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Sexual Harassment and Corporate Law

Daniel Hemel
dangelolawlib+danielhemel@gmail.com

Dorothy Shapiro Lund
dorothy.shapiro@chicagounbound.edu

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Daniel Hemel[*] & Dorothy S. Lund[**]
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Abstract

The year 2017 marked an inflection point in the evolution of social norms regarding sexual harassment. While victims of workplace harassment had long suffered in silence, the surfacing of serious sexual misconduct allegations against Hollywood producer Harvey Weinstein encouraged many more victims to tell their personal stories of abuse. These scandals have spread beyond Hollywood to the rest of corporate America, leading to the departures of several high-profile executives as well as sharp stock price declines at a number of firms. In the past year, shareholders at four publicly traded companies have filed lawsuits alleging that corporate directors and officers breached their fiduciary duties or violated federal securities laws in connection with sexual harassment scandals at those firms. More such suits are likely to follow in the months and years ahead.

In this Article, we examine 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 to shareholders under state corporation law for perpetrating sexual misconduct or allowing it to occur at their firms. We also discuss the circumstances under which federal securities law requires issuers to disclose sexual misconduct allegations against top executives and to reveal payments made to settle 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 as tools to address workplace-based sexual misconduct. We conclude that corporate and securities law can serve to 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 emphasizing the promise as well as the pitfalls of corporate law as a catalyst for organizational and social change.

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[*] Assistant Professor of Law, University of Chicago Law School; dhemel@uchicago.edu.

[**] Harry A. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago; dorothyshapiro@uchicago.edu. For insightful comments, the authors thank Tony Casey, Jessica Clarke, Lee Fennell, George Georgiev, Emma Kaufman, Leah Littman, Alice Ristoph, Leo Strine, Jr., and participants in the Brooklyn Law School Faculty Workshop, the Chicago-Kent College of Law Faculty Workshop, and the University of Chicago Law School Workshop on Regulating Family, Sex, and Gender. For excellent research assistance, the authors thank Matt Enloe. For financial support, the authors thank the Douglas Clark and Ruth Ann McNees Faculty Research Fund.

SEXUAL HARASSMENT AND CORPORATE LAW

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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 two 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, Bill O'Reilly, 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 company BetterWorks,[7] and Mike Cagney of the online lender SoFi.[8] And since Weinstein's departure from his film

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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 (Dec. 20, 2017), http://time.com/5015204/harvey-weinstein-scandal.

2 See Monica Akhtar, #MeToo: A movement or a moment?, The Washington Post (Nov. 9, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/11/09/metoo-a-movement-or-a-moment/?utm_term=.c6edec5a9c44.

3 Ben Worthen & Pui-Wing Tom, H-P Chief Quits in Scandal, Wall St. J. (Aug. 7, 2010), https://www.wsj.com/articles/SB10001424052748703309704575413663370670900

4 See Shane Farro, American Apparel Lawsuit Is 'Mother Of All Sexual Harassment Cases,' Judge Says, Huffington Post (Oct. 9, 2015), https://www.huffingtonpost.com/entry/american-apparel-lawsuit-dov-charney-sexual-harassment_us_5617c6dce4b0082030a2067d.

5 Emily Steel & Michael Schmidt, More Trouble at Fox News: Ailes Faces New Sexual Claims and O'Reilly Loses Two Advertisers, N.Y. Times (April 3, 2017), https://www.nytimes.com/2017/04/03/.../fox-news-roger-ailes-harassment-suit.html.

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/news/business/wp/2017/07/17/signet-jewelers-ceo-mark-light-at-the-center-of-a-sprawling-gender-discrimination-case-out-for-health-reasons.

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.

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. In

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 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. And in 2017 and the first quarter of 2018, shareholders at four publicly traded firms—Signet Jewelers, Twenty-First Century Fox, Liberty Tax, and Wynn Resorts—filed lawsuits against corporate directors and officers on grounds related to reported sexual misconduct at those companies. 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.[15] 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

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addition, Uber founder Travis Kalanick resigned as CEO of the ride-sharing app maker amid allegations that he tolerated a toxic work environment and widespread sexual harassment at the firm. 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.

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; Fenway Health CEO Quits Over Sexual Harassment Claims Against Doctor, Modern Healthcare (Dec. 11, 2017), http://www.modernhealthcare.com/article/20171211/NEWS/171219983.

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; 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.

11 Kirsten Grind, Sarah Krouse & Jim Oberman, 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.

12 See Margas 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.

13 See David Folkenflik, NPR's Sexual Harassment Scandal, NPR (Nov. 5, 2017), https://www.npr.org/2017/11/05/562188679/nprs-sexual-harassment-scandal

14 See 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.

15 For the most recent complaint in the case, see Fourth Amended Class Action Compl., In re Signet Jewelers Limited Securities Litigation, Docket No. 1:16-cv-06728 (S.D.N.Y. filed Dec. 22, 2017) [hereinafter *Signet* Complaint]. For earlier pleadings, see Second Amended Class Action Compl., Dube v. Signet Jewelers Ltd., No. 1:16-cv-06728 (S.D.N.Y. filed Apr. 3, 2017); Mikolchak v. Signet Jewelers Ltd., No. 1:17-cv-02846 (S.D.N.Y. filed Mar. 31, 2017); Irving Firemen's Relief & Ret. Sys. v. Signet Jewelers Ltd., No. 1:17-cv-02845 (S.D.N.Y. filed Mar. 28, 2017).

action complaint is now fully briefed and pending decision.[16] 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.[17] 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.[18] 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 sexual relationships with several female employees and diverted company resources to his romantic liaisons.[19] Fourth and most recently, three pension funds filed derivative actions against Wynn Resorts in Nevada 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.[20]

These four 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), the tech giant Hewlett-Packard, the clothing brand American Apparel, and the executive search firm CTPartners all have led to shareholder suits in the past. However, the #MeToo movement will likely lead to many more such claims, raising important doctrinal questions for scholars

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16 See Order, In re Signet Jewelers Limited Securities Litigation, Docket No. 1:16-cv-06728 (S.D.N.Y. Jan. 7, 2018).

17 See Derivative Compl., City of Monroe Employees' Ret. Sys. v. Murdoch, Docket No. 2017-0833 (Del. Ch. Nov. 20, 2017) [hereinafter *Murdoch* Complaint].

18 See Stipulation and Agreement of Settlement, Compromise, and Release 26-28, City of Monroe Employees' Ret. Sys. v. Murdoch, Docket No. 2017-0833-AGB (Del. Ch. Nov. 20, 2017). 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 Rothfield, 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. No charges have been filed publicly in the several months since news of the investigation emerged.

19 See Verified Stockholder Derivative Compl., Asbestos Workers' Philadelphia Pension Fund v. Hewitt, No. 2017-0883 (Del. Ch. filed Dec. 11, 2017), http://bit.ly/2F9G2QS [hereinafter *Hewitt* 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.

20 Verified Stockholder Derivative Compl., Norfolk Cnty Ret. Sys. v. Wynn, No. A-18-769062-B (Nev. Dist. Ct., Clark Cnty., Feb. 6, 2018), http://bit.ly/2EUYYzl [hereinafter *Wynn* Complaint]; Register of Actions, Operating Engineers Construction Industry & Miscellaneous Pension Fund v. Wynn, No. A-18-769630-B (Nev. Dist. Ct., Clark Cnty., Feb. 15, 2018), https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=11844440; Verified Stockholder Derivative Complaint, DiNapoli v. Wynn, No. __ (Nev. Dist. Ct., Clark Cnty. filed Feb. 22, 2018), http://osc.state.ny.us/press/docs/wynn-complaint.pdf; see 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.

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? On 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. And looming are legitimate concerns about the potential for liability to backfire in ways 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.[21] 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—historically have addressed workplace-based sexual misconduct. We take stock of Title VII's successes while also highlighting its shortcomings and identifying the voids that corporate and securities law potentially can fill.

[21] On the relationship between corporate law and social norms, see generally Melvin A. Eisenberg, Corporate Law and Social Norms, 99 Colum. L. Rev. 1253 (1999); and Edward B. Rock & Michael L. Wachter, Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation, 149 U. Pa. L. Rev. 1619 (2001).

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.[22]) We use the handful of 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. We identify various legal arguments available to shareholders who seek hold directors and officers responsible for corporate sexual misconduct, 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. And 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 ask *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 maximize shareholder value,[23] protect investors,[24] and promote the

[22] 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 U.C.L.A. 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 James Park notes, those who argue that "securities law is just a federal version of corporate law" 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. See id. at 118. For present purposes, we take no position in that debate. We clump corporate and securities law together for the entirely non-ideological purpose of avoiding awkward and cumbersome sentence constructions in the pages that follow.

[23] See, e.g., Henry Hansmann & Reiner 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.").

[24] See U.S. Securities and Exchange Commission, What We Do (last accessed Dec. 26, 2017), https://www.sec.gov/Article/whatwedo.html ("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.").

efficient allocation of capital.[25] 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. 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. 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 their inner circle.[26] We take all of these objections seriously, though we nonetheless conclude that corporate law still 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 conservation over corporate law and workplace-based sexual misconduct within the broader context of the debate over corporate governance and social responsibility. On one view, 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[27] to genocide in the Democratic Republic of the Congo[28] to global greenhouse gas emissions.[29] On another view, corporate law concepts such as "shareholder value" and "materiality" necessarily reflect changing perceptions among corporate stakeholders and society at large.[30] On 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.

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

26 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.

27 See David A. Katz & Laura McIntosh, Gender Diversity on Boards: The Future Is Almost Here, Harvard Law School Forum on Corporate Governance and Financial Regulation (March 25, 2016), https://corpgov.law.harvard.edu/2016/03/25/gender-diversity-on-boards-the-future-is-almost-here/

28 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 (2011).

29 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 (2004).

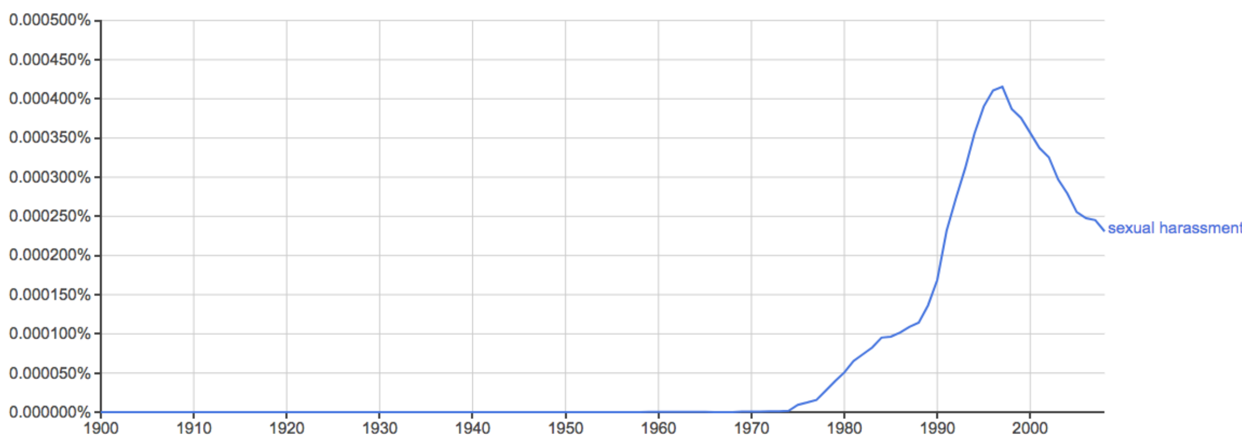
30 Oliver Hart & Luigi Zingales, Companies Should Maximize Shareholder Welfare Not Market Value, ECGI - Finance Working Paper No. 521/2017 (August 1, 2017), https://ssrn.com/abstract=3004794.

I. THE REGULATION OF SEXUAL HARASSMENT BEFORE #METOO

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 upsurge 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.)

Figure 1. Frequency of the Phrase "Sexual Harassment" in Google Books Archive, 1900-2008



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:

> Any repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find objectionable or offensive and causes you discomfort on your job.[31]

This definition has evolved since Farley coined the term forty years ago. First, the consensus today is that objectionable or offensive conduct need not be "repeated" to constitute sexual harassment.[32] Second, courts have said that "sexual harassment" includes

[31] Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job 20 (1978).
[32] See Margaret A. Crouch, The "Social Etymology" of 'Sexual Harassment', 29 J. Soc. Phil. 19, 20 (1998).

harassment on the basis of sex even when it does not "take the form of sexual advancements or of other incidents with clearly sexual overtones."[33] What matters is that the harassment is discriminatory on the basis of sex, not that it is sexual.[34] Therefore, a physically aggressive but not explicitly sexual act by a male supervisor against a female employee may be actionable under Title VII. In addition, harassment of men by men, and of men by women, and of women by women also may violate the statute.[35] Third, the Equal Employment Opportunity Commission (EEOC)[36] and one federal court of appeals[37] have taken the position that "sexual harassment" includes harassment on the basis of sexual orientation. Several other circuits,[38] as well as the Trump administration Justice Department,[39] have adopted the opposite view.

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. Second, Farley's definition of sexual 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.[40] 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.

Following Farley's pioneering work, the feminist scholar Catherine MacKinnon further articulated the concept of sexual harassment in her now-classic 1979 book *Sexual Harassment of Working Women: A Case of Sex Discrimination*.[41] MacKinnon drew a distinction between "*quid pro quo*" sexual harassment and sexual harassment as a "persistent *condition of work*."[42] 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."[43]

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33 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*).

34 See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

35 See id. (same-sex harassment); 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.").

36 See Baldwin v. Foxx, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (E.E.O.C. July 15, 2015).

37 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

38 See, e.g., Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Zarda v. Altitude Express, __ F.3d __, 2018 U.S. App. LEXIS 4608 (Feb. 26, 2018) (en banc).

39 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.

40 See Angie Andera, Here's The Real Difference Between Sexual Harassment & Sexual Assault, Since Some People Still Don't Get It, Women.com (Oct. 23, 2017), https://www.women.com/angie/lists/what-is-the-difference-between-sexual-harassment-and-assault-assault.

41 Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 32 (1979).

42 Id. at 32.

43 Id.

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."[44] 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.[45]

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,[46] the distinction between "quid pro quo" and "hostile work environment" sexual harassment—has gained wide acceptance, including by the EEOC and the Supreme Court. But the road to legal recognition has been long and winding. The following Section briefly charts that path.

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 . . . .[47]

According to a persistent myth, the word "sex" was added to Title VII at the last minute by a congressman from Virginia who opposed civil rights for African-Americans and sought to scuttle the bill by broadening it to cover gender. 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.[48] 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

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[44] Id. at 40.
[45] Id.
[46] MacKinnon's view that sexual harassment can occur only "in the context of a relationship of unequal power" is not as uniformly accepted. Compare id. 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 J. 333, 335 (1990) ("Incorporating abuse of power into the definition . . . seems unduly limiting.").
[47] 42 U.S.C. § 2000e-2(a).
[48] Rachel Ostermant, 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).

the civil rights law.[49] 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.[50] (The period for filing a charge is extended to 300 days when a state or local agency enforces an overlapping employment discrimination law.[51]) If the EEOC finds in favor of the employee, it first seeks to settle the charge with the employer,[52] and if that fails, the commission can sue the employer in federal court.[53] 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.[54] If the EEOC instead makes a "no probable cause" determination or dismisses the charge for procedural irregularities, it will also send the employee a "dismissal and notice of rights" that informs the employee of his or her right to sue within 90 days.[55]

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.[56] (In 2016, the figure was a slightly lower but still substantial 29.4%.[57]) 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 is illustrative of 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. 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. At lunch, according to Tomkins, the supervisor told her that she should have sex with him if she wanted to continue their working relationship. 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. Tomkins did complain—and was transferred to an inferior position in another department before being fired in January 1975.[58]

Tomkins filed a charge with the EEOC, which found no probable cause—thus allowing her to sue in federal court. The district court dismissed Tomkins's claim that her supervisor's

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49 Id.

50 29 C.F.R. § 1601.13.

51 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 (2002).

52 29 C.F.R. § 1601.24.

53 29 C.F.R. §§ 1601.27; 1601.29.

54 29 C.F.R. § 1601.19.

55 29 C.F.R. § 1601.18.

56 Equal Employment Opportunity Commission, Shaping employment discrimination law (July 30, 2016), www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html.

57 Equal Employment Opportunity Commission, Charge Statistics, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

58 These facts are drawn from the federal district court and appellate opinions in Tomkins's case. See Tomkins v. Pub. Serv. Elec. & Gas Co. (*Tomkins I*), 422 F. Supp. 553, 555 (D.N.J. 1976); Tomkins v. Pub. Serv. Elec. & Gas Co. (*Tomkins II*), 568 F.2d 1044, 1045-46 (3d Cir. 1977) (reversing the judgment in *Tomkins I*).

conduct was actionable under Title VII (though it allowed her to pursue a claim against PSE&G for her firing). As the district 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 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.[59]

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 already 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."[60] 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."[61] 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.[62] And in 1980, the EEOC for the first time issued guidelines that defined sexual harassment as a form of sex discrimination.[63] Significantly, the 1980 guidelines recognized both quid pro quo

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[59] *Tomkins I*, 422 F. Supp. at 556-57 (internal quotation marks omitted). For other early cases holding that sexual harassment did not constitute sex discrimination, see Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975); and Miller v. Bank of Am., 418 F. Supp. 233, 236 (C.D Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979).
[60] 413 F. Supp. 654 (D.D.C. 1976).
[61] Id. at 657–58.
[62] 561 F.2d 983 (D.C. Cir. 1977).
[63] 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, __ (Nov. 10, 1980), 29 CFR § 16044.11(a).

sexual harassment and hostile work environment sexual harassment as unlawful employment practices under Title VII.[64]

C. Employer Liability for Sexual Harassment

While the EEOC guidelines were quickly embraced by lower federal courts,[65] it was not until 1986 that the Supreme Court explicitly recognized sexual harassment as a form of sex discrimination under Title VII. That decision, in *Meritor Savings Bank v. Vinson*,[66] 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. Vinson said that she initially refused but later acquiesced out of fear that she would otherwise lose her job. 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 40 or 50 times. 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." She said that she broke off the relationship when she "started going with a steady boyfriend," and she was fired the following year.[67] She subsequently sued the bank and the branch manager under Title VII, lost in district court,[68] but prevailed upon the D.C. Circuit to reverse the district court's decision.[69] 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.[70] It added that such conduct is actionable if the harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[71] 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."[72] The Court also rejected the notion that Vinson's "voluntary" submission to intercourse with the branch manager vitiated her sexual harassment claim. "The correct inquiry," according to the Court, "is whether [the victim] by her conduct indicated that the

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64 See id.
65 See, e.g., Bundy v. Jackson, 641 F.2d 934, 934-44 (D.C. Cir. 1981); Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983).
66 477 U.S. 57 (1986).
67 Id. at 59-61.
68 Vinson v. Taylor, 1980 U.S. Dist. LEXIS 10676 (D.D.C. 1980).
69 Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).
70 477 U.S. at 67.
71 Id. (alterations and internal quotation marks omitted).
72 Id.

alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[73]

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.[74] As Justice Marshall argued, "it 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."[75] 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."[76] 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.[77]

In the dozen years that followed *Meritor*, federal courts adopted conflicting standards for determining when an employer should be liable for sexual harassment by a supervisor,[78] 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."[79] A tangible employment action, the Court said, is one that constitutes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[80] 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

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73 Id. at 68.
74 Id. at 78 (Marshall, J., concurring in the judgment).
75 Id. at 76-77.
76 Id. at 72.
77 Id.
78 Scott B. Goldberg, Discrimination by Managers and Supervisors: Recognizing Agent Liability under Title VII, 143 U. Penn. L. Rev. 571 (1994).
79 See Faragher, 524 U.S. 775 (1998); Ellerth, 524 U.S. 742 (1998).
80 Ellerth, 524 U.S. at 761.

supervisor's harassment culminates in a tangible employment action….[81]

This affirmative defense—now known as the *Ellerth/Faragher* defense—is tailored to cases of harassment by supervisors, whereas employers can more easily escape liability when the harasser is a co-worker. In such cases, employer liability is governed by a negligence standard, which means that employers would be liable only when they knew or should have known of the harassment, but failed to take prompt and effective remedial action.[82]

At the same time as it limited the range of circumstances in which supervisor and co-worker 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."[83] The Court did not fully define the contours of that class, but it said that a company's president was "indisputably" within the category.[84] It also approvingly cited lower court decisions recognizing strict liability when the harasser is an owner, proprietor, partner, corporate officer,[85] or a supervisor "holding a sufficiently high position 'in the management hierarchy of the company for his actions to be imputed automatically to the employer.'"[86] Lower courts have applied this last rule—known as the alter ego doctrine—in cases of high-ranking corporate officials below the officer level.[87] Beyond evidence of high rank, the key is to show that the employee exercised "exceptional authority and control" within the organization.[88]

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

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81 Id. at 765; Faragher, 524 U.S. at 807–08.
82 See Faragher, 524 U.S. at 799 (noting that lower courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard"); see also 29 C.F.R. § 1604.11 (d) (2002).
83 See Faragher, 524 U.S. at 789; see also Ellerth, 524 U.S. at 758 (recognizing that under agency law principles, corporation is liable for torts committed by employee outside scope of employment "where the agent's high rank in the company makes him or her the employer's alter ego").
84 See Faragher, 524 U.S. at 789 (citing Harris v. Forklift Sys., 510 U.S. 17 (1993)).
85 See id. at 790 (citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)).
86 Id. at 789-90 (quoting Torres v. Pisano, 116 F.3d 625, 634-35 & n.11 (2d Cir. 1997)).
87 Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232-33 (10th Cir. 2000) (alter ego liability applies in case of senior vice president of consumer lending who had hiring/firing and supervisory authority over employees in one department, ultimate authority to disapprove all consumer loans, and who reported directly to president); Townsend v. Benjamin Enters., 679 F.3d 41, 53-55 (2d Cir. 2012) (jury question as to whether alter ego liability applies in case of vice president who "exercised a significant degree of control over corporate affairs" and whose family held all corporate shares).
88 Helm v. Kansas, 656 F.3d 1277 (11th Cir. 2011).

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.[89] 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.[90] The availability of such damages was not unlimited, however. Proponents of tort reform insisted on statutory caps on damage awards based on the size of the company.[91] The size 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.[92]

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 damage caps.[93] Critics argue that the caps pose a deterrence problem, in addition to a compensation problem: 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 under-compensation 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.[94]

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

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

[90] 42 U.S.C.A. § 1981a (1992). Note that these caps do not apply for victims of racial or age discrimination.

[91] See President Bush's Statement on Signing the Civil Rights Act of 1991, 226 Daily Lab. Rep. (BNA), at D-1 (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.

[92] § 1981a(b)(3).

[93] On November 26, 1991, Senator 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. S18,337. On that same day Senator Kennedy introduced the Equal Remedies Act of 1991, which would have done away with all damages caps for victims of discrimination. Id. at S. 18,357.

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

of the alleged harm, or 300 days if the victim also files a charge with a state or local agency.[95] This period of limitations is shorter than that which governs most civil actions, including torts and breach of contract,[96] and also much shorter than the limitations period for other anti-discrimination laws.[97]

For victims of supervisory harassment, the *Faragher-Ellerth* defense imposes even more stringent reporting obligations. Under the second prong of the defense, employers must show that the plaintiff-employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[98] And prompt reporting is a key part of the reasonableness requirement. For example, one court found a seven-day delay unreasonable, while others have found delays as short as two months to be unreasonable.[99]

This truncated reporting period imposes substantial hurdles for victims of harassment, many of whom may not realize that they have suffered harassment right away. 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,[100] may worry about social and professional retaliation,[101] and/or may harbor

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95 42 U.S.C. 5 2000e-5(e).

96 See, e.g., N.Y. Civ. Prac. Laws & Rules § 201 et seq. (providing that the statute of limitations for breach of contract is six years); Wultz v. Bank of China Ltd., 306 F.R.D. 112 (S.D.N.Y. 2013) (relying on the one-year statute of limitations for intentional torts).

97 See, e.g., 42 U.S.C.A. § 1981 (providing a four-year statute of limitations for victims 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 Livingston, The Civil Rights Act of 1991, Twenty-Five Years After, ABA Section of Labor & Employment Law (Nov. 9, 2016), https://www.americanbar.org/content/dam/aba/events/labor_law/2016/11/annual/papers/16b.authcheckdam.pdf.

98 Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807–08.

99 See Marsicano v. Am. Soc'y of Safety Eng'rs, No. 97-C7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998) (finding a seven-day delay unreasonable); Pinkerton v. Colorado Dept. of Trans., 563 F.3d 1052 (10th Cir. 2009) (finding a reporting delay of approximately two months unreasonable); Thornton v. Fed. Express Corp., 530 F.3d 451, 457 (6th Cir. 2008) (finding a reporting delay of approximately two months unreasonable); Walton v. Johnson & Johnson Svcs., Inc., 347 F.3d 1272, 1277, 1290–91 (11th Cir. 2003) (finding a reporting delay of approximately two and a half months unreasonable).

100 Mindy Bergman et al., The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment, 87 J. Applied Psychology 230 (2002); U.S. Merit Sys. Prot. Bd., Sexual Harassment in the Federal Workplace: Trends, Progress, and Continuing Challenges (1995) (finding that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as hostility against the victim).

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

doubts about the confidentiality of internal grievance procedures.[102] In addition, the consequences of an investigation may be unknown or unsatisfactory to employees, further discouraging reporting.[103] 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.[104]

3. 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 collection action that has been the hallmark feature of "#MeToo."[105] 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.

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

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

103 Written Testimony of Mindy E. Bergman, Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_bergman.cfm. Psychological research confirms that victims view reporting sexual harassment as the least desirable response available to them. 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 (separation from harasser or situation). 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 co-workers about the harassment. The most infrequent response "is to seek institutional/ organizational relief. Victims apparently turn to such strategies as a last resort when all other efforts have failed." 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 117, 119 (1995).

104 See Joanna Grossman, Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law, 95 B.U. L. Rev. 1029 (2015).. One study found that gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of victims who experienced it. EEOC Select Task Force Study (citing K. A. Lonsway et al., Sexual Harassment in Law Enforcement: Incidence, Impact and Perception, 16 Police Quarterly 117 (Jun. 2013).

105 See, e.g., Tristin K. Green, The Future of Systemic Disparate Treatment Law, 32 Berkeley J. Emp. & Lab. L. 395, 395 (2011).

decision in *Wal-Mart Stores, Inc. v. Dukes*,[106] which involved a class of 1.5 million Wal-Mart employees who claimed that the company's pay practices discriminated against women in violation of Title VII. In a 5-4 ruling, the Supreme Court held that the Wal-Mart employees could not pursue their claims as a class action. 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."[107] 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.

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.[108] 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 class certification stage, requiring them to develop a detailed and nuanced factual record as a prerequisite to certification.[109]

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.[110] In other cases, employees have been able to surmount the new certification threshold.[111] And even when the class action mechanism is unavailable, harassment victims may use non-class joinder procedures so that they can litigate their claims collectively.[112]

4. Arbitration

106 564 U.S. 338 (2011).
107 Id. at 350.
108 See, e.g., Suzette M. Malveaux, How Goliath Won: The Future Implications of Dukes v. Wal-Mart, 106 Nw. U. L. Rev. 34, 37 (2011) ("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.").
109 Katherine Lamm, Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes, 50 Harv. C.R.-C.L. L. Rev. 153 (2015).
110 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, Workplace Class Action Blog (Apr. 9, 2017), https://www.workplaceclassaction.com/2017/04/court-uses-novel-issue-certification-device-to-sidestep-individualized-issues-otherwise-precluding-class-certification.
111 See, e.g., Leyva v. Medline Industries, 716 F.3d 510, 511 (9th Cir. 2013) (certifying a class of employees bringing wage and hour claims, despite the fact that each class member's damages were different, because the evidence suggested that the employer could calculate the information in a computer database).
112 See Fed. R. Civ. P. 20(a)(1) ("Persons may join in one action as plaintiffs if: (A) they 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.").

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.[113] 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.[114] While the *Epic Systems* case involved claims under the Fair Labor Standards Act, the Court's decision applies four square 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.[115]

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 still will 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.[116] And not only do arbitration clauses complicate employees' ability to vindicate their rights in court, but these provisions also make it more difficult for others to learn about employee harassment, as most arbitration proceedings are subject to confidentiality requirements. 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,[117] 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 strict limitations periods, as well as the limited availability of the class action mechanism in federal court. 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[118]—have enacted human rights laws that allow for uncapped compensatory and punitive damages in cases of sexual harassment and other forms of

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113 Alexander J.S. Colvin, Economic Policy Inst., The Growing Use of Mandatory Arbitration 1–2 (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf.
114 584 U.S. __ (2018) (slip op.).
115 Id. at __ (slip op. at 2).
116 Katherine V.W. Stone and Alexander J.S. Colvin, Economic Policy Inst., The Arbitration Epidemic 20 tbl.1 (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf.
117 EEOC v. Waffle House, Inc., 534 U.S. 279 (2001).
118 See Barry A. Herstein, 50 Ways From Sunday—Can a Corporation Have a Successful Nationwide Policy That Is Consistent With State and Local Laws?: Survey of State EEO and Related Laws, Including Significant Developments and Jury Verdicts 14, 31, 88, 144 (Morgan, Lewis & Bockius LLP, 2009), http://apps.americanbar.org/labor/eeocomm/mw/Papers/2009/data/papers/19.pdf.

employment discrimination. 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,[119] and the statute of limitations under the New York state and city human rights laws is three years from the date of harassment.[120] Thus, anchor Gretchen Carlson could (and did[121]) 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 for $20 million that far exceeded what would have been available under Title VII.[122]

Sexual harassment victims also have scored some victories in tort law actions against perpetrators—specifically on claims of assault, battery, and intentional infliction of emotional distress.[123] However, assault and battery claims require either reasonable apprehension of immediate harmful or offensive conduct (assault) or actual contact (battery), thus providing no remedy in cases where harassment takes a non-physical form. Moreover, emotional distress claims tend to succeed only in the most egregious circumstances;[124] as one practitioner notes, "[m]ost courts recognize that ordinary employment suits involving sexual discrimination will not establish a cause of action for intentional infliction of emotional distress."[125] Even when tort law claims against perpetrators of sexual harassment succeed, courts often will 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.[126]

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119 See id. at 97.

120 N.Y. Civ. Prac. L. & R. § 214; see 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.

121 See Compl. at 7, Carlson v. Ailes, No. __ (N.J. Sup. Ct. filed July 6, 2016), https://www.smithmullin.com/wp-content/uploads/2016/07/Carlson-Complaint.pdf.

122 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.

123 See, e.g., Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1439 (10th Cir. 1997) (battery). 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 Bennett Capers, Real Rape Too, 99 Cal. 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."); 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.").

124 See, e.g., Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 611, 613-14 (5th Cir. 1999) (sufficient evidence to support verdict against supervisor for intentional infliction of emotional distress where employee testified that 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").

125 Stephanie D. Gironda, Employment Torts 2-3 (ABA Section of Labor & Employment Law—2009 Labor and Employment Law CLE Conference, Washington, D.C., Nov. 2009).

126 See, e.g., Skidmore, 188 F.3d at 614-15, 617 (no employer liability); Cornwall v. Nat'l Westminster Bank, 1996 NYLJ LEXIS 2505, *24 (N.Y. Sup. Ct. Sept. 17, 1996) ("Where, as here, a tort is

Notably, none of these regimes—Title VII,[127] 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. Second, negative publicity associated with sexual harassment scandals may cause harm to a company's reputation. Third, sexual harassment potentially interferes with a company's ability to hire and retain talented employees who are repelled by the hostile work environment at the firm. Fourth, harassment may impede the productivity of employees who are its victims, or who try to steer clear of settings where they might be victimized. In a handful of cases, shareholders have turned toward state corporate law and/or federal securities law in order to obtain redress for 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.[128] 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 seven more companies—American Apparel, Hewlett-Packard, CTPartners, Signet Jewelers, Twenty-First Century Fox, Liberty Tax, and Wynn Resorts—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.

A. Canaries in the Coal Mine?

1. ICN

Valeant Pharmaceuticals International made headlines—and enemies—on September 2015 when the firm raised the per-tablet price of a drug that treats a parasitic infection from $13.50 to $750 overnight.[129] 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

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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.").

127 See Thompson v. North American Stainless, 562 U.S. 170, 176-77 (2011) ("If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow. For example, 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.").

128 See White v. Panic, 793 A.2d 356, 359 (Del. Ch. 2000), aff'd, 783 A.2d 543 (Del. 2001).

129 See Andrew Pollack, Drug Goes From $13.50 a Tablet to $750, Overnight, N.Y. Times (Sept. 20, 2015), https://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html.

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.[130] Six women told *U.S. News* of repeated incidents in which Panic propositioned them, groped them, or forcibly kissed them.[131] Board members said that they knew nothing about Panic's behavior for years. Even after they did learn, they kept him on at the company and continued to compensate him handsomely.[132]

The *U.S. News* story prompted an ICN shareholder, Andrew White, to file a derivative action against the company, Panic, and 14 other board members.[133] 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.[134] The company guaranteed a $3.5 million loan to Panic so that he could pay a settlement in a paternity suit, and the only collateral that Panic posted for the loan were out-of-the-money stock options.[135] 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.[136]

The Delaware Chancery Court dismissed White's complaint on the grounds that White had not made out a case for "demand excusal." We discuss the criteria for demand excusal at greater detail below, but for 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.[137] The Delaware Supreme Court affirmed, noting the "sparse" nature of the allegations against the board.[138] 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 *White v. 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 Stonecipher had carried on an affair with a subordinate.[139] Sara Lee Corp.'s CEO, Steven McMillan, resigned that same year amid allegations that he offered a woman a job at the company on the condition that

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130 Miriam Horn, Sex and the CEO, U.S. News & World Report, July 6, 1998, at 32.
131 Id.
132 Id.
133 White, 793 A.2d at 359.
134 Id. at 363.
135 Id.
136 Id. at 368-69.
137 See id. at 367-71.
138 783 A.2d at 552.
139 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/?utm_term=.557d44915d21.

she have sex with him.[140] The board of the hotel chain Starwood ousted its CEO in 2007 after he sent sexually suggestive e-mails and text messages to a female employee.[141] 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 H-P contractor.[142] 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.[143] 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.[144] That same month, Best Buy forced out CEO Brian Dunn 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."[145]

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.[146] Schulze did, however, return to the company the following year as "chairman emeritus,"[147] 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[148] (and specifically, the SEC's Rule 10b-5, which applies to untrue statements of

140 Susan Chandler, CEO Indiscretions No Longer Overlooked by Boards, Chi. Tribune (Mar. 8, 2005), http://articles.chicagotribune.com/2005-03-08/business/0503080224_1_harry-stonecipher-female-boeing-executive-philip-condit.
141 Marcus Baram, Misconduct in the Corner Office, ABC News (Apr. 11, 2007), http://abcnews.go.com/Business/story?id=3027563&page=1.
142 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.
143 Joann S. Lublin & Christopher Weaver, CEO Sought Nod for Romance, Wall St. J. (May 23, 2012), https://www.wsj.com/articles/SB10001424052702304791704577420681311173856.
144 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-business/2015/09/03/Former-Highmark-CEO-sues-insurer-for-32-million/stories/201509030183.
145 Erin Carlyle, Best Buy CEO Brian Dunn Gets $6.6 Million Severance Package After "Friendship" With 29-Year-Old Employee, Forbes.com (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.
146 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.
147 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.
148 15 U.S.C. § 78i.

material fact and material omissions[149]). 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.[150]

The district court dismissed the shareholders' complaint,[151] and a Ninth Circuit panel unanimously affirmed.[152] 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 [policy] by the CEO or anyone else."[153] The Ninth Circuit also noted in a footnote that it was "somewhat perplexed" by the shareholders' theory of the case. 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.[154]

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[155] and now makes roughly that amount each year as CEO of Oracle.[156] 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, 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

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149 17 C.F.R. 240.10b-5(b).
150 Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268, 1273-75 (9th Cir. 2017).
151 Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 52 F. Supp. 3d 961 (N.D. Cal. 2014).
152 845 F.3d at 1278-79.
153 Id. at 1278.
154 Id. at 1277 n.3.
155 See Julie Bort, A Rare Glimpse Inside The Life And Mind Of Oracle CEO Mark Hurd, Business Insider (Jan. 25, 2015), http://www.businessinsider.com/inside-the-mind-of-oracle-ceo-mark-hurd-2015-1. 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, 2012 WL 2366448 (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.
156 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; 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.

writing a profile of him.[157] In 2005, three former female employees sued him for sexual harassment,[158] with another female employee filing a complaint with the EEOC against Charney the following year.[159] In 2010, the EEOC found the company liable for discriminating against women "as a class" by "subjecting them to sexual harassment."[160] Five more female employees filed harassment lawsuits against Charney the following year.[161] All the while, American Apparel's board left Charney in charge.

In 2010, shareholders of American Apparel filed a derivative action against the company, Charney, the company's chief financial officer, and several current and former directors alleging (among other claims) breaches of fiduciary duties related to sexual harassment at the company.[162] 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*. 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."[163] The court further noted that the EEOC's finding of sexual harassment at the company "lends some credibility to plaintiffs' claims."[164] 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."[165] As in *White v. Panic*, the plaintiffs' failure to disqualify the directors meant that the decision whether to sue Charney was left to the board.

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.[166] One month later, two American Apparel shareholders filed fresh derivative actions against the company, Charney, and former and current directors,[167] but these claims were also unsuccessful. According to the district court, the cascade of sexual harassment claims against Charney

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[157] Jamie 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.

[158] Id.

[159] 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.

[160] Id.

[161] Id.

[162] In re Am. Apparel S'holder Derivative Litig., No. CV 10-06576 MMM (RCx), 2012 U.S. Dist. LEXIS 146970 (C.D. Cal. July 31, 2012).

[163] Id. at *99-100.

[164] Id. at *102.

[165] Id. at *100.

[166] 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.

[167] In re Am. Apparel, Inc., No. CV-14-05230-MWF (JEMx), 2015 U.S. Dist. LEXIS 191466, at *24-25 (C.D. Cal. Apr. 28, 2015), aff'd, 696 Fed. Appx. 848 (9th Cir. 2017).

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."[168] 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."[169]

The Ninth Circuit again affirmed the district court's decision, this time without a published decision.[170] American Apparel, meanwhile, continued to suffer reputationally and financially. The company has twice filed for bankruptcy since Charney's departure.[171]

4. CTPartners

At around the same time as 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."[172] According to the *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." 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."[173] The *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.[174]

On the day that the *Post* published its report, CTPartners' stock price dropped nearly 25 percent.[175] 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.[176] 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

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168 Id. at *60.
169 Id. at *52.
170 696 Fed. Appx. 848 (9th Cir. 2017).
171 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.
172 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.
173 Id.
174 Id.
175 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.
176 See Compl., Zinno v. CTPartners Exec. Search Inc., No. 15-1476 (S.D.N.Y. filed Feb. 25, 2015); Amended Compl., Lopez v. CTPartners Exec. Search Inc., No. 15-1476 (S.D.N.Y. filed June 15, 2015).

were misleading, and that the company's failure to disclose the "true nature" of its work environment ran afoul of its affirmative disclosure obligations.[177]

In March 2016, a federal district court in the Southern District of New York granted CTPartners' motion to dismiss the plaintiffs' complaint. 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. The court also concluded that the company had no affirmative duty to disclose sexual harassment claims under federal securities laws.[178] But even though it escaped liability, the consequences for CTPartners were devastating: just over six months after the *Post* article, the firm filed for Chapter 11 bankruptcy protection.[179]A Chicago-based rival purchased some of the company's assets, but the company's shareholders emerged empty-handed.[180]

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 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."[181] 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."[182] The *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."[183] The list of executives who participated in the practice included the company's CEO Mark Light.[184]

Sexual harassment claims against Signet had been pending for nearly a decade by the time that the *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

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177 Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp. 3d 12, 26-38 (S.D.N.Y. 2016).
178 Id.
179 Press Release, CTPartners Exec. Search. Inc., CTPartners Executive Search (CTP) Announces Notice of Default Receipts from JPMogan, Phoenix Life Insurance (June 26, 2015), http://bit.ly/2EYzm7b.
180 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.
181 Drew Harwell, Hundreds Allege Sex Harassment and Discrimination at Kay and Jared Jewelry Company (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.
182 Id.
183 Id.
184 Id.

allegations.[185] The *Post* story changed all of that, and—unsurprisingly—Signet's share price plummeted: the stock dropped more than 12 percent in a single day.[186] The company criticized the *Post* report as "distorted and inaccurate,"[187] but that did little to mitigate the damage. The stock lost nearly 40% of its value over the course of the calendar year.[188]

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.[189] The first suit—a class action complaint filed in federal district court at the end of March—seized on statements made by the company between 2013 and 2016 acknowledging the existence of employment discrimination claims but denying all allegations.[190] 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."[191] The complaint asserted violations of Section 10(b) of the Securities Exchange Act[192] as well as Section 20(a),[193] which imposes joint and several liability on controlling persons who aid and abet securities law violations.

The fourth and most recent amended class action complaint in the case 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."[194] 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."[195] The consolidated case has not yet been resolved: briefing at the dismissal stage is scheduled to conclude in March 2018, with a decision expected sometime this year.[196]

6. Fox News

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185 Id.
186 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.
187 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.
188 See NYSE: SIG, Google Finance, https://www.google.com/search?q=NYSE:SIG (last visited Feb. 2, 2017).
189 See *Signet* Complaint.
190 Class Action Compl. at 6-17, Mikolchak v. Signet Jewelers Limited et al, Docket No. 1:17-cv-02846, Doc. No. 1 (S.D.N.Y. filed Mar. 31, 2017).
191 Id. at 8-9 (quoting press release).
192 15 U.S.C. § 78i.
193 15 U.S.C. § 78t(a).
194 *Signet* Complaint at 7.
195 Id. at 8.
196 Id.

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.[197] 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 Twenty-First Century Fox board.[198] 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,[199] that Murdoch and others at Twenty-First Century Fox allowed Fox News anchor Bill O'Reilly to harass several female employees,[200] and that the company paid over $55 million to settle claims of sexual harassment and racial discrimination.[201] 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;[202] a drop in advertising revenue and ratings; 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.[203]

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' estate.[204] The settlement also provided for a payment of attorneys' fees to the plaintiffs' counsel,[205] 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.[206]

The Twenty-First Century Fox settlement led one corporate governance expert to predict that "we'll see a lot more derivative lawsuits and share price lawsuits over sexual harassment cases in coming months."[207] We share that expectation, though the failure of the

[197] See *Murdoch* Complaint, supra note 17.
[198] Id. at 1.
[199] Id. at 3.
[200] Id. at 47-48.
[201] Id. at 5.
[202] Id. at 49.
[203] Id. at 50.
[204] 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.
[205] Stipulation and Agreement of Settlement, Compromise, and Release 26-28, City of Monroe Employees' Retirement System v. Rupert Murdoch, No. 2017-0833 (Del. Ch. filed Nov. 20, 2017).
[206] Non-Monetary Relief, Compromise, and Release 26-28, City of Monroe Employees' Retirement System v. Rupert Murdoch, No. 2017-0833 (Del. Ch. filed Nov. 20, 2017).
[207] Anousha Sakoui & Christie Smythe, Fox News Creates Workplace Council to Settle Harassment Suit, Bloomberg (Nov. 20, 2017), https://www.bloomberg.com/news/articles/2017-11-20/fox-

earlier suits against ICN, Hewlett-Packard, and American Apparel also suggests that such 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 that 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.[208] "Even by the standards of the recent deluge of sexual misconduct revelations, the situation at Liberty is shocking," the complaint charged.[209] By February 2018, a second CEO would be ousted from the company as Liberty Tax's stock price continued to tumble amid scandal.[210]

The problems at Liberty Tax started long before 2017, though they only came to light in the second half of that year. 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. 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.[211] 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. According to news reports, Skadden's probe revealed that Hewitt had engaged in relationships with as many as ten employees and had used company resources to provide favors to several of his romantic partners. 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.[212] Remarkably, employees continued to overhear Hewitt having sex in his office even while the Skadden investigation was ongoing. In September, the board voted to terminate to Hewitt, paid him more than $800,000 in severance, and began to negotiate to repurchase his controlling stake in the

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agrees-to-workplace-council-to-settle-harassment-litigation (quoting Kirk O. Hanson, executive director of the Markkula Center for Applied Ethics at Santa Clara University).

208 *Hewitt* Complaint.

209 Id. at 1.

210 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.

211 See Pierceall, supra note 19.

212 See id.

company.[213] On the day that a Virginia newspaper first reported details of Skadden's findings, Liberty Tax's stock price dropped by 17 percent.[214]

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 retains the power to choose five of the company's nine directors, and he has made himself one of the five.[215] His majority control over the board effectively allows 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.[216]

Meanwhile, the Philadelphia-based pension fund's derivative action against Hewitt moves forward in the Delaware Court of Chancery. The complaint alleges, 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."[217] 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."[218]

8. Wynn Resorts

The latest publicly traded company to emerge as the subject of a serious sexual harassment scandal is Wynn Resorts, a developer and operator of high-end hotels and casinos.[219] 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.[220] 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. Several other female employees said that Wynn frequently exposed himself to them. Another said that Wynn grabbed her waist and told her to kiss him. A former manicurist at a Wynn-owned hotel said that Wynn forced

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213 Id.; see also Letter from John Garel to Bd. of Directors, Liberty Tax, Inc. (Nov. 10, 2017), https://www.sec.gov/Archives/edgar/data/1528930/000117184317006901/exh_991.htm.
214 Google Finance, TAX, https://www.google.com/search?q=NASDAQ:TAX&tbm=fin (see results for Nov. 8, 2017).
215 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.
216 See Pierceall, supra note 210.
217 *Hewitt* Complaint at 26.
218 Jeff Montgomery, Chancellor Won't Expedite Liberty CEO Misconduct Suit, Law360 (Jan. 16, 2018).
219 See Berzon et al., supra note 20.
220 Id.

her to have sex with him. The manicurist reportedly complained to the company's human resources department and later settled claims against Wynn for $7.5 million.[221]

News of the allegations against Wynn caused the company's share price to plunge, dropping ten percent in one day.[222] In response, the Wynn Resorts board formed a special committee with the purpose of investigating the allegations. Gambling authorities in Macau and Nevada also opened investigations. Two weeks later, Wynn resigned.[223]

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.[224] 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,[225] and that the board knew about the settlement and other allegations against Wynn by 2015.[226] 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.[227] 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.[228]

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.[229] Nevada law is generally considered to be less friendly to shareholder-plaintiffs than Delaware law.[230] In Nevada, the default rule is that directors and officers of Nevada corporations may

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221 Id.
222 *Wynn* Complaint at 20.
223 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.
224 *Wynn* Complaint at 20.
225 Id. at 15.
226 Id. at 12.
227 Id.
228 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.
229 See id. at 3. Signet Jewelers is incorporated in Bermuda, which presumably is the reason why 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.
230 See, e.g., Michal Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 98 Va. L. Rev. 935 (2012); Jens Dammann, How Lax Is Nevada Corporate Law? A

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."[231] While Wynn's alleged conduct appears to be both intentional 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.

B. The Legal Framework

As illustrated in the previous Section, shareholder lawsuits stemming from corporate sexual misconduct have become increasingly common in recent years, and as the #MeToo movement continues to gain momentum, we predict that the trend will continue. Here, we take stock of the legal tools available to investors seeking redress for sexual misconduct that occurs at the firms in which they own shares. We focus in particular on the corporate law of Delaware, where more than 66 percent of Fortune 500 firms are incorporated,[232] 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 decision-making 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.[233]

The duty of care mandates that corporate fiduciaries exercise informed business judgment in their stewardship of the company.[234] Essentially, the duty of care requires directors and officers to act with reasonable information and to proceed with a critical eye in assessing such information in order to protect the interests of the corporation and its shareholders.[235] The duty of care does not, however, mean that Delaware courts will second-guess every business decision that directors or officers make. Under the "business judgment

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Response to Professor Barzuza, 99 Va. L. Rev. In Brief 1, 10 (2013) (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).

231 Nev. Rev. Stat. Ann. § 78.138(7).

232 Delaware Division of Corporations 2015 Annual Report, https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf (last visited Feb. 4, 2018).

233 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). But if the shareholders are permitted to proceed with their action, they will be entitled to reimbursement for the expenses associated with the claim. However, any proceeds from the action will be remitted to the corporation. See Ralph C. Ferrara, Kevin T. Abikoff, & Laura Leedy Gansler, Shareholder Derivative Litigation: Beseiging the Board § 14.06, Attorneys' Fees and Incentive Awards (2005).

234 Leo Strine, Jr., et al., Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, 98 Geo. L.J. 629 (2010).

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

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.[236]

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."[237] Finally, Delaware (like most other states[238]) 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.[239]

The duty of loyalty, by contrast, has traditionally been immutable under Delaware law.[240] The duty of loyalty requires fiduciaries to "exercise their authority in a good-faith attempt to advance corporate purposes."[241] 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.[242] 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.[243]

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236 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 v. Lewis, 473 A. 2d 805, 812 (Del. 1984).

237 See, e.g., Del. Code Ann. tit. 8, § 145(a) (2017).

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

239 See id. § 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).

240 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, Colum. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822248.

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 Auriga Capital Corporation v. Gatz Properties, LLC, 2012 WL 361677 (Del. Ch. Jan. 27, 2012); 6 Del. C. § 18-1101(c).

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

242 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 the company, he is permitted to rely on the business judgment rule….").

243 See 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

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."[244] 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."[245] 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."[246] Moreover, a "de minimis" principle may apply[247]: for example, 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."[248]

Second, directors can be held liable for breach of fiduciary duty when they fail to exercise oversight of a corporation—but only when their failure is "sustained or systematic."[249] This line of precedent originated from the Delaware Chancery Court's 1996 decision *In re Caremark International Inc. Derivative Litigation.*[250] In that case, Caremark, a healthcare corporation, was indicted in federal court on various charges related to illegal kickbacks allegedly paid to a physician in exchange for prescribing Caremark-delivered drugs.[251] Caremark settled the federal litigation by pleading guilty to one count of mail fraud, paying criminal fines, and making a monetary settlement of the civil claims. It also settled private party lawsuits brought by insurance company payors who claimed damages arising out of Caremark's allegedly improper business practices.[252] In total, Caremark paid about $250 million to resolve these claims.[253]

In the wake of that litigation, shareholders filed five derivative suits against Caremark's board of directors, seeking to hold the directors liable for the losses Caremark had suffered. The parties eventually settled, but in approving the settlement, Chancellor William Allen of

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"liability-free" jurisdiction for managers. Barzuza, Market Segmentation, 98 Va. L. Rev. 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) (2003).

244 In re Goldman Sachs Grp., Inc. S'holder Litig., Civil Action No. 5215-VCG, 2011 Del. Ch. LEXIS 151, at *65 (Ch. Oct. 12, 2011); see Guttman, 823 A.2d at 506 ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.").

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

246 Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 2.01 (Mar. 2018 update) (West).

247 Id.

248 Stephen Bainbridge, Can Directors of Corporations Be Held Liable to Shareholders When the Corporation Breaks the Law? (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#_ftnref11.

249 Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006).

250 698 A.2d 959 (Del. Ch. 1996).

251 Id.

252 Id.

253 Id. at 960-61.

the Delaware Chancery Court took the opportunity to describe the oversight responsibilities of corporate boards. In addition to liability for ill-advised decisions, according to Chancellor Allen, "liability 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."[254] Chancellor Allen concluded that the board of directors' duty to be attentive to the business of the corporation "includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."[255]

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,[256] meaning that such claims are safe from exculpation under § 102(b)(7). 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."[257] 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,'"[258] 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."[259]

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.[260] 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."[261]

Delaware case law provides two different frameworks for assessing demand futility. The first, articulated by the Delaware Supreme Court in the 1984 case *Aronson v. Lewis*,[262] applies when the derivative suit challenges a decision made by the same board that would consider

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254 Id. at 968.
255 Id. at 970.
256 Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003) ("Although the *Caremark* decision is rightly seen as a prod towards the greater exercise of care by directors in monitoring their corporations' compliance with legal standards, by its plain and intentional terms, 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.").
257 In re Caremark, 698 A.2d at 967.
258 Horman v. Abney, No. 12290-VCS, 2017 Del. Ch. LEXIS 13, at *20 (Ch. Jan. 19, 2017) (quoting Stone, 911 A.2d at 370).
259 Id. (quoting Reiter, 2016 Del. Ch. LEXIS 158, 2016 WL 6081823, at *8 (Del. Ch. Oct. 18, 2016)).
260 See Del. Ch. Ct. C.P.R. 23.1; Spiegel v. Buntrock, 571 A.2d 767, 773 (Del. 1990).
261 Kamen v. Kemper Fin. Serv. Inc., 908 F.2d 1338, 1343 (7th Cir. 1990), rev'd on other grounds, 500 U.S. 90 (1991).
262 473 A.2d 805 (Del. 1984).

the demand.[263] The second, announced nine years later in *Rales v. Blasband*,[264]applies "where the board that would be considering the demand did not make a business decision which is being challenged in the derivative suit."[265] This could be the case if a majority of the board has been replaced since the time of the decision under attack, or if the suit does not attack a specific decision, or if the decision under attack was made by the board of a different company (*e.g.*, prior to an acquisition).[266]

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. The first prong asks whether the shareholders' complaint creates a "reasonable doubt" that "the directors are disinterested and independent."[267] Delaware courts consult a range of factors when considering whether directors meet this standard.[268] Close family connections are generally disqualifying. Chief Justice Leo Strine, then a Vice-Chancellor of the Delaware Chancery Court, has said 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."[269] Other ties—including financial entanglements and social relationships—are also relevant to the judicial inquiry into disinterestedness and independence.[270]

Aronson's second prong, as originally articulated, asks whether the "particular facts alleged" by the shareholder plaintiffs create a reasonable doubt that "the challenged transaction was . . . the product of a valid business judgment."[271] "In simple terms," according to then-Vice Chancellor Strine, this "second prong of *Aronson* can be said to fulfill two important integrity-assuring functions."[272] One is the concern that even a "putatively independent board" will exhibit bias against shareholder plaintiffs.[273] 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."[274] This might occur if the board "intentionally breaks the law,"

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263 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.").
264 634 A.2d 927 (Del. 1993).
265 Id. at 933-34.
266 Id. at 934.
267 Id. at 814.
268 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.").
269 See In re Oracle Corp. Derivative Litig., 824 A.2d 917, 937-38 (Del. Ch. 2003).
270 See id. at 938-39.
271 See Aronson, 473 A.2d at 814.
272 Guttman, 823 A.2d at 500.
273 Id.
274 Lenois v. Lawal, No. 11963-VCMR, 2017 Del. Ch. LEXIS 784, at *30 (Ch. Nov. 7, 2017) (quoting White v. Panic, 783 A.2d 544, 554 n.36 (Del. Ch. 2003)).

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."[275] 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."[276] 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."[277] Where the corporation has adopted a charter provision pursuant to § 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" (*i.e.*, duty-of-loyalty) claims.[278]

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 irrational," or (b) because a majority of the directors themselves face a "substantial likelihood" of liability for non-exculpated 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 (*i.e.*, a failure to act in the face of red flags), then there would be no specific decision under attack and so *Rales* rather than *Aronson* would apply.[279] The *Rales* test involves a "singular inquiry": 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."[280] 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 themselves."[281] 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 non-exculpated 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. The special litigation committee 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

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275 Id. at *30-31.
276 Guttman, 823 A.2d at 500.
277 Id. at 501.
278 See Lenois, 2017 Del. Ch. LEXIS 784, at *41-44 (collecting cases).
279 Oklahoma Firefighters, C.A. No. 12151-VCG; City of Birmingham Ret. & Relief Sys. v. Good, 2017 WL 6397490, at *1 (Del. Dec. 15, 2017).
280 Guttman, 823 A.2d at 501; see Rales, 634 A.2d at 934.
281 Guttman, 823 A.2d at 501 (internal quotation marks omitted).

investigation and its findings and recommendations."[282] 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."[283] 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 Caesar's wife—above reproach."[284] 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.[285] 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.[286] 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.[287]

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[288]) securities law. In some instances, federal securities laws saddle public companies with affirmative duties to disclose certain information to shareholders.[289] 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, and must file "such information and documents as the Commission shall require" in order to keep the issuer's registration statement "reasonably current."[290] For present purposes, the most important set of SEC rules defining the affirmative disclosure duties of public companies is found in Regulation S-K.[291]

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."[292] An omission is

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[282] See Zapata v. Maldonado, 430 A.2d 779, 788 (Del. 1981).
[283] Id. at 788-89.
[284] Beam v. Stewart, 845 A.2d 1040, 1056 (Del. 2004) (internal quotation marks omitted).
[285] Id. at 789.
[286] In re Primedia Inc., 67 A.3d 455, 468 (Del. Ch. 2013).
[287] Zapata, 430 A.2d at 786.
[288] 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. 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.
[289] As just one example, Regulation FD requires companies to disclose material information to investors at the same time. See 17 C.F.R. § 243
[290] 15 U.S.C. § 78m; cf. 15 U.S.C. § 78*l*(a) (registration required for securities to be traded on national securities exchange).
[291] 17 C.F.R. pt. 229.
[292] 17 C.F.R. § 240.10b-5.

"material," according to the Supreme Court, if "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[293]

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 some federal courts have held that there is no private right of action for a Regulation S-K violation (this issue is currently the subject of circuit split).[294] By contrast, the Supreme Court has recognized a private right of action under Rule 10b-5, meaning that investors can recover damages from public companies and individual officers for violations of the rule.[295] To be sure, there are still high hurdles to recovery under Rule 10b-5: among others, a Rule 10b-5 plaintiff always will have to prove that the defendant acted "with a wrongful state of mind,"[296] and must in her complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[297] 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."[298] Several courts have held, though, that Item 103 does not require a company to disclose the mere fact that it is under investigation by federal and state authorities,[299]

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293 Piper v. Chris-Craft Indus., 430 U.S. 1, 50 (1977) (quoting TSC Indus., 426 U.S. at 449) (internal quotation marks omitted)). The materiality standard is often assessed relative to the size of the firm, which means that for large firms, the materiality threshold is much higher. 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." See George Georgiev, Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation, 64 UCLA L. Rev. 602 (2017).

294 See Srebnik v. Dean, Civil Action No. 05-cv-01086-WYD-MJW, 2006 U.S. Dist. LEXIS 73836, at *9 (D. Colo. Sep. 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 Law: Securities & Capital Markets (Sept. 22, 2017), https://www.bna.com/rules-collideleidos-supreme-n73014470276 (overview of statutory and regulatory scheme).

295 Superintendent of Ins. of N. Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n. 9 (1971); see also Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) (reaffirming private right of action).

296 Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42, 125 S. Ct. 1627, 1631 (2005).

297 15 U.S.C. § 78u-4(b)(2)(A).

298 17 C.F.R. § 229.103. 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 Financial Accounting Standards Board, Contingencies (Topic 450): Disclosure of Certain Loss Contingencies (2010). Pending or threatened litigation is one example and must be disclosed if it can result in a "material loss."

299 See City of Westland Police & Fire Ret. Sys. v. MetLife, Inc., 928 F. Supp. 2d 705, 718 (S.D.N.Y. 2013) (no obligation to disclose the fact that authorities in approximately thirty states are investigating insurance company for violating unclaimed property laws); Richman v. Goldman Sachs

although misleading statements about the investigation are of course actionable under Rule 10b-5.[300] 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 percent of the current assets" of the company and its subsidiaries.[301] An aggregation rule requires companies to count all proceedings that "present[] in large degree the same legal and factual issues" toward that 10 percent threshold,[302] but even so, the 10 percent 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."[303] 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,[304] 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."[305] On this view, the omission of material trends 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.[306] The Supreme Court granted certiorari in March 2017 to resolve this split,[307] but that case is on hold while the parties seek to work out a settlement.[308] In the meantime, uncertainty regarding the consequences of Item 303 noncompliance lingers.

Grp., Inc., 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012) (no obligation to disclose SEC "Wells Notice" informing company that agency may bring civil action); see also ABA Disclosure Obligations under the Federal Securities Laws in Government Investigations—Part II.C.; Regulation S-K, Item 103: Disclosure of "Legal Proceedings," 64 Bus. Law. 973 (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.").

300 See Menaldi v. Och-Ziff Capital Management Group LLC, 164 F. Supp. 3d 568 (S.D.N.Y. 2016).

301 17 C.F.R. § 229.103 instruction (2).

302 Id.

303 17 C.F.R. § 229.303.

304 Stratte-Mcclure v. Stanley, 776 F.3d 94, 101-04 (2d Cir. 2015).

305 Id. at 102 (alterations and internal quotation marks omitted).

306 Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.), 768 F.3d 1046, 1054-56 (9th Cir. 2014).

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

308 Leidos, Inc. v. Ind. Pub. Ret. Sys., 138 S. Ct. 369 (2017); see Andrew Chang, 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.

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.[309] The required disclosure includes "perquisites,"[310] 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, GE settled SEC charges after divorce papers revealed that General Electric'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.[311] In April 2005, the SEC sued Tyson Foods, as well as the company's CEO Don Tyson, for its failure to disclose various perquisites to its CEO, 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.[312] In settling those charges, the SEC required Don Tyson to reimburse the company for millions of dollars of expenses.[313] A year later, in April 2006, Tyco International reached a settlement with the SEC for, among other things, its failure to disclose lavish prerequisites to its CEO, Dennis Kozlowski, including a $6,000 shower curtain and a $15,000 "dog umbrella stand."[314]

In response to these and other high-profile enforcement actions, the SEC significantly expanded the perquisite disclosure requirement by lowering the threshold triggering disclosure from $50,000 to $10,000 and demanding a new table to identify and quantify any perquisite exceeding $10,000.[315] 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 those provisions apply to *material* facts and omissions. 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 "relatively simple" hormone imbalance, whose remedy would be "simple and straightforward."[316] That disclosure, which most likely was *not* mandated by SEC rules,[317]

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309 Id. § 229.402.
310 Id.
311 Securities and Exchange Commission Release 2004-135 (Sept. 23, 2004), https://www.sec.gov/news/press/2004-135.htm.
312 Deborah Solomon, In SEC Complaint, Tale of Chicken Mogul Feathering His Nest, Wall St. J. (Apr. 29, 2005), https://www.wsj.com/articles/SB111470683583119695.
313 Id.
314 Securities and Exchange Commission Release 2006-58 (Apr. 17, 2006); Tyco International, Current Report (Form 8-K) (Sept. 10, 2002).
315 See Securities and Exchange Commission Release 33-8732 (Aug. 11, 2006).
316 Nicholas Carlson, Steve Jobs' Health Likely Caused Him To Skip Macworld, Business Insider (Jan. 5, 2009), http://www.businessinsider.com/2009/1/steve-jobs-addresses-his-health-in-open-letter-aapl.
317 See Patricia Sanchez Abril & Ann M. Olazabal, The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law, 46 Hous. L. Rev. 1545, 1590-1604 (2009).

drove Apple's stock price up by 4%. Nine days later, Jobs told the public he would take five months off to recover from a more complex health problem,[318] and in April 2009, Jobs underwent a liver transplant that he initially kept secret.[319] These events prompted the SEC to open an investigation to determine whether the January 5 statements were misleading.[320] The SEC probe did not yield charges against Apple or against Jobs, who died of cancer in 2011,[321] and 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 the fact 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.[322] 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. 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.[323] 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."[324] By contrast, the Seventh Circuit maintains that there is *no* "duty to update" a "forward-looking statement" that "because of subsequent events becomes untrue."[325]

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. In the following Section, we will discuss how these obligations and principles of state corporate law intersect with sexual harassment cases.

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318 Nicholas Carlson, SEC Investigates Apple, Jobs, Business Insider (July 8, 2009), http://www.businessinsider.com/apple-steve-jobs-undergo-sec-investigation-2009-7.
319 Yukari Iwatani Kane & Joann S. Lublin, Jobs Had Liver Transplant, Wall St. J. (June 20, 2009), https://www.wsj.com/articles/SB124546193182433491.
320 See Carlson, supra note 318.
321 See Walter Isaacson, Steve Jobs 481 (2011) (noting that "[t]he SEC investigation ended up going nowhere").
322 In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993).
323 Illinois State Bd. of Inv. v. Authentidate Holding Corp., 369 Fed. App'x 260, 263, 265 (2d 2010).
324 See, e.g., City of Edinburgh Council v. Pfizer, Inc., 754 F.3d 159, 176 (3d Cir. 2014).
325 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. Second, corporate fiduciaries who fail to monitor harassment at their firms may be liable in certain circumstances under a *Caremark* theory. 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. 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. 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. The cases of Mark Hurd at Hewlett-Packard, Dov Charney at American Apparel, and—more recently—Travis Kalanick at Uber,[326] Roger Ailes at Fox News, Mark Light at Signet Jewelers, John Hewitt at Liberty Tax, and Steve Wynn of the Wynn Resorts casino chain[327] all appear to fall within the 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. Where a fiduciary "intentionally acts with a purpose other than that of advancing the best interests of the corporation,"[328] the fiduciary's bad-faith conduct can be the basis for liability. And when a CEO or other corporate officer uses his position of power to harass, intimidate, or assault employees, he clearly acts for a purpose other than that of advancing the company's interests.[329] The consequences for the firm go well beyond the risk of liability: sexual

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[326] 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.

[327] See 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.

[328] Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27, 67 (Del. 2006).

[329] 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. 2003) (where 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").

harassment in the workplace potentially damages employee morale, drives talented individuals away from the firm, and endangers the company's reputation.

However, one daunting obstacle remains. 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. Where the allegation is that an officer violated his fiduciary duty by committing sexual harassment, the shareholder derivative action challenges the conduct of an officer rather than a decision of the board, and so *Rales* rather than *Aronson* supplies the applicable framework for evaluating demand futility. 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 (*e.g.*, on account of *Caremark* violations arising from a failure to monitor a sexual-harasser CEO). The pension-fund plaintiff in the Twenty-First Century Fox case pursued both approaches,[330] and the plaintiffs in the Liberty Tax and Wynn lawsuits are following the same two-pronged strategy.[331] 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.

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 § 102(b)(7) would not immunize directors, making the *Caremark* line of argument especially appealing for plaintiffs. 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, 84 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. 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. Several of the accusations resulted in legal settlements in which Weinstein's accusers agreed to confidentiality clauses that barred them from

330 See *Murdoch* Complaint, supra note 17, at 52-65.
331 *Hewitt* Complaint, supra note 19, at 22-25; *Wynn* Complaint, supra note 20, at 23-33.

speaking about their experiences. Immediately after the allegations came to light, the board professed ignorance, saying that the allegations came as an "utter surprise."[332]

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."[333] 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[334] and the comedian Seth MacFarlane alluded to Weinstein's behavior at the Oscars the following year.[335] 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.[336] 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.[337] 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.[338] 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.[339]

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332 See Daniel Hemel & Dorothy Lund, It May Not Matter What The Weinstein Company Knew, The Atlantic (Oct. 14, 2017), https://www.theatlantic.com/business/archive/2017/10/harvey-weinstein-company-legal-consequences/542838.

333 In re Lear Corp. S'holder Litig., 967 A.2d 640, 654-55 (Del. Ch. 2008).

334 See Jacob Stolworthy, 30 Rock joke referenced Harvey Weinstein allegations in 2012, The Independent (Oct. 11, 2017), http://www.independent.co.uk/arts-entertainment/films/news/harvey-weinstein-sexual-assault-allegations-30-rock-reference-tina-fey-jenna-entourage-oscars-a7995091.html.

335 Maya Oppenheim, Seth MacFarlane made joke about Harvey Weinstein and women at 2013 Oscars, The 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.

336 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.

337 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.

338 See supra note 240.

339 See generally Larry E. Ribstein, The Rise of the Uncorporation (2010); Rodney D. Chrisman, LLCs are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations,

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 toxic work environment existed at the news network. These red flags include a 2004 sexual harassment lawsuit by a Fox News producer against anchor Bill O'Reilly,[340] a 2006 settlement of an EEOC lawsuit against a Fox vice president,[341] a 2011 settlement of a sexual harassment lawsuit against Ailes by a former employee,[342] and a 2014 publication of a biography of Ailes, *The Loudest Voice in the Room*, which alleged decades of sexual harassment by its subject.[343] 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.[344] 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 its 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*.[345]

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,[346] 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.[347] Among other steps, the board formed a special committee in 1995 to review sexual harassment claims against the CEO and hired outside counsel to investigate the

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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, 460 (2010).

340 Emily Steel & Michael S. Schmidt, Bill O'Reilly Thrives at Fox News, N.Y. Times (April 1, 2017), https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html. 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 the company finally fired O'Reilly, he was entitled to a $25 million severance payment. See *Murdoch* Complaint, supra note 17, at 44.

341 Fox News Agrees to Settlement of Sex Discrimination Suit, Washington Post (Aug. 1, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073101122.html.

342 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.

343 See Emily Crockett, Here Are The Women Who Have Publically 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.

344 See *Murdoch* Complaint, supra note 17, at 5.

345 See In re Lear Corp. S'holder Litig., 967 A.2d at 654-55; Stone, 911 A.2d at 362.

346 See White v. Panic, 783 A.2d 543 at 551-52 (Del. 2001) (footnote omitted) ("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.").

347 See White v. Panic, 793 A.2d 356, 371 (Del. Ch. 2000).

allegations.[348] Whether or not those steps were adequate, they amount to more than the "utter failure" of oversight that characterizes a *Caremark* violation.[349]

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.[350] The fact that Charney had masturbated in front of a female journalist had been reported in the *New York Times* as early as 2006, and Charney did not dispute the accuracy of the report.[351] Nonetheless, the district court in the *American Apparel* case said that "the bare allegation that Charney's sexual proclivities were widely known is insufficient to support a lack of oversight claim,"[352] and the fact that these allegations were supported by "multiple sources"—including articles in reputable newspapers—apparently left the court unmoved.[353]

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,[354] 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. 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 sexual misconduct, shareholders also may 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 the contract with Harvey

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348 Id. at 368.
349 In re Caremark, 698 A.2d at 971.
350 See supra notes 157-161 and accompanying text.
351 See Holson, supra note 157.
352 In re Am. Apparel S'holder Derivative Litig., No. CV 10-06576 MMM (RCx), 2012 U.S. Dist. LEXIS 146970, at *100 (C.D. Cal. July 31, 2012).
353 See id. at *100-104.
354 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.

Weinstein that was approved by the board of the Weinstein Company 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."[355] The contract extension also imposed escalating penalties on Weinstein that would apply if the company had to make a payment arising from Weinstein's misconduct, but no such penalties if Weinstein bore the cost of such a claim himself.[356] 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).[357]

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 § 102(b)(7). In most cases, therefore, shareholder-plaintiffs will be better off pursing 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 consciously caused the company to violate the law.[358] Remember that under the alter ego doctrine, sexual harassment by a corporate officer is imputed to the employer;[359] 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 be somewhat of a leap: To say that the board *caused* Weinstein to commit harassment seems to stretch the bounds of the causation concept. For that reason, shareholder-plaintiffs may turn toward a second—and somewhat more promising—line of argument in these contract-focused cases. However, a shareholder-plaintiff may be able to avoid the causation inquiry 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.[360]

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355 Petition at 30, State v. Weinstein Co. LLC, No. _____ (N.Y. Sup. Ct. Feb. 11, 2018), https://ag.ny.gov/sites/default/files/weinstein_company.pdf.
356 Id. at 31.
357 Id.
358 See supra note 244-245.
359 See supra notes 84-86 and accompanying text.
360 See In re Massey Energy Co., C.A. No. 5430-VCS, 2011 Del. Ch. LEXIS 83, 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.").

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.'"[361] 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 Ivan Panic and guaranteed a bank loan to Panic so that he could settle a paternity suit brought by a former employee.[362] American Apparel reportedly paid more than $3 million to settle claims involving CEO Dov Charney.[363] Twenty-First Century Fox allegedly paid more than $55 million to settle sexual harassment and discrimination claims against Roger Ailes and other Fox News executives.[364] 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 Cagney, but kept Cagney as CEO for roughly five more years.[365] 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 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." 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."[366] 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).[367] That decision is particularly ominous

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361 Horman v. Abney, No. 12290-VCS, 2017 Del. Ch. LEXIS 13, at *20 (Ch. Jan. 19, 2017) (quoting Stone, 911 A.2d at 370).

362 White v. Panic, 783 A.2d 543, 548 & n.7 (Del. 2001).

363 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-ordered-to-pay-over-3-million-in-arbitration-1433891690,

364 See *Murdoch* Complaint, supra note 17, at 5, 25.

365 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; 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.

366 White, 783 A.2d at 553.

367 Id.

for shareholder-plaintiffs in cases in which corporate directors are shielded from duty-of-care liability by § 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 in effect 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 we doubt that approval of settlements, standing alone, will 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 those allegations, then the case for *Caremark* liability gains steam. It is hard to imagine a more obvious "red flag" then 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 the fact 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 also may 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.[368] 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

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[368] 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.

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 sexual harassment—alone or in combination—exceed 10 percent of corporate assets and thus need to be disclosed under Item 103.[369] 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."[370] The Seventh Circuit agreed that the disclosure "constituted a material 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.[371] 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,"[372] 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 ever can 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.[373] 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. . . . 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 expose, they had had no impact on the Company's operation.[374]

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

[369] See supra notes 301-302 and accompanying text.
[370] Greengrass v. Int'l Monetary Sys., Ltd., 776 F.3d 481, 484 (7th Cir. 2015).
[371] Id.
[372] See 17 C.F.R. § 229.303.
[373] See supra note 293-308 and accompanying text.
[374] Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp. 3d 12, 34-35 (S.D.N.Y. 2016) (citations omitted).

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 notion 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.[375] 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[376]), 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.[377] 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 available on a non-discriminatory basis to all employees."[378] 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.[379] 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 still would have to show that the failure to

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375 See 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 (reviewing literature and concluding that "[s]exual harassment is not a women's problem but a threat to companies' health"); 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 U.S. Army to shed further light on productivity- and transfer-related costs); Heather McLaughlin, Christopher Uggen & Amy Blackstone, The Economic and Career Effects of Sexual Harassment of Working Women, 31 Gender & Soc'y 333 (2017) (documenting productivity and turnover costs).

376 As a district court decision, *CTPartners* is not binding precedent in future cases within the same district or elsewhere. See ATSI Comm'cns, 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 . . . .").

377 See 17 C.F.R. § 229.402; supra notes 309-315 and accompanying text.

378 See Securities and Exchange Commission Release 33-8732 (Aug. 11, 2006), https://www.sec.gov/rules/final/2006/33-8732a.pdf.

379 Id.

disclose such a payment on a Form 10-K renders the company's filings actionably misleading under Rule 10b-5.

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"—was "aspirational" and therefore not capable of being "objectively false."[380] According to the court, "[t]he 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."[381] But the court also added that "[t]he analysis would likely be different" if the company or its executives engaged in misconduct that was revealed, and then adopted a new code of ethics in response to the earlier misbehavior, and then "continued the conduct that gave rise to the [initial] scandal while claiming it had learned a valuable lesson in ethics."[382] 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 *CFPartners* discussed above[383] 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 define the category."[384] 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."[385] 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." As the arbitrator overseeing the class action said in her opinion certifying the class, the plaintiffs now allege "a corporate

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380 Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268, 1275-77 (9th Cir. 2017).
381 Id. at 1278.
382 See id.
383 See supra notes 172-180 and accompanying text.
384 Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp. 3d 12, 28 (S.D.N.Y. 2016).
385 See, e.g., Signet Jewelers Limited, Form 10-Q, at 27 (Nov. 19, 2017), https://seekingalpha.com/filings/pdf/12411250.pdf.

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."[386] 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,[387] it will be difficult for Signet to convince a court or a 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, 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. Moreover, aspirational statements about corporate ethics are less likely to lead to liability than inaccurate 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. Certainly not every instance of corporate sexual misconduct will be accompanied by 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/or 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, 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,[388] and the company allegedly has paid more than $55 million in total to settle harassment claims.[389] 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 this past November.[390]

Second, sexual harassment is a significant cause of employee turnover. One survey of female law firm associates found that "[e]xperienced or observed sexual harassment" from male supervisors or colleagues "increases the likelihood that the respondent reported an

[386] See Class Determination Award at 3, Jock v. Sterling, AAA Case No. 11-20-0800-0655 (Feb. 2, 2015), https://www.cohenmilstein.com/sites/default/files/media.5300.pdf.
[387] See supra note 184 and accompanying text.
[388] See Grynbaum et al., supra note 122.
[389] See *Murdoch* Complaint, supra note 17, at 5.
[390] See Stipulation and Agreement of Settlement, supra note __.

intention to quit her current workplace within two years by over 25%."[391] Higher turnover rates result in direct outlays (for recruiting, hiring, training, and integrating new employees) as well as indirect costs (including interruptions in production and—potentially—a decline in morale among remaining employees).[392] Plaintiffs can rely on a long literature in the fields of management and organizational behavior to estimate the effects of increased turnover on financial performance.[393]

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.[394] Of particular concern is the probe in Massachusetts, where Wynn Resorts is building a $2.4 billion property on Boston Harbor. 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.[395] 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.[396] 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,[397] 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 revelations of sexual misconduct by Harvey Weinstein emerged, Amazon Studios called off a $160 million project to co-produce a series starring Robert DeNiro and Julianne Moore with the Weinstein Company; Amazon cancelled a series on Elvis Presley that it had planned to purchase from the firm; and the publisher Hachette

391 David N. Laband & Bernard F. Lentz, The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover, 51 Indus. & Lab. Rels. Rev. 594, 604 (1998).
392 See Aharon Tziner & Assa Birati, Assessing Employee Turnover Costs: A Revised Approach, 6 Hum. Res. Mgmt. Rev. 113, 116 (1996).
393 For an overview, see Julie L. Hancock et al., Meta-Analytic Review of Employee Turnover as a Predictor of Firm Performance, 39 J. Mgmt. 573 (2013).
394 *Wynn* Complaint at 19.
395 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 (noting that when asked whether Wynn would meet the commission's standard if the allegations turned out to be true, Baker responded: "God, no").
396 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.
397 See supra note 186 and accompanying text.

ended an arrangement with Weinstein Company's book publishing unit.[398] 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.[399] 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.[400] 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. 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,[401] Signet Jewelers,[402] Liberty Tax,[403] and Wynn Resorts[404] in the wake of sexual harassment revelations—along with 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

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398 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.

399 See Chelsea 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).

400 See id. at 149 (reporting results of meta-analysis).

401 See supra note 175 and accompanying text.

402 See supra note 195 and accompanying text.

403 See supra note 208and accompanying text.

404 See supra note 222 and accompanying text.

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 percent of boards "had not discussed accusations of sexually inappropriate behavior and/or sexism in the workplace."[405] 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."[406] This strikes us as a sensible approach for corporate boards. According to research by Michael Housman and Dylan Minor, who examined data on more than 50,000 workers across 11 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.[407] 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 recent survey by the Association for Talent Development found that 71 percent of employers "offered" sexual harassment prevention training.[408] 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

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405 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.

406 See 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.

407 See Michael Housman & Dylan Minor, Toxic Workers (Harvard Business School Working Paper 16-057, Nov. 2015), http://www.hbs.edu/faculty/Publication%20Files/16-057_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf.

408 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.

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.[409] Moreover, courts have recognized the existence of a training program as a factor affecting whether an employer will be held liable for harassment.[410] 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, which teaches employees how to intervene when they witness harassment.[411] 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.[412] But according to former employees of the company, Twenty-First Century 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.[413] A more promising strategy is to appoint an organizational ombudsperson who receives anonymous and non-anonymous complaints, works with supervisors to address those complaints, and has authority to report directly to the board in the event that complaints involve corporate officers or that management responses appear inadequate.[414] By ensuring that serious allegations of sexual misconduct are

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409 See Heather Antecol & Deborah Cobb-Clark, Does Sexual Harassment Training Change Attitudes? A View from the Federal Level 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 (2013).

410 See 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 Employee Responsibilities & Rights J. 111, 117 (2006); see also Setser v. Idaho Home Health & Hospice/LHC Grp., LLC, No. 4:12-CV-00444-EJL-REB, 2014 U.S. Dist. LEXIS 32957, at *24 (D. Idaho Mar. 11, 2014) (employee training as factor affecting whether employer satisfies first prong of *Farragher-Ellerth* test); Sackett v. ITC Deltacom, Inc., 374 F. Supp. 2d 602, 627 (E.D. Tenn. 2005) (employee training as factor affecting availability of punitive damages for Title VII violations).

411 EEOC Select Task Force Study at v. (June 2016).

412 See 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.

413 See id.

414 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

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 (*e.g.*, a single crude joke) that might seem like it should fall short of a fireable offense.[415] 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.[416] 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. (The rule—adopted by dozens of law firms and corporate legal departments since its emergence in 2017—is named for Arabella Mansfield, the first women admitted to practice law in the United States.[417]) 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.[418] 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

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Designed To, Quartz at Work (May 2, 2017), https://work.qz.com/971112/corporate-sexual-harassment-hotlines-dont-work-theyre-not-designed-to.

415 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.

416 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).

417 See Ellen McGirt, How Lawyers Are Working to Change Their Industry's Diversity Problem, Fortune (Aug. 30, 2017).

418 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).

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.[419]

We acknowledge, of course, that these measures will not reduce the incidence of sexual harassment to zero at any organization of sufficient size. Yet even ex post (*i.e.*, after a harassment allegation comes before a corporate board), directors still can 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 *White v. Panic* that the directors had lived up to their *Caremark* duties.[420] 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 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 6 percent immediately after the board announced that it had accepted CEO Steve Wynn's resignation[421]—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.

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[419] For analogous arguments in the context of race-based affirmative action, see Jerry Kang & Mahzarin Banaji, Fair Measures: A Behavioral Realist Revision of Affirmative Action, 94 Cal. L. Rev. 1063, 1098-1101 (2006); and Daniel Hemel, An Exam-Grading Hypothetical for Affirmative Action's Supreme Court Test, U. Chi. L. Faculty Blog (Dec. 8, 2015), http://uchicagolaw.typepad.com/faculty/2015/12/an-exam-grading-hypothetical-for-affirmative-actions-supreme-court-test.html.

[420] See supra note 347 and accompanying text.

[421] See Kimberly Chin, Wynn Resorts Surges After Billionaire Casino Mogul Steve Wynn Resigns (WYNN), Bus. 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.

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,[422] Delaware courts will 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 allowing a shareholder-plaintiff to proceed. But when the board starts from a strong position, then utilizing an SLC can actually weaken its hand.

Finally, while our 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,[423] 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 muscle not just in litigation, but also in behind-the-scenes engagement, proxy contests, and shareholder proposals.[424] And because the shareholder base has grown increasingly concentrated in the hands of institutional investors, shareholder influence has reached an unprecedented level.[425] In the recent past, shareholders had primarily used their growing power to press for changes in corporate governance and business strategy, but today, they are increasingly occupied by social issues.

For example, the 2017 proxy season broke the record for the number of environmental and social ("E&S") proposals put to a vote.[426] Although these proposals received average support of only 21.4 percent of votes cast, support continues an upward trend. For instance, in 2016 environmental and social proposals received average support of 19.7 percent of

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[422] See supra notes 282-287.

[423] See supra note 370 and accompanying text.

[424] See Dorothy S. Lund, The Case Against Passive Shareholder Voting ,__ J. of Corp. Law__(2018).

[425] See id.; William Bratton & Simone Sepe, Shareholder Power in Incomplete Markets, Working Paper (2018); Randall Thomas et al., Shareholder Voting in an Age of Intermediary Capitalism, 87 S. Cal. L. Rev. 1379 (2014).

[426] Ramsha Khursheed & Thomas Singer, Environmental Social Proposals in the 2017 Proxy Season, Harvard Law School Forum for Corporate Governance and Financial Regulation (Oct. 26, 2017), https://corpgov.law.harvard.edu/2017/10/26/environmental-and-social-proposals-in-the-2017-proxy-season/.

votes cast.[427] 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.[428] These numbers are hardly impressive, but they represent an upward trend that shows no sign of slowing.

The uptick 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 companies stating his expectations that "companies, both public and private, serve a social purpose."[429] He also indicated that companies that failed to demonstrate that they "failed to 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. 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.

And this newfound interest in social proposals is not limited to large passive institutional investors; 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 long-term consequences for children.[430] Engagement of this type is not unusual for pension funds, but was a first for activist hedge funds, which tend to focus on corporate governance. And 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.[431]

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 co-filed 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."[432] 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

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[427] Id.
[428] Id.
[429] BlackRock, Larry Fink's Annual Letter to CEOs (Jan 16, 2018), https://www.blackrock.com/corporate/en-us/investor-relations/larry-fink-ceo-letter.
[430] Open Letter From Jana Partners and Calstrs to Apple Inc. (Jan. 6, 2018), https://thinkdifferentlyaboutkids.com/.
[431] Robert Eccles, Why An Activist Hedge Fund Cares Whether Apple's Devices Are Bad for Kids, Harv. B. Rev. (Jan. 26, 2018), https://hbr.org/2018/01/why-an-activist-hedge-fund-cares-whether-apples-devices-are-bad-for-kids
[432] Selina Wang, Shareholders Press Twitter, Facebook on Sexual Harassment, Bloomberg (Jan. 11, 2018). https://www.bloomberg.com/news/articles/2018-01-11/shareholders-press-twitter-facebook-to-curb-sexual-harassment

executives and directors.[433] These are 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.[434] Although all of the proposals were unsuccessful in 2017, Citigroup recently changed its position and agreed to disclose internal data on gender pay.[435]

Citi's change of heart demonstrates the increasing power influence of shareholders concerned with social issues. In the past, companies could ignore such proposals with impunity. Such a position is more difficult when the company's largest shareholders see a link between social practices and long-term company value and are committed to investing in companies with ethical practices. We expect that shareholders will increasingly use shareholder proposals to push for changes in sexual harassment policies at their portfolio companies, not just asking for disclosure of sexual harassment policies and settlement payments, but also demanding that firms eliminate forced employee arbitration agreements[436] or deny indemnification for sexual harassment claims against corporate executives. By doing so, shareholders may be able to overcome board resistance to policy changes that would drive meaningful organizational change.

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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 less likely to have their claims subject 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. Although it is debatable whether such reforms go beyond cosmetic

[433] John Gittelsohn, CalPERS Weighs Push for Sexual-Harassment Corporate Disclosure, Bloomberg Law (Apr. 11, 2018), https://news.bloomberglaw.com/employee-benefits/calpers-weighs-push-for-sexual-harassment-corporate-disclosure.

[434] Arjuna Capital Shareholder Proposal for Gender Pay Equity, https://arjuna-capital.com/wp-content/uploads/2018/01/C-Shareholder-Proposal_Gender-Pay-Equity-11132018.pdf

[435] https://www.ft.com/content/591b0900-f9f9-11e7-9b32-d7d59aace167.

[436] See, e.g., Nick Wingfield & Jessica Silver-Greenberg, Microsoft Moves to End Secrecy in Sexual Harassment Claims, N.Y. Times (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html.

compliance,[437] 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. And the disclosure of material allegations would likely benefit employees, in addition to investors. 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.[438] But there is also the risk that companies will respond by implementing measures designed to keep allegations from coming to their attention (although 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, and/or concealing sexual harassment under existing law. But of course, "can" does not imply "ought."[439] 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 harassment. 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. (We will refer to this as the "diversion" argument.) David Lynn, formerly the chief counsel of the SEC's Division of Corporate Finance, 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

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437 See Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 Wm. & Mary L. Rev. 2075 (2016).

438 Cf. Hans Bonde Christensen, Eric Floyd, Lisa Yao Liu, & Mark G. Maffet, The Real Effects of Mandated Information on Social Responsibility in Financial Reports: Evidence from Mine-Safety Records, 64 J. Accounting & Econ. (2017) (examining the effect of the Dodd-Frank Act's requirement that companies disclose purchases of war minerals from Congo, as well as evidence of mine health, and concluding that such disclose improved safety performance by shaming managers and because of shareholder distaste for socially irresponsible companies).

439 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 (1999).

Congo,[440] payments to governments for resource extraction rights,[441] violations of mine health and safety rules.[442] 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."[443] 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 would assume, arguendo, that the above-listed aims are and should be the principal purposes of corporate law but would posit 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.

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 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,"[444] other views are increasingly prevalent.[445] For example, Lynn Stout advances 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. In her view, once profitability is achieved, the firm should relax its

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440 15 U.S.C. § 78m(p).

441 Id. § 78m(q).

442 Id. § 78m-2.

443 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, 330-31 (2011).

444 Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 439 (2001). The view that the corporate purpose should be to maximize shareholder wealth emerged in 1932, when Adolph Berle famously responded to an essay written by Gardinier Means advancing the opposite view. See William Bratton, Berle and Means Considered at the Century's Turn, 26 J. Corp. L. 737 (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) (arguing that corporate executives have a "responsibility is to conduct the business in accordance with their desires, which will generally 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.").

445 See, e.g., Einer Elhague, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. Rev. 733 (2005); Kent Greenfield, The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities (2006); William W. Bratton & Michael L. Wachter, The Case Against Shareholder Empowerment, 158 U. Pa. L. Rev. 653 (2010); Lynn Stout, The Shareholder Value Myth (2012).

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.[446]

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. Oliver Hart and Luigi Zingales have recently advanced the idea that managers should pursue a broad agenda that encompasses shareholders' prosocial aims.[447] They also contend that shareholders should use their voting rights to signal their prosocial desires to management.[448] 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 believed that a corporation should adhere to ethical standards when maximizing shareholder welfare.[449] And hybrid purposes are not unique to this area of 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 objective aside from revenue-raising (*e.g.*, promoting homeownership,[450] charitable contributions,[451] retirement saving,[452] and the development of orphan drugs[453]). 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 (*e.g.*, promoting trust among attorneys and clients, as well as among doctors and patients).[454] 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 remedy workplace-based sexual misconduct. This is the nub of the third rebuttal to the diversion argument: workplace-based sexual misconduct *does* reduce

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446 Stout, The Shareholder Value Myth, supra note 445. But see Leo Strine Jr., Making It Easier for Directors to "Do The Right Thing"?, 4 Harv. B. L. Rev. 235 (2015).
447 Hart & Zingales, supra note 30.
448 Id.
449 Friedman, supra note 444.
450 See 26 U.S.C. § 163(h)(2)(D) (deduction for home mortgage interest), Stout, The Shareholder Value Myth, supra note 445.
451 See id. § 170 (charitable contribution deduction).
452 See id. § 401(k) (allowing employers to establish defined contribution plans, with contributions and accretions excluded from employee income until distribution); § 402A (allowing for Roth 401(k) plans); § 408 (IRAs); § 408A (Roth IRAs).
453 See id. § 45C (50% credit for clinical testing expenses for drugs to treat or cure rare diseases or conditions).
454 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 (1999).

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.

An 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, "[a]t 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*."[455] 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 womankind."[456]

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 from sexual harassment might be seen as suggesting that investors—rather than the employees who suffer through sexual harassment firsthand—are the 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.

[455] Reva B. Siegel, Introduction: A Short History of Sexual Harassment, in Directions in Sexual Harassment Law 5-6 (Catharine A. MacKinnon & Reva B. Siegel eds., 2008).
[456] Lydia Maria Child, Letter from New York, No. V, Bos. Courier, Feb. 6, 1844, at 2, reprinted in 9 The Universalist Union 218, 219 (P. Price ed., Albany Universalist Union Press 1844) (check cite).

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 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."[457] 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.[458] 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,[459] 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 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 deter lawyers, shareholders, and activists from pursing 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

[457] See Katzenbach v. McClung, 379 U.S. 294, 304 (1964)

[458] See generally George Rutherglen, The Thirteenth Amendment, the Power of Congress, and the Shifting Source of Civil Rights Law, 112 Colum. L. Rev. 1551 (2012).

[459] For a discussion of other third-party effects that result from sexual harassment, see Nancy Leong, Them Too, Wash. U. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118040.

others. Insofar as top executives at publicly traded companies engage in sexual harassment, the victims are likely to be other relatively well-compensated professionals rather than the rank-and-file. Sexual harassment is endemic in blue-collar work environments as well as white-collar ones. 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. The recently revealed pattern of sexual harassment at Ford Motor Company plants in Chicago may be another case in point.[460] Second, 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.[461] 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 upwards—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.[462]

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460 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.

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

462 See, e.g., Katherine Tarbox, Is #MeToo Backlash Hurting Women's Opportunities in Finance?, Harvard Business Review (March 12, 2018), https://hbr.org/2018/03/is-metoo-backlash-hurting-womens-opportunities-in-finance; Melinda Newman, Why the #MeToo Movement Could Have Chilling Effect for Women in Music Industry, Billboard (Dec. 14, 2017),

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. Along those lines, some of the same theories that might support director and officer liability in cases of sexual harassment also would 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 allegations.[463] 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 discrimination, such as a failure to mentor, that may result from an increased risk of corporate liability. 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. Third and finally, the "market for mentorship" is not one-sided; mentees seek out mentors, too. And 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. 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 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 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

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https://www.billboard.com/articles/business/8070562/metoo-movement-women-music-industry-impact.

[463] 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.").

reluctant to come forward on their own.[464] Moreover, Title VII's caps on compensatory and punitive damages could be raised—or, at least, adjusted for inflation.[465] 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 Ian Ayres and Cait Unkovic have termed "information escrow" arrangements,[466] now being implemented on some college campuses for sexual assault cases through the Callisto app.[467] 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.[468] One might imagine a state-level equivalent that applies to workplace-based sexual misconduct: 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,[469] assault, and battery.[470] Some authors have argued for a

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464 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.

465 The $300,000 cap for large employers in 1991 is equivalent to more than $537,000 today, based on the Consumer Price Index for All Urban Consumers (CPI-U). See Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 26, 2017); cf. Civil Rights Act of 1991, Pub. L. No. 102-116, § 1997A, 105 Stat. 1071, 1072-73 (codified at 42 U.S.C. § 1981a).

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

467 Laura Bassett, How a New Technology Could Help Find the Next Harvey Weinstein, Huffington Post (Nov. 7, 2017), https://www.huffingtonpost.com/entry/callisto-rape-reporting-app_us_59df86c7e4b0eb18af06d54e.

468 What We Do, Callisto, https://www.projectcallisto.org/what-we-do (last visited Dec. 27, 2017).

469 Jessica Stander & Roberta Steele, Employment Torts 2-3 (ABA Section of Labor & Employment Law—2009 Labor and Employment Law CLE Conference, Washington, D.C., Nov. 2009) ("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, e.g., Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 611, 613-14 (5th Cir. 1999) (sufficient evidence to support verdict against supervisor for intentional infliction of emotional distress where employee testified that 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").

470 Stander & Steele, supra note 5, at 9; see, e.g., Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1439 (10th Cir. 1997) (battery); Rudas v. Nationwide Mut. Ins. Co., No. 96-5987, 1997 U.S. Dist. LEXIS 169, at *12 (E.D. Pa. Jan. 7, 1997) (assault and battery).

more expansive freestanding tort for sexual harassment.[471] 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.[472] 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.[473] And aside from tax law, several other policy levers remain available for addressing the specific problem of confidential sexual harassment settlements. As Saul Levmore and Frank Fagan have suggested, attorneys could be required under professional responsibility rules to report such non-disclosure agreements to authorities or vulnerable third parties; courts could refuse to enforce such agreements; and/or jurisdictions could impose mandatory disclosure requirements as to some or all information concerning these settlements.[474]

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

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471 See, e.g., Anita Bernstein, Treating Sexual Harassment With Respect, 111 Harv. L. Rev. 446, 450-51 & n.38, 526 (1997); Katherine M. Franke, What's Wrong With Sexual Harassment?, 49 Stan. L. Rev. 691, 769 & n.407 (1997); Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 Yale L. & Pol'y J. 333, 359-65 (1990); Krista J. Schoenheider, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. Pa. L. Rev. 1461 (1986). Catherine MacKinnon has argued that treating sexual harassment as a tort is "inadequate" because it fails to recognize the inherent element of economic coercion. See MacKinnon, supra note __, at 173.

472 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. (forthcoming 2018).

473 An Act to Provide for Reconciliation Pursuant to Titles II and IV of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-__, § 13307, __ Stat. __ (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. For a proposal to deny a tax deduction for confidential sexual misconduct settlements that preceded the emergence of the Weinstein allegations and the Republican tax plan, see Saul Levmore & Frank Fagan, Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases, 103 Cornell L. Rev. (forthcoming 2018), https://ssrn.com/abstract=2921059 (manuscript at 29-32).

474 See Levmore & Fagan, supra note 472 (manuscript at 26-29).

any change to existing law. 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 to adopt a shareholder resolution requiring disclosure of sexual harassment settlements may be a more plausible short-term objective than nationwide legislative change.[475]

IV. 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, and/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 Henry Hansmann and Reinier 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.[476] But even if that is so (and we are far from sure that it is[477]), the question of how to maximize long-term shareholder value still will 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.[478] For

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

476 See Hansmann & Kraakman, supra note 23, at 439.

477 See supra note 445-446 and accompanying text.

478 For classic (and empirically grounded) statements of such skepticism, see Roberta Romano, The Shareholder Suit: Litigation without Foundation?, 7 J. L. & Econ. Org. 55 (1991); and Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497 (1991).

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, *e.g.*, 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 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 longlasting 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.