ARTICLE

CAPITAL DISCRIMINATION

Ann M. Lipton[*]

ABSTRACT

The law of business associations does not recognize gender. The rights and responsibilities imposed by states on business owners, directors, and officers do not vary based on whether the actors are male or female, and there is no explicit recognition of the influence of gender in the doctrine.

Sex and gender nonetheless may pervade business disputes. One co-owner may harass another co-owner; women equity holders may be forced out of the company; men may refuse to pay dividends to women shareholders.

In some contexts, courts do account for these dynamics, such as when married co-owners file for divorce. But business law itself has no vocabulary to engage the influence of sex and gender, or to correct for unfairness traceable to discrimination. Instead, these types of disputes are resolved using the generic language of fiduciary duty and business judgment, with the issue of discrimination left, at best, as subtext. The failure of business law doctrine to confront how gender influences decision-making has

* Associate Dean for Faculty Research and Michael M. Fleishman Associate Professor in Business Law and Entrepreneurship, Tulane University Law School. I am grateful for the insights of Stephen Bainbridge, Onnig Dombalagian, Benjamin Edwards, Adam Feibelman, Kristin Johnson, Douglas Moll, Samantha Prince, Sally Richardson, Ron Scalise, Allison Tait, the participants in the Cornell Law School Faculty Legal Studies Workshop, the Institute for Law & Economics workshop at the University of Pennsylvania Carey Law School, the Law & Economics Colloquium at the University of Toronto Faculty of Law, the Tulane Corporate & Securities Roundtable, the Tulane Faculty Workshop, and the National Business Law Scholars Conference, as well as for the research assistance of Jenna B. Fontenot, Adrianna Jimenez, Abigail Joens-Witherow, Alex Rodriguez, and Chelsea C. Ryan.

broad implications for everything from the allocation of capital throughout the financing ecosystem to the lessons that young lawyers are taught regarding how to counsel their clients.

This Article will explore how courts address—or fail to address—the problem of discrimination against women as owners and investors. Ultimately, the Article proposes new mechanisms, both via statute and through a reconceptualization of fiduciary duty, that would allow courts to recognize, and account for, gender-based oppression in business.

TABLE OF CONTENTS

I. INTRODUCTION

In 2014, Diane Straka, along with three male associates, formed a corporation for the purpose of providing accounting services.[1] Each of the founders was an officer, director, and 25% shareholder of the new entity, and in addition to serving clients, Straka also assumed certain administrative responsibilities.[2] One of the corporation's employees, Thomas Urbanek, taunted Straka with sexist jokes and cartoons in the office. His comments were sufficiently offensive that Straka, as well as other female employees, chose not to eat in the corporate lunchroom. Straka raised the issue at a meeting with the other shareholders, but no action was taken.[3] To the contrary, on at least one occasion, one of the male shareholders expressed amusement at Urbanek's mockery.[4] Urbanek was permitted to dominate the office, inhibiting Straka's, and others', work. Straka's work was also undermined by some of the other male shareholders, who condescended to her and countermanded decisions in the areas where she had responsibility.[5] Eventually, Straka left the firm, but she remained a shareholder.[6] That ownership interest was worthless, however, because the corporation paid out profits in the form of salaries; Straka, now no longer employed, did not share in those payments.[7]

In 2017, Straka brought a lawsuit in New York State court alleging shareholder oppression.[8] Oppression is a cause of action, available in most states, allowing dissolution, forced buyouts, or other remedies when shareholders in close corporations are denied the benefits of their investments.[9] In this case, Straka alleged that the majority's treatment of her constituted oppressive conduct.[10] After a hearing, the court agreed, writing:

---

1. Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, 92 N.Y.S.3d 567, 570 (Sup. Ct. 2019).

2. *Id.*

3. Though one shareholder eventually claimed that he asked Urbanek to stop making sexist comments, the judge found his testimony not to be credible. *Id.* at 571 & n.1.

4. *Id.* at 572.

5. *Id.* at 571.

6. *Id.* at 572.

7. *Id.*

8. *Id.* at 569.

9. *See* Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 717, 727–28 (2002) [hereinafter *Reasonable Expectations*].

10. *Straka*, 92 N.Y.S.3d at 569.

> This court finds that . . . any shareholder of any corporation, should know that a female shareholder reasonably expects to be treated with equal dignity and respect as male shareholders forming the majority. Straka has demonstrated that she was not. The shareholders' slow and inadequate response to Urbanek's demeaning behavior marginalized Straka, as did the lack of respect provided to her as the head of IT at the corporation.[11]

As a remedy, the court ordered that the firm buy out Straka's shares.[12]

The *Straka* ruling was remarkable in that it may be the only reported decision in which a court has explicitly recognized sex discrimination as prohibited by *corporate* law. Though sex discrimination and harassment occur among business associates, just as they occur within other types of relationships, unlike in other contexts, corporate law offers no explicit avenue to advance sex-based claims. For example, though federal and state laws prohibit sex discrimination in employment, these causes of action are unavailable when the women are themselves deemed to be "employers," such as partners, corporate directors, or large shareholders.[13] States may protect the rights of shareholders who are denied the benefits of an investment,[14] but—*Straka* notwithstanding—they do not generally recognize the right to be free of sex-based harassment and may offer no protection in the absence of a controlling shareholder.[15] And capital providers, from venture capitalists to testators, are largely free to engage in sex discrimination, without any legal constraints at all.

As a result, when women *principals* experience sex discrimination—which this Article calls "capital discrimination"—both judges and litigants hesitate to identify it for what it is, preferring to resort to the language of economic analysis, fiduciary breach, and contractual obligation. That lack can make for some uncomfortable reading when sexism pervades a dispute, but judges appear oblivious to the elephant in the boardroom. But

11. *Id.* at 570, 573.

12. *Id.* at 574.

13. *See, e.g.*, Kristin Nicole Johnson, Note, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067, 1069–70, 1069 n.6 (2003).

14. Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 521, 526 (1999) [hereinafter *Investment Model*].

15. *See* Lemon v. Myers Bigel, P.A., No. 18-CV-200, 2019 WL 1117911, at *4, *19 (E.D.N.C. Mar. 11, 2019), *aff'd*, 985 F.3d 392 (4th Cir. 2021).

absent recognition of how discrimination can undermine women's ability to participate in business as principals, business law doctrine cannot address the problem. Worse, corporate managers (and their attorneys) may not recognize a problem at all and therefore will not make any attempts at remediation.

In this Article, I will describe some of the contexts in which capital discrimination manifests and explain the roundabout manner by which existing business frameworks address (or ignore) the phenomenon. I will then propose modifications to business law doctrine that would allow for explicit recognition of—and prohibition against—capital discrimination. From the outset, however, it should be understood that capital discrimination is not limited to sex; it can involve other status-based grounds such as race and disability[16] or religion.[17] For ease of discussion, this Article is limited to an examination of discrimination on the grounds of sex and gender,[18] but the conclusions could be extended to other protected characteristics.

II. THE MANY FACES OF CAPITAL DISCRIMINATION

Capital discrimination sits at the intersection of several different areas of law because investors' relationships with their portfolio investments vary. Some investors are passive and simply expect to collect a fair return; others expect to take an active role in managing the business. Active investors may limit themselves to the traditional activities of shareholder oversight—power over the selection of directors, general monitoring of strategic business decisions—or may instead be directly involved, managing operations on a day-to-day basis. Investors may found a company

16. *See, e.g.*, Chin v. CH2M Hill Cos., No. 12 Civ. 4010, 2012 WL 4473293, at *1 (S.D.N.Y. Sept. 28, 2012).

17. Mariotti v. Mariotti Bldg. Prods. Inc., 714 F.3d 761, 764 (3d Cir. 2013). Discrimination may also be intersectional, in the sense that an individual is penalized or stereotyped based on multiple or interacting traits. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143 (1989).

18. "Sex is [a term] commonly used to denote one's status as a man or woman based upon biological factors" while "gender is [a term] generally used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex." Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271, 274 (1999). Discrimination based on one or the other are frequently intertwined, such as when an individual is penalized for not conforming to the gender roles expected of her sex. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1313 (2012). This Article addresses discrimination based on either, or both, factors.

and award themselves equity, or may receive an interest in an existing business either through a purchase or through a nonfinancial transaction, such as an inheritance or a divorce settlement. What these scenarios have in common is that women are denied the full benefit and enjoyment of their investment, apparently on the basis of their sex, and though existing legal frameworks may address aspects of the problem, none provides complete "fit."

A. Four Stories

1. Clash of the Founders. After an earlier draft of this Article was posted to an online scholarship repository, Philip Shawe, through counsel, claimed that the Article defamed him by "falsely assert[ing] that Mr. Shawe engaged in sex and/or gender-based misconduct."[19] *The descriptions of the events related to the disputes between Shawe and Elizabeth Elting are based on publicly available court decisions and filings in the litigation between Shawe and Elting. The conclusions and commentary drawn from those events constitute the Author's opinion.* In 1992, Elizabeth Elting and Philip Shawe co-founded a translation and litigation support business out of their shared dorm room at New York University's business school.[20] In 2007, the company was incorporated in Delaware as TransPerfect Global, and by 2015, it had 3,500 employees operating out of eighty-six cities around the world.[21]

Elting and Shawe served as co-CEOs and the only two corporate board members. Elting owned fifty of TransPerfect's 100 shares of stock, and Shawe held forty-nine. The final share was held by Shawe's mother, which technically made TransPerfect eligible for certain benefits as a majority women-owned business. In practice, however, Shawe voted his mother's share, giving the two founders equal control over the company.[22]

Despite the company's business success, things were not all smooth sailing. As found by the Delaware Court of Chancery in subsequent litigation (unless otherwise indicated), Elting and Shawe became engaged to be married in 1996, but Elting broke it

19. Letter from Martin P. Russo, Member, Russo PLLC to Gregg Gordon, Managing Dir., SSRN (Dec. 23, 2021) (on file with Houston Law Review).

20. *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733, at *1–3 (Del. Ch. Aug. 13, 2015), *aff'd sub nom.* Shawe v. Elting, 157 A.3d 152 (Del. 2017).

21. *Id.* at *1, *3.

22. *Id.* at *2.

off in 1997.[23] After that, their relationship became increasingly acrimonious. Shawe, angry at the breakup, crawled under the bed and refused to leave for at least half an hour—a behavior he repeated years later after showing up unannounced at Elting's hotel room when she was on a business trip to Argentina.[24] When Elting eventually married another man in 1999, Shawe "oddly" invited himself and his mother to Elting's destination wedding in Jamaica.[25] Elting testified that Shawe "terrorize[d]" her and said "horrendous things" about her husband.[26]

By late 2012, the two were engaged in constant disagreements over how to run the company, often refusing to approve moves sought by the other.[27] In what the Delaware Court of Chancery eventually described as a typical "bullying tactic[]," Shawe threatened to shut the company down if Elting refused to approve a new office in France.[28] Though Elting wanted to increase distributions to shareholders as profits increased, Shawe refused in order to use "distribution as a club to exert leverage" over her,[29] on two occasions telling TransPerfect's accountant that he was withholding distributions because Elting was being a "lunatic."[30] Shawe sought to undermine Elting's authority in various ways, including hiring employees without her knowledge and concealing the terms of their employment from her.[31] According to the Delaware Court of Chancery, Shawe "belittl[ed]" Elting's requests to negotiate a more functional relationship to two TransPerfect employees as—in his words—"her latest tantrum."[32]

Shawe's tactics extended to personal intimidation. In addition to the hotel room bed incident described above, on another occasion, Shawe surprised Elting by booking himself a seat across from her on a transatlantic flight; though he claimed to have "no idea" they were on the same plane, in fact, Chancery concluded this was "not true," and, after the flight, Shawe texted certain male TransPerfect colleagues to share his "amuse[ment] by yet

23. *Id.* at *3.

24. *Id.* at *3 & n.12; *see also* Shawe v. Elting, 157 A.3d 152, 156 n.3 (Del. 2017) (citing Trial Tr. at 2393).

25. *Shawe*, 2015 WL 4874733, at *3 & n.12.

26. *Id.* at *3.

27. *Id.* at *4–5.

28. *Id.* at *5.

29. *Id.* at *26.

30. *Id.* at *5–6.

31. *Id.* at *22.

32. *Id.* at *10. When one of them opined that Shawe himself had brought the relationship to this point, Shawe raged that the idea was "batsh*t crazy." *Id.*

another opportunity to harass Elting."[33] Another time, Shawe confronted Elting in her office and refused to leave, sticking his foot in the door to block her from closing it. She tried to dislodge his foot with her foot, and the next day, he filed a police report accusing Elting of kicking him in the ankle.[34] To ensure his complaint would be handled as a criminal domestic violence matter, he characterized Elting as his ex-fiancée, despite the fact that their engagement had ended seventeen years earlier. Elting was nearly arrested for assault and battery, and, when the criminal charges were dropped, Shawe filed a tort claim against her.[35]

In late 2013, Elting hired attorneys to negotiate her relationship with Shawe, and when Shawe discovered as much, he began spying on Elting "in pursuit of what had become a personal battle in which Shawe was determined to get his way over Elting at all costs."[36] He surreptitiously broke into her office on multiple occasions, dismantled and copied her hard drive, and enlisted the assistance of a TransPerfect employee to monitor her computer activity.[37] He ultimately gained access to thousands of Elting's emails, including privileged communications with her attorneys.[38]

The feuds culminated in Elting petitioning the Delaware Court of Chancery to use its power under Delaware General Corporate Law § 226 to appoint a custodian due to shareholder and director deadlock, with a view toward ultimately dissolving the company.[39] At that point, Shawe offered to buy Elting's shares

33. *Id.* at *23.

34. *Id.* at *20–21.

35. *Id.* at *21; *see also* Shawe v. Elting, 157 A.3d 152, 156 (Del. 2017).

36. *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2016 WL 3951339, at *1 (Del. Ch. July 20, 2016), *aff'd sub nom.* Shawe v. Elting, 157 A.3d 142 (Del. 2017).

37. *Id.* at *1–2; *Shawe*, 2015 WL 4874733, at *27.

38. *Shawe*, 2015 WL 4874733, at *27. The Delaware Court of Chancery found that Elting, as well, used her authority to try to proceed with certain business actions over Shawe's objection and blocked some of his decisions in order to force him to relent on matters she favored. *See, e.g.*, *id.* at *5 (Elting threatened to block payments to attorneys representing TransPerfect in connection with patent litigation); *id.* (Elting refused to approve a proposed acquisition); *id.* at *7 (Elting threatened to fire employees, including Shawe's brother, if Shawe blocked raises for employees in her division and forced another employee to make transfers in order to pay taxes that Shawe opposed). As a result, the Delaware Court of Chancery agreed with Shawe's characterization of their relationship as one of "mutual hostaging." *Id.* at *5. However, Shawe alone was eventually sanctioned for his litigation conduct. *Shawe*, 2016 WL 3951339, at *1. When the matter reached the Delaware Supreme Court, that court opened with bullet-pointed lists of both parties' misdeeds. Shawe's behavior made up nine of the ten items, Shawe v. Elting, 157 A.3d 152, 156–57 (Del. 2017), and the court singled out "the lengths that Shawe would go to harass Elting," *id.* at 157.

39. *Shawe*, 2015 WL 4874733, at *24–25.

himself for between $150 to $223.4 million, an amount he admitted was well below their pro rata value.[40] He contended that his offer was a fair one because her 50% stake was only a "minority," "non-controlling" position,[41] and, according to Elting, affirmed that he believed himself to be in control of TransPerfect.[42] The court ultimately granted Elting's petition on the grounds that the deadlock was undeniable and that the rancor between Shawe and Elting threatened to scare away employees and customers.[43]

Reading the Delaware court's findings and the parties' submissions, the gendered aspects of the conflict are difficult to miss. The facts identified in court filings suggest that Shawe may have been using his ex-fiancée's investment in their shared company to keep her in his life, fighting bitterly to avoid their separation.[44] At one point early in their relationship, Elting claimed Shawe had told her:

> I will never sign a buy-sell agreement with you. If you ever want out of the company or if you ever don't want to work with me anymore and you try to sell the company to someone else, I will meet them, let them know what a crazy person I am[,] and I'll sabotage the company—or I will buy you out for next to nothing.[45]

40. Philip Shawe's Post-Trial Brief at 56, 89–91, *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733 (Del. Ch. Aug. 13, 2015).

41. *Id.* at 90, 91 n.20.

42. Elizabeth Elting's Post-Trial Brief at 24–25, *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733 (Del. Ch. Aug. 13, 2015).

43. *Shawe*, 2015 WL 4874733, at *28–29, *40–41.

44. Shawe's litigiousness in connection with the TransPerfect dispute was remarkable. He filed multiple collateral attacks on the Delaware decision, *see In re* TransPerfect Glob., Inc., C.A. Nos. 9700, 10449, 2018 WL 904160, at *1 (Del. Ch. Feb. 15, 2018), *aff'd sub nom*. Elting v. Shawe, 185 A.3d 694 (Del. 2018); Shawe v. Elting, Index Nos. 153375/2016, 652482/2016, 652664/2016, at 3 (N.Y. Sup. Ct. June 30, 2017), prompting one judge to accuse him of "revisionist history" and "downright frivolity," *Shawe*, Index Nos. 153375/2016, 652482/2016, 652664/2016, at 3; *see also In re* TransPerfect Glob., Inc., C.A. Nos. 9700, 10449, 2021 WL 1711797, at *17 (Del. Ch. Apr. 30, 2021) (describing Shawe's "insatiable appetite for litigation and proclivity to engage in scorched-earth tactics using an army of lawyers"). At one point, in a last-ditch effort to avoid a sale, Shawe's mother tried to end the deadlock by allowing Elting to vote her share in connection with board elections. *In re* TransPerfect Glob., Inc., C.A. Nos. 9700, 10449, 2017-0306, 2017 WL 3499921, at *2 (Del. Ch. Aug. 4, 2017).

45. Elizabeth Elting's Post-Trial Brief, *supra* note 42, at 28–29. The Delaware Court of Chancery never made any factual findings about this statement, and though Shawe did not deny that he said those words, he argued they were vitiated by his more recent professed willingness to enter into a buy/sell agreement if suitable terms could be reached. *See id.*; Philip Shawe's Answering Post-Trial Brief at 39, *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733 (Del. Ch. Aug. 13, 2015).

Part of the reason that the court felt dissolution was necessary was because Elting could not exit by simply selling her shares to someone else; as the court put it, "Shawe's actions have cast a pall on the prospect that a third party would pay a fair price for her shares."[46]

Yet this aspect of the dispute was explicitly referenced by the Delaware courts only obliquely, if at all.[47] The possibility that Shawe had been using the company to stalk and harass his ex—enlisting several male employees and company advisors along the way—simply had little *legal* relevance to the question whether dissolution was authorized under Delaware General Corporate Law § 226 and whether irreparable harm to the company would result without it.[48] One Delaware Supreme Court justice would have denied Elting's petition and forced the couple to stay together;[49] the others recognized a dysfunctional relationship but did not identify it for what it was. The Delaware Court of Chancery even held that Shawe was not at legal fault[50]—a determination that may ultimately have cost Elting tens of millions of dollars in the sale.[51]

2. (Un)Professional Associations. Straka presents one example of sex-based oppression within a professional association, but *Walta v. Gallegos*[52] perhaps played out in a more typical manner. There, Gene Gallegos was the controlling shareholder of a law firm organized as a professional corporation.[53] The only other significant shareholder was Mary Walta; three male

46. *Shawe*, 2015 WL 4874733, at *31.

47. For example, the Delaware Court of Chancery mentioned crediting Elting's testimony that Shawe did not take the breakup well, *id.* at *3, mentioned that Shawe "co-opted the services of Company advisors . . . to assist him in advancing his personal agenda against Elting," *id.* at *27, and that he pursued "a personal vendetta against her," *id.* at *27 n.288. Bizarre behavior, such as when Shawe twice hid under Elting's bed, was highlighted by both the Delaware Supreme Court and the Delaware Court of Chancery. *See* Shawe v. Elting, 157 A.3d 152, 156 & n.3 (Del. 2017).

48. *See Shawe*, 2015 WL 4874733, at *12–14, *14 n.160, *25–28, *34; *see also* Elizabeth Elting's Post-Trial Brief, *supra* note 42, at 17 (describing four male executives who she claimed ignored her and allied with Shawe).

49. *See Shawe*, 157 A.3d at 171 (Valihura, J., dissenting).

50. Though Shawe was sanctioned for his litigation conduct, *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2016 WL 3951339, at *19–20 (Del. Ch. July 20, 2016), *aff'd sub nom*. Shawe v. Elting, 157 A.3d 152 (Del. 2017), the court did not find legal fault with his business conduct in connection with the management of TransPerfect, *see Shawe*, 2015 WL 4874733, at *34.

51. *See infra* Section III.C.

52. Walta v. Gallegos L. Firm, P.C., 40 P.3d 449 (N.M. Ct. App. 2001).

53. *Id.* at 451.

attorneys were also shareholders, but with minimal stakes.[54] Throughout the corporation's existence, Gallegos and Walta frequently clashed, with Gallegos complaining that Walta was "nagging" him, that she reminded him of one of his ex-wives, and that "the same thing is going to happen to you that happened to her if you don't be quiet."[55]

Eventually, Gallegos proposed a restructuring whereby he would buy out the other shareholders and remain as sole owner, but he secretly invited the male shareholders to join him in the new entity, and, in at least one case, at a higher salary than he was currently earning.[56] In other words, the restructuring was used as a mechanism to oust Walta from the firm. She sued alleging various contract and fiduciary causes of action, and ultimately a jury agreed with her that Gallegos had breached his fiduciary duties by withholding information about the true value of her shares in the buyout.[57] Critically, the possibility that Gallegos's antagonism toward Walta was attributable to her gender was not—at least explicitly—part of her claims.[58] However, the jury awarded punitive damages against Gallegos, and in upholding that verdict, the appellate court explained:

> [W]e believe a rational jury could conclude that Gallegos misrepresented his intentions with regard to the restructuring of the firm and that his actions detailed above were motivated by a desire to rid himself only of Walta. Thus, a rational jury could conclude that he improperly exercised his power as the majority shareholder . . . .[59]

Thus, Gallegos's (potentially) sexist motives were alluded to by the court, even if they were never confronted directly.

3. Family Matters. Steven Aune and Cecilia Horne were romantic cohabitants who formally drew up a partnership agreement to govern the disposition of the residence that they purchased together.[60] Previously, Aune's ex-wife had obtained an order of protection against him, and Horne herself eventually obtained the same after he shoved her and assaulted her

54. These shareholders had significantly smaller holdings than Gallegos and Walta, and their shares were "unvested" due to their short tenures at the firm. *See id.* at 451–53.

55. *Id.* at 451–52.

56. *Id.* at 452, 454–55.

57. *Id.* at 455.

58. *Id.*

59. *Id.* at 455, 462.

60. Horne v. Aune, 121 P.3d 1227, 1228 (Wash. Ct. App. 2005).

twelve-year-old son, acts for which he was charged criminally.[61] Aune was given a deferred sentence on condition that he have no further contact with Horne, and he moved out.[62] Later, the couple's finances were litigated as a matter of partnership law, namely, whether the dissolution of their partnership required that the house be sold at public auction—Aune's position, which may have forced Horne out of her home—or whether instead under the relevant partnership statutes, one could buy the other's share.[63] The court ultimately ruled that the partnership statute did not require a public auction, and only after that determination was made, decided that "equitable" considerations allowed Horne to buy out Aune rather than the reverse.[64] However, when Horne argued that Aune had breached his fiduciary obligations, the court rejected the claim, because Aune's assault on Horne's son was not deemed an offense against either the partnership or Horne as a partner.[65]

4. Public Governance. Recently, the publicly traded CBS Corporation made headlines when its independent board members revolted against their new controlling shareholder, Shari Redstone.[66] CBS had a dual-class stock structure; most of the stock had no votes at all, but a small number of shares had voting power.[67] Because Redstone controlled almost all of these voting shares, she had control over the company. However, not long after Redstone obtained control of the voting shares from her father, Sumner Redstone, many of the board members decided that Redstone's plan to combine CBS with Viacom—a corporation that had a similar dual-class structure, and which Redstone also controlled—was unacceptable.[68] In response, they took the

61. On an earlier occasion, Aune left Horne and her son stranded by the side of the road after a quarrel. *Id.* at 1228–29.

62. *See id.* at 1229.

63. *Id.* at 1230–31.

64. *Id.* at 1230, 1234.

65. *Id.* at 1235.

66. *E.g.*, Keach Hagey & Joe Flint, *CBS Board Defies Shari Redstone*, WALL ST. J., https://www.wsj.com/articles/court-rules-for-redstone-family-in-cbs-fight-1526573011 [https://perma.cc/USL4-JTTE] (May 17, 2018, 9:21 PM).

67. Elizabeth Winkler, *Can Super-Voting Stocks Survive the CBS Challenge?*, WALL ST. J. (May 15, 2018, 2:43 PM), https://www.wsj.com/articles/can-super-voting-stocks-survive-the-cbs-challenge-1526409830 [https://perma.cc/J846-MNSF].

68. Hagey & Flint, *supra* note 66. Sumner Redstone himself had combined CBS and Viacom in 1999 and then broke them apart in 2006. *See* Benjamin Mullin & Joe Flint, *Viacom-CBS Deal Drama Was Worthy of the Fall Lineup*, WALL ST. J. (Aug. 13, 2019, 4:49 PM), https://www.wsj.com/articles/behind-the-scenes-viacom-cbs-deal-drama-was-worthy-

extraordinary and nearly unprecedented step of seeking to dilute Redstone's voting power by causing the company to issue new voting shares to the public holders of the nonvoting shares.[69]

Though it was never alleged or proved that the board's ire was related to Redstone's gender, that possibility pervaded the dispute. The rebellion was alleged to have been instigated by Leslie Moonves, CBS's longtime CEO, who apparently delivered an ultimatum to CBS board members that he would resign if Redstone retained voting control.[70] As would later be revealed, Moonves had allegedly assaulted or harassed multiple women during his tenure at CBS,[71] and cultivated a "boys' club" atmosphere in which women felt they could not advance[72] and that

of-the-fall-lineup-11565729372 [https://perma.cc/EXH9-P4Q2]. In the period leading up to Shari Redstone's takeover, there had been rumors that the two might recombine, and several market analysts recommended the move. *See, e.g.*, Keach Hagey, *Numbers Don't Lie: Viacom, CBS Should Merge*, DOW JONES INSTITUTIONAL NEWS, Jan. 20, 2015, Factiva; Jill Goldsmith & Sharon Waxman, *Why Sumner Redstone's Succession Fog Clouds Viacom*, WRAP (June 21, 2015, 8:11 PM), https://www.thewrap.com/why-sumner-redstones-succession-fog-clouds-viacom-cbs-empire/ [https://perma.cc/W46T-CZWA]; Christopher Zara, *Viacom Inc (VIAB) Earnings Preview: MTV, Nickelodeon Woes Soak Up 'SpongeBob' Profits in Q2 2015*, INT'L BUS. TIMES (Apr. 29, 2015, 10:40 AM), https://www.ibtimes.com/viacom-inc-viab-earnings-preview-mtv-nickelodeon-woes-soak-spongebob-profits-q2-2015-1900585 [https://perma.cc/RV6S-UGUE]. The CEOs of both companies denied that such a plan was in the works, however, or that the move would be beneficial. Andrew Wallenstein, *Leslie Moonves Nixes Purchasing CBS Corp.*, VARIETY (May 27, 2015, 10:20 AM), https://variety.com/2015/biz/news/leslie-moonves-nixes-purchasing-cbs-corp-1201506422/ [https://perma.c/XG8B-RCWC]; Claire Atkinson, *Viacom CEO: Merger with CBS Not Happening*, N.Y. POST (Mar. 9, 2015, 3:38 PM), https://nypost.com/2015/03/09/viacom-ceo-merger-with-cbs-not-happening/ [https://perma.cc/T9GK-Q2YX]; Edmund Lee, *Les Moonves Says It's Unlikely CBS and Viacom Will Merge*, VOX (May 27, 2015, 11:24 AM), https://www.vox.com/2015/5/27/11563006/les-moonves-says-its-unlikely-cbs-and-viacom-will-merge [https://perma.cc/64UK-89X6].

69. Hagey & Flint, *supra* note 66.

70. Verified Amended Complaint of National Amusements, Inc., NAI Entertainment Holdings LLC, and Shari Redstone ¶¶ 9, 128, 131, *In re* CBS Corp. Litig., C.A. No. 2018-0342 (Del. Ch. Aug. 3, 2018). Moonves and the CBS Board denied this characterization, and the precise sequence of events was never proved. *See* Defendants' Answer to Verified Amended Complaint of National Amusements, Inc., NAI Entertainment Holdings LLC, and Shari Redstone ¶¶ 9, 128, 131, *In re* CBS Corp. Litig., C.A. No. 2018-0342 (Del. Ch. Aug. 20, 2018).

71. Ronan Farrow, *As Leslie Moonves Negotiates His Exit from CBS, Six Women Raise 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/G579-XTHZ].

72. Keach Hagey & Joe Flint, *CBS's Handling of Les Moonves Accusations Hampered by Battle for Control*, WALL ST. J. (Sept. 10, 2018, 8:11 PM), https://www.wsj.com/articles/cbs-handling-of-les-moonves-accusations-hampered-by-battle-for-control-1536624692 [https://perma.cc/K5RE-FAWB].

permitted other harassers to flourish.[73] Redstone, by contrast, had recently become the first American woman to control a media empire of that size.[74]

Moonves and at least one board member related to Redstone in condescending and unprofessionally familiar ways. Moonves personalized his differences with Redstone by complaining to her that she "liked" the head of Viacom more than him and "disliked" Moonves's second-in-command, thus forcing her to "repeatedly assure" Moonves "that was not the case."[75] In subsequent litigation, it was alleged that Moonves had advance discussions with his second-in-command over the proposed dilutive share issuance, characterizing the plan as likely to take away Redstone's "whole life."[76] While attending the Super Bowl in 2017, shortly after Redstone had taken CBS's reins, CBS board member Charles Gifford grabbed her by the face to get her attention and said, "We need to talk, young lady."[77] Upon learning that his conduct had upset Redstone, Gifford excused himself on the ground that this was how he treated his daughters.[78]

When the board sought declaratory judgment that the proposed dilutive stock issuance was proper, it explicitly characterized Redstone as an untutored interloper, usurping authority to which she was not entitled. Its attorneys argued that she was "not a founding entrepreneur but a legacy claim, an

73. John Koblin, *The Year of Reckoning at CBS: Sexual Harassment Allegations and Attempts to Cover Them Up*, N.Y. TIMES, https://www.nytimes.com/2018/12/14/business/media/cbs-sexual-harassment-timeline.html [https://perma.cc/EY2B-M9BZ] (Dec. 17, 2018). When Moonves's alleged conduct was first exposed, the board initially supported him, with one director insisting, "I don't care if 30 more women come forward and allege this kind of stuff." James B. Stewart, *Threats and Deception: Why CBS's Board Turned Against Leslie Moonves*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/business/cbs-les-moonves-board.html [https://perma.cc/QA9Y-MTX5].

74. Keach Hagey, *Shari Redstone's Path to Power*, WALL ST. J. (June 22, 2018, 5:32 AM), https://www.wsj.com/articles/shari-redstones-path-to-power-1529659921 [https://perma.cc/9TB8-E7A7]. Anonymous executives described her to journalists as "pushy and overly keen for power" and as someone who "rubs everyone the wrong way" who had "developed something of a reputation for not mastering the details." Irin Carmon, *Last Woman Standing*, N.Y. MAG. (July 9, 2019), https://nymag.com/intelligencer/2019/07/shari-redstone-cbs-viacom-media-empire.html [https://perma.cc/36SE-NYBS].

75. Verified Amended Complaint, *supra* note 70, ¶¶ 85–86.

76. Verified Consolidated Class Action and Derivative Complaint ¶ 73, *In re* CBS Corp. Stockholder Class Action & Derivative Litig., C.A. No. 2020-0111 (Del. Ch. Apr. 21, 2020).

77. Carmon, *supra* note 74. Apparently, this was not the first incident of its kind. *See* Verified Amended Complaint, *supra* note 70, ¶ 87.

78. Redstone was forced to clarify that she was not his daughter but the Vice Chair of CBS. Verified Amended Complaint, *supra* note 70, ¶ 87 n.9.

inheritor,"[79] and that her "interference . . . made it difficult for the CBS management team installed by the CBS Board to effectively manage the Company's affairs and implement the Board's and management's views on the long-term interests of the Company and its stockholders."[80] Not only were these comments facially infantilizing but the suggestion that Redstone was illegitimate because she inherited her stake echoed traditional justifications for excluding women from corporate decision-making.[81]

If Redstone was viewed as vulnerable or weak due to her gender, it would be well in keeping with the evidence on women who control public companies. Women founders and CEOs are perceived as less capable than their male counterparts,[82] and activist hedge funds are more likely to target firms helmed by women.[83]

B. Connecting the Dots

The stories recounted above are just that—stories—and sex discrimination was neither alleged nor proved. That, of course, is because there is no clear avenue of recourse; as it stands, investors who experience sex-based oppression have no incentive to litigate the matter except obliquely and in code, and so identifying relevant instances is a challenging exercise. And many cases won't

79. Transcript of Oral Argument on Plaintiffs' Motion for a Temporary Restraining Order at 11:4-6, CBS Corp. v. Nat'l Amusements, Inc., C.A. No. 2018-0342 (Del. Ch. May 16, 2018).

80. Amended Verified Complaint ¶ 73, CBS Corp. v. Nat'l Amusements, Inc., C.A. No. 2018-0342 (Del. Ch. May 23, 2018). News reports also portrayed Redstone as "thrust unexpectedly into the role of media mogul," necessitating that she go "on a crash course in media management." James B. Stewart, *A Battle for Control of CBS, with Far-Reaching Consequences*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/business/cbs-viacom-battle-redstone.html [https://perma.cc/CQ5N-6C27].

81. *See* Sarah C. Haan, Corporate Governance and the Feminization of Capital 23–24 (Dec. 1, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740608 [https://perma.cc/V3HC-Z44T] (describing the history of denigrating women's participation in corporate governance on the grounds that they merely inherited their interest).

82. Andrew Ross Sorkin, *Do Activist Investors Target Female C.E.O.s?*, N.Y. TIMES: DEALBOOK (Feb. 9, 2015, 9:09 PM), https://dealbook.nytimes.com/2015/02/09/the-women-of-the-s-p-500-and-investor-activism/ [https://perma.cc/TH6V-TDWU].

83. Vishal K. Gupta, Seonghee Han, Sandra C. Mortal, Sabatino (Dino) Silveri & Daniel B. Turban, *Do Women CEOs Face Greater Threat of Shareholder Activism Compared to Male CEOs? A Role Congruity Perspective*, 103 J. APPLIED PSYCH. 228, 233 (2018); Bill B. Francis, Iftekhar Hasan, Yinjie (Victor) Shen & Qiang Wu, *Do Activist Hedge Funds Target Female CEOs? The Role of CEO Gender in Hedge Fund Activism*, 141 J. FIN. ECON. 372, 373 (2021); Anna Domanska, *The Intense Scrutiny on Female CEOs by Activist Investors*, INDUS. LEADERS MAG. (2016), https://www.industryleadersmagazine.com/intense-scrutiny-female-ceos-shareholders-activist-investors/ [https://perma.cc/Z7PQ-GJ5N].

make it to court at all, because private firms often have arbitration agreements and settle differences confidentially.[84]

Nonetheless, these stories exemplify instances where firm controllers, managers, or partners acted against women principals for reasons that at least appear to have stemmed from the principals' status *as women* and the managers' relationship to the principals specifically as women. In some cases, these women's gender may itself have inspired a kind of hostility that would not have been felt for a man; in others, her associates may have believed (consciously or unconsciously) that her gender rendered her unfit for, or less valuable to, the firm.[85] Or, her partners may simply have believed that due to her gender, she was more vulnerable to exploitation. What these scenarios have in common is that managers may have acted because of the women's sex.[86] And though a direct line cannot be traced from anecdotes to societal phenomena, the proof is in the pudding: we know, simply as a statistical matter, that women do not participate in business at the same rates as men. Women are less likely to be law firm partners;[87] they are underrepresented on company boards and at the highest levels of corporate management;[88] they are

84. G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 528 (1989) ("[I]nvestors in close corporations have included arbitration clauses in negotiated shareholder agreements for many decades."); Chris Cumming, *Kainos Co-Founder Says Colleagues Illegally Took Her Ownership Stake*, WALL ST. J. (Jan. 29, 2019, 5:23 PM), https://www.wsj.com/articles/kainos-co-founder-says-colleagues-illegally-took-her-ownership-stake-11548800631 [https://perma.cc/7DET-YRQ8] ("Disputes between private-equity executives usually don't reach the point of litigation because firms typically prefer to resolve them in private . . . . Many firms require employees to agree to resolve disagreements through arbitration . . . .").

85. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 937–38 (2016) (describing how stereotyping operates as a form of sex discrimination).

86. In the employment context, actions taken "because of such individual's . . . sex" constitute illegal discrimination. 42 U.S.C. § 2000e–2(a)(1).

87. MARC BRODHERSON, LAURA MCGEE & MARIANA PIRES DOS REIS, MCKINSEY & CO., WOMEN IN LAW FIRMS 2 (2017). Even among law firm partners, women are less likely to be represented in M&A practice groups, *see* Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 369, 379, 389 (2022), and women partners are paid less and have fewer management responsibilities than their male peers, *see* Katrina Lee, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, 98 DENV. L. REV. 581, 590–91 (2021).

88. Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, FLA. ST. U. L. REV. 345, 349–51, 362–64 (2019); Kellye Y. Testy, *From Governess to Governance: Advancing Gender Equity in Corporate Leadership*, 87 GEO. WASH. L. REV. 1095, 1096–98 (2019); Afsharipour, *supra* note 87, at 369.

underrepresented in investment firms;[89] women often encounter hostility when dealing with male investors;[90] and very few women have ever founded and led a company from startup through initial public offering.[91] Black women in particular start businesses at a higher rate than either White women or men, but their businesses often flounder, possibly due to lack of access to capital.[92]

Though no doubt there are many factors that contribute to women's diminished role as firm principals,[93] it would be surprising if capital discrimination were not an important contributor. Yet, at least currently, there is little legal recognition—or prohibition—of the practice.

III. THE LIMITS OF EXISTING LEGAL FRAMES

A. Employment Law

Especially when it comes to smaller or privately held businesses, equity investors may also be employees or managers of the company. Many investors in small businesses expect that their investment comes with employment; indeed, the appeal of the investment may be to be their own boss.[94] Smaller companies, in particular, may expect that profits will be distributed in the form of salaries to employees rather than traditional dividend payments.[95] As a result, women investors may endure sex-based oppression that is entangled with their working relationships.

89. Fan, *supra* note 88, at 360; Jessica Guynn, *Sexism and Silicon Valley: Women Can't Raise Cash and Now We Have One More Reason Why*, USA TODAY, https://www.usatoday.com/story/tech/news/2017/07/13/there-hasnt-been-female-mark-zuckerberg-heres-one-more-reason-why/469470001/ [https://perma.cc/84Y9-JDPR] (July 13, 2017, 5:58 PM).

90. *See infra* Section V.B.

91. Alyson Shontell, *Hundreds of Startups Go Public Every Year. Only 20 Are Founded and Led by Women*, BUS. INSIDER, https://www.businessinsider.com/female-entrepreneurs-face-obstacles-taking-companies-public-2020-12 [https://perma.cc/7NF4-F28U] (Jan. 5, 2021, 6:02 AM). Since this article was written, Bumble was taken public by a woman founder. Notably, that founder, Whitney Herd, was also a founder of Tinder before she was forced out by sexual harassment. Jena McGregor, *Bumble Gave Women More Power in Dating. Now the App Is Giving Women Power in the Boardroom*, WASH. POST (Feb. 5, 2021, 8:00 AM), https://www.washingtonpost.com/business/2021/02/05/dating-app-bumble-ipo-/ [https://perma.cc/HGZ4-F4R5].

92. Donna Kelley, Mahdi Maibouri & Angela Randolph, *Black Women Are More Likely to Start a Business than White Men*, HARV. BUS. REV. (May 11, 2021), https://hbr.org/2021/05/black-women-are-more-likely-to-start-a-business-than-white-men [https://perma.cc/ZM2T-EV9E].

93. Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1884 (2019); Fan, *supra* note 88, at 364–65.

94. *Investment Model*, *supra* note 14, at 548–50.

95. *Id.* at 548.

For example, Alyson Kirleis was a shareholder and director of Dickie, McCamey & Chilcote, P.C., a law firm organized as a professional corporation. Though she served on various board committees, she was not part of the Executive Committee that made compensation determinations and doled out work assignments.[96] According to Kirleis, she was told by one Executive Committee member that her priorities were not straight because she worked full time and remained a shareholder rather than care for her husband and children, while another Executive Committee member informed her that a major client would prefer that cases be tried by "gray haired guys" and that "gals" would prepare cases for trial by men.[97] She claimed that she was compensated at a lower rate than her male peers and denied invitations to client outings like sporting events that would help develop her career.[98]

Title VII of the Civil Rights Act of 1965 prohibits discrimination on the basis of sex with respect to "compensation, terms, conditions, or privileges of employment."[99] By its terms, then, Title VII would seem to apply to Kirleis's situation. But Kirleis was not permitted to sue under Title VII because courts have interpreted that statute to draw sharp distinctions between "employees," who qualify for protection, and "employers," who do not.[100] Kirleis participated in firm governance, could only be terminated for cause by a three-fourths vote of the Board of Directors, and shared in the firm's profits, losses, and liabilities; consequently, she was deemed a principal of her firm and was therefore not entitled to bring claims under federal antidiscrimination law.[101]

The rationale behind Title VII's limitation is that "employers," by definition, set their own working conditions: they are not vulnerable to conditions set by others and do not require legal protection.[102] To distinguish employers from employees, courts do not rely on formal titles but instead deploy a

96. Kirleis v. Dickie, McCamey & Chilcote, P.C., No. 06cv1495, 2009 WL 3602008, at *1, *3 (W.D. Pa. Oct. 28, 2009), *aff'd*, No. 09-4498, 2010 WL 2780927 (3d Cir. July 15, 2010).

97. Complaint at 4, Kirleis v. Dickie, McCamey & Chilcote, P.C, No. 06cv1495 (W.D. Pa. Oct. 28, 2009), 2006 WL 5291524; Brief for Appellant, Kirleis v. Dickie, McCamey & Chilcote, P.C, No. 09-4498 (3d Cir. July 15, 2010), 2010 WL 4313762.

98. Complaint, *supra* note 97, at 3, 5.

99. 42 U.S.C. § 2000e–2(a)(1).

100. Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 143–45 (2010).

101. Kirleis v. Dickie, McCamey & Chilcote, P.C., No. 09-4498, 2010 WL 2780927, at *2 (3d Cir. July 5, 2010).

102. *See* Smith v. Castaways Fam. Diner, 453 F.3d 971, 976 (7th Cir. 2006).

multi-factored test intended to discern the degree of control exercised by an organization over the individual's work.[103] Still, even under this test, women who participate in management of a business—such as law firm partners, brokerage firm partners, and physician members of medical practice groups—but who may be outvoted on various matters, cannot seek redress for disparate treatment and harassment as employees.[104] Somewhat paradoxically, employees may bring Title VII claims if they are denied an elevation to ownership status on the basis of sex,[105] but once they become owners, they lose that protection—even if their partners eventually force them out of the firm.[106] State antidiscrimination laws tend to draw similar distinctions.[107]

The limitations of most antidiscrimination laws mean that not only are women principals unprotected, but corporate directors—who are usually not considered employees—are likewise carved out.[108] Independent directors are not corporate owners in the same way as holders of capital, but because they are selected to their positions by shareholders, they are representatives of capital and, in that capacity, have general oversight of corporate operations. Yet when Carolyn Chin was terminated from her position as an independent board member of a private corporation because, she alleged, the Chair and CEO was biased against her as a disabled Asian female,[109] she had difficulty stating a claim. Though she sued the company under New York City's antidiscrimination law, the defendants were able to identify

103. Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449–51 (2003); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, DIRECTIVES TRANSMITTAL NO. 915.003, EEOC COMPLIANCE MANUAL § 2–III.A.1.d (2000) [hereinafter EEOC COMPLIANCE MANUAL], https://www.eeoc.gov/laws/guidance/section-2-threshold-issues [https://perma.cc/S6B9-8BAQ] (listing factors to consider and noting that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees").

104. Hishon v. King & Spalding, 467 U.S. 69, 79–81 (1984) (Powell, J., concurring) (law firm partners); Rhoads v. Jones Fin. Cos., 957 F. Supp. 1102, 1106–07 (E.D. Mo. 1997) (brokerage firm partners), *aff'd*, 131 F.3d 144 (8th Cir. 1997); Fitzsimons v. Cal. Emergency Physicians Med. Grp., 141 Cal. Rptr. 3d 265, 266–67, 270 (Ct. App. 2012) (physician members of medical practice groups).

105. *Hishon*, 467 U.S. at 77.

106. Solon v. Kaplan, 398 F.3d 629, 631 (7th Cir. 2005).

107. *See, e.g.*, Johnson, *supra* note 13, at 1069 n.6; *see also* D. Allison Baker, Lauren Hoffer & Monica Meier, *Gender-Based Discrimination*, 1 GEO. J. GENDER & L. 503, 566 (2000). Some states may have idiosyncratic protections, like Connecticut's prohibition on discrimination against interns. *See* CONN. GEN. STAT. § 31-40y.

108. EEOC COMPLIANCE MANUAL, *supra* note 103, § 2–III.A.1.d.

109. Complaint ¶¶ 1–2, 9, 35, 42, 56–57, 59, Chin v. CH2M Hill Cos., Index No. 101635/12 (N.Y. Sup. Ct. Feb. 14, 2012).

several cases holding that only employees, and not other persons, were covered.[110] The case settled before a court could rule on the matter.[111]

The exclusion of directors from antidiscrimination protections is particularly ironic in light of recent moves by states to encourage greater inclusion of women and people of color on corporate boards. California has mandated that public companies headquartered within the state appoint women to their boards,[112] and the federal government, and other states, have either enacted or are considering legislation to mandate board diversity disclosure requirements.[113] Yet no law prevents a company from refusing to nominate board candidates, or firing board members, due to sex. Importantly, a diversification requirement is not the same as a prohibition on sex discrimination at the board level. Companies that, for example, discriminate against women who are "pushy" or who demand an equal voice may still be able to satisfy diversification requirements by selecting women who they anticipate will be more pliant;[114] indeed, it has already been documented that even gender-diverse boards tend to sideline women by assigning them less responsibility.[115]

110. Memorandum of Law in Support of Defendants' Motion to Dismiss at 11–12, Chin v. CH2M Hill Cos., Index No. 101635/12 (N.Y. Sup. Ct. Nov. 24, 2014).

111. *See* Stipulation to Adjourn Compliance Conference and Motion Return Date at 1, Chin v. CH2M Hill Cos., Index No. 101635/12 (N.Y. Sup. Ct. Oct. 7, 2015); Order, Chin v. CH2M Hill Cos., Index No. 101635/12 (N.Y. Sup. Ct. Dec. 11, 2015).

112. CAL. CORP. CODE § 301.3(a). California has also recently adopted a similar requirement for diversity along race, sexual orientation, and gender identity grounds. *Id.* § 301.4(b), (e)(1).

113. Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2020), https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/ [https://perma.cc/6CE2-YUJ4]; Alexander Osipovich & Akane Otani, *Nasdaq Seeks Board-Diversity Rule that Most Listed Firms Don't Meet*, WALL ST. J., https://www.wsj.com/articles/nasdaq-proposes-board-diversity-rule-for-listed-companies-11606829244 [https://perma.cc/AQ6L-JTX5] (Dec. 1, 2020, 5:26 PM) (reporting that Nasdaq has proposed a rule requiring listed companies "to have at least one woman on their boards, in addition to a director who is a racial minority or one who self-identifies as lesbian, gay, bisexual, transgender or queer" or explain why they do not); H.R. 1018, 116th Cong. (2019).

114. For example, Carolyn Chin, described above, alleged that she was removed as a board member in part because of a bias against "outspoken" women, and that, after her removal, another woman was appointed as outside director but without any "key" committee assignments. Complaint, *supra* note 109, ¶¶ 42, 89.

115. Laura Casares Field, Matthew E. Souther & Adam S. Yore, *At the Table but Can Not Break Through the Glass Ceiling: Board Leadership Positions Elude Diverse Directors*, 137 J. FIN. ECON. 787, 795–97 (2020); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 171 (2019); Afsharipour, *supra* note 87, at 377–78.

B. Family Law

Businesses are often founded and run by families, which means that the disputes within families—and the gender imbalances that accompany them—are transformed into investment disputes. For example, one common pattern has been for women to remain invested in private companies controlled by their ex-husbands, men allied with them, or both, who subsequently attempt to deny the women the full value of their investments. Thus, in *Fischer v. Fischer*, after a woman received shares in her husband's family corporation as part of a divorce settlement, the family attempted to freeze her out by selling the corporate assets at a lowball price to a new entity in which the family, but not the ex-wife, held ownership interests.[116] What is striking about this and similar cases[117] is that they essentially present divorce disputes, where in practical effect the ex-husband is using his control over business assets to avoid obligations imposed under family law. But because the divorce has been resolved, family law—which typically would mandate a particular division of marital assets[118]—provides little relief.[119]

Outside of marital relationships, romantic partners who work together and then split up often dispute whether they formed a contract for services or an inadvertent partnership, with business law—and its mechanisms for determining whether a partnership was formed and how the assets should be divided—functioning as a substitute for what might otherwise be a claim for palimony.[120] The difficulty that courts have here is distinguishing between the "market" contributions of the nonpropertied partner and the "domestic" services that are deemed incidental to the romantic relationship and therefore (usually) uncompensable.[121] "Courts tend to be wary of peering too closely into the nature of intimate

116. Fischer v. Fischer, No. C.A. 16864, 1999 WL 1032768, at *2 (Del. Ch. Nov. 4, 1999).

117. *See* Case v. Sink & Rise, Inc., 297 P.3d 762, 763–64 (Wyo. 2013); Waters v. G & B Feeds, Inc., 306 S.W.3d 138, 141 (Mo. Ct. App. 2010); Kasten v. Doral Dental USA, LLC, 733 N.W.2d 300, 305–06 (Wis. 2007); Alaska Plastics v. Coppock, 621 P.2d 270, 272 (Alaska 1980); Wilderman v. Wilderman, 315 A.2d 610, 612–13 (Del. Ch. 1974); Thrasher v. Thrasher, 103 Cal. Rptr. 618, 619–21 (Ct. App. 1972); McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 233 (N.M. Ct. App. 1986).

118. *See* Allison Anna Tait, *Corporate Family Law*, 112 NW. U. L. REV. 1, 6, 30 (2017).

119. Courts may try to avoid these divisions because of this problem. *See* McCulloch v. McCulloch, 69 A.3d 810, 818 (R.I. 2013); *see also* Tait, *supra* note 118, at 49.

120. *See, e.g.*, Glidewell v. Glidewell, 790 S.W.2d 925, 926 (Ky. Ct. App. 1990); Via v. Oehlert, 347 S.W.3d 224, 226 (Tenn. Ct. App. 2010).

121. Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 33, 42 (2017).

relationships,"[122] fearing that "emotion-laden afterthought" will impede their attempts to identify instances of "jural significance."[123] "As a result, courts generally require a higher degree of proof in cases involving former nonmarital partners than is required in cases involving former nonintimate partners."[124] When business arrangements are inseparable from personal ones—which may be common among intimate partners—some jurisdictions will not enforce contracts at all,[125] while others may require written agreements that are unlikely to exist.[126] The upshot is that courts attempting to disentangle the business side of a relationship from the personal side may fall back on gendered assumptions about which services were provided as part of a domestic arrangement, leaving the nonpropertied partner (usually a woman) without any recovery for her business contributions.[127] For example, in *Thomas v. LaRosa*, a woman sued her ex-lover for support payments, alleging that, among other things, she had assisted his business by advising him on the planning and development of his properties.[128] The court rejected the claim on the ground that "chewing the fat" over business decisions is "typical of the services performed by most wives who are in the good graces of their husbands."[129]

122. Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 921 (2019).

123. Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980).

124. Joslin, *supra* note 122, at 921.

125. *See* Stefanie L. Ferrari, Note, *Cohabitation in Illinois: The Need for Legislative Intervention*, 93 CHI.-KENT L. REV. 561, 567–72 (2018).

126. Joslin, *supra* note 122, at 928; Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331, 336–37 (Robin Fretwell Wilson ed., 2006).

127. Antognini, *supra* note 121, at 33, 41 ("Courts' reluctance to compensate domestic services in the context of a nonmarital relationship can be so strong as to extend beyond the boundaries of the relationship itself, and into the realm of employed work. Contributions made outside of the home in a literal sense are sometimes absorbed into its loving, affective and, ultimately gratuitous, pull.").

128. Thomas v. LaRosa, 400 S.E.2d 809, 810–11 (W. Va. 1990).

129. *Id.* at 814; *see also* Story v. Lanier, 166 S.W.3d 167, 178 (Tenn. Ct. App. 2004) (disregarding woman's work of cooking meals for her cohabitant's employees when determining her entitlement to a share of the cohabitant's property); Featherston v. Steinhoff, 575 N.W.2d 6, 8, 10 (Mich. Ct. App. 1997) (refusing to award compensation for a woman's assistance with her cohabitant's business). Of course, the problem of devaluing women's work is not confined to business law; it arises in marital disputes where parties' respective contributions are used to determine how property is to be split, *see* Tait, *supra* note 118, at 32, 34–35, and in tax disputes, *see* Lisa Philipps, *Helping Out in the Family Firm: The Legal Treatment of Unpaid Market Labor*, 23 WIS. J.L. GENDER & SOC'Y 65, 74–75 (2008), but, as above, in the context of family law there is at least a floor (as well as formal recognition of the value of women's domestic services).

More generally, a common fact pattern is for a small business owner to rely on the labor of a romantic partner and leverage the personal relationship to refuse to formalize their respective entitlements. Even if a court awards some compensation for that labor when the relationship ends, it is likely to be far less than the division that would often be awarded upon either termination of a marriage or a general business partnership.[130] The effect is to disadvantage women when business concepts are employed; though family law implicitly recognizes the importance of women's labor in contributing to wealth accumulated within a romantic relationship and creates default rules to address that fact,[131] once the analysis is exclusively rooted in business doctrine, women's contributions may be casually denigrated.

To be sure, in the abstract, there is no reason why litigating family disputes as business disputes necessarily results in the oppression of women specifically, and indeed, in some cases, men may find themselves excluded from family assets over which women have control.[132] That said, for historical and sociological reasons, it is more likely that in heterosexual relationships, men will be the propertied partner,[133] and while family law has frames—however imperfect—to recognize that fact, these are absent from business law. Thus, when family disputes are litigated through a business lens, there is no language to recognize disparate impacts on women or the effects of gender-based harassment. *Horne v. Aune*, described above, typifies the problem: a domestic dispute regarding a woman's possession of her home after her partner was judicially ordered to keep his distance was litigated and decided entirely denuded of the gendered dynamics.[134]

In other ways, business law concepts may end up replicating the inequities that exist in family law. Specifically, while the American legal system limits the extent to which one spouse can

130. *See* Carney v. Hansell, 831 A.2d 128, 135–36 (N.J. Super. Ct. Ch. Div. 2003); Gazvoda v. Wright, No. 07A01-0607-CV-288, 2007 WL 2284722, at *2–3 (Ind. Ct. App. Aug. 10, 2007).

131. *See, e.g.*, Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1364 (2011); Tait, *supra* note 118, at 34.

132. *E.g.*, Woodward v. Andersen, 627 N.W.2d 742, 748, 753 (Neb. 2001).

133. Deborah S. Gordon, *Engendering Trust*, 2019 WIS. L. REV. 213, 218–20 (2019); Joslin, *supra* note 122, at 937–38.

134. *See generally* Horne v. Aune, 121 P.3d 1227 (Wash. Ct. App. 2005).

unilaterally disinherit the other,[135] parents operate under almost no constraints in determining how to allocate assets among their children.[136] Thus, it is not uncommon for patriarchs to pass ownership interests in the family business to sons and daughters but hand controlling interests to sons alone, leaving daughters with a minority position that makes them vulnerable to exploitation.[137] As Benjamin Means puts it, "the shape of family-business ownership is affected by the absence of family law controls over testamentary choices."[138]

An exemplary case is *Stuparich v. Harbor Furniture Manufacturing*, where the father granted his son control of the family business, while the daughters held shares and board seats but lacked voting control.[139] The company had a profitable side and an unprofitable side, but because the son, his wife, and his own son were employed by the unprofitable side, the son refused to sell it, leaving it as a continuing drain on corporate profits.[140] The sisters sued seeking dissolution or a buyout to protect their interests, but the California courts rejected the claim.[141] In their view, the father had free choice as to whom to hand control over his company, and the son had not demonstrated bad faith in his management.[142] Critically, the court did not accord any legal significance to the fact that after the action was filed, there had been a "violent confrontation" between the brother and one of the sisters, resulting in "physical injuries" to her.[143] As the court put it:

> While unfortunate, the situation presented is not unique to this close corporation. It is undisputed that plaintiffs hold a minority of voting stock, their brother holds the controlling share of voting stock, and the relationship between them has broken down and is hostile. Historically, Malcolm, Jr. has

135. Scalise, *supra* note 131, at 1365. *But see* Allison Tait, *Trusting Marriage*, 10 U.C. IRVINE L. REV. 199, 217 (2019) (discussing how trusts may be used to evade mandatory inheritance rights).

136. Scalise, *supra* note 131, at 1325; Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 WASH. L. REV. 619, 631 (2020).

137. *See* Benjamin Means, *Solving the "*King Lear *Problem,"* 12 U.C. IRVINE L. REV. (forthcoming 2022) (manuscript at 34 n.147), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803377 [https://perma.cc/HZ6V-A9CB].

138. Benjamin Means, *The Contractual Foundation of Family-Business Law*, 75 OHIO ST. L.J. 675, 702 (2014) (emphasis omitted).

139. Stuparich v. Harbor Furniture Mfg., 100 Cal. Rptr. 2d 313, 314 (Ct. App. 2000).

140. *Id.* at 315–16.

141. *Id.* at 315–16, 320.

142. *Id.* at 319.

143. *Id.* at 315, 318–20.

> been instrumental in the operation of the corporation and plaintiffs have played no role in the day-to-day operations. *Out of frustration, and perhaps out of fear, plaintiffs have chosen not to participate further* in the meetings of the board of directors. . . . On this undisputed record, we cannot say that the trial court erred in finding as a matter of law, that the drastic remedy of liquidation is not reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders. As holders of a minority of the voting shares, plaintiffs are not entitled to substitute their business judgment for their brother's . . . .[144]

Though unmentioned in the opinion, the altercation apparently occurred in the father's home,[145] which may have contributed to the court's impression of the matter as a domestic dispute, but the decision itself seems to suggest that the fight was directly related to management of the business.[146] Nonetheless, the sisters' fear of their brother could not give rise to a bad faith claim or even be recognized within the confines of their right of dissolution.

In one striking dispute, *Baks v. Maroun*, shares of the family business were divided between a brother and his three sisters.[147] The brother, working in concert with two (male) corporate officers, was alleged to have taken control of the company and run it to benefit himself and his son, denying the sisters the ability to participate in management or basic information about corporate affairs.[148] When the sisters sued for breach of fiduciary duty, the court held that the statute of limitations had expired on their claims—noting in particular with respect to one claim that they were deemed to have knowledge of it *due to their status as board members*.[149]

Compare *Baks*, which was litigated entirely under the corporate law of Michigan, with *Osborn v. Griffin*, which was litigated as a probate dispute in Kentucky.[150] There, the two oldest sons schemed to take control of a family business that was

144. *Id.* at 319–20 (emphasis added) (citations omitted).

145. *See* STEPHEN M. BAINBRIDGE, TEACHER'S MANUAL, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS 384 (11th ed. 2022).

146. *Stuparich*, 100 Cal. Rptr. 2d at 318–19.

147. Baks v. Moroun, 576 N.W.2d 413, 415 (Mich. Ct. App. 1998).

148. *Id.* at 415–16.

149. *Id.* at 415, 424.

150. Osborn v. Griffin, 865 F.3d 417, 428, 432 (6th Cir. 2017).

intended by their father to be shared equally among his children, including the daughters.[151] The district court explicitly recognized the "patriarchal" nature of the family structure, which, it concluded, resulted in the sons being "groomed" to manage the family business and the daughters to remain passive.[152] This, in turn, gave the sons a sense of entitlement to control the business and to exclude their sisters, and led the daughters to trust their authority, which delayed their discovery of their brothers' conduct.[153] In light of these facts, the court not only denied defenses based on laches and acquiescence[154] but also awarded a substantial amount of prejudgment interest.[155] "In other words, the *Osborn* court explicitly acknowledged the family's patriarchal structure as giving rise to the circumstances that enabled and fostered the trustees' manipulation."[156]

C. Business Law

The bread and butter of business law—fiduciary duty, shareholder oppression, and the covenant of good faith and fair dealing—end up as the catch-all means by which capital discrimination is addressed. But invidious discrimination is not officially recognized within the confines of these doctrines and thus is almost never explicitly addressed by courts.

Corporate fiduciaries have an obligation to act in the "best interests of the corporation and its stockholders."[157] That maxim would seem to prohibit capital discrimination, which clearly does not serve the interests of women stockholders and—to the extent it results in the exclusion of competent women from management of the firm—is contrary to the interests of all stockholders regardless of sex. But matters are not so simple because fiduciary duties are reducible to two aspects: the duty of care, and the duty of loyalty.[158] These obligations are owed by officers, directors, and controlling stockholders, and though they may be defined in

151. *Id.* at 429–30.

152. Osborn v. Griffin, Civil Action Nos. 2011-89, 2013-32, 2016 WL 1092672, at *1, *3 (E.D. Ky. Mar. 21, 2016), *aff'd*, 865 F.3d 417 (6th Cir. 2017).

153. *Id.* at *6–7, *31–32; Osborn v. Griffin, Civil Action Nos. 2011-89, 2013-32, 2016 WL 4014987, at *3 (E.D. Ky. July 26, 2016), *aff'd*, 865 F.3d 417 (6th Cir. 2017).

154. *Osborn*, 2016 WL 1092672, at *31–32.

155. *Osborn*, 865 F.3d at 456–57.

156. Gordon, *supra* note 133, at 234.

157. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181 (Del. 1986); Quadrant Structured Prods. Co. v. Vertin, 115 A.3d 535, 549 (Del. Ch. 2015).

158. *See, e.g.*, Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1989).

different ways depending on the jurisdiction, under Delaware law (which is, of course, enormously influential), courts require a showing of "gross negligence" before they will identify a violation of the duty of care.[159] The duty of loyalty, by contrast, may be violated by acts of self-dealing and also acts taken in bad faith, which includes a subjective intent to harm the corporation,[160] "a purpose other than that of advancing the best interests of the corporation," an intention "to violate applicable positive law," or an intention to "fail[] to act in the face of a known duty to act, demonstrating a conscious disregard" for one's fiduciary duties.[161]

It is not obvious that *discriminatory* actions fit into these categories as they are currently constituted. In most instances, discrimination is likely not intended to harm the corporation, and if it is only intended to annoy or harm individuals, the loyalty duty is not implicated.[162] In some ways, the current doctrine mirrors Title VII, where sexual harassment by way of the creation of a hostile environment is treated largely as a frolic of the harasser, in which the employer is not implicated absent fault.[163] If anything, many acts of discrimination may be intended to benefit the corporation, out of the misguided belief that a person's sex renders them unsuitable to participate in corporate operations. Similarly, and somewhat ironically, conscious discrimination—no matter how reprehensible—is also not a *negligent* act in the sense that it does not stem from a failure to properly review and consider an action. Even unconscious bias may not constitute grossly

159. Morrison v. Berry, C.A. No. 12808, 2019 WL 7369431, at *22 (Del. Ch. Dec. 31, 2019). In some scenarios, such as when a plaintiff seeks nonmonetary relief regarding a transaction that presents a structural risk of self-interested behavior, care violations may be established by conduct that falls outside of a "range of reasonableness." RBC Cap. Mkts., LLC v. Jervis, 129 A.3d 816, 857 (Del. 2015).

160. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64, 66 (Del. 2006).

161. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006) (quoting *In re* Walt Disney Co. Derivative Litig., 906 A.2d at 67).

162. *See In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733, at *34 (Del. Ch. Aug. 13, 2015), *aff'd*, 157 A.3d 152 (Del. 2017); Wright v. Phillips, C.A. No. 11536, 2020 WL 2770617, at *8 (Del. Ch. May 28, 2020); *cf.* Klaassen v. Allegro Dev. Corp., C.A. No. 8626, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) ("[C]orporate directors do not owe fiduciary duties to individual stockholders; they owe fiduciary duties to the entity and to the stockholders as a whole."); Pers. Touch Holding Corp. v. Glaubach, C.A. No. 11199, 2019 WL 937180, at *28 (Del. Ch. Feb. 25, 2019) (bad faith demonstrated when a director sent anonymous, disturbing letters to corporate managers and their spouses, "the logical and foreseeable consequence of which was to hurt morale and create an enormous distraction of time and resources to the detriment of the Company").

163. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758–59 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

negligent behavior to the extent it is not reckless from a subjective point of view.[164]

Notably, because *employment* discrimination is illegal, under these standards, the duty of loyalty does prohibit corporate officers, directors, and controlling shareholders from discriminating against women employees, or even allowing sex discrimination to flourish within the firm.[165] And though courts have, in the past, given boards the benefit of the doubt when faced with allegations that they turned a blind eye to sexual harassment,[166] it is possible that, in the last few years, courts have become more sympathetic to these kinds of claims.[167] Thus, at least indirectly, corporate managers have fiduciary obligations to avoid discriminating against women employees on the basis of sex. But, in circular fashion, because capital discrimination is not prohibited by law, it is not prohibited by the fiduciary duty to obey the law.

To be sure, there are those who argue that diversifying corporate participants—including board members—may itself maximize corporate value, and thus the duties of loyalty and care require that corporate managers pursue that goal.[168] But, leaving aside that diversification is not the same as nondiscrimination,[169] given the discretion that corporate fiduciaries may exercise in

164. *Morrison*, 2019 WL 7369431, at *22 (Del. Ch. Dec. 31, 2019) (defining gross negligence to mean "conduct that constitutes reckless indifference or actions that are without the bounds of reason" (quoting Zucker v. Hassell, C.A. No. 11625, 2016 WL 7011351, at *7 (Del. Ch. Nov. 30, 2016), *aff'd*, 165 A.3d 288 (Del. 2017))). *But see* Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1103–07 (2017) (arguing that certain biases are predictable enough that failure to compensate for them constitutes recklessness).

165. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1630–31 (2018). Title VII only covers firms with at least fifteen employees, 42 U.S.C. § 2000e; therefore, smaller firms may not be acting illegally when engaging in discrimination, though some states may prohibit employment discrimination at smaller firms.

166. Hemel & Lund, *supra* note 165, at 1645–46, 1649.

167. Not only might the #MeToo movement have alerted courts to the risks that harassment poses, but Delaware has recently begun to look more favorably on claims that boards ignored or encouraged illegal conduct. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 822–24 (Del. 2019); *In re* Clovis Oncology Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *10, *15 (Del. Ch. Oct. 1, 2019).

168. Testy, *supra* note 88, at 1100–01; Anat Alon-Beck, Michal Agmon-Gonnen & Darren Rosenblum, *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 445, 458 (2021).

169. *See supra* text accompanying notes 112–14.

pursuit of profit,[170] any duty to diversify (if it exists)[171] is, as a practical matter, unenforceable.[172]

In light of business law's failure to recognize invidious discrimination as a category of misconduct, the most obvious route by which courts can address capital discrimination is via a claim that the investor was denied basic entitlements associated with the investment, regardless of the motive for that denial. For example, shareholders in a corporation typically have the right to vote for corporate directors and on major transactions, as well as certain informational rights; they may also have the right to dividends—either specific payouts or payouts similar to those of the same class of shareholders.[173] Additionally, if corporate decision-makers act under a conflict—namely, if they receive special benefits from a corporate action that are not shared with stockholders generally—their actions must be "entirely fair" to the

170. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 103 (2004).

171. There has been a recent flurry of shareholder lawsuits alleging that public company directors breached their fiduciary duties to the corporation by failing to diversify their workforces and their boards. *See, e.g.*, Verified Shareholder Derivative Complaint at 3, Foote v. Micron Tech., Inc., No. 21-cv-00169 (D. Del. Feb. 9, 2021); Verified Shareholder Derivative Complaint at 6–7, 21, Kiger *ex rel.* Qualcomm Inc. v. Mollenkopf, No. 20-cv-01355 (S.D. Cal. July 17, 2020); Verified Shareholder Derivative Complaint at 9, Ocegueda *ex rel.* Facebook, Inc. v. Zuckerberg, 526 F. Supp. 3d 637 (N.D. Cal. 2021) (No. 20-cv-04444); Verified Shareholder Derivative Complaint at 5, Klein v. Ellison, No. 20-cv-04439, 2021 WL 2075591 (N.D. Cal. May 24, 2021). Most of the allegations are predicated on the companies' violations of antidiscrimination law, and their purported betrayal of their own public promises to diversify, rather than any freestanding fiduciary obligation of nondiscrimination. In that posture, many cases have been dismissed. *See, e.g.*, Esa v. Nortonlifelock Inc., No. 20-cv-05410, 2021 WL 3861434, at *1–2, *6 (N.D. Cal. Aug. 30, 2021); Ocegueda *ex rel.* Facebook v. Zuckerberg, 526 F. Supp. 3d 637, 650–51 (N.D. Cal. 2021); Klein v. Ellison, No. 20-cv-04439, 2021 WL 2075591, at *1–3, *8 (N.D. Cal. May 24, 2021); Kiger *ex rel.* Qualcomm Inc. v. Mollenkopf, Civ. No. 21-409, 2021 WL 5299581, at *2–3, *5–6, *9 (D. Del. Nov. 15, 2021). A few complaints have alleged that directors have a duty to diversify their boards as part of their obligation to maximize corporate wealth, but courts have thus far rejected those allegations as well. *See* Falat v. Sacks, No. SACV 20-1782, 2021 WL 1558940, at *2, *5 (C.D. Cal. Apr. 8, 2021) ("Delaware imposes no duty to maintain diversity on a Board of Directors, and the Court declines to engage in judicial lawmaking in order to create such a duty."); *In re* Danaher Corp. S'holder Derivative Litig., No. 20-cv-02445, 2021 WL 2652367, at *8–9 (D.D.C. June 28, 2021) ("[A] director's fiduciary duty can encompass earning profit. . . . But the Court agrees with the Directors that 'neither the duty of care nor the duty of loyalty binds directors to any single course of profit-maximizing action.'" (quoting Defendants' Reply in Support of Motion to Dismiss Plaintiffs' Verified Shareholder Complaint at 19)).

172. In tacit recognition of this fact, many arguments that boards should be more proactive about diversifying are not so much rooted in a claim that boards have a duty to do so but that there is nothing in the law that bars them from doing so. *E.g.*, Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 77–81, 87–88 (2022).

173. *E.g.*, DEL. CODE ANN. tit. 8, §§ 211(b), 242(b), 251(c) (voting rights); *id.* § 220 (informational rights); *id.* § 151(c) (dividend rights).

corporation.[174] If corporate decision-makers fail to meet these obligations, courts need not inquire into their motives in order to find that injured shareholders are entitled to some kind of legal redress.

These principles were sufficient to allow the plaintiff in *Fischer v. Fischer*, described above, to survive a motion to dismiss.[175] There, an ex-wife claimed that her ex-husband's family, all of whom were directors and officers of the family business, violated their fiduciary duties to the corporation by scheming to sell the corporate assets at a lowball price to an entity that they owned, but in which the ex-wife had no interest. Such a transaction is a classic example of self-dealing: the family members, operating under a conflict, were obligated to ensure that the transaction was fair to the subject corporation. If it was not, remedies would be available, such as damages or even equitable rescission of the disloyal transaction.

Redstone similarly framed her dispute with CBS in traditional terms. When board members ordered the stock issuance that threatened to dilute her control, she sued them for exceeding the authority granted to them in CBS's bylaws and charter and also argued that they breached their duties of loyalty by attempting to undermine her franchise.[176] Marion Coster, who inherited a half interest in a corporation from her late husband, similarly argued that male board members violated their duties of loyalty by issuing new stock to one director for the purpose of diluting her control rights.[177] And Walta, squeezed out of the law firm in which she was a principal, was able to claim that the amount that Gallegos offered for her shares violated the shareholder agreement and breached Gallegos's fiduciary duties, because he misrepresented the firm's finances.[178]

The problem is that these claims available under traditional business law doctrines may not be sufficient to recognize the

174. *In re* Viacom Inc. S'holders Litig., Consol. C.A. No. 2019-0948, 2020 WL 7711128, at *16 (Del. Ch. Dec. 30, 2020); Fliegler v. Lawrence, 361 A.2d 218, 221–22 (Del. 1976).

175. Fischer v. Fischer, No. C.A. 16864, 1999 WL 1032768, at *3–4 (Del. Ch. Nov. 4, 1999).

176. Verified Amended Complaint of National Amusements, Inc. ¶¶ 143–45, 149–50, 153–55, *In re* CBS Corp. Litig., Consol. C.A. No. 2018-0342 (Del. Ch. Aug. 3, 2018).

177. Coster v. UIP Cos., 255 A.3d 952, 953–55 (Del. 2021).

178. Walta v. Gallegos L. Firm, P.C., 40 P.3d 449, 451, 462 (N.M. Ct. App. 2001). Similarly, an ex-wife in *Kasten v. Doral Dental* exercised her statutory rights to corporate information in order to determine whether her ex-husband was leeching assets out of the LLC in which she held an interest. Kasten v. Doral Dental USA, LLC, 733 N.W.2d 300, 305–06, 310 (Wis. 2007).

harms that discrimination may cause. For example, individual shareholders may owe no duties to the corporation unless they hold a controlling stake; as a result, the collective action of a group of minority shareholders to exclude one person may not constitute a breach of duty at all. Thus, when Shawna Lemon claimed that her fellow law firm shareholders conspired to retaliate against her due to her race and her complaints about sex discrimination, the court held that because all shareholders held an equal number of shares, none owed fiduciary duties to the others.[179]

Even when fiduciary duties are in play, personal animus toward individual shareholders may not constitute a breach absent harm to the entity.[180] As a result, a wide variety of actions that may be taken to exclude women shareholders, such as the refusal to pay dividends,[181] terminating a shareholder from an employment position,[182] a reduction in salary,[183] or lowball buyout offers,[184] may not give rise to liability. Indeed, such actions may actually *enhance* corporate value,[185] making it harder for shareholders to claim that they violate managers' duties, and traditionally courts have been hesitant to second-guess these exercises of managerial discretion absent evidence of a financial conflict of interest.[186] Yet especially in a private corporation—where the shareholder has no obvious ability to sell her shares—these actions can render an investment functionally worthless to an individual investor.[187]

As a result, in the TransPerfect dispute, Elting was able to prevail on her claim that she and Shawe were deadlocked—entitling her to dissolution under Delaware's corporate statute—

179. Lemon v. Myers Bigel, P.A., No. 18-CV-200, 2019 WL 1117911, at *1, *19, *21 (E.D.N.C. Mar. 11, 2019), *aff'd*, 985 F.3d 392 (4th Cir. 2021).

180. Wright v. Phillips, C.A. No. 11536, 2020 WL 2770617, at *8 (Del. Ch. May 28, 2020) ("[T]o the extent Wright acted with scienter, it was her intent to irritate Phillips, and not to hurt the business for which she was a fiduciary and of which she owned half.").

181. *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733, at *6, *36 (Del. Ch. Aug. 13, 2015), *aff'd sub nom.* Shawe v. Elting, 157 A.3d 152 (Del. 2017).

182. *Lemon*, 2019 WL 1117911, at *8–9, *22 (alleging that termination was considered and threatened, until the plaintiff resigned).

183. Kirleis v. Dickie, McCamey & Chilcote, P.C., No. 06cv1495, 2009 WL 3602008, at *16 (W.D. Pa. Oct. 28, 2009), *aff'd*, No. 09-4498, 2010 WL 2780927 (3d Cir. July 15, 2010).

184. *See supra* text accompanying notes 40–41, 45; Walta v. Gallegos L. Firm, P.C., 40 P.3d 449, 462 (N.M. Ct. App. 2001).

185. Ritchie v. Rupe, 443 S.W.3d 856, 903–04 (Tex. 2014) (Guzman, J., dissenting).

186. Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 822–23 (2000) [hereinafter *Unanswered Question*].

187. *Id.* at 803–04.

but the court stopped short of finding any wrongdoing or breach of fiduciary duty by Shawe[188] because his actions were aimed at Elting personally rather than TransPerfect generally.[189] This was important because absent a showing of wrongdoing aimed at lessening the value of the company, the court was unwilling to impose a noncompetition order on Shawe in connection with TransPerfect's sale to a third-party buyer.[190] As it happened, at the conclusion of the sales process, the highest bid came from Shawe himself, who offered to buy Elting's shares for $385 million.[191] Had a noncompetition order been imposed, it is possible the company might have sold to a third party for a considerably higher sum.[192]

The broader issue here is that the "best interests of the corporation" for which fiduciaries must strive is typically—and especially in Delaware—equated with shareholder wealth maximization, or more specifically, maximizing the value of the corporate equity.[193] That formulation abstracts away any differences among shareholders' individual circumstances in favor of treating the corporate *shares* themselves as the object of fiduciary concern.[194] This reductionistic view of fiduciary duty has

188. In part this was because Elting herself did not fully argue that Shawe had breached his fiduciary duties, *see In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10449, 2015 WL 4874733, at *18 n.206, *34, (Del. Ch. Aug. 13, 2015), *aff'd sub nom.* Shawe v. Elting, 157 A.3d 152 (Del. 2017), perhaps due to the limited availability of that claim in this context.

189. *Id.* at *34 ("[T]he record does not show that Shawe engaged in self-dealing or financially enriched himself at the Company's expense. Additionally, many of the cited acts of misconduct (*e.g.*, intercepting Elting's mail, copying her hard drive, reading her privileged Gmails, filing a police report against her, etc.) were aimed at Elting personally. To be sure, those actions demonstrate the dysfunction in the Company's management, the basis for Elting's justifiable distrust of Shawe, and the need for relief under Section 226 to resolve proven deadlocks, but it is not self-evident that these actions amount to egregious breaches of fiduciary duty.").

190. *In re* TransPerfect Glob., Inc., Civil Action Nos. 9700, 10449, 2016 WL 3477217, at *3–4 (Del. Ch. June 21, 2016). For further discussion of the possibility of a noncompetition order, see *infra* note 310 and accompanying text.

191. *In re* TransPerfect Glob., Inc., C.A. Nos. 9700, 10449, 2018 WL 904160, at *12 (Del. Ch. Feb. 15, 2018), *aff'd sub nom.* Elting v. Shawe, 185 A.3d 694 (Del. 2018).

192. *Id.* at *9.

193. *E.g.*, PWP Xerion Holdings III LLC v. Red Leaf Res., Inc., C.A. No. 2017-0235, 2019 WL 5424778, at *16 (Del. Ch. Oct. 23, 2019) ("A director is a fiduciary who must seek loyally, in good faith, and with due care to pursue the best interests of the corporation and maximize its value for the ultimate benefit of the undifferentiated equity in the aggregate.").

194. *See* Shannon Kathleen O'Byrne & Cindy A. Schipani, *Feminism(s), Progressive Corporate Law, and the Corporate Oppression Remedy: Seeking Fairness and Justice*, 19 GEO. J. GENDER & L. 61, 99 (2017). Even the language courts use to describe fiduciary duties

created several paradoxes of Delaware law due to the obvious reality that shares do not exist independent of the investors who hold them. As numerous commenters have discussed—typically in the context of large institutional investors—shareholders may operate on different timelines,[195] be taxed differently,[196] have different risk appetites, hold derivatives or investments at multiple levels within a single corporation's capital structure, and hold interests in related companies,[197] all of which affect how they would prefer firm equity to be managed. Nonetheless, directors are charged with advancing the interests of a hypothetical "pure" investor who possesses none of these individualized characteristics,[198] creating unanswerable questions as to how, if at all, the concrete preferences of existing shareholders should be permitted to influence corporate behavior.[199]

Natural person shareholders present the same problem writ small. Because Delaware has no language for evaluating stockholders as individuals rather than as acontextual providers of capital, the oppression of a particular type of stockholder (women) based on their sex is rendered legally illegible. In fact, one of the very few corporate law cases to recognize gender at all—*Francis v. United Jersey Bank* (a New Jersey case)[200]—did so for the specific purpose of *denying* that it should have any relevance

reflects this orientation; many opinions describe corporate common stock as having interests, disembodied from the interests of those who hold it. *See, e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 47 (Del. Ch. 2013) (describing directors whose interests "conflicted with the interests of the common stock"); *id.* at 42 n.16 ("As long as a board complies with its legal obligations, the standard of fiduciary conduct calls for the board to maximize the value of the corporation for the benefit of the common stock."); Equity-Linked Invs., L.P. v. Adams, 705 A.2d 1040, 1042 (Del. Ch. 1997) (boards have a duty to "prefer the interests of common stock").

195. Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 579 (2006).

196. Omri Marian, *Is All Corporate Tax Planning Good for Shareholders?*, 52 U.C. DAVIS L. REV. 905, 929, 931 (2018).

197. Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 311–13 (2018).

198. Hon. J. Travis Laster, *Fiduciary Duties in Activist Situations*, 13 VA. L. & BUS. REV. 75, 82, 84 (2019) ("[C]ommon stockholders have heterogeneous preferences. For purposes of fiduciary duties, these distinctions do not matter. . . . [A] director owes duties to the corporation for the benefit of the undifferentiated equity as a whole, as if that equity was held by a hypothetical single owner or group of owners who were indifferent as to the time horizon for realizing the value of their investment, and indifferent to any other factor other than the goal of obtaining the best value possible for their investment.").

199. *See* Lipton, *supra* note 197, at 322; Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RSRV. L. REV. 863, 892 (2019).

200. Francis v. United Jersey Bank, 432 A.2d 814, 816, 819–20 (N.J. 1981).

to the court's legal analysis.[201] As Mae Kuykendall put it, when it comes to modern business law cases, "[o]nly a determined reader may assign significance to the gender of the participants that the judicial authors do not explore or even foreground with narrative tension. The cases are written for a world of gender neutrality, in which disembodied economic actors go their maximizing way."[202]

That said, there is one area of corporate law where these tensions may be resolved: namely, through the doctrine of shareholder oppression. That cause of action, available in most states, recognizes harms that are peculiar to corporations that do not trade publicly. Depending on the jurisdiction, all shareholders may be deemed to owe fiduciary duties to one another individually, and distinctions between direct harms (running against individuals) and derivative harms (running against the company) may be relaxed.[203] That opens the door for individual shareholders to claim harms to the value of their investments to them, personally, even if there has been no harm to the corporation itself. Through the oppression doctrine, courts may recognize that a refusal to pay dividends for an illiquid investment may render it functionally worthless to particular shareholders, or that investors in close corporations often expect to be able to participate as employees or managers, and the loss of those benefits diminishes the value of their investment.[204] Though different jurisdictions employ different definitions of oppression, in general, courts inquire as to whether there has been a "frustration of the reasonable expectations" of the affected shareholder,[205] or whether the defendants have engaged in "burdensome, harsh and wrongful conduct . . . a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who

201. *See* Faith Stevelman, Feminism, Pedagogy and *Francis v. United Jersey Bank* (Apr. 7, 2021) (unpublished manuscript) (manuscript at 8), https://ssrn.com/abstract=3821982 [https://perma.cc/6F3D-8LWX].

202. Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 584 (2007).

203. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 712–14 (1993).

204. Tait, *supra* note 118, at 57; *Unanswered Question*, *supra* note 186, at 757–58; *see also* Walta v. Gallegos L. Firm, P.C., 40 P.3d 449, 456 (N.M. Ct. App. 2001) ("Minority shareholders are vulnerable to a variety of oppressive devices. These devices include refusing to declare dividends, draining of corporate earnings in the form of exorbitant salaries and bonuses paid to majority shareholders, denying minority shareholders corporate offices and employment, and selling corporate assets to majority shareholders at reduced prices.").

205. *Investment Model*, *supra* note 14, at 529.

entrusts his money to a company is entitled to rely."[206] It was by using the "reasonable expectations" test that the *Straka* court was able to find that Straka had been oppressed by her fellow shareholders.[207] In *Walta v. Gallegos*, Walta brought claims against Gallegos based on the duties he owed her as a fellow shareholder in a close corporation.[208]

Oppression doctrine is in many ways the best "fit" for capital discrimination, in that, unlike ordinary corporate fiduciary obligations, it acknowledges the specific circumstances of shareholders as individuals. That is, while a typical fiduciary analysis addresses the rights that attach to *shares*, without regard for the identity of any particular *shareholder*, the oppression doctrine addresses particular *shareholders* and the context in which they invested.[209] As such, oppression doctrine is well-suited to recognize how shareholders may be targeted based on their identity.

But even these remedies do not completely solve the problem. First and most obviously, they are not available in every jurisdiction, and Delaware—the undisputed leader in the generation of corporate law—does not recognize the shareholder oppression doctrine.[210] And even in those jurisdictions that do provide remedies for oppression, they may only be available for corporations of a particular size or form and may be entirely unavailable in public companies.[211] When discrimination manifests as lost employment, states may accord greater or lesser deference to corporate decisionmakers,[212] and other than *Straka*, no court appears to have recognized constructive discharge, harassment, or demeaning conduct as types of oppression.[213]

206. *Id.* at 528.

207. *See* Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, 92 N.Y.S.3d 567, 573 (Sup. Ct. 2019).

208. Walta v. Gallegos L. Firm, P.C., 40 P.3d 449, 455–56 (N.M. Ct. App. 2001).

209. *See* O'Byrne & Schipani, *supra* note 194, at 98–104.

210. Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993); *see also* Ritchie v Rupe, 443 S.W.3d 856, 891 (Tex. 2014) (rejecting most forms of the shareholder oppression doctrine in Texas).

211. *See* Meredith R. Miller, *Challenging Gender Discrimination in Closely Held Firms: The Hope and Hazard of the Corporate Oppression Doctrine*, 54 IND. L. REV. 123, 135 (2021); Model Bus. Corp. Act § 14.30(a)–(b).

212. *Unanswered Question*, *supra* note 186, at 822–23, 823 n.285.

213. Illinois has recognized "overbearing and heavy-handed" conduct as oppressive, which it has apparently defined to mean a usurpation of authority. *See, e.g.*, Donovan v. Quade, 830 F. Supp. 2d 460, 488 (N.D. Ill. 2011) (noting it is oppressive for shareholders to make management decisions "without seeking assent" from others).

It is possible that post-*Straka* and in the wake of the #MeToo movement, more courts might be willing to identify sex discrimination as a type of oppression if shareholders are willing to make the argument, but there still remain questions as to what standards would be employed. The reasonable expectations test, for example, is based on the actual bargain struck by the shareholder at the time of investment.[214] In light of the pervasive differences between how men and women are treated in the workplace, it may in fact be reasonable for women to expect—and women may well expect, however unjust—some degree of unequal treatment. Moreover, the reasonable expectations test often requires a showing that the violated expectation was "central to the decision to join the venture,"[215] which could create fact-specific and extremely fraught questions as to what any particular woman might have been prepared to tolerate.

The inquiry becomes even more unanswerable if the woman was not an initial investor but instead obtained shares in a divorce or as part of an inheritance.[216] Because the woman herself did not have any expectations at the time of investment, one might instead look to the expectations of the person from whom the woman obtained her shares.[217] Those expectations, though, may simply replicate biases.[218] For example, in *Jones v. McDonald Farms*, the court purported to follow the expectations of the family patriarch when concluding that, in allocating his shares among his children, he intended the sons, but not the daughters, to retain virtually all financial benefits associated with the family farm, despite the fact that shares representing a 14.25% interest in the farm had been conferred upon the daughters.[219]

Though of course courts could adopt a blanket assumption that women are entitled to expect equal treatment, such a legally constructed view of "expectations" would differ from the reasonable expectations test as it is currently understood and would be the equivalent of simply declaring a standard of conduct owed to women within the firm (which is exactly what business law has so far declined to do).

214. *Investment Model*, *supra* note 14, at 530–31; 16A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8046.10 (2020).

215. FLETCHER ET AL., *supra* note 214.

216. *See Reasonable Expectations*, *supra* note 9, at 763.

217. *Id.* at 772 (recommending against this solution).

218. *See* Gordon, *supra* note 133, at 235–36 (discussing this problem in the context of testator trusts).

219. Jones v. McDonald Farms, Inc., 896 N.W.2d 199, 202, 208–09 (Neb. App. 2017).

More generally, even shareholder oppression remedies will often fail to recognize the harm that discrimination itself inflicts. The most common remedy for an oppression claim is to award the investor a fair price for her shares, either through dissolution or—more frequently—buyout.[220] Leaving aside the difficulties of valuing shares in a private company,[221] dissolution and buyout remedies may fail to account for loss of employment that for many investors is part and parcel of their investment expectation,[222] not to mention the dignitary harms associated with discriminatory treatment. Moreover, some corporations may have shareholder agreements limiting the buyout price,[223] and professional corporations may divide profits according to each shareholder's contributions to corporate earnings, such that the "value" of each individual's shares, absent employment, is relatively minimal. Though, technically, in many states, courts are empowered to fashion additional remedies as equity demands,[224] in practice, their imagination is often limited,[225] which is unsurprising given that the oppression is ultimately not designed to address discrimination but the "vulnerability of the minority owner that lacks exit from a closely held company."[226] In this respect, the remedy awarded in *Walta* was unusual: the court permitted punitive damages to be assessed against Gallegos, and though nothing was explicitly said about his sexism, punishment was deemed justified because he had misled Walta both about the value of her shares and about his actual intentions when forcing her out of the firm.[227]

The situation is even murkier when it comes to noncorporate entities. Partners by default owe fiduciary duties to one another,[228]

220. F. Hodge O'Neal & Robert B. Thompson, 2 O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 9:18 (rev. 3d ed. 2012); Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissention*, 35 CLEV. ST. L. REV. 25, 43 (1987). Remedies may also include a forced dividend or a reduction in salaries paid to the oppressing shareholders. *See* O'Byrne & Schipani, *supra* note 194, at 79.

221. Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 314 (2004) [hereinafter *Shareholder Oppression and "Fair Value"*]; Tait, *supra* note 118, at 51–53.

222. *Investment Model*, *supra* note 14, at 572–77.

223. *E.g.*, *Jones*, 896 N.W.2d at 209.

224. Miller, *supra* note 211, at 136.

225. *See Investment Model*, *supra* note 14, at 572–77.

226. Miller, *supra* note 211, at 149.

227. Walta v. Gallegos L. Firm, P.C., 40 P.3d 449, 462 (N.M. Ct. App. 2001).

228. UNIF. P'SHIP ACT OF 1997 § 409(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2013).

and thus a formal oppression doctrine may be less necessary, but some states make those duties waivable.[229] Perhaps more importantly, the fiduciary obligations imposed by modern partnership statutes are very limited and define violations in terms of benefits particular partners may derive at the expense of the partnership as a whole.[230] This, perhaps, is why the *Horne v. Aune* court concluded that Aune's assault on Horne's son did not constitute an offense against *the partnership*. Standard partnership statutes do not "protect the more vulnerable partners against discrimination"[231] or "account . . . for the eventuality that an 'equal' partner may suffer from discrimination in the partnership that can manifest itself in economic or dignitary harm."[232]

The same problem exists with LLCs. LLC statutes, as well, may impose member-to-member fiduciary duties, but the substance of those obligations may be defined in a restrictive manner similar to those of partnerships.[233] And, as with partnerships, some states may make these duties waivable.[234] As a result, fewer states have oppression remedies in the LLC context.[235]

Consider the case of *Bradley v. Rosen*, involving a Delaware LLC.[236] Sarah Bradley co-founded private equity firm Kainos

229. *E.g.*, DEL. CODE ANN. tit. 6, § 17–1101(f).

230. UNIF. P'SHIP ACT OF 1997 § 409(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2013).

231. Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 46 (2004).

232. *Id*. at 45. Law firm partnerships in particular may be subject to state bar ethics rules that prohibit discrimination, but these often do not cover firm management and compensation and offer few practical remedies for aggrieved partners. *See* Katrina Lee, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, 98 DENV. L. REV. 581, 606–15 (2021).

233. Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 965 n.263 (2005) [hereinafter *Minority Oppression*].

234. DEL. CODE ANN. tit. 6, § 18-1101(e). In some jurisdictions, LLC managers' duty of loyalty may only run to the entity, and not to individual members. *See* Douglas Moll, *Minority Oppression in the LLC*, BUS. L. PROF. BLOG (June 29, 2016), https://lawprofessors.typepad.com/business_law/2016/06/minority-oppression-in-the-llc.html [https://perma.cc/V2T9-8GQH]. Nevada does not impose fiduciary duties on LLC members at all; they must be separately contracted for. *See* Israyelyan v. Chavez, No. 78415, 2020 WL 3603743, at *4 (Nev. 2020).

235. *Minority Oppression*, *supra* note 233, at 887, 958. More recently, though, the Uniform LLC Act has added protections against oppressive behavior. *See* UNIF. LTD. LIAB. CO. ACT OF 2006 § 701(a)(4)(C) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2013).

236. Corrected Verified Complaint, Bradley v. Rosen., No. 2019-0056-JTL (Del. Ch. Jan. 28, 2019).

Capital LLC with Robert Sperry and Andrew Rosen. The LLC operating agreement granted Rosen a 42% interest in the firm, Sperry a 33% interest, and Bradley 25%.[237] Bradley's interest in Kainos entitled her to a share of its profits, and she earned additional amounts through a salary, through performance bonuses, and by sharing profits in each fund sponsored by Kainos.[238] According to a complaint Bradley later filed in Delaware Court of Chancery, from Kainos's earliest days, Rosen and Sperry encouraged a "frat-house culture" in which employees were pressured to engage in binge-drinking, to the point where female associates passed out and in one instance had to be revived by EMTs.[239] Bradley was groped by a Kainos executive at one of these events,[240] and after she expressed concern about this type of behavior, Rosen and Sperry functionally froze her out of Kainos management, denying her access to Kainos's financials, board seats at portfolio companies, and the opportunity to work on new deals.[241] Rosen attempted to persuade Bradley to voluntarily reduce her interest in Kainos to 12%,[242] and when she refused, Bradley alleged that Rosen and Sperry misrepresented the nature of certain paperwork in order to fraudulently induce Bradley to agree to restructure Kainos as a limited partnership in a manner that stripped Bradley of her ownership interests in Kainos Capital LLC and eliminated her management rights.[243]

Though these allegations were included in the lawsuit Bradley later filed in Delaware, her claims—which included breach of fiduciary duty, breach of the LLC agreement, and fraud—all focused on the allegedly fraudulent conversion of the LLC to an LP, and not the earlier denial of Bradley's access to information and opportunities. The case settled before it could be resolved, but it is worth pointing out that the limited nature of her claims was no doubt a strategic choice. After all, even assuming the truth of her allegations (and defendants denied many of them),[244] it may have been impossible for Bradley to prove that

237. *Id.* ¶¶ 66, 68.
238. *Id.* ¶¶ 63–65.
239. *Id.* ¶¶ 72, 75–76, 78.
240. *Id.* ¶ 76.
241. *Id.* ¶¶ 81–82.
242. *Id.* ¶ 83.
243. *Id.* ¶¶ 83–109.
244. *E.g.*, Second Amended Verified Counterclaims ¶ 21, Bradley v. Rosen, No. 2019-0056-JTL (Del. Ch. Sept. 18, 2019) (denying that Bradley had an interest in business

denying her management opportunities caused any harm *to the entity* (and if Kainos's clients shared the same sensibilities as those allegedly harbored by her partners, it is possible that the exclusion benefitted Kainos, at least in the short term). Because her compensation was not directly tied to seats on portfolio company boards (though presumably her bonuses were related to these positions), she may not even have been able to show the economic hardship necessary to meet the standard for oppression in the jurisdictions where that cause of action is recognized.

Principals of alternative entities like partnerships and LLCs also owe each other a contractual duty of good faith and fair dealing. Some courts, essentially as a matter of public policy, have held in the context of at-will employment that this duty includes the right not to be terminated for a discriminatory reason.[245] Multiple scholars have extended that reasoning to argue that the duty of good faith should be read to prohibit all employment discrimination,[246] or even all racial discrimination in contracting.[247] But, thus far, no court has held that the duty of good faith prohibits discrimination among firm principals, and what case law exists on the subject of good faith among partners does not appear to include a nondiscrimination imperative.[248]

development); Verified Counterclaims and Answer ¶ 72, Bradley v. Rosen, No. 2019-0056-JTL (Del. Ch. Mar. 26, 2019) (denying allegations about drinking at a Kainos holiday party).

245. *See* Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1069–74, 1076 (2003); Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785, 804–07 (2003); *see also* Schuster v. Derocili, 775 A.2d 1029, 1040 (Del. 2001) (holding that the termination of an at-will employee for rejecting sexual advances violates the contractual duty of good faith and fair dealing).

246. Houh, *supra* note 245, at 1095–96; Baynes, *supra* note 245, at 804–09.

247. Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 189 (1994).

248. *See* Jeff Schwartz, *Good Faith in Partner Expulsions: Application of a Contract Law Paradigm*, 9 CHAP. L. REV. 1, 11 (2005) (arguing that current formulations of the duty of good faith among partners are too narrow and do not contemplate discriminatory motives); *see also* Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 74 (1994) (arguing that courts should read the duty of good faith and fair dealing to prohibit gender discrimination in law firm partnerships).

IV. POTENTIAL SOLUTIONS

A. Is One Even Necessary?

As explained above, the circumstantial evidence suggests that capital discrimination is both real and prevalent, even if its precise scope cannot be determined. But accepting the *existence* of the phenomenon does not answer the question whether it requires a *legal* response. After all, many of the women described here are the most elite and powerful in the United States; even in the face of sex discrimination, they likely have resources and opportunities unavailable to the millions of working women who depend on the protections of traditional antidiscrimination statutes. In addition to the existing legal remedies available to them—however incomplete they may be—many likely have the social position and wealth to be able assert themselves even in the face of sexist attacks. Shari Redstone, for example, controls a $30 billion media empire and ultimately was able to oust the directors who opposed her, stacking the board of CBS with her allies and ultimately forcing the merger with Viacom that Moonves opposed.[249] These social pressures are, however slowly, bringing about change: for example, corporate boards (at least at larger companies) are rapidly adding women,[250] and various scandals, including the #MeToo movement, have brought about shifts within corporate cultures.[251] This is precisely why Title VII doctrine focuses on the level of control and power a person is able to exercise to distinguish

249. Carmon, *supra* note 74.

250. Jeff Green, *Women Gained 22 Seats on S&P 500 Boards in January Surge*, BLOOMBERG (Feb. 23, 2021), https://www.bloomberg.com/news/articles/2021-02-23/women-gained-22-seats-on-s-p-500-boards-in-january-surge [https://perma.cc/J5V4-9KUR]. Smaller companies seem to be slower to change—for example, in 2020, 13% of boards in the Russell 3000 index had no women at all. *See* Afsharipour, *supra* note 87, at 376. But even in that index there appears to be movement, in part in response to California's mandatory diversity law. *See* Andrew Ross Sorkin, Jason Karaian, Sarah Kessler, Michael J. de la Merced, Lauren Hirsch & Ephrat Liyni, *Another Apollo Co-Founder Steps Back*, N.Y. TIMES (May 20, 2021), https://www.nytimes.com/2021/05/20/business/dealbook/josh-harris-apollo.html [https://perma.cc/2YJK-TRA4]. That said, the overall number of women on public company boards is still low. *See* Alisha Haridasani Gupta, *Companies Promised Diversity, but Their Boards Are Still Mostly White and Male*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/live/2021/06/08/business/economy-stock-market-news#companies-promised-diversity-but-their-boards-are-still-mostly-white-and-male [https://perma.cc/F6W4-KJVH]. And there is evidence that men obtain prestigious board positions more readily than similarly credentialed women. *See* Peter Cziraki & Adriana Z. Robertson, Credentials Matter, but Only for Men: Evidence from the S&P 500 (unpublished manuscript) (manuscript at 28), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3894730 [https://perma.cc/F5KA-LE4K].

251. Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913, 1980 (2021).

between employers and employees. The implication is that state intervention is only necessary when the oppressor is able to turn prejudice into tangible action; anything short of that represents nothing more than a personal inconvenience.

There is no question that the effects of sex discrimination are amplified when coupled with economic dependence, rendering some women particularly vulnerable. That fact alone, however, does not mean that discrimination affecting wealthier women should go unaddressed; it simply means that they are different problems and perhaps require different types of solutions. Nor does the mere fact that some women may have access to greater resources and social capital mean that they are immune from the harms that discrimination may cause. If anything, the disappearance of more overt forms of employment discrimination after the passage of Title VII has led to greater wage gaps at the upper echelons of business than at the lower tiers.[252]

Certainly, formal position—and even legal power—does not mean that the holder of that power can exercise it freely. When board members plot an insurrection,[253] or 50% owners assume full control by installing allies and hiding information,[254] women may as a practical matter be unable to avail themselves of their legal rights. Women who hold minority positions within firms may be especially at-risk; co-owners may either actively defy their authority or passively refuse to support them.[255] Coming forward about their experiences may be costly; women may not only fear industry ostracization but also harassment on social media.[256] If nothing else, the sheer energy women have to devote to placating and reassuring business partners and even subordinates in order to make use of their power exacts a psychic cost that impedes their

252. Nancy Levit, June Carbone & Naomi R. Cahn, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 445, 454–58 (2018).

253. *See supra* Section II.A.4.

254. *See supra* Section II.A.1; *see also* Waters v. G & B Feeds, 306 S.W.3d 138, 141, 143 (Mo. Ct. App. 2010).

255. McGinley, *supra* note 231, at 49 (recognizing how co-owners may gang up on a particular member). This is precisely what Diane Straka experienced. Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, 92 N.Y.S.3d 567, 569 (Sup. Ct. 2019).

256. Sara O'Brien & Laurie Segall, *Sexual Harassment in Tech: Women Tell Their Stories*, CNN, https://money.cnn.com/technology/sexual-harassment-tech/ [https://perma.cc/PWW7-74KX] (last visited Oct. 1, 2021); *see also* Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (June 30, 2017), https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html [https://perma.cc/2L7M-SM76].

ability to nurture and profit from their investments.[257] One woman left her startup due to the "spirit crushing" burden of repeatedly having to validate herself to her male co-founder and her own employees; another described the experience as "death by a thousand paper cuts."[258] Thus, capital discrimination not only causes real economic suffering to its victims but also results in palpable dignitary and psychic harms.

Looking beyond the direct effects on the women who are targeted, capital discrimination injures the firm itself. Women may add important new viewpoints to company decision-making and recognize opportunities that men overlook[259]—a fact that, paradoxically, is not captured within fiduciary doctrine as currently constituted. Additionally, discrimination against a specific class of principals has ripple effects on corporate governance more generally, introducing dysfunction into the boardroom and interfering with firm operations.

Shari Redstone's battle with the CBS board provides a salient example. After CBS and Viacom merged, the public shareholders of both companies sued, claiming that the merger had been conducted on unfair terms due to Redstone's personal interference. Taking the allegations in the complaints as true for the purposes of the motions to dismiss, Vice Chancellor Slights concluded that Redstone had forced the merger through by ousting independent directors at both companies, installing allies, participating in merger discussions despite a legal settlement promising not to do so, and functionally bribing CBS's Chief Operating Officer to accede to her wishes.[260] These facts, if proved, would likely establish that Redstone, as a controlling shareholder, had violated her fiduciary duties to both Viacom and CBS.

But without defending Redstone's alleged conduct, consider the situation that she found herself in. After inheriting control from her father, Sumner Redstone, she faced unusually defiant

257. *Cf.* Edwards & McGinley, *supra* note 93, at 1914 (describing how women must devote valuable work time and energy to overcoming bias).

258. Yoree Koh, *Silicon Valley Scandals Open Dialogue Between Male VCs and Female Founders*, WALL ST. J. (Aug. 24, 2017, 5:30 AM), https://www.wsj.com/articles/sexual-harassment-scandals-lead-to-tough-conversations-in-silicon-valley-1503567006 [https://perma.cc/RMK6-P263].

259. Fan, *supra* note 88, at 391; Edwards & McGinley, *supra* note 93, at 1903–04; Alon-Beck et al., *supra* note 168, at 465–67; Afra Afsharipour, *Bias, Identity and M&A*, 2020 WIS. L. REV. 471, 482–85 (2020).

260. *See In re* CBS Corp. S'holder Class Action & Deriv. Litig., 2021 WL 268779, at *1–4, *7, *9, *17 (Del. Ch. Feb. 4, 2021); *In re* Viacom, Inc. S'holders Litig., 2020 WL 7711128, at *2, *4 (Del. Ch. Dec. 30, 2020).

boards of both companies. The Viacom board, for example, issued a public letter warning her against interfering with board composition.[261] The CBS board, as previously described, went so far as to attempt to unilaterally wrest away her control. If we contemplate an alternative universe where the Viacom and CBS boards accepted Redstone's authority, it is possible that the relationship between Redstone and both boards would have been more harmonious and would not have prompted such an extreme defensive reaction from Redstone herself. As a result, the public stockholders of both companies might have been better protected.

Continuing in this vein, Vice Chancellor Slights—relying, for the purposes of a motion to dismiss, on allegations made by Viacom and CBS stockholders—contrasted Shari Redstone's relationship with the CBS and Viacom boards with the relationship her father had allegedly cultivated, highlighting that Sumner Redstone was "dedicated to independent corporate governance" and had "self-disabled" himself from "taint[ing]" the boards, while Shari Redstone would "stop at nothing to achieve her personal ambitions."[262] But not three years earlier, a different Chancery judge had concluded that the CBS board members appeared to have paid Sumner Redstone millions of dollars in compensation wholly untethered from any services he actually performed for the company, potentially risking personal liability for wasting corporate assets in the process.[263] Meanwhile, prior to Shari Redstone's takeover, the Viacom board included members with decades-long ties to Sumner Redstone,[264] and the board had

261. *See* Viacom Inc., Current Report (Form 8-K) (May 30, 2016), https://www.sec.gov/Archives/edgar/data/1339947/000133994716000077/may308-k.htm [https://perma.cc/7ZXZ-JPX9]; *see id.* at Exhibit 99, https://www.sec.gov/Archives/edgar/data/1339947/000133994716000077/may30.htm [https://perma.cc/4ZGE-NZLJ]; *see also* David Folkenflik, *In Viacom Shakeup, Sumner Redstone Replaces 5 Board Members*, NPR (June 16, 2016, 4:33 PM), https://www.npr.org/2016/06/16/482362976/in-viacom-shakeup-sumner-redstone-replaces-5-board-members [https://perma.cc/CDF9-ZY5C] ("What you have here is a corporation who's [sic] upper management and currently elected board is at open war with the family that ultimately controls the fate of this company."). Though the letter was not specifically addressed to Shari Redstone, the Viacom board was, at the time, alleging that Sumner was functionally incapacitated and being manipulated by Shari. *See* Georg Szalai & Paul Bond, *Sumner Redstone Fires Most of Viacom Board*, HOLLYWOOD REP. (June 16, 2016, 12:25 PM), https://www.hollywoodreporter.com/news/sumner-redstone-fires-viacom-board-897851 [https://perma.cc/V48L-8WY4].

262. *In re* CBS Corp., 2021 WL 268779, at *4, *38.

263. Feuer *ex rel.* CBS Corp. v. Redstone, 2018 WL 1870074, at *1, *17 (Del. Ch. Apr. 19, 2018).

264. *See* Jenna Greene, *He Was Sumner Redstone's Lawyer for 50 Years—Now He's Suing Him*, LAW: AM. LAW. LITIG. DAILY (June 6, 2016), https://www.law.com/litigationdail

been criticized by proxy advisors for approving excessive compensation[265] and misidentifying at least one member as "independent" who in fact was beholden to Sumner.[266] In other words, Sumner Redstone's commitment to "independence" may very well have been predicated on his confidence in both boards' quiescence—a confidence that Shari Redstone did not enjoy.[267] In this respect, the Redstone dispute echoes the situation in TransPerfect, where, in the course of Elizabeth Elting's clashes with Philip Shawe, Elting blocked certain acquisitions that might otherwise have been favorable to the company. The Court of Chancery concluded that Elting may have violated her fiduciary duties but that her actions were nonetheless "understandable," given her legitimate distrust of Shawe and her unwillingness to increase her investment with him.[268] And, of course, the Delaware courts ultimately concluded that the animosity between Elting and Shawe threatened "irreparable harm" to the company.[269]

---

y/almID/1202759434485/He-Was-Sumner-Redstones-Lawyer-for-50-YearsNow-Hes-Suing-Him-/ [https://perma.cc/5WUR-7BZZ]; Ezequiel Minaya, *Viacom Names Salerno, Close to Redstone, as Lead Independent Director*, WALL ST. J. (Mar. 16, 2016, 5:45 PM), https://www.wsj.com/articles/viacom-names-salerno-close-to-redstone-as-lead-independent-director-1458158415 [https://perma.cc/5HRV-Y8BH]; Emily Steel, *Redstone Moves to Replace Five Viacom Directors, Escalating Battle*, N.Y. TIMES (June 17, 2016), https://www.nytimes.com/2016/06/17/business/media/five-viacom-directors-are-replaced-in-escalation-of-redstone-battle.html [https://perma.cc/Y6UY-TWG8]. Philippe Dauman, at the time the Viacom CEO and a Viacom board member, has been described in the press as, alternately, Sumner Redstone's "surrogate son," "crony," and "consigliere." James B. Stewart, *How Philippe Dauman Lost the Battle for Viacom*, N.Y. TIMES (Aug. 25, 2016), https://www.nytimes.com/2016/08/26/business/how-philippe-dauman-lost-the-battle-for-viacom.html [https://perma.cc/Q5SN-MF3Q]; Michael Wolff, *Michael Wolff on Shari Redstone: Yes, She Does Have a Plan for Viacom*, HOLLYWOOD REP. (Jan. 11, 2017), https://www.hollywoodreporter.com/features/michael-wolff-shari-redstone-yes-she-does-have-a-plan-viacom-963240 [https://perma.cc/K5H2-XXD6]; Geoffrey Smith & Alan Murray, *CEO Daily: Monday, June 20*, FORTUNE (June 20, 2016, 6:13 AM), https://fortune.com/2016/06/20/ceo-daily-monday-june-20/ [https://perma.cc/TFZ5-6NDD]. Dauman reportedly was responsible for selecting many of the other Viacom board members. *See* Stewart, *supra*.

265. Joann S. Lublin, *Proxy Adviser ISS Opposes Re-Election of Six Viacom Directors*, WALL ST. J. (Feb. 19, 2016, 6:35 PM), https://www.wsj.com/articles/proxy-adviser-iss-opposes-re-election-of-six-viacom-directors-1455916523 [https://perma.cc/J28B-WSBT].

266. Kim Masters, *Viacom CEO Dauman's $54M Payday? Meet the Five Board Members Who Signed Off on It*, HOLLYWOOD REP. (Feb. 3, 2016), https://www.hollywoodreporter.com/news/viacom-ceo-daumans-54m-payday-861538 [https://perma.cc/87TU-J5SJ].

267. During his tenure as the head of Viacom and CBS, Redstone was hardly known for his tolerance for dissent. *See* Michael A. Hiltzik, *Company Town: Creating a Media Giant*, L.A. TIMES (Sept. 8, 1999, 12:00 AM), https://www.latimes.com/archives/la-xpm-1999-sep-08-fi-7806-story.html [https://perma.cc/BZ2Y-WZKH] (quoting Sumner Redstone as declaring "I'm in control!" and that "Viacom is me!" prior to the original CBS/Viacom merger).

268. *In re* Shawe & Elting LLC, C.A. Nos. 9661, 9686, 9700, 10499, 2015 WL 4874733, at *27–28 (Del. Ch. Aug. 13, 2015).

269. *Id.* at *28–30.

What all this suggests is that while corporate law may not be the appropriate site to resolve every category of irrational personal dispute, certain types of bias not only disadvantage women individually but—because they are likely to be harbored not just by a single person but by an entire board, or a group of shareholders, and/or by employees aligned them—also predictably and systematically distort managerial relationships, to the detriment of the business as a whole. Thus, these kinds of biases are a legitimate subject of legal concern.

On a broader level, when women are excluded from the ability to participate in business or profit from it, they are excluded from this country's centers of economic and social power. That affects them not only as individuals but also generally impedes women's ability to have an influence in American society. For example, the marginalization of women within venture capital firms—similar to what Sarah Bradley alleged—not only affects them personally but also may affect the kinds of businesses and founders that such firms are willing to fund.[270] Women may be denied the opportunity to join the ranks of business leaders who hold enormous influence over social, political, and economic life. Products and services that would benefit women consumers may be starved of resources, which not only harms the affected businesses but also harms women who would otherwise have their needs served.[271] And to the extent women business leaders run firms differently from men—for example, there is some evidence that women are more

270. Fan, *supra* note 88, at 360–62; Edwards & McGinley, *supra* note 93, at 1903; Valentina Zarya, *Venture Capital's Funding Gender Gap Is Actually Getting Worse*, FORTUNE (Mar. 13, 2017), https://fortune.com/2017/03/13/female-founders-venture-capital/ [https://perma.cc/V2SD-54LK]. One study concluded that when VC firms began adding more women as a result of allegations of sexism in the industry, the new women venture capitalists were more willing to fund women-backed firms. *See* Sophie Calder-Wang, Paul Gompers & Patrick Sweeney, *Venture Capital's "Me Too" Moment* 16, 22, 25 (Nat'l Bureau of Econ. Rsch. Working Paper No. 28679, 2021), http://www.nber.org/papers/w28679 [https://perma.cc/N5UX-JSMC]. Thus, the fact that venture capital decision-makers remain overwhelmingly male likely influences how capital is allocated. *See* Nitasha Tiku, *Gen Z Women Are Breaking into the Venture-Capital Boys Club*, WASH. POST (Apr. 23, 2021, 9:00 AM), https://www.washingtonpost.com/technology/2021/04/23/gen-z-venture-capital/ [https://perma.cc/GJ64-WUFF]; Paul A. Gompers & Sophie Calder-Wang, *Diversity in Innovation* 10–11 (Nat'l Bureau of Econ. Rsch. Working Paper No. 23082, 2017), https://www.nber.org/papers/w23082 [https://perma.cc/Q66S-D86D].

271. Edwards & McGinley, *supra* note 93, at 1903; Briana Morgaine, *Venture Capital Funding and the Sexism You Can't Quite Prove*, BPLANS, https://articles.bplans.com/venture-capital-funding-and-the-sexism-you-cant-quite-prove/ [https://perma.cc/7XA4-EEE8] (last visited Oct. 1, 2021).

concerned about compliance and risk mitigation[272]—excluding them from these positions may have broad repercussions for business conduct and the externalities that businesses inflict on the communities with which they interact. Most obviously, gendered power imbalances within firms may create unhealthy corporate cultures where women are systematically exploited and harassed all the way down.[273]

Finally, even if many of the harms from capital discrimination can be addressed within existing legal frameworks, there is value in the expressive function that a specific prohibition on discrimination would provide. Arming women with legal entitlements they can enforce in court would reveal more information about the prevalence of capital discrimination and allow the public to gauge its contours and effects.[274] By contrast, courts' failure to discuss (or even acknowledge) capital discrimination sends its own kind of message. Corporate law in particular has been described as operating through the transmission of norms, whereby judges use their opinions to communicate expectations for business conduct in terms of morality plays, even in the absence of formal legal sanction.[275]

---

272. *See, e.g.*, Philip Yang, Jan Riepe, Katharina Moser, Kerstin Pull & Siri Terjesen, *Women Directors, Firm Performance, and Firm Risk: A Causal Perspective*, LEADERSHIP Q., Oct. 2019, at 1, 11 (finding that firms with mandated gender-diverse boards are less risky); Binay K. Adhikari, Anup Agrawal & James Malm, *Do Women Managers Keep Firms Out of Trouble? Evidence from Corporate Litigation and Policies*, 67 J. ACCT. & ECON. 202, 203 (2019) (finding that firms with women at high levels of management face fewer lawsuits); *cf.* Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic & C.K. Mertz, *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 479 (2007) (discussing empirical findings that White men fear risks less than other groups); Kimberly A. Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the United States*, 63 WM. & MARY L. REV. 497, 506–07 (2021). Brummer & Strine, *supra* note 172, at 35 n.118; Corinne Post, Boris Lokshin & Christophe Boone, *Research: Adding Women to the C-Suite Changes How Companies Think*, HARV. BUS. REV. (Apr. 6, 2021), https://hbr.org/amp/2021/04/research-adding-women-to-the-c-suite-changes-how-companies-think [https://perma.cc/TEZ9-K8NM]; June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and The Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1127 (2019) (arguing that the same cultures that exclude women also select for lawbreaking by men); Jill E. Fisch & Steven Davidoff Solomon, Centros, *California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 507–08 (2019).

273. Miazad, *supra* note 251, at 1926–30; *see also* Fisch & Solomon, *supra* note 272, at 508–09 (describing empirical findings that female board representation is associated with greater gender equality throughout the organization).

274. *See, e.g.*, Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1201–02 (2016); Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the "Genius of American Corporate Law,"* 63 EMORY L.J. 1383, 1495 (2014).

275. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1063 (1997).

Students, and young attorneys, learn what business law considers important—and what it considers beneath notice—by studying these cases, and they pass those lessons on to their clients.[276] *Stuparich v. Harbor Furniture*, *Horne v. Aune*, and *Shawe v. Elting* have all been included in popular law school casebooks,[277] and it is, frankly, *creepy*—if not outright exclusionary to women entering the field[278]—for judges to describe facts that suggest sex discrimination but never identify it by name or suggest that it is worthy of condemnation. When discrimination goes unremarked, the silence itself conveys unremarkableness.[279]

In sum, though women investors as a class may not be the most vulnerable to gender discrimination, the harms they endure are real, and society would benefit if those harms were recognized, redressed, and deterred.

B. Revising Title VII

One simple reform would be to expand the boundaries of Title VII coverage, either by legislation or judicial interpretation. The existing distinctions between "employer" and "employee" have been subject to a barrage of scholarly criticism, on everything from textualist[280] to pragmatic grounds.[281] As Ann McGinley, among others, has argued, the current distinctions place too much emphasis on formal power without recognizing how power is

276. *Id.* ("[T]he core of [Delaware's] body of law resides in the firms and in the advice given to clients in confidence.").

277. STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS 647 (11th ed. 2022) (*Stuparich v. Harbor Furniture*); THOMAS LEE HAZEN, JERRY W. MARKHAM, & JOHN F. COYLE, CORPORATIONS AND OTHER BUSINESS ENTERPRISES: CASES AND MATERIALS 67–71 (4th ed. 2016) (*Horne v. Aune*); JAMES D. COX & MELVIN ARON EISENBERG, BUSINESS ORGANIZATIONS: CASES AND MATERIALS xvii, xlvi, 634 (12th ed. 2019) (*Shawe v. Elting*). The Bainbridge casebook includes a note to students asking them to think about the relevance of the physical violence in *Stuparich*. *See* BAINBRIDGE, *supra*, at 653. The Hazen/Markham/Coyle book, which included *Horne* until the 2021 Fifth edition, edited out the details of the altercation, while including a note inviting students to contemplate whether Aune was driven by purely economic motives. HAZEN ET AL., *supra*, at 71. The Cox/Eisenberg book contains no notes on the Shawe/Elting relationship at all. COX & EISENBERG, *supra*, at 634–41.

278. Women are not only underrepresented in business, but they are underrepresented as M&A professors and law students. *See* Afsharipour, *supra* note 87, at 417–18.

279. *See* Baynes, *supra* note 245, at 810 (recognizing the "psychic benefit" of having corporate law principles include a nondiscrimination norm).

280. *See* Menetrez, *supra* note 100, at 143–46; Thomas F. Cochrane, Note, *Partners Are Individuals: Applying Title VII to Female Partners in Large Law Firms*, 65 UCLA L. REV. 488, 505–06 (2018).

281. Menetrez, *supra* note 100, at 161–62; Johnson, *supra* note 13, at 1098–99.

actually exercised within a business, including the social dynamics that may tie women to particular firms but make it difficult for them to thrive.[282]

But however beneficial such changes would be, they would not entirely resolve the problem. Simply as a formal matter, Title VII only provides remedies against the employing entity—not individuals within a firm.[283] This matters because damages extracted from the *firm* function as nothing more than a forced dividend to women *as investors*, and for women with large stakes, they may not provide much benefit at all while inflicting little in the way of actual punishment on the wrongdoers.[284]

More conceptually, employment discrimination does not capture the variety of circumstances and means by which women may experience discrimination as owners. For example, Shawe did not so much interfere with Elting's *job* as with her ability to manage her *assets* as she saw fit. Walta and Bradley were forcibly divested of ownership stakes, and the equity interests of the plaintiffs in *Fischer v. Fischer* and *Jones v. McDonald* were rendered worthless by other shareholders.

C. Revising Family Law

As in the employment realm, there have been multiple proposals to improve women's positions within the boundaries of family law. Some scholars have recommended that courts more easily recognize how domestic services contribute to family wealth even in the context of nonmarital relationships.[285] Alternatively, if courts' assumptions about the shape of domestic relationships influence how they value (or fail to value) women's business contributions,[286] legal standards could be modified to formally recognize the foundational role that unpaid market labor by domestic partners plays in generating household assets (beyond, for example, the minimum wage value of the services the nonpropertied partner may provide).[287] More radical proposals might institute legal control over parents' testamentary choices by

282. McGinley, *supra* note 231, at 50–51, 54–56.

283. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588–89 (9th Cir. 1993); Williams v. Banning, 72 F.3d 552, 553–55 (7th Cir. 1995).

284. Additionally, Title VII does not cover smaller firms, and it caps damages based on the number of employees. *See* Miller, *supra* note 211, at 130–33.

285. Joslin, *supra* note 122, at 982–86.

286. Antognini, *supra* note 121, at 41–43.

287. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2176–79 (2019); Philipps, *supra* note 129, at 102.

guaranteeing certain divisions of wealth—and control over assets—among sons and daughters.[288] The cumulative effect of these modifications would be to soften the divisions between the legal treatment of the market and the familial, allowing for greater legal recognition of a spectrum of relationships.[289]

But, just as with Title VII, however salutary such changes might be (and the appropriate legal treatment of family relationships as economic units is a matter vigorously debated among family and feminist scholars)[290]—for our purposes, the relevant point is that whatever the correct legal rule, it would be incomplete at best to address the whole of the problem of discrimination against women as firm principals. Even if the law treated the market role of domestic relationships with greater dignity, it would not address the myriad scenarios that do not involve family or domestic relationships, however defined.

D. Revising Business Law

The most natural option for addressing capital discrimination—and the one that would most directly address the *expressive* concern about the law's failure to recognize and address an issue that pervades many business disputes—would be to locate a nondiscrimination obligation within existing standards of conduct for actors within a firm.

Though fiduciary duties currently do not address discrimination, it does not have to be this way. In Delaware, for example, intentional violations of law are per se violations of the duty of loyalty, even if the goal is to benefit the corporation by increasing its profits.[291] A similar rule could be adopted for sex discrimination. Courts or legislatures could explicitly recognize that by discriminating with respect to the "terms, conditions, or privileges" of an investment[292]—including ownership rights, rights to participate in the business, and economic rights—on the basis

288. *Cf.* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2221–22, 2233–38 (2011). To the extent inheriting sons freeze out their siblings in violation of the testator's wishes, an enhanced notion of fiduciary duty may also help alleviate the disparate effects on women. *Cf.* Tait, *supra* note 118, at 54–55.

289. Philipps, *supra* note 129, at 99 (describing how feminist legal scholarship has challenged the market/family dichotomy).

290. Joslin, *supra* note 122, at 985–86; Philipps, *supra* note 129, at 107; Antognini, *supra* note 287, at 2201–02.

291. *See supra* Section III.C.

292. *Cf.* 42 U.S.C. § 2000e-2 (prohibiting such discrimination in employment).

of sex or gender, corporate actors violate their fiduciary duties.[293] Such a rule would constitute a declaration by the state that the rights of a stockholder include the right to be free of invidious discrimination, and that excluding women from participation in the firm deprives the business of the value provided by women's voices.

There might be some question as to what precisely counts as a loyalty violation versus a care violation in this context. That is, consciously discriminating based on sex would likely be an intentional and thus disloyal act, but unconscious discrimination might not be. In the Title VII literature, there has long been a debate about how—and whether—to distinguish between intentional acts of discrimination and the role that unconscious bias plays in employer decision-making.[294] Drawing that line is beyond the scope of this Article, but the relevant point is that a line could be drawn (and need not mirror federal law), with some unintentional, but biased, actions treated not as loyalty violations but as care violations.[295]

A softer justification for a similar legal rule would rest on the concept of ultra vires. The principle that illegal actions are per se disloyal is controversial; many have argued that policing corporations for legal compliance is beyond the appropriate boundaries of corporate law and that so long as corporate managers are seeking to generate stockholder wealth, even illegal actions should not be a matter of *fiduciary* concern.[296] The rejoinder is to invoke the concept of ultra vires action, which refers to the fact that corporations, as creations of the state, are subject to state-imposed limits on the arenas in which they are authorized to act. Though ultra vires plays little role in corporate doctrine today,[297] it may accurately describe the continuing corporate prohibition on illegal action: as then-Vice Chancellor Strine once

293. *Cf.* Baynes, *supra* note 245, at 810, 818, 824, 830–32 (2003) (arguing that the duty of loyalty among partners should include a racial nondiscrimination obligation).

294. *See* Bornstein, *supra* note 164, at 1070–71, 1077–78, 1104–05; Katie Eyer, *The But-For Theory of Antidiscrimination Law*, 107 VA. L. REV. 1621, 1631–37, 1670–72 (2021).

295. *Cf.* Baynes, *supra* note 245, at 832–33 (arguing that fiduciary approaches to law firm relationships can prohibit racial discrimination without mirroring federal definitions).

296. *See, e.g.*, Charles R. Korsmo, *Illegality and the Business Judgment Rule*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 98, 100–01 (Sean Griffith et al. eds., 2018); Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 750, 752–53 (2019).

297. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 58 (2002).

wrote, "Delaware law does not charter law breakers."[298] Significantly, there is some precedent for treating sex discrimination specifically as ultra vires: in *Cross v. Midtown Club*, a Connecticut court held that a private club exceeded its authorized powers by refusing to admit women as members.[299] Thus, at least doctrinally, courts could reach the same result by holding that actions aimed at undermining women investors can never have an appropriate business purpose and are categorically prohibited.

Ordinarily, of course, decision-making by corporate fiduciaries is protected by the business judgment rule, which is a presumption that directors "act[] on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[300] Significantly, nothing in the business judgment rule requires a presumption that corporate fiduciaries were *not* influenced by biased thinking—indeed, one might argue that it would be inappropriate to presume a lack of bias, given what we know about the pervasiveness of unconscious discrimination.[301] After all, Delaware developed a heightened form of scrutiny for "recurring and recognizable situations" in which "decisional dynamics"[302] raise the "'omnipresent specter' that even nominally disinterested and independent directors may be influenced by . . . their own interests";[303] a similar heightened scrutiny might be appropriate for situations that raise the "omnipresent specter" of invidious discrimination. That said, assuming that, in most cases, the business judgment rule would operate as an initial screen to protect corporate fiduciaries from a finding of wrongdoing, the efficacy of a nondiscrimination duty would depend, in part, on the evidence courts deemed sufficient to rebut a presumption that they acted without bias.

Burdens of proof are discussed in more detail below,[304] but in the employment context, one mechanism by which a plaintiff may create a prima facie inference of discrimination is by use of a

298. *In re* Massey Energy Co., C.A. No. 5430–VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011); *see also* Kent Greenfield, *Ultra Vires Lives!: A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1316–17 (2001).

299. Cross v. Midtown Club, Inc., 365 A.2d 1227, 1230–31 (Conn. Super. Ct. 1976).

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

301. Bornstein, *supra* note 164, at 1100–02.

302. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013).

303. Chen v. Howard-Anderson, 87 A.3d 648, 678 (Del. Ch. 2014) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

304. *See infra* Section V.C.

comparator, demonstrating that she was passed over for a position in favor of a similarly situated man.[305] That framework may be incompatible with the business judgment rule, which provides that (with limited exceptions) a breach of duty cannot be demonstrated solely by reference to the content of the decision itself.[306] What courts should be willing to entertain, however, is evidence of a pattern of decision-making (whether or not in combination with statements or behavior by the fiduciary indicating biased motives or subscription to stereotypes), so that while a single action may not be sufficient to rebut the business judgment rule, a collective series of actions may be.[307] Meanwhile, just as in other contexts,[308] a particularly egregious decision may, standing alone, be deemed evidence of a fiduciary breach.

These principles would permit an avenue for explicit judicial recognition of how capital discrimination harms women and might deter the evasive tactics currently deployed by courts to avoid confronting the problem head on. Consider the *Stuparich* case. Though the court acknowledged the possibility that the daughters had been physically intimidated out of participating in corporate decision-making, the court did not recognize that as a potential breach of fiduciary duty by the brother.[309] Had the court been forced to frame the problem in terms of gender-based intimidation and exclusion, the case may have come out differently. And if Shawe's stalking and undermining of Elting's authority had been identified as gender-based harassment, his breach of fiduciary duty to the TransPerfect corporation might have persuaded the court to impose a noncompetition order, allowing for a sales process that would have been more favorable to Elting.[310]

---

305. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Bornstein, *supra* note 85, at 944.

306. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–68 (Del. Ch.1996).

307. *Cf.* Sarah Haan, *Rewritten* White v. Panic, in Rewritten Corporate Law Opinions (forthcoming) (on file with the Author) (arguing that a pattern of conduct gives rise to an inference of bad faith).

308. Pers. Touch Holding Corp. v. Glaubach, C.A. No. 11199–CB, 2019 WL 937180, at *1, *27 (Del. Ch. Feb. 25, 2019); Feuer *ex rel.* CBS Corp. v. Redstone, C.A. No. 12575–CB, 2018 WL 1870074, at *16 (Del. Ch. Apr. 19, 2018).

309. It is unfortunately not uncommon to have ugly confrontations—and even physical violence—in the context of family corporations, *see, e.g.*, Sipko v. Koger, 70 A.3d 512, 514, 516, 520–21 (N.J. 2013), and it is arguable that all such violence should be recognized as a breach of duty. For the purposes of this Article, however, the relevant question is whether the violence in *Stuparich* was aimed at intimidating women board members, specifically, and should have been recognized as such.

310. *See In re* TransPerfect Glob., Inc., Civil Action Nos. 9700, 10449, 2016 WL 3477217, at *4 (Del. Ch. June 21, 2016) ("[I]t would not be appropriate to impose

One can also speculate how a nondiscrimination duty may have played out in the Redstone matter. Redstone sued CBS board members for a declaratory judgment that, among other things, they violated their duties of loyalty and care by attempting to undermine her franchise "absent extreme and truly extraordinary circumstances and compelling justification."[311] The matter settled before any determination could be reached, but with respect to this particular claim, it is not clear who would have prevailed under current standards. Courts have suggested that boards may dilute the power of an abusive controller,[312] and even if the CBS board's actions were reviewed under the heightened scrutiny reserved for measures that "touch upon issues of control,"[313] that test would only have required the board to demonstrate its own good faith belief that Redstone represented a danger to the corporation, and that the board's actions fell within a range of reasonable responses.[314] Such an inquiry is designed to root out conflicts of interest, not how sexism may have tainted the board's assessment of the threat that Redstone posed.[315] The fact that the dilutive issuance was sought by an independent special committee of a majority-independent board,[316] and would not have entrenched board members but instead would have distributed voting power

non-competition or non-solicitation restrictions on a selling stockholder as a condition of the sale of the Company absent evidence of wrongdoing."). The Chancellor did not clarify whether he was only willing to impose a noncompetition order as a sanction for wrongdoing in connection with the sales process, or whether he would have entertained such an order as a sanction for fiduciary wrongdoing generally. *See id.* (describing precedent involving a fiduciary who intentionally undermined a sale). However, his discussion of the importance of selling the company as it was—and not to add contractual protections the parties had not previously bargained for—suggests that had he concluded Shawe himself damaged Elting's interests in violation of preexisting duties, he would have imposed such an order. *See id.*

311. Defendants' Answer to Verified Amended Complaint of National Amusements, Inc. et al., *supra* note 70, ¶ 154.

312. Klaassen v. Allegro Dev. Corp., No. 8626–VCL, 2013 WL 5967028, at *11 (Del. Ch. 2013) ("The board's fiduciary duty of loyalty compels the directors to act in the best interests of the entity and the stockholders as a whole, and a board acting loyally may take action to oppose, constrain, or even dilute a large or controlling stockholder."); Mendel v. Carroll, 651 A.2d 297, 304 (Del. Ch. 1994).

313. Gilbert v. El Paso Co., 575 A.2d 1131, 1144 (Del. 1990).

314. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373, 1386 (Del. 1995); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 807–11 (Del. Ch. 2007).

315. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 43 (Del. Ch. 2013). Redstone did allege that the board members were financially conflicted because they too would receive shares in the proposed issuance, but that (relatively weak) claim was not the focus of her allegations. Defendants' Answer to Verified Amended Complaint of National Amusements, Inc. et al., *supra* note 70, ¶ 171.

316. Amended Verified Complaint of CBS Corp. et al., *supra* note 80, ¶¶ 7, 11, 75. Approval by independent directors "materially enhance[s]" proof of good faith. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

in accord with the economic interests of all shareholders,[317] would have weighed heavily in the board's favor. Though a court may have held that any attempt by the CBS board to inhibit Redstone's voting power was per se disloyal absent compelling circumstances,[318] the cases where that standard has been invoked involved far more entrenching conduct than the CBS board's;[319] thus, the board's (attempted) dilutive issuance occupied something of a legal grey area with respect to its fiduciary obligations.

But suppose Redstone had been able to argue that the board, consciously or unconsciously, had acted out of gender bias. Granted, there are pragmatic reasons why Redstone may not have wanted to publicly advance such a claim, but if a doctrine existed recognizing the illegitimacy of gender bias as a motive, Redstone might not only have had a stronger *legal* claim but the court would also have been able to forthrightly examine the true nature of the dispute. An ability to place gender bias at the forefront of a discussion of the board's duties would have permitted a close, and perhaps more realistic, look at the dynamics of the board's

317. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1382–83 (Del. 1995) (approving measures in part because board remained vulnerable to removal in a shareholder vote); *see also* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003). Significantly, in a separate case involving Redstone's allegedly abusive conduct, a Chancery court expressed concern over the "significant governance risks" posed by the dual-class share structure that facilitated her control over Viacom and CBS. *In re* Viacom Inc. S'holders Litig., C.A. No. 2019–0948–JRS, 2020 WL 7711128, at *15 n.183 (Del. Ch. Dec. 30, 2020) (quoting Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1466 (2019)), which might suggest that a court would have greeted the CBS board's attempt to create greater alignment between voting control and economic interest with some sympathy. *Cf.* Condec Corp. v. Lunkenheimer Co, 230 A.2d 769, 777 (Del. Ch. 1967) (invalidating a defensive share issuance that would diminish a particular shareholder's "right to a proportionate voice and influence in corporate affairs"). *But cf.* WNH Invs., LLC v. Batzel, Civ. A. No. 13931, 1995 WL 262248, at *6–7 (Del. Ch. Apr. 28, 1995) (invalidating defensive stock issuance because "before the dilutive issuance WNH was virtually assured of success without a proxy contest, but afterwards would face an expensive proxy contest with a doubtful outcome").

318. Coster v. UIP Cos., 255 A.3d 952, 962 (Del. 2021); Blasius Indus. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988). There is vigorous commentary arguing that the "compelling interest" formulation does not represent a separate test but is instead a specific application of the ordinary heightened scrutiny applied to defensive measures. *See, e.g.*, *Mercier*, 929 A.2d at 809; Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 285–86 (Del. Ch. 1989); James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 365–66 (2018). Recently, the Delaware Supreme Court suggested the matter was an open question. *Coster*, 255 A.3d at 963 n.66.

319. In some, directors interfered with the mechanics of the shareholder voting process in a manner that made it impossible to dislodge them, *see Shamrock Holdings*, 559 A.2d at 286; *MM Cos.*, 813 A.2d at 1130–31, and in others, dilutive share issuances were intentionally placed with friendly holders to ensure directors' continuance in office, *e.g.*, *Coster*, 255 A.3d at 953, 959; Johnston v. Pedersen, 28 A.3d 1079, 1088 (Del. Ch. 2011); *WNH Invs., LLC*, 1995 WL 262248, at *7–8.

decision-making process. More importantly, looking to a point in time before the dispute reached the Delaware Court of Chancery, suppose it had already been established under Delaware law that board members have a fiduciary duty of nondiscrimination and the CBS board had been so advised by counsel before they acted. That conversation alone—bringing considerations of bias and gender into the boardroom—may have caused the board to be more thoughtful about its actions and its motives, and even to reconsider its plan entirely.

A recognition that discriminatory motives represent a breach of fiduciary duty might also provide a means to address the correlative problem of discrimination against female board members, as allegedly occurred to Carolyn Chin.[320] Such a duty of *nondiscrimination* might be a less invasive, more familiar mechanism for dealing with a lack of female representation on boards than current efforts at mandating that board seats be allocated to women,[321] or creating affirmative duties to diversify.[322]

Should these issues be litigated in the context of shareholder oppression specifically, courts could follow the *Straka* decision and not only recognize invidious discrimination as a violation of shareholders' reasonable expectations but also make clear that on this subject, expectations are not part of the usual fact-specific inquiry into the parties' actual bargains[323] but instead are imputed to shareholders as a matter of judicial fiat.[324] In other areas of law, certain reasonable expectations are treated more as legal entitlements than as descriptions of actual states of mind;[325]

320. *See supra* Section III.A.

321. *See supra* Sections III.A, C.

322. Testy, *supra* note 88, at 1100–01; Alon-Beck et al., *supra* note 168, at 458; Houser & Williams, *supra* note 272, at 55–56.

323. This was the doctrinal move in *Straka*. *See* Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, 92 N.Y.S.3d 567, 573 (Sup. Ct. 2019) ("[A]ny shareholder of any corporation, should know that a female shareholder reasonably expects to be treated with equal dignity and respect as male shareholders . . . .").

324. Douglas Moll argues that there are certain "general" expectations, such as a proportionate claim on corporate earnings, that are common to all investors, and "specific" expectations that are idiosyncratic. In his view, both types should be protected under the shareholder oppression doctrine, but only the latter need be specifically proved. *See Reasonable Expectations*, *supra* note 9, at 764–67. The proposal here is comparable but not quite identical: in Moll's view, "general expectations" *really are* the in-fact expectations of the shareholders; when it comes to discrimination, by contrast, it is highly unlikely that all (or perhaps even most) women in fact expect to be free of discrimination in their business arrangements.

325. See Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on* Amgen *and the Second Coming of* Halliburton, 57 ARIZ. L. REV. 37, 49 (2015) (securities

oppression doctrine could approach discrimination in the same way.

Yet while a formal recognition of nondiscrimination as an aspect of fiduciary duty is a promising path, it would need to be crafted with an eye toward how it would work within existing business doctrines. For example, absent special rules for close corporations, only controlling shareholders, corporate directors, and corporate officers owe fiduciary duties, and while minority shareholders might conspire to form a controlling block, determining when that has occurred is a complex inquiry.[326] A group of minority shareholders, owing no duties to the corporation or their fellow shareholders, might simply refuse to vote a woman onto the board (fellow shareholder or no), or refuse to remove a board member whose decisions disadvantage women investors. In Straka's case, for example, viewed through an ordinary fiduciary lens, her co-owners' failures to act with respect to Urbanek's behavior might not have violated any fiduciary duties.

There are additional hurdles that would come into play if a nondiscrimination norm were located within managerial fiduciary duties. To understand why, it is important to recall that what has been articulated here are two separate notions of harm. The first is to the entity: capital discrimination robs businesses of the value of women's participation. The second is to the individual woman: capital discrimination deprives women of the full value of, and dominion over, their investment. Certain types of actions described here would almost certainly be harms to only one or the other. For example, actions taken to freeze out a passive woman investor would be hard to characterize as entity-level harms, while discrimination against nonshareholding women directors would rarely, if ever, impact individual shareholders' rights to benefit from and control their investments.[327] Depriving women investors of the ability to participate in the company—through voting, employment, and so forth—would likely constitute both kinds of harm. Distinguishing between the two is important because it has implications for how nondiscrimination duties would be enforced.

---

fraud claims); Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 114–15, 131–32 (2015) (Fourth Amendment doctrine).

326. Ann M. Lipton, *After* Corwin*: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1997–2001 (2019).

327. Theoretically, though, in a corporation where shareholders have rights to place particular nominees on the board, a shareholder's control over his or her investment would be damaged if the board froze out the shareholder's preferred nominee on sex-based grounds.

Lawsuits to redress individual, or direct, harms are relatively easy to bring. They are subject to the ordinary rules of civil procedure, and damages would be paid directly to the affected stockholder.[328] Harms to the entity, however, may only be enforced through a derivative action, where a shareholder sues on behalf of the corporation.[329] When capital discrimination is treated as a corporate harm, presumably any shareholder (even ones not personally affected) could bring an action alleging a fiduciary breach. But derivative actions come with certain procedural barriers. First, the shareholder must continue to hold the shares throughout the litigation.[330] Thus, women who were forced out of the company would not be able to bring claims; women discriminated against in their role as directors would have no claim (in their director capacity) at all. Second, derivative plaintiffs must first demand that the board take action; only if the board is too conflicted to handle the matter will the shareholder be permitted to proceed.[331] In situations where a board has passively enabled discriminatory behavior by others, the demand requirement might function as a significant barrier to relief. Finally, in an action for damages (leaving aside issues of how they are to be calculated, discussed in section V.C, *infra*), payments would be made to the corporation, which may not be entirely satisfying in situations where a majority of shareholders are the ones at fault. In that case, derivative damages would simply be a form of pocket shifting, with the wrongdoers returning money to themselves.

But most of these barriers are surmountable within the confines of traditional business doctrine. For example, as stated above, some states relax direct/derivative distinctions in close corporations, and presumably those states would continue to do so if nondiscrimination was identified as a duty of corporate fiduciaries. In other situations, where appropriate, courts could order that derivative damages "flow-through" as direct payments to the shareholders who are not at fault, which is a rare remedy but has been employed when derivative damages would simply return wealth to wrongdoers.[332] Injunctive or declaratory relief

328. Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1036 (Del. 2004).

329. *Id.*

330. *Id.*

331. Sandys *ex rel.* Zynga Inc. v. Pincus, 152 A.3d 124, 126–28 (Del. 2016).

332. *See, e.g.*, Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R., 417 U.S. 703, 718 n.15 (1974); *In re* Mercury Interactive Corp. Derivative Litig., 487 F. Supp. 2d

would avoid the damages question entirely. And though minority shareholders might not owe duties as shareholders, if they also occupy board or officer positions, they could be held responsible for acts taken in those capacities.

Discrimination against women board members may be characterized as an entity-level harm, thus depriving the actual affected woman of the opportunity to vindicate her own rights to a board seat directly, but at least in private firms, the venture capitalists who provide startup funding typically seed the board with their own principals;[333] thus, granting women more rights (à la Bradley) within the venture capital firm itself will have the secondary effect of introducing more women onto portfolio company boards. And individual women who experience discrimination in their capacity as corporate directors are likely to hold at least a small amount of stock in the same firm, enabling them to spearhead a derivative action that could win them injunctive or nominal relief.

V. ADDITIONAL CONSIDERATIONS

A. Private Ordering and the Internal Affairs Doctrine

Adopting the above recommendations would necessarily come with questions about the mechanics of implementation, but these actually are part and parcel of a broader policy issue regarding how exactly capital discrimination should be policed.

Ordinarily, the internal rules governing business associations are decided by the state in which they are organized. This is known as the "internal affairs doctrine," and it addresses such matters as the nature of managers' fiduciary duties, permissible charter and bylaw terms, and shareholder voting and informational rights.[334] Under ordinary business law doctrine, then, if nondiscrimination is treated as a matter of fiduciary obligation, it is an internal affairs issue that may vary by the state of organization. That matters because fiduciary duties are waivable in different jurisdictions to various degrees. For example, corporations can include provisions in their charters that exculpate corporate

1132, 1137 (N.D. Cal. 2007); TEX. BUS. ORGS. CODE ANN. § 21.563 (authorizing direct payments in derivative actions involving close corporations); *see also In re* Freeport-McMoRan Copper & Gold Inc. Derivative Litig., No. 8145-VCN (Del. Ch.) (derivative settlement with a flow-through payment); *cf.* Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036, 1059–60 (9th Cir. 2015).

333. Fan, *supra* note 88, at 355, 363.

334. RESTATEMENT (SECOND) CONFLICT OF LAWS § 302 cmt. A (AM. L. INST. 1971).

directors, and sometimes even corporate officers, for damages payments associated with care violations,[335] which might eliminate liability for discriminatory acts that are not deemed to rise to the level of intentional. And as described above, in partnerships and LLCs, fiduciary duties may be entirely waivable. Thus, even if a state were to provide that a duty of nondiscrimination is *unwaivable*, founders could still evade the rule by organizing in a jurisdiction with different obligations.

The internal affairs rule may be traceable to certain historical visions of the corporation,[336] but in modern times, the usual justification is that it allows investors to select the set of rules that will govern their relationship.[337] When it comes to discrimination against women investors, however, the calculus might be different. Discrimination restricts women's choices in a way that it does not restrict men's, and the effects of capital discrimination are felt where the women reside, whether it comes in the form of reduced economic returns to those women or in the form of reduced employment opportunities. The upshot is that one might argue that capital discrimination should not be addressed through doctrines that ordinarily exist within the framework of internal affairs but instead should be imposed by the state with the greatest interest in the woman's well-being, likely the state where either she resides or where the company does business. It could even be addressed as a matter of a federal law that applies uniformly across the states.

That reasoning, however, elides the real issue: Whether a nondiscrimination duty should be an affirmative state-imposed obligation or treated as a matter of private ordering. The least *disruptive* thing in terms of ordinary business doctrine would be to simply read nondiscrimination into preexisting obligations and follow where they lead (i.e., corporate fiduciary duties are unwaivable, but damages liability for care violations may be waived, and sometimes fiduciary duties may be waived in

335. DEL. CODE ANN. tit. 8, § 102(b)(7); LA. STAT. ANN. § 12:1-832. The Model Business Corporation Act, for example, permits corporations to eliminate directors' personal liability for any actions other than intentional violations of criminal law, intentional infliction of harm on the corporation, transactions in which the director has a personal financial conflict, and unauthorized dividend payments. MODEL BUS. CORP. ACT. § 2.02(b)(4) (AM. BAR ASS'N 2016).

336. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 37 (2006).

337. Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 675 (2008).

alternative entities). But nondisruption is not *necessary* and should not be used to mask the real policy choices at stake.

For the same reason that Title VII obligations cannot be prospectively waived,[338] it would be a mistake to allow a nondiscrimination duty to be waived. In general, nondiscrimination prohibitions are not waivable because we assume that likely victims lack equal bargaining power, and because we recognize that combatting discrimination is a matter of general, not simply individual, concern.[339] In the case of women capital providers, they may, as a class, have greater ability to bargain for their interests than women employees, but that does not mean they have the same bargaining power as men—especially since women, and not men, are uniquely vulnerable to discrimination, and thus move through the world burdened by a risk that men do not have to bargain for protections against. But perhaps more importantly, gender discrimination impacts society as a whole; as described above, women's influence in business has implications that go well beyond the rights of the individual woman affected. For that reason, waiver of claims for intentional discrimination, at least, should not be permitted, even if that means limiting the ability of firm organizers to waive fiduciary duties in states where they might otherwise be able to do so. Similarly, if some types of discrimination are treated as care, rather than loyalty, violations, states should not allow firms to exculpate against damages liability for them.

No doubt, as a practical matter, getting all fifty states on board would be a challenging exercise. Coordination and inertia aside,[340] states may have differing levels of receptivity to the idea. For example, as described above, Delaware is particularly committed to a vision of the corporation as the site of economically rational activity and therefore may not be inclined to recognize irrational bias as a formal aspect of its doctrine. On the other hand, Delaware has already experienced something of an epiphany along these lines: not long ago, it had a very strict approach to assessing how personal relationships might influence directors' judgment in the context of conflict transactions, whereby directors would only be viewed as lacking independence when they

338. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

339. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 114–16 (1997); McGinley, *supra* note 231, at 47.

340. At least some of the collective action problems might be solved through amendments to existing model business codes.

had a direct monetary or familial relationship with a relevant party.[341] Presumably, this was because courts feared opening the floodgates to subjective judgments regarding degrees of social attachment. Yet in the last few years, Delaware has charted a new path,[342] recognizing friendships and professional networks as relationships that may taint a director's decision-making.[343] The lesson is that just as it has done with respect to independence, Delaware courts can recognize minimum standards of interpersonal conduct that—while not imposing Marquess of Queensberry rules—still identify some types of conduct as out of bounds.

Another barrier may be the competition for charters. States may be eager to attract charters not only from U.S. companies but also from foreign firms,[344] which may have founders that hail from parts of the world that have not committed to gender (or racial, religious, or sexual orientation) equality.[345] Still, however much these concerns may influence states' inclination to make a nondiscrimination norm explicit, as a matter of fairness, it is not unreasonable to expect firms seeking the benefits and protections of U.S. law to adhere to certain U.S. standards of conduct. Moreover, it is important to remember that the nondiscrimination duty proposed here would only be enforceable in the event of an actual dispute among members; to the extent a private firm includes only members who share a common understanding of the appropriate status of women (whatever that understanding may be), a nondiscrimination duty would pose no difficulty.

341. *E.g.*, Beam *ex rel.* Martha Stewart Living Omnimedia Inc. v. Stewart, 845 A.2d 1040, 1051–52 (Del. 2004).

342. Yaron Nili, *Successor CEOs*, 99 B.U. L. REV. 787, 800 (2019) (noting the change in Delaware courts' approach).

343. Del. Cnty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1022 (Del. 2015); Sandys *ex rel.* Zynga Inc. v. Pincus, 152 A.3d 124, 134 (Del. 2016); Marchand v. Barnhill, 212 A.3d 805, 820 (Del. 2019).

344. *See* William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1695–97, 1707–08 (2021) (describing how foreign firms are increasingly choosing certain international corporate law "havens" over Delaware).

345. Significantly, in the United States, even as large institutional investors and financial firms have declared their commitment to encouraging diverse boards, they have also modified those policies to accommodate country level norms and practices. *See* Ann M. Lipton, *ESG Investing ESG Investing, or, If You Can't Beat 'Em, Join 'Em, in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 141 (Elizabeth Pollman & Robert Thompson eds., 2021).

B. Initial Allocations

These changes, while beneficial, leave an obvious gap: Fiduciary duties are only owed among those who are already involved in a business relationship; there are no fiduciary duties owed to, or by, *potential* investors with respect to those who are already firm members.[346]

In a limited way, Title VII fills some of that space, by requiring admittance into a firm when that status is a privilege of employment. Law firm associates, for example, are employees, and typically consideration for partnership status is a term of their employment arrangement. As a result, Title VII prohibits discrimination against associates by refusing to admit them to the partnership on the basis of sex.[347] Outside of that context, however, there is no law that prohibits investors from refusing to provide capital to women-led firms, or firms from refusing to admit women as principals, or to accept capital from women.

This is a problem because women are dramatically underrepresented as recipients of venture capital funding. In 2019, businesses that were solely founded by women received 2.7% of venture capital funding, while businesses co-founded by men and women received 14%.[348] And it is unlikely the differential is entirely attributable to fewer women seeking funding in the first place. Women have founded nearly 40% of U.S. privately held firms,[349] and there is evidence of pervasive gender bias among funders, exhibited through everything from overt hostility to

346. Feldman v. Cutaia, No. 1656-N, 2006 WL 920420, at *6 n.37 (Del. Ch. Apr. 5, 2006).

347. Hishon v. King & Spalding, 467 U.S. 69, 77 (1984). Similarly, Title VII should prohibit firms from discriminating between men and women, or between White employees and people of color, when awarding equity as part of a compensation package, though studies find that in fact there is a significant race and gender gap in such awards. *See* Yoree Koh, *Pay Gap? For Women at Startups, the Equity Gap Is Worse*, WALL ST. J. (Sept. 18, 2018, 11:00 AM), https://www.wsj.com/articles/women-trail-men-in-size-of-equity-stakes-in-startups-1537282800 [https://perma.cc/9MJC-F7VN]; J.J. McCorvey, *For Black and Latino Workers, Equity Rewards Are Elusive*, WALL ST. J. (Aug. 1, 2021, 1:00 PM), https://www.wsj.com/articles/black-latino-workers-equity-compensation-programs-11627745280 [https://perma.cc/T8JQ-F72F].

348. Shontell, *supra* note 91.

349. Kelsey Gee, *Are Female Founders Prone to Failure? Study Shows 'Implicit' Stereotype Fuels Funding Gap*, WALL ST. J. (July 11, 2017, 9:00 AM), https://www.wsj.com/articles/questions-posed-in-startup-funding-suggest-gender-bias-1499778000 [https://perma.cc/7G3E-TSMD].

women-led firms,[350] to implicit bias evidenced by the different questions asked of women founders in pitch meetings.[351]

Women frequently report being belittled or harassed by potential investors;[352] for example, when Rachel Renock and her women partners were seeking financing for their website in 2017, "one investor told them that they should marry for money, that he liked it when women fought back because he would always win, and that they needed more attractive photos of themselves in their presentation."[353] The women ultimately raised funding elsewhere.[354] As described above, when women are shut out of the business world, the repercussions are felt throughout society; women's inability to obtain investment capital on terms equal with men is an important piece of that puzzle.

California has taken some limited steps in this regard. Under its general antidiscrimination law, sexual harassment, specifically, is prohibited among persons with a "business, service, or professional relationship."[355] In 2018, responding to news reports that venture capitalists had harassed female founders, California expanded those protections to prohibit sexual harassment by persons who hold themselves out "as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party."[356] But even California's law is incomplete, because it only prohibits harassment, and not the decision whether to invest at all.

To some extent, the fiduciary duty proposal described above could address this problem. If, as suggested, loyalty to one's own

350. Edwards & McGinley, *supra* note 93, at 1883, 1888; Ellen Pao, *This Is How Sexism Works in Silicon Valley*, CUT (Aug. 21, 2017), https://www.thecut.com/2017/08/ellen-pao-silicon-valley-sexism-reset-excerpt.html [https://perma.cc/HXH2-DQYA].

351. Gee, *supra* note 349; Malin Malmstrom, Jeaneth Johansson & Joakim Wincent, *We Recorded VCs' Conversations and Analyzed How Differently They Talk About Female Entrepreneurs*, HARV. BUS. REV. (May 17, 2017), https://hbr.org/2017/05/we-recorded-vcs-conversations-and-analyzed-how-differently-they-talk-about-female-entrepreneurs [https://perma.cc/7EXV-872W]; *see also* Jeff Green, *VC Pitch Deck Bias Is Costing Diverse Startups Funding Dollars*, BLOOMBERG (May 8, 2021, 7:00 AM), https://www.bloomberg.com/news/articles/2021-05-08/vc-pitch-deck-bias-is-costing-diverse-startups-funding-dollars [https://perma.cc/P4AU-GB9H]. One study found that male venture capitalists were less likely to fund women than female venture capitalists. Calder-Wang et al., *supra* note 270, at 24–25.

352. Koh, *supra* note 258; Benner, *supra* note 256.

353. Benner, *supra* note 256.

354. *Id.*

355. CAL. CIV. CODE § 51.9.

356. S.B. 224, 2018 Leg., Reg. Sess. (Cal. 2018); Luke Stangel, *New State Bill Would Make Sexual Harassment in Venture Capital Illegal*, SILICON VALLEY BUS. J. (Aug. 22, 2017, 10:07 AM), https://www.bizjournals.com/sanjose/news/2017/08/22/vc-harassment-bill-sb-224-state-sen-jackson.html [https://perma.cc/64Z5-UQGY].

firm included a nondiscrimination element, that would mean that a venture capital fund violates its duties *to its own investors* if it turns down opportunities on gender-based grounds. The same principle would apply to professional firms that discriminate against bringing in women principals from outside the organization. In either case, existing equity investors would have a potential derivative claim against the firm's managers. But given how unlikely it is that investors in these organizations would be able or willing to bring a claim against those firms for refusing to deal with women,[357] these fiduciary duties alone are not the solution.

What all this suggests, then, is that capital discrimination should be prohibited not only *within* the firm but also *without* the firm, i.e., at the point of entry. In other words, refusing to provide capital to female founders, or barring women from joining a firm as a principal, should be illegal as well.

This would be, to be sure, a much more radical intervention than the revisions to fiduciary duty proposed above. People who form businesses voluntarily choose to enter relationships that the state has imbued with certain responsibilities; it is from there a small step for the state to expand those responsibilities to include a duty of nondiscrimination. If anything, given that fiduciary relationships are typically defined by the fiduciary's discretionary power over the beneficiary and the beneficiary's trust in the fiduciary,[358] it seems almost absurd to argue that fiduciary duties should *not* include a duty of nondiscrimination—the only surprising thing is that they do not already.

Outside of that context, however, matters look different. Prior to entering into a relationship, firms and investors are strangers to each other and have not usually been conceptualized as owing any specific duties either way. But the reality is, in modern society, strangers are often required to offer contracts on a nondiscriminatory basis, such as when employers hire new employees,[359] when businesses offer their facilities to the public,[360]

357. Edwards & McGinley, *supra* note 93, at 1919–20.

358. *See, e.g.*, United States v. Chestman, 947 F.2d 551, 569 (2d Cir. 1991) (en banc) ("A fiduciary relationship involves discretionary authority and dependency: One person depends on another—the fiduciary—to serve his interests."); Arthur B. Laby, *Advisors as Fiduciaries*, 72 FLA. L. REV. 953, 1008–09 (2020) (describing the relationship between trust and fiduciary status).

359. 42 U.S.C. § 2000e–2(a)–(b).

360. *Id.* § 2000a.

or when landlords seek tenants.[361] In these contexts, privacy and associational rights are gauged by reference to such matters as the size of the business and its expressive versus commercial functions.[362] Investment contracts—at least those involving large firms and that do not espouse a particular expressive or religious purpose—should not be viewed any differently.

More practically, it might be difficult to maintain a nondiscrimination rule *within* the firm without an external corollary; if firm principals know that they have a duty of nondiscrimination toward women co-investors but are permitted to *refuse* to take on women as business associates, they might be hesitant to allow women to join firms in the first place in order to avoid the risk of liability. Moreover, women's power *within* the firm is necessarily tied to the ease with which they expect they can find an alternative situation *without* it, making parallel protections necessary.[363]

Interestingly, there is a model for how this broader rule could work: § 1981 of the 1866 Civil Rights Act. Section 1981 prohibits racial discrimination in private contracting[364] and has been invoked in refusal-to-deal cases, such as a claim that a cable company refused to carry Black-owned channels,[365] a claim that a landlord refused to rent space to a Black-owned and themed business,[366] a claim that a water district refused to include low-income housing within the district,[367] and a claim that a cleaning service was denied the opportunity to bid on contracts.[368] Recently, a group of Black McDonald's franchisees sued under

361. *Id.* § 3604.

362. Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984); Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 238 (2016). *See generally* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015).

363. *Cf.* Robert W. Hillman, *Business Partners as Fiduciaries: Reflections on the Limits of Doctrine*, 22 CARDOZO L. REV. 51, 64–65 (2000) (recognizing how the threat of exit permits partners within a firm to revise the fundamental terms of their relationship).

364. Firms, as well as individuals, may be deemed to have a "race" for § 1981 purposes. Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth., 745 F.3d 703, 709–11, 713 (4th Cir. 2014).

365. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1010, 1013 (2020).

366. Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc., 295 F.3d 1065, 1070–71 (10th Cir. 2002).

367. Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 11 (1st Cir. 1979).

368. John & Vincent Arduini Inc. v. NYNEX, 129 F. Supp. 2d 162, 166 (N.D.N.Y. 2001).

§ 1981, alleging, among other things, that McDonald's denied them the opportunity to purchase stores at more profitable sites.[369]

A similar prohibition could be extended to sex discrimination.[370] As relevant here, the statute would forbid refusing to extend an equity investment, or refusing to permit an equity investment, on the basis of sex or gender—which would represent a natural corollary to current prohibitions on discrimination in lending.[371] We would likely not want to extend the prohibition to all manner of transactions: for example, we might want to limit coverage to certain types of entities, like professional associations, venture capital funds,[372] or certain types of institutional investors,[373] and exempt smaller firms—especially ones where the principals work closely together—out of respect for the privacy and associational rights of firm members.[374] The statute would also have to be carefully drafted so as to not prohibit investors from choosing to finance businesses organized by members of underrepresented groups.[375] In the end, perfect

369. Amended Complaint ¶¶ 20, 29, 193–202, Crawford v. McDonald's USA, LLC (No. 20-cv-05132) (N.D. Ill. Nov. 16, 2020).

370. California has a § 1981-like statute that extends to gender as well as race, and broadly prohibits discrimination in contracting by "business establishments." CAL. CIV. CODE § 51.5. That statute does not appear to have been applied to investment relationships, however, and it is not clear that it could be; California has interpreted the phrase "business establishment" to mean public venues. Whooley v. Tamalpais Union High Sch. Dist., 399 F. Supp. 3d 986, 997–98 (N.D. Cal. 2019).

371. *See* 15 U.S.C. §§ 1691–1691f.

372. The federal securities laws currently define various types of investment companies, which could be used as a basis for the statute's coverage. *See, e.g.*, *id.* § 80a-3.

373. There is evidence that institutional investors discriminate against women and minority-owned funds when making their own allocation decisions, either by employing a double standard that penalizes these funds more harshly for investment failures, *see* ANN LEAMON, JOSH LERNER, SAMUEL HOLT & RICHARD SESSA, INTOLERANCE OF FAILURE? EVIDENCE FROM U.S. PRIVATE EQUITY 8, 13 (2019), https://www.sec.gov/files/amac-background-intolerance-of-failure.pdf [https://perma.cc/9XLV-FJC6], cited in GILBERT A. GARCIA, SCOT E. DRAEGER & PAUL GREFF, SEC ASSET MANAGEMENT ADVISORY COMMITTEE - SUBCOMMITTEE ON DIVERSITY AND INCLUSION: RECOMMENDATIONS FOR CONSIDERATION BY THE AMAC 3–4 (2021), https://www.sec.gov/files/amac-recommendations-di-subcommittee-070721.pdf [https://perma.cc/95T3-U9YJ], or by using purportedly neutral criteria that have the effect of excluding women and minority-owned funds from consideration, U.S. GOV'T ACCOUNTABILITY OFF., GAO 17-726, KEY PRACTICES COULD PROVIDE MORE OPTIONS FOR FEDERAL ENTITIES AND OPPORTUNITIES FOR MINORITY- AND WOMEN-OWNED ASSET MANAGERS 15–17, 29 (2017), https://www.sec.gov/files/amac-background-gao-investment-management.pdf [https://perma.cc/Z6PD-7WJS].

374. *Cf.* McGinley, *supra* note 231, at 40 (recognizing that small firms might have constitutional rights of association that trump antidiscrimination protections).

375. A number of new venture capital funds have sprung up recently to provide opportunities to members of underrepresented groups, *see* EQUITY LEAGUE, https://www.theequityleague.com [https://perma.cc/EX2Z-7SM7] (last visited Sept. 26, 2021); *see also* Erin Griffith, *Group Seeking Equality for Women in Tech Raises $11 Million*, N.Y. TIMES,

tailoring may not be possible, but a prohibition on discrimination with respect to at least some equity investment would help level the playing field.

Certainly, this would not be a complete panacea; we know that because § 1981 is on the books and yet Black entrepreneurs, like women, also are woefully underrepresented among recipients of venture capital (and as principals in venture capital firms).[376] Not only would there be difficult issues of proof—discussed more below—but victims of discrimination may be hesitant to bring a lawsuit and thus generate a reputation for litigiousness. That is generally a dynamic that holds in the startup industry; however, given the recent lawsuits women have been willing to file, it is possible that some of that reticence may be fading.[377] If nothing else, it is possible that the mere existence of such a law—perhaps in tandem with the fiduciary obligations proposed above—would promote a more equitable environment for women principals.

A § 1981-like remedy would also not solve all problems; testator discrimination, and the difficult situation of unmarried couples who work together, would still remain. To the extent men choose to bequeath control of family businesses to sons rather than daughters, it would take a wholesale revision of America's preference for testamentary freedom to fix.[378] Still, the harmful

---

https://www.nytimes.com/2020/11/30/technology/women-tech-allraise.html [https://perma.cc/2XTV-DR7V] (last updated Dec. 4, 2020); Christopher Mims, *How Some Black Startup Founders Are Thriving in a Pandemic Year*, WALL ST. J. (Dec. 5, 2020, 12:00 AM), https://www.wsj.com/articles/how-some-black-startup-founders-are-thriving-in-a-pandemic-year-11607144450 [https://perma.cc/7F56-QCAT], and some have proposed that institutional investors contractually obligate venture capitalists to fund diverse founders, *see* Jennifer Fan, *Diversifying Startups and VC Power Corridors*, TECHCRUNCH (Aug. 29, 2021, 7:32 AM), https://techcrunch.com/2021/08/29/diversifying-startups-and-vc-power-corridors/ [https://perma.cc/M638-UVEL]; Connie Loizos, *For More Equitable Startup Funding, the "Money Behind the Money" Needs to Be Accountable, Too*, TECHCRUNCH (June 3, 2020, 4:21 PM), https://techcrunch.com/2020/06/03/for-more-equitable-startup-funding-the-money-behind-the-money-needs-to-be-accountable-too/ [https://perma.cc/EW6G-VT6Z].

376. Mims, *supra* note 375; Tiku, *supra* note 270.

377. In recent years, several high-ranking women in startups and finance have filed lawsuits alleging sex discrimination. *See, e.g.*, Bhargav Acharya & Kanishka Singh, *Hedge Fund Bridgewater Associates Sued by Former Co-CEO Murray*, REUTERS, July 24, 2020, 7:55 PM, https://www.reuters.com/article/us-bridgewater-associates-lawsuit/hedge-fund-bridgewater-associates-sued-by-former-co-ceo-murray-idUSKCN24Q00V [https://perma.cc/AJ9L-Z8CZ]; Erin Griffith, *Preaching Equality, Start-Up Didn't Practice It with Employees*, N.Y. TIMES (Aug. 30, 2020), https://www.nytimes.com/2020/08/30/business/carta-workers-inequality.html [https://perma.cc/D7AV-X54S]; Daniel Arkin, *Tinder Executive Whitney Wolfe Settles Sexual Harassment Lawsuit*, NBC NEWS (Sept. 8, 2014, 8:49 PM), https://www.nbcnews.com/tech/tech-news/tinder-executive-whitney-wolfe-settles-sexual-harassment-lawsuit-n198801 [https://perma.cc/P6H7-2KUP].

378. Scalise, *supra* note 131, at 1325–26 ("[T]he permissibility of free testation in America is unparalleled throughout the Western world.").

effects of that kind of discrimination might be minimized if the other protections recommended here were enacted, and if nothing else, courts adjudicating future cases may be more sensitive to the gender dynamics at play.

C. Burden of Proof, Causation, and Damages

If any of the above proposals were adopted, there would be a number of practicalities to iron out. For example, causation and burdens of proof have long been an issue in Title VII and § 1981 litigation, and similar decisions would have to be made with respect to capital discrimination. In the § 1981 context, the plaintiff must plead and prove that race was a "but for" cause of the defendant's refusal to contract.[379] By contrast, in the Title VII context, there is something of a sliding scale of causation regimes. The plaintiff must first establish that the protected characteristic was a motivating factor in the adverse employment action, at which point the employer may try to establish that the action would have been taken regardless. If the employer succeeds, the plaintiff can obtain injunctive relief and attorneys' fees; if not, the plaintiff can also obtain money damages.[380]

The Title VII regime would likely be more appropriate for capital discrimination cases. By shifting the burden to the defendant to show *lack* of but-for causation, Title VII implicitly recognizes that subjective decision-making may be infected with bias, the effects of which are very hard to disentangle after the fact. Presumably, the more idiosyncratic the decision, the harder it will be to separate out the distinct contributions of permissible and prohibited motives. That is, without a direct comparator to an identically situated man, a woman may find it difficult to prove that a challenged action would not have been taken but for her sex. But capital discrimination will often involve idiosyncratic scenarios—a venture capitalist's investment decision, the choice to dilute a controlling shareholder's voting power, restructuring to eliminate an owner's interest—for which no comparator is available. Therefore, a regime that shifts the causation burden to the defendant after a prohibited motive is proved would be more effective at preventing, and remedying, invidious discrimination.

379. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1014–15 (2020).

380. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013).

There is an additional reason why the Title VII burden-shifting regime is more appropriate in the fiduciary context. Fiduciary obligations extend not only to the *actions* taken by the fiduciary but also to the decision-making *process* employed.[381] A fiduciary may violate his obligations by use of an improper process, even if there is no effect on the outcome.[382] For that reason, it would be more consonant with fiduciary doctrine to recognize that a breach occurs the moment a fiduciary's adverse decision is motivated by an investor's sex, regardless of whether the decision would have been the same for an investor of a different sex.

Another open question concerns the issue of damages. For women investors who are divested of ownership interests, forced out of employment positions that they expected to accompany their investment, or similar, some types of damages would be a relatively simple matter—front and back pay, an appraisal of the value of their shares, and so forth.[383] But these may not be sufficient because they do not recognize the *wrongfulness* of discriminatory conduct. This is particularly true when a remedy—such as a forced buyout—mirrors the remedy that would have been available under a no-fault regime such as dissolution due to deadlock.

To some extent, courts already have tools available to punish bad actors even in "no-fault" regimes. For example, they can adjust valuation methods in a manner that favors one party or the other,[384] and when it comes to forced sales, they can impose conditions or restrictions on the sales process.[385] Yet these may not be sufficient to compensate women for the dignitary harm they suffer as a result of discrimination or serve as a deterrent against future bad behavior. And the question of damages would be particularly knotty in derivative actions when the alleged harm is to the *entity* rather than the individual excluded investor. Illegal

381. Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligations*, 20 LEGAL THEORY 106, 107, 115–18 (2014); Leo E. Strine, Jr., Lawrence Hamermesh, R. Franklin Balotti & Jeffrey Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 633 (2010) ("[T]he duty of loyalty most fundamentally requires that a corporate fiduciary's actions be undertaken in the good faith belief that they are in the best interests of the corporation and its stockholders.").

382. *In re* Nine Sys. Corp. S'holders Litig., No. 3940-VCN, 2014 WL 4383127, at *22–23 (Del. Ch. Sept. 4, 2014).

383. *Investment Model*, *supra* note 14, at 571.

384. *Shareholder Oppression and "Fair Value," supra* note 221, at 354.

385. *Cf. In re* TransPerfect Glob., Inc., Civil Action Nos. 9700, 10449, 2016 WL 3477217, at *4 (Del. Ch. June 21, 2016) (refusing to impose such restrictions).

actions may be per se violations of the duty of loyalty, but investors only bring claims when they result in tangible harms, such as those resulting from regulatory enforcement actions. Exclusion of women may result in long-term damage to the business, but probably not in the highly visible manner that lawbreaking does.

For these kinds of situations, there are a number of options. Courts may choose to recognize the emotional and dignitary harms that women suffer as a result of discrimination and award damages as appropriate;[386] Delaware courts, for example, sitting in equity, have broad powers to fashion remedies appropriate to the harm experienced.[387] Absent proof of harm, and similar to Title VII, courts could award attorneys' fees and injunctive relief—which is not unlike what courts do now in corporate cases when harm from a fiduciary breach cannot be established.[388]

Punitive damages should also be considered an option. Currently, states differ on the extent to which punitive damages may be available for breaches of fiduciary duty,[389] but they are available under Title VII (subject to a statutory cap) for discrimination undertaken maliciously or with reckless indifference to an individual's rights.[390]

VI. CONCLUSION

Though this Article recommends that the problem of capital discrimination be addressed by extending private rights of action to its victims, the reality is that litigation is an imperfect remedy. Injured parties may be reluctant to sue for fear of developing a reputation for litigiousness; in the corporate context especially, strike suits may render courts distrustful of even meritorious claims; judges may be unsympathetic to victims and may impose unreasonably high standards of proof.

But, especially in the context of business law, private rights of action are valuable less for the outcomes they produce than for the information they generate and the cultural norms they

386. Title VII allows for emotional distress damages, with amounts capped based on the size of the entity. 42 U.S.C. § 1981a(b)(3).

387. In re *Nine Sys. Corp.*, 2014 WL 4383127, at *51.

388. *Id.* at *51–52.

389. *Compare* Walta v. Gallegos L. Firm, P.C., 40 P.3d 449, 461 (N.M. Ct. App. 2001) (concluding that punitive damages for fiduciary breaches accomplished with a culpable mental state are appropriate), *with* Adams v. Calvarese Farms Maint. Corp., No. 4262–VCP, 2010 WL 3944961, at *21 n.204 (Del. Ch. Sept. 17, 2010) (punitive damages unavailable for fiduciary breaches absent specific statutory authorization).

390. 42 U.S.C. § 1981a(b)(1).

represent. An explicit recognition that loyalty and care require a lack of bias—and a corresponding rejection of the notion that a discriminatory act can also be a loyal one—would cast a long shadow. Students would study that principle in their business classes, attorneys would include nondiscrimination warnings in their transactional checklists, and litigants would obtain discovery about boardroom bias (and boards would be counseled that such discovery would be available). The ghost image of sexism would no longer hover in the corner of business law's eye; instead, courts would be forced to bring it into the light, examine any role it may have played in corporate decision-making, and if a claim of discrimination were to be denied, articulate why in explicit reasoning available for the public to scrutinize. And that kind of paradigm shift is what may ultimately bring about change.