Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter

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This Essay considers the problem of racial harassment and discrimination in the aftermath of the recent and more thorough discussion about gender inequality. It begins by explaining the inadequacies of the SEC Board Diversity Rules and Section 342. It then describes the reasons why, despite these inadequacies, more regulation relating to discrimination and diversity is not needed. Finally, it discusses how to improve U.S. businesses' compliance with existing antidiscrimination law.

INTRODUCTION

The diversity business is an increasingly important and dramatically expanding niche. Business organizations spend large amounts of money on diversity efforts. They employ diversity and inclusion officers and workers who lead and operate diversity and inclusion departments that typically oversee diversity training.[1] I consider the adequacy of diversity

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efforts, programs, and discourse at U.S. companies in this Essay. I do so in the context of compliance with antidiscrimination law, and by focusing primarily on the problem of the racial homogeneity of business constituencies. Continuing discrimination and racism are the genesis of a lack of diversity among corporate directors, executives, business leaders, employees, and suppliers. Persisting bias also explains the inferior service many consumers of color receive.[2]

Scholarly consideration of constituents other than shareholders is typically dismissed as contrary to the prevailing paradigm of shareholder primacy. But a focus on non-shareholder groups leads to best practices that are ethical, compliant, and protective of a firm's reputation. This focus reduces the likelihood that non-shareholder groups will sue a firm. It mitigates the impact of litigation brought on behalf of non-shareholder constituencies for failure to comply with the laws and regulations aimed at their protection. It reduces the risk of scandals that result in negative publicity and harm to a firm's reputation. Seen this way, corporate governance practices that include consideration of the interests of non-shareholder constituencies reduce harm to firms and their shareholders. This is a practical and realistic approach to shareholder primacy.

Business leaders can design more effective diversity programs and ethical and compliant corporate cultures that promote rather than suppress racial equity if they understand the impact that continuing societal discrimination has on corporate cultures. Large public companies employ hundreds, sometimes thousands of people who interact with other employees, communities and consumers of color, and minority-owned businesses. Implicit or unconscious racism that affects the relationships between public companies and their constituents of color is inevitable because the individuals who act on behalf of these companies live in a nation in which racism and discrimination endure. The racism that continues to plague our national culture is in some instances unconscious, implicit, and subtle. Sometimes it is blatant and overt. Whatever its manifestation, the racism that continues to be part of U.S. culture impacts corporate cultures and shapes the relationships between public companies and their constituents of color.

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1. Diversity professionals frequently gather together to share details about their firms' diversity efforts. *See* INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, http://www.theiilp.com/ (last visited Feb. 13, 2018).

2. For a discussion about the impact of business activity on constituents of color, see Cheryl L. Wade, *Fiduciary Duty and the Public Interest*, 91 B.U. L. REV. 1191 (2011).

Large public companies, however, provide a promising locus for cultural transformation when it comes to race and racism. This is because while individualism reigns in U.S. culture, norms are homogeneous in the corporate context. In corporate cultures, individuals must conform to the norms and priorities established by the CEO and other senior executives. This is why a focus on corporate governance is an important first step toward achieving racial equity.[3] The diversity industry can transform expectations within a firm, and those expectations can impact the nation. We saw this happen in 2017 when several women accused powerful men of sexual harassment. The alleged harassers in the private sector were quickly fired. Private firms responded quickly to accusations of sexual misconduct. In the public sector, however, the response to the accusers' allegations was slower, and the accused men's presence in Congress, in the oval office, or as political candidates was tolerated until some of them voluntarily resigned.

As a nation, we have engaged in a good amount of discourse (but not enough) about the status of women in business and politics. The sexual harassment policies at private sector firms may have helped to create corporate and business cultures that are less tolerant (when compared to the public sector) of credible sexual misconduct. This suggests that corporate governance best practices, particularly those focusing on race and gender equity, can promote and encourage ethical and compliant conduct throughout an organization. In this Essay I consider the problem of racial harassment and discrimination in the aftermath of the recent and more thorough discussion about gender inequality. I suggest improvements in corporate and organizational governance that will diminish racial bias in the business context. My suggestions are modest. I do not propose reformation of corporate governance. I merely suggest a focus on best practices under the corporate governance principles that are already in place. Business leaders should understand that racism and discrimination persist in the twenty-first century, even though their occurrence is frequently implicit, unconscious, and more subtle. It is only with this understanding that business leaders will be able to govern companies in a way that ensures that racial bias can be detected, monitored, and addressed.

On the rare occasions that we discuss racism in the United States, we

3. *See generally* Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This Is Not Just Women's Work*, 65 MD. L. REV. 346 (2006) (arguing that the advancement of women of color in the corporate context requires that white male CEOs understand the status and experience of women of color within the corporation); *see also* Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187 (2017) (exploring corporate governance and corporate social responsibility).

condemn it. The national message is clear: racism is wrong. But, public discussions about race and racism are infrequent, and as a result they are typically limited and superficial. It is difficult to talk about race and racism, even in the twenty-first century. The words themselves—"racism" or "racist"—chill discussion about the issues that still plague our nation.[4] News stories about racism and race discrimination appear in news broadcasts and newspapers for several days during which the pundits disagree and argue. Then, the public discussions end, and many white Americans continue with their lives, oblivious to the perennial nature of steadfast racism and race discrimination. The daily occurrences of modern-day racism—the micro aggressions—are not dramatic enough to be deemed newsworthy. Racist cultures—corporate or national—are not newsworthy. They are not even noticed.

So, as a nation, when it comes to public interracial discourse about racism, we are out of practice because we only talk about racism in reaction to a "newsworthy" controversy or catastrophe. The infrequency of an ongoing, in-depth national discourse about race and racism belies the persistence and ubiquity of the kind of subtle and covert discrimination that infects the lives of people of color every day, particularly in the business setting. Even when the discrimination that people of color face is blatant and overt, it rarely inspires national discussion if it does not involve physical harm or the loss of life. Discrimination that impacts the economic or financial lives of people of color is infrequently discussed.

As the twenty-first century's first decade closed, two corporate governance enactments—one regulatory, the other legislative—ostensibly addressed diversity issues in the business setting. First, in December 2009, the Securities and Exchange Commission ("SEC") amended Item 407(c) of Regulation S-K to require disclosure of certain information relating to corporate board diversity ("SEC Board Diversity Rules" or "SEC Rules"). Second, in 2010, Congress enacted Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), requiring various federal agencies to create offices charged with monitoring the diversity efforts of the agencies, the entities they regulate, and the firms with whom the agencies do business.

Both the SEC Board Diversity Rules and Dodd-Frank's Section 342 are likely to survive in the Trump administration's era of deregulation, but their survival matters little because their enactment utterly failed to

4. Philip Galanes, *Bill Maher and Fran Lebowitz: When Comedy Cuts Deep*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/fashion/bill-maher-fran-lebowitz-table-for-three-trump.html ("We need to find a middle ground on race. If you look at the polling of conservatives, Republicans and Fox News watchers, they think racism is over – which is insane. Denying racism is the new racism.").

elevate the discourse on discrimination and bias in the business setting. Both reforms employed the rhetorical discourse of diversity that ignores the real problems: racism, sexism, and discrimination. The SEC Board Diversity Rules have led to more disclosure that has done little to advance the interests of people of color on corporate boards. Section 342 has generated more disclosure relating to people of color and women, but the benefits for people of color are obscured in the avalanche of information that has resulted.

In the first two Sections of this Essay, I explain the inadequacies of the SEC Board Diversity Rules and Section 342. The reforms have not inspired companies to move beyond empty rhetorical flourishes about diversity and have added little of value for anyone seeking real information about racial equity goals in the business setting. In the rest of the Essay, however, I describe the reasons why more regulation relating to diversity and discrimination is not needed, and why some amount of deregulation (undoing, for example, Section 342 and the SEC Rules) would not impede the advancement of people of color in the business setting. Section 342 and the SEC Rules are superfluous. The requirement that U.S. businesses and the financial sector comply with Title VII and other federal and state laws that prohibit discrimination is enough without Section 342 or the SEC Rules. That is why the focus of the remainder of this Essay is on how to improve U.S. businesses' compliance with existing antidiscrimination law.

I. THE SEC'S BOARD DIVERSITY RULES

It is common to find African Americans and Latinos at or near the bottom of business hierarchies.[5] But what about attaining greater racial diversity at the top of business hierarchies in the U.S.? There has been a great deal of academic and business literature about diversifying corporate boards of directors,[6] and slightly less robust discourse about

5. McDonald's has been named one of the most diverse companies in the U.S. Most of its racial diversity, however, is found among the lowest-paid workers with the fewest benefits. *Compare* Aman Singh, *McDonald's Makes Diversity About the Bottom Line*, FORBES (Sept. 8, 2010, 10:39 AM), https://www.forbes.com/sites/csr/2010/09/08/mcdonalds-makes-diversity-about-the-bottom-line/#357240a2506a ("Women and people of color make up 73% of McDonald's total workforce, 43% of all franchise staff and 55% of suppliers."), *with* Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L.J. 61, 70–71 (2016) ("According to the Economic Policy Institute, 5.9 million African Americans (38% of all African American workers) make less than $12 per hour and 8.2 million African Americans (roughly 53% of all African American workers) make less than $15 per hour.").

6. *See, e.g.*, Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOY. U. CHI. L.J. 569, 595 (2018) (discussing the issue of large banks and corporations tolerating unethical practices).

diversity among the ranks of senior managers and executives. U.S. boards are far more diverse than they were a decade ago. Today, far fewer corporate boards are all white or all male.[7]

The relatively recent focus in the U.S. on board diversity began in earnest on December 16, 2009, when the SEC amended Item 407(c) of Regulation S-K. Under the amended rule, corporate boards must disclose in their proxy and registration statements the processes they use to find and evaluate board nominees. In describing their process, boards must disclose whether they include diversity as one of the bases for identifying and choosing board members. If diversity is a consideration, boards must describe how it factors into the decisionmaking. If a firm has a policy about diversity in the board's nomination process, the company must disclose the policy, the way it is implemented, and the way its effectiveness is evaluated.[8]

The goal of disclosure is to provide potential investors and security holders with material information. But disclosure also has the potential to change corporate behavior.[9] A requirement that firms disclose

7. *See* Cheryl L. Wade, *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, 26 PACE INT'L L. REV. 23, 29 (2014) ("The numbers of white women and people of color on boards have increased significantly, yet in recent years, the numbers of white women serving as directors have stagnated.").

8. Corporate governance, 17 C.F.R. § 229.407(c)(2)(vi) (2012). The effective date for the SEC rule on board diversity disclosure was February 28, 2010, and the exact language of the amended rule states that boards must:

> [d]escribe the nominating committee's process for identifying and evaluating nominees for director . . . and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy. *Id.*

See generally ALLIANCE FOR BOARD DIVERSITY AND DELOITTE, MISSING PIECES REPORT: THE 2016 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON *FORTUNE* 500 BOARDS 20, 23 (2017), http://www.catalyst.org/system/files/2016_board_diversity_census_deloitte_abd.pdf (noting that that in 2010, 74.5 percent of Fortune 500 directors were white men; white women held 12.7 percent of the board seats at Fortune 500 companies; African American men held 5.7 percent of Fortune 500 directorships; African American women held 1.9 percent of the seats; Latinos held 2.3 percent of the seats; and Latinas held just 0.7 percent); *see also Women on Boards*, CATALYST 5 (Dec. 14, 2011), http://boardagender.org/files/Catalyst-2011-Quick-Takes-Women-on-Boards.pdf (in 2011, the percentage of white women on the boards of Fortune 500 companies rose slightly to 13.1 percent. African American women, Latinas, and Asian women held 3.0 percent of the board seats of Fortune 500 companies that year. In 2011, most Fortune 500 companies (70.7 percent) had *no* women of color serving on their boards).

9. *See Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569*, Fed. Sec. L. Rep. (CCH) ¶ 85,706, at 85,712 (Oct. 14, 1975). In the 1970s, several public interest groups petitioned the SEC to revise mandatory disclosure rules to include information regarding a company's civil rights and environmental performance. The SEC declined to mandate that companies disclose equal employment opportunity practices, nor would it require disclosure of unlawful employment discrimination. The Commission

information relating to their diversity policies has the potential to inspire meaningful change. Corporate managers may change policies or practices that could damage their companies' reputations if they are required to disclose information relating to those policies or practices. Or, companies may boost their reputations by voluntarily disclosing certain facts. For example, some companies voluntarily disclose the racial and gender composition of their boards by sending shareholders proxy materials that include directors' pictures. These companies have more minority and women directors than companies that do not engage in this kind of voluntary disclosure.[10]

There was some intrinsic potential for the SEC's Board Diversity Rules to inspire corporate directors to think about the homogeneity of their boards in a meaningful way. The SEC Board Diversity Rules could have encouraged boards with no formal or informal diversity policy to think about adopting one. The requirement that boards describe how they implement their diversity policy could have encouraged reflection about the process. And, the SEC's mandate for boards that have a diversity policy to disclose how they evaluate their policy's effectiveness had the power to promote introspection about the adequacy of the process. Unfortunately, however, the SEC Rules do not seem to have inspired meaningful reflection about the lack of racial diversity on corporate boards.

After the SEC Board Diversity Rules became effective in 2010, more corporate boards added discussion about diversity in their proxy statements. But, even in the first few months after the Rules' effective date, it was clear that the diversity discussion inspired by the SEC's changes was diversity doublespeak.[11] The SEC Rules did not define diversity, so some companies articulated a commitment to diversity but defined the concept expansively. Many companies expressed a commitment not only to racial and gender diversity, but also enumerated a long list of other factors including ethnicity, age, and national origin,

stated: "As a practical matter, it is impossible to provide every item of information that might be of interest to some investor in making investment decisions. . . ." According to the Commission, several commenters "suggested more than 100 topics concerning which they desired disclosure. A disclosure document which incorporated each of the suggestions would consist of excessive and possibly confusing detail. . . ." *Id.*

10. Richard A. Bernardi, David F. Bean & Kristen M. Weippert, *Minority Membership on Boards of Directors: The Case for Requiring Pictures of Boards in Annual Reports*, CRITICAL PERSP. ON ACCT. 16, 1019 (2005).

11. In another article, I discuss the problem with using the rhetoric of diversity, inclusion, access, and equal opportunity without focusing on the genesis of the problem—discrimination, racism and sexism. *See* Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004) [hereinafter Wade, *Diversity Doublespeak*].

along with diversity of geographic location, experience, background, viewpoint, and skills.[12] The disclosure was vague, superficial, and obscure.

With this kind of expansive definition of diversity, the concepts of racial and gender diversity get lost among the various types of diversity that business leaders claim to value. This approach to diversity obscures the fact of historical discrimination against women and people of color. Diversity efforts are necessary because, for decades, women and people of color have faced discrimination that has impeded their entry into and success in the business world. The history of discrimination in the United States on the basis of age, ethnicity, and national origin is comparable in many ways. But there is no similar history of discrimination on the basis of viewpoint, experience, background, or skills in the United States. It is true that elitism, class-consciousness, and politics have impeded the professional advancement of individuals with certain viewpoints, or those from modest backgrounds. But these individuals have not faced the pervasive and systemic discrimination that women and people of color have endured. Diversity of skills, viewpoint, experience, background, and even geographical location are essential for successful firms. These are important considerations when hiring employees, promoting managers, and identifying board members. Companies, however, should pursue viewpoint, experiential, and background diversity without eclipsing the very different goals of racial and gender diversity.[13]

II. SECTION 342 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

In 2010, another corporate governance reform addressed racial and gender diversity in the financial sector. Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act created an Office of Minority & Women Inclusion at various agencies: the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Department of the Treasury, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and each of the twelve Federal Reserve Banks. These "Inclusion Offices" are charged

12. Kimberly Gladman, *Beyond The Boilerplate: The Performance Impacts of Board Diversity*, THE CORPORATE LIBRARY (July 29, 2010).

13. The debate about corporate board diversity is a global one. Norway and France have, with varying degrees of success, imposed quotas on public companies that set specific goals for more gender parity on boards of directors. Of course, the U.S., for a variety of reasons, will never impose board composition quotas, but comparisons between the approaches taken in other nations with the U.S. approach to board diversity provide insight into the U.S. discourse about race and gender itself. *See* Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada*, 32 NW. J. INT'L L. & BUS. 81A, 83A–84A (2012) (providing a synopsis of Norway's quota system for female board membership).

with monitoring the diversity efforts of the agencies, the entities they regulate, and the firms with whom the agencies do business. The disclosure and monitoring required under Section 342 applies to almost all participants in the private sector because the agencies covered by the provision regulate corporations, and they do business with financial institutions, investment banks, mortgage banking firms, brokers, dealers, underwriters, accountants, and even law firms.

Under Section 342, each Inclusion Office must establish procedures to "ensure the fair inclusion and utilization of minorities and women" at the businesses with which the agencies contract, at the companies they regulate, and at the agencies themselves. Regulated firms, contractors, and subcontractors must "provide a written statement that the company will ensure the inclusion of women and minorities in its workforce to the maximum extent possible." Directors of each Inclusion Office must determine whether regulated firms, contractors, and subcontractors have made a "good faith effort" to include women and minorities. If no good faith effort is made, directors may recommend that their agency terminate the contract. The provision also requires the directors to monitor the fair inclusion of women- and minority-owned businesses as suppliers to the covered agencies.[14]

Representative Maxine Waters proposed adding Section 342 to the Dodd-Frank legislation. In a 2009 speech she made to the House of Representatives, she explained that, even though they are qualified, women- and minority-owned businesses "continue to be excluded from contracting opportunities made available by the government's historic intervention at banks and other financial institutions."[15] Some have criticized the provision, calling it "vague" and "redundant."[16] They argue that rules prohibiting discrimination against women and minorities in the business setting are already in place.[17] The provision, however, is

14. Similar provisions have been established in other statutes as well as companies such as Fannie Mae and Freddie Mac. *E.g.*, Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 § 1116 (2008) (requiring that entities develop and implement standards to ensure that minorities and women are included "in all business and activities of the regulated entity at all levels, including in procurement, insurance, and all types of contracts"); *Diverse Suppliers*, FANNIE MAE, http://www.fanniemae.com/portal/suppliers/diverse-suppliers.html (last visited Feb. 13, 2018) (documenting Fannie Mae's commitment to hiring diverse suppliers); *Freddie Mac's Supplier Diversity Policy*, FREDDIE MAC, http://www.freddiemac.com/about/supplier-diversity-policy.html (last visited Feb. 13, 2018).

15. Kevin Roose, *Seeking Guidance on Dodd-Frank's Diversity Clause*, N.Y. TIMES: DEALBOOK (Nov. 11, 2010, 5:04 PM), dealbook.nytimes.com/2010/11/11/seeking-guidance-on-dodd-franks-diversity-clause/.

16. *Id.*

17. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33016, 33020 (June 10,

intended to reinforce and reiterate principles relating to racial justice and fairness for women, and for these reasons, the provision's redundancy is potentially helpful.[18] But opponents of Section 342 are correct in that the provision adds nothing that will protect people of color and women from bias.

Right after Section 342 was enacted, law firms promised clients that they would follow the provision's development and keep clients up to date about its details. This presented an opportunity for meaningful discourse about race. Proskauer Rose LLP, a prominent New York City law firm, explained to its clients that "the ultimate impact of the [Inclusion Offices] will not be known until they are operational, but it certainly is one reason to stay abreast of developments under the Dodd-Frank Act and ensure that [our clients] are familiar with all of the relevant provisions contained in it."[19] Another law firm, Baker McKenzie, assured its clients that the firm would "monitor the development of standards by the Inclusion Offices and report on them as the program" evolved.[20]

Section 342 presented an opportunity to elevate the discourse on racism and sexism with respect to discriminatory attitudes that may exclude women and people of color from the financial sector and impede their progress once they join the sector. Corporate lawyers, however, failed to seize this opportunity. While Proskauer Rose LLP promised to keep clients informed about Section 342's development, it denounced the Section, telling its clients that the provision was "potentially onerous."[21] Baker McKenzie wrote to its clients dismissing Section 342 as a potentially "significant administrative burden for contractors and service providers to Dodd-Frank covered agencies."[22] Neither firm addressed the issue of racial and gender homogeneity in the private sector. Corporate law firms in general squandered an opportunity to address the issue of racial and gender injustice in the business setting.

2015) ("Another commenter argued that these standards are unnecessary because regulated entities can achieve diversity and inclusion without disclosing this information, while others noted that many entities already publish information about their diversity and inclusion efforts.").

18. *See generally* Kristin Johnson et al., *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795 (2016) (positing the provision's importance with respect to diversifying the financial sector).

19. *Uncertainty in the Dodd-Frank Act's "Office of Minority and Women Inclusion" Provision*, PROSKAUER ROSE LLP (July 27, 2010), http://www.proskauer.com/publications/client-alert/uncertainty-in-the-dodd-frank-act/ [hereinafter PROSKAUER ROSE].

20. Cheryl L. Wade, *Corporate Lawyers and Diversity Discourse*, *in* IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 124, 130 (2017), http://www.theiilp.com/resources/Pictures/IILP_2016_Final_LowRes.pdf [hereinafter Wade, *Corporate Lawyers and Diversity Discourse*].

21. PROSKAUER ROSE, *supra* note 19.

22. Wade, *Corporate Lawyers and Diversity Discourse*, *supra* note 20, at 130.

Section 342, like the SEC's Board Diversity Rules, does not require that companies diversify workforces or supplier groups. Both are disclosure measures. Section 342 required the creation of Inclusion Offices to monitor diversity, but that monitoring is based on written reports—or disclosure—about diversity. Yet, even though it merely requires disclosure about diversity, Section 342 creates a perception for some that it advantages women and minorities at the expense of white men. One observer resorted to an old and arguably racist and sexist position, lamenting that Section 342 "is likely to encourage" affected employers to "hire women and minorities for the sake of appearances, even if some new hires are less qualified than other applicants."[23]

Section 342's effectiveness was compromised not only by the corporate bar's dismissal and criticism of the provision, but also by the language its drafters used, which blunts its potential impact. The provision refers to women and minorities as though the issues the two groups face are identical and interchangeable. This is common in discussions about diversity, but is problematic because a call for racial equity in business requires considerations that are different than those intended to create equity for women in the business context.

III. INTERPLAY BETWEEN AMERICAN CULTURE AND CORPORATE AMERICAN CULTURE

The SEC Board Diversity Rules and Dodd-Frank's Section 342 provide two vivid examples of the inadequacy of the discourse on race and gender inequities in the business setting. Understanding the inadequacy of the national discourse about race and racism is imperative. Our national inability to understand and address the complexity of twenty-first century racial injustice infects the discussion in corporate America on these issues. But there is an interesting interplay between American culture and the culture of American businesses. The inadequacy of our national discourse about race and racism impacts corporate discourse and views on the issue, but the reverse is also true. Corporate culture, discourse, and practices impact the national discourse on race and racism.

In our national culture, individuality is valued. Norms are heterogeneous in U.S. culture. In corporate and business cultures, however, individuals must conform to the norms of the firm. Norms are homogeneous in business organizations, and internal cultural precepts

23. Diana Furchtgott-Roth, *Racial, Gender Quotas in the Financial Bill?*, REALCLEAR MARKETS (July 8, 2010), https://www.realclearmarkets.com/articles/2010/07/08/diversity_in_the_financial_sector_98562.html.

require compliance and uniformity. For this reason, business settings provide unique opportunities for improving race relations. Individuals who work for and represent businesses must conform to the priorities, culture, and expectations established by the CEO and other senior executives. If they do not, they will not be successful within the company. When individuals fail to conform to the cultural precepts of the firms they work for, they will eventually be forced out. Employees, managers, and agents—who conform to a corporate culture in which racial equity is a priority—will shape the relationships between the company and its consumers, employees, suppliers, and the communities in which the firm does business. Cultural mandates frame and define the ways that employees and agents interact with the constituencies impacted by their firms. This is why a focus on corporate and organizational governance is an important first step toward racial reconciliation. This focus presents hope for a modest transformation of race relations in the business context if those who govern business associations make racial equity a priority. Meaningful discourse about race, racism, and discrimination, along with committed anti-discrimination discourse and efforts, can create cultural expectations of racial equity within organizations. And when racial discourse is elevated and interracial relationships are healed within the firm, there is a potential for improvement of interracial relationships beyond the organization.

In order for this to happen, corporate and organizational cultures must support and affirm racial equity. Business leaders have the power to create cultures that support equitable relationships between their companies and constituents of color. Chief executive officers (and their counterparts in other types of business organizations) can use their considerable influence on corporate and business culture to achieve racial equity in the business context by encouraging those who work for them to make racial equity a priority.

Experts on executive leadership and management development define corporate culture as:

> [T]he deeply felt system of shared values and assumptions, conveyed through stories, myths, and legends, that explains how members of the organization think, feel, and act. . . . This culture, and the level of conformity it imposes, is willingly accepted by the members, and this bargain between the members and the culture gives the organization its stability, predictability, and continuity.[24]

How does a CEO contribute to a company's "system of shared values and assumptions"? To what extent do CEOs control how corporate managers, employees, and agents "think, feel, and act"?

24. PRICE M. COBBS & JUDITH L. TURNOCK, CRACKING THE CORPORATE CODE xi–xii (2003).

Business leaders, particularly CEOs, exert a remarkable amount of influence and power over their subordinates. Leaders have a great deal of influence on the ethical cultures of their companies.[25] CEOs typically command unrestrained devotion from managers and employees, who almost blindly adhere to the CEO's business philosophy. Chief executives shape the thoughts, ideas, and goals of those who work for them. Most CEOs expect their views on how the company should be governed and the views of their executives and employees to be identical—at least ostensibly. Corporate and business culture commands conformity. Employees and managers must conform to the corporate or organizational culture created by senior executives, and if they do not, they will eventually have to leave the company.

Chief executives are able to transform corporate culture because it is typical for managers and employees to be blindly loyal to the CEO's vision. Ursula Burns, the first African-American woman to chair Xerox Corporation, and who served as the company's CEO from 2009–2016, confirmed the uniquely powerful position that CEOs enjoy: "Being CEO is almost instant credibility. It's instant power."[26] This makes corporate governance an extremely promising source of cultural transformation as it relates to race and racism. If a CEO's vision for his or her company includes establishing a corporate culture that promotes and supports racial equity, managers and employees must conform to the CEO's vision and the company's culture. If they do not, they will not survive at the company.

CEOs must work hard to communicate their vision about corporate policy to managers and employees. A chief executive can command loyalty to his or her vision and adherence to the company's cultural requirements, but the vision and requirements must be clearly articulated. As one commentator observed, "it was no good writing [guidelines regarding conformity to the firm's culture] in memo form and distributing them. People would simply read them and toss the memo aside."[27]

IV. FIDUCIARY DUTY, EMPATHY, AND THE TRANSFORMATION OF CORPORATE CULTURE

A focus on racial justice is just one of many opportunities for

25. Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 41 (2003) ("Top management and supervisors are in authority positions that enable them to influence employees' interpretations of corporate policies and practices.").

26. Gallatin Business Club, *A Conversation with Ursula Burns*, YOUTUBE (Feb. 16, 2012), https://www.youtube.com/watch?v=lejX2SjGBrY.

27. ROBERT SLATER, THE WAL-MART DECADE 44 (2003).

corporations to behave in a way that is socially responsible. But these matters are not just corporate social responsibility matters. Corporations *must* comply with anti-discrimination law. This makes racial justice work in the business context a corporate governance matter in that directors and officers must install information and reporting systems that monitor compliance with law in order to fulfill fiduciary duties. Corporate directors owe a duty of loyalty to shareholders that includes a good faith obligation to monitor their companies' compliance with law.[28] Compliance programs are an integral part of corporate governance, and they typically include training for employees about how to comply with the various laws that apply to a firm and its business.[29] When business leaders monitor their employees' compliance with law, they help to avoid harm to the corporation and its shareholders. Monitoring law compliance may uncover employee conduct that would harm a company's reputation or invite civil litigation or criminal prosecution if it continues unchecked.[30]

Racial equity has not been a priority in the business setting. CEOs and senior executives rarely move beyond diversity doublespeak[31] and the check-the-box approach of most diversity programs. Can CEOs be motivated to use their power to transform corporate cultures in a way that would foster equitable relationships between their companies on the one hand, and employees, consumers, and communities of color on the other?

Consider the role of empathy in corporate governance in achieving more meaningful discussions about racial equity in the business setting. Discourse and empathy are amorphous concepts. But it is the amorphousness of these concepts that makes them relevant in the attempt to achieve racial equity within the contexts in which businesses operate. An analysis of discourse and empathy in the business setting has none of the preciseness of rulemaking. But we already have rules, laws, and governance principles in place that address race discrimination in

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

29. In matters regarding racial justice, this includes diversity training and handbooks.

30. Consider the Texaco and Coca-Cola class actions that led to each company's pledge to change workplace realities for employees of color. This pledge was an integral settlement term. Both companies agreed to establish systems that would monitor and respond to discrimination allegations. The companies promised to create programs to train employees on diversity issues, and agreed to oversight by a task force composed of members who were not employed by or otherwise affiliated with the companies. In other words, after the litigation was settled, the companies agreed to take the kind of action that directors and officers should have been taking all along to satisfy the fiduciary obligations they owe their shareholders. The companies agreed to prevent avoidable corporate loss by monitoring their firms' compliance with applicable law. If directors and managers had monitored compliance with anti-discrimination law, they may have avoided the litigation altogether.

31. *See generally* Wade, *Diversity Doublespeak*, *supra* note 11.

business. Anti-discrimination law—like Title VII[32] and the Civil Rights Act of 1991[33]—prohibits discrimination. Basic corporate governance principles require directors and officers to monitor their firms' compliance with anti-discrimination law. Best practices dictate that firms establish compliance departments, appoint compliance officers, install compliance telephone hotlines, and draft compliance policies and handbooks. The problem for people of color who are impacted by bias in the business setting, however, is that these steps are typically taken as part of a check-the-box approach that focuses on the details of the steps rather than the principles on which good governance and anti-discrimination are based.

Anti-discrimination law and corporate governance best practices cannot change corporate cultures and climates. Too often, corporate actors devote time and attention to getting around the law or bending rules. Corporate governance best practices are typically deemed aspirational and too lofty to attain, and therefore justifiably ignored. We have seen stunning examples of this in the twenty-first century in the predatory lending context[34] and at companies like Enron, WorldCom, Tyco, and Adelphia, where accounting and financial fraud destroyed the lives of individuals and the companies themselves.[35]

Elevating discourse about the continuing problem of race discrimination and examining the capacity for and potential of corporate managers' empathic understanding about race may help to change corporate cultures in a way that more regulation and rulemaking cannot. That is why I suggest a principles-based approach to corporate governance that does not rely solely on rules, law, and regulation. Business leaders should focus on the principles of good governance, such as adequately and honestly monitoring compliance with anti-discrimination law. Leaders should also focus on the principles that underlie the laws with which they must comply. This includes a focus on the principle of uncovering and dealing with discrimination rather than relying solely on the rhetoric of diversity.

Boards and managers must gather information about their firms' compliance with the laws that prohibit discrimination. Empathic

32. 42 U.S.C. §§ 2000e–2000e17 (2012).

33. 42 U.S.C. § 1981 (2012).

34. *See generally* Melissa Huelsman, *A Brief Primer on Fighting Predatory Lending Practices*, GP SOLO: LAW TRENDS & NEWS (Sept. 2005), https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0509_business_predatorylending.html#top (examining the trend of "nontraditional" lending practices and warning practitioners of their potentially predatory nature).

35. *See* Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES (Aug. 26, 2002, 5:30 PM), https://www.forbes.com/2002/07/25/accountingtracker.html#419e910257e8 (providing an alphabetical list of accounting scandals up to the date of publishing in 2002).

understanding can convince corporate directors and managers to live up to the fiduciary duties they owe shareholders to monitor compliance with anti-discrimination law. The corporate board's monitoring obligation that is part of its fiduciary duty of loyalty, like the process that inspires empathy, includes the work of gathering information. If this information gathering is done properly, it has the power to inspire empathy for minority communities, consumers, potential suppliers, and employees by providing information about the relationship of these constituencies to the company. In other words, the information-gathering process that helps business leaders fulfill their fiduciary duties is similar to the process that inspires empathy for others.

Empathy has been defined as the "identification with and understanding of another's situation, feelings, and motives."[36] "Empathy . . . is more than an intellectual predisposition, or belief; it is a readiness to be engaged in the experience of others."[37] Empathy has also been described as a "process" and an "information-gathering activity."[38]

Empathy plays a significant role in corporate governance. The Delaware Supreme Court explicitly acknowledged the role empathy plays when companies form special board committees to determine whether shareholder litigation alleging directorial wrongdoing that harmed the corporation should go forward.[39] The court held that it would review the substance of a committee's decision to dismiss this type of litigation because committee members may empathize with the fellow directors whose conduct is challenged. The court acknowledged that it had to "be mindful that directors are passing judgment on fellow directors in the same corporation. . . . The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role."

Another example of a corporate governance practice that implicitly recognizes the importance of empathy is the provision of stock options for corporate managers in order to align the interests of the corporate decisionmaker with the interests of the group for whom decisions are made: the shareholders. Stock option grants align the manager's personal wealth with that of shareholders. They foster a manager's identification with, or empathy for, shareholders.[40]

36. *Empathy*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 369 (4th ed. 2000).

37. Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1966 (1988).

38. Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 891 (1996).

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

40. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 844 (2d Cir. 1968). Other examples of corporate governance rules implicitly aimed at inspiring empathy are found in federal securities law. For example, one provision protects corporate actors from liability for materially misleading statements or omissions in registration statements. This is called the "due diligence" defense. It is

It seems, however, that there is an empathy imbalance in corporate governance. It is easier to find corporate governance practices that are based on empathy for relatively privileged groups like board members or shareholders than it is to find examples of empathy for constituencies that are impacted by corporate activity, such as labor, consumers, and communities. The law that protects labor, consumers, and communities is external to the corporation, and consideration of the interests of these constituencies is not typically considered a corporate governance issue or a matter internal to the company. In other words, corporate governance practices—internal to the corporation—have been inspired by empathy for directors, officers, and shareholders, but the same is not true for labor, consumers, and communities. This empathy imbalance becomes especially compelling when it comes to minority communities, employees, and consumers.

Business leaders, successful themselves, are not likely to understand the impediments to success faced by many people of color. Professor Richard Delgado concluded that "we think we—and others—have much more empathy for the downtrodden than we, in fact, do," and that this kind of "false empathy is worse than indifference. . . . It encourages the possessor to believe he is beyond reproach."[41] Professors Trina Grillo and Stephanie Wildman observed that "the way we empathize with and understand others is by comparing their situations with some aspects of our own."[42] Empathy is engendered by finding similarities with the object of empathic understanding or by analogizing the other's situation to that of the one who empathizes. The comparisons that inspire empathy obscure important experiential distinctions and reduce the possibility for true understanding of another's circumstances.

Professor Dorothy Roberts wrote that "empathy is often interpreted as finding oneself in others," and that "unequal power arrangements can block any instinct toward empathy."[43] Corporate hierarchies are defined by unequal power arrangements. This is yet another barrier to empathy for Americans of color, whose presence at the lower levels of corporate

available to any defendant who conducted a reasonable investigation about the truthfulness of registration statement materials. The Securities Act of 1933 defines reasonable investigation as requiring a level of reasonableness that "a prudent" person would apply "in the management of his own property." 15 U.S.C. § 77k (2000). This standard inspires empathy for shareholders, or potential shareholders, who may rely on a registration statement by requiring defendants to manage shareholders' affairs in the same way they would manage their own.

41. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy,* 84 CAL. L. REV. 61, 69, 78 (1996).

42. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other –Isms)*, 1991 DUKE L.J. 397, 400 (1991).

43. Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175, 188, 191 (1998).

hierarchies is disproportionately higher. The inequality of these power arrangements is vivid when considering the huge amount of power that CEOs and other executives and senior managers have as compared to the relatively low level or complete lack of bargaining power for those on the lower rungs of the corporate ladder. And the reality of de facto segregation that separates many Americans of color from white Americans precludes empathic understanding. This societal segregation reduces the possibility of interaction between business leaders, most of whom are white, and the members of the communities of color that are impacted by corporate activity. Moreover, the de facto segregation that impedes access for minority-owned businesses as potential suppliers to larger firms is another manifestation of empathic barriers.

Because "empathy does not guarantee that our emotions will lead us to act in an ethical or just way,"[44] taking action to enhance empathy for Americans of color will not resolve persistent race discrimination in the business setting. In fact, empathy may not be the solution. It may be the problem. "Empathic feelings toward members of one's own racial group . . . explain indifference or even hostility toward members of other racial groups."[45] Empathy for others who are similarly situated is not difficult, and in the corporate setting, this means that corporate managers and directors, most of whom are white, will easily empathize with the corporate constituents who are most like them. This empathy imbalance privileges white entrepreneurs who want to do business with public companies. It privileges white workers and disadvantages minority consumers, communities, employees, and suppliers. Acknowledging and understanding this empathy imbalance is an important first step toward establishing more equitable business climates.

Unfortunately, instead of understanding the possibility that an empathy imbalance exists or acknowledging the persistence of race discrimination in both American and corporate culture, most senior executives avoid meaningful discussion about race and racism. They typically display a dangerously simplistic and unsophisticated approach to the discussion of race matters. For example, I asked the CEO of a large transnational corporation who visited my Corporate Governance and Accountability class to discuss the aftermath of the 1996 settlement of the racial discrimination suit brought against Texaco. He told my students that one of the questions most frequently asked of chief executives by their boards immediately after the settlement was: "Do *we* have a Texaco problem?" He went on to say that he was able to assure his board that there was no "Texaco problem" at his company. I asked the CEO how he was able to

44. *Id.* at 193.

45. Linder, *supra* note 38, at 893.

determine that there was no racial discrimination anywhere in a multinational corporation that employed thousands of people. His response was: “There is no racism at my company because I’m not a racist. It all starts from the top.” While the concept of establishing a corporate culture that “starts from the top” is a frequently articulated proposition, its unthinking and empty reiteration in this context is corporate governance by rote. Without making appropriate inquiries, it is dangerously naïve to think that none of the company’s thousands of employees engaged in racially biased decisionmaking.

CEOs have the power to establish corporate cultures in which racial equity is a priority. But this will happen only if empathic understanding for minority communities, consumers, suppliers, and employees inspires CEOs and other senior executives and managers to focus some of their power on achieving racial equity within their firms. Empathy can be inspired by gathering information about another’s situation. Even though not explicitly undertaken to inspire empathy, similar information-gathering processes in the business setting are integral to the fulfillment of corporate officers’ and directors’ fiduciary obligations to adequately monitor compliance with law within their firms.

Understanding the impact of empathic consideration, or lack thereof, for constituencies of color that are affected by corporate activity is imperative. Relationships between a business on the one hand, and minority employees, communities, consumers, and businesses as potential suppliers on the other, are dramatically shaped by the ability, or the inability, of business leaders to empathize with these constituencies.

V. What Can Companies Do?: Critical Race Theory and Diversity Training and Programs

In this Section, I make concrete suggestions for corporate governance reform as it relates to constituencies of color who are impacted by business. The reform I suggest requires the attention of officers, managers, and even directors, and will inure to the benefit of shareholders whose long-term interests are served when discrimination litigation and the attendant negative publicity are avoided.

Professor David Thomas of the Harvard Business School recommends “educating managers . . . by teaching them how to mentor effectively.”[46] Thomas acknowledges that all workers, regardless of race, benefit from good mentoring relationships, but he recognizes that for minorities, good

46. David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV. 98, 104 (Apr. 2001), http://www.emfp.org/Main-Menu-Category/Library/Mentoring/The-Truth-About-Mentoring-Minorities-PDF.pdf.

mentors are essential in garnering company-wide support for employees of color. Mentors may be able to protect minority employees from disadvantages and criticisms that are tinged with racism. Mentors can create opportunities for minority employees that others would deny them.[47] The need to effectively train mentors as part of an established, formal mentoring program cannot be overemphasized. The mentors' training must encourage open and honest discussions with mentees about racial differences, privilege, and disadvantage.

A mentoring program is typically part of a firm's overall diversity efforts and training. The goal for any firm should be to install a diversity program that elevates the discourse on race beyond superficial utterances about diversity, inclusion, and equal opportunity. Mentors and diversity program participants should read excerpts from accessible scholarly articles that advance understanding about racial reality. For example, Peggy McIntosh, a white American activist and scholar, has thought about and explained the notion of white privilege—a concept that is especially relevant when examining issues of race in the business setting.[48] McIntosh writes that "whites are carefully taught not to recognize white privilege. . . ."[49] She explains why she thinks this is so: "The pressure to avoid [white privilege] is great, for in facing it [whites] must give up the myth of meritocracy."[50]

Most salient in McIntosh's essay is her list of ways that whiteness provides her with unearned advantages that people of color do not have. One of her observations relates directly to mentoring: "I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally."[51] She also observes: "I can take a job with an affirmative action employer without having coworkers on the job suspect that I got it because of race" and "I can speak in public to a powerful male group without putting my race on trial."[52] Few white mentors, managers, supervisors, or employees would have occasion to think about these simple examples of white privilege and how it impacts

47. *Id.*

48. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE AND FREEDOM MAGAZINE 10–12 (July/Aug. 1989), https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf. McIntosh is the Associate Director of the Wellesley Center for Research on Women. Other notable scholars have written about white privilege. *See* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999) (discussing race as an issue); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245 (2005) (discussing white privilege as perception).

49. McIntosh, *supra* note 48.

50. *Id.*

51. *Id.*

52. *Id.*

minority workers, community members, consumers, and actual or potential suppliers. Including these observations as part of a diversity training program would inspire deeper thinking on the part of managers about the struggles of many people of color in the business setting.

In addition to addressing the notion of white privilege, a good diversity program should address other subtle, complex matters of race about which critical race theorists have written. Programs should introduce participants to Derrick Bell's work, in which he concludes that racism is permanent.[53] Bell did not give up on the fight for racial justice with his permanence-of-racism thesis. He understood that the type of blatant, overt racism that was prevalent in the United States from the seventeenth century through the twenty-first century has evolved, for the most part, into a subtler, more covert, and implicit racism. Overt racism still exists in the twenty-first century, but most of the racism that people of color continue to deal with is hidden just below the surface—particularly in the business context. Racism is no longer acceptable in the minds of most Americans, but it persists. Understanding this is essential to mitigating racism's impact on the lives of people of color. If racism's permanence is not acknowledged, some may conclude that the problem is resolved, and festering problems will never be addressed.

Many white Americans are likely to resist McIntosh's observations about white privilege and Bell's permanence-of-racism thesis. There is little reason for white Americans to observe the subtleties of white privilege, and the same is true regarding modern-day racism because it is not directed at them. Moreover, Bell's thesis is hard to accept because most Americans continue to think that racism is confined to instances of racial hatred, the use of racist epithets, and other overtly hostile acts and attitudes. Most Americans condemn overtly racist behavior.

Because of the almost universal public condemnation of blatantly racist behavior, many white Americans, including business leaders, conclude that modern-day racism is rare and that overt or hate-filled racists are outliers who are not in the mainstream. When these white Americans join in the condemnation of blatant racism, they conclude that they themselves are not racists because they abhor the condemned conduct. In this regard, Charles Lawrence's work about unconscious

53. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (Basic Books ed., 1992) (arguing that the nature of racism in the United States is ingrained and institutional, and that self-preservation instincts of the white majority inherently reject the premise of civil rights activism).

racism[54] and more recent writings about implicit bias[55] are illuminating. Diversity training should include discussion of the idea that most Americans, regardless of race, carry with them implicit biases of which they are not aware.

When business activity negatively impacts people of color who are employees, consumers, potential and actual suppliers who are small business owners, and community members, it is frequently the result of unconscious racism or implicit bias rather than overtly blatant racism. The implicit bias that infects some corporate decisions can be confronted only if it is acknowledged. Business leaders, agents, and representatives would more fully understand the nature of modern-day racism if diversity training programs included Lawrence's thesis about unconscious racism.

If business leaders were to hear the narratives of people of color who are negatively impacted by business activity, they would more easily understand unconscious racism or implicit bias. Richard Delgado's work on the importance of narrative would elevate the discourse about race in diversity programs. Delgado explains that the stories of outsiders or individuals who are marginalized must be told and heard in order to attempt to resolve racial inequity.[56] Critical race theory can also help business leaders understand the issues with which women of color grapple when private firms employ them, when they consume goods and services, or when they attempt to do business with firms. Intersection theory explains that women of color typically face discrimination on the basis of race *and* gender, and that it is conceptually impossible to separate these two components of an individual's identity.[57] Legal scholars have

54. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

55. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

56. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 91 (1989).

57. *See generally* Kimberle 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, 168 (1989) (noting that the intersectional experience is greater than the sum of racism and sexism). The authors of a 2017 article concluded that female attorneys of color, when compared to other attorneys, have greater perceptions of unfair treatment where they work. Todd A. Collins, Tao L. Dumas, & Laura P. Moyer, *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorneys*, 98 SOC. SCIENCE Q. 1643 (2017). This article found that perceptions of age discrimination among female attorneys of color were also high. *Id.* The authors demonstrate an understanding of intersection theory that is typically not prevalent in the context of diversity discussions, programs, and training in businesses. *Id.* This study reveals how the problems that plague corporations and other business organizations also affect law firms. *Id.* This is stunning because one would expect attorneys to be cognizant of antidiscrimination law and policy. *Id.*

also written about the dangers of essentialism.[58] They have warned against attempts to reduce an entire group—African Americans or women, for example—to a simplistic monolith that fails to acknowledge other facets of an individual's identity.

Critical race theorists have written about the ideas I describe in the preceding paragraphs for decades. It is stunning that the impact of their work has been, for the most part, confined to academic circles. The permanence of racism, implicit bias, the importance of narrative, intersection theory, and essentialism are concepts worn thin from seemingly endless dissection and examination among academics. Few in the business setting, however, engage with these ideas. Diversity training and programs, when designed properly, can expose business actors to insights about race that can be culturally transformative.

One of the most significant structural changes that companies can make would be to ensure that workers, managers, and leaders at all levels of corporate hierarchies take the work done by human resources and diversity and inclusion department professionals seriously. One former Associate Development Supervisor in Human Resources at The Home Depot, Inc., complained that the company did not take its human resources department and professionals seriously.[59] Her lawyer confirmed this, adding:

> [D]iscrimination is usually not a matter that really gets that far up the chain in the corporate structure. It is not a matter that anyone is really concerned about. They issue the policies, they issue all the programs on diversity but truthfully it has always been a matter that's dealt with at a very low level in any corporation.[60]

CONCLUSION

Most public corporations and many other types of business organizations expend significant effort and resources on diversity efforts. I encourage business leaders to consider that the genesis of the need to engage in these efforts is the continuing problem of discrimination. Efforts to increase diversity can only be successful if business leaders understand that discrimination persists. Leaders must understand that the groups of employees, suppliers, and consumers who work and do business with a firm will be diverse, and will be treated fairly, only if firm managers diligently monitor compliance with anti-discrimination law. Once business leaders understand that a lack of diversity among various

58. The seminal work on essentialism was written by Elizabeth Spelman decades ago. ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (Beacon Press ed., 1988).

59. Interview with Glenor Cyrus (Oct. 6, 2006).

60. Interview with James Vagnini, Employment Discrimination Attorney (July 27, 2011).

corporate constituents results from a failure to monitor compliance with the laws that prohibit discrimination, diversity efforts become more meaningful and potentially successful.

A focus on compliance is a significant step toward achieving more ethical corporate cultures in general, and a focus on compliance with antidiscrimination law moves a firm toward greater diversity. However, "[l]ots of organizations focus on the latest compliance trends but fail to establish an ethical culture that deters misconduct."[61] Business managers must move beyond the check-the-box type of compliance in order to create more ethical climates.

Why should business leaders invest in meaningful compliance and diversity efforts? Do shareholders care about these issues? Some shareholders may not. When it comes to diversity on corporate boards, for example, a 2017 report from the Investor Responsibility Research Center Institute focuses on activist shareholders seeking to change or influence the composition of corporate boards at S&P 1500 firms.[62] According to the report, this type of shareholder activism did not increase racial, ethnic, or gender diversity. But some shareholders see board diversity as a crucial corporate governance issue. After 21st Century Fox paid millions to settle sexual harassment suits, an investment group approached the firm about increasing the number of women on its board beyond the one female director then serving.[63] Any disagreement that may exist among shareholders about the importance of diversity among the constituent groups with which their firms deal may not be salient. In other words, shareholder tastes for diversity may not be the most important factor in motivating business leaders to pursue diversity and anti-discrimination efforts. One recurring lesson in the aftermath of corporate scandal is that business leaders must consider their firms' reputations and potential public outrage in reaction to misconduct at their firms. This is an important lesson that is illustrated by the expression of public outrage to workplace sexual harassment and abuse that ignited the

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61. Stephanie Francis Ward & Rachel M. Zahorsky, *Legal Rebels 2012: If the Shoe Fits . . .*, ABA J.: LEGAL REBELS (Sept. 2012), http://www.abajournal.com/magazine/article/legal_rebels_2012_if_the_shoe_fits (quoting Jordan Thomas, a lawyer who represents Dodd-Frank whistleblowers).

62. Andrew Borek, Zachary Friesner, & Patrick McGurn, *The Impact of Shareholder Activism on Board Refreshment Trends at S&P 1500 Firms*, INVESTOR RESP. RES. CTR. INST. (2017).

63. *See* Emily Steel, *21st Century Fox Pressed by Investment Group to Overhaul Board,* N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/business/media/21st-century-fox-sexual-harassment.html (calling for an overhaul of 21st Century Fox's board). *See also* Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 S.M.U. L. REV. 327 (2017) (contending that the failure to enhance gender diversity in leadership ranks of financial services firms may undermine important goals, such as risk management oversight).

2017–2018 #MeToo and #TimesUp movements.

It is clear that the discourse, norms, and practices relating to sexual discrimination and harassment in the business context have evolved. Feminist activists and their outspoken intolerance of sexual harassment, abuse, and discrimination have created new norms for women in business. This activism has uncovered hidden, but persistent, sexism, and this revelation has resulted in intolerance for behavior once tolerated. Private businesses quickly fired powerful men in the face of credible allegations of sexual harassment. That is why I celebrate the private sector as a potentially promising locus for the fair treatment of women.

In an insightfully critical opinion piece about the changes in employer response to sexual abuse and harassment allegations, Daphne Merkin, a critic and writer, challenged recent employer responses to sexual harassment and abuse allegations. "We are witnessing the re-moralization of sex, not via the Judeo-Christian ethos but via a legalistic, *corporate* consensus."[64] My thoughts regarding the correctness of this comment are beyond the scope of this Essay. My point in citing to this observation is simply to highlight the salience of business organizations in general, and more narrowly corporations, in shaping our lives, relationships, and interactions, and potentially mitigating the impact of racism and sexism in the business setting.

Most salient for me are Merkin's observations that dig deeply into the notions and discourse about how women are treated in the business setting. Lamenting the loss of "subtlety and reflection" in public discussion about and employer reaction to sexual harassment and abuse allegations, Merkin longs for nuance and clarification. She asks: "What is the difference between harassment and assault and inappropriate conduct?"[65] Further demonstrating the careful and in-depth thinking and discourse on this issue, others engaged and disagreed with her positions.[66]

It is important that the nation is engaging in a discussion that moves

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64. Daphne Merkin, Opinion, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html (emphasis added).

65. *Id.* Anticipating the protest where celebrities promised to dress in black to protest sexual harassment and abuse of women in the workplace, Merkin wrote:

> [M]any of us, including many longstanding feminists, will be rolling our eyes, having had it with the reflexive and unnuanced sense of outrage that has accompanied the [anti-sexual harassment movement] from its inception, turning a bona fide moment of moral accountability into a series of ad hoc and sometimes unproven accusations. *Id.*

66. *See, e.g.*, Samantha Grasso, *Do Women with #MeToo 'misgivings' have the right to call themselves feminists?*, DAILY DOT (Jan. 5, 2018), https://www.dailydot.com/irl/daphne-merkin-metoo (characterizing Merkin's writing as attempting to shame women into silence).

beyond the superficiality that typified previous discussions about sexism and sexual harassment. This evolution of thought, nuanced discourse, and practice, however, that characterizes the 2017–2018 protest movement relating to sexism in the business setting has not yet occurred with respect to issues relating to race and racism.[67] My hope is that these important potential changes in the business context in the way (white) women are treated will lead eventually to a similar intolerance for race discrimination and harassment that impede the attainment of racial diversity in the private sector. My more modest, but perhaps more attainable, hope is that the discourse on race and racism will become less superficial and more nuanced in a way that is similar to the discourse about sexual abuse, harassment, and discrimination.

67. For example, there was far less reporting and discussion about race discrimination at Fox even though eleven employees filed a class action and one individual filed a suit alleging racial harassment. *See* Sydney Ember, *11 Sue Fox News, Citing 'Intolerable' Racial Bias*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/business/media/fox-news-racial-discrimination-lawsuit.html (noting the lawsuits contend that Fox News employees repeatedly complained about racial discrimination to current network executives but no action was taken and the inappropriate behavior continued).