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Do Social Movements Spur Corporate Change? The Rise of “MeToo Termination Rights” in CEO Contracts

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Do Social Movements Spur Corporate Change? The Rise of “MeToo Termination Rights” in CEO Contracts

RACHEL ARNOW-RICHMAN, JAMES HICKS &
STEVEN DAVIDOFF SOLOMON*

Do social movements spur corporate change? This Article sheds new empirical and theoretical light on the issue through an original study of executive contracts before and after MeToo. The MeToo movement, beginning in late 2017, exposed a workplace culture seemingly permissive of high-level, sex-based misconduct. Companies typically responded slowly and imposed few consequences on perpetrators, often allowing them to depart with lucrative exit packages. Why did companies reward rather than penalize bad actors, and has the movement disrupted this culture of complicity?

The passage of time since the height of the movement allows us to investigate these issues empirically, using the lens of executive contracts. Economic theory posits that CEO employment agreements are not negotiated at arm’s length and contain terms that strongly favor the executive. We hypothesize that these dynamics—typically associated with outsized compensation packages—resulted in pro-executive termination provisions that left room for executives to engage in sex-based misconduct without fear of reprisal. We argue that the MeToo movement represented a major shock to these bargaining dynamics and predict that, in the face of new reputational and liability risks, corporate boards will seek to reserve greater power to terminate CEOs for sex-based misconduct in post-MeToo agreements.

We test—and substantiate—our hypotheses using a novel dataset of CEO employment agreements. We focus on changes to the contractual definition of a “for-cause” termination. In the wake of MeToo, we find a significant and growing rise in the prevalence of what we call “MeToo termination rights”—definitions of cause that permit companies to terminate CEOs without severance pay in cases of harassment, discrimination, and violations of company policy. Such grounds for cause broadly capture most forms of sex-based misconduct.

This documented rise in “MeToo termination rights” holds important lessons for corporate governance, executive contracting, and gender equity. First, our results show that external shocks can disrupt traditional corporate bargaining dynamics, bringing contract terms more in line with changing expectations. Second, our results provide insight into contract design, suggesting possible tradeoffs that companies make in structuring these novel termination rights. Finally, our results can be

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understood as reflecting a realignment of the treatment of top-level executives with the treatment of ordinary workers, who have long been subject to capacious sexual harassment policies.

We conclude that the rise in “MeToo termination rights” offers evidence of increased corporate control of CEO behavior and greater institutional accountability for sex-based misconduct. We are therefore cautiously optimistic about the long-term effects of MeToo and the ability of powerful social movements to inspire change within private institutions.

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INTRODUCTION

Five years ago, investigative journalists broke the news of film mogul Harvey Weinstein’s decades-long history of sex-based misconduct, launching the viral movement that became #MeToo.¹ Many of the consequences of the movement have

1. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [https://perma.cc/3599-SHVN]. Five days later, actress Alyssa Milano triggered an outpouring of responses when she tweeted that anyone who had experienced sexual harassment or assault should reply “me too” to her tweet, launching what became a viral hashtag movement. See Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied.*, NBC NEWS (Oct. 15, 2018, 5:59 PM), <https://www.nbcnews.com/news/us-news/year-agoalyssa-milano-started-conversation-about-metoo-these-women-n920246> [https://perma.cc/CT5F-M8KS]. Ms. Milano credited Tarana Burke, who in 2007 used “Me Too” as the slogan for her nonprofit organization that assists sexual abuse victims. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/N8LR-LQ4A]. For a detailed account of the events and allegations that

played out in the public arena, either in the media or the statehouse. In just the first year following the watershed Weinstein revelations, some 200 individuals were ousted from positions of power due to allegations of sex-based misconduct,² and new allegations continue to surface.³ Companies have publicly committed to initiatives aimed at eliminating discrimination and improving diversity and transparency.⁴

coalesced to form the movement, see Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 50–54; see also Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 375–79 (discussing the value and impact of social media in defining the MeToo movement).

2. Between October 2017 and October 2018, approximately 200 high-profile individuals were accused of and suffered consequences for sex-based misconduct. See Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/T3QV-84TK>] (Oct. 29, 2018); *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (May 18, 2019), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations> [<https://perma.cc/VV32-H9SU>].

3. See, e.g., Ryan Mac, *SpaceX Executive Defends Elon Musk Against Misconduct Accusations*, N.Y. TIMES (May 23, 2022), <https://www.nytimes.com/2022/05/23/technology/spacex-elon-musk.html> [<https://perma.cc/7KRH-KLJE>]; Sharon Terlep & Suzanne Kapner, *CVS Ousts Executives After Internal Probe, Vows to Overhaul How It Handles Sexual-Harassment Complaints*, WALL ST. J., https://www.wsj.com/articles/cvs-ousts-executives-after-internal-probe-vows-to-overhaul-how-it-handles-sexual-harassment-complaints-11647024845?mod=hp_lead_pos3 [<https://perma.cc/3SJF-EAWG>] (Mar. 11, 2022, 2:25 PM); Brian Stelter & Oliver Darcy, *CNN President Jeff Zucker Resigns over Consensual Relationship with Key Lieutenant*, CNN BUS., <https://www.cnn.com/2022/02/02/media/jeff-zucker-cnn/index.html> [<https://perma.cc/9QFQ-LAUL>] (Feb. 2, 2022, 5:50 PM); Sarah E. Needleman, *Activision Blizzard Executives Exit as Company Faces Gender-Bias Lawsuit*, WALL ST. J., https://www.wsj.com/articles/activision-replaces-blizzard-head-j-allen-brack-as-it-grapples-with-gender-bias-lawsuit-11627999132?mod=Searchresults_pos8&page=1 [<https://perma.cc/D7S7-C4FR>] (Aug. 3, 2021, 7:24 PM); David Yaffe-Bellany, *McDonald's Fires C.E.O. Steve Easterbrook After Relationship with Employee*, N.Y. TIMES (Nov. 3, 2019), <https://www.nytimes.com/2019/11/03/business/mcdonalds-ceo-fired-steve-easterbrook.html> [<https://perma.cc/K889-B72N>].

4. See, e.g., Janelle Griffith, *Google Changes Sexual Harassment Policies After Employee Walkout*, NBC NEWS (Nov. 8, 2018, 1:04 PM), <https://www.nbcnews.com/tech/tech-news/google-changes-sexual-harassment-policies-after-employee-walkout-n934046> [<https://perma.cc/D23V-NWV6>]; Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> [<https://perma.cc/7EVU-484K>]; Imani Moise, *Wells Fargo Ends Forced Arbitration for Sexual Harassment Claims*, REUTERS, <https://www.reuters.com/article/us-wells-fargo-harassment/wells-fargo-ends-forced-arbitration-for-sexual-harassment-claims-idUSKBN2062J4> [<https://perma.cc/7S6Q-6UK6>] (Feb. 12, 2020, 12:35 PM). Notably, many companies hired or promoted women when replacing men ousted for sex-based misconduct. See Carlsen, Salam, Miller, Lu, Ngu, Patel & Wichter, *supra* note 2. For a review and assessment of the corporate response, see generally

Congress and state legislatures have enacted new and amended legislation seeking to increase sexual harassment training, enhance victims’ ability to bring claims, and improve transparency around the resolution of disputes.⁵

Yet we know little about what happened within companies in the wake of the movement. A critical question is whether MeToo has led to greater institutional accountability for the misconduct of high-level actors. The central stories of the movement brought to light not only the pervasiveness of sex-based misconduct⁶ but in many companies, an organizational culture seemingly permissive of such wrongdoing when perpetrated by powerful individuals. In the most egregious examples, the misconduct went on for years, targeted multiple victims, and was an

Amelia Miazad, *How the #MeToo Movement Is Transforming Corporate Governance*, in THE GLOBAL #METOO MOVEMENT 459, 459–73 (Ann M. Noel & David B. Oppenheimer eds., 2020) [hereinafter Miazad, *#MeToo Movement*]; Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913 (2021) [hereinafter Miazad, *Corporate Governance*].

5. The legislative response to MeToo has taken various forms. It includes reforms targeting sexual harassment and discrimination specifically, such as state laws that mandate sexual harassment training and/or alter the threshold for demonstrating actionable sexual harassments. *See, e.g.*, CAL. CIV. CODE § 51.9 (West 2019); CAL. GOV’T CODE § 12940 (West 2022); CAL. GOV’T CODE § 12950 (West 2020); CAL. GOV’T CODE § 12950.1 (West 2020); DEL. CODE ANN. Tit. 19, § 711A (2019); Workplace Transparency Act, Pub. L. No. 101-0221, 2019 Ill. Legis. Serv. 101-0221 (West); 775 ILL. COMP. STAT. ANN. 5/2-101(E) (West 2022); ME. REV. STAT. ANN. tit. 26, § 807 (West 2017); MINN. STAT. ANN. § 363A.03 (West 2022); N.Y. LAB. LAW § 201-g (McKinney 2019); N.Y. C.P.L.R. 7515 (McKinney 2019); S.B. 1586, 81st Legis. Assemb., Reg. Sess. (Or. 2022); TEX. LAB. CODE ANN. § 21.141 (West 2021); WASH. REV. CODE ANN. § 28A.640.020 (West 2022). It also includes reforms seeking to promote transparency in the resolution of sexual harassment and discrimination claims, such as the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which prohibits forced arbitration of sexual harassment claims, 9 U.S.C.A. § 402 (West), the federal Speak Out Act, S. 4524, 117th Cong. § 4(a) (2022), and various state laws that prohibit the use of confidential settlement clauses. *See, e.g.*, CAL. CIV. PROC. CODE § 1001 (West 2022); CAL. CIV. PROC. CODE § 1002 (West 2020); CAL. GOV’T CODE § 12964.5 (West 2022); N.J. STAT. ANN. § 10:5-12.8 (West 2019); N.M. STAT. ANN. § 50-4-36 (2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019); N.Y. C.P.L.R. 5003-b (McKinney 2019); S.B. 1586, 81st Legis. Assemb., Reg. Sess. (Or. 2022); TENN. CODE ANN. § 50-1-108 (2018); VT. STAT. ANN. tit. 21, § 495h (2018); WASH. REV. CODE § 49.44.211 (2022); WASH. REV. CODE § 4.24.840 (2018); H.B. 1795, 67th Leg., Reg. Sess. (Wash. 2022). For a summary of legislative activity in the immediate aftermath of MeToo, including bill tracking, see generally Williams, Singh & Mezey, *supra* note 1, at 386–89.

6. We use the term “sex-based misconduct” as shorthand for the wide range of objectionable behaviors brought to light by the MeToo movement, recognizing that not all instances of such behavior were proved to have occurred nor, had they been, would necessarily have constituted sexual harassment. Our focus in this Article is on corporate boards’ ability to take action against behavior that jeopardizes (mostly women) workers irrespective of its legality. For a taxonomy of the various forms of sex-based misconduct implicated by the movement and their relationship to sexual harassment law, see Rachel Arnow-Richman, *Finding Balance, Forging a Legacy: Harassers’ Rights and Employer Best Practices in the Era of MeToo*, 54 U.S.F. L. REV. 1 (2019) [hereinafter *Best Practices*].

open secret among corporate higher-ups.⁷ Yet pre-MeToo, these companies responded slowly and imposed few consequences on alleged perpetrators, preferring to cover up the problem with confidential settlements and cushioned exits.⁸

This phenomenon—what we refer to as the “MeToo accountability problem”—came as no surprise to employment discrimination scholars. These commentators have long bemoaned the limits of antidiscrimination law in effecting cultural change within workplaces.⁹ They have observed that, in the case of sexual harassment, deeply rooted gender inequity can coexist alongside “zero tolerance” policies and corporate commitments to diversity.¹⁰ Worse yet, companies may deploy such policies instrumentally in service to other managerial goals,¹¹ aggressively policing

7. See, e.g., Monica Hesse & Dan Zak, *Violence. Threats. Begging. Harvey Weinstein's 30-Year Pattern of Abuse in Hollywood*, WASH. POST (Oct. 14, 2017), https://www.washingtonpost.com/lifestyle/style/violence-threats-begging-harvey-weinsteins-30-year-pattern-of-abuse-in-hollywood/2017/10/14/2638b1fc-aeab-11e7-be94-fabb0f1e9ffb_story.html [<https://perma.cc/8A9E-TP6E>] (reporting that Weinstein's conduct was widely known or suspected by colleagues, employees, reporters, and others around him); Matthew Goldstein, Tiffany Hsu & Kenneth P. Vogel, *Stephen Wynn, Casino Mogul, Accused of Decades of Sexual Misconduct*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/steve-wynn-sexual-misconduct-claims.html> [<https://perma.cc/P75T-NBVZ>] (reporting that Wynn's misconduct continued for decades and that numerous female employees had complained over the years to their supervisors); 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/E63N-SW4K>] (Dec. 17, 2018) (reporting investigations into CBS's company-wide culture after three high-profile executives were accused of sexual harassment by dozens of women over a span of thirteen months); Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html> [<https://perma.cc/Y8SA-ZPQY>].

8. A widely publicized example is Google's treatment of Android-creator Andy Rubin, who was given a \$90 million exit package following credible allegations of sexual misconduct. Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the 'Father of Android'*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html> [<https://perma.cc/WNR5-4EYT>]; cf. Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html> [<https://perma.cc/SKZ2-ZV2Q>] (reporting how 21st Century Fox favorably treated Bill O'Reilly—renewing his contract and ultimately terminating him with a \$25 million payout—despite multiple credible and settled allegations of harassment against him).

9. This literature is too vast to be thoroughly captured here. For a brief but comprehensive summary of the limits of sexual harassment law and the complaint and response system within organizations, see Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 380–94 (2019).

10. This critique focuses principally on the Court-created liability structure surrounding hostile work-environment harassment, which many believe encourages mere symbolic compliance with antidiscrimination law. See *infra* note 169.

11. See LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC

the behavior of marginalized workers while turning a blind eye to the sex-based misconduct of corporate stars deemed too valuable to lose.¹²

The MeToo movement, with its revelations of high-level misconduct and corporate complicity, has revived these concerns within the employment discrimination discourse.¹³ Yet an emerging, more optimistic body of literature is examining this problem from a corporate governance perspective.¹⁴ This work relies on increased stakeholder attention to the reputational consequences and liability risks associated with sex-based misconduct in the wake of the MeToo movement.¹⁵

CIVIL RIGHTS 33–37 (2016) (describing how employers respond to legal mandates by implementing compliance measures in ways that advance their organizational interests); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087–88 (2003) (describing how employers have leveraged sexual harassment law to tamp down on personal expression, advance productivity goals, and provide justification for eliminating out-of-favor employees).

12. See *Best Practices*, *supra* note 6; Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85 (2018) [hereinafter *Power and Process*]; Schultz, *supra* note 11; cf. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22 (2018) (arguing that employers’ conferral of unfettered power to favored employees encourages and enables sexual harassment).

13. See Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155 (2021); Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057 (2018); Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361 (2020); Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419 (2020); Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943 (2021); L. Camille Hébert, *Is “MeToo” Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL’Y J. 321 (2018); Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It’s Complicated*, 50 SETON HALL L. REV. 1397, 1424 (2020); Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 FLA. L. REV. 797 (2020); Schultz, *supra* note 12, at 30; Deborah M. Weiss, *Sexual Harms Without Misogyny*, 2019 U. CHI. LEGAL F. 299; Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014 (2018).

14. See, e.g., Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018); Claire A. Hill, *#MeToo and the Convergence of CSR and Profit Maximization*, 69 CASE W. RES. L. REV. 895 (2019); Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327 (2020); Miazad, *Corporate Governance*, *supra* note 4; cf. Michael D. Rebeck, *Sexual Misconduct & Securities Disclosures in the “#MeToo” World*, 75 N.Y.U. ANN. SURV. AM. L. 85 (2019) (exploring risks of SEC disclosure liability for failure to disclose instances of high-level sex-based misconduct); Joni Hersch, *Efficient Deterrence of Workplace Sexual Harassment*, 2019 U. CHI. LEGAL F. 147 (proposing financial incentives or damage awards as a method of incentivizing business organizations to eliminate sexual harassment).

15. A developing literature explores the effects of MeToo on shareholder perception/firm value. See, e.g., Mary Brooke Billings, April Klein & Yanting Crystal Shi, *Investors’ Response to the #MeToo Movement: Does Corporate Culture Matter?*, 27 REV. ACCT. STUD. 897 (2022); Karl V. Lins, Lukas Roth, Henri Servaes & Ane Tamayo, *Sexism, Culture, and Firm Value: Evidence from the Harvey Weinstein Scandal and the #MeToo Movement* (Eur. Corp. Governance Inst., Fin. Working Paper No. 679/2020, 2019), <https://ssrn.com/abstract=3458312> [<https://perma.cc/LL38-VCQR>] (finding that returns for firms with female executives are substantially higher in industries with few women in executive positions and that perception of a nonsexist culture adds value to firms); Robert

Responding to their shareholders, previously recalcitrant companies may exercise greater institutional oversight of sex-based misconduct and strengthen efforts to achieve gender inclusivity, including within the upper echelons of corporate leadership.¹⁶ In effect, the corporate governance process can buttress antidiscrimination law, yielding change that could not be achieved through purely legal channels.

Five years from the onset of MeToo, the time is ripe to test these competing ideas. We provide an empirically supported and theoretically grounded assessment of the effects of the MeToo movement on corporate accountability for high-level harassment. While antidiscrimination scholars have focused primarily on human resources practices, we explore the role of executive employment contracts. These generally grant high-level actors expansive job security rights that may constrain a company's ability to respond to sex-based misconduct, contributing to the MeToo accountability problem.¹⁷ Recent work proposes that companies should—and in some cases predict that companies will—revise their drafting practices to reserve greater discretion to terminate executives engaged in such behavior.¹⁸ Such claims, however, have not been tested or adequately theorized.¹⁹

Mooibroek & Willem F.C. Verschoor, *Stock Market Response to CEO Sexual Misconduct: Evidence from the #MeToo Era* (Jan. 2021) (unpublished manuscript), <https://ssrn.com/abstract=3771575> [<https://perma.cc/CX3W-ZRHR>] (studying the stock market response to firms' sex-based misconduct scandals and the type of firms most prone to those scandals).

16. Hemel & Lund, *supra* note 14; Hill, *supra* note 14; Lin, *supra* note 14; Miazad, *#MeToo Movement*, *supra* note 4, at 66. *But see* Stavros Gadinis & Chris Havasy, *The Quest for Legitimacy in Corporate Law* (May 6, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4081543> [<https://perma.cc/8JBT-6GBD>] (cautioning against improvident corporate responses to social movements and recommending legitimizing protocols consistent with public agency procedures). Workplace law scholars have similarly made predictions of progressive reform within organizations from an antidiscrimination compliance and institutional response perspective. *See Best Practices*, *supra* note 6, at 29–31; Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 278 (2018).

17. *See, e.g., Best Practices*, *supra* note 6; Miazad, *Corporate Governance*, *supra* note 4; Tippet, *supra* note 16, at 278.

18. *See supra* note 17. Comparable recommendations have been made regarding the use of “morals clauses” in the entertainment industry. *See* Rick G. Morris, *Media Moguls Risking It All: Contract Clauses in the Entertainment Business in the Age of #MeToo*, 9 ARIZ. ST. SPORTS & ENT. L.J. 1 (2019); Jihad Sheikh, *Punishing Bad Actors: The Expansion of Morals Clauses in Hollywood Entertainment Contracts in the Wake of the #MeToo Movement*, 43 NOVA L. REV. 203, 205 (2019).

19. There is very limited data on corporate policies and drafting practices in the wake of MeToo. One study finds significant expansion in the length of corporate ethics codes and increased uses of terms related to issues of corporate social responsibility between 2008 and 2019. Tim Loughran, Bill McDonald & James Otteson, *How Have Corporate Codes of Ethics Responded to an Era of Increased Scrutiny?*, J. BUS. ETHICS (forthcoming), <https://ssrn.com/abstract=3887743> [<https://perma.cc/PXT8-KMYA>]. However, that study does not focus on MeToo or gender equity. A somewhat different project looks at changes to corporate M&A practices. Anna Windemuth, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 YALE L.J. 488 (2019). That study documents the rise of clauses specifically

We draw on corporate law and agency theory, which assert that the negotiation and enforcement of CEO contracts is inherently favorable to CEOs, to argue that dynamics traditionally associated with outsized executive compensation will also yield overly generous protections against CEO termination.²⁰ We then hypothesize that the MeToo movement acted as an external shock to these dynamics, spurring corporations to insist on more pro-company terms that preserve greater discretion to terminate.²¹ Finally, we test—and substantiate—both assertions through an empirical study of CEO contracts before and after the rise of the MeToo movement. We find statistically significant increases in the inclusion of what we call “MeToo termination rights”—clauses that grant companies greater flexibility to terminate for cause in the face of sex-based misconduct. We thus conclude that, post-MeToo, corporations are positioning themselves to exercise greater oversight of CEO behavior and respond proactively to sex-based misconduct.

This Article proceeds as follows: Part I lays the factual and theoretical groundwork for our study. Using a case example and drawing on agency theory, we argue that the MeToo accountability problem owes in part to CEO contract language. Unlike ordinary employees, CEOs are protected by written contracts that not only reject the default rule of employment at will²² but contain bespoke provisions that

contemplating a MeToo event but only in the context of corporate transactions. It does not examine employment contracts.

20. There is an extensive literature arguing that CEOs can extract rents from the corporation with respect to compensation. *See, e.g.*, Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 30 J. CORP. L. 647 (2005); LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004). *But see* M. Todd Henderson, *Paying CEOs in Bankruptcy: Executive Compensation When Agency Costs Are Low*, 101 NW. U. L. REV. 1543, 1557 n.74 (2007) (describing studies purporting to show that CEO compensation is not a product of agency costs).

21. As we discuss further below, CEO contracts, like other corporate agreements, are at least partly the product of form documents and are heavily influenced by drafting customs. Our findings therefore align with other studies that have found path dependence in boilerplate terms, even in contracts subject to arm’s-length bargaining by sophisticated parties. This boilerplate can shift in response to shocks to the contracting environment. *See* Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481 (2009) (documenting the shift in “material adverse change” clauses in private equity acquisition contracts in response to the 2008 financial crisis); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 353–55 (1996) (discussing the forces that shape and perpetuate common boilerplate contract terms).

22. The employment-at-will default rule provides that either party may terminate the employment relationship for any or no reason. *See* RESTATEMENT (THIRD) OF EMP. L. § 2.06 (AM. L. INST. 2014). It is generally attributed to an 1877 treatise by Horace Wood and has been much criticized by employment law scholars from both a historical and policy perspective. *See* Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 n.1 (2004) (estimating that there are over two hundred articles advocating for eliminating employment at will in favor of a just cause rule). Regardless of its desirability or its historical legitimacy, however, employment at will remains the presumptive rule in every state except Montana, which has modified the default rule by statute. Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-904(1)(b) (2021)

limit companies' ability to terminate CEOs without significant financial penalty.²³ This is achieved through narrowly drafted definitions of "cause" that enumerate the precise and exclusive grounds under which the executive may be terminated without separation pay. Extant law generally interprets these provisions in favor of CEOs, making it financially risky for companies to remove CEOs for behavior that, while wrongful, may ultimately fall short of the contractual standard.²⁴

We then turn from external law to internal norms, examining the nature of executive contracting within the structure of the corporation. From this perspective, we consider why companies agree to these generous job security protections—in effect contracting away their ability to respond nimbly to allegations of sex-based misconduct. Corporate governance scholars, seeking to explain high executive compensation packages, have long argued that boards of directors and corporate executives do not deal at arm's length.²⁵ However, such theories have not been applied to other features of executive agreements, such as termination provisions and definitions of cause. We build on the existing literature, arguing that these same dynamics can result in pro-CEO definitions of cause that limit board discretion to discipline CEOs or control misbehavior.

In Part II, we examine these issues empirically. While the principal-agent gap has been widely theorized, there has been only limited study of the actual terms of CEO contracts and the extent to which they reflect this governance problem.²⁶ Similarly, although several scholars have speculated about the likely effects of the MeToo movement on corporate decision-making, their predictions have not been tested empirically.²⁷ We provide the first original study comparing employment agreements before and after MeToo.

Our results confirm that definitions of cause in CEO contracts generally enumerate narrow and exclusive grounds for an uncompensated termination (such as failure to perform and material breach of contract)—terms that, in most cases, do not embrace sex-based misconduct.²⁸ However, in the wake of the MeToo movement,

(making discharge wrongful if "the discharge was not for good cause").

23. See *infra* Part I.A. See generally Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 233 (2006) (finding in a sample of 375 contracts only twenty-five that "expressly declare the contract to be at-will," of which only thirteen "give the CEO the same rights if dismissed with or without cause").

24. See *infra* Part I.A.

25. See BEBCHUK & FRIED, *supra* note 20, at 201 ("The problems of executive compensation arrangements . . . are rooted in boards' failure to bargain at arm's length with executives.").

26. A 2006 study examined 375 CEO contracts between 1984 and 2003, but that research focused on the differences between standard employment contracts and executive contracts. Schwab & Thomas, *supra* note 23, at 232.

27. See *supra* note 14.

28. See *infra* Part III.C. Of course, sex-based misconduct *could* rise to the level of a material breach of contract if it is of sufficient severity or pervasiveness as to implicate corporate liability. But this is not a certainty. See, e.g., *Balles v. Babcock Power Inc.*, 70 N.E.3d 905, 916 (Mass. 2016); *Prozinski v. Ne. Real Est. Servs.*, 797 N.E.2d 415, 423–24 (Mass. App. Ct. 2003); *infra* Part I.A. For this reason, our focus is on contract language that more clearly and directly embraces all forms of sex-based misconduct, enabling companies to

we find evidence that companies increasingly include what we refer to as “MeToo termination rights.” In particular, we see a higher incidence of termination provisions that include sexual harassment, discrimination, and violations of company policies as grounds for cause for termination. Such language embraces sex-based misconduct explicitly and expansively, strengthening a company’s ability to respond to this behavior.

In Part III, we analyze our findings from three perspectives: corporate governance, contract design, and gender equity. Societal expectations about the seriousness of sex-based misconduct and the need for corporate accountability have clearly shifted, and our study shows that terms of employment are following.²⁹ Our results demonstrate that bargaining dynamics in the corporate context are responsive to external social change. They also emphasize how contract and governance intersect to affect organizational behavior. The drafting choices we identify provide insight into how companies communicate, monitor, and ultimately enforce corporate values and expectations through contract design. Finally, our results suggest that companies are anticipating the risk of sex-based misconduct and positioning themselves to respond. We argue that this change holds promise for safer, more equitable workplaces where high-level and rank-and-file employees are held to the same standards of conduct.

In Part IV, we explore the limitations of our findings and highlight areas for further research. Of course, the changes we identify are on paper—only time will tell if changes to contract language result in changes to actual behavior. Nor is sex-based misconduct by CEOs an isolated concern. Much more is at stake in the quest for gender equity in the world of work than the conduct of individual bad actors.³⁰ But the wide space for harassment and related misconduct—previously permitted by CEO contracts—has become more limited, pushing the acceptable boundaries of workplace behavior and the norms of executive contracts closer together. We conclude that these changes, spurred by the viral power of MeToo, represent a modest victory for the movement.

comfortably terminate the offender without significant fear of a breach of contract claim.

29. See *infra* Part II.

30. Indeed, employment discrimination scholars caution that focusing on specific perpetrators can have the adverse effect of diverting attention away from broader cultural problems within organizations. See, e.g., Claudia Flores, *Beyond the Bad Apple—Transforming the American Workplace for Women After #MeToo*, 2019 U. CHI. LEGAL F. 85; Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 836–37 (2005); Schultz, *supra* note 11, at 2103–19; cf. Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 78 (2019) (critiquing “mainstream media’s systematic focus on sexual harassment as a twisted manifestation of male sexual desire [that] grabs the headlines, and when the harasser is discharged, the story ends”). But see Ryan H. Nelson, *Workplace Harasser Liability: Assailing Its Moral Hazards and Rehabilitating the Individualist Approach*, TENN. L. REV. (forthcoming), <https://ssrn.com/abstract=3833129> (arguing for individual harasser liability as a means of more optimally deterring bad actors).

I. CONTRACT, GOVERNANCE, AND THE MeTOO ACCOUNTABILITY PROBLEM

In the wake of MeToo, a question of central importance is whether the organizational cultures that tolerated high-level, sex-based misconduct will change as a result of the movement. Early anecdotal evidence suggests the answer may be yes. In the two years following the watershed Weinstein revelations, some 200 accused individuals were ousted from positions of power following allegations of sex-based misconduct. In several instances, accused executives were terminated for cause or exited without pay.³¹ Companies proved willing to investigate, publicly acknowledge the underlying misconduct, and deny severance to the offender.

However, for MeToo to have a lasting effect, companies must act proactively, not just reactively. In many of the movement's headline examples—Wynn Resorts, CBS, and Weinstein Holdings, among others—accountability came only after decades of reported misconduct.³² A safer, more gender-inclusive workplace depends on companies responding promptly and proportionately to sex-based misconduct. It also depends on companies' willingness to withhold pay and other benefits when termination is warranted. In several instances, the MeToo movement revealed that known perpetrators had been allowed to leave companies under favorable exit terms.³³ Such decisions seemingly prioritize the CEO at the expense of victims and signal corporate ambivalence about the seriousness of sex-based misconduct.³⁴

However, companies face an important limitation on their ability to respond appropriately to sex-based misconduct: the content of executive contracts. This Part explores the relationship between accountability, contract terms, and corporate governance. It sets up the animating theory of our Article: that companies' ability to effectively police high-level, sex-based misconduct is constrained by pro-executive contract termination provisions. These provisions make it costly for companies to terminate offenders except (and sometimes even) in the most egregious

31. See, e.g., Elahe Izadi & Travis M. Andrews, *Former CBS Chairman Les Moonves Fired for Cause, Will Not Receive Severance in Wake of Sexual Misconduct Allegations*, WASH. POST (Dec. 17, 2018), <https://www.washingtonpost.com/arts-entertainment/2018/12/17/former-cbs-chairman-les-moonves-fired-cause-will-not-receive-severance-wake-sexual-misconduct-allegations/> [<https://perma.cc/8Z6B-YS2X>]; Tiffany Hsu, *Wynn Resorts Will Not Pay Steve Wynn Severance*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/business/steve-wynn-severance.html> [<https://perma.cc/U2NT-3YLT>]; Matthew Townsend, *Barnes & Noble Fires Its CEO Without Severance Pay*, BLOOMBERG (July 3, 2018), <https://www.bloomberg.com/news/articles/2018-07-03/barnes-noble-fires-its-ceo-parneros-without-severance-pay> [<https://perma.cc/T8RM-3F8K>].

32. See *supra* note 7.

33. See, e.g., Wakabayashi & Benner, *supra* note 8; Steel & Schmidt, *supra* note 8.

34. See Hébert, *supra* note 13, at 323 (“[T]raditionally, it has been more common for the targets of sexual harassment, rather than the perpetrators of that harassment, to suffer those negative employment consequences.”); Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, 23 EMP. RTS. & EMP. POL’Y J. 115, 147 (2019) (“When the alleged harasser is a top-level executive, companies try to keep the victim quiet or retaliate against the victim because the company becomes more concerned about losing their star and how that loss will affect the company’s prospects.”).

circumstances. As a result, companies are incentivized to take a “wait-and-see” approach to sex-based misconduct, allowing the workplace climate to worsen before taking decisive action.

A. Contract Termination Provisions as Constraints on Responsive Action

There are many reasons why companies might fail to effectively police and respond to sex-based misconduct in the workplace.³⁵ In ordinary cases, the risk of legal liability to the accused is not one of them. Most private-sector workers are employed at will, meaning they can be terminated for any (or no) reason.³⁶ Therefore, companies are generally not at risk of violating any legal duty to the accused in the event that they react precipitously or disproportionately to allegations of sex-based misconduct.³⁷ For a variety of reasons, they may *choose* to follow internal policies or practices for investigating and disciplining such behavior.³⁸ But they are not legally compelled to do so, nor must they substantiate the underlying allegations or justify their disciplinary response.³⁹ Moreover, a company’s reasonable concern over

35. These might include an inability to recognize the problem due to lack of facts or knowledge, a desire to avoid conflict and/or protect the accused, and personal discomfort or fear of self-incrimination.

36. There is an extensive literature on the development of employment at will, much of it critical of the doctrine. For a general summary, see Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At-Will*, 58 UCLA L. REV. 1 (2010).

37. See generally *Best Practices*, *supra* note 6; *Power and Process*, *supra* note 12, at 85.

38. Among other things, employers who investigate complaints of harassment gain a litigation advantage in the event of subsequent suit by the victim. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (recognizing an affirmative defense to hostile work-environment liability where, *inter alia*, the employer takes preventative and corrective action in response to harassment, including through adopting and following antiharassment policies and investigation protocols); *Faragher v. City of Boca Raton*, 524 U.S. 775, 779 (1998) (same). There is an extensive sociological literature exploring how organizations use their policies and complaint procedures to advance other managerial goals and communicate a symbolic commitment to workplace equity. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1567 (1992) (“[W]here legal ambiguity, procedural constraints, and weak enforcement mechanisms leave the meaning of compliance open to organizational construction, organizations that are subject to normative pressure from their environment elaborate their formal structures to create visible symbols of their attention to law.”); Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1599 (2001) (“[A]s legal ideas move into managerial and organizational arenas, law tends to become ‘managerialized,’ or progressively infused with managerial values.”) (emphasis omitted). See generally Schultz, *supra* note 11, at 2066 (“As sociologists of law have shown, human resource managers—the inside managers and outside consultants who specialize in helping organizations handle personnel matters—and management-side labor lawyers consistently shape understandings of law and compliance with it in a direction that emphasizes organizational aims, especially efficiency.”).

39. This creates a high risk that an employer will be overly hasty or disproportionate in its response to allegations of sex-based misconduct levied against rank-and-file employees. See generally *Best Practices*, *supra* note 6, at 14–15 (discussing this problem).

possible sex-based misconduct would presumably be a legitimate basis for termination, if one were required.⁴⁰

However, the opposite is true when it comes to high-level executives. Almost universally, these individuals are protected by written employment contracts or related documents that reject the employment-at-will default.⁴¹ Instead, these agreements are usually structured as fixed-term appointments, guaranteeing the executive a period of several years of employment. During this term, the company ostensibly retains a right to terminate at will—it can effect a termination “without cause”—but only if it pays significant compensation to the separated executive.⁴² The company avoids those financial consequences only when it terminates for “cause” as defined in the agreement.⁴³

These definitions usually consist of an enumerated list of precise and exclusive “grounds” that can support a penalty-free termination.⁴⁴ As we will see, they tend to be narrowly drafted in favor of the executive such that ordinary misbehavior—including some forms of sex-based misconduct—may not suffice.⁴⁵ This makes it risky for companies to respond aggressively to “lesser” instances of sex-based misconduct, such as first offenses or behavior that, while inappropriate, is not unlawful.⁴⁶

A widely publicized example illustrates the ways in which such language can dictate and constrain a company’s response to sex-based misconduct. In November 2019, McDonald’s Corporation fired its CEO, Steve Easterbrook, for having “demonstrated poor judgment” in connection with a personal relationship.⁴⁷ As

40. For instance, where a nonunionized employee enjoys contractual protection against arbitrary discharge, but not the elaborate protections associated with high-level executive contracts of the type described below, the majority rule merely requires that the employer have a reasonable, good faith belief for termination. *See, e.g., Cotran v. Rollins Hudig Hall Int’l, Inc.*, 948 P.2d 412, 423 (Cal. 1998) (finding that the jury should consider not whether the employee actually sexually harassed other employees but whether, at the time of termination, the decision to terminate his employment was made in good faith by the defendants). In other words, employers generally do not need to be “right” about the facts in order to lawfully terminate on the basis of cause. We return to this distinction *infra* Part III.C.

41. *See generally* Schwab & Thomas, *supra* note 23, at 233 (finding no distinction between consequences of for-cause and no-cause termination in only thirteen out of 375 CEO contracts).

42. *Id.* at 251 (finding that two years’ salary is the most common contractual award for terminations without cause). *See generally* *Best Practices*, *supra* note 6, at 18 (describing these financial obligations as “a type of liquidated damages clause in the event that the employer terminates for a non-enumerated reason”).

43. The agreement may refer to “just cause” or “good cause” or simply “cause.” Schwab & Thomas, *supra* note 23, at 247, 250.

44. *Id.* at 248–50.

45. *Id.* at 249; *see infra* Part II.

46. *See* Wexler, Robbennolt & Murphy, *supra* note 1, at 56 (calling such unwanted sexual behavior “lawful but awful”).

47. Press Release, McDonald’s Corp., McDonald’s Corporation Announces Leadership Transition (Nov. 3, 2019), <https://www.prnewswire.com/news-releases/mcdonalds-corporation-announces-leadership-transition-300950405.html> [<https://perma.cc/3JCK-B5W2>]; Yaffe-Bellany, *supra* note 3.

reported at the time, Easterbrook engaged in a consensual, nonphysical, but sexualized relationship with a female subordinate.⁴⁸ A company investigation substantiated the misconduct, which Easterbrook acknowledged in a letter to employees.⁴⁹ He was initially terminated without cause, resigned from the board of directors, and received twenty-six weeks’ severance pay amounting to \$700,000.⁵⁰

Subsequent litigation offers a rare look inside the company’s termination decision. According to court documents, the company’s board of directors, in determining how to respond to Easterbrook’s misconduct, considered whether it could terminate him for cause and thereby avoid severance payments.⁵¹ The operative language in the relevant company documents⁵² defined “cause” as follows:

- (a) [an act] involving dishonesty, fraud, illegality, or moral turpitude;
- (b) . . . willful, reckless, or material misconduct in the performance of [the employee’s] duties;
- (c) . . . willful or habitual failure to perform or neglect of material duties; or
- (d) . . . serious, reckless or material violation of McDonald’s Standards of Business Conduct or other employment policies.⁵³

48. David Enrich & Rachel Abrams, *McDonald’s Sues Former C.E.O., Accusing Him of Lying and Fraud*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/business/mcdonalds-ceo-steve-easterbrook.html> [<https://perma.cc/8VUV-U55M>]. In subsequent litigation, McDonald’s described the relationship as one “involving texting and video calls.” Complaint ¶ 2, *McDonald’s Corp. v. Easterbrook*, No. 2020-0658 (Del. Ch. Aug. 10, 2020).

49. Press Release, McDonald’s Corp., *supra* note 47; Emma Newburger & Amelia Lucas, *McDonald’s Fires CEO Steve Easterbrook for Violating Policy over Relationship with Employee*, CNBC (Nov. 3, 2019), <https://www.cnn.com/2019/11/03/mcdonalds-steve-easterbrook-is-out-as-ceo-due-to-a-consensual-relationship-with-an-employee.html> [<https://perma.cc/MPS7-P58M>].

50. Stephen Gandel, *Fired McDonald’s CEO Could See \$70 Million Payout After Co-Worker Affair*, CBS NEWS, <https://www.cbsnews.com/news/steve-easterbrook-fired-mcdonalds-ceo-could-see-70-million-payout-after-exit-over-consensual-relationship-with/> [<https://perma.cc/EJU8-ULM5>] (Nov. 5, 2019, 7:17 PM); Heather Haddon, *McDonald’s Fires CEO Steve Easterbrook over Relationship with Employee*, WALL ST. J. (Nov. 4, 2019), <https://www.wsj.com/articles/mcdonalds-fires-ceo-steve-easterbrook-over-relationship-with-employee-11572816660> [<https://perma.cc/4DQ9-7TAF>].

51. Complaint, *supra* note 48, ¶¶ 24–25.

52. According to its proxy statements, McDonald’s does not enter into individual employment agreements but rather applies a uniform contractual policy governing termination and severance to all of its corporate officers. *See, e.g.*, McDonald’s Corp., Notice of 2015 Annual Shareholders’ Meeting and Proxy Statement (Form DEF 14A) (Apr. 10, 2015), <https://www.sec.gov/Archives/edgar/data/63908/000119312515125315/d853131ddef14a.htm> [<https://perma.cc/AF6U-5VDT>].

53. McDonald’s Corp., McDonald’s Corporation Officer Severance Plan (Form 10-Q), 1 (Mar. 8, 2019), <https://www.sec.gov/Archives/edgar/data/63908/000006390819000039/mcd-3312019xex10q.htm> [<https://perma.cc/Y5AE-J97D>].

Close examination of this definition reveals why the company chose to terminate with severance at the time. Easterbrook's misconduct was not connected with his work-related duties, as required for a finding of cause under prongs (b) and (c). Since his inappropriate relationship was consensual, Easterbrook's misconduct could not have been categorized as either "moral turpitude" or an "illegal" act under prong (a), and while a closer fit, it is unlikely that the relationship constituted a policy violation under (d). Many company policies go beyond prohibitions on sexual and other forms of discriminatory harassment to preclude consensual workplace relationships.⁵⁴ However, since Easterbrook's misconduct involved only phone messages and videos, not physical intimacy, it presumably did not violate company policy.

Interestingly, subsequent evidence revealed that Easterbrook had in fact committed more extensive sex-based misconduct in the year preceding his termination. Several months after Easterbrook's separation, the company learned that he engaged in intimate physical relationships with three other employees, one of whom received a substantial stock grant during the course of their relationship.⁵⁵ On the basis of this information, the company took the rare step of seeking to clawback Easterbrook's exit pay.⁵⁶ In a suit filed in Delaware Chancery Court, the company alleged that Easterbrook's misconduct constituted a breach of fiduciary duty and that

54. See, e.g., MCDONALD'S, STANDARDS OF BUSINESS CONDUCT 20 (2018), https://corporate.mcdonalds.com/content/dam/gwscorp/corporate-governance-content/codes-of-conduct/US_English_Sept_2018.pdf [<https://perma.cc/P4CW-4NZR>] ("[E]mployees who have a direct or indirect reporting relationship to each other are prohibited from dating or having a sexual relationship."). Whether, as a general matter, company antiharassment policies ought to go beyond unlawful conduct to prohibit consensual relationships is a contested issue and outside the scope of this Article. Compare Nancy Leong, *Them Too*, 96 WASH. U. L. REV. 941 (2019) (arguing that regardless of consent, intimate relationships involving an institutional power disparity should be prohibited based on their impact on third parties), with Schultz, *supra* note 11, at 2186 (arguing that consensual relationships should be treated like other nonsexual relationships where management intervenes only when specific organizational goals are being undermined). See also Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 34 (2018) ("[S]weeping prohibitions tend to be unhelpful; they can even hinder the cause of eliminating harassment and discrimination at work."). Regardless of the case of high-level employees with job security, the existence of such a policy enhances the company's position in arguing that inappropriate behavior constitutes cause for termination, at least where the executive's contractual termination provision references the company's policies (as in the McDonald's example).

55. The company received an anonymous complaint in July 2020, prompting it to open a second investigation into Easterbrook's conduct, which confirmed the misconduct. Heather Haddon, *McDonald's Sues to Recover Severance from Fired CEO, Claiming He Lied About Affairs with Employees*, WALL ST. J. (Aug. 10, 2020), <https://www.wsj.com/articles/mcdonalds-sues-to-recover-severance-from-fired-ceo-claiming-he-lied-about-affairs-with-employees-11597064924> [<https://perma.cc/BA6S-VRQ6>].

56. For other recent examples of companies making use of this tool, see Erika Kelton, *Hertz Makes a Rare Move by Suing Former Executives*, FORBES (May 2, 2019), <https://www.forbes.com/sites/erikakelton/2019/05/02/hertz-makes-a-rare-move-by-suing-former-executives> [<https://perma.cc/W5U8-UYF8>] (noting power of clawback suits and lamenting their relatively limited use).

he committed fraud by concealing his behavior during his exit negotiations.⁵⁷ The company contended that it would have fired Easterbrook for cause had it known the full extent of his misconduct.⁵⁸

Notwithstanding these additional incidents, however, it remains unclear whether Easterbrook’s sex-based misconduct constituted cause under the contractual standard for denying severance. Unlike the nonphysical exchanges uncovered by the company’s initial investigation, Easterbrook’s conduct doubtlessly violated McDonald’s antifraternalization policy and likely ran afoul of other internal or external code of conduct rules as well.⁵⁹ But a policy violation in and of itself would not have satisfied the relevant definition. To fall within prong (d) of the definition of cause in Easterbrook’s agreement, the violation must be “serious, material, or reckless.”

As our data will demonstrate, this type of “limiting language”—as we refer to it—is typical of executive contracts.⁶⁰ Such language qualifies the type of behavior that constitutes cause for purposes of denying exit pay. It may impose an intent requirement, set a threshold level of seriousness, require actual harm to the company, or all three. Thus, in the instant example, Easterbrook might have argued that his relationships were consensual and did not harm the company, making his misconduct neither serious, material, nor reckless. McDonald’s, on the other hand, could have claimed that the behavior was serial and posed a risk of negative publicity and legal liability. The question is a factual one to be determined based on these and other aggravating and mitigating circumstances, making the outcome difficult to predict.⁶¹

Ultimately, the parties settled prior to any ruling, so we will never know how a court would have interpreted Easterbrook’s contract.⁶² Tellingly, however, McDonald’s clawback complaint did not rely solely on the former CEO’s sexual relationships in alleging cause to terminate. The complaint also pled Easterbrook’s failure to disclose key facts and his affirmative denial of past relationships during McDonald’s initial investigation. McDonald’s presumably included these

57. Complaint, *supra* note 48, ¶¶ 44, 47.

58. *Id.* ¶ 41.

59. McDonald’s complaint alleges, for instance, that Easterbrook’s approval of a stock grant in favor of one paramour violated conflict of interest provisions, and that his denial of past intimate relationships and efforts to conceal them violated his fiduciary duties. *Id.* ¶¶ 12–13, 40.

60. See *infra* Part II.

61. Case law is of little assistance in this regard. Few high-level employment contract disputes reach litigation, let alone result in a reported decision, and many executive contracts contain arbitration agreements. Moreover, the termination provisions of the contracts, as well as the facts of any misconduct, are usually highly particular, yielding nongeneralizable results. Compare *Prozinski v. Ne. Real Est. Servs.*, 797 N.E.2d 415, 423–24 (Mass. App. Ct. 2003) (finding question of fact presented as to whether executive’s harassment of multiple women, combined with financial mismanagement, constituted material breach of employment contract) with *Balles v. Babcock Power Inc.*, 70 N.E.3d 905, 916 (Mass. 2016) (holding an employer liable for breach of an executive stock contract despite the executive’s sexual misconduct where the company failed to provide him notice and an opportunity to cure his behavior).

62. See Heather Haddon, *McDonald’s Settles Lawsuit with Former CEO Steve Easterbrook*, WALL ST. J. (Dec. 16, 2021), <https://www.wsj.com/articles/mcdonalds-settles-lawsuit-with-former-ceo-11639659901> [<https://perma.cc/GNN7-KDC6>].

allegations in order to lay a factual basis for a finding of cause based on dishonesty or fraud under prong (a).⁶³

None of this is to suggest that Easterbrook should or should not have received severance, or that the court, had it ruled, should have reached a particular conclusion. The point is that contract language, rather than a straightforward assessment of culpability, drives the answer to the question. In any situation involving sex-based misconduct, idiosyncratic facts and circumstances will affect the company's decision as to whether termination is warranted and on what terms. This is particularly so in cases of "lesser" offenses, such as Easterbrook's consensual (though prohibited) relationships.⁶⁴ When dealing with ordinary employees, companies enjoy near total discretion under the at-will default and are free to take a hard line on all forms of sex-based misconduct. But when it comes to executives with robust job security rights, the opposite is true. Companies are likely to err on the side of caution, particularly in dealing with behavior that falls on or just short of the line, in order to avoid contract liability to the accused. If the company is especially risk averse, it may await repeat behavior or especially egregious acts of misconduct before it is willing to terminate without pay.

Therefore, one proactive measure that companies can take in response to the MeToo movement is to alter the terms of their executive employment contracts. By prospectively expanding the definition of cause, companies can obtain increased flexibility to terminate without pay—or at least credibly threaten to do so—in the face of sex-based misconduct. Ironically, the definition of cause at issue in the McDonald's case is notably more pro-company than many found in high-level employment contracts. As we discuss in Part III, barely over half of termination provisions in pre-MeToo CEO contracts included violations of company policy—what we will refer to later as a "VCP clause"—as grounds for cause.⁶⁵ Far more common grounds are, for instance, crimes or illegal acts, under which a company

63. Complaint, *supra* note 48, ¶¶ 24–25.

64. The MeToo movement implicated a wide range of behavior. *See Best Practices, supra* note 6 (providing a taxonomy). Various circumstances—the nature of the conduct, type of work relationship, degree of power imbalance, degree of gender diversity, and workplace culture—can appropriately influence companies' judgments as to what behavior is wrongful, whether it ought to be prohibited, and what the penalties should be. For our purposes, we recognize that there is a subset of conduct that—while not unlawful—companies should prohibit in order to prevent more serious problems. Where that line should be drawn is beyond the scope of this Article, but we note that arguments for prohibiting consensual workplace relationships are strongest where they involve workers in disparate positions of power. *See Green, supra* note 34 (advocating for a strict "no consent" rule in disputes arising from such relationships); *Leong, supra* note 54 (arguing that such relationships should be barred regardless of consent in the interest of protecting third parties).

65. Moreover, the limiting language in McDonald's definition is written in the disjunctive; that is, policy violations will qualify as cause if they are "serious, reckless or material." *See supra* note 53 (emphasis added). That formulation reflects a pro-company change made in 2019 as compared to the prior version of the governing severance plan that treated a policy violation as cause to terminate only if "serious and reckless or intentional." McDonald's Corp., McDonald's Corporation Severance Plan (Form 10-Q) 2 (Nov. 4, 2015), <https://www.sec.gov/Archives/edgar/data/63908/000006390815000081/mcd-9302015xex10o.htm> [<https://perma.cc/B83A-9T4P>] (emphasis added).

would need to show that the conduct in question constituted a sex crime or that the executive’s behavior was egregious enough to meet the narrow legal definition of sexual harassment.⁶⁶ The specific contract language that applied to Easterbrook’s termination was therefore key in enabling McDonald’s to bring suit in an attempt to hold him accountable for his behavior. If such actions are to become the norm post-MeToo, companies must take steps to include more expansive definitions of cause in executive employment contracts using language that clearly embraces sex-based misconduct.

B. Corporate Governance and the Negotiation of Executive Employment Contracts

The previous Section illustrated how definitions of cause to terminate affect a company’s options and bargaining position when faced with an allegation of sex-based misconduct against an incumbent CEO. If this is the case, then changing the *ex ante* negotiation of executive contracts is central to addressing the MeToo accountability problem. It is widely argued, however, that CEOs have excess bargaining power in negotiating their terms of employment with corporate boards of directors.⁶⁷ While such arguments have been used primarily to explain outsized compensation, CEOs can similarly leverage their power to achieve favorable termination provisions, including those that protect them when facing accusations of sex-based misconduct. In this Part, we assess this and competing theories of corporate bargaining, exploring how those dynamics influence CEO contract terms and contribute to the MeToo accountability problem.

1. Theories of Executive Compensation

The principal theory that CEOs are able to gain advantageous executive compensation is known as the managerial power hypothesis.⁶⁸ A public corporation

66. To demonstrate hostile work-environment liability under federal law, the conduct in question must be, *inter alia*, severe or pervasive and objectively offensive. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This high threshold, and other judicially created limits on employer liability for sexual harassment, have long been the subject of scholarly criticism. See, e.g., SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 32–40 (2017) (critiquing such interpretations as unsupported by statutory text and inappropriately barring recovery for victims); Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 844 (1991) (“Title VII [reaches] only the most extreme cases of sexual harassment.”). Notably, a few states have rejected the “severe or pervasive” requirement or otherwise redefined the standard for actionable harassment under state antidiscrimination law in the wake of the MeToo movement. See, e.g., N.Y. EXEC. LAW § 296(1)(h) (West, Westlaw through L.2019 Ch. 360) (effective Nov. 18, 2019) (permitting the finding of a violation “regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims”); cf. CAL. GOV’T CODE § 12923(b) (West, Westlaw through Ch. 134 of 2022 Reg. Sess.) (providing that a “single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment”).

67. See generally BEBCHUK & FRIED, *supra* note 20 (arguing that executive compensation is a product of undue executive influence resulting in excess compensation).

68. See Michael B. Dorff, *The Group Dynamics Theory of Executive Compensation*, 28

is governed by a board of directors that is elected by shareholders.⁶⁹ The shareholders, however, have limited ability to monitor these director-agents. This principal-agent problem in corporate operations enables rent seeking by CEOs who can leverage their position vis-à-vis the board to reap private gains through more favorable compensation terms.⁷⁰

In the context of CEO compensation, an agency problem arises because executives bargain for themselves while directors bargain on behalf of the corporation. But director-agents do not internalize the costs of this bargaining, which are instead borne by the company.⁷¹ This creates unequal incentives between the executive and directors that the executive can exploit to obtain an advantageous compensation package. This situation is exacerbated by a second agency problem: since the CEO is responsible for the day-to-day operation of the corporation, directors will be loath to make this executive unhappy.

The managerial power hypothesis thus posits that executives use their leverage to negotiate pay packages that are not fully aligned with performance.⁷² Ordinarily, one would expect pay packages to be sensitive to the CEO's success or failure in operating the corporation. Instead, CEOs receive what has been termed "pay without performance"—compensation that is neither market based nor the product of arm's-length bargaining but is instead biased in favor of the executive.⁷³

This phenomenon has been explored most prominently by Professors Lucian Bebchuk and Jesse Fried. In their book *Pay Without Performance*, the two argue that directors are incentivized to acquiesce to compensation packages that pay excess compensation to executives.⁷⁴ Their arguments follow another premise of principal-agent theory: directors—who have their own incentives to remain on the board—are often chosen with the consent of the CEO and therefore are prone to cater to that CEO.⁷⁵ Bebchuk and Fried also argue that the inherent group dynamics among the board and management make directors loyal to management and want to win executives' allegiance by consenting to exorbitant pay packages.⁷⁶ Bebchuk and Fried extensively document this effect through examples of excess pay to executives with records of poor performance.⁷⁷

CARDOZO L. REV. 2025, 2032–33 (2007).

69. See DEL. CODE ANN. tit. 8, § 141 (2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .").

70. See BEBCHUK & FRIED, *supra* note 20, at 62. See generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (theorizing that the separation of ownership and control in the corporation results in undue agency costs).

71. See generally Roy Radner, *Hierarchy: The Economics of Managing*, 30 J. ECON. LITERATURE 1382, 1405–07 (1992) (discussing the incentives of agents).

72. See generally Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225, 227–28 (1990).

73. BEBCHUK & FRIED, *supra* note 20.

74. *Id.*

75. *Id.* at 25–31.

76. *Id.* at 31–37.

77. See *id.* at 9.

There is a countervailing thesis: the optimal contracting theory.⁷⁸ This theory posits that compensation is designed to incentivize executives and that the resulting arrangements are in fact the product of arm’s-length bargaining based on market forces.⁷⁹ As with the managerial power theory, there is some evidence to support the optimal contracting theory.⁸⁰

First, in private corporations—where shareholders are able to better monitor the CEO—CEOs enjoy similar, if not higher, pay.⁸¹ Second, the tenure of CEOs is short—approximately six years on average for the S&P 500.⁸² What Bebchuk and Fried view as excess compensation might instead be justified as an incentive to perform during this short period, and thus a result of optimal contracting.⁸³ Finally, there is evidence that responses to criticism of CEO pay have pushed compensation packages to be more performance-driven (for example, by increasing the proportion of compensation that comes in the form of stock options and awards).⁸⁴ The shift toward stock options may result in extremely high payouts as the stock market rises. This results in a skewed distribution of compensation, and the pay packages which Bebchuk and Fried report may be marginal cases that are the inherent by-products of any incentive-based system.

Our data provide some evidence that CEOs enjoy significant bargaining power.⁸⁵ But for purposes of this Article, we do not need to resolve this debate. We focus on whether MeToo changed the outcome of executive contract negotiation on termination provisions, regardless of which theory best explains the baseline

78. See Stephen A. Ross, *The Economic Theory of Agency: The Principal’s Problem*, 63 AM. ECON. REV. 134, 135 (1973); Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615, 1620–24 (2005) (book review) (reviewing the optimal contracting theory).

79. See generally John E. Core, Wayne R. Guay & Randall S. Thomas, *Is U.S. CEO Compensation Inefficient Pay Without Performance?*, 103 MICH. L. REV. 1142, 1160 (2005) (book review).

80. *Id.* at 1160–67.

81. See David I. Walker, *Executive Pay Lessons from Private Equity*, 91 B.U. L. REV. 1209 (2011).

82. See Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1031 (2010).

83. This line of scholarship builds on foundational work on the agency costs of the firm. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–10 (1976); Iman Anabtawi, *Explaining Pay Without Performance: The Tournament Alternative*, 54 EMORY L.J. 1557 (2005) (arguing that executive pay is a tournament model designed to motivate and reward employees).

84. See Brian J. Hall & Kevin J. Murphy, *The Trouble with Stock Options*, 17 J. ECON. PERSPS. 49, 51 (2003); Marcel Kahan, *The Limited Significance of Norms for Corporate Governance*, 149 U. PA. L. REV. 1869, 1888 (2001); Kevin J. Murphy, *Executive Compensation*, in HANDBOOK OF LABOR ECONOMICS 2485, 2525 (Orley Ashenfelter & David Card eds., 1999).

85. We confirm that CEOs almost universally enjoy extremely robust job security protection, although we do not explore why that occurs.

dynamic.⁸⁶ The competing arguments about executive power, however, are fundamental to understanding the tensions and corporate governance issues that underlie the negotiation of CEO employment contracts.

2. Nonprice Contract Terms and the Agency Problem

These two contending theories of executive compensation can be applied to the negotiation of other terms of CEO employment contracts. If the managerial-power hypothesis holds, then termination provisions and other contractual terms of employment can suffer from the same pathologies as compensation. CEO contracts are ostensibly negotiated between the board and the CEO, but because the board does not bear the costs of enforcement of the contract—which instead fall on the company—the board may again fail to internalize the costs of these contract terms. The CEOs can therefore leverage their position to obtain preferential terms of employment in addition to compensation.

Indeed, this problem could be exacerbated in the case of nonprice terms of CEO employment agreements that, unlike compensation, are not subject to special review. CEO compensation must be disclosed in a company's proxy statement,⁸⁷ and requires the approval of shareholders in a nonbinding "say-on-pay" vote every one to three years.⁸⁸ When assessing how to vote, institutional shareholders have discussions with the compensation committee of the board, and proxy advisory services make recommendations as to precatory approval of this compensation.⁸⁹ This disclosure and review process could potentially provide a soft check on managerial compensation and help to minimize any principal-agent conflicts by imposing outside pressures from shareholders and proxy advisory services.

But there is no equivalent process for contract terms beyond compensation. Shareholders and other interested parties have the ability to access and review contract content. CEO contracts are publicly available because executive employment agreements are material documents that must be filed with the Securities and Exchange Commission (SEC).⁹⁰ But there is no organized scrutiny of these terms and no formal process by which shareholders can assess or disapprove them. Thus, if the managerial power theory is correct, executives should be able to assert even greater bargaining power over the nonprice terms of their employment contracts than they can over actual compensation.

The negotiation of the terms of employment may also be biased by other unique contractual bargaining factors. The first is cognitive bias: the exact amount of

86. Notably in the executive compensation literature, some have argued that even if optimal contract theory holds, regulation of CEO pay may be justified. See Randall S. Thomas & Harwell Wells, *Executive Compensation in the Courts: Board Capture, Optimal Contracting, and Officers' Fiduciary Duties*, 95 MINN. L. REV. 846 (2011).

87. See Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599 (2013).

88. See *Executive Compensation*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/fast-answers/answers-execomphmt.html> [<https://perma.cc/Y7M6-58F9>].

89. See Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101 (2018).

90. 107 C.F.R. § 229.601(b)(10)(iii) (2020).

compensation is an immediate factor in a negotiation.⁹¹ But the enforcement terms of a contract are relevant at a future date, if ever. Corporate agents may fail to vigorously negotiate (or even contemplate) contract terms that may only be triggered in the distant future.⁹² This allows the CEO to obtain a contractual advantage by bargaining for termination provisions that may prove overly favorable to the executive but pose no immediate cost to the corporation.⁹³

Finally, in negotiating complex contracts, parties often rely on a form that contains standard language. As we see in the next Part, some aspects of CEO contracts follow a similar pattern. The definition of cause to terminate in such agreements is often comprised of standard categories of wrongdoing. If this pre-existing language is beneficial to CEOs, there will be incentives within the bargaining dynamic to keep it.⁹⁴ A departure from the usual drafting practices is unlikely to occur absent a shock to the system—something that would move the parties from the path dependency of the contracting process.⁹⁵ Thus, even if some CEOs do not have power in a specific instance, they may benefit from a set of overall bargaining dynamics that provide them favorable terms.⁹⁶ But these are all theories. In the next Part, we turn to an empirical assessment of CEO contract terms and companies’ response to the MeToo movement.

II. EMPIRICAL FINDINGS

A. Study Design

Our empirical approach takes advantage of the availability of public companies’ executive employment agreements, which are material documents that are required to be filed with the SEC.⁹⁷ We gather six years of contracts and code by hand the inclusion of various grounds for cause for termination. Our particular focus is on the incidence of those grounds that might plausibly cover sex-based misconduct: (1) harassment or discrimination; (2) violations of company policy or codes of conduct;

91. See generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1084–1102 (2002) (describing various cognitive biases and heuristics, including confirmatory bias, probability bias, and overconfidences).

92. See *id.* at 1119–24 (discussing inconsistencies in the way individuals value present and future events).

93. This may have been a factor in the infamous Disney case in which former CEO Michael Ovitz was able to reap a \$130 million windfall pay package—payable from the start date of his employment—if he was terminated at any time without cause. See generally JAMES STEWART, *DISNEYWAR* (2005); Kenneth M. Rosen, *Mickey, Can You Spare a Dime? DisneyWar, Executive Compensation, Corporate Governance, and Business Law Pedagogy*, 105 MICH. L. REV. 1151 (2007).

94. See Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “the Economics of Boilerplate”)*, 83 VA. L. REV. 713 (1997).

95. See Davidoff, *supra* note 21 (detailing the theory that external shocks engender changes to boilerplate contract language).

96. See Russell B. Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

97. See *supra* note 89 and accompanying text.

(3) general misconduct; and (4) moral turpitude. We refer to these collectively as “MeToo termination rights,” although we focus specifically on the first two grounds, as discussed below.

To assess the effect of MeToo, we adopt a quasi-experimental before/after design in which we compare the set of contracts signed by companies before MeToo to the set of those signed after. As a dividing line, we split the sample after the fourth quarter of 2017—the quarter in which the Harvey Weinstein revelations were made public.⁹⁸ We consider all contracts signed between January 2015 and December 2017 to be “pre-MeToo,” and all contracts signed between January 2018 and December 2020 to be “post-MeToo.”⁹⁹

Ideally, we would compare the employment agreements of companies that were affected by MeToo to those that were not exposed.¹⁰⁰ However, because the rise of MeToo affected all U.S. corporations at the same time, there is no set of unaffected companies that can serve as a control group.¹⁰¹ Instead, in order to attribute any differences to the impact of MeToo, our before-and-after approach relies on an important assumption: that contracting practices relating to termination clauses were constant and would not have changed *if not for MeToo*. Although this is a strong—and untestable—assumption, it is very credible in this case, for several reasons.

First, we choose a deliberately short study window—three years before and three years after MeToo—to minimize the risk of capturing variation caused by other, unrelated factors. Second, the Weinstein revelation (our “treatment” event) was unexpected, limiting the risk that companies might have adjusted their behavior in anticipation of the MeToo movement. In its wake, the movement became a viral phenomenon remarkably quickly.

Finally, and most importantly, the data bear out our assumption of general stasis in two ways. First, we find that inclusions of sexual harassment and discrimination as grounds for cause are essentially constant in the pre-MeToo period—in other words, the pre-trend is flat. Second, between the pre- and post-MeToo periods, we

98. See Kantor & Twohey, *supra* note 1; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/ZRN6-5R5E>].

99. Of course, the wider “Me Too” movement has a much longer history—the phrase was first coined by Tarana Burke in 2006. See Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created It — 10 Years Ago*, WASH. POST (Oct. 19, 2017, 8:38 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago> [<https://perma.cc/M4PV-3QVR>]; *supra* note 1. However, it was not until late 2017 that the movement became a viral, mainstream phenomenon and so, for our purposes, we consider this to be the beginning of the movement writ large.

100. This approach is known as a “difference-in-differences” design. See, e.g., Jonah B. Gelbach & Jonathan Klick, *Empirical Law and Economics*, in THE OXFORD HANDBOOK OF LAW AND ECONOMICS 29 (Francesco Parisi ed., 2017) (discussing various quasi-experimental empirical designs). The empirical design that we adopt is closest in spirit to the before-and-after time series approach that the authors discuss in section 3.5.1. *Id.* at 51–53.

101. Nor can we rely on panel data—that is, repeated observations of the same firm—because the vast majority of companies signed only one new CEO contract during our study window.

find no change in the incidence of grounds that are *not* related to sex-based misconduct, in keeping with our prior sense that there is a significant degree of stasis and path dependency in these contracts. In Part III.C, *infra*, we discuss these results in greater detail, but first we turn to data collection.

B. Data and Coding

Our sampling frame comprises CEOs from every company listed in the S&P 1500 composite index.¹⁰² We began by obtaining a list of every CEO whose employment commenced between January 2015 and December 2020. Our primary source for CEO transitions was Compustat’s Execucomp database, which tracks executive compensation on an annual basis.¹⁰³ However, because Execucomp harvests its data from annual proxy statements—which lag new appointments by up to a year—we found its coverage of 2020 to be significantly truncated. To correct this, we supplemented our list with executive data from BoardEx,¹⁰⁴ which added a further thirty-seven new CEOs to our list.

Using this list of CEOs, we searched the SEC’s EDGAR¹⁰⁵ website for employment agreements, severance agreements, or offer letters pertaining to each executive. In many cases, a full-text search was enough to locate the agreement; in others, we checked the annual (10-K), quarterly (10-Q), and 8-K reports for the year surrounding the CEO’s appointment. In total, we located 638 agreements, relating to 620 individuals at 518 companies. Table 1 shows, for each year, the number of CEOs and number of contracts that we located.¹⁰⁶

102. The S&P 1500, or Standard & Poor’s Composite 1500 Index, is a market-capitalization-weighted index of 1500 of the largest (by market capitalization) publicly traded companies in the United States. The composite index is composed of three constituent indices: the S&P 500, the S&P MidCap 400, and the S&P SmallCap 600.

103. See *Compustat Execucomp: The Basics*, WHARTON RSCH. DATA SERVS., <https://wrds-www.wharton.upenn.edu/pages/grid-items/compustat-execucomp-basics> [<https://perma.cc/PNL7-9LY8>].

104. See *BoardEx*, WHARTON RSCH. DATA SERVS., <https://wrds-www.wharton.upenn.edu/pages/about/data-vendors/boardex> [<https://perma.cc/8EAT-SLFG>].

105. EDGAR—or the Electronic Data Gathering, Analysis, and Retrieval system—is the primary system by which companies file legally required information with the SEC. *Filings & Forms*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/edgar> [<https://perma.cc/B6S6-4XJW>].

106. Even with the additional data, there is still a notable decline in the number of CEO transitions in 2020, which appears to be a consequence of the COVID-19 pandemic. See, e.g., Cathy Anterasian, Courtney della Cava, Claudius Hildebrand & Dale Cottrell, *Crisis Put CEO Successions on Hold in 2020. Expect a Rebound in 2021.*, SPENCERSTUART (Feb. 2021), <https://www.spencerstuart.com/research-and-insight/crisis-put-ceo-successions-on-hold-in-2020> [<https://perma.cc/H3K4-5NSM>].

Table 1: New S&P 1500 CEOs by year of hire, 2015–2020

	2015	2016	2017	2018	2019	2020
New CEOs	193	183	177	184	206	163
Located contracts	101	93	117	114	124	89

Our sample of contracts covers fifty-seven percent of the CEOs who were hired during our study window. There are a few reasons for this. First, some of the executives in our list are interim CEOs, who are generally (though not always) appointed without a formal agreement.¹⁰⁷ Second, some companies do not sign individual agreements with executive officers: a CEO may instead be governed by a more general executive severance plan or be a true at-will employee.¹⁰⁸ Finally, we suspect that a small minority of companies fail to file extant agreements despite SEC requirements.¹⁰⁹ Nevertheless, our sample is sufficiently large and has representative coverage across time (Table 1, above) and market index (Table 2, below).

With the located agreements in hand, we manually reviewed each contract. Where we found a definition of cause for termination, we coded the individual grounds according to a codebook that we specified in advance.¹¹⁰ Of the agreements that we obtained, seventy-four percent contain an explicit definition of cause, either in the termination provisions themselves or elsewhere in the contract—for example, in an Appendix. Of the remaining twenty-six percent of contracts, the majority refer to terms or definitions that are contained elsewhere—for example, in company handbooks and policies, or more general executive severance plans. Consistent with prior research, only a handful of the contracts are true “at-will” agreements, which allow the CEO to be terminated at any time without financial penalty to the company.¹¹¹ We also encountered a handful of amendments to employment agreements, and we included these in our analysis if they contained definitions of cause.¹¹²

107. Typically, an interim CEO is an internal appointment who continues to be governed by the terms of the employment agreement (if any) from their prior role.

108. Such is the case with McDonald’s CEO Steve Easterbrook, as discussed previously. *See supra* Part I.A. Because we could not reliably obtain general severance policies or corporate handbooks for every company, we elected only to code termination provisions that we found on the face of the contract.

109. This is in line with previous findings in the literature. *See, e.g.*, Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 25–26 (2015); Stuart L. Gillan, Jay C. Hartzell & Robert Parrino, *Explicit Versus Implicit Contracts: Evidence from CEO Employment Agreements*, 64 J. FIN. 1629 (2009). Of course, it may also be that we missed some contracts. Although we took care to be inclusive, no data collection strategy is foolproof.

110. We discuss the specific grounds in greater detail below. The codebook, and our full data, will be available at <http://www.jameshicks.io>.

111. *See* Schwab & Thomas, *supra* note 23, at 248–49.

112. Amendments and renewals are most commonly used to extend the term of the initial agreement or to adjust the executive’s compensation package (for example, with a stock

Table 2 provides a breakdown of our data across the three S&P indices in the sample. The three rows show the number of CEOs; the number of employment agreements that we located; and finally, the number of located agreements that contain termination provisions.

Table 2: CEO employment agreement data by S&P index, 2015–2020

	S&P 500	MidCap 400	SmallCap 600	Total
Newly hired CEOs	393	272	441	1106
Located contracts	190	155	293	638
Contracts containing termination provisions	131	115	235	481

C. What Happened in the Wake of MeToo?

Table 3 presents our main results: the difference in the incidence of various grounds for cause before and after MeToo. For comparison purposes, Table 3 also includes a column showing the results from a 2006 study by Professors Schwab and Randall Thomas—to our knowledge, the only previous comprehensive study of the termination clauses in CEO contracts.¹¹³ Those authors collected a set of agreements from S&P 1500 CEOs who were employed in 1999, with the bulk of their agreements signed between 1996 and 2000. Their data offer a snapshot of contract terms during that period, though they do not draw explicit comparisons over time.¹¹⁴

In the first four rows, we highlight the four grounds that we characterize as comprising “MeToo termination rights.” Our main results provide strong support for the hypothesis that post-MeToo companies anticipate the risk of a MeToo-type event and specifically reserve power to terminate without pay in those circumstances. We observe statistically significant shifts in the incidence of contracts containing two of the four grounds for cause that relate to sex-based misconduct—and, importantly, relative stasis in other areas.

Explicit inclusions of harassment or discrimination as grounds for cause increase by more than eleven percentage points in the post-MeToo period, from 3.9% to 15.2%. Notably, such grounds for cause have traditionally been extremely rare. Schwab and Thomas found only *two* mentions of harassment in their sample of 375 contracts. Despite a modest increase by the pre-MeToo period of our study window, fifteen years later, we find that significant change only begins in the wake of MeToo.

award).

113. See Schwab & Thomas, *supra* note 23, at 249.

114. Given the focus of our study, we captured slightly different variables than those authors, but what comparisons we have are illuminating. Interestingly, the incidence of termination provisions that include moral turpitude and breach of fiduciary duty have fallen sharply in the last two decades.

Similarly, the incidence of company policy violations as grounds for cause increases by around fourteen percentage points, from 53% to 67%.

On the other hand, we observe no change in the rate of “general misconduct” or “moral turpitude” clauses. Given the premise of our study, this is unsurprising. As previously discussed, these two grounds may encompass *some* forms of sex-based misconduct, but judging from past practice and judicial interpretation, they are not adequate to capture the full range of MeToo-type behavior.¹¹⁵ Notably, the baseline rate for general misconduct was already very high, at nearly eighty percent. This is unsurprising given the wide variety of wrongful behaviors other than sex-based misconduct that could foreseeably justify a for-cause termination. What we expected was to see companies moving beyond existing drafting practices to anticipate specifically *sex-based* misconduct, and to reserve the flexibility to respond proactively to “lesser” forms of such behavior. And, indeed, this is what we find: among all grounds, only harassment and policy violations show statistically significant differences at conventional levels.

Table 3: Incidence of select grounds for a for-cause termination in S&P 1500 CEO employment agreements

Grounds	Schwab & Thomas study (1996–2000)	Current study (2015–2020)		
		Pre-MeToo	Post-MeToo	P
Harassment or discrimination	0.5%	4%	15%	0.00
Violation of company policy or code of conduct	—	53%	67%	0.00
Misconduct	69.1%	79%	78%	0.83
Moral turpitude	72.9%	45%	45%	0.93
Illegal, unlawful, or criminal act	—	95%	95%	0.84
Limited to felony	—	71%	70%	0.84
Failure to perform	57.9%	82%	86%	0.22
Breach of fiduciary duty	50.7%	27%	26%	0.83
Fraud or deceit	—	79%	78%	0.74
Breach of contract	—	70%	63%	0.10
Number of agreements	375	238	243	—

Note: In the current study, the “pre-MeToo” contracts were executed between 2015 and 2017; “post-MeToo” contracts were executed between 2018 and 2020. In the Schwab & Thomas

115. See *supra* Part I.A (discussing the example of CEO Steve Easterbrook).

study, the majority of agreements were executed between 1996 and 2000.¹¹⁶ Two-sided *p*-values are from Fisher’s exact test of independence.

Next, we consider whether our results might be partly driven by some other characteristic of the firm, such as corporate governance, rather than the MeToo movement. For instance, a corporate board with a high proportion of independent directors might be expected to provide more robust oversight of the company’s managers. In Table 4, we show the results of a set of regression models that add a set of firm-level controls to our basic model. In each case, we estimate a version of:

$$y_{ijt} = \beta 1(\text{MeToo}_i) + \gamma \mathbf{X}_{jt} + \epsilon_{ijt}.$$

In this specification, the outcome y_{ijt} is a binary indicator, which is equal to 1 if contract i (with firm j at time t) contains a harassment or discrimination clause, and 0 otherwise. $1(\text{MeToo}_i)$ is a binary indicator that is equal to 1 if the contract is signed in the post-MeToo period, and 0 otherwise. \mathbf{X}_{jt} are various firm-level controls, including industry and S&P index fixed effects (note that these controls vary over time for companies that sign multiple contracts). ϵ_{ijt} is the usual error term. The coefficient β captures the effect of MeToo.

Model 1 includes the fraction of independent directors on the board, as a proxy for executive capture of the board. In Model 2, we add a control for industry.¹¹⁷ Finally, in Model 3, we include the “e-index,” a commonly used measure of firm-level management entrenchment that runs from 0 to 6 (where 6 indicates the highest level of entrenchment).¹¹⁸ Each model also includes S&P index fixed effects to control for the size and prominence of the company.

The post-MeToo effect continues to stand out in both substantive and statistical terms, closely matching the results above. Across all three models, post-MeToo contracts are eleven to twelve percent more likely to include sexual harassment or discrimination as grounds for cause, regardless of the control. The inclusion of firm controls and governance characteristics has no impact on the main results.

116. Schwab & Thomas, *supra* note 23, at 245.

117. We control for industry using fixed effects at the two-digit “standard industry classification” (SIC) level. See *Standard Industrial Classification Code (SIC Code)*, LIBR. OF CONG., <https://guides.loc.gov/industry-research/classification-sic> [<https://perma.cc/LX8T-KFR8>].

118. The entrenchment index is a simple summation of six indicators for limits to shareholder amendment of: (1) the bylaws; (2) the charter; (3) a supermajority voting requirement for any merger; (4) a classified board; (5) a poison pill; and (6) golden parachutes for senior executives. See Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009). The accuracy and reliability of governance indices are somewhat controversial. See, e.g., Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1363–68 (2013); Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1 (2021). We take no position on those questions here and include the index only to show that our main results are unchanged.

Table 4: Linear regression showing the relationship between presence of a harassment or discrimination clause and MeToo, controlling for firm and governance characteristics

	(1)	(2)	(3)
Post-MeToo? (0/1)	0.124*** (0.027)	0.116*** (0.027)	0.115*** (0.027)
Proportion of the board that is independent (0–1)	-0.192 (0.15)	-0.352 (0.187)	—
Entrenchment index (0–6)	—	—	0.012 (0.02)
S&P index fixed effects	Yes	Yes	Yes
Industry fixed effects	No	Yes	Yes
Observations	473	463	464
Adjusted R ²	0.05	0.21	0.20

Note: The dependent variable is an indicator for the presence of a contractual ground for a for-cause termination in the event of harassment or discrimination. Results are from a linear probability model (ordinary least squares with binary outcomes) using standard errors clustered at the company level. Standard errors are in parentheses. Industry fixed effects are two-digit SIC codes. We could not locate up-to-date governance and industry data for ten companies, and they are excluded here.

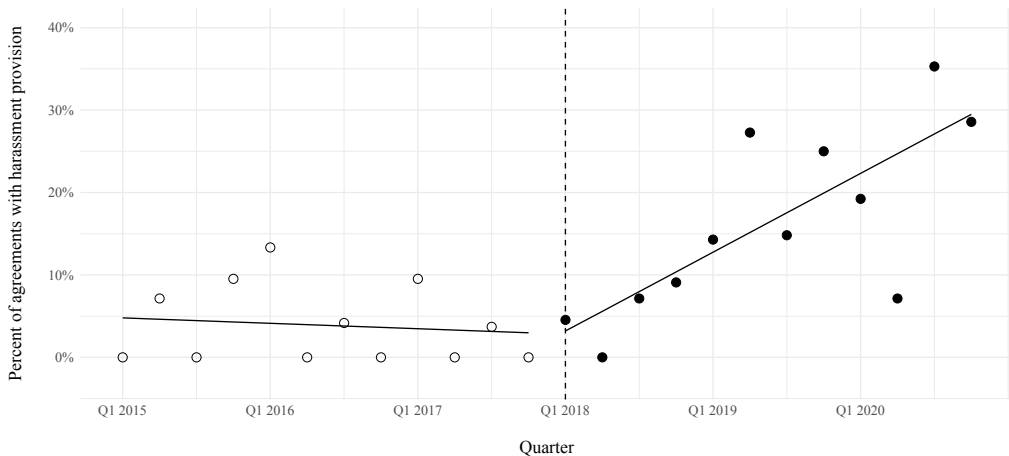
One limitation of a before/after framework is its potential to mask important changes over time. The various estimates above reflect the difference between the *average incidences* in the pre- and post-MeToo periods. However, it is reasonable to suppose that the effect of MeToo would take some time to mature, in part due to the path dependence of executive contracting. To explore the underlying trends, we bin the contracts into quarters and plot the fraction of contracts in each quarter that include harassment or discrimination as grounds for cause.

As Figure 1 shows, the trend in the pre-MeToo period is flat and low: harassment clauses were simply not a significant feature of CEO contracts before MeToo.¹¹⁹ However, in the three years *after* the Weinstein revelations, we observe a sharp

119. As previously discussed, this constant trend in the pre-period also lends support to our assumption that the incidence of harassment clauses would have remained steady in the counterfactual world without MeToo.

change: a growing trend in contractual language that targets harassment. In the third quarter of 2020, nearly forty percent of contracts included a sexual harassment clause. Clearly, the increase in averages post-MeToo tells only part of the story; the underlying trend indicates that harassment clauses are becoming more prevalent over time. We are hesitant to extrapolate this trend too far into the future—it may be that the incidence of these clauses will reach a natural ceiling—but in Parts IV and V, we discuss the potential implications of the changes that we are already witnessing.

Figure 1: Fraction of contracts that include harassment or discrimination as grounds for cause in CEO employment agreements



Note: Solid lines are interrupted time series regressions.

D. Limiting Language and Procedural Protections

Finally, we consider several ways in which the apparent rise in “MeToo termination rights” might be undermined elsewhere in the parties’ contract. Thus far we see evidence that companies are more frequently insisting on grounds for cause that permit termination in the event of sex-based misconduct on the part of CEOs. However, there remain contractual mechanisms through which CEOs might protect themselves, notwithstanding these more capacious definitions of cause.¹²⁰ These include what we refer to as “limiting language” and “procedural protections.”

As noted in Part I, for-cause grounds are often qualified by a threshold level of intent, seriousness, or harm to the company that must be met for the grounds to be satisfied.¹²¹ Limiting language of this sort can reduce the scope of any particular

120. See *supra* Part I.A (describing Easterbrook’s contract); Hemel & Lund, *supra* note 14, at 1647 (describing Weinstein’s contract).

121. See *supra* note 59 and accompanying text. For an example of limiting language that includes both intent and seriousness, consider the previously discussed clause from the McDonald’s executive severance plan. The plan defines “cause” as: “*willful, reckless, or material* misconduct in the performance of [the employee’s] duties.” McDonald’s Corporation Officer Severance Plan, *supra* note 53 and accompanying text (emphasis added).

ground for cause, constraining the company’s ability to respond to bad acts. The increase in explicit sexual harassment and discrimination grounds is particularly noteworthy because, unlike other grounds for cause, these do not generally appear with any kind of qualification. In Table 5, we show the incidence of limiting language for two other grounds for cause that relate to sex-based misconduct: violations of company policy (or codes of conduct) and general misconduct.

As Table 5 indicates, limiting language is common with respect to both these grounds. In most contracts, violations of company policy and general misconduct include some kind of seriousness threshold, and general misconduct commonly also includes requirements of CEO intent and actual harm to the company. Overall, we find very little change between the two periods in our study. Only one instance is statistically significant—the seriousness requirement for policy violations—and the change is in the “pro-company” direction (in the sense that fewer termination provisions are subject to a heightened threshold in the post-MeToo period).¹²² Thus, while we have some concern about the practical scope of the “MeToo termination rights” where limiting language is present, the relative stasis in such language does not undermine our conclusion that companies are reserving greater discretion to terminate CEOs for sex-based misconduct.

Table 5: Incidence of limiting language on grounds for cause in CEO employment agreements

	Pre-MeToo	Post-MeToo	P
Total contracts	238	243	—
Violation of company policy or code of conduct	n = 127	163	—
Intent	39%	29%	0.11
Seriousness	73%	62%	0.05
Harm	14%	16%	0.74
Misconduct	188	189	—
Intent	77%	71%	0.24
Seriousness	54%	54%	1
Harm	61%	65%	0.46

Note: Two-sided p-values are from Fisher’s exact test of independence.

122. On the other hand, the underlying data suggest that the prevalence of each example of limiting language is quite variable from year-to-year, in keeping with our finding that there are few clear changes.

Another common pro-CEO feature of termination provisions is what we refer to as “procedural protections.” These are essentially CEO due process rights, which govern the way a company can exercise its for-cause termination rights. These protections are intended to ensure that board members do not invoke grounds for cause pretextually or without sufficient evidence. We hypothesized that if CEOs were willing to accept wider latitude for for-cause terminations, they might demand stronger procedural protections in exchange.

Table 6 shows the incidence of five of the most common types of protection: a written description of the offending conduct; an opportunity to cure the offending behavior; an opportunity to be heard; a supermajority vote of the board; and good faith on the part of the board. Most contracts require the board to give the CEO a written description of the offending conduct and to provide the CEO an opportunity to cure the offending behavior. However, other substantive protections are rare. In general—and contrary to our expectations—we find no evidence that procedural protections are on the rise in CEO agreements post-MeToo. There are few substantive changes, and none are statistically significant. This is especially notable given the fears expressed by some MeToo critics about a rush to judgment based on mere allegations and limited proof.¹²³ At least on the strength of this evidence, it does not appear that “MeToo termination rights” are being undermined by more expansive procedural protections.

Table 6: Procedural protections against termination in CEO agreements

Protection	Pre-MeToo	Post-MeToo	p
Written description	79%	77%	0.66
Opportunity to cure	72%	67%	0.23
Opportunity to be heard	23%	18%	0.21
Board must behave in good faith	30%	23%	0.10
Supermajority board vote	13%	10%	0.31

Note: Two-sided p-values are from Fisher’s exact test of independence.

123. See Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 38 (describing backlash against the movement grounded in due process concerns); Rhode, *supra* note 9, at 411–17 (same).

III. WHAT DOES THIS MEAN FOR EXECUTIVE CONTRACTING AND WORKPLACE NORMS?

In this Part, we analyze our findings from three perspectives: corporate governance, contract design, and gender equity. First, our empirical findings are largely in line with the managerial power theory and offer insight into what circumstances will drive corporate boards to break established bargaining patterns. Second, they illustrate the range of drafting choices that companies face when anticipating CEO misconduct and suggest possible tradeoffs that companies might make when crafting “MeToo termination rights.” Finally, our findings allow us to imagine various ways in which changes in contract language can positively impact gender equity goals. “MeToo termination rights” may have signaling value at the point of hire, deterrent effects over the course of the relationship, and influence on the terms of CEO exit if and when the executive engages in sex-based misconduct. Including these grounds for cause also has symbolic value insofar as they incorporate existing company policies, effectively making the CEO abide by the same rules as the workforce at large.

A. Implications for the Principal-Agent Problem

The shifts in contract language that we document provide evidence of the agency issues highlighted in Part I. As we discussed, corporate governance theory predicts that CEO contracts may not be market-based deals because unique bargaining dynamics enable the executive to extract rents in contract negotiations.¹²⁴ Consequently, CEO contract terms may be more favorable to the executive than would be expected under ordinary market conditions, resulting in greater compensation and less performance accountability. Our research augments this theoretical account in several ways.

First, our pre-MeToo results are in accord with the principal-agent theory, providing evidence of contract exit terms that are highly favorable to CEOs. In all of the contracts in our sample, we observe narrowly enumerated grounds for cause that do not capture the full range of behaviors that would justify termination under general contract law. For example, more than eighty percent of contracts both before and after MeToo list “failure to perform” as grounds for cause.¹²⁵ This phrasing is generally interpreted by courts to mean a failure so fundamental that it materially breaches the contract.¹²⁶ As previously discussed, when courts interpret general job

124. See *supra* Part I.

125. See *supra* Part II.

126. See, e.g., *Bolander v. Bolander*, 703 N.W.2d 529 (Minn. Ct. App. 2005) (contrasting failure to perform constituting a material breach of contract with mere poor performance that did not constitute cause for termination of executive’s employment contract). Furthermore, many contracts further qualify “failure to perform” with limiting language. We did not collect data on this point because we focused on grounds that either explicitly addressed or could be interpreted to capture sex-based misconduct. However, for an example, see discussion of Easterbrook’s contract, *supra* notes 47–63 and accompanying text (including “willful or habitual failure to perform” as grounds for cause).

security contracts that do not define cause, they interpret cause to mean any reasonable, good-faith basis for termination.¹²⁷ This would include mere dissatisfaction with performance if objectively based and asserted in good faith.¹²⁸

For the same reasons, typical executive contracts that define cause narrowly (and lack “MeToo termination rights”) leave space for CEOs to engage in some forms of sex-based misconduct. The more common grounds for cause may capture some of this behavior, but they are less capacious. CEO contracts that include criminal behavior, for instance, would presumably capture acts of sexual assault, but not civil sexual harassment. Those that include “moral turpitude” might capture some forms of noncriminal sexual harassment, but probably would not apply to gender-based harassment that is nonsexual in nature. Generic “misconduct” would appear to capture all of these behaviors, but as discussed in Part II, CEO contracts often qualify that term with limiting language. Our data show that over ninety percent of contracts that list “misconduct” as grounds for cause pair that term with one or more threshold levels of intent, seriousness, or harmfulness that narrow the scope of actionable behavior. Thus, contracts that lack explicit “MeToo termination rights” generally give companies the clear right to terminate executives for cause *only* when sex-based misconduct has already done harm or placed the company at risk of liability. In such contracts, companies have effectively negotiated away their ability to act preventatively in anticipation of these harms.

Yet our post-MeToo results show that companies can and will bridge this apparent principal-agent gap in response to external pressures. There are at least three dimensions to this shift with implications for corporate governance. First, companies are clearly claiming more at the bargaining table, directly responding to gaps in CEO contracts brought to light by the MeToo movement. By negotiating for the explicit inclusion of discrimination or harassment and violations of company policy in the definition of cause, companies are insisting on greater power to terminate and at the same time sending a clear signal to CEOs from the moment of hire that sex-based misconduct will not be tolerated.

Second, companies are laying the groundwork to legally terminate executives without pay should a MeToo-type incident arise. As described in Part I, the MeToo

127. See, e.g., *Pugh v. See’s Candies, Inc.*, 250 Cal. Rptr. 195 (Cal. Ct. App. 1988) (distinguishing required showing for breach of implied contract for just cause employment from that required for breach of an express fixed-term employment contract); *supra* Part I.A.

128. *Pugh*, 250 Cal. Rptr. at 211–13; *Uintah Basin Med. Ctr. v. Hardy*, 179 P.3d 786, 789 (Utah 2008) (“[U]nsatisfactory job performance would most likely establish just cause . . .”). This is not to suggest that these narrow definitions of cause are necessarily inefficient. For instance, companies may prefer to prioritize other terms of the deal (compensation, restrictive covenants, etc.) rather than negotiate for a more nuanced definition of cause that may be difficult to enforce. See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 279 (1992) (suggesting that, owing to the cost of proof, “the employer’s best strategy often is to limit discharge to egregiously bad performance but routinely to take shirking into account in connection with salary or promotion”). We are unable to determine from our research what trade-offs occurred in any one contract with respect to any particular term, a matter we return to in *infra* Part IV.A. For our purposes here, what is important is that the definition of cause in executive contracts markedly diverges from the default definition of the term.

movement revealed a corporate practice of terminating CEOs who committed sex-based misconduct under the “no cause” provision of the relevant contract. These failures to invoke the for-cause provisions resulted in a contractual payout to the CEO, ostensibly rewarding the CEO for misconduct. This choice also communicated to future CEOs that the company was willing to tolerate this behavior from high-level employees, diminishing CEO incentives for future compliance. Either consciously or unconsciously, these CEOs might not have taken the appropriate degree of care in monitoring their behavior since, prior to MeToo, it was logical to assume that the costs of misconduct would not be fully internalized by the CEO. Companies are now putting themselves in a position to reframe this message and better incentivize CEO compliance. We believe that the changes we see herald increased monitoring during the course of the relationship backed by the credible threat of a for-cause termination.

Third, such changes show that corporate boards are responsive to shareholder concerns. Since the MeToo movement, a number of shareholder lawsuits have been filed alleging a failure of oversight in identifying and responding to high-level sex-based misconduct in violation of the board’s fiduciary duties to the company.¹²⁹ These types of derivative suits are challenging to win for a variety of reasons, in particular the high level of deference granted to boards by the business judgment rule.¹³⁰ But the contractual changes that we document actually *narrow* corporate boards’ freedom of action under the rule. If a contract contains a very narrow definition of “cause” typical of pre-MeToo contracts, a board can credibly argue that its choice to terminate an offending CEO without cause is justified by the desire to avoid possible litigation and reputational issues that might flow from a for-cause termination.¹³¹ However, by explicitly providing that harassment or discrimination and violations of company policy are grounds for cause, boards are eliminating that contractual uncertainty and its attendant legal risks. In effect, these boards are giving themselves less latitude to avoid a “for cause” termination consistent with their fiduciary duties.

In sum, these documented shifts in the language of CEO employment contracts should theoretically affect CEO behavior, as well as the actions of corporate boards operating in the shadow of the CEO’s contract. The nature and degree of that effect will depend in part on the specific drafting choices made by the parties in designing “MeToo termination rights,” a matter we take up in the next subsection.

129. See Hemel & Lund, *supra* note 14, at 1625–28 (discussing derivative suit against Wynn Resorts and other post-MeToo filings).

130. *Id.* at 1628–35 (describing the limited scope of the duties of care and loyalty, as well as procedural obstacles to successful claims premised on sex-based misconduct).

131. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 72 (Del. 2006) (affirming that the board did not breach its fiduciary duty in terminating poorly performing CEO Michael Ovitz without cause and paying severance where the alternatives “at the very least would have resulted in a costly lawsuit to determine whether Ovitz was so entitled”).

B. Implications for CEO Employment Contracts

Our results can also be interpreted from the perspective of contract design. This branch of scholarship offers a framework for understanding the drafting choices of sophisticated negotiators.¹³²

One insight from this literature is that parties consider a variety of costs in determining whether to include a particular term in their written contract and, if so, how it should be drafted.¹³³ As a consequence, contracts are necessarily “incomplete” in that they do not explicitly address all foreseeable contingencies, such as a low-probability event for which it would be difficult to negotiate or specify the parties’ obligations.¹³⁴ Even where the risks justify the transaction costs and reputational risk involved in introducing a new term, difficulties inherent in enforcing the term influence how the term is drafted.¹³⁵ Weighing these costs, parties must determine how to delineate that particular right or obligation, sometimes described as a choice between rules and standards.¹³⁶

Against this backdrop, we offer two observations about CEO contracts post-MeToo. First, the movement appears to have altered the cost/benefit analysis for companies seeking to expand termination rights. Second, in crafting expanded termination rights, companies may be choosing between greater signaling power and greater enforcement potential.

132. As one scholar describes it, the “contract design literature focuses on the efficient design of contracts and [its] connection [to] aspects of contract theory—such as enforcement and interpretation.” Cathy Hwang, *Value Creation by Transactional Associates*, 88 FORDHAM L. REV. 1649, 1652 (2020).

133. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 114 YALE L.J. 815, 817 (2006) (“By reaching the optimal combination of front-end and back-end costs, parties can minimize the aggregate contracting costs of achieving a particular gain in contractual incentives.”).

134. There is a deep literature on the notion of “incomplete” contracts, focusing on why parties omit terms from their contracts and how such “gaps” should be treated by courts. See, e.g., Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RESV. L. REV. 187, 189–90 (2005); Schwartz, *supra* note 128, at 308–13; Albert Choi & George G. Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503, 504 (2008); Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 161 (1994).

135. Scott & Triantis, *supra* note 133, at 822–23 (distinguishing “front-end” costs, incurred during contract drafting, from “back-end” enforcement costs, incurred when litigating disputes).

136. *Id.* at 839–44; Choi & Triantis, *supra* note 134 (describing how parties may use standards like “best efforts,” instead of rules like “work hours” in their contracts); cf. Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. ECON. & ORG. 330, 347–48 (2005) (explaining that standards, like “material adverse change” in a contract exit clause, allocate future risks to sellers while rule exceptions shift similar risks to buyers).

1. Filling a Contractual Gap

The increase in “MeToo termination rights” likely reflects changes in how companies price the risk of a MeToo-type event. Contracts without these termination rights could be described as incomplete as to the effect of sex-based misconduct (as distinct from other types of wrongful actions). Such contracts do not clearly set out the company’s termination rights in that context or, more importantly, its financial obligations to the departing CEO.

There are several possible explanations for this type of gap, particularly in pre-MeToo contracts. Assuming the company considered the matter, it may have believed it improbable that its chosen hire would engage in sex-based misconduct or that, in the event they did so, the cost to the company would be relatively low.¹³⁷ If so, the company likely believed it unnecessary to incur the costs involved in seeking additional or more explicit termination rights. The drafting costs of including these additional termination rights may be low in the sense that they do not require lengthy or complex language. Even so, the bargaining dynamics of asking for these rights from the CEO (and possible ill will resulting from their negotiation) may militate against pursuing them—particularly if companies believe they are unlikely to be used.

This is especially true if such terms are atypical. Contract design literature suggests that negotiating pairs are reluctant to deviate from conventional patterns of negotiation, preferring to rely on forms and standard language even in high-stakes, heavily lawyered transactions.¹³⁸ A request for contract language addressing sex-based misconduct by the CEO, where such language is outside the norm, risks a variety of negative signaling effects for the company.¹³⁹ It could communicate to candidates that the company is suspicious of their character and past behavior, or that the company has a history of workplace harassment and discrimination. Relatedly, such a request could signal to candidates that the company is likely to be exceptionally vigilant regarding such matters, which could be concerning to candidates fearful of unfounded allegations or overzealous enforcement.

The increase in “MeToo termination rights” thus suggests that this cost-benefit calculus may be changing. This makes sense for at least three reasons. First, the MeToo movement has demonstrated that sex-based misconduct by high-level actors

137. Such was arguably the case prior to the MeToo movement when companies could easily and commonly effect a private settlement with the victim. See Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 4–5 (2022) (describing instances of this phenomenon); Catherine L. Fisk, *Nondisclosure Agreements and Sexual Harassment: #MeToo and the Change in American Law of Hush Contracts*, in THE GLOBAL #METOO MOVEMENT 475, 475–83 (Ann M. Noel & David B. Oppenheimer eds., 2020) (same). The enforceability of confidential settlement agreements is currently in flux. See *supra* note 5 and accompanying text.

138. Cf. Davidoff, *supra* note 21, at 527–28 (suggesting that private equity structure is path dependent because private equity lawyers are “not incentivized to rethink and renegotiate the boilerplate,” which is costly).

139. Cf. *id.* at 530 (explaining that “extralegal forces” and “reputational constraints” influence contract design, including “bonding, signaling, and understandings” that occur during negotiations).

is not a remote possibility. The number of individuals accused in the course of the MeToo movement, among them many popular and admired public figures, provides evidence that this behavior is widespread and not perpetrated merely by the rare, rogue individual.¹⁴⁰ Second, the movement has raised the stakes for companies struggling to manage MeToo-type events. Previously, the primary cost of sex-based misconduct to the company was the risk of liability to the victim, a price companies were willing to pay to retain their top leaders.¹⁴¹ This was particularly true when the settlement could be accompanied by a nondisclosure agreement to mitigate adverse publicity.¹⁴² Post-MeToo, companies face additional risks and costs in the event of sex-based misconduct, ranging from harmful public relations consequences to shareholder liability suits.¹⁴³ They are also less able to resolve MeToo incidents out of the public eye, owing to new legislation limiting the use of confidential settlement clauses and private arbitration.¹⁴⁴ Third, the penalties associated with raising sex-based misconduct at the bargaining table have likely diminished. With the increased awareness of the problem, a company’s desire to secure language addressing the risk of MeToo-type events should not be deemed unusual and would likely involve fewer, if any, negative signals.¹⁴⁵

Finally, the limits of relying on the usual grounds for cause to deal with MeToo-type events have come to light. As previously discussed, grounds for cause included in pre-MeToo contracts, such as criminal behavior and serious misconduct, could

140. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, *supra* note 2.

141. *See Power and Process*, *supra* note 12, at 95.

142. On the role of confidential settlement agreements and other corporate secrecy practices in insulating high-profile harassers, see Fisk, *supra* note 137; Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2515–17 (2018); *cf.* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167–68 (2019) (suggesting such agreements may be voided under general contract law).

143. Perhaps the highest profile example was the suit brought against Activision Blizzard. *See* Maeve Allsup, *Activision Hit with Derivative Suit over Sexual Harassment*, BLOOMBERG L. (Aug. 6, 2021), <https://news.bloomberglaw.com/us-law-week/activision-blizzard-hit-with-derivative-suit-over-sex-harassment> [<https://perma.cc/EK8X-DRYL>]. *See generally* Hemel & Lund, *supra* note 14 (surveying derivative suits). As previously discussed, these suits face a number of obstacles and most, including the one levied against Activision, have been dismissed or settled. *See id.* (explaining the procedural and substantive obstacles to establishing board liability); *supra* Part III.A. But such suits can still be costly and operate as a check on corporate behavior regardless of their outcomes. *See, e.g.*, Daisuke Wakabayashi, *Alphabet Settles Shareholder Suits over Sexual Harassment Claims*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/technology/google-sexual-harassment-lawsuit-settlement.html> [<https://perma.cc/TW5R-KA4S>]. There is also emerging evidence that perceptions of workplace culture and the risk of misconduct influence investors. Billings, Klein & Shi, *supra* note 15.

144. *See supra* note 5 and accompanying text.

145. The fact that drafting changes are occurring in the highly path-dependent context of corporate mergers and acquisitions, see Windemuth, *supra* note 19 (documenting the rise of “MeToo clauses” in M&A agreements), offers good reason to think that “MeToo termination rights” will become more acceptable in the CEO contract context.

encompass some types of sex-based misconduct and certainly the most severe.¹⁴⁶ But the dangers of waiting for severe events is exactly the problem. To get ahead of the situation, companies require greater flexibility than they have generally enjoyed under the usual grounds for cause. They must design new categories that will better capture objectionable behavior, expansively defined, allowing for a nimbler corporate response. The next section considers how companies have done this, giving closer attention to the drafting choices they have made in adding “MeToo termination rights” to their contracts.

2. Choosing the Appropriate Term

Once a party determines that a written term is worth its attendant costs, the next question is how it should be drafted. When contracting parties agree to a performance term, they must choose a benchmark, or “proxy,” for compliance.¹⁴⁷ In the case of company termination rights, the drafting question posed is essentially the inverse: how should the parties describe the type of noncompliance that will trigger the company’s right to terminate for cause? In other words, what constitutes sex-based misconduct justifying a for-cause termination?¹⁴⁸

In the case of “MeToo termination rights,” our results reveal two approaches to identifying an actionable MeToo-type event. The first and arguably more direct approach is to include language expressly referring to sexual harassment and discrimination, what we refer to as a sexual harassment or discrimination (SHD) clause. This design relies on an external or public proxy: antidiscrimination law. The second, more opaque approach is to include language referencing violations of company policies or codes of conduct, what we refer to as a violation of company policy (VCP) clause. This design relies on an internal proxy: personnel standards established by the company. These two approaches differ in scope, pose different enforcement challenges, and likely send different signals to the subject CEOs.

a. Sexual Harassment and Discrimination Clauses

The chief advantage of an SHD clause is likely its strong signaling effect. By adopting a legal term of art, the company indicates clearly the type of conduct prohibited and its commitment to MeToo values. Such language places discrimination on the same level of importance as more typical grounds for

146. See *supra* Part I.A.

147. See Scott & Triantis, *supra* note 133, at 818 n.8 (explaining that “proxies” refer to “operative facts,” which facilitate “compliance with precise and vague contract terms” in anticipation of contract enforcement).

148. It is worth noting this problem of delineating the type of behavior that justifies termination or other adverse consequences is not unique to drafting CEO contracts. The MeToo movement struggled to define its own contours, a matter vigorously debated in the public realm. The movement spotlighted a wide swath of behaviors, some of which constituted crimes, some of which would not be considered unlawful even under civil law. See *Best Practices*, *supra* note 6, at 9–10 (providing a taxonomy of MeToo behavior). Questions about what behavior should be sanctionable, what penalty ought to apply, and in what dimensions of civic and private life are deeply contested.

termination, such as material breach of contract. It is also likely to be impactful for outside observers. While the CEO is the principal audience for this language, the contract is a public document that can be accessed by interested parties. To the extent the company wishes to appease activist shareholders or other interest groups that may scrutinize these contracts, this language could be quite effective.

The pairing of sexual harassment and discrimination in this formulation is also noteworthy. A chief concern of some antidiscrimination law scholars was the MeToo movement’s near-exclusive concern with sexualized behavior.¹⁴⁹ These thinkers point out the need to focus on broader forms of sex discrimination, such as implicit bias, lack of mentoring opportunities, failure to promote, pay inequity, and nonsexualized gender-based harassment.¹⁵⁰ In this respect, an SHD clause not only has strong signaling value with respect to sex-based misconduct, it conveys broader values about gender equity and other forms of equal protection.

At the same time, SHD clauses pose problems of scope and enforceability. The phrase “sexual harassment and discrimination” invokes antidiscrimination law, making legal principles the benchmark for noncompliance. Existing standards for what constitutes legally actionable discrimination are difficult to meet and violations of law notoriously difficult to prove, a long-standing lament of worker protection advocates.¹⁵¹ To bring a federal claim for a hostile work environment, the cause of action most suitable to noncriminal MeToo-type events, victims must show that they were subjected to severe or pervasive sex-based conduct that was objectively and subjectively offensive.¹⁵² Almost every aspect of this definition poses a challenge in situations where the perceptions of the victim and perpetrator invariably differ.¹⁵³ This may make such clauses less effective as a tool for monitoring and disciplining a wayward CEO, despite their high signaling value at the point of hire. A risk-averse company may be loath to invoke the clause if it is uncertain about its ability to substantiate alleged misconduct in the face of a possible challenge by the CEO. Alternatively, the company might fear that its reliance on such grounds will be cited by the victim as *prima facie* evidence of liability for the CEO’s misconduct in a subsequent discrimination suit. If such concerns make companies reluctant to invoke

149. See Schultz, *supra* note 12, at 24; Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227; *Power and Process*, *supra* note 12, at 88.

150. See Schultz, *supra* note 12; Soucek & Schultz, *supra* note 149; *Power and Process*, *supra* note 12, at 88.

151. SPERINO & THOMAS, *supra* note 66; Heather L. Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1129 (2005) (comparing the higher bar used by some courts to meet the “severe or pervasive” standard in a sexual harassment case to that used in a racial harassment case); see also Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85 (2003) (arguing that many courts have used the “severe or pervasive” standard to excuse harassment against women).

152. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998).

153. In other words, whether a company has grounds to terminate for cause under an SHD clause may be unobservable as well as unverifiable.

SHD clauses, their inclusion in CEO contracts is not likely to improve the corporate response to sex-based misconduct.

On the other hand, it is possible that these scope and enforcement difficulties are of less significance given how CEO terminations are generally effected. Few such events result in outright disputes but rather are resolved through a quietly negotiated exit settlement.¹⁵⁴ Those that are disputed are generally addressed in private arbitration rather than in court.¹⁵⁵ Thus, the choice to include an SHD clause lays the groundwork for a middle-ground exit strategy, one that pairs a no-cause dismissal or styled resignation with decreased pay and benefits.¹⁵⁶

b. Violations of Company Policy Clauses

While the rise in SHD clauses is an important change, we believe that references to company policy have potentially greater impact. VCP clauses are arguably less novel than SHD clauses. While the incidence of SHD clauses was negligible prior to MeToo, the majority of termination provisions already included VCP clauses, although we see a statistically significant increase in both.¹⁵⁷ VCP clauses are also less direct in that they do not expressly reference sex-based misconduct or discrimination. For both of these reasons, VCP clauses likely have less signaling value than SHD clauses. Indeed, VCP clauses capture sex-based misconduct only derivatively and might seem to trivialize such behavior, equating it with an array of minor CEO infractions that could arise under any number of administrative policies.

However, it is precisely because company policies are so wide-ranging that VCP clauses can be highly impactful. While SHD clauses bring definitions of cause in line with external law, VCPs make the company the arbiter of wrongful behavior, which is often defined expansively. For instance, corporate sexual-harassment policies generally proscribe such behavior in idiosyncratic ways that go beyond the contours of antidiscrimination law, such as by proscribing all forms of sexual humor or physical touching irrespective of consent.¹⁵⁸ More importantly, company policies regulate a wide range of lawful behavior that falls well outside the scope of antidiscrimination law but could have a negative impact based on gender. These include antifraternalization policies, drug and alcohol policies, prohibitions on personal use of space and resources, rules about expenses and expenditures, conflict-of-interest policies, and anti-nepotism policies, among others. Violations of such

154. See generally Ian D. Gow, David F. Larcker & Brian Tayan, *Retired or Fired: How Can Investors Tell if a CEO Was Pressured to Leave?*, STAN. CLOSER LOOK SERIES (Corp. Governance Rsch. Initiative, Stanford, Cal.), May 25, 2017, at 1 (describing secrecy around corporate turnover decisions).

155. Schwab & Thomas, *supra* note 23.

156. While the company and CEO may prefer this result, confidentially negotiated exits can negatively affect employees' and outsiders' perceptions of the company. See Gow, Larcker & Tayan, *supra* note 154 (noting that the lack of clarity around executive departures makes it difficult for shareholders to assess accountability and governance quality).

157. See *supra* Part II.C.

158. See Schultz, *supra* note 11, at 2094–99; cf. Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 510–13 (2018) (finding similar overreach in corporate training materials).

policies could, in some situations, lead to sex-based misconduct, create the appearance of sexual favoritism, or otherwise adversely affect the workplace environment.¹⁵⁹

We do not consider in this Article the efficacy or appropriateness of such policies as a general matter.¹⁶⁰ Rather, our concern is companies’ ability to act prophylactically in the face of possible sex-based misconduct by the CEO. Whereas SHD clauses provide only a narrow, limited standard for what constitutes CEO noncompliance, VCP clauses provide companies with a capacious rule book, giving them flexibility to intervene despite uncertainty as to whether the CEO’s behavior qualifies as unlawful. That is not to suggest that companies should respond with equal severity to every misdeed. As a matter of general fairness, penalties for CEO sex-based misconduct should be appropriately tailored to the circumstances, as with any form of wrongful workplace behavior.¹⁶¹ The point is that VCP clauses give companies a contract basis for acting promptly rather than awaiting more definitive and invariably more egregious behavior.

A competing concern about VCP clauses is that their reach may be constrained by limiting language. As previously discussed, certain grounds for cause are typically modified by contract language requiring that the proscribed behavior be of a threshold level of seriousness, cause actual or probable harm, or be committed with some form of intent. According to our data, while SHD clauses appear never to contain this type of language, between seventy-two and eighty-nine percent of VCP clauses in each year of our sample do.¹⁶² Such language narrows the reach of those clauses and may increase enforcement costs in close cases by diminishing the verifiability advantage associated with established rules as performance proxies.

We do not find this to be a per se concern, however, given the expansiveness and diversity of company policies. Certainly not every violation of a company policy should be deemed a terminable offense, and it is unsurprising that CEOs would bargain for (and companies agree to) such limitations. We are mindful, though, that extensive and heavily layered language constraining the types of policy violations that constitute cause could significantly undermine the value of such a clause. For example, the final contract between Harvey Weinstein and his film company included a VCP clause so heavily modified by limiting language that, ironically, it

159. See Leong, *supra* note 54, at 958–74 (discussing the adverse impact of consensual workplace relationships on third parties and institutions); *cf.* Green, *supra* note 34 (rejecting the possibility of consensual relationships between influential executives and their subordinates).

160. Indeed, the consensus of antidiscrimination scholars is that sexual harassment policies alone do little to improve gender equity, and overbroad policies can backfire or have other harmful effects on workers. See EDELMAN, *supra* note 11, at 101; Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIO. 1203, 1203–05 (2007); Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC’Y REV. 83, 87 (2005).

161. *Power and Process*, *supra* note 12, at 25.

162. See *supra* Table 5.

might not capture behavior that would satisfy the legal standard for unlawful sexual harassment.¹⁶³

We do not judge our overall data, however, based on the bespoke contract of one especially egregious bad actor.¹⁶⁴ The critical point is that corporate policies go beyond proscriptions against discrimination in establishing the contours of professional workplace behavior. Thus, VCP clauses will generally give companies greater ability to anticipate sex-based misconduct than SHD clauses and ultimately greater freedom to terminate CEOs for cause, although limiting language will play a role in how companies exercise those rights.

C. Implications for the MeToo Accountability Problem

A significant implication of our findings for workplace gender equity is the promise of increased accountability for sex-based misconduct. As previously discussed, the MeToo movement revealed not just widespread sex-based misconduct by CEOs and others in power, but companies' willingness to ignore or cover up the problem when perpetrated by powerful, high-level actors.¹⁶⁵ The introduction of "MeToo termination rights" into CEO contracts has the potential to alter this dynamic in a number of ways.

As previously discussed, these rights give companies greater latitude to terminate for cause in cases of sex-based misconduct not sufficiently egregious to trigger other grounds. This can be especially important in situations where the underlying facts are contested,¹⁶⁶ or the CEO's conduct is not clearly unlawful but falls close to the

163. The contract defined cause to include "a *willful* violation of the Code of Conduct if it is determined by a vote of a majority of the Board [including one Co-Chairman] that such violation *has caused serious harm* to the Company." Letter Agreement from Weinstein Company Holdings to Harvey Weinstein 12–13 (Oct. 20, 2015) (emphasis added) (on file with author). By comparison, unlawful sexual harassment does not require willfulness, nor does it invariably cause serious harm to the company. Rather, the principal harm is to the victim, and whatever consequences may ensue to the company (e.g., liability for the violation) may not be especially "serious" from a business or financial perspective, particularly in the case of a single incident. For this and other reasons, it is likely that Weinstein's contract was intentionally drafted to insulate him from any employment-related consequences for engaging in sex-based misconduct rather than to lay the basis for disciplining such behavior. See *Best Practices*, *supra* note 6, at 18–22 (providing a detailed explication of Weinstein's contract).

164. Weinstein's contract is not a public document because his former company was privately held, and it is therefore not part of our pre-MeToo sample.

165. See *supra* note 7.

166. Notably, several individuals accused of sex-based misconduct during the MeToo movement staunchly defended their behavior as consensual. See Katie Benner, *Silicon Valley Investor Takes Leave of Absence After Harassment Reports*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/technology/shervin-pishevar-harassment.html> [<https://perma.cc/HGR4-295B>] (reporting that investor Shervin Pishevar, after being accused of sexual harassment by five women, claimed that "any accusations were part of a plot . . . to smear him"); Russell Simmons's *Statement on Rape Allegations*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/arts/music/russell-simmons-statement.html> [<https://perma.cc/LV2B-BYFG>] (providing a statement from Russell Simmons denying accusations of rape and stating that "all of my relations have been consensual"); Graham

line.¹⁶⁷ The existence of “MeToo termination rights”—and in particular the inclusion of violations of company policy as grounds for cause—reduces the risk of contract liability that might otherwise disincentivize a for-cause termination in those circumstances.

However, we see “MeToo termination rights” as more than an on-off lever to be invoked at the point of exit. The law of hostile work-environment liability offers a useful lens for considering the range of possible effects. Under federal antidiscrimination law, a company is vicariously liable for hostile work-environment harassment perpetrated by an alter ego of the company, such as a CEO.¹⁶⁸ But where ordinary supervisors are concerned, the employer can avoid liability if it can establish, among other things, that it took reasonable care to prevent and correct harassment.¹⁶⁹

Kates, *Women Suing Charlie Rose Make New Claims of Sexual Harassment*, CBS NEWS (Apr. 2, 2019, 3:31 PM), <https://www.cbsnews.com/news/women-suing-charlie-rose-make-new-claims-of-sexual-harassment> [<https://perma.cc/22JR-N4GA>] (“Mr. Rose vigorously denies the claims. He did not physically or verbally sexually harass these plaintiffs.”).

167. This would be particularly important in situations where a CEO engages in an inappropriate, but consensual, relationship. See Haddon, *supra* note 50; Don Clark, *Intel C.E.O. Brian Krzanich Resigns After Relationship with Employee*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/technology/intel-ceo-resigns-consensual-relationship.html> [<https://perma.cc/4G8F-X4ZP>] (describing an investigation into Brian Krzanich’s consensual relationship with an Intel employee that violated a nonfraternization policy applicable to managers); Christopher Drew, *Lockheed’s Incoming Chief Forced Out over Ethics Violation*, N.Y. TIMES (Nov. 9, 2012), <https://www.nytimes.com/2012/11/10/business/lockheed-citing-ethics-violation-says-incoming-chief-has-quit.html> [<https://perma.cc/8ARA-LQ2Y>] (reporting the dismissal of the chief operating officer following an investigation that showed he had a “long-standing relationship with a female employee”).

168. *Townsend v. Benjamin Enters.*, 679 F.3d 41, 54 (2d Cir. 2012) (finding “supervisors to be of sufficiently high rank to qualify as an employer’s proxy or alter ego when the supervisor is ‘a president, owner, proprietor, partner, corporate officer,’ or otherwise highly-positioned in the management hierarchy”) (quoting *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000)); *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 421–22 (11th Cir. 1999) (“[A]n employer can be held *vicariously* liable for a supervisor’s sexual harassment . . . [if] the supervisor holds such a high position in the company that he could be considered the employer’s ‘alter ego’”) (emphasis in original) (footnote omitted) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)).

169. *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998) (articulating affirmative defense comprising “two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise”); *Burlington Indus.*, 524 U.S. at 807 (same). This so-called *Ellerth-Faragher* defense has been subject to significant criticism. See, e.g., SPERINO & THOMAS, *supra* note 66, at 151–57; Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 731–32 (2000) (arguing that strict liability for supervisor harassment, rather than the compromise rule adopted by the Supreme Court, would create a stronger incentive to prevent sexual harassment claims); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004) (“By hinging liability on a response to

“MeToo termination rights” serve both these purposes. As a preventative tool, the terms operate at the hiring stage to flush out potential offenders. Candidates who object to them or seek significant concessions in exchange would bring higher scrutiny on their preemployment conduct. In addition, the inclusion of the terms sets the expectation for the relationship, placing the candidate on notice that this behavior will not be tolerated and that compliance will be monitored. This likely has a deterrent effect over the course of employment.

In the same way, “MeToo termination rights” also open the possibility of effective corrective action short of termination. Not all acts of sex-based misconduct necessarily justify termination.¹⁷⁰ With rank-and-file workers, companies typically use formal or informal systems of progressive discipline in sanctioning unwanted behavior.¹⁷¹ Companies could discipline CEOs for sex-based misconduct even absent “MeToo termination rights.” But the force behind any act of employer discipline is the ultimate threat of termination. Against the backdrop of “MeToo termination rights,” companies have the ability to credibly, but proportionally, intervene in the face of questionable behavior and hopefully both correct and prevent sex-based misconduct.

Finally, “MeToo termination rights” set a consistent message at the top of the corporate hierarchy that can have implications for the workplace at large. For decades, companies have maintained company-wide sexual harassment policies, sponsored trainings, and touted their commitments to equal employment opportunity compliance and inclusivity.¹⁷² The MeToo movement revealed that high-level executives have been playing by a different rule book, literally and figuratively. Not only were the most egregious perpetrators permitted to offend over and over again

harassment that is uncommon [i.e., victim reporting], especially in cases involving supervisors, the Court created a legal rule that from its inception was unlikely to promote the stated goal of prevention.”); McGinley, *supra* note 13 (arguing that courts should abolish the *Ellerth-Faragher* defense “because it serves as a shield against liability but does not operate to limit or prevent sex- or gender-based harassment”). Much of the critique concerns the way the defense has been interpreted and applied by courts. *See, e.g.*, Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 605–06 (2006) (finding that “lower courts’ analysis of whether the employer has satisfied its burden of proof . . . is often cursory and, at times, virtually nonexistent”); *see* David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1289 (2001) (finding in examination of published judicial opinions that the majority of courts apply the affirmative defense in a manner favorable to employers). That debate falls outside the scope of this Article. Our purpose in drawing on the defense is to consider the ways in which the advent of “MeToo termination rights” in CEO contracts might advance its underlying goals.

170. *See Power and Process*, *supra* note 12, at 97.

171. *See id.* (explaining that in workforces using progressive discipline, employees face escalating penalties for each infraction and, in some cases, can challenge their employer’s decision to terminate them).

172. Tippett, *supra* note 16, at 244. There is an extensive legal and sociological literature suggesting that such policies and trainings have symbolic value to companies. *See* EDELMAN, *supra* note 11; Dobbin & Kelly, *supra* note 163.

without consequence, in some cases their contracts seemed to anticipate and condone that very sequence of events. The termination provision of Harvey Weinstein’s contract, for instance, permitted him to “cure” any behavior giving rise to cause by making the company whole for any resulting losses.¹⁷³ In other words, if Weinstein committed sex-based misconduct sufficiently egregious to constitute cause under the exceedingly narrow definition contained in his contract, he could simply pay back the cost of any judgment or settlement his conduct incurred.¹⁷⁴ The adoption of “MeToo termination rights” stands in sharp contrast to contracts like Weinstein’s and promises a change in step from this type of protectionism and disparate standards that enabled his ongoing misconduct.

IV. THE LIMITS OF “METOO TERMINATION RIGHTS”

Our results reveal a statistically significant shift in the language of CEO contracts, reflecting companies’ increased attention to the problem of high-level, sex-based misconduct and commitment to improved workplace equity. The drafting changes we document signal to CEOs that companies will no longer tolerate the type of behavior implicitly condoned by some companies prior to MeToo. They also give companies the power to follow through on that message, expanding their rights to terminate for cause in situations that would previously have risked costly litigation. This puts in place expectations at the top of the organizational hierarchy, setting a tone that will likely follow through to the rest of the company.

At the same time, we recognize the limitations of both our research design and ultimately our results. Even with the addition of “MeToo termination rights,” CEO contracts remain highly favorable to the executive. Nor can we predict whether and

173. In defining “cause,” the Weinstein contract states: “For purposes of this Agreement, ‘[C]ause’ shall mean only: (i) a willful failure or refusal by you to follow [Board instructions] or your knowingly taking any action [requiring Board approval] without approval; (ii) the perpetuation by you of a material fraud against the Company [determined through arbitration]; (iii) a conviction for a felony involving fraud, dishonesty or moral turpitude, after the exhaustion of all possible appeals; (iv) an indictment for [such a felony] if it is determined by a vote of the majority of the Board [including one Co-Chairman] to cause serious harm to the Company; (v) a willful violation of the Code of Conduct if it is determined by a vote of a majority of the Board [including one Co-Chairman] that such violation has caused serious harm to the Company; or (vi) a material breach by you of [this agreement] provided that, in the case of each of clauses (i), (v) and (vi) above, the Board has first notified you in writing, within a reasonable time . . . of such action or omission by you . . . and you have not cured the particular action or omission complained of within thirty (30) days . . . provided further . . . the payment by you of any costs incurred by the Company as a result of a violation of [this agreement] shall constitute a cure of such violations.” *Best Practices*, *supra* note 6, at 18–19 (alterations in original) (quoting Letter Agreement from Weinstein Company Holdings to Harvey Weinstein 12–13 (Oct. 20, 2015) (on file with author)).

174. *See generally Best Practices*, *supra* note 6, at 19 (explaining how the narrow definition of cause, the lack of a “catch-all” provision, the requirement of a willful violation of the company Code of Conduct, and the other qualifying language of the employment contract insulated Weinstein against the risk of termination for harassment and misconduct); *supra* Part II.B.2 (noting uniquely pro-executive terms of Weinstein’s contract).

how companies will exercise these newly created rights. We explore some of those limitations here, highlighting areas for further research.

A. Contract Tradeoffs and the Persistence of Procedural Protections

As we have seen, the typical definition of cause includes multiple distinct grounds. These comprise a component of the contract termination provision, which itself is but one term of the parties' overall agreement. Our research design examined the incidence of particular grounds for cause within each contract termination provision in our sample. We did not examine the individual grounds for cause vis-à-vis one another within particular contracts, nor did we examine termination provisions in relation to other terms of the contract. This raises several questions about the relationship between contract terms and CEO bargaining power, opening areas for possible future research.

First, we are unable to delineate what would constitute an optimal CEO employment contract. Any individual contract is the result of the idiosyncratic interests of the parties and their distinct bargaining positions. In particular, we cannot observe which, if any, tradeoffs are being struck at the bargaining table in exchange for expanded "MeToo termination rights." It is possible that CEOs are insisting that companies dial back other grounds to compensate for the pro-company expansions we document. It is also possible that any such tradeoffs are effected through other contract terms, such as increases in pay or benefits.

That said, we do not believe that such tradeoffs—assuming they occur—undermine the importance of our results. If companies are purchasing "MeToo termination rights" through other concessions, it may be that, on balance, these agreements still reflect some of the same overall inefficiencies that agency theory predicts. But that does not diminish the importance of the changes we document: they reflect companies' attention to the MeToo movement and a new willingness to overcome existing bargaining norms in order to advance MeToo values.

Second, our conclusions do not integrate other pro-CEO protections that could diminish the value of "MeToo termination rights." For instance, we find that eighty-four percent of CEO contracts include some form of "procedural protection" designed to ensure the accuracy and appropriateness of companies' invocation of for-cause termination rights.¹⁷⁵ As described in Part II, these generally afford a degree of due process protection for the accused CEO, such as the right to receive a written description of the basis for cause, a forum to dispute the accuracy of the charges, and an opportunity to cure any wrongdoing. They may also impose requirements and limitations on the company's exercise of its power to terminate, such as a duty to act in good faith. Our review of the incidence of such protections does not reveal any meaningful change post-MeToo, meaning CEOs are free to avail themselves of these protections in response to companies' invocation of their newly added termination rights. This may limit companies' ability to effectively exercise those rights, particularly where the company has invoked an SHD clause that uses a legal standard as the proxy for cause. As discussed in Part III, the elements of sexual

175. See *supra* Table 6.

harassment are difficult to prove, making the outcome in any termination premised on its existence subject to challenge.

B. Paper Versus Practice

Another uncertainty is the durability of the changes we have identified and their ultimate effects. Our research presents a look at CEO contracts in the years immediately surrounding the beginning of the MeToo movement. We do not know whether the changes we document will endure in the years to come, nor do we know how these changes will be implemented on the ground.

First, it is possible that the change we see is momentary and fleeting, an immediate response to a powerful, but short-lived, movement. Notably, our post-MeToo sample ends in March 2020, the point in time at which the COVID-19 pandemic took center stage in the public consciousness. However, we believe that the changes that we find will both increase and maintain their staying power. Our post-MeToo sample captures only the first two years of the movement—a period of time that may be too short to capture its full effect on contracting. According to the 2006 study, the most common duration for CEO contracts was three years (followed by five years).¹⁷⁶ Thus, only a subset of companies within the sample years had occasion to hire or renew a CEO contract since MeToo. We suspect that these changes will continue as companies have the opportunity to revisit individual CEO contracts.

This prediction is strengthened by the general path dependency of contract terms, that is, the likelihood that they will become embedded once agreed to.¹⁷⁷ We believe that this force alone is powerful enough to ensure that the current trends continue. The changes in CEO contracts today are likely to be preserved in the draft agreements and form contracts of tomorrow, making it likely that the inclusion of “MeToo termination rights” becomes standard in definitions of cause, even when attention drifts to other issues.¹⁷⁸

Despite our belief that the changes we see in executive contracts are likely to persist, our results cannot tell us how companies will *use* their “MeToo termination rights.” Companies have put CEOs on notice that sex-based misconduct will not be tolerated, and they have negotiated the necessary rights to back up that claim. However, enforcement is another question; we cannot tell whether companies will

176. See Schwab & Thomas, *supra* note 23, at 247.

177. See Davidoff, *supra* note 21, at 529 (“Path dependency is created by market participants’ paying heed to the market norm and their desire not to stray too far.”); Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 89 (2018) (“Market complexity can lead parties to standardize contract terms, which can exhibit network effects that introduce path dependencies into the contract design process.”).

178. See Davidoff, *supra* note 21, at 528 (“[F]irst-agreed terms are ‘locked-in,’ become boilerplate, and may persist In these later contractual iterations, parties do not renegotiate these terms due to the costs associated with such a change.”); Jennejohn, *supra* note 177, at 90 (“Widely adopted standardized terms allow parties to reduce both front-end negotiating costs—both parties to the deal understand the common language, which can streamline costly dickering—and back-end enforcement costs—if a court has given a standard term a definitive interpretation, then enforcement uncertainty can be reduced.”).

exercise those rights and under what circumstances. Indeed, companies are often reluctant to terminate for cause, contract language notwithstanding.¹⁷⁹ Even so, this revised language will change the bargaining positions of the parties at the point of exit. In other words, even if companies persist in using the no-cause option when terminating CEOs, any increased willingness to terminate, and to do so on less favorable terms, can itself be seen as a victory for the MeToo movement.¹⁸⁰

Finally, we note that disciplining bad actors is not the same as eliminating sex-based misconduct, which itself is only one aspect of improving gender equity. While such matters fall outside the scope of our study, we note anecdotally that, in tandem with the changes we document, companies have announced a variety of plans aimed at those goals.¹⁸¹ Future research may determine the degree to which these actions correspond to the changes we document, as well as their long-term effect.

CONCLUSION

A critical question post-MeToo is whether the power of that social movement has translated into real change in the organizational response to sex-based misconduct.

179. This problem was made infamous by the 2005 shareholder derivative action brought against the Walt Disney Company in connection with the costly “no cause” termination of CEO Michael Ovitz. See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff’d*, 906 A.2d 27 (Del. 2006). That litigation challenged the board’s \$140 million payout to Michael Ovitz after his brief and stormy tenure as CEO, arguing that the board breached its fiduciary duty to the company by not opting to proceed on for cause. *Id.* at 70–74. For background on the case, see generally Holger Spamann, *Corporate Law — Fiduciary Duties of Directors — Delaware Court of Chancery Finds Disney Directors Not Liable for Approval of an Employment Agreement Providing \$140 Million in Termination Payments.* — *In re Walt Disney Co. Derivative Litigation*, No. Civ. A. 15452, 2005 WL 2056651 (Del. Ch. Aug. 9, 2005), 119 HARV. L. REV. 923 (2006) (analyzing the court’s conclusion that none of the officers or directors of the Walt Disney Company breached their fiduciary duties). For other cases in which an executive may have been terminated for cause but instead received a payout, see *Shabbouei v. Laurent*, No. 2018-0847-JRS, 2020 Del. Ch. LEXIS 121 (Del. Ch. Apr. 2, 2020); *MMC Energy, Inc. v. Miller*, No. 08 Civ. 4353(DAB), 2009 WL 2981914 (S.D.N.Y. Sept. 14, 2009); *In re Am. Apparel, Inc. 2014 Derivative S’holder Litig.*, No. CV-14-05230-MWF, 2015 WL 12724070, at *4 (C.D. Cal. Apr. 28, 2015), *aff’d sub nom. In re Am. Apparel, Inc.*, 2014 Derivative S’holder Litig. v. Charney, 696 F. App’x 848 (9th Cir. 2017) (holding that the termination of a former American Apparel CEO not for cause despite sexual harassment allegations was not a breach of the board of directors’ fiduciary duty).

180. We recognize that other forces of corporate-governance are likely at work in this area, including market forces. See, e.g., Mooibroek & Verschoor, *supra* note 15 (finding that investors react negatively to companies that experience MeToo incidents); Veronica Root Martinez, *A More Equitable Corporate Purpose*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., 2021) (arguing that the newfound urge of corporations to reevaluate their corporate purpose due to social movements such as MeToo and Black Lives Matter should consider the historical disparities that permeated society when the widely accepted corporate-purpose theories were created). We also recognize that other types of corporate-governance reforms may address the concerns we have raised here. See, e.g., Hersch, *supra* note 14 (proposing that workers receive a hazard-pay premium for exposure to risk of sexual harassment).

181. See generally Miazad, *Corporate Governance*, *supra* note 4.

This Article provides proof that it has. Our study of nearly 500 CEO contracts reveals that, post-MeToo, publicly traded companies are reserving greater discretion to terminate executives for sex-based misconduct in statistically significant numbers. By insisting on expanded contractual definitions of “cause” to terminate, these companies are signaling to CEOs that such behavior will not be tolerated. They are also reducing the risks and costs that previously deterred corporate boards from penalizing wayward CEOs.

In this way, this Article has implications beyond the discrete though important problem of sex-based misconduct. The post-MeToo changes documented here reveal that CEO-company bargaining dynamics and the resulting contracts are responsive to external shocks. In the wake of the MeToo movement, companies have departed from past drafting practice to negotiate language giving them greater control over CEO behavior. To be sure, CEO employment contracts—with their narrow and exclusive grounds for cause—remain highly favorable to CEOs, at least when compared to the rights of employees generally. However, the space to engage in sex-based (and potentially other forms of) misconduct that was previously afforded to CEOs is diminishing. This result promises not only reduced corporate tolerance and greater accountability for sex-based misconduct, but more meaningful oversight of CEO behavior generally.