability under *Caremark* only when they take an ostrich-like approach to misconduct allegations, and hiring outside counsel to conduct an internal investigation is one obvious way for directors to extricate their heads from the sand.

Second, when corporate officers are sued for sexual harassment, boards should approve the use of corporate funds to pay liability- and litigation-related expenses only when an internal investigation concludes that those claims are unfounded. Otherwise, the charge that the board allowed for corporate funds to be used to facilitate the officer's harassment gains considerable force. This is one area in which ex ante and ex post measures intersect: The board will, of course, need to ensure that the company has not agreed to a blanket indemnification policy in its contract with the CEO or any other corporate officer.

Third, even when the target of misconduct allegations is a CEO who founded the company and is intimately associated with the firm's brand, board members should think seriously about whether the misconduct allegations rise to the level of a fireable offense—and should terminate the CEO if they do. In the case of Wynn Resorts, the company's stock price rose by over 6% immediately after the board announced that it had accepted CEO Steve Wynn's resignation[526]—dispelling the myth that investors considered Wynn to be an indispensable component of the firm. The damage to a firm's value from losing an iconic CEO may be far less than the reputational consequences of a high-profile sexual harassment scandal.

Fourth, board members should think carefully about whether to appoint a special litigation committee to evaluate actual or potential shareholder derivative actions. As noted above,[527] Delaware courts will

525. See supra note 440 and accompanying text.

526. See Kimberly Chin, Wynn Resorts Surges After Billionaire Casino Mogul Steve Wynn Resigns (WYNN), Bus. Insider: Markets Insider (Feb. 7, 2018), http://markets.businessinsider.com/news/stocks/wynn-resorts-stock-price-surges-after-billionaire-casino-mogul-steve-wynn-resigns-from-the-company-2018-2-1015049099 [https://perma.cc/P2AU-7RM9].

527. See supra notes 360–365 and accompanying text.

hold SLCs to a higher standard for disinterestedness and independence than they will apply to full boards, and courts will review decisions to reject demand with less deference. Boards should therefore weigh the viability of a plaintiff's argument for demand excusal against the additional vulnerability that comes with the formation of an SLC. To be sure, a board that would flunk the *Aronson* or *Rales* test itself will generally want to appoint an SLC rather than allow a shareholder-plaintiff to proceed with a lawsuit. But when the board starts from a strong position, utilizing an SLC can actually weaken its hand.

While the analysis in the previous section suggests that public companies generally do *not* have an affirmative duty to disclose sexual misconduct allegations, boards should consider whether statements in their SEC filings might be misleading if sexual misconduct claims emerge. One strategy is to incorporate this factor into any internal investigation: Outside counsel could be asked not only to evaluate the merits of harassment claims but also to assess whether any of the company's public statements require correction or updating on account of the facts that the investigation reveals. While we would caution against disclosing the names of victims or any facts that would make those victims easily identifiable,[528] we think that companies would be well advised to disclose facts beyond the bare legal minimum so as to reduce the risk of strike suits as well as potentially meritorious claims.

E. *What (Else) Shareholders Can Do*

Finally, if boards do not act, shareholders potentially can. In the past few decades, shareholders have been flexing their muscles not just in litigation but also in behind-the-scenes engagement, proxy contests, and shareholder proposals.[529] And because the shareholder base has grown increasingly concentrated in the hands of institutional investors, shareholder influence has reached an unprecedented level.[530] In the recent past, shareholders had primarily used their growing power to press for changes in corporate governance and business strategy, but shareholders are increasingly setting their sights on a broader range of issues. For example, the 2017 proxy season broke the record for the number of environmental and social (E&S) proposals put to a vote.[531] Although these

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528. See supra note 466–467 and accompanying text.

529. See Dorothy S. Lund, The Case Against Passive Shareholder Voting, 43 J. Corp. L. 493, 500–02 (2018).

530. See Paul H. Edelman et al., Shareholder Voting in an Age of Intermediary Capitalism, 87 S. Cal. L. Rev. 1359, 1383–84 (2014); Lund, supra note 529, at 500–02; William W. Bratton & Simone M. Sepe, Shareholder Power in Incomplete Markets 26–28 (Nov. 1, 2017) (unpublished manuscript), https://www.iast.fr/sites/default/files/IAST/conf/law/bratton.pdf [http://perma.cc/45RE-6EX9].

531. Thomas Singer & Ramsha Khursheed, Environmental and Social Proposals in the 2017 Proxy Season, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (Oct. 26, 2017),

proposals received average support of only 21.4% of votes cast, this level of support continues an upward trend. For instance, in 2016, environmental and social proposals received average support of 19.7% of votes cast.[532] The number of E&S proposals that have won majority support has also increased over the last few years: Six proposals passed in 2017, compared to four in 2016 and four in 2013.[533] These numbers are hardly impressive, but they nevertheless represent an uptick over time.

The rise in successful environmental and social proposals can largely be attributed to a shift in the voting policies of traditionally passive institutional investors. In 2018, Larry Fink, the CEO of BlackRock, which manages over $6 trillion in investments in 14,000 companies, issued an open letter to other CEOs stating that "[c]ompanies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[534] He also indicated that companies that failed to demonstrate how they "make[] a positive contribution to society" would risk losing the support of BlackRock, one of the largest shareholders of every company in the S&P 500.[535] Other influential institutional investors, including Vanguard and State Street, have also begun to support E&S shareholder proposals, including those that ask companies to disclose business risks related to climate change or enhance employee diversity.[536] In doing so, they join forces with pension funds that invest on behalf of public employees and labor union members, which were using their power to pursue environmental and social aims long before Fink emerged as the E&S movement's most prominent voice.[537]

And this newfound interest in social proposals is not limited to large passive institutional investors and pension funds; activist hedge funds, too, are taking an interest in E&S issues. For example, in early 2018, the activist hedge fund Jana Partners joined with the California State Teachers' Retirement System in pushing Apple's board to address the growing concern that the iPhone is addictive and that overuse could cause negative

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https://corpgov.law.harvard.edu/2017/10/26/environmental-and-social-proposals-in-the-2017-proxy-season/ [https://perma.cc/7S6S-9UUS].

532. Id.

533. Id.

534. Larry Fink, A Sense of Purpose, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/ [https://perma.cc/WLU8-97JH].

535. Id.

536. Janet Geldzahler & Glen Schleyer, Sullivan & Cromwell LLP, Lessons from the 2017 Proxy Season: S&C Client Webinar 24 (Sept. 18, 2017), https://www.sullcrom.com/files/upload/Webinar_Lessons_Proxy_Season_2017.pdf [https://perma.cc/2LTK-68DQ]; see also Singer & Khursheed, supra note 531.

537. On the history of pension fund activism, see generally David Webber, The Rise of the Working-Class Shareholder: Labor's Last Best Weapon (2018).

long-term consequences for children.[538] Engagement of this type is, as noted above, not unusual for pension funds, but it marks a shift for activist hedge funds, which tend to focus on more traditional questions of corporate governance. The growth of socially motivated activist hedge funds reveals the growing sense among investors of all types that environmental and social factors are value-relevant for companies.[539]

Sexual harassment policies and procedures are likely to be the next frontier. In January 2018, shareholders from Arjuna Capital and the New York State Common Retirement Fund announced that they had cofiled shareholder resolutions asking Facebook and Twitter to produce a detailed report on the scope of sexual harassment on their platforms and the remedies either in place or already contemplated for the future.[540] The California Public Employees' Retirement system is currently weighing a policy that would urge companies to disclose settlement payments made to victims of sexual harassment on the behalf of executives and directors.[541] These appear to be the first investor proposals to address corporate sexual harassment, but Arjuna Capital was also behind a shareholder proposal submitted at six of the largest U.S. financial institutions that asked for detailed reports on the percentage pay gap between male and female employees.[542] Although all of the proposals were unsuccessful in 2017, Citigroup recently changed its position and agreed to disclose internal data on gender pay.[543] Amazon, for its part, announced in May 2018 that it would adopt a version of the Mansfield Rule for Board of Directors candidates—a move it made after union-affiliated

538. Letter from Barry Rosenstein, Managing Partner, JANA Partners LLC, & Anne Sheehan, Dir. of Corp. Governance, The Cal. State Teachers' Ret. Sys., to Apple Inc. (Jan. 6, 2018), https://thinkdifferentlyaboutkids.com/letter/?acc=1 [https://perma.cc/43ME-PKR9].

539. Robert G. Eccles, Why an Activist Hedge Fund Cares Whether Apple's Devices Are Bad for Kids, Harv. Bus. Rev. (Jan. 16, 2018), https://hbr.org/2018/01/why-an-activist-hedge-fund-cares-whether-apples-devices-are-bad-for-kids (on file with the *Columbia Law Review*).

540. Arjuna Capital: Twitter and Facebook Face First-Ever Shareholder Resolutions Targeting Online Sexual Harassment, Hate Speech and Fake News, PRNewswire (Jan. 11, 2018), https://www.prnewswire.com/news-releases/arjuna-capital-twitter-and-facebook-face-first-ever-shareholder-resolutions-targeting-online-sexual-harassment-hate-speech-and-fake-news-300581656.html [https://perma.cc/VQ73-AFJ3].

541. John Gittelsohn, CalPERS Weighs Push for Sexual-Harassment Corporate Disclosure, Bloomberg L. (Apr. 11, 2018), https://news.bloomberglaw.com/employee-benefits/calpers-weighs-push-for-sexual-harassment-corporate-disclosure (on file with the *Columbia Law Review*).

542. Arjuna Capital, Shareholder Proposal for Gender Pay Equity (2017), https://arjuna-capital.com/wp-content/uploads/2018/01/C-Shareholder-Proposal_Gender-Pay-Equity-11132018.pdf [https://perma.cc/MWB7-K5JS].

543. Laura Noonan & Ben McLannahan, Citigroup Bows to Activist and Discloses Gender Pay Data, Fin. Times (Jan. 15, 2018), https://www.ft.com/content/591b0900-f9f9-11e7-9b32-d7d59aace167 (on file with the *Columbia Law Review*).

pension funds submitted a shareholder proposal seeking to compel the company to adopt such a policy.[544]

While shareholder activism surrounding issues of sexual harassment and diversity can be understood as part of a broader E&S trend, it is also important not to draw too sharp a distinction between these efforts and more traditional shareholder activity aimed at influencing corporate governance or business strategy. The argument that boards should bolster corporate anti–sexual harassment efforts is not solely an argument about social responsibility; it is also an argument about business strategy and the bottom line. It is, ultimately, a claim that corporations cannot maximize shareholder value if they squander human and financial capital by allowing sexual harassment to persist within their ranks.[545]

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These examples demonstrate the ways in which shareholders can use corporate law to hold boards and management accountable for sexual harassment. Unlike suits under Title VII, shareholder suits are not subject to Title VII's limitations. Shareholders do not face damage caps or an unusually truncated statute of limitations period. They are also better positioned to utilize the class action vehicle, and they are less likely to have their claims subjected to arbitration.

Shareholder litigation also offers other important benefits. Although shareholder suits will not make harassment victims whole, the most important result may be the message they send to other corporate leaders. For example, the case against the Fox News board may serve to underscore the fact that if corporate directors ignore allegations of sexual harassment at their companies, they will be subject to consequences: litigation, the risk of individual liability (and higher insurance premiums), and at the very least, severe reputational harm. Those consequences, in aggregate, may be large enough to deter those and other companies from failing to address toxic corporate cultures and discipline harassers. Another advantage of shareholder litigation may be in securing wide-ranging compliance reforms along the lines of what Twenty-First Century Fox agreed to in its settlement with shareholders.[546] Although it

544. See Jason Del Rey, Amazon Will Adopt a 'Rooney Rule' to Increase Board Diversity After Its Initial Opposition Sparked Employee Outrage, Recode (May 14, 2018), https://www.recode.net/2018/5/14/17353626/amazon-rooney-rule-board-diversity-reversal-shareholder-proposal [https://perma.cc/ZA83-CSJ3]. The so-called Rooney Rule—named for Dan Rooney, the former owner of the National Football League's Pittsburgh Steelers, who spearheaded the adoption of the rule for high-level NFL coaching positions—requires employers to include members of underrepresented minority groups (and in Amazon's case, women as well) among the list of candidates for open positions. See McGirt, supra note 521. Unlike the Mansfield Rule, it does not specify that a particular percentage of candidates in the pool must be minority or female. Id.

545. We return to this point in section III.A, infra.

546. See *Murdoch* Settlement Exhibit A, supra note 261, at 2–14. The settlement established a "Workplace Professionalism and Inclusion Council" tasked with strengthening

is debatable whether such reforms go beyond cosmetic compliance,[547] the implementation of a workplace council devoted to improving corporate culture and recruiting women and minorities is certainly a step in the right direction.

In addition, the increased risk of securities liability could encourage companies to more regularly disclose sexual harassment allegations, as well as payments made to settle such claims, in their public filings. Those disclosures would likely benefit current and potential employees as they consider future employment decisions by arming them with information on how an employer treats sexual harassment allegations. Most importantly, heightened disclosure obligations might encourage companies to do more to prevent workplace sexual harassment to avoid having to make such disclosures in the first place.[548] But there is also the risk that companies will respond by implementing measures designed to keep allegations from coming to their attention (though such action could render them vulnerable to a *Caremark* claim). Moreover, although employers are required to keep the victim's name confidential when reporting the allegations, the prospect of public disclosure could chill employee reporting if the employee hopes to avoid attention or discussion of the event that triggered the disclosure. The next Part addresses additional normative and strategic considerations for shareholders hoping to use litigation as a force for change.

III. NORMATIVE AND STRATEGIC CONCERNS

We have so far sought to show that corporations and their directors and officers can be held liable to shareholders for committing, allowing, or concealing sexual harassment under existing law. But of course, "can" does not imply "ought."[549] In this Part, we approach the issue of corporate law liability for sexual harassment from normative and strategic perspectives. We consider several possible objections to the use of corporate law as a mechanism to regulate and remedy workplace-based sexual har-

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reporting, bolstering sexual harassment–related training, and helping to recruit and promote the advancement of women and minorities. Id.

547. See Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 Wm. & Mary L. Rev. 2075, 2093–95 (2016) ("The creation of even well-designed policies and procedures, however, is not sufficient in itself. . . . [C]ompliance must be housed somewhere in the organization, where a responsible agent has specific authority over it along with sufficient staff to perform necessary compliance-related tasks.").

548. Cf. Hans B. Christensen et al., The Real Effects of Mandated Information on Social Responsibility in Financial Reports: Evidence from Mine-Safety Records, 64 J. Acct. & Econ. 284, 287, 299 (2017) (examining the effect of the Dodd-Frank Act's requirement that companies disclose mine-safety information and concluding that such required disclosures improved safety performance by shaming managers and because of shareholder distaste for socially irresponsible companies).

549. The converse may be true, at least as a matter of analytic philosophy. See, e.g., Gideon Yaffe, 'Ought' Implies 'Can' and the Principle of Alternate Possibilities, 59 Analysis 218, 219–21 (1999).

assment. While we take these objections seriously, we ultimately conclude that corporate law has a socially productive role to play in this domain.

A. *Stretching Corporate Law Beyond Its Limits*

One argument against the use of corporate law to regulate and remedy sexual harassment arises from the premise that corporate law should remain focused on its principal objectives—maximizing shareholder value, protecting investors, and promoting the efficient allocation of capital—and that involving corporate law in questions of workplace-based sexual misconduct would divert it from its core mission.[550] (We will refer to this as the "diversion" argument.)

David Lynn, formerly the chief counsel of the SEC's Division of Corporate Finance,[551] makes a similar claim in his critique of the Dodd-Frank Act's disclosure requirements regarding the use of "conflict minerals" from the Democratic Republic of the Congo,[552] payments to governments for resource extraction rights,[553] and violations of mine health and safety rules.[554] Lynn notes that these rules "were borne out of discrete public policy concerns" and not "in accordance with the mission of the SEC to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[555] We can anticipate an analogous argument in the sexual harassment context: Corporate law should be focused on maximizing shareholder value and protecting investors and markets—not on protecting employees from workplace-based sexual misconduct. The latter objective, while certainly a worthy one, is better addressed through alternative mechanisms.

There are (at least) three potential rebuttals to the diversion argument. One is to challenge the claim that the core objectives of corporate law are (or should be) maximizing shareholder value, protecting investors, and promoting the efficient allocation of capital. A second line of attack assumes, arguendo, that the above-listed aims are and should be the principal purposes of corporate law but posits that corporate law can nonetheless pursue secondary goals without running off the rails. A third approach is to argue that regulating and remedying sexual misconduct by corporate executives is entirely consistent with the traditional goals of corporate law.

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550. See, e.g., William W. Bratton, Framing a Purpose for Corporate Law, 39 J. Corp. L. 713, 723–24 (2014) (arguing that "corporate law should facilitate corporate attempts to maximize productive output" and that "social welfare enhancement, while desirable, lies outside the limited sphere occupied by corporate law").

551. People: David M. Lynn, Morrison & Foerster LLP, https://www.mofo.com/people/david-lynn.html [https://perma.cc/6NRL-6568] (last visited July 27, 2018).

552. 15 U.S.C. § 78m(p) (2012).

553. Id. § 78m(q).

554. Id. § 78m-2.

555. Lynn, supra note 41, at 330–31.

The first line of attack centers on one of the most fundamental debates in corporate law—whether the principal goal of corporate law is (or should be) to maximize shareholder welfare. While Professors Henry Hansmann and Reinier Kraakman observed in 2001 that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value,"[556] other views have become increasingly prevalent.[557] For example, the late Professor Lynn Stout advanced the view that while profit maximization (and thus, shareholder wealth maximization) is necessary for the firm's long-term survival, it is not the only corporate objective.[558] In her view, once profitability is achieved, the firm should relax its focus on shareholder wealth and commit instead to satisfying other goals, such as managing risk and taking care of investors, employees, customers, and society at large.[559]

But even if the shareholder primacy premise is accepted, there is a growing awareness that shareholders desire something more than wealth and that shareholder "value" therefore encompasses more than pure wealth maximization. Economists Oliver Hart and Luigi Zingales have recently argued that managers should pursue a broad agenda that

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556. Hansmann & Kraakman, supra note 34, at 439. The view that the corporate purpose should be to maximize shareholder wealth emerged in 1932, when Adolph Berle collaborated with Gardiner Means to write *The Modern Corporation and Private Policy*. See William W. Bratton, Berle and Means Considered at the Century's Turn, 26 J. Corp. L. 737, 737, 760 (2001). However, a 1970 *New York Times* op-ed by Milton Friedman championing shareholder primacy kicked off the modern view that shareholder wealth maximization should be the norm. See Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times (Sept. 13, 1970), http://graphics8.nytimes.com/packages/pdf/business/miltonfriedman1970.pdf [https://perma.cc/7VUC-SZHZ] (arguing that corporate executives have a "responsibility . . . to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom").

557. See generally, e.g., Kent Greenfield, The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities (2006) (arguing that the law of corporations would be better evaluated as a branch of public, rather than private law); Lynn Stout, The Shareholder Value Myth (2012) (arguing that the view that public corporations existing only to maximize shareholder value is a managerial choice that is not grounded in law); William W. Bratton & Michael L. Wachter, The Case Against Shareholder Empowerment, 158 U. Pa. L. Rev. 653 (2010) (arguing that risk-averse managers should be empowered to make more corporate policy decisions because the shareholder-based agency model of corporate governance and shareholder wealth maximization led to the financial crisis of 2008); Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. Rev. 733 (2005) (arguing that corporate law should support sacrificing some shareholder profit in order to avoid social and moral sanctions).

558. Stout, supra note 557, at 31.

559. Id. at vi ("[Conventional shareholder-value thinking] threatens the welfare of consumers, employees, communities, and investors alike."). But see Leo E. Strine, Jr., Making It Easier for Directors to "Do the Right Thing"?, 4 Harv. Bus. L. Rev. 235, 235–36 (2014) (calling some scholars, including Stout, "a tad naïve and tiring" for "admonish[ing] the directors and top executives of American public corporations to 'do the right thing'").

encompasses shareholders' prosocial aims.[560] They also contend that shareholders should use their voting rights to signal their prosocial desires to management.[561] Derivative and securities actions against corporate directors and officers who commit, allow, or conceal sexual harassment could serve as one way for shareholders to signal their prosocial objectives and to hold management accountable for antisocial behavior.

Moreover, even if shareholder wealth maximization is accepted as the principal goal of corporate law, an area of law can have a primary purpose while still advancing a number of secondary aims. Indeed, even Milton Friedman, who posited that a corporation's responsibility is to make as much money for shareholders as possible, also believed that a corporation should adhere to ethical standards when maximizing shareholder wealth.[562] And hybrid purposes are not unique to corporate law. For example, the primary purpose of federal income tax law is—uncontroversially—to raise revenue for the United States government, and yet federal income tax law is also used to advance a wide variety of objectives aside from revenue-raising (for example, promoting homeownership,[563] charitable contributions,[564] retirement saving,[565] and the development of orphan drugs[566]). Likewise, the primary purpose of evidence law is—at least arguably—to promote the accurate determination of facts at trial, but no one would dispute that evidence law also seeks to advance and protect a number of other interests (such as promoting trust among attorneys and clients, as well as among doctors and patients).[567] The notion that corporate law can pursue only one or a small set of objectives stands in tension with the reality that many areas of law serve plural purposes while still more or less achieving their principal goals.

Yet one need not reject the premise that corporate law should remain focused on a small set of core objectives in order to embrace the normative claim that corporate law should be used to regulate and rem-

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560. Hart & Zingales, supra note 43.

561. Id.

562. Friedman, supra note 556 (recognizing that corporate executives should conform to the "basic rules of the society, both those embodied in law and those embodied in ethical custom" even as they are conducting their businesses to maximize shareholder welfare).

563. See 26 U.S.C. § 163(h)(2)(D) (2012) (deduction for home mortgage interest).

564. See id. § 170 (charitable contribution deduction).

565. See id. § 401(k) (allowing employers to establish defined contribution plans, with contributions and accretions excluded from employee income until distribution); id. § 402A (allowing for Roth 401(k) plans); id. § 408 (IRAs); id. § 408A (Roth IRAs).

566. See id. § 45C (providing a 50% credit for clinical testing expenses for drugs to treat or cure rare diseases or conditions).

567. For one perspective on the purposes of evidence law, see Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1485 (1999) (noting that "the law of evidence has multiple goals rather than just the goal of accuracy in fact-finding" but that these noneconomic concerns "can be accommodated within a framework of economic analysis").

edy workplace-based sexual misconduct. This is the nub of the third rebuttal to the diversion argument: Workplace-based sexual misconduct *does* reduce shareholder value, harm investors, and interfere with the efficient allocation of capital. It reduces shareholder value most directly when corporate funds are used to pay judgments, settlements, and attorneys' fees in employment discrimination cases, but that is only one among a number of ways in which sexual misconduct by a corporation's executives and employees harms the corporation's investors. Avoiding these results—or penalizing corporate fiduciaries for allowing these results to transpire—is entirely within corporate law's central ambit.

B. *Discursive Harms*

Apart from any worry as to the overextension of corporate law, the prospect of corporate law liability in cases of sexual harassment raises a separate concern regarding the discursive consequences of framing sexual harassment in terms of the injury to shareholders. Even if one believes that sexual harassment results in the misallocation of human capital and the misuse of corporate resources, these harms are most certainly secondary to the victim's injury. Overemphasizing the harm to shareholders and to markets runs the risk of equating the negative economic externalities of sexual harassment with the human tragedy that victims endure. Relatedly, framing sexual harassment in terms of harm to shareholders might be criticized as commodifying the employees who bear the brunt of sexual harassment's costs.

A historical analogy to the tort law treatment of sexual assault in the nineteenth century illustrates the potential dignitary harms that stem from characterizing a sexual attack on one person as an economic injury to another. As Reva Siegel notes, "At common law, sexual assault gave rise to an action for damages insofar as it inflicted an injury on *a man's property interest in the woman who was assaulted*."[568] For example, the rape of a slave might give rise to a trespass claim by the master; impregnation might give rise to a seduction claim by the pregnant woman's father. The abolitionist and women's rights activist Lydia Maria Child wrote that the "miserable legal fiction" requiring a woman to "acknowledge herself the servant of somebody" in order to visit common law consequences on her attacker was a "standing insult to woman kind."[569]

We can anticipate a somewhat similar critique of efforts to use corporate law liability to regulate and remedy workplace-based sexual harassment. Just as the rhetoric surrounding common law actions for seduction and trespass suggested that fathers, husbands, and masters were the ones harmed by sexual assault, shareholder derivative actions arising

568. Reva B. Siegel, Introduction: A Short History of Sexual Harassment, *in* Directions in Sexual Harassment Law 1, 5–6 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

569. Lydia Maria Child, Letter from New York, No. V, Bos. Courier, Feb. 6, 1844, at 2 (on file with the *Columbia Law Review*).

from sexual harassment might be seen as suggesting that investors—rather than the employees who suffer through sexual harassment firsthand—are the only victims whose injuries require redress. Moreover, the claim that workplace-based sexual harassment damages shareholders through the misallocation of human capital might be interpreted to imply that the female employees of publicly traded corporations are themselves corporate assets.

A commitment to discursive purity would, however, implicate much more than the use of corporate law to regulate and remedy sexual harassment—it would cast doubt on Title VII itself. The Supreme Court held that the Civil Rights Act of 1964 lay within Congress's constitutional authority because of discrimination's "direct and adverse effect on the free flow of interstate commerce."[570] This holding has attracted criticism from some scholars who argue that discrimination should be actionable regardless of whether it affects commerce, but federal employment discrimination law continues to be grounded in the rationale that discrimination is bad for business.[571] If the use of the Civil Rights Act of 1964 to address sexual harassment can survive the commodification critique, then presumably the use of corporate law can too.

The fact that the social meaning of corporate legal liability in cases of sexual harassment is potentially plastic further lessens concerns about discursive harm. By this we mean that the imposition of corporate law liability can be interpreted in multiple ways and that various actors will have opportunities to influence the direction that such interpretation takes. From one vantage point, liability would reinforce the view that successful companies are ones that make it possible for all of their employees—regardless of gender—to thrive, and that directors and officers who allow sexual harassment to occur at their firms have failed in a fundamental respect. By that same token, the imposition of liability on individuals other than the harasser may communicate that harassment is the product of a systemic failure, with systemic consequences,[572] and that responsibility can be attributed to groups of individuals rather than a single harasser. The social meaning of corporate law liability is not fixed in stone, and attorneys, judges, journalists, and shareholders will shape that social meaning through the language that they deploy.

We acknowledge the uncomfortable reality that shareholders will sometimes recover damages arising out of harassment scandals while the victims will be left emptyhanded. However, this is not a reason to abandon corporate law but a reminder that corporate law will always be a

570. Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

571. See George Rutherglen, The Thirteenth Amendment, the Power of Congress, and the Shifting Source of Civil Rights Law, 112 Colum. L. Rev. 1551, 1559 (2012) ("Congress and the Supreme Court found a new avenue for civil rights legislation under the Commerce Clause.").

572. For a discussion of other third-party effects that result from sexual harassment, see generally Nancy Leong, Them Too, 96 Wash. U. L. Rev. (forthcoming 2019).

complement to, rather than a substitute for, legal protections designed to compensate victims. In sum, concerns about the discursive consequences of corporate law liability ought not to deter lawyers, shareholders, and activists from pursuing this course, but it is important that practitioners remain cognizant of the messages that liability might send. Reliance on corporate law runs the risk of diverting attention away from victims and contributing to commodification of female employees, but that is a reason to think carefully about the words we use to articulate corporate law claims—not a compelling reason to call off the enterprise altogether.

C. *Distributional Considerations*

A separate worry regarding the use of corporate law to regulate and remedy workplace-based sexual harassment is that this approach privileges certain classes of employees above others. Insofar as top executives at publicly traded companies engage in sexual harassment, the victims will often (though not always[573]) be other relatively well-compensated professionals rather than the rank-and-file.[574] Sexual harassment is endemic in blue-collar work environments as well as white-collar ones.[575] Corporate law liability might not have much to offer employees of smaller businesses, or even lower-level employees of publicly traded companies whose own experiences of sexual harassment are so far removed from the company's top executives that it would be difficult to demonstrate the enterprise-wide harm necessary to hold the latter liable.

Our response to this concern is threefold. First, we can imagine circumstances in which a company's failure to address sexual harassment among lower-level employees would give rise to liability under fiduciary duty or securities laws. As discussed, Signet Jewelers provides one example.[576] The recently revealed pattern of sexual harassment at Ford Motor Company plants in Chicago may be another case in point.[577] Second,

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573. Allegations that Wynn Resorts CEO Steve Wynn harassed a massage therapist and manicurist at his company remind us that not all victims of sexual harassment by top executives will be other executives or highly compensated employees. See Berzon et al., supra note 21.

574. Cf. Clare Malone, Will Women in Low-Wage Jobs Get Their #MeToo Moment?, FiveThirtyEight (Dec. 14, 2017), https://fivethirtyeight.com/features/the-metoo-moment-hasnt-reached-women-in-low-wage-jobs-will-it/ [https://perma.cc/H6UT-8BYG] (describing how the harassment of "pink-collar" service professionals like hotel maids and bartenders is primarily perpetrated by customers, not corporate agents or fiduciaries).

575. See, e.g., id.; Amanda Helm Wright, Note, From the Factory to the Firm: Clarifying Standards for Blue-Collar and White-Collar Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964, 2001 U. Ill. L. Rev. 1085, 1090 (examining standards for sexual harassment across blue-collar and white-collar work environments).

576. See supra section II.A.5.

577. See Susan Chira & Catrin Einhorn, How Tough Is It to Change a Culture of Harassment? Ask Women at Ford, N.Y. Times (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html (on file with the *Columbia Law Review*).

norms at the top of the corporate hierarchy likely influence behavior several rungs below. Research on management and organizational behavior identifies similar "trickle down" effects in related contexts.[578] Third, even if reliance on corporate law liability does have differential effects at higher and lower rungs of the corporate hierarchy, that in itself is not necessarily a reason to reject the approach. Rather, it is a reason to explore alternative mechanisms (discussed in section III.E) to supplement the deterrent effects of corporate law liability at lower levels.

D. *Backfire*

A further concern—which arises any time that penalties for sexual harassment are ratcheted upward—is that male employers will respond in ways that redound to the detriment of female employees. (We frame this concern in heteronormative terms because we think it is particularly likely to manifest itself when potential perpetrators and victims occupy traditional gender roles, though we also emphasize that sexual harassment is not an exclusively male-against-female phenomenon.) Male executives may be more reluctant to hire female employees—or may be more reluctant to play a mentor role with respect to female employees—if they are worried about potential harassment allegations, and those worries may become even more salient if the existing employment discrimination penalties for sexual harassment are supplemented by other forms of liability. This "Mike Pence effect"—so named on account of the Vice President's reported refusal to dine alone with any woman other than his wife—is arguably the most serious potential unintended consequence of the #MeToo movement's successes.[579]

Yet even as the law potentially gives rise to this response, the legal system has responses of its own to this concern. For one, systematically excluding female employees from positions of proximity to top executives is itself a violation of employment discrimination law.[580] Along those lines, some of the same theories that might support director and officer liability in cases of sexual harassment would also support liability if it came to light that the company had shut the C-suite door to female employees in order to manage the risk of sexual harassment allega-

578. See, e.g., David M. Mayer et al., How Low Does Ethical Leadership Flow? Test of a Trickle-Down Model, 108 Organizational Behav. & Hum. Decision Processes 1, 7 (2009); Bennett J. Tepper & Edward C. Taylor, Relationships Among Supervisors' and Subordinates' Procedural Justice Perceptions and Organizational Citizenship Behaviors, 46 Acad. Mgmt. J. 97, 100–03 (2003).

579. See, e.g., Newman, supra note 39; Katherine Tarbox, Is #MeToo Backlash Hurting Women's Opportunities in Finance?, Harv. Bus. Rev. (Mar. 12, 2018), https://hbr.org/2018/03/is-metoo-backlash-hurting-womens-opportunities-in-finance [http://perma.cc/GHG4-8ZAF].

580. See Prohibited Employment Policies/Practices, EEOC, https://www.eeoc.gov/laws/practices/index.cfm [https://perma.cc/R9W5-HP4N] (last visited July 27, 2018).

tions.[581] The argument that we should refrain from penalizing executives for behaving illegally because they might respond by behaving illegally is, we think, a weak one.

To be sure, Title VII might not encompass more subtle forms of discrimination, such as a failure to mentor, which may result from an increased risk of corporate liability.[582] But there are several responses to this concern. First, that risk is present with respect to all employment discrimination protections, and if the risk is not a sufficient basis to ratchet down protections under Title VII and similar statutes, then it is difficult to see why it would be a reason to back away from the use of corporate law to regulate and remedy sexual harassment. Second, to the extent that backfire results because employees are worried about mistakenly or falsely being accused of harassment, the success and visibility of the #MeToo movement may reduce this risk by clarifying the standards of acceptable workplace behavior.[583] Finally, the "market for mentorship" is not one-sided; mentees seek out mentors, too. A legal regime that penalizes inappropriate behavior and empowers junior employees to bring harassment claims might actually make those junior employees more likely to seek out senior male mentors and enhance mentorship opportunities for them.[584] This is not to dismiss the backfire concern out of hand; it is to say that the benefits of increased legal protection almost certainly outweigh the costs.

E. *Alternative Mechanisms*

Even if one accepts that regulating and remedying workplace-based sexual misconduct through corporate law could have positive consequences, one still might question whether corporate law is the best tool to achieve these ends. Why not focus instead on alternative mechanisms, such as federal and state employment discrimination law? Surely reforms

581. See Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.").

582. See Ramona L. Paetzold & Rafael Gely, Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?, 31 Hous. L. Rev. 1517, 1524–25 (1995) ("[W]omen and minorities are often excluded from developmental programs, training, relocation opportunities, and key assignments, and they are often without mentors or sponsors within the organization.").

583. See Kevin B. Leblang et al., The Rise of the Me Too Movement: An Opportunity, Not an Obligation, Kramer Levin (Apr. 3, 2018), https://www.kramerlevin.com/en/perspectives-search/the-rise-of-the-metoo-movement-an-opportunity-not-an-obligation.html [https://perma.cc/X4BH-6WT9] (recommending that companies broaden the conduct covered by employee handbooks to clarify acceptable workplace behavior).

584. See Lynn M. Morgan & Marilyn J. Davidson, Sexual Dynamics in Mentoring Relationships—A Critical Review, 19 Brit. J. Mgmt. S120, S122–25 (2008) (describing the negative effects of sexual relationships in heterosexual cross-gender mentoring but noting the benefits to both parties when there are clear boundaries in place).

to these areas of law would address the problem of workplace-based sexual misconduct more directly than corporate law liability would.

We readily acknowledge that corporate law ought not to be the only—nor the primary—mechanism for addressing the problem of workplace-based sexual misconduct. Moreover, nothing in this Article should be read to suggest that corporate law is the most effective means of regulating or remedying sexual harassment. While a comprehensive analysis of Title VII reform options lies well beyond our present scope, the analysis above suggests a number of ways in which the federal employment discrimination regime might be revised to better achieve its aims. For example, the 180-day period for filing a charge with the EEOC could be extended in sexual harassment cases to reflect the reality that victims often are reluctant to come forward on their own.[585] Moreover, Title VII's caps on compensatory and punitive damages could be raised—or, at least, adjusted for inflation.[586] In the absence of congressional action, state legislators could take the lead by passing laws providing for longer limitations periods and higher or unlimited damages.

More creative solutions might involve the use of what scholars Ian Ayres and Cait Unkovic have termed "information escrow" arrangements,[587] now being implemented on some college campuses for sexual assault cases through the Callisto app.[588] Callisto allows victims to report their experiences of sexual assault and to keep those reports confidential until another victim lodges a report with respect to the same perpetrator. When two victims have reported assaults by the same perpetrator, the institution receives the contact information of each victim, and the victims are themselves told that there has been a match.[589] One might imagine a state-level equivalent that applies to workplace-based sexual mis-

585. For a recent commentary, see, e.g., Danny Cevallos, Sex Misconduct Cases Spur Rethinking of Statute of Limitations, NBC News (Dec. 26, 2017), https://www.nbcnews.com/storyline/sexual-misconduct/sex-misconduct-cases-spur-rethinking-statute-limitations-n822286 [https://perma.cc/YF28-L2RD] (describing the modern legislative trend of expanding or removing statutes of limitations for lawsuits arising from sexual misconduct). For a more detailed articulation of the reasons victims may not report sexual harassment within the statute of limitations, see Michael B. Reuben & Isaac M. Zucker, Remedying Sexual Harassment: A Primer, Litig., Winter 1995, at 43, 45–46.

586. The $300,000 cap for large employers in November 1991 is equivalent to more than $548,000 in June 2018 based on the Consumer Price Index for All Urban Consumers. See CPI Inflation Calculator, Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm (on file with the *Columbia Law Review*) (last visited Aug. 18, 2018); cf. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–73 (codified at 42 U.S.C. § 1981a (2012)) (capping damages at $300,000).

587. Ian Ayres & Cait Unkovic, Information Escrows, 111 Mich. L. Rev. 145, 145 (2012).

588. Laura Bassett, How a New Technology Could Help Find the Next Harvey Weinstein, HuffPost (Oct. 16, 2017), https://www.huffingtonpost.com/entry/callisto-rape-reporting-app_us_59df86c7e4b0eb18af06d54e [https://perma.cc/2SN4-TFH4] (last updated Nov. 7, 2017).

589. What We Do, Callisto, https://www.projectcallisto.org/what-we-do [https://perma.cc/T5EV-T5LV] (last visited July 27, 2017).

conduct: Victims could lodge confidential complaints with the state human rights agency, and once multiple victims have reported instances of harassment or assaults by the same perpetrator, each victim would be informed, and a new limitations period would run from that date.

Beyond federal and state employment discrimination and civil rights law, tort law and tax law might have a role to play in regulating and remedying sexual harassment. Victims of sexual harassment have had some (limited) success bringing tort law claims for intentional infliction of emotional distress,[590] assault, and battery.[591] Some authors have argued for a more expansive freestanding tort for sexual harassment.[592] The #MeToo movement might give new momentum to the push for such a tort to be recognized. Tax law, meanwhile, is already being used to discourage confidential settlements of sexual misconduct claims, which potentially allow perpetrators to escape public exposure.[593] Specifically, the Republican-backed tax legislation signed into law by President Trump in December 2017 includes a provision that denies a deduction for amounts paid to settle sexual harassment and abuse claims if such settlement is subject to a nondisclosure agreement.[594] And aside from tax

590. Stender & Steele, supra note 165, at 2–3 ("Most courts recognize that ordinary employment suits involving sexual discrimination will not establish a cause of action for intentional infliction of emotional distress. . . . However, some courts have held that egregious sexual harassment may rise to the level of intentional infliction of emotional distress."); see also supra note 164 (describing the finding of intentional infliction of emotional distress in Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606 (5th Cir. 1999)).

591. Stender & Steele, supra note 165, at 8–9; see also, e.g., Harrison v. Eddy Potash, Inc., 158 F.3d 1371, 1377 (10th Cir. 1998) (affirming in part and reversing in part a judgment against an employer under a theory of vicarious liability for alleged hostile work environment sexual harassment); Rudas v. Nationwide Mut. Ins. Co., No. 96-5987, 1997 WL 11302, at *5 (E.D. Pa. Jan. 10, 1997) (granting in part and denying in part a motion to dismiss a complaint alleging intentional infliction of emotional distress, assault, and battery).

592. See, e.g., Anita Bernstein, Treating Sexual Harassment with Respect, 111 Harv. L. Rev. 445, 450–51, 526 (1997); Katherine M. Franke, What's Wrong with Sexual Harassment?, 49 Stan. L. Rev. 691, 769–70 & n.407 (1997); Paul, supra note 63, at 359–65 (1990); Krista J. Schoenheider, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. Pa. L. Rev. 1461, 1463 (1986). Catharine MacKinnon has argued that treating sexual harassment as a tort is "inadequate" because it fails to recognize the inherent element of economic coercion. MacKinnon, supra note 58, at 173.

593. On confidentiality clauses in settlements of sexual misconduct cases, see generally Saul Levmore & Frank Fagan, Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases, 103 Cornell L. Rev. 311 (2018).

594. An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, § 13307, 131 Stat. 2054, 2129 (2017) (to be codified at 26 U.S.C. § 162(q)). On some of the ambiguities in that provision, see Leandra Lederman, Are Sexual Harassment Plaintiffs' Attorneys' Fees Inadvertently Disallowed by the Tax Cuts Bill?, Surly Subgroup (Dec. 19, 2017), https://surlysubgroup.com/2017/12/19/are-sexual-harassment-plaintiffs-attorneys-fees-inadvertently-disallowed-by-the-tax-cuts-bill [https://perma.cc/YL4H-L67W]. For a proposal to deny a tax deduction for confidential sexual misconduct settlements that pre-

law, several other policy levers remain available for addressing the specific problem of confidential sexual harassment settlements. As Professors Saul Levmore and Frank Fagan have suggested, attorneys could be required under professional responsibility rules to report such nondisclosure agreements to authorities or vulnerable third parties, courts could refuse to enforce such agreements, or jurisdictions could impose mandatory disclosure requirements as to some or all information concerning these settlements.[595]

Importantly, however, the availability of alternative mechanisms for addressing problems related to workplace sexual misconduct does not make corporate law an irrelevant—or undesirable—tool in the fight against sexual harassment. First, the problem of sexual harassment appears to be so prevalent and pervasive that multiple policy tools will be needed in the effort to eradicate sexual misconduct from the workplace (and even then, "eradication" is almost certainly an unrealistic goal). Second, these various tools may be complements rather than substitutes. For example, if securities law forces publicly traded companies to disclose large sexual harassment settlements or allegations against executives, those revelations—insofar as they supply further evidence of the problem's prevalence—may add further fuel to the push for legal reform.

Third, whereas most other policy responses to sexual misconduct in the workplace would require legislative action, corporate law can be used to address the problem without any change to existing statutes. As we argue in Part II, corporate directors and officers who commit, allow, or conceal workplace-based sexual misconduct can be held liable under the fiduciary duty laws of Delaware and other states, and publicly traded companies can be held liable under federal securities law for misleading investors about workplace sexual misconduct in certain circumstances. Convincing federal and state court judges of those propositions is probably a lighter lift than persuading federal and state lawmakers to enact new statutes. And convincing one or a handful of the approximately 3,700 publicly listed companies in the United States[596] to adopt a shareholder resolution requiring disclosure of sexual harassment settlements may be a more plausible short-term objective than nationwide legislative change.[597]

ceded the emergence of the Weinstein allegations and the Republican tax plan, see Levmore & Fagan, supra note 593, at 343–45.

595. See Levmore & Fagan, supra note 593, at 342–43.

596. Why the Decline in the Number of Listed American Firms Matters, Economist: Schumpeter (Apr. 22, 2017), https://www.economist.com/news/business/21721153-company-founders-are-reluctant-go-public-and-takeovers-are-soaring-why-decline [https://perma.cc/Z2LT-YR2U] (reporting that the number of listed companies in the United States is 3,671).

597. See Elana Schor & Heather Caygle, Congress Dawdles as #MeToo Scandals Rage On, Politico (Aug. 11, 2018), https://www.politico.com/story/2018/08/11/congress-sexual-harassment-metoo-scandals-773309 [https://perma.cc/VG8Z-Y6SR].

CONCLUSION

Our focus in this Article has been on the role of corporate law in regulating and remedying workplace-based sexual misconduct. We have argued that corporate fiduciaries who engage in, enable, or ignore sexual harassment at their companies will be liable to shareholders under specific circumstances. We also have highlighted the ways in which publicly traded companies contending with sexual harassment scandals can—if not careful—run afoul of federal securities laws. And we have argued that corporate law, while certainly not the only legal tool for addressing the widespread problem of workplace sexual misconduct, can play a positive role in advancing the #MeToo movement's objectives, though we also caution that advocates for liability should be aware of and attentive to the discursive and distributional consequences of their efforts.

Not only does corporate law have important implications for the fight against sexual harassment, but the #MeToo movement also—we think—has important implications for corporate law. Perhaps the "history" of corporate law is over, as Hansmann and Kraakman provocatively proclaimed in 2001, and maybe the claim that corporate law "should principally strive to increase long-term shareholder value" has won the day.[598] But even if that is so (and we are far from sure that it is[599]), the question of how to maximize long-term shareholder value will still be contested, and corporate law will continue to provide a forum in which that contest is waged. Social movements influence the evolution of ideas about investment and management, and now, we are seeing that evolution in real time.

Ultimately, the impact of shareholder suits arising out of corporate sexual misconduct will not be measurable in terms of dollars recovered. Indeed, one can be skeptical in general about derivative actions and securities fraud lawsuits as mechanisms for compensation and specific deterrence while also retaining hope that litigation will serve a useful role here.[600] For one, shareholder lawsuits against corporate fiduciaries who commit, enable, ignore, or conceal sexual harassment chip away at a public–private divide that places the sexual behavior of executives entirely—and in our view, incorrectly—on the private side. What a CEO does behind closed doors *is* the board's business, at least when the CEO exploits employees (as in, for example, the Wynn case), when the CEO's romantic interests cause him to favor some employees over others (as allegedly occurred at Liberty Tax), or when a CEO's behavior generates legal risk for the company. So, too, shareholder suits can emphasize that

598. Hansmann & Kraakman, supra note 34, at 439.

599. See supra notes 557–559 and accompanying text.

600. For classic (and empirically grounded) statements of such skepticism, see Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 500 (1991); Roberta Romano, The Shareholder Suit: Litigation Without Foundation?, J.L. Econ. & Org., Spring 1991, at 55, 55.

executives' behavior toward lower-level employees matters not only for civility but also for firm productivity. Even if indemnification and insurance shield most defendants from personal liability, shareholder actions can serve to redefine the responsibilities of corporate fiduciaries and clarify that the prevention of sexual harassment is a critical component of good governance.

There are, concededly, costs to using corporate law for these purposes. Aside from the direct costs of litigation (which in the end may be borne by shareholders), there is—as we acknowledge—a potentially serious cost in recasting shareholders as sexual harassment's victims when of course the direct impact on the harassee is orders of magnitude more severe. We are nonetheless optimistic that a changing litigation environment will make individuals in positions of power more attentive to the lived experiences and long-lasting injuries of harassment's foremost victims—and more committed toward preventing it from happening again. That, more than any settlement or verdict, will be the final and most significant metric of success.