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# #MeToo and the Convergence of CSR and Profit Maximization

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# #METOO AND THE CONVERGENCE OF CSR AND PROFIT MAXIMIZATION

*Claire A. Hill†*

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## INTRODUCTION

After allegations that Harvey Weinstein had sexually assaulted many women appeared on the front page of the New York Times in October of 2017,<sup>1</sup> the #MeToo movement began in earnest.<sup>2</sup> Nowadays, allegations implicating #MeToo concerns as to a company’s employee, whether or not involving illegal behavior, may result in swift firing or reprimand; in any event, such allegations cannot appear to be taken lightly lest the company’s reputation suffer. Lawsuits and shareholder activism are increasingly focusing on “toxic” “boys club” cultures at

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1. See Jodi Kantor & Megan 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> [<https://perma.cc/4RQA-KHLG>].
2. See, e.g., Christen A. Johnson & KT Hawbaker, *#Me Too: A Timeline of Events*, CHI. TRIB., (Mar. 7, 2019, 9:43 AM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmllstory.html> [<https://perma.cc/65CZ-KAB4>]; *Me Too Movement*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Me\\_Too\\_movement](https://en.wikipedia.org/wiki/Me_Too_movement) [<https://perma.cc/QD5X-HAP9>] (last visited Mar. 25, 2019).

workplaces,<sup>3</sup> and going beyond misconduct to consider other issues relating to gender such as board diversity.<sup>4</sup>

This development has broader implications for the debate as to whose interests corporations should be serving: should corporations be solely or primarily focused on profits for shareholders or should they also be taking into account the interests of other stakeholders? In previous work, I have argued that the increasing emphasis on corporate social responsibility (CSR) and environmental, social, and governance (ESG) concerns is leading to a convergence between these supposed alternatives; here, I make the case with specific reference to #MeToo, outlining a rhetorical strategy by which the convergence might be more successful.

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3. See Kevin LaCroix, *Nike Board Hit with Sexual Misconduct-Related Derivative Suit*, D&O DIARY (Oct. 30, 2018), <https://www.dandodiary.com/2018/10/articles/director-and-officer-liability/nike-board-hit-sexual-misconduct-related-derivative-suit/> [<https://perma.cc/9N7L-J7LB>] [hereinafter LaCroix, *Nike Board*] (reporting shareholder lawsuit against Nike's Board of Directors that alleges Nike's board allowed a "toxic 'boys club' culture"); David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [<https://perma.cc/MDW8-6AKS>] (describing recent shareholder proposals regarding sexual harassment, gender diversity, and the gender pay gap); Ryan Vlastelica, *Why the Wave of Sexual Harassment Allegations Won't Have an Impact on Stock Prices*, MARKETWATCH (Dec. 15, 2017, 3:14 PM), <https://www.marketwatch.com/story/why-the-wave-of-sexual-harassment-allegations-wont-have-an-impact-on-stock-prices-2017-12-15> [<https://perma.cc/MAE5-TQ24>] (referencing sexual-misconduct related lawsuits against companies such as Netflix, Amazon, and CBS); *Tag Archives: Sexual Harassment*, D&O DIARY, <https://www.dandodiary.com/tags/sexual-harassment/> [<https://perma.cc/U868-ZNSX>] (last visited Mar. 25, 2019) (listing articles on sexual-misconduct related law suits); Peter J. Biging & Heather M. Zimmer, *Corporate D&O Liability and Sexual Harassment in the Workplace*, AM. BAR ASS'N. (Nov. 20, 2018), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2018/november-2018/corporate-d-o-liability-sexual-harassment-workplace/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2018/november-2018/corporate-d-o-liability-sexual-harassment-workplace/) [<https://perma.cc/KY3F-G37L>] (referencing lawsuits brought by investors for the manner in which company boards have handled sexual harassment allegations).
  4. Katz & McIntosh, *supra* note 3; *American Business and #MeToo*, ECONOMIST (Sept. 27, 2018), <https://www.economist.com/business/2018/09/27/american-business-and-metoo> [<https://perma.cc/TSZ5-387X>]; see also EQUILEAP, <https://equileap.org/> [<https://perma.cc/E6S6-RFE5>] (last visited Mar. 25, 2019) (discussing Equileap, a global organization that advocates for gender equality in the corporate sector).

## I. SEXUAL MISCONDUCT

Since the #MeToo movement began in earnest, many business executives, media figures, and other prominent people have been subject to allegations of sexual misconduct.<sup>5</sup> What has happened to these people? There have been a range of responses, some more serious, and some more warranted than others.<sup>6</sup> As noted above, it is clear that behavior that was once acceptable no longer is. Indeed, some of the more serious misconduct seems to have been an open secret,<sup>7</sup> but the executives responsible for the misconduct were nevertheless signed to new employment agreements.<sup>8</sup> What the board knew in some of the cases may be litigated, but there are indications of some level of board knowledge in at least the *Weinstein* case and perhaps in the comparatively less egregious case of Les Moonves, now-former CEO of

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5. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (Dec. 1, 2018), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations> [<https://perma.cc/XD23-LR2V>] (listing nearly 100 famous men accused of sexual misconduct).
  6. *See id.* (detailing both the general fallout and the accused's reactions to sexual misconduct allegations against public figures). Allegations are easy to make, and the set of people alleged to have committed sexual misconduct is surely not coextensive with the set of people who have actually done so, nor is it even a subset of those people.
  7. *See infra* note 9 and accompanying text.
  8. *See* Harvey Weinstein Employment Agreement, available at <https://www.documentcloud.org/documents/4495391-Weinstein-Employment.html> [<https://perma.cc/7ZQ7-CJ6Y>] (showing that Weinstein's employment contract was renewed in 2015, years after Weinstein had been known by several prominent figures to have acted inappropriately, and included provisions apparently evidencing an awareness that Weinstein might commit misconduct); Leslie Moonves Employment Agreement, available at <https://www.sec.gov/Archives/edgar/data/813828/000119312507222104/dex10.htm> [<https://perma.cc/3VK5-7K7L>].

CBS, as well.<sup>9</sup> Weinstein is potentially facing ruinous criminal and civil liability.<sup>10</sup> Moonves, by contrast, is doing much better:

Just months after being fired by CBS, Leslie Moonves is running a new company. And though Mr. Moonves and his former employer are locked in a dispute over \$120 million in severance, CBS is paying for the office space that Mr. Moonves now occupies. The company, Moon Rise Unlimited, operates out of a 10th-floor suite at 9000 Sunset Boulevard, among the tallest buildings in West Hollywood. A glass-sheathed office tower with expansive views of Los Angeles, it can be seen from miles away and is near entertainment industry beehives like Soho House and Chateau Marmont. Mr. Moonves was forced out of CBS in September after multiple women accused him of sexual misconduct. In December, the company officially said he was fired, citing “willful and material misfeasance, violation of company policies and breach of his employment contract.” His exit agreement, however, states that CBS must pay for Mr. Moonves’s “office services” for no less than a year, even if the company fired him for cause. CBS declined to comment.<sup>11</sup>

This account, notwithstanding being in the news section of a prominent newspaper, seems to convey the reporter’s disapproval. Moonves was accused of serious misconduct yet was able to negotiate an exit agreement under which he receives significant benefits. And Moonves would, apparently, have a case that he is entitled to receive

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9. Yohana Desta, *What Exactly, Did the Weinstein Company Know About the Harvey Weinstein Allegations?*, VANITY FAIR (Oct. 12, 2017), <https://www.vanityfair.com/hollywood/2017/10/harvey-weinstein-company-lawyer> [<https://perma.cc/4EVE-KSX8>] (suggesting that Weinstein’s board knew of confidential settlement agreements between Weinstein and women in 2015); Dade Hayes & Nancy Tartaglione, *Weinstein Co. Board Has Known About Payoffs to Women Since 2015: Report*, DEADLINE (Oct. 12, 2017), <https://deadline.com/2017/10/weinstein-co-board-knew-payoffs-to-women-since-2015-report-1202186928/> [<https://perma.cc/76PX-L9AK>]; *CBS Higher-Ups Knew of CEO Leslie Moonves’ Sexual Misconduct and Did Nothing, Report Finds*, WOMEN WORLD (Dec. 5, 2018), <https://womenintheworld.com/2018/12/05/cbs-higher-ups-knew-of-ceo-leslie-moonves-sexual-misconduct-and-did-nothing-report-finds/> [<https://perma.cc/62G8-JQNJ>] (indicating that a CBS board member was privately informed of Moonves’ misconduct in 2007).
  10. Jan Ransom, *5 Ways Harvey Weinstein’s Lawyers Plan to Fight the Accusations Against Him*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/nyregion/weinstein-sexual-assault-defense.html> [<https://perma.cc/DT6H-5BMY>].
  11. David Gelles et al., *Les Moonves, Fired by CBS, Sets Up Shop in Hollywood*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/business/media/les-moonves-moonrise.html> [<https://perma.cc/6AUR-6Y56>].

his \$120 million severance. There are many media reports that criticize the possibility that he could receive severance under these circumstances.<sup>12</sup>

This outcome is in part a story of CEO employment agreements that make firings for cause very difficult indeed.<sup>13</sup> For instance, often, being convicted of a misdemeanor, or being indicted on felony charges but not being convicted, does not yield for-cause firing.<sup>14</sup> One article suggests that Moonves not getting severance “could signal a shift in the #MeToo quest to hold abusers accountable—a new data point that gives the existing scatter plot coherent shape.”<sup>15</sup>

It will be interesting to see what the lawsuits and other pressures yield. Certainly, there have been firings, and interestingly, many of the

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12. See, e.g., Vanessa Romo, *CBS Denies Former CEO Les Moonves \$120 Million Severance Package*, NPR (Dec. 17, 2018), <https://www.npr.org/2018/12/17/677587813/cbs-denies-former-ceo-les-moonves-120-million-severance-package> [<https://perma.cc/GLV7-DTR6>] (explaining that CBS fired Moonves for cause and he is not entitled to severance). But see Bloomberg, *Les Moonves Wants His \$120 Million Severance and He's Going to Fight CBS for It*, FORTUNE (Jan. 17, 2019), [fortune.com/2019/01/17/les-moonves-cbs-severance/](https://fortune.com/2019/01/17/les-moonves-cbs-severance/) [<https://perma.cc/JX52-8N6Y>] (stating that Moonves is demanding arbitration following CBS's decision to withhold severance).
  13. See generally ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 269–70 (5th ed. 2011) (noting that in the backdrop of the famous case *In Re The Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. Aug. 9, 2005), Disney could not justify for-cause termination of Ovitz, even though there was general consensus that Ovitz had not done a great job); Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833 (2007).
  14. See Mark J. Oberti, *5 Things All Execs Should Have in Employment Agreements*, THE BUS. J. (Aug. 29, 2013, 7:00 A.M. EDT), <https://www.bizjournals.com/bizjournals/how-to/human-resources/2013/01/5-things-all-execs-should-have-in.html> [<https://perma.cc/JXS3-YH5G>] (advising executives to seek narrow definitions of “cause” for termination in their employment agreements, covering only “conviction of a felony, embezzlement, theft or gross misconduct connected with work”); see, e.g., Harvey Weinstein Employment Agreement, *supra* note 8, at 12–13; Leslie Moonves Employment Agreement, *supra* note 8, at 13–14 .
  15. Mary Childs, *How Les Moonves' Zero Tolerance Could Be a Turning Point in Harassment Suits*, BARRON'S (Dec. 21, 2018, 7:58 PM ET), <https://www.barrons.com/articles/how-les-moonves-severance-could-change-the-math-of-sexual-harassment-suits-51545440338> [<https://perma.cc/2PWX-8B4B>].

men fired have been replaced by women.<sup>16</sup> Female representation seems to be increasing on boards as well.<sup>17</sup>

## II. PROFIT MAXIMIZING FIRMS AND SEXUAL MISCONDUCT

Corporations have duties to their shareholders, notably, to earn profits. But to whom else do they owe duties, and what do those duties entail? Different people have different views about this issue and, ultimately, many of the differences are matters of first principle, not really amenable to resolution.<sup>18</sup> The question we can approach, though, is: what maximizes profits? Obviously, companies spend enormous amounts of time considering this question, and they proceed according to their best assessment of the answer.

I am presently exploring whether certain business practices that seem to increase profits by reducing costs might have ancillary effects that limit, if not eliminate, the effect of the cost reductions. Imagine trying to save money on wages by hiring Worker B for 50 percent of the wage of the previous Worker A, only to find out that Worker B is less than 50 percent as productive as Worker A. Worker A may have friends who might shun the business, not being willing to work or shop there. Worker B's income is, by hypothesis, quite low, and he may not be particularly well-disposed to his company. The aggregate effect may be that the labor cost savings may be more than offset by increased production costs, increased costs in finding employees, and reduced demand. Worker B, who was ostensibly saving money for the company, turns out to ultimately cost money instead.

Another example involves a company's imposition of overly aggressive sales targets. Such targets may encourage overly aggressive sales tactics. The result may be that more honest employees quit and are replaced by employees whose willingness to lie *for* the company might be matched by their willingness to lie *to* the company. A third example hits closer to the topic of this Article: a company's assessment that a particular executive who engages in sexual or other misconduct brings value to the company that outweighs the costs of the behavior. The behavior may be worse than what the company thinks it is overlooking, or its assessment of how the behavior will be regarded once it becomes known may understate the costs, which may include

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16. Audrey Carlson et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/7DRM-KJ2R>].

17. *Quick Take: Women on Corporate Boards*, CATALYST (Dec. 21, 2018), <https://www.catalyst.org/knowledge/women-corporate-boards> [<https://perma.cc/G3HM-8RLJ>].

18. Claire A. Hill, *An Identity Theory of the Short- and Long-Term Investor Debate*, 41 SEATTLE U. L. REV. 475, 475–76 (2018).

penalties, increased regulatory scrutiny, and other results of reputational loss.

In the face of pressure from various realms, even a company taking the position that its only stakeholders are shareholders seeking profit could conclude that profit maximization is not always furthered by aggressive cost-reduction or revenue-maximization strategies or by not punishing (or even rewarding) its executives notwithstanding the executives' bad behavior. Especially as to the latter, but to some extent also as to the former, even a profit-maximizing company would not want to be caught making precise computations as to respects in which it gets close to, or perhaps crosses, a line (usually of legality, but perhaps even morality). Imagine a company being caught having made an assessment that the expected benefits of an "interaction" with Government Official X are \$10,000, whereas the expected costs, including as to the possibility that the "interaction" is considered a bribe, are \$8,000. Or, imagine a company being caught making an assessment that whatever settlement monies it has to pay for Harvey Weinstein's conduct were worth it, given how valuable an employee he was. Thus, even on profit maximization grounds, a company might want to estimate the costs associated with sensitive matters less conservatively.<sup>19</sup>

Certainly, as to conduct in the general category addressed by #MeToo, it seems likely that more generous assessments of expected costs are being made. Companies are now going further than a more conservative cost/benefit analysis would suggest in attempting to prevent, minimize, or *ex post* address the conduct. They are, perhaps, making a generous computation as to the reputational cost if sexual misconduct by a top official is discovered (and probably even if credibly alleged). In fact, we do not really know what the bottom-line effect of sexual misconduct allegations on a company will be. Some of the worst stock price effects seem to reflect not so much the misconduct itself, but rather the anticipated departure of the executive whom markets had perceived as valuable.<sup>20</sup> Harvey Weinstein's company went into bankruptcy. But in that case, the allegations were numerous, serious, and credible, and the company was so closely associated with Weinstein

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19. Claire A. Hill, *Caremark as Soft Law*, 90 TEMPLE L. REV. 681, 687–88 (2018); Claire A. Hill, *Marshalling Reputation to Limit Problematic Business Conduct*, 99 B.U. L. REV. (forthcoming 2019).

20. See Ryan Vlastelica, *Why the Wave of Sexual Harassment Allegations Won't Have an Impact on Stock Prices*, MARKETWATCH (Dec. 15, 2017), <https://www.marketwatch.com/story/why-the-wave-of-sexual-harassment-allegations-wont-have-an-impact-on-stock-prices-2017-12-15> [https://perma.cc/P7BE-XZYD] (noting, for example, a dip in 21st Century Fox Inc.'s stock after former network chairman Roger Ailes was accused of sexual misconduct and then subsequently departed the company).



that, once he was terminated, there was virtually nothing left.<sup>21</sup> That being said, however, the situation is dynamic. An important part of the #MeToo story is that behavior that was previously tolerated no longer is. My own life experience provides data points for this proposition. In my practice experience in the 1980s, suggestive remarks, gestures, and invitations of certain sorts by male clients directed at female lawyers were common and considered unremarkable; nowadays, it is apparently far more remarked upon (and less accepted). Will investors start doing more to punish firms that are considered not to be taking #MeToo seriously enough? And what are the costs of regulatory and “public” disfavor to a firm?<sup>22</sup> We don't know. Finally, whatever the effect on investors, regulators, and others, the costs of “managing” the crisis might be factored in as well, again supporting spending more to prevent or limit difficulties.

The foregoing argues that even a profit-maximizing firm might do more than a conservative instrumental calculation might suggest in order to prevent or minimize the costs of certain #MeToo harms. Firms that characterize themselves as profit-maximizing, concerned only about profits and shareholders, might go further for reasons of managerial agency costs: going further might benefit the directors more than the firm, insofar as the directors were also taking costs to themselves into account.

What sort of costs? To some extent, the “costs” are ones that the law wants them to take into account: the costs of personal liability for engaging in or not doing enough to prevent illegal conduct. “Pure” theory would regard these as agency costs, while any kind of ordinary understanding would not. If the expected benefit of bribing official A or concealing the criminal conduct of executive B is positive after taking into account the costs, notably the size of the bribe, the executive's salary, and the probability of detection and punishment of the firm,

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21. Weinstein was terminated on October 8, 2017, and the company declared bankruptcy in March 2018. Brooks Barnes, *Harvey Weinstein, Fired on Oct. 8, Resigns From Company's Board*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/business/media/harvey-weinstein-sexual-harassment.html> [https://perma.cc/VZF9-R84S]; Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html> [https://perma.cc/TKA4-8JRW].

22. See John Armour et al., *Putting Technology to Good Use for Society: The Role of Corporate, Competition and Tax Law* 9–10 (European Corp. Governance Inst., Working Paper No. 427/2018), [https://ecgi.global/sites/default/files/working\\_papers/documents/finalarmourenriquezezrachivella1.pdf](https://ecgi.global/sites/default/files/working_papers/documents/finalarmourenriquezezrachivella1.pdf) [https://perma.cc/YFU8-TTLS] (discussing the distinction between market reputation and political reputation).

then the perfect agent would bribe/conceal.<sup>23</sup> But of course, this reasoning is to be rejected; we cannot countenance directors' participation or facilitation of law breaking even if doing so would yield profit for their corporations. This reasoning should also allow directors to go beyond the minimum necessary in this context. A recent paper, summarized by the authors in the following blog post, discusses the types of claims that could be made against directors in relation to sexual harassment by company executives:

In our article, "Sexual Harassment and Corporate Law," we identify various legal arguments available to shareholders who seek to hold directors and officers responsible for corporate sexual misconduct. We conclude that in some instances, corporate fiduciaries will indeed be liable to shareholders when workplace-based sexual misconduct occurs at their companies. First and most straightforwardly, corporate fiduciaries violate their duties of care and loyalty when they engage in harassment themselves—and thus put the firm's resources and reputation at risk for their own personal gratification. Second, 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 the category in which the doctrinal case for liability is likely the weakest. Fourth, corporations and their officers and directors face potential liability under the federal securities statutes when they make

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23. Directors breach their fiduciary duties if they engage in conduct involving illegality (that is, engaging in it themselves or being culpable for not ferreting it out, as is alleged in *Caremark* cases) even if on balance there is a net profit for the corporation, an issue Brett McDonnell and I discuss in *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1784 (2007). We argue that most fiduciary duties are a way for shareholders to limit directors' and officers' ability and incentive to benefit themselves at the expense of their corporation, but:

a stark divergence between directors' interests and those of shareholders is not in any obvious way what is at issue. Illegal behavior may very well maximize corporate profits; indeed, we would expect that it often would. Paying an illegal bribe in country Z is intended to get you more business in country Z. Often, a company's (non-U.S.) competitors are not subject to antibribery rules, and if the U.S. executive follows the rules, he will lose business to the competitor that can bribe without fear of legal sanction.

*Id.*

inaccurate or misleading statements regarding workplace sexual misconduct.<sup>24</sup>

Firms that characterize themselves as profit-maximizing might go further for other reasons as well. Directors are concerned about their reputations and might take #MeToo preventing and minimizing steps for that reason. Is that an agency cost? Again, assuming that the firm's aims are characterized as profit maximization for shareholders, one could characterize the directors' actions as an agency cost insofar as what they are doing benefits their individual reputations (and perhaps saves them the trouble of defending their reputations) rather than benefiting the firm.

### III. BEYOND SEXUAL MISCONDUCT

The advent of the #MeToo movement has brought together and made more salient as one phenomenon issues surrounding women in the workplace. As two commentators explain:

As the #MeToo movement continues to make itself felt in all facets of American life, public company boards of directors that are newly focused on the issue of workplace harassment have seen corporate responses evolve. In recent months, many boards have overseen the addition of anti-harassment policies to corporate codes of conduct, the establishment of procedures for addressing allegations, and the enhancement of employee training at all

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24. Daniel Hemel & Dorothy Lund, *Sexual Harassment and Corporate Law*, CLS BLUE SKY BLOG (Apr. 9, 2018), <http://clsbluesky.law.columbia.edu/2018/04/09/sexual-harassment-and-corporate-law/> [<https://perma.cc/XF4L-PWKB>]. Some of the lawsuits include securities law claims alleging that companies did not disclose the problematic behavior of one or more executives (Wynn Resorts; CBS); alleging that the directors breached their fiduciary duties in not preventing such behavior and in attempting to conceal it (Nike; 21st Century Fox); and alleging that executives were rewarded for engaging in such behavior with generous severance packages that caused employees to revolt (Google/Alphabet, for example). Kevin M. LaCroix, *Sexual Misconduct and D&O Claims*, D&O DIARY (Apr. 11, 2018), <https://www.dandodiary.com/2018/04/articles/director-and-officer-liability/sexual-misconduct-claims/> [<https://perma.cc/UGW6-5QJ7>]; Kevin M. LaCroix, *Investor Files Sexual Misconduct-Related Securities Suit Against CBS*, D&O DIARY (Aug. 28, 2018), <https://www.dandodiary.com/2018/08/articles/securities-litigation/investor-files-sexual-misconduct-related-securities-suit-cbs/> [<https://perma.cc/Q98Q-NK9N>]; LaCroix, *Nike Board*, *supra* note 3; Kevin M. LaCroix, *Alphabet Board Hit with Derivative Suits over Alleged Sexual Misconduct at Google*, D&O DIARY (Jan. 13, 2019), <https://www.dandodiary.com/2019/01/articles/director-and-officer-liability/alphabet-board-hit-derivative-suits-alleged-sexual-misconduct-google/> [<https://perma.cc/DTM4-P562>] [hereinafter LaCroix, *Alphabet*].

levels. Directors are taking proactive steps toward educating themselves and looking deeply into the issues involved, and many have highlighted it as a priority for the senior management team. Boards that have successfully installed the nuts and bolts of good governance in this area can now step back and consider the larger project of gender equality in corporate America, in which sexual harassment, corporate culture, gender pay equity, and gender diversity are related issues. Shareholder activity in all four of these areas—which we will call collectively, “corporate equality”—has markedly increased, and boards looking ahead to the next phase of corporate governance activism should take note of this trend and try to be proactive as opposed to reactive.<sup>25</sup>

Another commentator speaks to the role of sexual harassment lawsuits in this regard:

[One of the cases against Google] not only refers to sexual misconduct involving Google executives, but also refers to the sexual discrimination in the male-dominated company culture that the complaint alleges has resulted in gender based pay and advancement disparity. The shareholder derivative lawsuit filed last summer against Nike . . . raised similar gender disparity allegations. The issue of gender-based pay disparity is an arguably related but different issue than the kinds of over sexual misconduct and harassment issues on which many of the #MeToo-related D&O lawsuits are based.

If the focus of the #MeToo social media movement were to move more generally from the sexual misconduct-type allegations and more toward gender based pay and advancement disparity, the wave of revelations could sweep much more broadly and the scope of the follow-on litigation could expand significantly as well.<sup>26</sup>

The author points out that two of the complaints in the cases against Google “refer to a toxic male-dominated culture.” He notes that “‘programmer culture’ . . . is not found just at Google . . . . [T]he implication is that the toxic conditions at Google can be found at other tech companies—which in turn suggests that other tech companies also could find themselves the target of this kind of litigation.”<sup>27</sup>

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25. David A. Katz et al., *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG., (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [<https://perma.cc/2E8E-HYJB>].

26. LaCroix, *Alphabet*, *supra* note 24.

27. *Id.*

This suggests that various pressures are being brought to bear to encourage companies not just to minimize or prevent sexual misconduct, but also, to deal more broadly with problems associated with women in the workplace, at both junior and senior levels. In an almost tautological way, so long as the efforts requested of companies are not that costly and also do not affirmatively harm their profit-making missions, these efforts could be consistent with profit maximization for shareholders as the sole corporate mission. If, for instance, having some percentage of women on a board is not demonstrably bad for profits and if the constituencies making the request have to be attended to (if, for instance, they are major shareholders), the company surely is not going against its profit-maximizing mission to assent. Because the matters at issue are difficult to investigate, it will not be possible to determine with enough certainty what effect women on boards have on profitability; thus, it will not be clear whether or not profitability is positively or adversely affected, leaving room for other pressures to affect decisions as to board composition.<sup>28</sup>

A similar stance can be taken regarding the effect of any of these initiatives on reputation. What does (and does not) and would (and would not) affect reputation is the subject of considerable debate. Given the complexities involved and the dynamic nature of the issue and reactions to it, it is easy to couch a comprehensive program addressing many #MeToo issues, such as the avoidance of sexual misconduct and harassment, the encouragement of “good” things such as diversity on boards, and, perhaps, pay equality for women, as consistent with profit maximization.

#### IV. RETURNING TO PROFIT MAXIMIZATION AND CSR

In 2018, Larry Fink, CEO of Blackrock and one of the biggest institutional investors in the world, wrote a letter to CEOs that has been quite influential as a call to corporations to act more for the long term and more in the public interest.

Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees,

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28. *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WHARTON (May 18, 2017), <http://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/> [<https://perma.cc/N3AC-DMN8>] (summarizing studies about the impact of having women on corporate boards and concluding that the results do not indicate a negative impact to businesses with women on the board).

customers, and the communities in which they operate. Without a sense of purpose, no company, either public or private, can achieve its full potential.<sup>29</sup>

Fink also made the case for boards that are diverse, including as to gender:

We also will continue to emphasize the importance of a diverse board. Boards with a diverse mix of genders, ethnicities, career experiences, and ways of thinking have, as a result, a more diverse and aware mindset. They are less likely to succumb to groupthink or miss new threats to a company's business model. And they are better able to identify opportunities that promote long-term growth.<sup>30</sup>

Some commentators have suggested that Fink's letter is just "good PR."<sup>31</sup> There are also respects in which, notwithstanding his "all things to all people" language, there are real tensions at issue and very difficult societal questions—that being "all things to all people" is not actually possible and perhaps not even desirable. And finally, there are very real questions as to what is in society's interests. Still, especially with memories and traces of the 2008 financial crisis remaining, there is a general sense that corporations have sometimes been forces for harm and could, many believe should, be forces for good.

But what does that entail beyond avoiding harm? Some commentators argue—or even assert—that corporations should, for reasons of good corporate citizenship or for some other like reason, go what some might consider "above and beyond." Not surprisingly, a search for the term "Corporate Social Responsibility" on Google yields 245,000,000 hits;<sup>32</sup> a search for "Environmental Social Governance" yields 233,000,000 hits.<sup>33</sup> Many commentators argue or simply assume that corporations "should" engage in certain "good" behaviors "because

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29. Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BlackRock (2018), <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/H5MT-4WF8>].

30. *Id.*

31. See, e.g., Jeff Hauser & Eleanor Eagan, *BlackRock's 'Greenwashing' Threatens to Undermine Climate Action*, AM. PROSPECT (Feb. 26, 2019), <https://prospect.org/article/blackrocks-greenwashing-threatens-undermine-climate-action> [<https://perma.cc/6894-F7QR>].

32. Corporate Social Responsibility, GOOGLE, [www.google.com](http://www.google.com) (search for "Corporate Social Responsibility") [<https://perma.cc/47SL-M7X9>] (last visited Mar. 22, 2019).

33. Environmental Social Governance, GOOGLE, [www.google.com](http://www.google.com) (search for "Environmental Social Governance") [<https://perma.cc/ZY8N-HQBN>] (last visited Mar. 22, 2019).

it is the right thing to do,” whether or not those behaviors are profit maximizing. My argument here suggests that the relationship between these behaviors and profit maximization is not straightforward and that the supposed tension may be overstated.

My broader aim is to argue that costs associated with certain types of behaviors, notably including additional reputational costs and the costs of potential legal liability and regulatory disfavor, are such that firms will have profit-maximizing reasons to minimize the behaviors.

But doesn't my reasoning support giving weight to any sort of strong pressure by a constituency against an entity, whether or not the pressure is for something "good" for the broader society?<sup>34</sup> Companies could deal with pressures from #MeToo instrumentally and atomistically. They could determine, crudely, that they will listen to the louder and seemingly more important and influential pressures and either follow their dictates or appear to do so, focusing on harm minimization and taking some affirmative steps that the company decides are sufficiently warranted or will appease enough of the right people. That is, they could respond narrowly. But alternatively, they could also take up Fink's charge, and the broader charge of the increasing forces favoring corporate good citizenship and be pro-active, not just as to particular issues but more holistically.

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34. I have attempted in other works to develop a principled basis to distinguish among various pressures. See Claire A. Hill, *Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda*, 74 WASH. & LEE L. REV. 973 (2017); Claire A. Hill, *Cheap Sentiment*, 81 L. & CONTEMP. PROBS. 67 (2018); Claire A. Hill, *Marshalling Reputation to Limit Problematic Business Conduct*, 99 B.U. L. REV. (forthcoming 2019).