Executive Private Misconduct

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Abstract

Executives misbehave. In recent years, the world has been outraged and appalled by the shocking misbehavior of corporate executives. Some of their behavior have been plainly unethical; others have been deeply offensive; and still others have been simply criminal. Regardless of the misbehavior, such executive private misconduct—when made public—has frequently damaged their public reputations, harmed their company's market values, destroyed investor portfolios, and raised serious legal and policy issues.

This Article provides one of the first comprehensive examinations of executive private misconduct and its wide-ranging effects on law, business, and society. It begins by providing context for how we got here. It investigates how the unfolding #MeToo movement, shifting social understandings of public and private, and changing corporate social expectations have all fostered a new landscape that is less tolerant of executive private misconduct. Next, it examines why legal gaps and tensions in current business law complicate executive private behavior discussions. It reveals how corporate law principles of fiduciary duties and securities law principles of disclosures were not structurally designed to confront the hard issues and questions raised by executive private misconduct. Moving from causes to consequences, this Article next examines the larger implications of executive private misconduct on corporate governance, corporate policies, and corporate purpose. Finally, this Article recommends pragmatic next steps for corporate stakeholders, regulators, and policymakers in a changing business environment. Specifically, it proposes a new baseline framework for working through perplexing executive private misconduct issues, along with concrete business policy reforms concerning nondisclosure agreements, mandatory arbitration, and annual misconduct reports. Ultimately, this Article seeks to provide an original, workable roadmap and compass for conceptualizing, navigating, and addressing executive private misconduct and its impact on law, business, and society.

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* Professor of Law, Temple University Beasley School of Law. Many thanks to Anthony Casey, Jill Fisch, Joan Heminway, Ann Lipton, Jennifer Nou, Anne Joseph O'Connell, Elizabeth Pollman, Rachel Rebouché, Usha Rodrigues, Megan Shaner, Lynn Stout, Harwell Wells, and the conference/workshop participants at Cornell Law School's Lynn Stout Memorial Conference, University of Chicago Law School, the 2018 Investment Funds Roundtable, and the 2019 National Business Law Scholars Conference for their invaluable insights, comments, and exchanges. Additionally, I am grateful to Anjali Deshpande and Matthew Sherman for their extraordinary research assistance.

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Introduction

All business executives, like all mortals, are "commingled out of good and evil."[1] They can be successes in their professional, public pursuits and failures in their personal, private lives.[2] They can be titans of industry and harassers of women.[3] They can be forward innovators and outdated bigots.[4] They can be business luminaries and

[1] Robert Louis Stevenson, Strange Case of Dr Jekyll and Mr Hyde 61–62 (Richard Dury ed., 2004) ("[A]ll human beings, as we meet them, are commingled out of good and evil . . . .").

[2] *See* Walter Isaacson, Steve Jobs 86–90, 140 (2011) (chronicling the personal failings of Steve Jobs in abandoning and denying the existence of his daughter).

[3] *See, e.g.*, 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 [https://perma.cc/Z6EQ-PYKD].

[4] *See, e.g.*, William Saletan, *Purge the Bigots*, Slate (Apr. 4, 2014, 8:12 AM), https://

criminal actors.[5] They can be great for our portfolios and damaging for our values. And more and more, these divergent lives of business executives are converging with serious legal, social, and business implications.

Over the last few years, the world has been outraged and appalled by the misbehavior of corporate executives like Harvey Weinstein, Steve Wynn, Leslie Moonves, and Elon Musk.[6] Some of the behaviors have been deeply offensive; others have been plainly unethical; and still others have been simply criminal. Regardless of the severity of their misbehavior, such executive private misconduct—when made public—has frequently damaged their public reputations, harmed their company's market values, and raised some serious legal and policy issues.[7]

This Article is about the convergence of the private lives and public consequences of executive personal misbehavior. This Article offers one of the first comprehensive examinations of the hard, legal issues arising from the private conduct of corporate executives and the consequences emanating from those issues for law, society, and business. It investigates the structural roots of these issues concerning executive private behavior and public firms, analyzes the core legal tensions that have made these issues so difficult to resolve, and offers pragmatic proposals for policymakers and executives in a rapidly changing world.

Drawing on the author's prior work and a rich body of interdisciplinary research that spans law, business, management, and sociology, this Article aspires to make three contributions.[8] First, this Article

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slate.com/news-and-politics/2014/04/brendan-eich-quits-mozilla-lets-purge-all-the-anti-gay-donors-to-prop-8.html [https://perma.cc/2VKC-XGC9].

5 *See, e.g.*, CATHERINE S. NEAL, TAKING DOWN THE LION 211–20 (2014) (detailing the business successes and ultimate criminal conviction of a leading executive); Andrew Ross Sorkin, *Tyco Details Lavish Lives of Executives*, N.Y. TIMES (Sept. 18, 2002), https://www.nytimes.com/2002/09/18/business/tyco-details-lavish-lives-of-executives.html [https://perma.cc/4G4K-9QDF] (describing indictments of former top Tyco executives and the corporate culture that facilitated the eventual criminal conduct).

6 *See infra* Section I.A.

7 *See, e.g.*, Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 133–34 (2018) ("[P]art of the power of the #MeToo and #TimesUp movements [is that] employers understand that negative publicity resulting from a failure to take action against a sexual harasser can have a devastating impact on their bottom lines.").

8 *See generally* George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 733–37 (2000); Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 77 (2018); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003); Margaret M. Blair & Lynn A. Stout, *A*

aims to build a cogent narrative for understanding and explaining the vexing issues posed by executive private misconduct in contemporary society. Second, it aims to highlight the legal and practical tensions that must be confronted when dealing with these issues, given the crosscutting concerns of law, capital, power, and privacy. Third, it aims to offer pragmatic recommendations that corporate stakeholders and policymakers should adopt in addressing the profound issues implicated by the private misconduct of business executives. In pursuit of these objectives, this Article recognizes that executive private misconduct issues are not limited to well-known executives of large, established companies like Elon Musk of Tesla, Steve Wynn formerly of Wynn Resorts, and Les Moonves formerly of CBS.[9] Rather, these issues extend to startups and newer companies like Uber, WeWork, and Theranos, as well as obscure executives at lesser known, undistinguished companies.[10] Additionally, in working towards these objectives, this Article is mindful of the fact that businesses and business law can only achieve—at best—a limited role in curtailing private misconduct and changing private behavior for the better, whether it is by

Team Production Theory of Corporate Law, 85 VA. L. REV. 247, 272 (1999); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1592–93 (2018); Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 774 (2007); Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 341–46 (2013); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 173 (2005); Mary-Hunter McDonnell & Brayden King, *Keeping up Appearances: Reputational Threat and Impression Management After Social Movement Boycotts*, 58 ADMIN. SCI. Q. 387, 409–12 (2013); Raghuram G. Rajan & Julie Wulf, *Are Perks Purely Managerial Excess?*, 79 J. FIN. ECON. 1, 2–5 (2006); Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 137, 137–38 (2011); Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 23–26 (2018); Victoria L. Schwartz, *Corporate Privacy Failures Start at the Top*, 58 B.C. L. REV. 1693, 1712 (2016).

9 *See infra* Section I.A.

10 *See, e.g.*, JOHN CARREYROU, BAD BLOOD 226–29 (2019) (discussing Theranos executives' fraudulent private actions); EMILY CHANG, BROTOPIA 7–11, 143–47 (2018) (chronicling certain Silicon Valley executives' boorish and harmful behavior); ELLEN K. PAO, RESET 76–77, 120–28 (2017) (describing systemic executive misconduct against female employees in the venture capital and technology industries); DAVID F. LARCKER & BRIAN TAYAN, STAN. CLOSER LOOK SERIES, GOVERNANCE GONE WILD 2–4 (2017) (outlining Uber executives' professional and private misdeeds); Sheelah Kolhatkar, *The Tech Industry's Gender-Discrimination Problem*, NEW YORKER (Nov. 13, 2017), https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem [https://perma.cc/9GKN-RNXY] (reporting on executive private misconduct against women in the technology industry); Lizzie Widdicombe, *The Rise and Fall of WeWork*, NEW YORKER (Nov. 6, 2019), https://www.newyorker.com/culture/culture-desk/the-rise-and-fall-of-wework [https://perma.cc/2KJJ-LDTD].

executives or by others. Nevertheless, because of the influential role of businesses and executives, companies can play an important role in stemming private misconduct in the workplace and society. Ultimately, in pursuit of these three objectives, this Article seeks to provide an original, workable roadmap and compass for conceptualizing, navigating, and addressing executive private misconduct and its impact on law, society, and business.[11]

This Article builds this roadmap and compass in three parts. Part I charts traveled lands and changing roads by exploring the new contemporary socioeconomic landscape where executive private behavior can have very serious and often public consequences. It examines three large, interrelated social and business shifts that have precipitated the formation of this new terrain. In particular, it explains how the #MeToo movement, changing understandings of public and private, and evolving societal expectations have all helped to foster this new landscape for law, business, and society.

Part II highlights structural obstacles—the pitfalls and perils of current policies and practices. It investigates the legal gaps and tensions presented by business law relating to executive private behavior. It reveals how corporate law principles of fiduciary duties and securities law principles of disclosures were not designed to confront the hard issues and questions raised by executive private misconduct. Furthermore, it highlights how these design mismatches have resulted in arbitrary and risky practices that leave companies, investors, and employees on precarious terrain, vulnerable to sudden revelations of executive private misconduct that shock investors, firms, and markets.

Moving from charting the past to navigating the future, Part III offers an early compass for moving forward in a new, changing environment. It highlights the larger implications of addressing executive private misconduct issues and recommends pragmatic next steps for corporate stakeholders, regulators, and policymakers. It contends directly with how such issues impact corporate governance, corporate

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11 For the purposes of this Article, the terms "business," "company," and "corporation" generally refer to large corporations, particularly public corporations because of their influential, outsized role in law, business, and society. The Model Business Corporation Act defines a public corporation as "a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association." MODEL BUS. CORP. ACT § 1.40(18A) (1969) (AM. BAR ASS'N, amended 2013). This Article recognizes that many business executives, including some referenced herein, who oversee enterprises organized as noncorporate entities—such as limited liability companies, general partnerships, and limited partnerships—may also engage in executive private misconduct. As such, this Article's discussion and analysis is relevant to executives of all business enterprises.

policies, and corporate purpose in a changing society and marketplace. It proposes an original, baseline framework for working through perplexing executive private misconduct issues, along with concrete business policy reforms concerning nondisclosure agreements, mandatory arbitration, and annual misconduct reports. It makes these proposals to help businesses and policymakers navigate the challenging questions posed by executive private misconduct in a society and marketplace that is redefining its understandings of, and relationships with corporations.

This Article briefly concludes by recounting the challenges inherent in regulating executive private conduct at the intersection of law, capital, power, and privacy, and it looks forward with hope at the possibility of better executives and businesses working toward a better and more just society.

I. A New Landscape

Businesses and executives operate in a new, changing socioeconomic landscape, where executive private conduct and corporate actions can have very serious and often public consequences.[12] Three noteworthy, interrelated social and business shifts have precipitated the formation of this new landscape. First, the emergence of the #MeToo movement has meant private actions once deemed tolerable are now unacceptable. Second, conventional understandings of private and public, on an individual and institutional basis, have given way to a more nuanced reality in a new media and sociopolitical environment. Third, societal and investor expectations of businesses and their executives have shifted away from traditional, profit-driven modes of the past toward one that cares about social responsibility in addition to financial earnings. Collectively, these significant, interrelated changes have forced law, society, and businesses to reexamine and reshape discussions about corporate conduct and executive private behavior.

A. *The #MeToo Movement & Beyond*

The unfolding #MeToo movement initiated by many courageous women and men has precipitated a long overdue examination of law, business, gender, dignity, and power throughout the business world and society.[13] The recent iteration of the #MeToo movement, originat-

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12 *See* Jeremy Heimans & Henry Timms, New Power 9–12 (2018).

13 *See, e.g.*, Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, New Yorker (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-

ing in 2017, has been an uncomfortable but necessary awakening for the business world and its executives[14]—one that is reshaping corporate norms and behaviors. In October 2017, the #MeToo hashtag went viral on social media when actress Alyssa Milano posted the following tweet:

Tweet by Alyssa Milano[15]

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and-cbs-face-allegations-of-sexual-misconduct [https://perma.cc/CCX6-EPFB]; Maggie Haberman, *Bill Shine, Ousted from Fox News in Scandal, Joins White House Communications Team*, N.Y. Times (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/bill-shine-white-house-communications.html [https://perma.cc/T66V-BJ7C]; *How Saying #MeToo Changed Their Lives*, N.Y. Times, https://www.nytimes.com/interactive/2018/06/28/arts/metoo-movement-stories.html [https://perma.cc/9A3H-E4LX]; Erik Ortiz & Corky Siemaszko, *NBC News Fires Matt Lauer After Sexual Misconduct Review*, NBC News (Nov. 30, 2017, 7:39 AM), https://www.nbcnews.com/storyline/sexual-misconduct/nbc-news-fires-today-anchor-matt-lauer-after-sexual-misconduct-n824831 [https://perma.cc/JDU7-ZJE8]; Emily Steel & Michael S. Schmidt, *Bill O'Reilly Is Forced out at Fox News*, N.Y. Times (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html [https://perma.cc/Y9LR-QDQV].

14 The recent iteration of the #MeToo movement actually finds its roots in Tarana Burke, a social activist working with victims of sexual abuse, who first used the term "Me Too" in 2007. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. Times (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/63VN-D3VB].

15 Alyssa Milano (@Alyssa_Milano), Twitter (Oct. 15, 2017, 1:21 PM)

Following Milano's tweet, the #MeToo hashtag trended on Twitter, Facebook, Snapchat, and other leading social media platforms. On Facebook alone, it was shared in more than 12 million posts within the first 24 hours.[16] The effects of this movement continue to ripple throughout American business and American society. Private or workplace sexual misconduct and other behavior by executives and colleagues previously tolerated or ignored is now deemed unacceptable and faces greater scrutiny.[17] This shift in what is deemed tolerable, even acceptable, has expanded beyond the #MeToo movement into other private behaviors of corporate executives and institutions. Four prominent recent cases involving Harvey Weinstein, Steven Wynn, Leslie Moonves, and Elon Musk help to illustrate this ongoing shift.

1. *Harvey Weinstein & The Weinstein Company*

The allegations of sexual assault and harassment against prominent Hollywood executive Harvey Weinstein in October of 2017 sparked widespread discussion and catalyzed the ongoing #MeToo movement.[18] Indeed, Milano's viral tweet actually came as a response to the allegations against Weinstein, the now disgraced but once powerful Hollywood producer.[19]

Weinstein's public demise started with the publication of two reports in early October 2017, which detailed the harrowing accounts of women alleging that Weinstein had abused them.[20] The reports, to-

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https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [https://perma.cc/3DNN-5QVS].

16 *More Than 12M "Me Too" Facebook Posts, Comments, Reactions, in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:26 PM), https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/ [https://perma.cc/AM48-3374]; *see also* Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html [https://perma.cc/J7DY-D4EU].

17 *See* Vanessa Fuhrmans & Rachel Feintzeig, *Scrutiny of CEOs' Personal Lives Rises in #MeToo Era*, WALL STREET J. (June 21, 2018, 3:09 PM), https://www.wsj.com/articles/scrutiny-of-ceos-personal-lives-rises-in-metoo-era-1529608172 [https://perma.cc/QDM5-76WX]; David Yaffe-Bellany, *McDonald's CEO Fired Over Relationship That's Becoming Taboo*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/business/mcdonalds-ceo-fired.html [https://perma.cc/A2RL-C9BK].

18 Garcia, *supra* note 14.

19 *See* Jessica Bennett & Maya Salam, *Harvey Weinstein 'Perp Walked' into the Future of #MeToo*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/harvey-weinstein-perp-walk.html [https://perma.cc/922U-2TC8]; Garcia, *supra* note 14; *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (Feb. 24, 2020), https://www.bbc.com/news/entertainment-arts-41594672 [https://perma.cc/69AK-DGLP].

20 *See* Jodi Kantor & Megan Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*,

gether, revealed horrific allegations of sexual assault and harassment against Weinstein that spanned nearly three decades and included at least eight settlements with his accusers.[21] Weinstein and his associates, wielding extraordinary power in Hollywood, allegedly used nondisclosure agreements, payoffs, retaliation, legal threats, and other aggressive tactics to silence his accusers for more than twenty years.[22]

In the aftermath of the revelation, Weinstein and his namesake business the Weinstein Company, a Delaware limited liability company cofounded by Weinstein and his brother Bob Weinstein, crumbled after serious strife in the boardroom over the matter.[23] The Weinstein Company fired Harvey Weinstein a few days after the initial *New York Times* report came out.[24] Several members of its board also resigned within days of the reports.[25] The Weinstein Company subsequently filed for bankruptcy, and, in 2018, the company sold itself for a fraction of its prescandal value.[26] On the personal front, Weinstein was arrested in New York City for various sex crimes in 2018, and he was later convicted in 2020 for criminal sexual assault and rape.[27]

N.Y. TIMES, Oct. 6, 2017, at A1; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/E3BF-66AC].

21 Kantor & Twohey, *supra* note 20; Farrow, *supra* note 20.

22 *See* Megan Twohey, *Citing Scandal, Studio's Board Fires Weinstein*, N.Y. TIMES, Oct. 9, 2017, at A1; Ronan Farrow, *Harvey Weinstein's Army of Spies*, NEW YORKER (Nov. 6, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies [https://perma.cc/2WYG-37PR]; Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 6, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [https://perma.cc/7PNP-YP52]; Ronan Farrow, *Weighing the Costs of Speaking Out About Harvey Weinstein*, NEW YORKER (Oct. 28, 2017), https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein [https://perma.cc/TL5U-GSHD].

23 RONAN FARROW, CATCH AND KILL 273–77 (2019).

24 Twohey, *supra* note 22, at A1.

25 *Id.*

26 Brooks Barnes, *Weinstein Company Is Losing the Other Weinstein Brother*, N.Y. TIMES, July 13, 2018, at B6; Chris Isidore, *Remains of the Weinstein Company Sold—To the Only Real Bidder*, CNN (May 2, 2018, 11:32 AM), https://money.cnn.com/2018/05/02/media/weinstein-company-bidder/index.html [https://perma.cc/2F23-PWA8].

27 Ronan Farrow, *Behind the Scenes of Harvey Weinstein's Arrest*, NEW YORKER (May 25, 2018), https://www.newyorker.com/news/news-desk/behind-the-scenes-of-harvey-weinsteins-impending-arrest [https://perma.cc/4XPH-MTZ3]; *see also* Benjamin Mueller & Alan Feuer, *A Day in Court Follows Decades of Abuse Claims*, N.Y. TIMES, May 26, 2018, at A1; Jan Ransom, *Judge Rejects Harvey Weinstein's Request to Dismiss Sexual Assault Case*, N.Y. TIMES (Dec. 20, 2018), https://www.nytimes.com/2018/12/20/nyregion/harvey-weinstein-case-sexual-assault.html [https://perma.cc/K4AF-KGFS]; Jan Ransom, *Harvey Weinstein Is Found Guilty of Sex Crimes in*

2. Steve Wynn & Wynn Resorts Ltd.

Steve Wynn, the chief executive officer ("CEO") and chairman of his namesake publicly traded company, Wynn Resorts, was ousted from his corporate positions in the wake of sexual misconduct accusations as part of the #MeToo movement.[28] According to various 2018 news reports, numerous women over the course of decades alleged that Wynn sexually assaulted and harassed them and then paid them millions of dollars in confidential settlements.[29] Following the allegations, the Wynn Resorts board formed a special committee to investigate the matter.[30] Within a week of the reports, Wynn resigned as chairman and CEO of the company, despite denying all of the allegations against him.[31] Wynn also resigned as chairman of Wynn Macau, which was the branch of the company that focused on Chinese gambling.[32] The board of Wynn Resorts named Matthew Maddox as the new CEO and installed three new female board members.[33] Wynn Resorts also created a new department to address unfair treatment in the workplace, which focuses on diversity, inclusion, gender equality, and support for employee charitable efforts.[34]

Wynn's importance to his namesake company cannot be overstated. In addition to being the CEO and chairman of the company, Wynn was also a significant shareholder and considered to be a leading figure in the gaming industry as the innovator and builder of sev-

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#*MeToo Watershed*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-trial-rape-verdict.html [https://perma.cc/NJE3-DYWQ].

28 *See* Astor & Creswell, *supra* note 3; Brad Tuttle, *Billionaire Casino Mogul Steve Wynn Has Been Accused of Sexual Misconduct. Here's What We Know About His Money*, MONEY (Jan. 26, 2018), http://money.com/money/5121403/steve-wynn-net-worth-sexual-misconduct/ [https://perma.cc/U92E-7TJ5].

29 Alexandra Berzon et al., *Wynn Accused of Sexual Misconduct—Interviews with Employees and Others Describe CEO Who Pressured Workers to Perform Sex Acts*, WALL STREET J., Jan. 27, 2018, at A1.

30 Chris Kirkham, *Wynn Resorts Board to Probe Allegations Against CEO*, WALL STREET J. (Jan. 27, 2018, 12:53 AM), https://www.wsj.com/articles/wynn-resorts-board-to-probe-allegations-against-ceo-1517032399?mod=article_inline [https://perma.cc/CM9R-F9E2].

31 Astor & Creswell, *supra* note 3.

32 *Id.* Shares of Wynn Macau are traded in Hong Kong. *Id.*

33 Christopher Palmeri & Anders Melin, *Wynn Resorts Adds Three Women to Board in Post-Scandal Shake-Up*, BLOOMBERG (Apr. 19, 2018, 9:57 AM), https://www.bloomberg.com/news/articles/2018-04-18/wynn-resorts-adds-female-board-members-in-post-scandal-makeover [https://perma.cc/36SD-NDUE].

34 Maria Armental, *Wynn Resorts Creates 'Culture and Community Department' in Wake of Sexual-Misconduct Scandal*, WALL STREET J. (Apr. 9, 2018, 11:09 PM), https://www.wsj.com/articles/wynn-resorts-creates-culture-and-community-department-in-wake-of-sexual-misconduct-scandal-1523307931 [https://perma.cc/8ETR-KDQT].

eral lavish casinos along the Las Vegas strip.[35] At the time of the *Wall Street Journal*'s initial report, Wynn held nearly 12% of shares, which was worth $2.4 billion.[36] Wynn was considered so integral to the company that it disclosed in its securities filings that "[i]f we lose the services of Mr. Wynn, or if he is unable to devote sufficient attention to our operations for any other reason, our business may be significantly impaired."[37] Shortly after Wynn resigned from the company, Wynn Resorts' stock price fell from $200.60 to $163.22.[38] In March of 2018, just a few months after the report, Wynn sold his entire stake in his namesake company.[39] By early 2019, Wynn Resorts had lost about 40% of its value since Wynn's resignation, representing a loss of billions of dollars for investors.[40]

3. *Leslie Moonves & CBS*

One of the most prominent corporate executives to be ousted as a result of the #MeToo movement is Leslie Moonves, the former CEO and chairman of CBS. Moonves was one of the most powerful figures in the entertainment industry for decades.[41] In July 2018, six women accused Moonves of sexual harassment, assault, and intimidation.[42] In the immediate aftermath of the report, CBS shares fell by more than six percent, costing shareholders hundreds of millions of dollars in market value.[43] In response to the report, the CBS board of directors initiated an investigation into the allegations.[44] While the investigation was pending, a second report published new claims that Moonves sexually assaulted and harassed six additional women.[45] Immediately fol-

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35 *See* Berzon et al., *supra* note 29, at A1; Astor & Creswell, *supra* note 3; Tuttle, *supra* note 28.

36 Berzon et al., *supra* note 29.

37 *Id.*

38 Astor & Creswell, *supra* note 3.

39 Chris Kirkham, *Steve Wynn Sells Remaining Shares in Wynn Resorts*, WALL STREET J. (Mar. 22, 2018, 8:35 PM), https://www.wsj.com/articles/steve-wynn-sells-remaining-shares-in-wynn-resorts-1521765316 [https://perma.cc/87Z7-YRPA].

40 Steve Friess, *Long vs. Short: Can Wynn Casinos Recover from Steve Wynn's #MeToo Scandal?*, N.Y. MAG: INTELLIGENCER (Jan. 4, 2019), http://nymag.com/intelligencer/2019/01/can-wynn-casinos-recover-from-steve-wynns-metoo-scandal.html [https://perma.cc/M4A9-X2HY]; *see also* Benjamin Rains, *Can Wynn Resorts Stock Recover from CEO Scandal?*, NASDAQ (Mar. 21, 2018, 6:44 AM), https://www.nasdaq.com/article/can-wynn-resorts-stock-recover-from-ceo-scandal-cm937986 [https://perma.cc/U35X-BHWJ].

41 Farrow, *supra* note 13.

42 *See id.*

43 *See* Edmund Lee, *Moonves Faces Inquiry by CBS on Misconduct*, N.Y. TIMES, July 28, 2018, at A1.

44 *Id.*

45 *See* Ronan Farrow, *As Leslie Moonves Negotiates His Exit from CBS, Six Women Raise*

lowing this second report, Moonves stepped down from his executive positions at CBS.[46] CBS also revamped its board of directors, adding six new members.[47]

In the aftermath of the Moonves scandal, CBS faced serious questions about its governance.[48] The investigation into Moonves and the wider work culture at CBS revealed deeply troubling behavior and governance issues.[49] For instance, the report indicated that Moonves—with the knowledge of some board members—worked to obstruct the investigation into his misconduct.[50] As result of the investigation, Moonves was denied his $120 million severance package.[51] In early 2019, CBS and its shareholders continued to suffer from governance uncertainty and a depressed stock price; by the end of that year, CBS would merge with Viacom to form ViacomCBS.[52]

4. *Elon Musk & Tesla*

In the midst of the #MeToo movement, some of Elon Musk's private behavior created significant controversy and serious consequences for him and his company, Tesla, even though the private conduct in question was not sexual in nature. Musk, in addition to being the CEO and former chairman of Tesla, is an admired entrepreneur and technologist.[53] Musk is also a widely followed executive with

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New Assault and Harassment Claims, NEW YORKER (Sept. 9, 2018), https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims [https://perma.cc/JPV8-C6FU].

46 *Id.*

47 Edmund Lee, *CBS Board Tries to Move Past Moonves Crisis with New Directors*, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/business/media/cbs-board-les-moonves-shari-redstone.html [https://perma.cc/XH2R-6W9Q].

48 *See* James B. Stewart, *'Disaster for CBS Shareholders': Damning Report on Moonves Reveals Total Failure at Top*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/business/leslie-moonves-cbs-board.html [https://perma.cc/UT6A-CXPV].

49 *See* Rachel Abrams & David Enrich, *'Transactional' Sex and a Secret Resignation Letter: Takeaways from a Report on Les Moonves*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/business/les-moonves-cbs-report-takeaways.html [https://perma.cc/A9Y2-AE6L].

50 *See* Edmund Lee & Rachel Abrams, *CBS Says Les Moonves Will Not Receive $120 Million Severance*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/business/media/les-moonves-cbs-severance.html [https://perma.cc/WEJ7-3MTW]; Stewart, *supra* note 48.

51 Lee & Abrams, *supra* note 50.

52 *See* Edmund Lee, *Young Sheldon, Meet Spongebob: CBS and Viacom Are Back Together*, N.Y. TIMES (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/business/media/viacom-cbs-merger.html [https://perma.cc/6GUJ-KM4D]; Stewart, *supra* note 48.

53 *See* ASHLEE VANCE, ELON MUSK 22 (2015) (describing Elon Musk as "an inventor, celebrity businessman, and industrialist able to take big ideas and turn them into big products"); Press Release, U.S. Sec. & Exch. Comm'n, Elon Musk Settles SEC Fraud Charges; Tesla Charged with and Resolves Securities Law Charge (Sept. 29, 2018), https://www.sec.gov/news/press-release/2018-226 [https://perma.cc/W87C-EQW2] [hereinafter Press Release].

an active social media presence, as evidenced in part by his more than 28 million Twitter followers.[54]

In 2018, Musk's private social media and publicity-seeking behavior led to a federal investigation, a decline in Tesla's stock price, and his eventual ouster as chairman of Tesla. On August 7, 2018, Musk tweeted, "[a]m considering taking Tesla private at $420. Funding secured."[55] At the time of the tweet—in the middle of the trading day—Tesla's stock was already up more than seven percent because of a report that Saudi Arabia was purchasing a sizable stake in Tesla.[56] The company halted trading and announced that it had made no final decision about taking Tesla private.[57] Tesla trading resumed that day, just 15 minutes before the close of trading, and Tesla shares closed at $379.57, up 11%.[58] That day, Tesla's short sellers accumulated $1.5 billion in losses, as Tesla is one of the most shorted stocks in the marketplace.[59] A few weeks later, Tesla announced that it would not go private after all.[60] Shortly thereafter, the U.S. Securities and Exchange Commission ("SEC") commenced an investigation into Musk for possible securities fraud and market manipulation.[61]

Around this time, Musk engaged in more questionable private behavior, troubling many investors. He gave an interview to the *New York Times*, where he expressed frustration about the stress and de-

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54 *See* Scott Austin & Samarth Bansal, *4,925 Tweets: Elon Musk's Twitter Habit, Dissected*, WALL STREET J. (Aug. 2, 2018), http://graphics.wsj.com/elon-musk-twitter-habit-analysis/ [https://perma.cc/5BZY-46B3]; Elon Musk (@elonmusk), TWITTER, https://twitter.com/elonmusk [https://perma.cc/3FEA-L4RE].

55 Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 12:48 PM), https://twitter.com/elonmusk/status/1026872652290379776 [https://perma.cc/Q8A8-JXSG].

56 Neal E. Boudette & Matt Phillips, *Elon Musk Says Tesla May Go Private, and Its Stock Soars*, N.Y. TIMES (Aug. 7, 2018), https://www.nytimes.com/2018/08/07/business/tesla-stock-elon-musk-private.html [https://perma.cc/BZY7-YU9U].

57 *Id.*

58 *Id.*

59 *Id.*

60 Neal E. Boudette, *Tesla Will Not Go Private, Elon Musk Says, Capping Month of Turmoil*, N.Y. TIMES (Aug. 24, 2018), https://www.nytimes.com/2018/08/24/business/elon-musk-tesla-public.html [https://perma.cc/8BVM-N374].

61 *See* Matthew Goldstein et al., *Tesla Is Said to Be Subpoenaed by S.E.C. over Elon Musk Tweet*, N.Y. TIMES (Aug. 15, 2018), https://www.nytimes.com/2018/08/15/business/tesla-musk-sec-subpoena-goldman.html [https://perma.cc/A7YF-JXQW]; Peter J. Henning, *How the S.E.C. May Pursue a Case Against Elon Musk and Tesla*, N.Y. TIMES (Aug. 24, 2018), https://www.nytimes.com/2018/08/24/business/dealbook/tesla-elon-musk-sec.html [https://perma.cc/33X7-WEZ3]; Hamza Shaban, *Tesla Staying Public Won't Resolve SEC Regulatory Troubles, Experts Say*, WASH. POST (Aug. 27, 2018, 9:50 AM), https://www.washingtonpost.com/technology/2018/08/27/tesla-staying-public-wont-resolve-sec-regulatory-troubles-experts-say/?noredirect=on&utm_term=.247636ba02a1 [https://perma.cc/U7D8-2GX9].

mands of operating the company.[62] Additionally, he appeared on comedian Joe Rogan's podcast for a two hour conversation in which he appeared to smoke marijuana and consume whiskey.[63] The day after the podcast, the public learned that two Tesla executives resigned, and Tesla's stock price plummeted.[64]

On September 27, 2018, the SEC announced it had charged Musk with securities fraud for a series of false and misleading tweets about the potential transaction to take Tesla private.[65] News of the charges caused Tesla's stock to drop almost 14%.[66] The SEC's complaint alleged that Musk had not actually discussed specific deal terms with any potential financing partners and that he knew it was uncertain and subject to numerous contingencies.[67] The complaint further alleged that Musk violated the federal securities laws' antifraud provisions[68] and that Musk's tweets and the subsequent market disruption caused by Tesla's stock price rising over six percent evidenced these violations.[69] The SEC accordingly sought a permanent injunction, disgorgement, civil penalties, and a bar prohibiting Musk from serving as an officer or director of a public company.[70]

The parties reached a settlement two days after the SEC announced these charges, resolving the controversy.[71] Pursuant to the settlement, Musk stepped down as the chairman of the Tesla board of directors for three years, but he maintained his position as Tesla's CEO.[72] Tesla and Musk each agreed to pay a $20 million penalty,

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62 *See* David Gelles et al., *Elon Musk Details 'Excruciating' Personal Toll of Tesla Turmoil*, N.Y. TIMES (Aug. 16, 2018), https://www.nytimes.com/2018/08/16/business/elon-musk-interview-tesla.html [https://perma.cc/BA2T-YGRZ].

63 Emily Stewart, *Elon Musk's Week of Pot Smoking and Wild Emails, Explained*, VOX (Sept. 8, 2018, 1:07 PM), https://www.vox.com/business-and-finance/2018/9/8/17834910/elon-musk-joe-rogan-podcast-tesla-stock [https://perma.cc/J92M-PVN6].

64 Dana Hull, *Tesla Erupts in Chaos After Senior Execs Leave, Musk Tokes up*, BLOOMBERG (Sept. 7, 2018, 4:33 PM), https://www.bloomberg.com/news/articles/2018-09-07/tesla-chief-accounting-officer-leaves-citing-level-of-scrutiny [https://perma.cc/QZG9-6VGM].

65 Press Release, U.S. Sec. & Exch. Comm'n, Elon Musk Charged with Securities Fraud for Misleading Tweets (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-219 [https://perma.cc/GZ7F-3EA8] [hereinafter Press Release].

66 Matthew Goldstein, *Elon Musk Steps Down as Chairman in Deal with S.E.C. over Tweet About Tesla*, N.Y. TIMES (Sept. 29, 2018), https://www.nytimes.com/2018/09/29/business/tesla-musk-sec-settlement.html?searchResultPosition=1 [https://perma.cc/W64E-AZZ9].

67 Press Release, *supra* note 65.

68 *Id.*

69 *See id.*

70 *Id.*

71 Press Release, *supra* note 53.

72 *Id.*; Javier E. David, *SEC Settles Charges with Tesla's Elon Musk, Will Remain as CEO but Relinquish Chairman Role and Pay Stiff Fine*, CNBC (Oct. 1, 2018, 6:31 AM), https://

which would be distributed among harmed investors.[73] Additionally, Tesla's board agreed to adopt new corporate governance reforms, including an obligation to oversee Musk's communications with investors.[74] Within a week of reaching this settlement, Musk tweeted that the SEC stood for the "Shortseller Enrichment Commission"[75] and alleged that they were helping his enemies; the tweet sent Tesla's stock price down by more than seven percent.[76] In 2019, just a year later, Tesla and Musk continued to face the fallout, including much skepticism about Tesla's viability and leadership, as profits declined and more senior executives exited the company.[77] In early 2020, Tesla stock traded with great volatility and velocity at record highs, and the SEC launched another investigation into the business and financial practices of the company under the leadership of Musk.[78]

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Each of the four above cases illustrate the ongoing shift in norms and expectations surrounding the private conduct of corporate executives, as precipitated in part by the recent #MeToo movement. This

www.cnbc.com/2018/09/29/sec-settles-charges-with-teslas-elon-musk-will-remain-as-ceo.html [https://perma.cc/B8C5-CM9S].

73 Press Release, *supra* note 53.

74 *Id.*

75 Elon Musk (@elonmusk), TWITTER (Oct. 4, 2018, 1:16 PM), https://twitter.com/elonmusk/status/1047943670350020608 [https://perma.cc/KD9V-MAHM] ("Just want to [say] that the Shortseller Enrichment Commission is doing incredible work. And the name change is so on point!").

76 Drew Harwell & Renae Merle, *Elon Musk Taunts the SEC Days After Fraud Settlement, Sending Tesla Stock Tumbling*, WASH. POST (Oct. 4, 2018, 5:09 PM), https://www.washingtonpost.com/technology/2018/10/04/elon-musk-taunts-sec-days-after-fraud-settlement/?utm_term=.099ed3b2be06 [https://perma.cc/JXY3-D9XN].

77 *See, e.g.*, Neal E. Boudette, *Tesla Profit Declines, but Musk Says Cash Position Is Strong*, N.Y. TIMES (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/business/tesla-earnings-elon-musk.html [https://perma.cc/ARS5-USUP]; Robert Ferris & Lora Kolodny, *Tesla Shares Drop Sharply After Musk Announces CFO Deepak Ahuja Is Leaving the Company—For the Second Time*, CNBC (Jan. 31, 2019, 1:47 PM), https://www.cnbc.com/2019/01/30/musk-says-tesla-cfo-deepak-ahuja-is-leaving-the-company.html [https://perma.cc/49U8-L2CD]; Tiffany Hsu, *Tesla to Cut 3,000 Jobs in Bid to Sell Model 3 to Mass Market*, N.Y. TIMES (Jan. 18, 2019), https://www.nytimes.com/2019/01/18/business/tesla-cutting-jobs.html [https://perma.cc/94QB-Y84U]; Reuters, *US SEC Commissioner Decries Agency's Deal with Tesla's Musk*, CNBC (May 1, 2019, 12:24 AM), https://www.cnbc.com/2019/05/01/judge-approves-agreement-between-elon-musk-and-sec-over-twitter-use.html [https://perma.cc/8GKL-5XPH].

78 *See* Niraj Chokshi and Peter Eavis, *Tesla's Stock Is Up 36% in Two Days. What's Going On?*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/business/tesla-stock-price.html [https://perma.cc/6W9U-C7Z7]; Niraj Chokshi, *Tesla Faces a New S.E.C. Investigation*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/business/tesla-sec-subpoena.html [https://perma.cc/PHK3-ADJX].

shift has impacted private conduct writ large and not simply sexual misconduct, as evidenced by the controversy surrounding Musk. The #MeToo movement's rippling impact has played a critical role in helping to create a new, consequential landscape concerning corporate practices and executive private behavior.[79]

B. *Redefining Private and Public*

Shifting conventions and understandings of what constitutes private and public, both individually and institutionally, in the modern media and sociopolitical environment have created a new landscape that raises uneasy and unanticipated questions for law, business, and society about corporate practices and executive private behavior. On an individual basis, expectations and norms concerning personal privacy have evolved in a new media landscape leading to greater demands for private information concerning executives. At the same time, on an institutional basis, expectations and norms concerning the publicness of corporations have evolved in a new social landscape leading to broader demands from the public on corporations.

1. *Redefining Individual Privacy*

On the individual level, norms concerning privacy have evolved greatly over the last decade with the advent of new information technology leading to an increased demand for information about executives' private lives.[80] In an era when anyone with a phone can readily record and report "news" about anyone or anything globally and instantaneously, our reasonable expectations of privacy have greatly diminished relative to citizens of years and eras past.[81] This diminished penumbra of privacy[82] is most true for celebrities and other prominent

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79 *See* Audrey Carlsen 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?action=click&module=top%20Stories&pgtype=homepage [https://perma.cc/8SG6-WZDB].

80 *See* Schwartz, *supra* note 8, at 1712 ("The overall claim is that a combination of legal and societal structures, including legal corporate disclosure obligations and insatiable and legally unchecked media interest in corporate executives, undermines the ability of those corporate executives to maintain their own personal privacy."); *id.* at 1715 ("Modern society's expanding use of social media, as well as other technological advances, has created an environment in which the media is able to report on the personal lives of executives.").

81 *See, e.g.*, Thomas L. Friedman, Opinion, *The Whole World Is Watching*, N.Y. Times, June 27, 2007, at A23 ("[E]veryone is a reporter and can talk back and be heard globally.").

82 *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (explaining that there exists "a penumbra where privacy is protected from governmental intrusion").

figures like certain well-known business executives, some of whom are even viewed as celebrities by investors and the wider public.[83]

This evolution in privacy norms coupled with the exalted status of leading executives has led to a "celebrity culture" in business, whereby the public demand for private information and gossip leads to more means to create, acquire, and publish such information.[84] Today, there are numerous sources for business news, information, and gossip spanning a wide range of mediums, including satellite radio, television, websites, blogs, tweets, and apps.[85] As such, it is not an exaggeration to assert that, like other celebrities, many executives are followed, and even stalked, by a public hungry for information about them, thereby diminishing their expectation of privacy.[86] As Scott McNealy, the former CEO of Sun Microsystems, presciently declared more than two decades ago in 1999, "[p]rivacy is dead. Get over it."[87]

Many executives today, especially CEOs, in addition to their celebrity status, are perceived as titans of industry, saviors of the economy, and "doppelgangers" of their firms.[88] This perception drives greater investor demand for information about CEOs' lives for investment purposes, rather than merely frivolous entertainment purposes.[89] Many prominent executives are viewed as alter egos, or leading in-

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83 Schwartz, *supra* note 8, at 1714.

84 *Id.* at 1714–16 ("The American media has come to treat corporate executives of publicly traded corporations as celebrities worthy of media attention including reporting on various aspects of their personal lives."); Press Release, U.S. Sec. & Exch. Comm'n, SEC Provides Guidance to Open Up Use of Corp. Web Sites for Disclosures to Investors (July 30, 2008), http://www.sec.gov/news/press/2008/2008-158.htm [https://perma.cc/UC8F-S9A2] ("Ongoing developments in technology have increased both the markets' and investors' demand for more timely company disclosure on the Web, and in turn, raised new securities law issues for public companies to consider." (quoting SEC Chairman Christopher Cox)).

85 *See* Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOUS. L. REV. 1545, 1552–53 (2010) (discussing the proliferation of media dedicated to business information); Schwartz, *supra* note 8, at 1715 ("[T]his increased demand in information about corporate executives is happily provided by a media experiencing a simultaneous explosion in information technology. Modern society's expanding use of social media, as well as other technological advances, has created an environment in which the media is able to report on the personal lives of corporate executives.").

86 *See* Schwartz, *supra* note 8, at 1714–15.

87 Priscilla M. Regan, *The United States*, *in* GLOBAL PRIVACY PROTECTION 50, 78 (James B. Rule & Graham Greenleaf eds., 2008).

88 *See* Schwartz, *supra* note 8, at 1714.

89 *See, e.g.*, RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR 51–81 (2002) (studying the conception of the "charismatic CEO"); JEFFREY SONNENFELD, THE HERO'S FAREWELL 5–9 (1988) (discussing the heroic mythology of CEOs); Adam Lashinsky, *The Decade of Steve*, FORTUNE (Nov. 23, 2009, 4:41 PM), https://fortune.com/2009/11/23/decade-steve-jobs-apple/ [https://perma.cc/5CN7-3LEV] (characterizing Steve Jobs as "the rare businessman with legitimate worldwide celebrity"). *But cf.* Harris Collingwood, *Do CEOs Matter?*, ATLANTIC (June

dicators, of their firms.[90] Jeff Bezos is Amazon. Warren Buffett is Berkshire Hathaway. Mark Zuckerberg is Facebook. Jamie Dimon is J.P. Morgan. As a result, many prominent executives become a primary factor, if not *the* primary factor, in an individual's or institution's decision to invest.[91] In an age where advanced financial technologies like artificial intelligence use a wide and large assortment of data to make financial decisions and assessments, the hunger for executive private information has grown more ravenous.[92] While many of these executives have been extremely well compensated for their new exalted status, they have accordingly faced greater public scrutiny in their professional and personal lives.[93]

Even prior to the #MeToo movement, this enhanced public scrutiny and curiosity about business executives led to public disclosures of very private matters concerning certain business executives. In 2000, the press widely reported Warren Buffett's surgery to remove

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2009), https://www.theatlantic.com/magazine/archive/2009/06/do-ceos-matter/307437/ [https://perma.cc/RQ4K-FC7Z] (critiquing the value of CEOs).

90 *See, e.g.*, Schwartz, *supra* note 8, at 1714 ("These individual investors, rightly or wrongly, came to view corporate executives as 'doppelgangers of their firms,' and therefore a primary factor in their investment decision making."); Joe Nocera, *Apple's Culture of Secrecy*, N.Y. TIMES (July 26, 2008), https://www.nytimes.com/2008/07/26/business/26nocera.html [https://perma.cc/XB4M-ZYAX] (opining on the unparalleled significance of Steve Jobs to Apple investors).

91 *See* GIDEON HAIGH, FAT CATS 98 (2005) ("[A] . . . survey found that 95 percent of respondents were influenced in stock selection by the CEO's profile and reputation."); Eduardo Porter, *How Superstars' Pay Stifles Everyone Else*, N.Y. TIMES (Dec. 25, 2010), https://www.nytimes.com/2010/12/26/business/26excerpt.html [https://perma.cc/GL7D-A4PW] ("As corporations have increased in size, management decisions at the top have become that much more important, measured in terms of profits or losses.").

92 *See, e.g.*, Tom C.W. Lin, *Artificial Intelligence, Finance, and the Law*, 88 FORDHAM L. REV. 531, 532–35 (2019) (discussing various applications of financial artificial intelligence).

93 *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE 1 (2004) (discussing the rise of executive compensation); HAIGH, *supra* note 91, at 11 ("CEO compensation in the U.S. surged another 535 percent in the 1990s."); Joan MacLeod Heminway, *Martha's (and Steve's) Good Faith: An Officer's Duty of Loyalty at the Intersection of Good Faith and Candor*, 11 TRANSACTIONS 111, 120 (2009) ("With our current information-overloaded society, the corporate and personal lives of founding and otherwise iconic executives—like Martha Stewart and Steve Jobs—are far more public."); Rajan & Wulf, *supra* note 8, at 2–5 (studying the enormity of some executive perks); Schwartz, *supra* note 8, at 1714 (observing "a demand for a wide variety of information, including personal information about the corporate executive, perhaps because this is the sort of information that the individual investor could digest better than the technical information about a corporation's financial positions"); Aarian Marshall, *Why Azealia Banks and Grimes Matter to a Tesla Investor Suit*, WIRED (Jan. 18, 2019, 8:26 PM), https://www.wired.com/story/tesla-lawsuit-elon-musk-grimes-azealia-banks/ [https://perma.cc/DJQ9-KQGQ] (reporting on Elon Musk's private romantic life).

benign polyps from his colon.[94] In 2007, British Petroleum's then-CEO, Lord John Browne, was forced to resign after a tabloid publicized his secret affair with a gay companion.[95] That same year, Whole Foods's CEO John Mackey was exposed for regularly using an alias in a chat room to insult a competitor.[96] In 2008, the media reported on Broadcom's CEO Henry Nicholas's alleged penchant for prostitutes, drugs, and secret lairs.[97] During the British Petroleum oil spill crisis in 2010,[98] CEO Tony Hayward was reported to be consorting with a woman who was not his wife.[99] More recently, in 2016, reports emerged regarding renovations to Mark Zuckerberg's private residence.[100] And in 2019, a number of outlets reported on Jeff Bezos's separation and pending divorce, along with some very private text messages and pictures from Bezos to his new girlfriend.[101] In sum, society's evolving understanding of privacy has led to decreasing executive privacy and

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94 *See Jobs's Job*, ECONOMIST (July 31, 2008), https://www.economist.com/business/2008/07/31/jobss-job [https://perma.cc/5E7U-KTNR].

95 Chip Cummins et al., *Scandal, Crises Hasten Exit for British Icon*, WALL STREET J. (May 2, 2007, 11:59 PM), https://www.wsj.com/articles/SB117803057067488218 [https://perma.cc/PMY4-C4PH].

96 David Kesmodel, *Whole Foods Sets Probe as CEO Apologizes*, WALL STREET J., July 18, 2007, at A3.

97 *See* Bethany McLean, *Dr. Nicholas and Mr. Hyde: Sex, Lies, and Underground Lairs*, VANITY FAIR (Sept. 30, 2008), https://www.vanityfair.com/news/2008/11/nicholas200811 [https://perma.cc/RF4U-A99K] (chronicling "allegations about Nicholas's out-of-control world: the parade of prostitutes, the spiking of clients' drinks with Ecstasy, and the secret lair he built underneath the Orange County mansion he shared with his wife and kids").

98 *See, e.g.*, Clifford Krauss, *Oil Spill's Blow to BP's Image May Eclipse Costs*, N.Y. TIMES (Apr. 29, 2010), https://www.nytimes.com/2010/04/30/business/30bp.html [https://perma.cc/632A-BCPR] ("BP says that the offshore drilling accident that is spewing thousands of barrels of oil a day into the Gulf of Mexico could cost the company several hundred million dollars."); Campbell Robertson & Leslie Kaufman, *Oil Leaks Could Take Months to Stop*, N.Y. TIMES (Apr. 25, 2010), https://www.nytimes.com/2010/04/26/us/26rig.html [https://perma.cc/9YZV-LS6Q].

99 Adrian Chen, *Tony Hayward Gets the Full-On TMZ Treatment*, GAWKER (July 10, 2010, 10:39 AM), http://gawker.com/5583933/tony-hayward-gets-the-full-on-tmz-treatment [https://perma.cc/NVC6-E8X8]; *Tony Hayward—Fish and Chicks*, TMZ (July 11, 2010, 1:00 AM), http://www.tmz.com/2010/07/09/tony-hayward-houston-bar-fish-chips-woman-b-p-british-petroleum-seafood-photo-picture-receipt/ [https://perma.cc/8GQ4-UEF4].

100 *See* Hope King, *Mark Zuckerberg to Tear Down and Rebuild Four Houses Surrounding His Home*, CNN (May 25, 2016, 5:32 PM), https://money.cnn.com/2016/05/25/technology/mark-zuckerberg-palo-alto-house/index.html [https://perma.cc/2L54-KMSH].

101 *See, e.g.*, Laura M. Holson, *Amazon Chief Announces End of Marriage in Twitter Post*, N.Y. TIMES, Jan. 10, 2019, at B4; James B. Stewart, *Why Jeff Bezos' Divorce Should Worry Amazon Investors*, N.Y. TIMES (Jan. 18, 2019), https://www.nytimes.com/2019/01/18/business/bezos-divorce-amazon-stock.html [https://perma.cc/GGW8-AXJL]; Kara Swisher, Opinion, *The Sexts of Jeff Bezos and the Death of Privacy*, N.Y. TIMES (Jan. 18, 2019), https://www.nytimes.com/2019/01/18/opinion/amazon-jeff-bezos-affair.html [https://perma.cc/L8U3-CCAZ].

increasing demand for information about executives, thus creating a market for such information.

2. *Redefining the Public Corporation*

Just as contemporary society has increasingly redefined privacy at the individual level, there has been a corresponding shift at the institutional level to redefine what it means to be a public corporation and, by extension, what it means to be a public company executive.[102] Traditionally, a public corporation is understood as a company that is publicly listed for trading on a national stock exchange.[103] This is in contrast to private corporations, which are privately held without a public secondary market for their shares.[104] In recent years, driven in part by the works of scholars like Hillary Sale, there has been a shift to reconceptualize "publicness" as a notion defined more by the public impact of a corporation and less by securities law.[105]

Under the new understanding of "publicness," a corporation is public by virtue of its large social impact, community influence, and civic engagement.[106] As such, a corporation can be deemed "public" even if its securities are not publicly listed and traded.[107] According to Professor Sale, "[p]ublic corporations are not just creatures of Wall Street. They are creatures of Main Street, the media, bloggers, Congress, and the government."[108] Proponents of this new definition of "public" argue that corporate governance should not be left to private institutions and private law alone; instead, corporations with significant social effects should be governed by the public as well.[109] This new definition of publicness holds particular salience in light of the

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102 *See* Sale, *supra* note 8, at 138 (discussing the "evolving" definition of a public corporation); Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573, 1574–75 (2013).

103 *See* MODEL BUS. CORP. ACT § 1.40(18A) (1969) (AM. BAR ASS'N, amended 2013) (defining a public corporation as "a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association"); Onnig H. Dombalagian, *Principles for Publicness*, 67 FLA. L. REV. 649, 655–63 (2015) (discussing what it means to be "publicly held" and "public traded" under federal securities law).

104 *See, e.g.*, Langevoort & Thompson, *supra* note 8, at 342–46 (discussing how recent changes in securities law are affecting traditional understandings of public and private firms).

105 *See* Sale, *supra* note 8, at 140–41, 148.

106 *See id.* at 147–48.

107 *See* Langevoort & Thompson, *supra* note 8, at 337–40 (using Facebook prior to its initial public offering to illustrate the shortcomings and limitations in distinguishing public from private companies based solely on their listing status given its large community of users).

108 Sale, *supra* note 8, at 137.

109 *See* Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013–14 (2013).

2008 financial crisis, when many large corporations collapsed due to weak and poor private governance, leading to much public pain and requiring much public assistance.[110] As a result of this shift—fueled in part by the intertwined factors of more civic awareness and the rise of social media—there has been greater scrutiny of businesses and their executives.[111]

Society, as part of this shift to redefine public corporations, now demands more of businesses and their executives, including actions, operations, and results that speak not only to the traditional financial metrics of Wall Street, but also to the aspirations of many on "Main Street."[112] Today, various constituencies publicly pressure and demand action from policymakers and regulators to better reflect and respond to their new expanded view of corporate "publicness," thus requiring businesses and executives to answer to more than just their shareholders and private constituencies.[113] Twitter, Facebook, and other social media platforms have bolstered this accountability by making it very easy for the public, consumers, and investors to engage directly with businesses and policymakers.[114] Indeed, these platforms can marshal millions of people to an issue, placing significant and direct pressure on businesses and policymakers.[115] In today's expansive and deep high-tech public marketplace, a company can feel the praise and wrath of its investors and the public almost instantaneously.[116] Delivering

110 *See* Sale, *supra* note 8, at 139–41 (suggesting that public rescues of otherwise doomed businesses obligate businesses to help address some societal ruins of the public).

111 *See id.* at 144.

112 *Id.* at 148.

113 *See* HEIMANS & TIMMS, *supra* note 12, at 9–12.

114 *See* Citizens United v. FEC, 558 U.S. 310, 370 (2010) (stating that modern information technology "provide[s] shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters"); Monica Anderson et al., *Activism in the Social Media Age*, PEW RES. CTR. (July 11, 2018), https://www.pewinternet.org/2018/07/11/activism-in-the-social-media-age/ [https://perma.cc/JM4U-GTCJ]; Lexi Pandell, *How Livestreaming Is Transforming Activism Around the World*, WIRED (Nov. 16, 2016, 11:00 AM), https://www.wired.com/2016/11/livestreaming-transforming-activism/ [https://perma.cc/2BD8-W9Z8].

115 *See* HEIMANS & TIMMS, *supra* note 12, at 9–12; CLAY SHIRKY, HERE COMES EVERYBODY 191–97 (2008) (noting that changing group dynamics in society are impacting how businesses operate and what types of businesses succeed or fail); Tanya Sichynsky, *These 10 Twitter Hashtags Changed the Way We Talk About Social Issues*, WASH. POST (Mar. 21, 2016, 12:37 PM), https://www.washingtonpost.com/news/the-switch/wp/2016/03/21/these-are-the-10-most-influential-hashtags-in-honor-of-twitters-birthday/?utm_term=.e4b6424b335a [https://perma.cc/2R79-D9B7]; Emily Steel, *'Ice Bucket Challenge' Donations for A.L.S. Research Top $41 Million*, N.Y. TIMES (Aug. 21, 2014), https://www.nytimes.com/2014/08/22/business/media/ice-bucket-challenge-donations-for-als-top-41-million.html [https://perma.cc/PX8M-TZK8].

116 *See, e.g.*, Tom C.W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 574–75

good financial results is no longer enough for many large businesses, if the means and effects of those stellar results are inconsistent with this new definition of publicness.[117] In sum, this evolving understanding of what it means to be a public corporation has led to greater public scrutiny and broader responsibilities for businesses and executives that extend beyond private law and private firms.

Together, the concurrent shifts to redefine "private" and "public" on the individual and firm levels, respectively, have meant that corporate conduct and executive behavior now attract greater attention and scrutiny in the marketplace and in the wider society. It is perhaps not surprising that these shifts coincide with the remarkable #MeToo movement, which has upended many corporate boardrooms and executive suites.

C. *Evolving Societal Corporate Expectations*

Related to the #MeToo movement and the ongoing shifts in understanding of private and public in law and society, evolving societal expectations of corporate behavior have played a critical role in creating a new landscape where the private conduct of business executives can have serious and public consequences.[118] Contemporary society has taken a deeper look at how businesses and executives perpetuate longstanding problems relating to capital, power, and identity in connection with their profit-seeking practices.[119] Contemporary society, and its increasingly large and diverse investor population,[120] now expects businesses to do more than merely produce goods and services that generate a profit with little or no care for the concerns of the wider civic community.[121]

(2014) (describing the contemporary high-tech, high-speed financial marketplace); Jonathan Wolfe, *Want Faster Airline Customer Service? Try Tweeting*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/travel/airline-customer-service-twitter.html [https://perma.cc/8UQT-2MAZ] (noting that companies are often more responsive to public demands made via social media platforms).

117 *See* Sale, *supra* note 109, at 1013 ("Publicness is both a process and an outcome. When corporate actors lose sight of the fact that the companies they run and decisions they make impact society more generally, and not just shareholders, they are subjected to publicness.").

118 *See* Hemel & Lund, *supra* note 8, at 1592–93.

119 *See, e.g.*, Akerlof & Kranton, *supra* note 8, at 733–37; Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 642–48 (2007); Schultz, *supra* note 8, at 27–28.

120 *See, e.g.*, Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 466–76 (2015) (describing a large and diverse population of contemporary investors).

121 *See* Sale, *supra* note 8, at 139–41.

Two developments in the business world evidence this change in corporate social expectations: (1) the prevalence of corporate social responsibility ("CSR") programs at major businesses and (2) the emergence of corporate social activism. First, because of changing social expectations, CSR programs are more prevalent and widely promoted throughout the business world.[122] CSR programs are initiatives businesses take to positively impact a wide range of local, national, and international stakeholders beyond just their shareholders and employees.[123] CSR programs can touch on a variety of social issues, including environmental protection, human rights, gender equality, diversity, and economic development.[124] While in the past there were robust debates about the utility of CSR programs, the debates today are less about *whether* CSR programs should exist, and more about *how* they should exist.[125] Many prominent businesses today, from blue-chip companies like J.P. Morgan and Starbucks to upstarts like Airbnb and Lyft, have CSR programs and publish annual CSR reports promoting their socially beneficial efforts and impact.[126] Salesforce, a leading software company, even includes social activism and responsibility disclosures in its annual report filed with its Form 10-K for the SEC.[127] These forms traditionally contain primarily business and financial information.[128] In recent years, the Fortune Global 500 companies, the 500 largest companies in the world, have collectively spent billions of dollars on their CSR programs, annually.[129] Accordingly,

122 *See* BRENT D. BEAL, CORPORATE SOCIAL RESPONSIBILITY 75–84 (2014).

123 *See Definition of Corporate Social Responsibility (CSR)*, FIN. TIMES, https://markets.ft.com/research/Lexicon/Term?term=corporate-social-responsibility—(CSR) [https://perma.cc/3MC5-L9LD].

124 *See id.*

125 *See* Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REVS. 85, 85–86 (2010).

126 *See id.* at 92–99; AIRBNB, AIRBNB: HELPING TRAVEL GROW GREENER (2017), https://www.airbnbcitizen.com/wp-content/uploads/2017/03/Airbnbandsustainabletravel2017.pdf [https://perma.cc/K7PS-F2BZ]; J.P. MORGAN CHASE & CO., ENVIRONMENTAL SOCIAL AND GOVERNANCE REPORT (2017), https://www.jpmorganchase.com/corporate/Corporate-Responsibility/document/jpmc-cr-esg-report-2017.pdf [https://perma.cc/42NJ-4R7G]; LYFT, 2017 ECONOMIC IMPACT REPORT (2017), https://take.lyft.com/economic-impact/2017/Lyft-Drives-Economy-pre.pdf [https://perma.cc/AN7P-HHP7]; STARBUCKS, GLOBAL SOCIAL IMPACT (2017), https://stories.starbucks.com/wp-content/uploads/2019/01/Starbucks_Social_Impact_Report_2017.pdf [https://perma.cc/P7YX-QMBN].

127 *See* SALESFORCE.COM, INC., ANNUAL REPORT (FORM 10-K) 51–52 (Mar. 9, 2018), https://www.sec.gov/Archives/edgar/data/1108524/000110852418000011/crmq4fy1810-k.htm [https://perma.cc/E6TZ-JRRN].

128 *See infra* text accompanying notes 196–200.

129 Alison Smith, *Fortune 500 Companies Spend More than $15bn on Corporate Responsi-*

today, CSR programs are the norm in the world of big business, not the exception.

Second, the rise of contemporary corporate social activism also reflects changing social expectations of businesses.[130] Although many large companies long have been expected to engage with the social impact of their business through initiatives like CSR programs, they previously had not been expected to engage in social issues unrelated to their core business.[131] Now, companies frequently do so for fear of public recriminations and in response to evolving societal expectations.[132] Today, many individuals in society expect businesses and executives, particularly those at large corporations, to engage with the significant social policy issues of the day.[133] Local communities, consumers, employees, and executives frequently expect businesses to engage in social activism on issues directly or indirectly related to their core businesses through public statements, sponsorships, partnerships, and policies supporting or denouncing a cause.[134] Silence, indifference,

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bility, FIN. TIMES (Oct. 12, 2014), https://www.ft.com/content/95239a6e-4fe0-11e4-a0a4-00144feab7de [https://perma.cc/E6TZ-JRRN].

130 *See* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1544–47 (2018) (discussing the rise of contemporary corporate social activism).

131 MARC BENIOFF & MONICA LANGLEY, TRAILBLAZER 212–16 (2019).

132 *See* McDonnell & King, *supra* note 8, at 409–12 (discussing reputational and economic harms related to corporate social boycotts); Sapna Maheshwari, *Advertisers, Afraid to Offend, Weigh in on Shakespeare and Megyn Kelly*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/business/media/ads-fox-news-megyn-kelly-infowars-alex-jones.html [https://perma.cc/T7P2-FKWQ] ("Companies face a seemingly daily challenge as they grapple with boycott-ready consumers on the left and right . . . .").

133 *See* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 339 (2015) ("For-profit corporations, in this view, are too powerful and have been accorded too many rights similar to those given to actual humans for them not to behave in a socially responsible manner that reflects the full range of concerns that actual humans consider important—concerns that go beyond a desire for lucre."); Aaron K. Chatterji & Michael W. Toffel, *The Power of C.E.O. Activism*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/03/opinion/sunday/the-power-of-ceo-activism.html [https://perma.cc/4Z8E-779E]; Tracey Lien & James F. Peltz, *More than 100 Tech Firms Join Legal Fight Against Trump's Travel Ban*, L.A. TIMES (Feb. 6, 2017, 4:05 PM), https://www.latimes.com/business/la-fi-tech-companies-travel-ban-20170206-story.html [https://perma.cc/F4YG-4WUP].

134 *See, e.g.*, Brief for Amici Curiae Apple, IBM Corp., Microsoft & 50 Other Cos. in Support of Respondent at 1–2, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273); WEBER SHANDWICK & KRC RESEARCH, EMPLOYEES RISING 8–9 (2014), https://www.webershandwick.com/uploads/news/files/employees-rising-seizing-the-opportunity-in-employee-activism.pdf [https://perma.cc/L99N-GXVP]; Matten & Crane, *supra* note 8, at 172 ("[C]orporations . . . could be said to have provided an additional conduit . . . through which citizens could exercise their political rights."); Mary-Hunter McDonnell, *Radical Repertoires: The Incidence and Impact of Corporate-Sponsored Social Activism*, 27 ORG. SCI. 53, 53–55 (2016); Brian Fung, *Watch AT&T's CEO Give a Forceful Defense of Black Lives Matter*, WASH.

and a singular, amoral focus on profits and financial returns in the face of significant social debates are becoming more and more uncommon for many businesses.[135] In the last few years alone, businesses and their executives have played a leading role in contemporary social activism on issues like immigration, racial justice, LGBTQ rights, gun regulation, and affordable housing.[136]

POST (Sept. 30, 2016, 10:20 AM), https://www.washingtonpost.com/news/the-switch/wp/2016/09/30/watch-atts-ceo-give-a-forceful-defense-of-black-lives-matter/?utm_term=.8bd91473c0dd [https://perma.cc/TH6G-DB7Q]; David Gelles, *The Moral Voice of Corporate America*, N.Y. TIMES (Aug. 19, 2017), https://www.nytimes.com/2017/08/19/business/moral-voice-ceos.html [https://perma.cc/2ZXP-CA39]; Monica Langley, *Salesforce's Marc Benioff Has Kicked Off New Era of Corporate Social Activism*, WALL STREET J. (May 2, 2016, 8:57 PM), https://www.wsj.com/articles/salesforces-marc-benioff-has-kicked-off-new-era-of-corporate-social-activism-1462201172 [https://perma.cc/49WK-4BNZ]; Jon Mertz, *A New Era of Corporate Social Leader Activism*, THIN DIFFERENCE (Oct. 6, 2016), https://www.thindifference.com/2016/10/new-era-corporate-social-leader-activism/ [https://perma.cc/L6XD-WPN6]; *"We Are Still in" Declaration*, WE ARE STILL IN (June 5, 2017), https://www.wearestillin.com/we-are-still-declaration [https://perma.cc/97LH-J2VL] (presenting an open letter signed by hundreds of business leaders and others in support of the Paris Agreement on climate change after the Trump administration announced American withdrawal).

135 *See* Lien & Peltz, *supra* note 133; Robert Safian, *Facebook, Airbnb, Uber, and the Struggle to Do The Right Thing*, FAST CO. (Apr. 11, 2017), https://www.fastcompany.com/40397294/facebook-airbnb-uber-and-the-struggle-to-do-the-right-thing [https://perma.cc/V3ZH-J4N2].

136 *See, e.g.*, Press Release, Apple, Apple Commits $2.5 Billion to Combat Hous. Crisis in Cal. (Nov. 4, 2019), https://www.apple.com/newsroom/2019/11/apple-commits-two-point-five-billion-to-combat-housing-crisis-in-california/ [https://perma.cc/BK79-KSBN]; Letter from Bus. Leaders to Pat McCrory, Governor of N.C., http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/NC_CEO_Letter_%283%29.pdf [https://perma.cc/UA6J-CUMC]; Letter from Leaders of Am. Indus., to Paul Ryan, Speaker, U.S. House of Representatives, Nancy Pelosi, Minority Leader, U.S. House of Representatives, Mitch McConnell, Majority Leader, U.S. Senate, Charles E. Schumer, Minority Leader, U.S. Senate (Sept. 20, 2017), https://www.businessleadersdreamletter.com/ [https://perma.cc/223Q-GTQD]; Julie Creswell & Michael Corkery, *Walmart and Dick's Sporting Goods Tighten Rules on the Guns They Sell*, N.Y. TIMES (Mar. 1, 2018), https://www.pulse.com.gh/the-new-york-times/world/world-walmart-and-dicks-sporting-goods-tighten-rules-on-the-guns-they-sell/g1gxd0z [https://perma.cc/9LM7-WW65]; Vanessa Fuhrmans, *A Watershed Moment in CEO Activism*, WALL STREET J. (Apr. 4, 2017, 9:00 AM), https://www.wsj.com/articles/a-watershed-moment-in-ceo-activism-1491310803?tesla=y [https://perma.cc/8LZ2-UUYZ] ("'There's been nothing like this travel ban that has created such a furor before' among companies . . . ."); Tiffany Hsu, *Citigroup Sets Restrictions on Gun Sales by Business Partners*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/business/citigroup-gun-control-policy.html [https://perma.cc/N7NU-X8PE] ("The new policy, announced Thursday, prohibits the sale of firearms to customers who have not passed a background check or who are younger than 21."); Christopher Mele, *In North Carolina and Mississippi, Backlash Grows over Rights Law*, N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/13/us/north-carolina-mississippi-gay-rights-boycott.html?smid=tw-nytimes&smtyp=cur [https://perma.cc/699Z-L7NZ]; Sundar Pichai, *$1 Billion for 20,000 Bay Area Homes*, GOOGLE (June 18, 2019), https://blog.google/inside-google/company-announcements/1-billion-investment-bay-area-housing/ [https://perma.cc/2C8M-KCGA]; David Wehner, *Facebook Commits $1 Billion and Partners with the State of California to Address*

In sum, changing societal expectations of corporations have been a key catalyst in creating a new landscape for businesses and their executives. These expectations have changed from viewing businesses as largely amoral profit-generating machines to more socially conscious institutions. In response, businesses have implemented more robust CSR programs and corporate social activism. Because businesses today are positioning and professing themselves to be more socially conscious, society naturally will view executive private conduct through the same lens and expect better private behavior from executives leading these businesses.

* * *

Three significant, interrelated corporate social catalysts have precipitated the formation of a new socioeconomic landscape where private executive conduct can have very serious and often public consequences. The #MeToo movement, shifts in conventional understandings of individual privacy and public corporations, and changing societal expectations for corporations have collectively challenged law, society, and businesses to reexamine old practices and beliefs about corporate conduct and executive private behavior in a new business environment.

II. Legal Gaps and Tensions

Private misconduct of executives presents a particularly vexing problem for business law. The two bodies of law and regulation that govern much of American business—state corporate law and federal securities law—were largely designed to address the professional obligations and duties of executives and not the private matters of their personal lives.[137] As a result of this incongruence, private misconduct that impacts corporate reputation, earnings, and stock prices in today's society, like that brought forth by the #MeToo movement discussed earlier in Part I, exposes serious legal gaps and difficult tensions concerning traditional understandings of corporate law and securities law.[138] As a result of these legal gaps and tensions, compa-

Housing Affordability, Facebook (Oct. 22, 2019), https://newsroom.fb.com/news/2019/10/facebook-commits-1-billion-to-address-housing-affordability/ [https://perma.cc/BUM9-PQEJ].

137 *See* Hemel & Lund, *supra* note 8, at 1591–92 (noting that "the principal purposes [of business law are] to maximize shareholder value, protect investors, and promote the efficient allocation of capital," not to curb misconduct (footnotes omitted)).

138 *See* Mizrahi, *supra* note 7, at 134 ("[E]mployers understand that negative publicity resulting from a failure to take action against a sexual harasser can have a devastating impact on their bottom lines.").

nies frequently engage in arbitrary and risky practices that expose companies, investors, and employees, all of whom are vulnerable to sudden revelations of executive private misconduct that shock investors, markets, and firm stability.[139]

A. Of Corporate Law

Private misconduct claims against executives highlight critical legal gaps and tensions in corporate law. In general, corporate law establishes that corporate directors and senior officers are fiduciaries of their companies and shareholders, owing them both the duties of care and loyalty.[140] These duties encompass an obligation to consistently act in the best interests of the corporation.[141] In connection with these fiduciary duties, corporate law requires boards to exercise reasonable oversight of the company pursuant to their duties established by *In re Caremark International Inc. Derivative Litigation*.[142] In practice and design, corporate law generally focuses on the professional conduct and matters of the firm and its executives in connection with the objective of maximizing shareholder value.[143] What happens in the private lives of company executives has traditionally been understood to be outside the scope of corporate law.[144] Furthermore, tough legal standards that favor corporate defendants, along with legally permissible insurance, indemnification, and exculpation for corporate directors, minimize the risk of personal liability and provide little incentive

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139 *See, e.g.*, Heminway, *supra* note 93, at 112 (exploring the breaches of fiduciary duties by executives for nondisclosure of personal facts); Tom C.W. Lin, *Executive Trade Secrets*, 87 NOTRE DAME L. REV. 911, 914 (2012) (observing that business law's ambiguous treatment of executive secrets leaves "corporations and investors dangerously susceptible to revelations of private facts that shock market valuation and institutional stability"); Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717, 718 (2009–10) (suggesting that "courts have encouraged boards to be uninformed of aggressive risk-taking by officers" by not requiring greater accountability).

140 *See* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) (holding that executives owe their firms the duties of care and loyalty); MODEL BUS. CORP. ACT ANNOTATED § 8.42(a)(2) (1969) (AM. BAR ASS'N, Supplement 2005) (stating the obligation of executives to exercise due care); Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475, 477–79 (2007) (acknowledging the fiduciary duties of corporate officers under Delaware law).

141 *See Gantler*, 965 A.2d at 708–09; MODEL BUS. CORP. ACT ANNOTATED § 8.42(a)(2) (1969) (AM. BAR ASS'N, Supplement 2005); Jones, *supra* note 140, at 477–79.

142 698 A.2d 959, 968 (Del. Ch. 1996); *see* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

143 *See, e.g.*, Hansmann & Kraakman, *supra* note 8, at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

144 *See* Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383, 401 (2009).

for firms to vigilantly police executive private misconduct.[145] However, in the contemporary socioeconomic landscape where private matters and conduct of executives can have very serious and often public consequences for a company and its investors, corporate law's shortcomings have become magnified, raising critical questions about the core duties of care, loyalty, and oversight.

1. Duty of Care

Corporate law's duty of care requires that executives, as fiduciaries of a corporation, exercise "that amount of care which ordinarily careful and prudent men would use in similar circumstances."[146] Executive private misconduct matters expose serious legal gaps and tensions in corporate law involving the duty of care because it can be challenging to determine how an "ordinarily careful and prudent" executive would behave in similar circumstances, especially if the matter is of a private nature. Absent clear lines of legality and criminality, it is difficult for a board to readily determine whether certain private conduct is acceptable, especially if the executive is performing their professional duties spectacularly.[147] How does a board begin to draw lines of permissibility and condemnation about private matters and conduct that are perfectly legal, but may be eccentric or offensive to some in society? As such, some boards and executives do not draw these lines and turn a blind eye to the questionable and problematic private behavior of their fellow executives rather than have the tough, awkward boardroom confrontation—especially when the executives are perceived to be invaluable to the firm.[148] For example, as part of a 2019 settlement, the Nevada Gaming Control Board reported that the

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145 *See* DEL. CODE ANN. tit. 8, § 145(a) (2019) (permitting indemnification of directors and officers); *id.* § 102(b)(7) (empowering corporations to exculpate directors and officers from personal liability); Hemel & Lund, *supra* note 8, at 1628–35 (explaining the challenges to attaching liability under corporate law for sexual misconduct claims).

146 Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963); *see also* MODEL BUS. CORP. ACT ANNOTATED § 8.42(a)(2) (1969) (AM. BAR ASS'N, Supplement 2005) (establishing the obligation of executives to exercise due care).

147 *See* EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 24 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/D4NN-PRFD] [hereinafter EEOC REPORT ON HARASSMENT IN THE WORKPLACE] (reporting on how businesses treat senior employees differently from rank-and-file employees in the context of misconduct allegations); Mizrahi, *supra* note 7, at 133–34 (discussing how, in the face of misconduct allegations, firms will protect "a high-level executive, a large revenue generator, a renowned professor, or someone whose knowledge, connections, or skills cannot easily be replaced").

148 *See* Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 33 (2018).

board of Wynn Resorts ignored the bad private behavior of its CEO Steve Wynn for more than a decade, despite numerous credible allegations.[149]

The absence of clear legal guidelines is understandably frustrating, but it may also be necessary, given the wide range of executives, companies, and conduct such guidelines could impact.[150] Aware of the individualized, subjective nature of business decisions, courts have generally deferred to the judgment of directors and executives under the doctrine of "the business judgment rule."[151] In accordance with that doctrine, courts generally do not second-guess the business decisions of executives, regardless of the outcome.[152] This deference, while broad and powerful, is not unlimited.[153] Business decisions that suggest illegality, fraud, bad faith, uninformed process, or unconsidered inactions do not readily receive the deferential judicial protection of the business judgment rule.[154]

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149 *See* Complaint paras. 14–34, Wynn Las Vegas, LLC, NGC No. 18-15 (Nev. Gaming Comm'n Feb. 26, 2019); Stipulation for Settlement and Order, Wynn Las Vegas, LLC, NGC No. 18-15 (Nev. Gaming Comm'n Feb. 26, 2019); Alexandra Berzon & Micah Maidenberg, *Nevada: Wynn Resorts Executives Ignored Sexual Misconduct Claims Against Steve Wynn*, WALL STREET J. (Jan. 29, 2019, 11:59 AM), https://www.wsj.com/articles/wynn-resorts-to-settle-nevada-regulators-probe-11548711027?modHP_lead_pos4 [https://perma.cc/97MQ-57KU].

150 *See, e.g.*, Lin, *supra* note 144, at 405–07 (discussing the contextual analysis that commonly accompany executive disclosure issues).

151 *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) ("In a purely business corporation . . . the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors." (quoting Helfman v. Am. Light & Traction Co., 187 A. 540, 550 (N.J. Ch. 1936))); Leslie v. Lorillard, 18 N.E. 363, 365 (N.Y. 1888) ("Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those intrusted [sic] with corporate management are largely discretionary."); Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 810–11 (N.Y. Sup. Ct. 1976) ("The directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions.").

152 *See, e.g.*, Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982) ("Whatever the terminology, the fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labelled [sic] the business judgment rule.").

153 *See id.* at 886 ("Whatever its merit, however, the business judgment rule extends only as far as the reasons which justify its existence.").

154 *See id.* ("[The business judgment rule] does not apply in cases, *e.g.*, in which the corporate decision lacks a business purpose, is tainted by a conflict of interest, is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision." (citations omitted)); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("Under the business judgment rule there is no protection for directors who have made 'an unintelligent or unadvised judgment.'" (quoting Mitchell v. Highland-Western Glass, 167 A. 831, 833 (Del. Ch. 1933))); Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) ("[T]he business judgment rule operates only in the context of director action."); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996) ("The second class of cases in which director liability for

Issues concerning executive private conduct expose legal gaps and tensions relating to the duty of care because such matters can be very personal or frivolous and the business significance of the behavior is subject to legitimate debate.[155] Courts, particularly the Delaware courts, which are highly influential on business matters, have generally not imposed liability on executives for bad outcomes, absent clear wrongdoing.[156] How does corporate law and a board decide what private conduct or matter should be subject to review absent clear alleged violations of law and company policy? Is a CEO's marital infidelity subject to corporate review? How about when a CEO is being blackmailed with private messages and pictures, as Amazon's Jeff Bezos was in 2019?[157] How about the legal, recreational use of marijuana by a chief financial officer ("CFO")? Mindful that courts defer to businesses' decisions,[158] an executive could simply refuse to disclose personal matters or conduct that may be of debatable company significance under a variety of scenarios.[159] In a number of such scenarios, boards will not even have an opportunity to timely consider how to respond to such undisclosed, personal matters.[160]

As a result of this deference and conventional corporate practices, many executives end up being the sole and final arbiter about conduct and matters in their private lives—conduct and matters that may have serious business implications for their boards and shareholders; thus, such matters would remain largely undisclosed.[161] For instance, Elizabeth Holmes, the disgraced founder and CEO of Thera-

inattention is theoretically possible entail circumstances in which a loss eventuates not from a decision but, from unconsidered inaction."); *Shlensky*, 237 N.E.2d at 780 (holding that the business judgment rule does not protect decisions that implicate illegality, fraud, or bad faith).

155 *See* Heminway, *supra* note 8, at 767–71 (characterizing such decisions as "highly stressful or emotionally charged").

156 *See* Pan, *supra* note 139, at 718 ("Delaware courts have refrained from holding boards of directors responsible for harmful outcomes that do not involve wrongful or illegal acts.").

157 *See* Jeff Bezos, *No Thank You, Mr. Pecker*, MEDIUM (Feb. 7, 2019), https://medium.com/@jeffreypbezos/no-thank-you-mr-pecker-146e3922310f [https://perma.cc/PMQ2-BZ7Y]; Jim Rutenberg & Karen Weise, *Jeff Bezos Accuses National Enquirer of 'Extortion and Blackmail,'* N.Y. TIMES (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/technology/jeff-bezos-sanchez-enquirer.html [https://perma.cc/UG82-AVUT].

158 *See, e.g.*, *Joy*, 692 F.2d at 885.

159 *See* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1194 (2003) ("There are many fascinating angles to an inquiry into whether corporate agents have an affirmative duty to disclose information to their superiors, a category that includes—at the very top of the corporate pyramid—the board of directors.").

160 *See id.*

161 *See* Heminway, *supra* note 8, at 765–71 ("The [e]xisting [d]isclosure [r]egime [p]laces [t]oo [m]uch [d]iscretion in the [h]ands of [e]xecutive [o]fficers[.]"); Tom C.W. Lin, *The Corpo-*

nos, concealed a private, romantic relationship with Sunny Balwani, the former president and CEO of the company, with whom she worked closely to defraud the board and investors, leading to over a billion dollars in lost value.[162] Such concealed information about a serious conflict of interest, of course, remains undisclosed until it is swiftly exposed to the public by sensational news stories that detrimentally blindside boards, shareholders, and the marketplace.[163]

2. *Duty of Loyalty*

Similar to the deficiencies related to the duty of care, matters concerning executive private misconduct also expose serious legal gaps and tensions involving corporate law's duty of loyalty. Again, the issue rests in delineating what personal and professional conduct is subject to corporate attention.[164] The duty of loyalty generally requires that executives, as fiduciaries of a corporation, place "the best interest of the corporation and its shareholders" over any of their personal interests.[165] Duty of loyalty claims frequently arise when there are allegations of bad faith and self-dealing that present conflicts of interest between the company's interests and the executive's interests.[166] Unlike straightforward duty of loyalty claims—where an executive embezzles corporate assets or takes advantage of opportunities for personal gain—private matters and conduct that do not directly implicate corporate property are much more difficult to untangle.[167] Corporate law establishes no clear, precise standard for making these determinations, as the influential Delaware Supreme Court held: "The occasions for the determination of honesty, good faith and loyal con-

rate Governance of Iconic Executives, 87 NOTRE DAME L. REV. 351, 363–73 (2011) (discussing the wide organizational and legal deference afforded to leading corporate executives).

162 *See* Indictment para. 11, United States v. Holmes, No. 18-cr-0258 (N.D. Cal. filed June 14, 2018); Complaint paras. 1–2, SEC v. Holmes, No. 18-cv-01602, (N.D. Cal. filed Mar. 14, 2018); Complaint para. 1, SEC v. Balwani, No. 18-cv-01603, (N.D. Cal. filed Mar. 14, 2018); CARREYROU, *supra* note 10, at 226–30.

163 *See, e.g.*, Isidore, *supra* note 26; Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1270–73 (2017) (describing the high velocity and impact of information in the contemporary, high-tech marketplace).

164 *See* Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 191 (Del. Ch. 2005).

165 *Id.* (quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993)).

166 *See, e.g.*, United States v. De La Mata, 266 F.3d 1275, 1293 (11th Cir. 2001) (explaining that the "duty of loyalty[ ] obligates officers and directors to avoid fraud, bad faith, usurpation of corporate opportunities, and self-dealing" (footnote omitted)); *Benihana*, 891 A.2d at 169 (alleging a duty of loyalty breach related to conflicted dealings involving board members).

167 *See In re* eBay, Inc. S'holders Litig., No. C.A. 19988-NC, 2004 WL 253521, at *4–5 (Del. Ch. Jan. 23, 2004) (discussing how the fiduciary duty of loyalty is implicated when directors and officers usurp corporate opportunities for personal gain).

duct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale."[168]

Matters concerning executive private misconduct expose legal gaps and tensions relating to the duty of loyalty because it can often be difficult to determine whether personal conduct or private matters are truly relevant to, and in conflict with, one's professional obligations. These issues are exacerbated by historical practices and norms, which suggest that what happens in an executive's private life is their business alone.[169] Yet, no matter how well one can compartmentalize their life, the happenings of one's personal life invariably affect one's professional life in profound and pedestrian ways. After all, energy and time are finite resources, even for rich and powerful business leaders. As such, many executives' private matters and conduct would be relevant to their professional obligations.

At the same time, it cannot be the case that an executive surrenders all of their privacy by virtue of taking a senior position at a company. Not everything eccentric, interesting, or "newsworthy" about an executive's private life should be subject to corporate and legal scrutiny.[170] Moreover, executives, like many individuals, can have complex personal lives and still be very successful in their professional pursuits.[171] Nevertheless, for many prominent executives, it can be incredibly difficult to untangle the executives themselves from evaluations of their company.[172] What happens in the private lives of executives like Jeff Bezos, Warren Buffett, Elon Musk, and Mark Zuckerberg clearly has an impact on the values of their businesses, rightfully or wrongfully, in the eyes of many investors.[173] For instance, the SEC investigated Apple and its late CEO Steve Jobs for concealing his serious health condition from investors because investors viewed Jobs as integral to Apple.[174] Likewise, federal prosecutors indicted Martha Stew-

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168 Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

169 *See* Langevoort, *supra* note 159, at 1194–95.

170 *See, e.g.*, Lin, *supra* note 144, at 405–07 (discussing what about a CEO's personal life is "material").

171 *See* ISAACSON, *supra* note 2, at 86–90, 140 (chronicling the personal failings of Steve Jobs in abandoning and denying the existence of his daughter).

172 *See* Timothy J. Quigley et al., *Shareholder Perceptions of the Changing Impact of CEOs: Market Reactions to Unexpected CEO Deaths, 1950–2009*, 38 STRATEGIC MGMT. J. 939 (2017) (finding that investors place significant investment value on CEOs); Berzon et al., *supra* note 29 (noting that Wynn's company thought him so integral to the company that it disclosed in SEC filings that should Wynn become unavailable to lead the company's value would take a serious hit).

173 *See supra* Section I.A.

174 *See* David Scheer & Connie Guglielmo, *Apple Disclosures About Jobs Said to Face SEC*

art, the CEO of her namesake firm, for securities fraud because they believed that her personal insider trading decisions related to the sale of shares in another company defrauded her company's shareholders.[175] In sum, matters concerning executive private conduct expose legal gaps and tensions relating to the duty of loyalty, because it can be incredibly hard to determine which private matters are relevant and potentially in conflict with a company's interests.

3. Caremark *Duties*

Matters concerning executive private misconduct expose critical legal gaps and tensions in corporate law involving a board's *Caremark* duties of oversight because it can be difficult and impractical for boards to monitor the private conduct of their fellow executives—especially given the permissive legal means by which boards can fulfill their oversight duties. *Caremark*, a 1996 Delaware Chancery Court ruling, was the first to introduce the concept of a board's duty of oversight in connection with its fiduciary obligations to the company and its shareholders.[176] The Delaware Supreme Court, in *Stone v. Ritter*,[177] would later enshrine this *Caremark* oversight duty into corporate law.[178] The law actually imposes a very high standard for holding directors liable in connection with their oversight duties. In *Caremark*, the Court set the following standard: "[O]nly a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exits [sic]—will establish the lack of good faith that is a necessary condition to liability."[179] This means that so long as a board has a reasonable oversight, and makes some good faith attempt at oversight, they generally would not have failed to fulfill their *Caremark* duties.[180] The

Review, BLOOMBERG (Jan. 21, 2009, 4:06 PM), https://www.bloomberg.com/news/articles/2009-01-21/apple-s-disclosures-about-jobs-s-health-said-to-face-sec-review [https://perma.cc/2SN4-QGBS] (noting the pressure from investors for the SEC to investigate Apple's disclosure of Jobs' health problems); *The SEC Reportedly Investigates Apple's Candor About Jobs's Health*, WIRED (Jan. 21, 2009, 12:02 PM), http://www.wired.com/epicenter/2009/01/the-sec-investi/ [https://perma.cc/C9CB-4QRQ] (reporting that an investigation was being conducted).

175 *See* United States v. Stewart, 305 F. Supp. 2d 368, 370 (S.D.N.Y. 2004) ("Count Nine of the Indictment charges that defendant Stewart made materially false statements of fact regarding her sale of ImClone securities with the intention of defrauding and deceiving investors by slowing or stopping the erosion of the value of the securities issued by her own company, Martha Stewart Living Omnimedia ('MLSO').").

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

177 911 A.2d 362 (Del. 2006).

178 *Id.* at 370.

179 *Caremark*, 698 A.2d at 971.

180 *Id.*

Caremark and *Stone* decisions, as well as the Federal Sentencing Guidelines, forced businesses across the country to bolster their internal compliance and ethical programs to help management fulfill their oversight duties.[181]

Matters relating to executive private conduct expose legal gaps and tensions concerning a director's oversight duties for the best interests of the company and its shareholders because creating and sustaining a meaningful monitoring system for such matters may be unnecessary in law and undesirable in practice. First, because of the high bar for attaching liability pursuant to a director's *Caremark* duties, directors bear little risk for not aggressively monitoring the private affairs of their fellow executives.[182] Even if such matters are subject to some oversight, reasonable attempts that do not "utterly" or "consciously" fail is all that the law requires of directors.[183] In fact, the court in *Caremark* stated that these types of cases may "possibly [represent] the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[184] As such, companies have not bolstered their compliance and oversight of executive private conduct as much as they have in other corporate areas because there is little risk of liability and there remain open questions about whether the executive private matters should even be subject to corporate monitoring.[185]

Second, creating and sustaining systems to oversee executive private conduct may be highly undesirable and impractical. After all, which senior executive is happy to subject themselves to being moni-

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181 *See* GEOFFREY PARSONS MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 168–69 (1st ed. 2014) (discussing how changes in federal regulations and enforcement practices have led to the growth of compliance efforts); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016) ("Over the past decade, compliance has blossomed into a thriving industry, and the compliance department has emerged, in many firms, as the co-equal of the legal department."); Tom C.W. Lin, *Compliance, Technology, and Modern Finance*, 11 BROOK. J. CORP. FIN. & COM. L. 159, 164–65 (2016) (describing the various legal and commercial factors that led to the growth of the modern compliance industry); Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 171–72 (2015) (explaining that the Federal Sentencing Guidelines contributed to the growth of compliance departments by considering good compliance programs a mitigating factor).

182 *See* Claire A. Hill, Caremark *As Soft Law*, 90 TEMP. L. REV. 681, 682 (2018) ("[L]iability for breach of *Caremark* duties is exceedingly difficult to establish.").

183 *See Stone*, 911 A.2d at 370.

184 *Caremark*, 698 A.2d at 967.

185 *See, e.g.*, White v. Panic, 793 A.2d 356, 371 (Del. Ch. 2000), *aff'd*, 783 A.2d 543 (Del. 2001) (alluding to the high threshold for imposing Caremark liability against the board in a sexual harassment case against a corporate executive).

tored by their fellow executives? Furthermore, it would be difficult to establish a surveillance system for senior executives concerning their private conduct, given the wide range of private travel and behaviors.[186] This is to say nothing of the norms of collegiality, privacy, and legality that may be breached as a result of such a corporate surveillance system. For example, in 2006, Hewlett Packard surveilled its directors' private communications with journalists in connection with a corporate "leaks" investigation.[187] This spying led to board upheaval, numerous lawsuits, and several regulatory actions.[188]

In sum, *Caremark* oversight duties present difficult issues concerning the monitoring of executive private behavior. This is because the law and business conventions suggest that such monitoring may be unnecessary and undesirable, despite the precarious ground that firms and investors may be left standing on in the event of an unexpected public disclosure of serious executive private misconduct.

B. Of Securities Law

Private misconduct claims against executives highlight critical legal gaps and tensions in securities law, similar to the deficiencies in corporate law. In general, federal securities law is built on the principle of "full and fair disclosure."[189] In the aftermath of the Great Depression, policymakers "substitute[d] a philosophy of full disclosure for the philosophy of *caveat emptor*," as the chief regulatory philosophy of securities regulation.[190] In connection with this fundamental goal of disclosure, the SEC has mandated periodic line-item and material disclosures from companies seeking access to public capital markets and investors.[191] Like state corporate law, federal securities law in practice and design generally focuses on the professional affairs of the

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186 *See id.* at 420–21, 423–25 (discussing the potential "chilling" effect of monitoring mechanisms and noting the range of information sought about executives).

187 *See* James Stewart, *The Kona Files*, NEW YORKER (Feb. 12, 2007), https://www.newyorker.com/magazine/2007/02/19/the-kona-files [https://perma.cc/XMF7-LY7V].

188 *See, e.g.*, Damon Darlin, *H.P. Will Pay $14.5 Million to Settle Suit*, N.Y. TIMES (Dec. 8, 2006), https://www.nytimes.com/2006/12/08/technology/08hewlett.html [https://perma.cc/L2YK-744J]; Matt Richtel, *Charges Dismissed in Hewlett-Packard Spying Case*, N.Y. TIMES (Mar. 15, 2007), https://www.nytimes.com/2007/03/15/technology/15dunn.html [https://perma.cc/L2YK-744J]; Matt Richtel, *Hewlett-Packard Settles Spy Case*, N.Y. TIMES (Feb. 14, 2008), https://www.nytimes.com/2008/02/14/business/media/14hp.html [https://perma.cc/UQ24-CCVC]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Settles Charges Against Hewlett-Packard for Misleading Disclosures Arising out of Company's Boardroom Leak Investigation (May 23, 2007), https://www.sec.gov/news/press/2007/2007-103.htm [https://perma.cc/LRM8-SHKJ].

189 SEC v. Searchlight Consol. Mining & Milling Co., 112 F. Supp. 726, 729 (D. Nev. 1953).

190 SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

191 *See* 15 U.S.C. §§ 77e, 77k, 77q, 77aa, 78a–78mm (2018).

firm and its executives.[192] What happens in the private lives of company employees and executives has traditionally rested outside the scope of federal securities law, absent some rule or regulation mandating disclosure.[193] In the contemporary socioeconomic and media landscape, however, where private matters and executive conduct can have very serious and often public consequences for a company and its investors,[194] securities law's shortcomings have become more pronounced and substantial, raising critical questions about the efficacy of line-item and material disclosures.

1. *Line-Item Disclosures*

Matters concerning executive private conduct expose serious legal gaps and tensions in securities law because it can be difficult to determine whether a company should disclose an executive's personal and private conduct under the various line-item disclosure rules designed to inform investors. Absent situations that clearly implicate legality, criminality, or explicit regulatory language, it is difficult for a board to readily decide that personal matters merit itemized disclosures.[195]

The SEC, through the Securities Act of 1933 (the "Securities Act")[196] and the Securities Exchange Act of 1934 (the "Exchange Act"),[197] requires companies that wish to access public markets to make certain line-item and narrative disclosures. The Securities Act mandates the registration of any securities offering or sale that uses the "means or instruments of transportation or communication in interstate commerce."[198] The Securities Act further ensures that investors have all the information Congress considered critical to making investment decisions through a mandated registration statement and accompanying prospectus.[199] Working in conjunction with the Securities Act, which largely focuses on the offering of securities, the Exchange Act focuses on the subsequent trading of those securities.[200]

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192 *See* Heminway, *supra* note 8, at 753–57.

193 *See id.* at 757–59 (discussing antifraud rules that may "compel disclosure of personal facts about executives").

194 *See supra* Section I.A.

195 *See* EEOC Report on Harassment in the Workplace, *supra* note 147, at 24.

196 15 U.S.C. §§ 77e, 77k, 77q, 77aa.

197 *Id.* §§ 78a–78mm.

198 *Id.* § 77e.

199 *See In re* Franchard Corp., 42 S.E.C. 163, 174 (1964) (noting that Congress determined with the passage of the Securities Act which areas of privacy an executive must relinquish, because those areas "impinge significantly upon the affairs of the company").

200 *See id.*; 15 U.S.C. §§ 78a–mm.

The Exchange Act, through its periodic reporting requirements and Section 10's broad antifraud provision, attempts to ensure that investors receive accurate information about the firms behind their investments.[201] Together, these Acts mandate that firms make timely line-item disclosures and update them on a quarterly and annual basis, at minimum, so that investors can be adequately protected with full and accurate information.[202] These disclosures include financial statements, management analyses, company risks, legal proceedings, executive compensation, and professional information about key executives.[203]

The line-item disclosure rules in Regulation S-K Items 401 through 404 further detail the types of information that firms must share about their executives. First, Item 401 mandates the disclosure of an executive's identity, age, business background, and any familial relationships amongst a firm's executives.[204] Item 401 also mandates the disclosure of any legal proceedings involving an executive during the preceding decade "that are material to an evaluation of the [executive's] ability or integrity," such as criminal or bankruptcy proceedings.[205] Second, Item 402 requires firms to disclose, detail, and discuss a senior executive's compensation, which includes monetary as well as nonmonetary benefits.[206] Third, Item 403 requires firms to disclose an executive's ownership stake in the company.[207] Lastly, Item 404 requires firms to disclose transactions between the executive and the firm exceeding $120,000, and where the executive or other related person would have a material interest.[208]

Matters concerning executive private conduct expose legal gaps and tensions relating to the SEC's line-item disclosure requirements because there are no rules explicitly requiring the disclosure of personal matters, outside of the few outlined above. Should a company disclose that its CEO is undergoing alcohol addiction treatment? Should a company disclose a CFO's contentious divorce and custody battle? Should a company disclose a general counsel's private, misogy-

201 *See* 15 U.S.C. § 78m(a)(1) (requiring companies to "keep reasonably current the information and documents required to be included in or filed with an application or registration statement"); 17 C.F.R. § 240.10b-5 (2019) (outlining SEC Rule 10b-5).

202 *See* 15 U.S.C. § 78m; 17 C.F.R. §§ 240.13a-13, 240.15d-13.

203 *See* 17 C.F.R. §§ 240.13a-13, 240.15d-13, 229.301, 229.401(b), (d)–(f), 229.402(a)(2).

204 *Id.* § 229.401(b), (d), (e).

205 *Id.* § 229.401(f).

206 *Id.* § 229.402(a)(2).

207 *Id.* § 229.403(b).

208 *Id.* § 229.404(a).

nist tweets? Historically and generally, securities disclosures like those made in a company's quarterly or annual reports have not contained private information about company executives, except for information explicitly required by the rules.[209] At the same time, many executives are seen as critical to the success and failure of their company, and what happens in their lives can be highly relevant to their abilities to carry out their professional obligations.[210] The SEC and courts have long held that "[a]n insider of a corporation that is asking the public for funds must, in return, relinquish various areas of privacy,"[211] but the terms of that exchange have never been clearly defined by law, regulation, or practice. As such, serious legal gaps and tensions exist under securities law over the disclosure of executive private affairs.

2. *Material, Antifraud Disclosures*

In addition to the deficiencies of line-item disclosures, matters concerning executive private conduct expose serious legal gaps and tensions in securities law's material antifraud disclosure rules, which were designed to protect investors. Absent clear regulatory guidance and precedent, it can be difficult and arbitrary for a board to determine that an executive's personal matter is material.

In addition to the line-item disclosure requirements, the Exchange Act mandates the disclosure of "material" information.[212] This demonstrates that policymakers—mindful that line-item rules could not possibly detail every type of information that should be disclosed to investors—incorporated "materiality" to capture potential gaps. In the landmark case *TSC Industries, Inc. v. Northway, Inc.*,[213] the Supreme Court defined materiality as follows:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as hav-

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209 *See supra* text accompanying notes 204–08.

210 *See supra* Section I.A.

211 *See, e.g.*, *In re* Franchard Corp., 42 S.E.C. 163, 174 (1964).

212 *See, e.g.*, 17 C.F.R. § 229.303 (requiring the disclosure of "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"); *id.* § 230.408(a) (mandating similarly); *id.* § 240.10b-5 (requiring similarly).

213 426 U.S. 438 (1976).

ing significantly altered the "total mix" of information made available.[214]

This conception of materiality, embedded in various antifraud theories,[215] has led to numerous disclosures from companies for fear of being sued for securities fraud by private plaintiffs. For instance, Rule 10b-5, a prominent antifraud provision in securities law,[216] makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact . . . in connection with the purchase or sale of any security."[217] Given the growth of private actions for securities fraud, especially under Rule 10b-5, the Supreme Court has remarked that "[w]hen we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn."[218]

Matters concerning executive private conduct expose legal gaps and tensions relating to securities law's conception of materiality because there are no clear legal precedents, best practices, or regulatory guidance for these types of disclosure decisions.[219] First of all, materiality analysis can be quite complicated for many companies.[220] Materiality decisions usually require "delicate assessments" by company executives based on the unique nature of the "'total mix' of informa-

214 *Id.* at 449. The Supreme Court would later explicitly adopt this definition of materiality for securities litigation under Section 10. Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

215 *See, e.g.*, Julie A. Herzog, *Fraud Created the Market: An Unwise and Unwarranted Extension of Section 10(b) and Rule 10b-5*, 63 GEO. WASH. L. REV. 359, 367–70 (1995) (discussing a "fraud-on-the-market" theory of economic analysis that courts have found useful in assessing investor reliance).

216 *See, e.g.*, *id.* at 366–73 (discussing litigation based on a theory of investor reliance falling under Rule 10).

217 17 C.F.R. § 240.10b-5.

218 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

219 *See, e.g.*, Jayne W. Barnard, *Sovereign Prerogatives*, 21 J. CORP. L. 307, 323 (1996) (book review) ("The law governing a corporation's affirmative obligation to disclose an executive's medical condition is unclear. Federal law does not require companies to make timely disclosure of executive illness." (footnote omitted)); Heminway, *supra* note 8, at 774 ("Unfortunately, current federal securities disclosure rules do not apparently recognize the tension they create with privacy rights or provide a concrete basis or process for performing the requisite balancing of governmental (or public) and individual interests."); Chris Dolmetsch & Peter Burrows, *Apple May Not Need to Reveal Details of Steve Jobs Medical Leave*, BLOOMBERG (Jan. 18, 2011, 12:01 AM), https://www.bloomberg.com/news/articles/2011-01-18/apple-s-disclosure-of-steve-jobs-medical-leave-is-sufficient-lawyers-say [https://perma.cc/MM5V-952C] (noting that securities law has no clear guidance on executive private health disclosures).

220 *See* Heminway, *supra* note 8, at 761 ("Materiality determinations are open-textured; the wording of the relevant antifraud rules is quite broad and susceptible to multiple interpretations, even with SEC and federal court guidance."); Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 644 (1996) ("Matters of materiality . . . are often difficult to work through confidently . . . .").

tion" that exists about their companies.[221] The delicateness of these decisions heightens when the information under consideration concerns an executive's private conduct and personal life—especially if the executive appears to be performing their professional obligations spectacularly or even reasonably well.[222] To further complicate matters, historical social and business norms in the boardroom and beyond may suggest that companies should err on the side of privacy, or nondisclosure.[223] Consequently, materiality decisions can be highly subjective, involving a variety of quantitative and qualitative factors, including consideration of tough and highly personal matters that have no clear answers.[224] Should a CFO's confidential payments to a manicurist, like in the case of Steve Wynn, be considered material?[225] Is a CEO's genetic mutation considered material?[226] What about a CEO's lavish home purchases and renovations?[227] What about the death of an executive's young child or parent?[228] Whether any or all of these matters are material under securities law is subject to legitimate debate. It is, however, less debatable that companies sometimes err on the side of secrecy to protect the privacy interests of executives. As such, investors are, therefore, deprived of valuable information to protect themselves, and companies are exposed to the risk of potential shocks when such private information is revealed publicly.

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221 TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449–50 (1976); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (adopting the "total mix of information" standard of materiality for omissions of facts connected to the sale or purchase of a security).

222 *See* Heminway, *supra* note 93, at 117 ("Omissions to state personal facts raise different, thornier issues.").

223 *See* Langevoort, *supra* note 159, at 1194–95.

224 *See* John M. Fedders, *Qualitative Materiality: The Birth, Struggles, and Demise of an Unworkable Standard*, 48 CATH. U. L. REV. 41, 45–47 (1998) (discussing the complex judgments involved in securities disclosures); Heminway, *supra* note 8, at 761–62 ("Materiality analyses also involve consideration of both quantitative and qualitative factors.").

225 *See* Matthew Goldstein et al., *Stephen Wynn, Casino Mogul, Accused of Decades of Sexual Misconduct*, N.Y. TIMES (Jan. 26, 2018), https://www.nytimes.com/2018/01/26/business/steve-wynn-sexual-misconduct-claims.html [https://perma.cc/8K5Q-L62D].

226 *See* Thomas Goetz, *Sergey's Search*, WIRED, July 2010, at 105, 108 (discussing Google's co-president's disclosure of a genetic mutation that increases the likelihood Parkinson's disease).

227 *See* Crocker Liu & David Yermack, *Where Are the Shareholders' Mansions? CEOs' Home Purchases, Stock Sales, and Subsequent Company Performance*, *in* CORPORATE GOVERNANCE 3 (Sabri Boubaker et al. eds., 2012) (studying the effect of CEOs' home purchases and stock sales on firm performance); McLean, *supra* note 97 (reporting on the secret lair of a CEO's mansion).

228 *See* Morten Bennedsen et al., Do CEO's Matter? 4, 35 (Dec. 2010) (unpublished manuscript), https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/3177/valueceos.pdf [https://perma.cc/VH9M-3JQF] (finding statistically significant stock declines in years following the death of a CEO's child or parent, but not mother-in-law).

C. Arbitrary and Risky Practices

The legal gaps and tensions in corporate law and securities law concerning executive private conduct have led to arbitrary and risky practices in boardrooms across America, endangering firm stability and shareholder value. The absence of clear legal guidance and best practices has given companies much discretion to decide how to address executive private conduct questions on an ad hoc basis,[229] because no two firms or executives are identical. In practice, this wide latitude means that companies can engage in arbitrary and risky corporate governance practices that readily place an executive's desires for privacy over the interests of firms and shareholders, despite their obligations pursuant to corporate and securities law.[230]

Recent corporate history is replete with incidents of such inconsistent and dangerous practices. In the early 1990s, when former Time Warner CEO Steve Ross was fighting prostate cancer, the company and its senior executives released obfuscating and misleading information all the way up until his ultimate demise.[231] Similarly, in 2003 and 2004, Apple made no timely disclosures about the serious health conditions of its founder and CEO Steve Jobs, despite his immeasurable importance to the company and its investors.[232]

In 2016, Fox News CEO Roger Ailes abruptly resigned in scandal after multiple allegations of sexual harassment.[233] In 2017, Travis Kalanick, the cofounder and CEO of Uber, resigned after Kalanick and the company faced serious allegations of harassment, discrimina-

229 *See, e.g.*, Nixon v. Blackwell, 626 A.2d 1366, 1381 (Del. 1993) ("The doctrine of entire fairness does not lend itself to bright line precision or rigid doctrine. Yet it does not necessarily require equality, it cannot be a matter of total subjectivity on the part of the trial court, and it cannot result in a random pattern of ad hoc determinations which could do violence to the stability of our corporation law."); Shlensky v. Wrigley, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (acknowledging that firms may address similar business concerns differently without violating their duty of care); Lin, *supra* note 144, at 407–08 (discussing the individualized analysis that is frequently needed for such issues).

230 *See* Pan, *supra* note 139, at 740 ("Risk management is a corporate governance problem. Corporate officers and employees make decisions every day that put the corporation at risk.").

231 *See* Barnard, *supra* note 219, at 309–10.

232 *See* ROBERT IGER, THE RIDE OF A LIFETIME 149–50 (2019) (detailing the secrecy surrounding the perilous health condition of Steve Jobs); Peter Elkind, *The Trouble with Steve Jobs*, FORTUNE (Mar. 5, 2008, 1:05 PM), https://fortune.com/2008/03/05/the-trouble-with-steve-jobs/ [https://perma.cc/VKC7-M4WJ] ("When Intel CEO Andy Grove was diagnosed with prostate cancer in 1995, he made no formal disclosure—Grove chose to write about it instead in a 1996 article for Fortune."); Nocera, *supra* note 90.

233 John Koblin et al., *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps in*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html [https://perma.cc/TD95-RF5H].

tion, and other misconduct within his company.[234] In 2018, Brian Krzanich resigned suddenly as CEO of Intel Corporation after it was found that he had been violating company policies.[235] In 2019, Steve Easterbrook was fired as CEO of McDonald's after violating company policy for engaging in a consensual relationship with a subordinate.[236] Just like the previously discussed episodes involving the Weinstein Company, Wynn Resorts, CBS, and Tesla, many of the companies in these incidents did not take timely actions in response to the private conduct and affairs of its key executives, and, as a result, their firms and shareholders suffered through varying levels of leadership uncertainty, economic loss, and reputational harm.[237]

In contrast to these risky practices, some CEOs and companies have been more forthcoming about their private affairs when they believed that private facts about their lives might impact their companies and its shareholders. In 2000, Warren Buffett, the widely-admired founder and CEO of Berkshire Hathaway, publicly disclosed that he needed routine surgery to remove polyps from his colon, perhaps mindful that investors viewed his wellness as critical to the company's success.[238] Similarly, in 2004, Charles Bell, the then-CEO of McDonald's, promptly disclosed his colorectal cancer diagnosis.[239] Shortly thereafter, Mr. Bell resigned from the firm and passed away.[240] In 2015, about a month into his tenure as CEO of United Airlines, Oscar Munoz was hospitalized, and the company promptly released a short

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234 *See* Olivia Solon & Julia Carrie Wong, *With Uber's Travis Kalanick out, Will Silicon Valley Clean Up Its Bro Culture?*, GUARDIAN (June 21, 2017, 4:06 PM), https://www.theguardian.com/technology/2017/jun/21/uber-travis-kalanick-what-next-silicon-valley [https://perma.cc/C66D-YSJV]; Julia Carrie Wong, *Uber CEO Travis Kalanick Resigns Following Months of Chaos*, GUARDIAN (June 21, 2017, 6:46 AM), https://www.theguardian.com/technology/2017/jun/20/uber-ceo-travis-kalanick-resigns [https://perma.cc/G8S7-JBU4].

235 *See* Don Clark, *Intel C.E.O. Brian Krzanich Resigns After Relationship with Employee*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/technology/intel-ceo-resigns-consensual-relationship.html [https://perma.cc/VXL5-7TVK]; Sara Ashley O'Brien, *Intel CEO Resigns After 'Past Consensual Relationship' with Employee*, CNN (June 21, 2018, 12:54 PM), https://money.cnn.com/2018/06/21/technology/intel-ceo-out/index.html [https://perma.cc/Z9XJ-KH3X].

236 Yaffe-Bellany, *supra* note 17.

237 *See supra* Section I.A; text accompanying notes 232–36.

238 *See* Elkind, *supra* note 232 ("Warren Buffett . . . issued a press release in June 2000 days after he learned he would need surgery to remove benign polyps along with part of his colon, even though the procedure was considered routine.").

239 Nocera, *supra* note 90 ("[W]hen Charles H. Bell received a diagnosis of colorectal cancer shortly after he became the chief executive of McDonald's in 2004, the company quickly released the news.").

240 *Id.* ("Mr. Bell resigned from the company that November, and died two months later.").

general statement about his hospitalization.[241] A few months later Munoz took medical leave and had a heart transplant, while the company continued normal operations in his absence.[242] In 2019, Arne Sorenson, the CEO of Marriott International, publicly disclosed his stage two pancreatic cancer and updated his shareholders about his treatment throughout the year as he continued to lead the company.[243] That said, for every episode like the ones involving Buffett, Bell, Munoz, and Sorenson, recent history suggests that there are many executives that choose nondisclosure and privacy over the interests of their firms and shareholders, despite their legal obligations under business law.[244]

The social dynamic amongst senior executives in boardrooms contributes to the difficulties regarding disclosure. Senior executives frequently work and socialize in the same elite, tight-knit circles where they build mutual relationships, values, and practices.[245] Furthermore, corporate norms generally frown on aggressively challenging senior executives and fellow board members.[246] Directors generally give great deference to the judgment and preferences of other senior executives, particularly a chairperson or CEO, and especially when that individual helped the director acquire his or her seat on the board.[247]

241 Jad Mouawad, *Oscar Munoz, United Airlines Chief, Is Hospitalized*, N.Y. Times (Oct. 16, 2015), https://www.nytimes.com/2015/10/17/business/oscar-munoz-united-airlines-chief-hospitalized-after-heart-attack.html [https://perma.cc/2YE6-SX2V].

242 Jad Mouawad, *United Airlines Chief, Oscar Munoz, Has Heart Transplant*, N.Y. Times (Jan. 6, 2016), https://www.nytimes.com/2016/01/07/business/united-airlines-chief-oscar-munoz-has-heart-transplant.html [https://perma.cc/E4FW-7TBJ].

243 Maria Armental, *Marriott CEO to Have Surgery as Part of Cancer Treatment*, Wall Street J. (Nov. 5, 2019, 12:05 PM), https://www.wsj.com/articles/marriott-ceo-to-have-surgery-as-part-of-cancer-treatment-11572973507 [https://perma.cc/F2BX-9WKM].

244 *See, e.g.*, Kelly v. Bell, 254 A.2d 62, 71 (Del. Ch. 1969) ("[D]irectors owe a duty to honestly disclose all material facts when they undertake to give out statements about the business to stockholders."), *aff'd*, 266 A.2d 878 (Del. 1970).

245 *See* Rosabeth Moss Kanter, Men and Women of the Corporation 48–63 (1977) (explaining "homosocial reproduction" in corporate settings); Schultz, *supra* note 8, at 50–52 (discussing how "tightly knit social networks" and "subjective authority" can lead to bad executive behavior and practices—such as sexual harassment—in the workplace). *See generally* Mia Gray et al., *Networks of Exclusion: Job Segmentation and Social Networks in the Knowledge Economy*, 26 Equal Opportunities Int'l 144 (2007) (studying the effects of social networks and discriminatory business practices).

246 *See* Jonathan R. Macey, Corporate Governance 62 (2008).

247 *See* Barry Baysinger & Robert E. Hoskisson, *The Composition of Boards of Directors and Strategic Control: Effects on Corporate Strategy*, 15 Acad. Mgmt. Rev. 72, 72–73 (1990) ("[M]anagers dominate their boards by using their de facto power to select and compensate directors and by exploiting personal ties with them."); Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. Davis L. Rev. 1351, 1370 (2014) ("Due to organizational dynamics, powerful CEOs can capture much of this deference and dominate a corporation."); Steven A. Ramirez, *The End of*

As such, traditional boardroom dynamics can lead boards to hope things will turn out well regarding private matters, rather than uncomfortably push their colleagues to make disclosures that may be harmful to their personal interests—even when such disclosure is in the best interests of the firm and its shareholders.[248]

Furthermore, many senior executives are protected by carefully negotiated employment contracts that include favorable termination and severance provisions, which greatly restrain the ability of firms to take meaningfully punitive action against the executives.[249] For instance, it was reported that Harvey Weinstein's employment contract explicitly contemplated his private misconduct, requiring him to reimburse the firm for any payments made to third parties, rather than contractually making such repeated misbehavior a cause for termination.[250]

In sum, while arbitrary and risky practices involving executive private conduct may be understandable and arguably defensible given past practices, they also leave firms and shareholders particularly vulnerable to exogenous shocks when the press or another third party unexpectedly makes public a serious private matter. Firms could suddenly lose critical senior executives without a succession plan in place; corporate governance could be left in disarray; and shareholders could see their stock plummet in an instant, if such news blindsides the marketplace.[251]

Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top, 24 YALE J. ON REG. 313, 332 (2007) ("CEOs of public companies have the unique privilege of picking their own nominal supervisors—the board of directors.").

248 *See* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 809 (2001) (discussing how board dynamics can lead to optimism bias and more risk exposure).

249 *See* Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 92 (2018) (discussing how "[t]op-level employees . . . often negotiate job-security rights that constrain employers' ability to terminate or discipline them even in situations involving alleged sexual harassment"); 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, 247–48, 261 n.44 (2006) (finding very favorable termination clauses for CEOs).

250 Eriq Gardner, *Harvey Weinstein Employment Deal Becomes Public Record*, HOLLYWOOD REP. (June 5, 2018, 3:15 PM), https://www.hollywoodreporter.com/thr-esq/harvey-weinstein-employment-deal-becomes-public-record-1117500 [https://perma.cc/E8MU-YZ9L].

251 *See, e.g.*, CHRISTINA BINKLEY, WINNER TAKES ALL 295–98 (2018) (describing the chaotic governance dynamics at Wynn Resorts after Wynn's sudden resignation); Elisabeth Dedman & Stephen W.-J. Lin, *Shareholder Wealth Effects of CEO Departures: Evidence from the UK*, 8 J. CORP. FIN. 81, 100 (2002) (finding that "CEO departure announcements generally induce a negative market reaction"); W. Bruce Johnson et al., *An Analysis of the Stock Price Reaction to Sudden Executive Deaths*, 7 J. ACCT. & ECON. 151, 151 (1985) (studying impact on stock price of

III. Key Implications & Recommendations

The hard legal and policy issues raised by executive private misconduct have broad implications for law, business, and society. They push executives, investors, regulators, and other corporate stakeholders to examine and respond to some difficult questions that business and society have long overlooked or ignored. They challenge existing assumptions about acceptable private behavior, the role of business in society, and the functions of business law. In particular, corporate executives, investors, lawyers, and policymakers should examine and respond to the impact of such issues on corporate governance, corporate policies, and corporate purpose.

A. *On Corporate Governance & Disclosure*

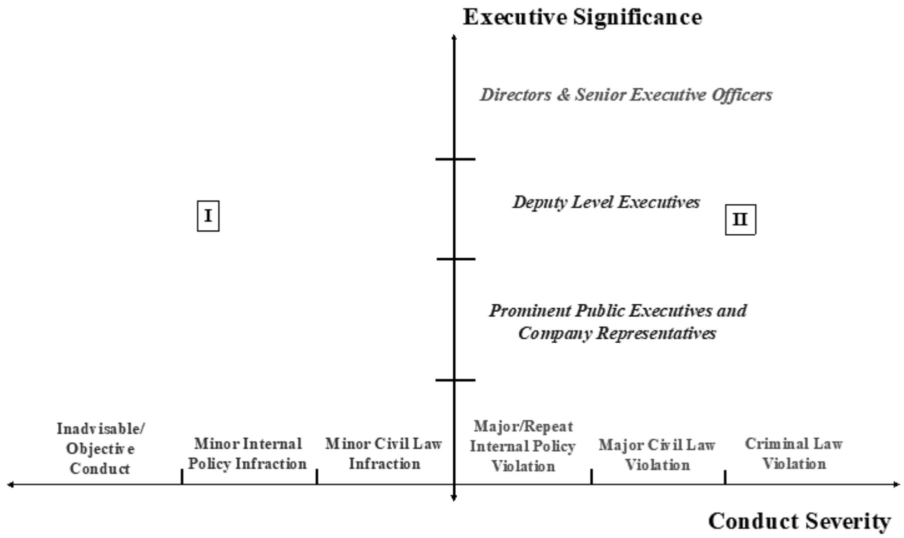
The recent scandals involving executive private misconduct are having profound implications for corporate governance.[252] The hard legal and policy issues raised by the recent scandals at start-up and established companies have appalled and confounded many regulators, investors, executives, and other stakeholders.[253] That said, the recent scandals also present an opportunity to rethink how to better address the serious challenges and risks surrounding the governance of executive private behavior. Rather than approach each incident on an ad hoc, arbitrary basis, this Article recommends an original baseline framework for systemically analyzing these issues, built on the intersectionality of executive significance and conduct severity, as illustrated in Figure 1 below.

unexpected executive change); Quigley et al., *supra* note 172 (finding that investors place significant investment value on CEOs); Jesus M. Salas, *Entrenchment, Governance, and the Stock Price Reaction to Sudden Executive Deaths*, 34 J. Banking & Fin. 656, 656–57 (2010) (highlighting impact on stock caused by abrupt executive change); *cf.* Neophytos Lambertides, *Sudden CEO Vacancy and the Long-Run Economic Consequences*, 35 Managerial Fin. 645, 645 (2009) (studying the importance of CEO succession planning and noting that CEO changes can result in positive abnormal returns).

252 *See supra* Part I.

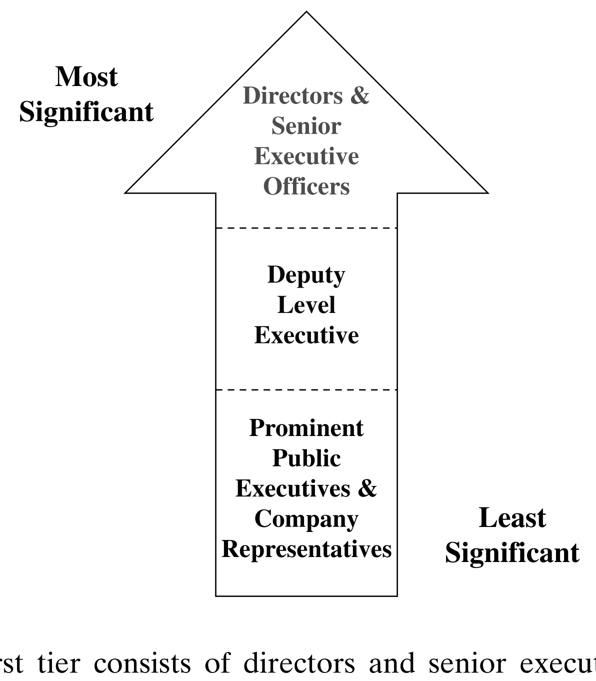
253 *See, e.g.*, Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165, 166–69 (2017) (outlining some of the corporate governance challenges at prominent startups with misbehaving and aggressive executives).

FIGURE 1. BASELINE FRAMEWORK



This framework categorizes senior executives into three tiers from most significant to least significant, as illustrated in Figure 2 below.

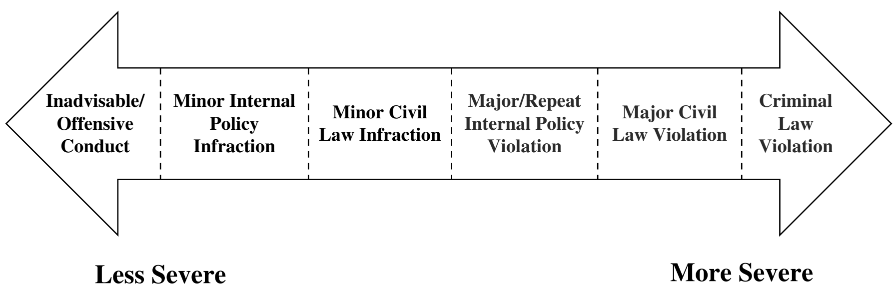
FIGURE 2. TIERS OF EXECUTIVE SIGNIFICANCE



The first tier consists of directors and senior executive officers who are the most important and highly ranked executives of a business. These individuals are required by corporate and securities laws to uphold certain fiduciary duties and make certain disclosures.[254] The second tier consists of deputy level executives who are just below a firm's most senior executives. Deputy level executives frequently report directly to the board of directors and the most senior executive officers. Finally, the third tier consists of prominent public executives and company representatives. These executives are high-profile executives that do not fall into the prior two categories but are widely associated with the firm and could have significant reputational impact on the firm. While this last tier of executives does not possess firm-wide management powers, they can nevertheless cause firm-wide reputational damage, given the modern viral informational environment where a hashtag campaign can sprout up overnight and eliminate millions of dollars in market value.[255]

In terms of conduct severity, this framework categorizes misconduct into a spectrum of six broad categories, where three types of conduct are considered increasingly severe and three types of conduct are considered decreasingly severe, as illustrated in Figure 3 below.

FIGURE 3. SPECTRUM OF CONDUCT SEVERITY



The more severe conduct includes major or repeat violations of internal policies, major civil law violations, and criminal law violations. The less severe conduct includes minor civil law infractions, minor internal policy infractions, and offensive or inadvisable conduct that does not rise to the level of any of the prior categories. It is important to note that the spectrum of conduct severity does not necessarily correlate directly with the impact an allegation of misconduct can have on the company. A major civil law violation from a director

254 *See, e.g.*, 17 C.F.R. §§ 240.16a-1(f), 240.16a-2 (2019) (identifying and mandating certain disclosures by key executives).

255 *See* McDonnell & King, *supra* note 8, at 409–12 (discussing corporate reputational and economic harms that arise from social movement boycotts); Maheshwari, *supra* note 132 ("Companies face a seemingly daily challenge as they grapple with boycott-ready consumers on the left and right . . . .").

may have little impact, but offensive conduct by another director that goes viral could cause grave damage to the company. For instance, John Schnatter, the founder and former chairman of Papa John's, was forced to resign after making a series of offensive remarks, some to a private audience and some tweeted commentary that many found objectionable.[256] His conduct led to a significant decline in the value of the company's stock prior to his resignation.[257]

This baseline framework gives companies a systematic, orderly way to assess executive private misconduct issues, as opposed to the existing ad hoc, arbitrary approach. It can help remove some of the harmful subjective discretion and power that fosters executive misconduct in the first place.[258] This framework can also help directors sidestep some difficult, uncomfortable preliminary discussions with some of the most powerful people within a firm by laying out a preset approach to investigating these issues.

Applying the framework, matters that fall into Quadrant II—involving more serious misconduct allegations, such as those implicating a potential major civil law or criminal violation—should be disclosed to the board for review and investigation. To the extent such allegations are found to be credible, the company should operate with a presumption of disclosing such allegations publicly via press release and a filing with the appropriate regulatory authorities, like the SEC. On the other side of the spectrum, matters that fall into Quadrant I—involving less severe conduct, like minor civil law infractions, minor internal policy infractions, and offensive conduct—generally should be addressed through the company's internal human resources systems rather than be elevated to the board or senior leadership level. In practice, this baseline framework offers a pragmatic starting point

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256 *See* Tiffany Hsu, *Racial Slur Leads to Papa John's Founder Quitting Chairman Post*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/business/papa-johns-racial-slur.html [https://perma.cc/FJ9E-2VU9] [hereinafter Hsu, *Racial Slur*]; Tiffany Hsu, *Papa John's Adopts 'Poison Pill' Defense Against John Schnatter*, N.Y. TIMES (July 23, 2018), https://www.nytimes.com/2018/07/23/business/papa-johns-john-schnatter-poison-pill.html [https://perma.cc/4KM3-SRNK]; Sarah Whitten & Yen Nee Lee, *Papa John's Founder John Schnatter Resigns as Chairman After Apologizing for N-Word Comment, Shares Surge*, CNBC (July 12, 2018, 3:45 PM), https://www.cnbc.com/2018/07/10/papa-johns-founder-john-schnatter-resigns-as-chairman-of-company-boar.html [https://perma.cc/9GKG-UHF6].

257 *See* Hsu, *Racial Slur*, *supra* note 256; Whitten & Lee, *supra* note 256.

258 *See* David L. Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 68–69 (1988) (discussing subjectivity, how it is sometimes confused with objectivity, and its role in workplace evaluations); Schultz, *supra* note 8, at 50 ("Harassment is fueled by employment systems that give higher-ups unchecked, subjective authority to make or break other people's careers on their own subjective say-so, without the use of objective criteria or external oversight to constrain their judgments.").

for systemically rethinking about executive private misconduct. Companies should build on this framework by tailoring a specific guide appropriate for their company's leadership structure, business models, and internal code of conduct policies.[259]

As part of constructing their own framework for assessing executive private misconduct, firms should study and act on three fronts. First, companies should preemptively establish special internal or external entities to review executive private misconduct allegations. Mindful of the institutional and behavioral norms that may make it difficult for executives to investigate and police their colleagues,[260] companies should designate independent internal or external entities to review such matters similar to the way that third party monitors are used as part of corporate enforcement actions or regulatory investigations.[261] Additionally, these independent entities may help to curb the fear of retaliation by victims seeking to report executive private misconduct.[262] These monitoring entities could be special committees made up of independent directors and in-house counsels, or they can be specially designated outside law firms or institutions that specialize in reviewing such matters. Many major corporations like J.P. Morgan, Morgan Stanley, and Pepsi use outside firms to manage their integrity and whistleblower reporting systems.[263]

Second, once a company has designed its own framework for executive private misconduct, it should release its newly designed framework to the board and other senior executives, so the executives have

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259 For example, in 2018, Uber published a tailored tiered framework for assessing sexual misbehavior involving its drivers and customers, given its special business model. *See* CHAD SNIFFEN ET AL., HELPING INDUSTRIES TO CLASSIFY REPORTS OF SEXUAL HARASSMENT, SEXUAL MISCONDUCT, AND SEXUAL ASSAULT 13 (2018), https://www.nsvrc.org/sites/default/files/publications/2018-11/NSVRC_HelpingIndustries.pdf [https://perma.cc/BWC5-FS99].

260 *See supra* notes 186–88, 246–49 and accompanying text.

261 *See* Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 114–15 (2016) (explaining the rising and changing use of monitors in contemporary law and business practice); Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523, 525 (2014) (describing the varying types and functions of corporate monitors); Laurie Hays, *The Board, CEO Misconduct, and Corporate Culture*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 12, 2019), https://corpgov.law.harvard.edu/2019/01/12/the-board-ceo-misconduct-and-corporate-culture/ [https://perma.cc/4HSV-GTX3] (suggesting the use of an internal "ombudsperson" to help oversee such matters).

262 *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 39–40 (2005).

263 *See Welcome to the JPMorgan Chase Code Reporting Hotline*, ETHICSPOINT, https://secure.ethicspoint.com/domain/media/en/gui/53069/index.html [https://perma.cc/QX3S-Y4DQ]; *Morgan Stanley Integrity Hotline*, ETHICSPOINT, https://secure.ethicspoint.com/domain/media/en/gui/54750/index.html [https://perma.cc/7VXQ-FQ9W]; *Welcome to the PepsiCo Speak Up Hotline*, ETHICSPOINT, https://secure.ethicspoint.com/domain/media/en/gui/52943/index.html [https://perma.cc/V77A-XASQ].

notice regarding how the company will review allegations of private misconduct ex ante. This has the further benefit of modeling best practices for the rest of the company.

Third, the company should create a similar framework for the rest of its employees, so that all employees are held to similar standards as the most senior executives.[264] In an era where social issues like those raised by the #MeToo movement lead to activism against firms from within and without, a clear and fair standard for all employees regardless of seniority and compensation can send a very powerful message about the company's desires to treat everyone equally and protect all of its people.[265] This would be a departure from current prevailing practices, where low-level employees are routinely punished or terminated for misconduct while senior executives are given a pass for similar misdeeds.[266] If done well, good-faith and firmwide adoption of the baseline framework could have the effect of raising company morale and creating a more ethical culture, leading executives and other employees to work harder, more inclusively, and more selflessly for the company.[267] By contrast, if firms retain their current amorphous and arbitrary practices, it could perpetuate a culture of fear, producing harmful, misguided practices like the so-called "Mike Pence Rule," named after the current Vice President, whereby

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264 *See* Hays, *supra* note 261 (recommending clearly communicated standards and policies for all employees of a firm on sensitive employment matters).

265 *See* NAT'L ASS'N OF CORP. DIRS., REPORT OF THE NACD BLUE RIBBON COMMISSION ON CULTURE AS A CORPORATE ASSET 10 (2017), http://boardleadership.nacdonline.org/rs/815-YTL-682/images/NACD%20BRC%20Culture%20as%20Corporate%20Asset%2010.6.17.pdf [https://perma.cc/CL6Z-4VSQ] ("The board, the CEO, and senior management need to establish clarity on the foundational elements of values and culture—where consistent behavior is expected across the entire organization . . . ."); Hemel & Lund, *supra* note 8, at 1642 ("Sexual harassment in the workplace potentially damages employee morale, drives talented individuals away from the firm, and endangers the company's reputation."); Mary-Hunter McDonnell et al., *A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges*, 80 AM. SOC. REV. 654, 674 (2015) ("[S]ustained activist challenges may actually begin to change the strategic mindset of executives, leading them to become increasingly sensitive to stakeholder and social issues.").

266 *See* Arnow-Richman, *supra* note 249, at 87 (describing the factors underlying "a world in which employers are inclined to tolerate sexual harassment and other misconduct by top-level employees but aggressively police 'inappropriate' behavior by the rank-and-file").

267 *See* SIMON SINEK, LEADERS EAT LAST 26–27 (paperback ed. 2017) (discussing the impact on a firm of ethical leaders); Schultz, *supra* note 148, at 38 ("To end harassment, organizations must create cultures of equal inclusion and respect; leaders set the tone and example. Managers can provide time, money, and organizational resources to prevent harassment, investigate complaints fairly, monitor results, and establish a climate of respect for all employees.").

women and minorities are avoided and disenfranchised in the workplace.[268]

Admittedly, the proposed baseline framework does not offer a perfectly elegant formula for assessing matters of executive private misconduct. Such matters are not like math problems that can be solved or answered in a mechanical fashion. Rather, such matters can be deeply personal and context dependent, requiring careful assessments of fact and law, be it pursuant to fiduciary duties under corporate law or disclosure rules under securities law. This baseline framework offers an orderly, systematic starting point for making these delicate and difficult assessments.

B. On Corporate Policies & Practices

The recent scandals involving executive private misconduct are having profound implications on human resources policies and practices in the business world across multiple industries.[269] The recent scandals, particularly those involving the #MeToo movement, have exposed the flaws and failures of many common, long-held business practices.[270] Accordingly, businesses have made serious and significant efforts to review and update outdated human resources trainings, policies, and practices.[271] The recent scandals involving executive private conduct present an opportunity to rethink and reform many of these outdated practices. To that end, this Article makes three recommendations for consideration and adoption: (1) operate with the default position of not using nondisclosure agreements ("NDAs") for settling

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268 *See* Hemel & Lund, *supra* note 8, at 1674 ("A further concern—which arises any time that penalties for sexual harassment are ratcheted upward—is that male employers will respond in ways that redound to the detriment of female employees."); Katherine Tarbox, *Is #MeToo Backlash Hurting Women's Opportunities in Finance?*, HARV. BUS. REV. (Mar. 12, 2018), https://hbr.org/2018/03/is-metoo-backlash-hurting-womens-opportunities-in-finance [https://perma.cc/N2LY-ECCM].

269 *See* Lydia Dishman, *What HR Is Doing to Make Sure There Aren't More #MeToo Moments*, FAST CO. (Apr. 18, 2018), https://www.fastcompany.com/40558858/what-hr-is-doing-to-make-sure-there-arent-more-metoo-moments [https://perma.cc/NVW4-Z5P3].

270 *See id.*; Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html [https://perma.cc/JZ4T-LD5L]; Noam Scheiber & Julie Creswell, *Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.*, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/business/sexual-harassment-human-resources.html [https://perma.cc/U56S-7UJG].

271 *See* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 62–64 (2018); Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 866–72 (2019).

allegations involving executive misconduct; (2) use arbitration as an opt-in dispute resolution alternative, rather than as a mandatory step in disputes involving misconduct; and (3) issue an annual, firm-wide report disclosing key statistics on misconduct complaints and incidents.

First, this Article recommends that firms should start with the default preference of not using NDAs for allegations involving executive misconduct. This should be the case particularly when the allegations involve a senior executive and the alleged misconduct is one of the more severe behaviors previously outlined in the baseline framework. One of the chief dangers of NDAs is that bad actors and their misconduct are not revealed or properly addressed, either internally by the firm or externally by the public and regulators, and such bad actors become repeat offenders and menaces to society.[272] The scandals involving Harvey Weinstein and Steve Wynn remained hidden for as long as they did in part because of the prevalent use of NDAs by both executives and their companies.[273] Had the companies not used NDAs, many inside and outside the firm may have been able to address these issues on a more timely basis and prevent future incidents.[274] Furthermore, many view NDAs as reflective of a problematic, coercive, and asymmetrical power dynamic among the contracting parties.[275] The executive and firm frequently have much more power than the alleged victim, which may have been one of the key factors in the alleged executive private misconduct in the first place.[276]

Following the #MeToo movement, businesses, policymakers, and other stakeholders have reexamined and reformed their use of NDAs in dealing with certain disputes relating to employees.[277] California,

272 *See, e.g.*, David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 171–76 (2019) (discussing the social costs of NDAs involving sexual misconduct); Mizrahi, *supra* note 7, at 134 ("These nondisclosure agreements not only protect an accused harasser from public censure in one instance but also undermine the likelihood that future cases of harassment will succeed. Subsequent victims lose the benefit of learning about the prior harassment.").

273 *See* Goldstein et al., *supra* note 225; Kantor & Twohey, *supra* note 20.

274 *See* Ayres, *supra* note 8, at 77 ("While NDAs might be mutually beneficial for the contractors, they might make it easier for the perpetrator to reoffend. A central concern with enforcement is that NDAs do not adequately manifest the assent of potential future victims of the perpetrator."); *cf.* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 169–71 (1998) (discussing the negative public externalities produced by NDAs in the whistleblower context).

275 *See* Arnow-Richman, *supra* note 249, at 89–90.

276 *See id.*

277 *See, e.g.*, Press Release, Connie M. Leyva, Senator, Cal. State Senate, Senator Leyva

for instance, already prohibits use of NDAs related to certain sexual misconduct, like that involving children, and Senators introduced the Stand Together Against Non-Disclosures ("STAND") Act to broaden the ban against the use of NDAs, in light of the #MeToo movement.[278] Policymakers in a few other states have also introduced similar legislation.[279] It is important to note that this Article does not recommend a general prohibition on the use of NDAs because there could be extraordinary circumstances where such agreements may be the best or only viable path forward.[280]

Second, this Article recommends that firms use arbitration as an opt-in dispute resolution alternative, rather than as a mandatory step in disputes involving executive misconduct. As part of their standard employment agreements, many firms and institutions mandate that disputes arising from one's employment must initially be resolved through binding arbitration, and the courts have largely upheld such agreements.[281] In a 2018 case, *Epic Systems Corp. v. Lewis*,[282] the U.S. Supreme Court held that arbitration clauses in employment contracts could apply to "any disputes."[283] According to one estimate, "around 60 million American workers" are constrained by mandatory arbitra-

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Introduces STAND (Stand Together Against Non-Disclosures) Act (Jan. 3, 2018), https://sd20.senate.ca.gov/news/2018-01-03-senator-leyva-introduces-stand-stand-together-against-non-disclosures-act [https://perma.cc/GY85-5LPB]; Amie Tsang, *A #MeToo Story in Britain Prompts Debate over Privacy Laws*, N.Y. Times (Oct. 26, 2018), https://www.nytimes.com/2018/10/26/world/europe/philip-green-nondisclosure-agreements.html [https://perma.cc/848L-XURC]; Daniel Wiessner, *Sexual Misconduct Outcry Makes U.S. Lawyers Rethink Confidentiality*, Reuters (Dec. 19, 2017, 7:08 AM), https://www.reuters.com/article/us-usa-misconduct-agreements/sexual-misconduct-outcry-makes-u-s-lawyers-rethink-confidentiality-idUSKBN1ED1DM [https://perma.cc/6VCG-GLK9].

278 *See* Cal. Civ. Proc. Code § 1002(a) (West 2019); S.B. 820, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

279 Wiessner, *supra* note 277.

280 *See* Ayres, *supra* note 8, at 77 (discussing various legitimate uses of NDAs); Orly Lobel, *NDAs Are out of Control. Here's What Needs to Change*, Harv. Bus. Rev. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/6UK4-MLC2] (arguing for refining the scope of NDAs rather prohibiting them outright).

281 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (affirming agreement imposing mandatory arbitration in lieu of class action lawsuits); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009) (upholding mandatory arbitration for age discrimination complaints); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (validating employment agreement requiring mandatory arbitration); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/X6LF-RYQ4].

282 138 S. Ct. 1612 (2018).

283 *Id.* at 1619.

tion clauses in their employment agreements.[284] Whereas powerful executives can negotiate favorable terms of employment, rank-and-file employees are frequently hired on an at-will basis and have little to no contractual protection.[285] Mandatory arbitration provisions frequently require an employee to waive the right to sue, often leading to poor chances of winning and lower awards, in the unlikely event that the employee does win.[286] Furthermore, like NDAs, one of the critical problems with mandatory arbitration is that such proceedings are frequently confidential, tilted in favor of the company and powerful executives, and often result in secret settlements.[287] This can prevent bad actors and misconduct from being revealed and addressed properly internally or externally by the public and regulators.[288] Rather than ban the use of arbitration as a dispute resolution alternative, firms should offer arbitration as one option among others that victims can pursue as part of their attempts at redress and justice. Following the recent scandals, many businesses and institutions, including prominent law firms, are revisiting and revising their mandatory arbitration poli-

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284 Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/5FLX-PG5A].

285 *See* Cynthia Estlund, Response, *Truth, Lies, and Power at Work*, 101 MINN. L. REV. HEADNOTES 349, 359–60 (2017).

286 *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC 20 tbl.1 (2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/GJ2S-4JBP]; Hemel & Lund, *supra* note 8, at 1609 ("While some employees will still prevail in the arbitral forum, their prospects are rather bleak: Employee win rates and damages awards are significantly lower in arbitral proceedings than in federal and state court.").

287 *See* Myriam Gilles, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*, *in* FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT 7, 17 (Pound Civil Justice Inst. ed., 2015), http://www.poundinstitute.org/wp-content/uploads/2019/04/2014PoundReport.pdf [https://perma.cc/NTR3-XRSK] (discussing the ramifications of confidentiality provisions in arbitration clauses); Myriam Gilles, *Oral Remarks of Professor Gilles*, *in* FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT, *supra*, at 29, 31–32 [hereinafter Gilles, *Oral Remarks*] (discussing the ramifications of confidentiality provisions in arbitration clauses); Mizrahi, *supra* note 7, at 134–35 ("Companies sheltering known harassers also benefit from the ability to impose mandatory arbitration agreements. This in turn prevents lawsuits from entering the public record and instead pushes cases into private forums that shroud the process in secrecy."); Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html [https://perma.cc/4QZK-J4AC].

288 *See* Gilles, *Oral Remarks*, *supra* note 287, at 32–33.

cies and practices.[289] For instance, in late 2018, Facebook and Google eliminated mandatory arbitration for harassment disputes.[290]

Third, in addition to making changes with regards to NDAs and mandatory arbitration, firms should prepare and issue annual reports presenting statistical data about misconduct complaints and incidents that they receive, and employees should have the option of filing such complaints anonymously.[291] These reports will provide an annual statistical snapshot for management and the public on executive and employee misconduct matters and would further provide a lens for company leaders and shareholders to measure and assess potential problems within firm culture and operations.[292] These reports would operate like the Clery Act's[293] Annual Campus Security Reports, whereby American universities and colleges must prepare and issue to the public information regarding campus crime and alleged sexual offense statistics.[294] However, the firm reports would hopefully undergo greater scrutiny and encourage greater accountability. Ideally, firms should prepare and issue these reports of their own accord, without regulatory mandate, as a good faith step towards reforming and instituting better practices.[295] Additionally, investors and the public should use such disclosures to hold businesses and executives more accountable. For example, in late 2019, Uber issued a landmark safety report detailing sexual assaults, murders, and other crimes and hazards in connection with its rides in the United States.[296] The report garnered much attention, praise, and criticism.[297] While less than comprehen-

289 *See* Max Abelson, *Welcome to Arbitration Hell*, BLOOMBERG BUSINESSWEEK, Jan. 28, 2019, at 46 ("After the #MeToo movement revealed that forced arbitration has been used to keep sexual harassment complaints quiet, a handful of companies, including Google and Facebook Inc., agreed to get rid of it for harassment claims."); Alexia Fernández Campbell, *Female Law Students Pressure Firms to Stop Banning Sexual Harassment Suits*, VOX (Dec. 3, 2018, 4:41 PM), https://www.vox.com/2018/12/3/18123798/womens-student-association-mandatory-arbitration [https://perma.cc/2ENA-GKS8].

290 Wakabayashi & Silver-Greenberg, *supra* note 287.

291 *See* Hays, *supra* note 261 (advocating for annual confidential surveys to identify any trouble spots or personnel in a company in light of the #MeToo movement).

292 *See* NATIONAL ASSOCIATION OF CORPORATE DIRECTORS, *supra* note 265, at 14–15 (recommending that boards make greater efforts to oversee and manage the culture of their firms).

293 20 U.S.C. § 1092(f) (2018).

294 *See id.* § 1092(f)(1)(F)(i).

295 California recently proposed a bill to require such recordkeeping by firms for sexual misconduct matters. *See* Assemb. B. 1867, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

296 Uber, 2017–2018 US Safety Report (2019), https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf [https://perma.cc/SPU6-KK25].

297 Kate Conger, *Uber Says 3,045 Sexual Assaults Were Reported in U.S. Rides Last Year*,

sive and detailed as some would have preferred, the report nevertheless represented a good first step in the right direction.

Admittedly, many firms may be reluctant to compile and publicly release their findings as Uber did for fear of bad press and reputational harm, especially if their peers are not uniformly making such disclosures. Furthermore, complaints, allegations, and incidents do not always turn out to be true, so such reports may make certain firms seem more problematic than they are in reality. On the flip side, misconduct claims frequently go unreported or underreported, so these reports may also provide an incomplete picture of what is happening at companies.[298] For instance, as part of the Clery Act disclosures, many colleges report zero incidents of sexual harassment or bullying, annually.[299] Such reports, however imperfect, nevertheless offer a valuable glimpse into the culture and happenings of a business and serve as a starting point for benchmarking, discussions, and progress.[300]

For too long, businesses and executives have overlooked or ignored misconduct related to the workplace or its employees. For instance, a 2017 national survey of companies found that 77% of boards "had not discussed accusations of sexually inappropriate behavior and/or sexism in the workplace," while 88% "had not implemented a plan of action as a result of recent revelations in the media," and 83% had not "re-evaluated the company's risks regarding sexual harassment or sexist behavior at the workplace."[301] In order to fully and directly address problematic behavior arising out of business settings and relationships, a good place to start would be to begin a full and direct annual accounting of the problem.

In sum, the recent executive private misconduct scandals have had significant ramifications on numerous outdated corporate policies and practices, particularly those relating to human resources. In response, this Article recommends that companies make serious efforts

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N.Y. TIMES (Dec. 6, 2019), https://www.nytimes.com/2019/12/05/technology/uber-sexual-assaults-murders-deaths-safety.html [https://perma.cc/T24V-FGYV].

298 *See, e.g.*, Mizrahi, *supra* note 7, at 125 (discussing how sexual harassment and "gender-harassing conduct" frequently go unreported).

299 Kevin Miller, *Schools Are Still Underreporting Sexual Harassment and Assault*, AAUW (Nov. 2, 2018), https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/ [https://perma.cc/6895-6J3E].

300 *See* NATIONAL ASSOCIATION OF CORPORATE DIRECTORS, *supra* note 265, at 15–16.

301 theBoardlist, *Corporate Boards Aren't Preparing for Sexual Harassment and Gender Discrimination Issues*, MEDIUM (Oct. 24, 2017), https://medium.com/@theBoardlist/corporate-boards-arent-preparing-for-sexual-harassment-and-gender-discrimination-issues-24ba425d6497 [https://perma.cc/PYR5-RZR5].

towards improving policies on NDAs, reforming mandatory arbitration practices, and disclosing firm-wide misconduct statistics.

C. On Corporate Purpose

The issues emerging from recent scandals involving executive private misconduct offer law and business a ripe opportunity to reexamine and reform traditional understandings of corporate purpose to something more suitable for a changing socioeconomic landscape—one that is demanding more from companies. By reexamining and reforming how society and the marketplace interacts with its wealthiest and most powerful executives, law and business can shift the perspective of corporate purpose from a traditional, singular, and amoral view of shareholder profit maximization toward a new, richer view that better accounts for social impact and other societal stakeholders, without sacrificing profit.[302] This marked shift in corporate purpose could in turn have huge implications within and beyond the business world.[303] Under the right leadership and with proper management, this perspective can not only help curb executive misconduct, but it can also create safer, more inclusive workplaces for all employees throughout a firm.[304]

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302 *See, e.g.*, KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 109 (2006) (advocating for corporate law reforms that better account for corporate social impact); NIKOS MOURKOGIANNIS, PURPOSE: THE STARTING POINT OF GREAT COMPANIES 5–7 (2006) (arguing for the importance of clear purpose-driven narratives for business success).

303 While the idea of a corporate purpose rooted in shareholder profit maximization has been most influential, there has long been a robust debate in business and legal scholarship about the fundamental purpose, governance, and powers of corporations. *See, e.g.*, Bainbridge, *supra* note 8, at 550 ("[D]irector primacy asserts that . . . [n]either shareholders nor managers control corporations—boards of directors do."); Blair & Stout, *supra* note 8, at 272–74 (noting that team members within a business make "an irrevocable commitment of resources to the joint enterprise" in order to share in the benefits of the final output); William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1378–81 (2007) (discussing a form of managerialism in corporate governance, specifically for hedge funds); Henry Hansmann, *Worker Participation and Corporate Governance*, 43 U. TORONTO L.J. 589, 589–91 (1993) (discussing the role of "collective choice mechanisms" in corporate governance); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 334 (2008) (arguing for employee primacy in which there is "ultimate employee control over the corporation, and an objective of maximizing employee welfare"); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277–78 (1998) ("Shareholders exercise control over corporations by electing directors, approving fundamental transactions, and bringing derivative suits on behalf of the corporation."); Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 384–85 (2016) (suggesting corporate governance power is best understood as shared among multiple actors).

304 *See* Rebecca K. Lee, *Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World*, 71 STAN. L. REV. ONLINE 110, 111 (2018).

It has long been understood by many in law, business, and society that a corporation's chief objective is to maximize shareholder value.[305] In the frequently cited passage from the landmark case *Dodge v. Ford Motor Co.*,[306] the Court opined that "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end . . . ."[307] Although the objective of shareholder profit maximization has many supporters, this aim does not have universal support and is subject to legitimate debate, even among those who agree with the end goal.[308] Differing views on shareholder profit maximization offer competing definitions, timelines, and metrics for assessment.[309] For instance, some may argue that maximizing shareholder returns means maximizing returns in the near term

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305 *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) (stating that directors of a for-profit Delaware corporation cannot "defend a business strategy that openly eschews stockholder wealth maximization"); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–24 (1993) ("Shareholder wealth maximization long has been the fundamental norm which guides U.S. corporate decisionmakers."); Hansmann & Kraakman, *supra* note 8, at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.").

306 170 N.W. 668 (Mich. 1919).

307 *Id.* at 684. *But see* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165–66 (2008) (arguing that the chief objective of the corporation is more than the blind pursuit of profit).

308 *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 40–41 (Del. Ch. 2013) ("[T]he standard of conduct for directors requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants, the ultimate beneficiaries of the firm's value, not for the benefit of its contractual claimants. . . . '[G]enerally it will be the duty of the board, where discretionary judgment is to be exercised, to prefer the interests of the common stock . . . .' " (citation and footnote omitted) (quoting Equity-Linked Inv'rs, LP v. Adams, 705 A.2d 1040, 1042 (Del. Ch. 1997))); PETER F. DRUCKER, THE PRACTICE OF MANAGEMENT 30–31 (2011) (critiquing profit-seeking as the main goal of business); LYNN STOUT, THE SHAREHOLDER VALUE MYTH 6–7 (2012) (contesting the dominant shareholder primacy model); Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 586 (2018) ("Scholars, judges, regulators, and practitioners have long debated what corporations are and what their purpose should be. The literature is replete with different theories or models, each of which attempts to reduce the pattern of legal rights, responsibilities, duties, and privileges typically found in corporations into a single coherent description.").

309 *See, e.g.*, *Trados*, 73 A.3d at 36 ("It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term.").

based on stock price alone, while others believe that a longer time horizon using other financial metrics is a more appropriate means of assessment.[310] Despite these arguments, the theory that business executives and investors continue to view a company's chief objective as maximizing shareholder value as measured through a mix of stock price and other financial results, and with little or only secondary regard for social impact, remains a predominant conception of many corporations.[311]

Adherence and subscription to this traditional, narrow view of corporate purpose as shareholder wealth maximization has contributed to the tolerance of harmful executive behavior.[312] Because if the primary objective of business is to maximize profits, then having an individual who can achieve that objective becomes the paramount criterion for recruiting and retaining an executive. As such, businesses, investors, and other executives have tolerated behavior from successful and powerful executives that most would have deemed unacceptable and abhorrent in other contexts.[313] Many people would quickly and strongly reject the abusive behavior reportedly engaged in by the likes of Harvey Weinstein, Leslie Moonves, and Roger Ailes in many other contexts, and yet many in the business world not only tolerated or turned a blind eye to their alleged misconduct but also praised them for their business prowess.[314]

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310 *See* DRUCKER, *supra* note 308, at 31 ("There is only one valid definition of business purpose: *to create a customer*."); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 579–83 (2006); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1771 (2006); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

311 *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992) ("The corporation's purpose is to advance the purposes of these [stockholder-owners] (predominantly to increase their wealth), and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners."); William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 788–89 (2017) (noting corporate focus on efficient production with little regard for social impact); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1374 (1993) (characterizing profit maximization for shareholders as the leading governance principle in American corporate law).

312 *See* Schultz, *supra* note 148, at 33.

313 *See id.*

314 *See, e.g.*, Berzon & Maidenberg, *supra* note 149; Sady Doyle, *Stop Rewarding Men for Turning a Blind Eye to Other Men's Sins*, NBC NEWS (Nov. 3, 2017, 9:54 AM), https://www.nbcnews.com/think/opinion/firing-every-man-accused-harassment-won-t-fix-broken-system-ncna816171 [https://perma.cc/53AV-YAKT]; *This Year Has Seen an Explosion of Rage About Sexual Harassment*, ECONOMIST (Dec. 19, 2017), https://www.economist.com/international/2017/12/19/this-year-has-seen-an-explosion-of-rage-about-sexual-harassment [https://

In contrast to the traditional view of corporate purpose, many in society now see a corporation's purpose as a broader notion—one that includes obligations to society and other stakeholders beyond the blind, amoral pursuit of maximizing profits for shareholders.[315] Many in society and business now expect companies to care about local communities, the environment, their employees, and other important issues facing society, writ large.[316] In fact, in 2019, the Business Roundtable, a powerful association representing the CEOs of the largest American corporations, released a statement expressing a commitment to a broad stakeholder-oriented view of corporate purpose that extends beyond the blind pursuit of profit.[317] As discussed earlier in this Article, this shift in social norms and expectations about the objectives and responsibilities of businesses has resulted in more CSR efforts and the rise of corporate social activism.[318] In response to this new, richer view of corporate purpose, executives and entrepreneurs have made various efforts to position their enterprises as good for profits and people, and not just good for shareholders and investors.[319] For instance, Dick's Sporting Goods, a national, publicly

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perma.cc/B2DH-V5SS]; Elizabeth C. Tippett, *Nike's #MeToo Moment Shows How 'Legal' Harassment Can Lead to Illegal Discrimination*, CONVERSATION (May 1, 2018, 6:41 AM), https://theconversation.com/nikes-metoo-moment-shows-how-legal-harassment-can-lead-to-illegal-discrimination-95828 [https://perma.cc/68JN-U4YP].

315 *See, e.g.*, Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 312 (2015) ("Requiring corporations to attend to a broader range of stakeholders would make corporations more like people, would make them better citizens . . . ."); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190, 1195–99 (2002) (noting the theory of team production, which argues against shareholder primacy); Strine, Jr. & Walter, *supra* note 133, at 348 ("[S]ingular focus on profits will be likely to induce [corporations] to take shortcuts that could result in harm to others through product defects, environmental spoilage, and firm failures, which hurt not only stockholders, but employees, creditors, and all who breathe the air and pay taxes.").

316 *See, e.g.*, BEAL, *supra* note 122, at 75–85 (discussing new and recent developments in CSR); CONE COMMC'NS, 2017 CONE COMMUNICATIONS CSR STUDY 6 (2017), http://www.conecomm.com/research-blog/2017-csr-study#download-the-research [https://perma.cc/AQ6D-HWZ6] (finding that a majority of Americans want businesses to engage in solving major social concerns); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 139 (2019) ("Many private firms have adopted different forms of private environmental governance to improve their environmental footprints, going beyond mere compliance with rules of traditional environmental law.").

317 *See Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Sept. 6, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf [https://perma.cc/DA5C-P2E9].

318 *See supra* Section I.C.

319 *See, e.g.*, DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW 2 (2017); Andrew Ross Sorkin, *Apple's Tim Cook Barnstorms for 'Moral Responsibility*,*'* N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/business/dealbook/tim-cook-apple-moral-responsibility.html [https://perma.cc/JB38-QQYA].

traded retailer, decided to stop selling assault weapons after a series of mass shootings in the United States as a means to curb gun violence in local communities.[320] Many executives and entrepreneurs have even organized their businesses as benefit corporations, a relatively new legal entity recognized in 36 states that is expressly designed for profits as well as public benefits.[321] Some large, publicly traded corporations have organized subsidiaries as benefit corporations. For instance, Gap's Athleta subsidiary is organized and certified as a benefit corporation.[322] To be clear, this new, more diverse, and social view of corporate purpose does not mean abandoning or subordinating profits. Recent research suggests that businesses with clearer, broader purposes may actually perform better financially as compared with counterparts that appear to focus narrowly on profits without regard for a greater purpose.[323] In fact, some of the world's richest and most successful businesses have corporate purposes that are completely silent about profits, revenues, or any other financial metric. For instance, Google's stated purpose is "to organize the world's information and make it universally accessible and useful."[324]

In light of this new perspective on corporate purpose, this Article recommends that as boards review and reform their corporate governance principles and internal practices concerning executive private conduct, they should make certain that their principles and practices align with the type of corporate purpose that they want to project to their employees and to the world.[325] How a company treats its most

320 ED STACK, IT'S HOW WE PLAY THE GAME 276–83 (2019).

321 *See* Kent Greenfield, *Corporate Citizenship: Goal or Fear?*, 10 U. ST. THOMAS L.J. 960, 966 (2013); BENEFIT CORP., www.benefitcorp.net [https://perma.cc/8J77-5L4Y]; *State by State Status of Legislation*, BENEFIT CORP., https://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/CU6P-QGRS].

322 *Athleta Earns B Corp Certification*, BUS. WIRE (Mar. 20, 2018, 8:30 AM), https://www.businesswire.com/news/home/20180320005035/en/Athleta-Earns-Corp-Certification [https://perma.cc/X9VH-YE6U]; *see also Our 5 Core Values*, ATHLETA, https://athleta.gap.com/browse/info.do?cid=1074427 [https://perma.cc/CC5R-7EFU] (enumerating the core principles of the business).

323 *See, e.g.*, Claudine Gartenberg et al., *Corporate Purpose and Financial Performance*, 30 ORG. SCI. 1, 8–10 (2019).

324 *From the Garage to the Googleplex*, GOOGLE, https://www.google.com/intl/en/about/our-story/ [https://perma.cc/XY48-TSMR].

325 *See* GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS 58–59 (2010); DAINA MAZUTIS & AILEEN IONESCU-SOMERS, IMD GLOB. CTR. FOR SUSTAINABILITY LEADERSHIP, HOW AUTHENTIC IS *YOUR* CORPORATE PURPOSE? 5–9 (2015), https://www.slideshare.net/GenesisBM/bm-imd-reporthowauthenticisyourcorporatepurpose [https://perma.cc/2EKR-QFEF] (discussing the importance of communicating an authentic corporate purpose); RAJ SISODIA ET AL., FIRMS OF ENDEARMENT 1–14 (2d ed. 2014) (discussing the importance of a business purpose that connects with key corporate stakeholders); Shuili Du et al., *Maximizing*

senior executives can say a great deal about itself and its corporate purpose.[326] If a company genuinely cares about its employees, its customers, and society at large, it is unlikely to tolerate some of the bad private behavior exhibited by executives like Harvey Weinstein just because they can turn a profit.[327] In recrafting their principles and practices concerning executive private conduct, corporate leaders should position those policies in a larger corporate purpose narrative—one that goes beyond amoral profit maximization and authentically reflects its core values and its mission to care for its employees and its communities.[328] This larger corporate purpose narrative could help promote greater civility and reduce misconduct within the firm.[329] More importantly, if companies take this process seriously and substantively, rather than as merely an act of marketing or whitewashing, having an authentic corporate purpose narrative could serve as an incredibly powerful tool to attract better talent to the firm, encourage employees to be more productive, customers to be more loyal, and investors to be more patient with the company.[330] This is highly plausi-

Business Returns to Corporate Social Responsibility (CSR): The Role of CSR Communication, 12 INT'L J. MGMT. REVIEWS 8, 9 (2010) (critiquing poor communication efforts regarding CSR as impeding the company's ability to take advantage of the social benefits stemming from CSR).

326 *See* SINEK, *supra* note 267, at 26–29.

327 *See* Lee, *supra* note 304, at 119 ("To create a harassment-free workplace . . . leaders must continually pay attention to the power dynamics and culture within their organizations. . . . [L]eaders have to clearly state and reiterate a message of equality and inclusion where harassment, bullying, and other forms of mistreatment and unethical behavior are unacceptable, and show that they care about their employees' welfare.").

328 *See id.* at 119–20 (discussing the importance of clearly communicated values and goals from corporate leaders to help reduce misconduct in the workplace).

329 *See* Junghyun Lee, *Passive Leadership and Sexual Harassment: Roles of Observed Hostility and Workplace Gender Ratio*, 47 PERSONNEL REV. 594, 603–04 (2018) (finding that hostile workplaces have higher incidents of sexual misconduct); Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, N.Y. TIMES (Dec. 11, 2017), https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html [https://perma.cc/EM2T-35CZ].

330 *See* SCOTT GALLOWAY, THE FOUR 33–34 (2017) (describing the power and value of Amazon's corporate purpose story); DONALD HISLOP, KNOWLEDGE MANAGEMENT IN ORGANIZATIONS 130, 172 tbl.11.4, 228–30 (1st ed. 2005) (connecting employee loyalty with strong firm identities); JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM 46–49 (2014) (discussing the importance of well-defined and well-rounded corporate purposes); DANIEL H. PINK, DRIVE 223 (2009) (explaining how institutional purpose motivates individuals); Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, 59 MGMT. SCI. 1045, 1046 (2013) (suggesting that public awareness of corporate social activity may "enhance[ ] the value of the firm"); Kate Losse, *The False Promise of Silicon Valley's Quest to Save the World*, NEW REPUBLIC (Feb. 7, 2019), https://newrepublic.com/article/153034/false-promise-silicon-valleys-quest-save-world [https://perma.cc/PP6P-2LWH] (discussing how employees and society use corporate purpose, as defined by a company's mission statement, to hold companies accountable).

ble because individuals, be it in their professional or personal capacities, frequently seek to contribute to a higher purpose; one that cannot be measured by financial benefits and gains alone.[331]

For the avoidance of doubt, this Article does not suggest that firms should surrender profits or financial successes for some nebulous social gain. Instead, this Article suggests that businesses should be able to articulate their profit-seeking objectives in a way that better accounts for the social interests and norms expected of today's best firms and that this expression may actually lead to more civil behavior as well as superior financial performance.[332] In fact, in 2018, BlackRock, one of the largest and most influential institutional investors, encouraged corporations to publicly articulate a long-term corporate purpose that better accounted for their social and economic impact beyond just profits, perhaps in recognition of the fundamental changes occurring in society and the marketplace.[333]

In sum, businesses should embrace the opportunity to rethink and refine their executive private conduct policies as a means to articulate their overall corporate purpose narratives to various stakeholders inside and outside their firms.[334] One clear and compelling way to signal that a company is more than an amoral machine for profits is in the way it treats its most powerful executives, not just when they do well, but especially when they misbehave.

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The recent spate of executive private misconduct scandals will continue to impact many aspects of law, business, and society in large and small ways. Particular attention should be paid to its conceptual and practical implications on corporate governance, corporate policies and practices, and corporate purpose. The recommendations made herein—an original, baseline framework, improved policies on NDAs,

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331 *See* PINK, *supra* note 330, at 223 ("Humans, by their nature, seek purpose—to make a contribution and to be part of a cause greater and more enduring than themselves.").

332 *See* MACKEY & SISODIA, *supra* note 330, at 276–83; JIM STENGEL, GROW 1–2, 22–33 (2011); Aaron K. Chatterji & Michael W. Toffel, *Do CEO Activists Make a Difference? Evidence from a Field Experiment* 3–5 (Harvard Bus. Sch., Working Paper No. 16-100, 2016); George Serafeim & Claudine Gartenberg, *The Type of Purpose That Makes Companies More Profitable*, HARV. BUS. REV. (Oct. 21, 2016), https://hbr.org/2016/10/the-type-of-purpose-that-makes-companies-more-profitable [https://perma.cc/WM5P-7L8L].

333 *See* Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/Z8UF-PG6A].

334 *See* Gerald F. Davis & Christopher J. White, *The New Face of Corporate Activism*, STAN. SOC. INNOVATION REV., Fall 2015, at 40, 40–42.

reforms to mandatory arbitration practices, and the publication of firm-wide misconduct statistics—can serve as important organizing guideposts toward more purposeful businesses. Undoubtedly, the hard work of reform will lie in the actual drafting, implementation, compliance, and enforcement of any new rules and policies. Nevertheless, the discussion herein offers meaningful starting points for a company to reexamine and reform its practices and for law and business to materially address societal changes impacting the marketplace. This discussion also works to build a more accountable and more ethical culture inside firms by reducing executive private misconduct, as well as other forms of misconduct.[335]

Conclusion

Addressing executive private misconduct issues will be one of the most daunting and vexing challenges for business leaders, policymakers, and regulators in the coming years. These issues are forged in a complex crucible of law, capital, power, and privacy. So long as humans remain flawed characters, there will always be offensive behavior, criminal acts, and discriminatory conduct by executives and others in business. While a perfect path forward is unfortunately elusive, a better path forward is certainly achievable.

This Article offers a new and better way for understanding and addressing the hard issues presented by executive private misconduct. This Article provides one of the first comprehensive examinations of the hard issues arising from executive private misconduct and the consequences emanating from those issues for law, society, and business. It investigates the structural roots of these issues, analyzes the core legal tensions that have made these issues so difficult for business law to resolve, and recommends pragmatic proposals for firms and policymakers in a changing society and the marketplace. Throughout its analysis, this Article fully recognizes that enhancing trainings, changing laws, and reforming policies and practices concerning executive private behavior will not eliminate most bad behavior in society, or even within firms themselves.[336] Nevertheless, because of the influen-

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335 *See, e.g.*, EEOC Report on Harassment in the Workplace, *supra* note 147, at 31–59 (advocating for structural and culture changes within companies to reduce workplace harassment).

336 *See id.* at 46–49 ("[I]t is less probable that training programs, on their own, will have a significant impact on changing employees' attitudes, and they may sometimes have the opposite effect."); Julia Belluz, *Congress Is Making Harassment Trainings Mandatory. Science Shows They Don't Work.*, Vox (Nov. 14, 2017, 4:20 PM), https://www.vox.com/science-and-health/2017/10/24/16498674/corporate-harassment-trainings-dont-work [https://perma.cc/S7BG-6REN].

tial role of businesses and executives, this Article also recognizes that businesses can play an important role in stemming private misconduct and creating a better workplace and a more just society. There remains so much progress to be made in the workplace and beyond, on areas like equality, inclusion, and diversity.[337] The road ahead will not be easy to travel, yet it is long overdue and must be done. Ultimately, this Article serves as a preliminary roadmap and compass for that road ahead—for conceptualizing, navigating, and addressing executive private misconduct and its wide-ranging impact on law, society, and business.

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337 *See generally* Deloitte & All. for Bd. Diversity, Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on *Fortune* 500 Boards (2019), https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/missing-pieces-fortune-500-board-diversity-study-2018.html [https://perma.cc/86A6-XKKA] (noting progress made towards diversity in the boardroom, but identifying ongoing areas of weakness); McKinsey & Co. & Lean In, Women in the Workplace: 2018 (2018), https://womenintheworkplace.com/#key-findings [https://perma.cc/4RP8-B7KM] (discussing ongoing issues related to women in the workplace and best practices for combatting those issues).