

## AUNT JEMIMA'S RESIGNATION LETTER

Audra L. Savage\*

*In response to the national reckoning on race that began in the summer of 2020, Aunt Jemima resigns and issues a call to all corporations to address systemic racism. In this imagining of the letter that she, as a real Black woman, would send upon her resignation from PepsiCo, she tells her own story as a spokesperson based on racist tropes and suggests that the country is at a turning point. Corporations must do more than issue statements about racial justice. Following Aunt Jemima's resignation letter is a preliminary proposal for holding corporations accountable for eliminating systemic racism. This proposal is based on ideals found in the Black Church: Reckoning, Repentance, and Restitution. 'Reckoning' outlines the reasons to hold public corporations accountable for dismantling systemic racism, reasons that extend beyond traditional economic or efficiency justifications. 'Repentance' highlights the need for a new regime of transparent accounting for each corporation's past dealings and present interactions with racism. 'Restitution' argues that it is not enough for corporations to be "not racist": they must instead be anti-racist and adopt an intentional approach to dismantling racism. The core of this proposal is developing certain metrics to gauge whether racism is diminishing, and then developing enforcement mechanisms to ensure the actions are taken. The goal is to create a new antiracist regime for corporations that can be integrated within the existing system of disclosure and enforcement regulation.*

I. THE RESIGNATION LETTER<sup>1</sup>

The following is a letter that the author imagines Aunt Jemima would submit as her last official act with PepsiCo to the leadership of the com-

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1. On June 17, 2020, PepsiCo, the owner of the Quaker Oats line of products, announced that it would retire the Aunt Jemima brand from the company. This move was part

pany, resigning as their spokesperson on June 17, 2020. Following the letter is a preliminary proposal inspired by Aunt Jemima's years of service for how corporations can address systemic racism going forward.<sup>2</sup>

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June 17, 2020

Dear Chairman and CEO Ramon L. Laguarta,

After 131 years of service, I resign as the spokesperson for your pancake and syrup breakfast products, effective immediately. Out of respect for our long-lasting business arrangement, I would like to fully express the reasons I am stepping down. After being silent for so long, I have so very much to say. Please indulge me with this opportunity to explain, with hopes that it edifies you and the larger business community.

I resign because it has become clear to me, after these many decades, what racism really means. At one time, I thought that, once my people had our rights just like whites, everything would be better. And I thought once hearts and minds changed, that

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of PepsiCo's efforts to address racial inequality after the global protests that erupted following the murder of Mr. George Floyd on May 25, 2020, by police. See Verdict, Count I at 1, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (Minn. 4th Jud. Dist. filed Apr. 20, 2021); Verdict, Count II at 1, *Chauvin*, No. 27-CR-20-12646 (Minn. 4th Jud. Dist. filed Apr. 20, 2021); Zamira Rahim & Rob Picheta, Thousands Around the World Protest George Floyd's Death in Global Display of Solidarity, CNN (June 1, 2020), <https://www.cnn.com/2020/06/01/world/george-floyd-global-protests-intl/index.html> [<https://perma.cc/EZ6Q-QNEZ>]; see also *infra* Part II for a discussion on the retirement of the Aunt Jemima brand.

The author used the following as primary sources for this section: Elisabeth Buchwald, Aunt Jemima, Uncle Ben's, Cream of Wheat Mrs. Butterworth's Reveal Plans to Rebrand: A Look Back at Their Racist Origins, Mkt. Watch (June 21, 2020), <https://www.marketwatch.com/story/with-aunt-jemima-and-uncle-ben-poised-to-disappear-from-american-kitchens-a-look-back-at-their-racist-origins-2020-06-17> [<https://perma.cc/4QVY-GBHH>]; Charisse Jones, For Faces Behind Aunt Jemima, Uncle Ben's and Cream of Wheat, Life Transcended Stereotype, USA Today (July 10, 2020), <https://www.usatoday.com/story/money/2020/07/10/real-people-behind-aunt-jemima-uncle-ben-cream-of-wheat/3285054001/> [<https://perma.cc/H9UJ-6TQ7>] (last updated July 12, 2020); Dan Kedmey, 'Aunt Jemima' Family Demands \$2 Billion Cut of Pancake Business, Time (Oct. 7, 2014), <https://time.com/3477983/aunt-jemima-2-billion-pancake-mix-lawsuit/> (on file with the *Columbia Law Review*); Jordan Valinsky, The Aunt Jemima Brand, Acknowledging Its Racist Past, Will Be Retired, CNN Bus. (June 17, 2020), <https://www.cnn.com/2020/06/17/business/aunt-jemima-logo-change/index.html> [<https://perma.cc/2XTX-G67T>]; see also Brand Origins, Pearl Milling Co., <https://www.pearl-milling-company.com/our-history> (on file with the *Columbia Law Review*) (last visited Aug. 27, 2021).

2. This resignation letter is written in the vein of Critical Race Theory's use of creative storytelling to interrogate the power structures that maintain white supremacy. See Derrick A. Bell, Who's Afraid of Critical Race Theory?, 1995 U. Ill. L. Rev. 893, 899 ("Critical race theory writing and lecturing is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of the law, and the unapologetic use of creativity."). See generally Derrick A. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1992) (using a series of fables and dialogues to probe the racist foundation of America).

we would be considered equal and treated—like other people—as human beings. But as I write this, I see fully the devastation this new virus, called COVID-19, is bringing across the country—especially to Black people like me. In just three months, we have been brought to our knees. And then Memorial Day weekend happened. I find myself holding that beautiful Black boy George Floyd in my heart (he could have been my child, like so many others) and wondering if we as Black Americans will ever be considered equal to and not less than—as full and complete human beings.

I have the advantage of being over one hundred years old, and from this vantage point, I see so clearly the structural racism that plagues our country—the first pandemic of America. You might call it “COVID-1619.”<sup>3</sup> It is more than individual attitudes or labeling people as racists. Instead, it is ingrained in who we are as Americans, from our country’s beginning.

Thinking about this racism and our history, I cannot help but think that now is the time to speak out and take ownership of my story and then take action that will have a lasting impact. Your corporate predecessors were inspired by a song in a minstrel show in the 1880s and created me using the racist stereotype of the one-dimensional, happy-go-lucky Mamie slave-servant who supported and brought comfort to white families in the antebellum and postbellum South. They used me to help white women feed their families, as Black women have done since the beginning. I asked Black women, starting with Nancy Green, Lillian Richard, Anna Robinson, and Anna Short Harrington, to represent me, and you severely underpaid them as your spokespersons and denied them, and their families, trademark royalties. Even when we complained and lobbied and got the support of advocates to help us convince you to retire us as racist tropes, you simply gave me a chemical relaxer, reduced the size of my nose, and put pearls and a lace collar on me. You ignored my pleas for freedom and instead did what was best for your bottom line—and in the process you perpetuated the Eurocentric ideal of beauty of straight hair, a small nose and old-fashioned adornments. You used this Black woman to achieve your goal of increasing profit without paying any attention to my demands for humanity.

At this point, it should be clear why I am resigning. I will no longer participate in your reducing the Black woman to a symbol for you to use at your whim. I am taking back my agency. Before I leave you, however, I give you a mission. Consider it my last and

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3. See, e.g., Audra L. Savage, COVID-1619: A Brief History of Racism 2–3 (2020), <https://ssrn.com/abstract=3671093> [<https://perma.cc/R93L-PPG6>] (unpublished manuscript).

final act of service of helping you grow as a company. I want this corporation, and all corporations, to realize that you had a role in perpetuating this racist capitalist system that began with slavery and have greatly benefitted from it. It is time for you to do more. I see these statements from corporations beginning to unfold after my child George's death at the hands of the police, and I see the protests beginning to take root around the world. But I want more than your statements. I want action. I want to see the kind of backbone you displayed back in the 1980s when leading the divestment from segregated South Africa. And I want more than just putting a few Black and brown people on your board of directors or giving money to groups so others can do the hard work of dismantling racism. I want so much more from you. I deserve so much more from you. But don't worry—true to my nature, I have a few ideas to help you.

Let me provide a little context by telling you that I have been steeped in the Black Church since the beginning. Yes, it's called the "Black Church" for a reason—Black people were exposed to the Christian God in slavery but were not allowed to worship fully with our white brothers and sisters. Therefore, we had to form our own religious expression as Christians. When I think about what you and your fellow corporate leaders can do to finally address this persistent virus of racism, I think of some of the values of my proud Christian tradition: reckoning, repentance, and restitution.

With my many years of experience in corporate America, I can use these values to provide ideas for how corporations like yours can fully address racism. I say "Reckoning" because corporations need to first recognize and accept that they have been the beneficiaries and perpetrators of systemic racism, and therefore, they ought to play a role in dismantling it. Next is "Repentance." As the older folks used to say, when you repent, you confess your wrongdoing and turn it around. The corporations can confess their wrongdoing by fully understanding and admitting what they, specifically, have done to create, perpetuate, and maintain systemic racism in this country. Lastly, I say that there ought to be "Restitution." The Good Book says that when a person does wrong, they must make amends for the wrongdoing by taking active steps to fix what they have done. By taking these steps, I believe corporations can fully address racism.

I know the above are bold ideas and outside your comfort zone. To help you on your way, I attach a preliminary proposal of these three ideas developed by my friend, Audra Savage. I know there are so many more ideas that need to be addressed, and I know these actions will take a lot of work . . . and a lot of time. But that's alright. It has taken us 400 years to get into this mess. It will take some time to get out of it. My hope is that you see the light

and do the work to fully eradicate the first pandemic of American racism. You, the corporation, are one of the major institutions in our society, for better or worse. I have to have faith in you. And so does America.

For me, though, it is time to resign and rest. I have done my work for you. I have helped you sell trillions of dollars' worth of products over my lifetime. And I have given you an action plan for moving forward. I pass my baton to another generation. I look forward to my retirement. And I'm very hopeful that my good friends, Uncle Ben, Mrs. Butterworth, and Chef Cream of Wheat, can join me soon.

With Admonition and Hope,  
Aunt Jemima

## II. A NEW PROPOSAL INSPIRED BY AUNT JEMIMA'S RESIGNATION

Like a rushing river, statements from various corporations flooded the digital airwaves in the wake of George Floyd's death and the resultant global uprising.<sup>4</sup> These corporate statements supported the Black Lives Matter movement, called for the end of police brutality and racism against Black Americans, and pledged substantial amounts of money to support the effort.<sup>5</sup> This groundswell of support has buoyed hope that the nation will finally reckon with its violent and oppressive history. Many have wondered, however, whether companies were sincere about dismantling racism or whether they were "woke-washing" in an attempt to be relevant and bolster sales in a sagging economy.<sup>6</sup> There is cause for skepticism, as companies have made statements regarding racism before—most recently in 2017 after the violence in Charlottesville—but have been impotent in implementing lasting reform. Indeed, it is incredibly difficult to hold corporations accountable as there is currently no oversight, nor tracking, of corporations fulfilling their corporate pledges.<sup>7</sup>

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4. See, e.g., Gillian Friedman, Here's What Companies Are Promising to Do to Fight Racism, *N.Y. Times* (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html> (on file with the *Columbia Law Review*).

5. *Id.*

6. See David Gelles, Corporate America Has Failed Black America, *N.Y. Times* (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html> (on file with the *Columbia Law Review*); see also Arwa Mahdawi, Opinion, Woke-Washing Brands Cash in on Social Justice. It's Lazy and Hypocritical, *Guardian* (Aug. 10, 2018), <https://www.theguardian.com/commentisfree/2018/aug/10/fellow-kids-woke-washing-cynical-alignment-worthy-causes> (on file with the *Columbia Law Review*).

7. See Tracy Jan, Jena McGregor & Meghan Hoyer, Corporate America's \$50 Billion Promise, *Wash. Post* (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> (on file with the *Columbia Law Review*) (last updated Aug. 24, 2021) ("It will be difficult to assess whether corporations deliver measurable results. There is no single entity tracking the corporate promises.").

A paradigmatic example of corporate action in the face of the national reckoning on race was that of PepsiCo/Quaker Oats retiring the Aunt Jemima pancake brand.<sup>8</sup> This move is but one part of a larger initiative by Quaker Oats' owner, PepsiCo, to address racial inequality.<sup>9</sup> Black activists lobbied Quaker Oats and PepsiCo for decades to emancipate Aunt Jemima and retire the brand they decried as racist and perpetuating harmful racial stereotypes of Black women.<sup>10</sup> But it was not until people took to calling them out on Twitter, and a TikTok video went viral after Mr. Floyd's death, that PepsiCo and Quaker Oats decided to retire the problematic brand.<sup>11</sup> This delay in retiring Aunt Jemima says two things. First, it is indicative of a culture and a system that allowed the companies to ignore the concerns and protests against the brand for decades without recourse. Second, there needs to be an accountability measure to ensure that corporations not only donate the money that they have pledged but also take steps to dismantle racism and ensure a product like Aunt Jemima is not created again. The idea of accountability is important because society cannot trust companies to continue their strident claims against racism after this current moment has passed. PepsiCo is a prime example. In the 1980s, PepsiCo was one of the first companies to begin divesting its holdings from South Africa amid the anti-apartheid movement (although they stated at the time they were doing so for "business reasons").<sup>12</sup> However, they did not completely sever ties to the country, as they sold their equipment to local Black Africans with the intention of maintaining a foothold in the

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8. See Valinsky, *supra* note 1.

9. See About, PepsiCo's Racial Equality Journey: Black Initiative, PepsiCo, <https://www.pepsico.com/healthcheck/racial-equality-journey> (on file with the *Columbia Law Review*) (last visited Aug. 27, 2021).

10. See, e.g., Michele L. Norris, Opinion, Why Did It Take So Long to Set Aunt Jemima Free?, *Wash. Post* (June 17, 2020), [https://www.washingtonpost.com/opinions/why-did-it-take-so-long-to-set-aunt-jemima-free/2020/06/17/788d0112-b0db-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/opinions/why-did-it-take-so-long-to-set-aunt-jemima-free/2020/06/17/788d0112-b0db-11ea-8758-bfd1d045525a_story.html) (on file with the *Columbia Law Review*); Riché Richardson, Can We Please, Finally, Get Rid of 'Aunt Jemima'?, *N.Y. Times* (June 24, 2015), <https://www.nytimes.com/roomfordebate/2015/06/24/besides-the-confederate-flag-what-other-symbols-should-go/can-we-please-finally-get-rid-of-aunt-jemima> (on file with the *Columbia Law Review*) (discussing the discriminatory meaning embedded in the Aunt Jemima brand).

11. See Kimberly Ashton, Alumna Kirby's Viral Video Helped Bring Down Aunt Jemima Brand, *Berklee* (June 24, 2020), <https://www.berklee.edu/news/berklee-now/alumna-kirbys-viral-video-helped-bring-down-aunt-jemima-brand> [<https://perma.cc/WL6C-2UUA>]; Ben Kesslen, Aunt Jemima Brand to Change Name, Remove Image That Quaker Says Is 'Based on a Racial Stereotype', *NBC News* (June 17, 2020), <https://www.nbcnews.com/news/us-news/aunt-jemima-brand-will-change-name-remove-image-quaker-says-n1231260> [<https://perma.cc/22YS-XTSA>] ("People on social media called out the brand for continuing to use the image and discussed its racist history, with the topic trending on Twitter.").

12. Ferraro Says PepsiCo Will Sell Plant in South Africa, *L.A. Times* (May 15, 1985), <https://www.latimes.com/archives/la-xpm-1985-05-15-fi-8499-story.html> (on file with the *Columbia Law Review*); John Kirby Spivey, *Coke vs. Pepsi: The Cola Wars in South Africa During the Anti-Apartheid Era* 30 (July 8, 2009) (M.A. thesis, Georgia State University), [https://scholarworks.gsu.edu/history\\_theses/35](https://scholarworks.gsu.edu/history_theses/35) [<https://perma.cc/U9T8-V6YV>].

country in order to revive it later.<sup>13</sup> Essentially, they reaped the public relations benefit of declaring their exit from a racially oppressive country, all while they unofficially remained in the country.<sup>14</sup> Further, at the time PepsiCo purchased Quaker Oats in 2001, the opposition to the Aunt Jemima brand had been continuing for years and included lawsuits brought by the families of the women hired to market the brand.<sup>15</sup> Despite this, the company continued to use the brand for twenty years, never addressing its racist origins and its perpetuation of racist stereotypes until after the global movement surrounding the murder of George Floyd began.<sup>16</sup>

In her letter above, Aunt Jemima left PepsiCo and all corporations with a mission—to take apart systemic racism. As she correctly notes, it will take many actions, by many parties, over a long period of time to begin eradicating racism. Below is a preliminary framework that addresses the need to adopt a comprehensive and robust regime for public corporations to dismantle systemic racism, while also allowing society to hold corporations accountable for their actions. The country is at a turning point with regard to acknowledging racism and allowing the continued oppression of people of color to continue unchecked. Corporations are part of society and play a significant role not only in how wealth is distributed but also in how the system is created to keep some at the top and the rest at the bottom. As such, any solution to repairing and recovering from the racist roots of America must involve corporations—all corporations, not just the ones making public statements—and their owners, the shareholders. In other work, I have explored how the Founding Fathers created a national civil religion based on racism and how that religion continues to order our jurisprudence and our society to this day.<sup>17</sup> Bringing this idea of racism as a religion into corporate law, then, it is fitting to use the Black Church ideals of “reckoning,” “repentance,” and “restitution” to offer a path forward for corporations to come to terms with the current state of affairs, to grapple with their role creating and maintaining this state of affairs, and to repair the damage of centuries of oppression and develop the full potential of equality in America.<sup>18</sup>

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13. Spivey, *supra* note 12, at 30–31.

14. *Id.*

15. Buchwald, *supra* note 1; Jones, *supra* note 1; Kedmey, *supra* note 1; Valinsky, *supra* note 1.

16. See Brand Origins, *supra* note 1 (displaying a timeline showing no changes to the brand after PepsiCo’s purchase in 2001 until the global protests of 2020).

17. See generally Audra L. Savage, *The Religion of Race: The Supreme Court as Priests of Racial Politics*, 2021 *Utah L. Rev.* 569, 570 (“Indeed, the Founding Fathers created a national civil religion based on racism when they compromised on the issue of slavery.”).

18. This proposal as outlined below received the 2020 Innovation, Business and Law Center Prize, University of Iowa College of Law, Fall 2020 Speaker Series: “Examining Institutional Structures: Race, Business, and the Law,” and was presented at the National Business Law Scholars Conference, University of Tennessee, Knoxville (June 18–19, 2020).

This Part is divided into the three sections of reckoning, repentance, and restitution. The first section—reckoning—outlines the reasons to hold public corporations accountable for dismantling systemic racism, reasons that extend beyond traditional economic or efficiency justifications. The next section—repentance—highlights the need for a new regime of transparent accounting for each corporation's past dealings and present interactions with racism. The final section—restitution—argues that it is not enough for corporations to be “not racist;” they must instead be anti-racist and adopt an intentional approach to dismantling racism. This approach would include developing certain metrics to gauge whether racism is diminishing and then developing enforcement mechanisms to ensure the actions are taken.

It is important to add a few notes at the outset. First, the focus of this Piece is on anti-Black racism in light of the global movement sparked by Mr. Floyd's death. This is not to ignore or diminish the marginalization and oppression felt by other racial groups. Instead, this focus on anti-Black racism can provide the blueprint to address all forms of racism and bigotry in this country. Next, the focus is on public corporations for now because some of the largest drivers of wealth in this country are public corporations, and to a certain extent, they are already accustomed to regulation and accountability. It is, therefore, easier to suggest a new antiracist regime that can be integrated with an existing system of regulation of disclosure and enforcement.

In her 2003 article, Professor Alfreda Robinson recommended making corporations responsible for past oppression of Black Americans by paying reparations.<sup>19</sup> She introduced the term “critical race corporate law theory” to describe this area of law.<sup>20</sup> Blending critical race theory, corporate social responsibility, and theory regarding reparations for Black Americans, Robinson argues that corporations responsible for historical malfeasance against Black Americans should recompense the victims.<sup>21</sup> She argues this compensation is consistent with corporate social responsibility as part of an expanded view of stakeholder theory.<sup>22</sup> It is time to pick up the mantle from Robinson and expand this to include a full regime for public corporations to actively dismantle racism in a systemic fashion. This Piece is the first step, as it outlines in simple terms the path forward. It is the beginning of the conversation and not the end, as I will develop these three areas more substantively in future work.<sup>23</sup>

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19. Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 *Rutgers L. Rev.* 309, 311–12 (2003).

20. *Id.* at 329.

21. *Id.* at 311.

22. *Id.* at 329.

23. This Piece intentionally uses the term “restitution” and not “reparations” in order to distinguish this proposal for all corporations to address the legacy of racism from Robinson's call for reparations from only those corporations that are known to have directly engaged in racially oppressive acts.

A. *Reckoning*

The first action for corporations to take to address systemic racism is reckoning. Reckoning means to calculate or estimate something, or, essentially, to come to terms with something. It is time for corporations to come to terms with the fact that they have a role to play in dismantling the racism that plagues this country. This section addresses the current state of affairs and how corporations have made modest attempts at addressing racism. It then lists reasons corporations should begin to intentionally and forcefully address racism.

1. *Where We Are.* — Even before the COVID-19 pandemic of 2020 hit, Black Americans were suffering economically. According to the Bureau of Labor Statistics, Black unemployment was 6.7% in March 2020 and rose to 16.8% in May 2020.<sup>24</sup> Black unemployment continued to rise even when the overall percentage of unemployment decreased. Federal Reserve surveys show that white households have eight times the wealth of typical Black households.<sup>25</sup>

Inside corporate America, Black Americans are not faring any better. Among the Fortune 500 CEOs in 2021, only four are Black, and only one of them identifies as female.<sup>26</sup> As of June 2019, 4.1% of board directors were Black, representing only a half percentage point above the 2008 level.<sup>27</sup> Of the 1,800 people who have been CEOs for Fortune 500 companies, only nineteen have been Black (this number shrinks to fifteen if you discount interim CEOs or those whose tenure lasted less than one year).<sup>28</sup> Black employees represented just 3% of chief executive and 1% of chief financial officer positions.<sup>29</sup> Management committees of boards are often comprised solely of white men.<sup>30</sup> These numbers are only estimates as it is

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24. See Bureau of Lab. Stat., *The Employment Situation—February 2021*, at 6 (2021), [https://www.bls.gov/news.release/archives/empsit\\_03052021.pdf](https://www.bls.gov/news.release/archives/empsit_03052021.pdf) [https://perma.cc/UL96-76JE]; Bureau of Lab. Stat., *The Employment Situation—May 2020*, at 7 (2020), [https://www.bls.gov/news.release/archives/empsit\\_06052020.pdf](https://www.bls.gov/news.release/archives/empsit_06052020.pdf) [https://perma.cc/HTP9-JRKX].

25. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Bd. of Governors of Fed. Rsrv. Sys. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [https://perma.cc/U4LC-FHVR].

26. Phil Wahba, *Only 19: The Lack of Black CEOs in the History of the Fortune 500*, *Fortune* (Feb. 1, 2021), <https://fortune.com/longform/fortune-500-black-ceos-business-history/> [https://perma.cc/A7VT-NRTV].

27. *Id.* (citing an analysis by Institutional Shareholder Services of the Russell 3000).

28. See *id.* (discussing the historical and present lack of Black CEOs in Fortune 500 companies).

29. David F. Larcker & Brian Tayan, *Stanford Closer Look Series, Diversity in the C-Suite: The Dismal State of Diversity Among Fortune 100 Senior Executives 16* (2020), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-82-diversity-among-f100.pdf> [https://perma.cc/6K7P-99RQ].

30. See Gelles, *supra* note 6 (highlighting the absence of Black members on the senior leadership teams of companies such as CVS, Bank of America, and Facebook).

notoriously difficult to find accurate numbers regarding diversity for corporations, due to the lack of transparency.<sup>31</sup> What is clear, however, is that more is needed.

Corporations have resisted addressing racism in a systemic fashion. There have been, and are currently still, efforts to recruit more diverse talent to the “C-suite” and to include diversity, equity, and inclusion trainings in corporate compliance programs.<sup>32</sup> These efforts, however, have been met with modest success.<sup>33</sup> Although diversity consultants and trainings have lasted for decades, there have been no significant long-term changes to structural racism.<sup>34</sup> In many cases, they may even reduce diversity or exacerbate biases.<sup>35</sup> Further, corporations instituted these programs not with the intent to address racism but as a means of protection against antidiscrimination lawsuits.<sup>36</sup> It is part of the shift toward blaming individual actors for racist actions and behavior instead of addressing the systemic nature of racism the corporation perpetuates.<sup>37</sup> As limited as they may be, even these modest efforts at addressing racism were met with resistance when former President Donald J. Trump claimed, without evidence or support, that these trainings are “anti-American” and racist in themselves.<sup>38</sup>

More importantly, these diversity and inclusion efforts, while important, are superficial in that they do not address underlying issues of

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31. See Jamilah Bowman Williams, *Diversity as a Trade Secret*, 107 *Geo. L.J.* 1684, 1687 (2019) (“One way that companies resist transparency is with a ‘diversity as trade secret’ argument . . . to block access to workforce demographic data.”).

32. See Bhaskar Sunkara, *Opinion*, *Stop Trying to Fight Racism With Corporate Diversity Consultants*, *Guardian* (July 8, 2020), <https://www.theguardian.com/commentisfree/2020/jul/08/diversity-consultants-racism-seminars-corporate-america> [<https://perma.cc/JC87-RPLR>] (“In this new political climate, corporate elites may indeed figure out a way to diversify their ranks with more executives of color. But it’s no triumph if poor people of color are simply exploited by those with similar melanin levels.”).

33. *Id.*

34. *Id.* (“[S]tudies show[] that these anti-racist struggle sessions at best offer no significant long-term effects on people’s behavior or attitudes and in many cases even reduced diversity or exacerbated participants’ biases.” (internal quotation marks omitted) (quoting J.C. Pan, *Why Diversity Training Isn’t Enough*, *New Republic* (Jan. 7, 2020), <https://newrepublic.com/article/156032/diversity-training-isnt-enough-pamela-newkirk-robin-diangelo-books-reviews> [<https://perma.cc/YT86-H3LR>])).

35. *Id.*

36. Cf. Cheryl L. Wade, “We Are an Equal Opportunity Employer”: Diversity Doublespeak, 61 *Wash. & Lee L. Rev.* 1541, 1545 (2004) (“When managers and boards talk about their diversity efforts while at the same time failing to adequately monitor compliance with antidiscrimination law, their firms’ reputations glisten, even while employees of color suffer.”).

37. Sunkara, *supra* note 32.

38. *Trump Bans ‘Anti-American’ Diversity Training*, *BBC* (Sept. 5, 2020), <https://www.bbc.com/news/world-us-canada-54038888> [<https://perma.cc/GT7V-RXXW>]; see also Alexandra Olson, *Biden Revokes Trump Ban on Some Diversity Training Addressing White Privilege, Systemic Racism*, *Chi. Trib.* (Jan. 21, 2021), <https://www.chicagotribune.com/business/ct-biz-biden-systemic-racism-diversity-inclusion-20210121-vvmorswr6bayzndvvhbscmbrs4-story.html> [<https://perma.cc/XS3F-7ZYM>].

income equality and suppression of economic advancement, which corporations have perpetuated. As Darren Walker, the president of the Ford Foundation, states, there needs to be a “systemic response to sufficiently address this crisis” as it has been “decades in the making.”<sup>39</sup> For instance, many of the same companies expressing solidarity in the wake of Mr. Floyd’s death have contributed to systemic inequality by targeting the Black community with unhealthy products and services and by failing to hire, promote, and fairly compensate Black people for years.<sup>40</sup> Companies have “studiously avoided confronting the legacy of racism.”<sup>41</sup> Generations of pledges have equated to only marginal advancement for Blacks.<sup>42</sup> Some firms tolerate racism or punish those pushing for more diversity.<sup>43</sup> Racially diverse CEOs are disproportionately and unfairly blamed for poor performance of firms.<sup>44</sup> According to one study, corporate managers who would discriminate are willing to forgo 8% of earnings to avoid working with someone of a different ethnicity, which works against shareholder interests.<sup>45</sup> CEOs gain from nondiverse boards because culturally homogeneous boards (i.e., all white) pay CEOs more than a culturally diverse board.<sup>46</sup>

The reason behind corporations’ failure to address racism is twofold. First, there is the traditional belief that the market will correct any deficiencies inherent in the functioning of the corporation. Second, there is the belief that the government—not businesses—should solve society’s problems. The problem with these beliefs is the fundamental denial that corporations contributed to and even promoted racism and the inequality facing Americans—the idea that businesses are somehow removed from society as sterile entities apart from the people and processes that exist behind them.

One of the most prevalent justifications given for increasing diversity in the employee ranks, in the top managerial roles, and in the boardroom is the belief that diversity would lead to better financial results for the company and thus for shareholders. While this may be true, corporations must take an active role in addressing racism for reasons extending beyond economic or efficiency reasons. These reasons are fragile because economic

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39. Gelles, *supra* note 6.

40. *Id.*

41. *Id.*

42. *Id.*

43. Bosses Say They Want to Tackle Racial Injustice, *Economist* (June 11, 2020), <https://www.economist.com/business/2020/06/11/bosses-say-they-want-to-tackle-racial-injustice> (on file with the *Columbia Law Review*).

44. *Id.*

45. *Id.*

46. See Cal. Corp. Code § 301.3–4 (2021); *id.* § 2115.6 (formerly known as California Assembly Bill 979); see also California’s Proposed AB 979 Requires Public Company Boards to Include Racial and Ethnic Diversity Information, Fenwick & West, LLP (July 23, 2020), <https://www.fenwick.com/insights/publications/californias-proposed-ab-979-requires-public-company-boards-to-include-racial-and-ethnic-diversity> [<https://perma.cc/UL4C-6DLP>].

gains and efficiency measures are inherently dynamic. What happens if it is no longer economically beneficial or feasible to make changes that reduce racism? Are corporations no longer required to continue a particular program or action? This has been the result for decades, as corporations have provided the bare minimum of action as long as it did not hurt the bottom line. And when such action did hurt the bottom line, corporate managers could justify discontinuing the action and doing nothing more based on the need to protect shareholders' wealth.

2. *Reasons to Hold Corporations Accountable.* — The reasons for corporations to address racism, and for society to hold them accountable, rest on the fundamental nature of the corporation and its role in society. The first reason is grounded in the concept of corporate personhood—as constitutional persons, corporations have constitutional responsibilities. The second reason is grounded in the purpose of the corporation—they are to be stewards of resources on behalf of all stakeholders, not just shareholders. The third reason is grounded in the role of the corporation as a significant institution in society—it can help ensure our system of governance remains a functioning democracy.

The past few years have seen the theory of the corporation expand from the idea of the corporation simply being a nexus of contracts with various stakeholders, to being a separate juridical entity with an existence apart from the persons that own it, to becoming a person who can claim fundamental constitutional rights just as a human being would (including the freedom of speech, religion, due process, and association—to name a few).<sup>47</sup> This Piece focuses on the latter, given the Supreme Court's predilection over the past ten years of empowering and strengthening the corporation as a person. Under the Court's understanding, the corporation has rights because it is an association of like-minded individuals who pool their capital together in a business with a certain goal in mind.<sup>48</sup> Regardless of whether this view is an accurate understanding of the corporation, it is based in long-standing constitutional rights of individuals to associate.<sup>49</sup> Included in these constitutional rights, however, is the responsibility to redress harm. Specifically, individuals must account for third-party harm and unjust enrichment, and by extension, this includes individuals in an association.<sup>50</sup> To this end, as corporations share responsibility for the state

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47. See Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 Nev. L.J. 811, 813 (2018); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 Utah L. Rev. 1629, 1630.

48. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (“An established body of law specifies the rights and obligations of the people . . . who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

49. *Id.*

50. See *Developments in the Law: Unjust Enrichment*, 133 Harv. L. Rev. 2062, 2064 (2020) (defining unjust enrichment as “circumstances in which the private law finds that an individual owes something to another party”).

of affairs regarding racism in this country, they are required to redress this harm by working to intentionally dismantle racist structures and systems—ones they have in place and ones to which they contribute.

One of the dominant and long-lasting views of the purpose of the corporation in law is for the corporation to be a steward of the resources provided by shareholders and thus protect the shareholder's investment.<sup>51</sup> This includes not only preventing loss but also encouraging growth. This theory of shareholder primacy, rooted in Milton Friedman and the law and economics group in the 1970s and 1980s, became the leading view of the corporation.<sup>52</sup> Many scholars and commentators have advocated for a more expansive view of the purpose of the corporation beyond increasing shareholder wealth.<sup>53</sup> This view is the next step of evolution in corporate law, as several prominent scholars and commentators have noted the shareholder primacy theory is no longer sustainable.<sup>54</sup> A focus on ensuring

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51. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919) (holding that the corporation's withholding of large accumulated earnings violated shareholders' expectations of profits from their investment); see also Frank H. Easterbook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 38 (1991) (enabling directors to serve groups beyond shareholders raises accountability issues); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305, 311 (1976) (arguing that the corporation is a nexus of contracts dictating the reliance by shareholders on managers to protect shareholder interests); Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, *N.Y. Times* (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> (on file with the *Columbia Law Review*) [hereinafter Friedman, *A Friedman Doctrine*] (arguing that the central concern of corporate managers is to maximize wealth for shareholders); cf. Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* 5–6 (1932) (describing the separation of control from management as part of the corporate structure, noting that managers control companies in spite of shareholders' formal ownership). See generally William W. Bratton, Michael L. Wachter, Peter P. Weidenbruch, Jr. & William B. Johnson, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 *J. Corp. L.* 99 (2008) (describing the origins of shareholder primacy theory and the debate among proponents and opponents).

52. See Friedman, *A Friedman Doctrine*, *supra* note 51.

53. Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* 6 (2012) (describing how traditional managerial focus on shareholder wealth can be harmful not only to stakeholders and the public but also to most shareholders); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 *J. Corp. L.* 637, 638 (2006) (challenging the shareholder primacy position); David Millon, *Theories of the Corporation*, 1990 *Duke L.J.* 201, 220–29 (describing the different positions in corporate law regarding the purpose and nature of the corporation).

54. See Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* (Univ. of Pa. Inst. for L. & Econ., Rsch. Paper No. 19-39, 2019), <https://ssrn.com/abstract=3461924> [<https://perma.cc/7R2H-624G>]; Martin Lipton, Steven A. Rosenblum, Karessa L. Cain, Sabastian V. Niles, Amanda S. Blackett & Kathleen Iannone Tatum, *Embracing the New Paradigm*, *Harv. L. Sch. F. on Corp. Governance* (Jan. 16, 2020),

growth and viability of all stakeholders is not new, however. The corporation was originally conceived as a separate legal entity created for the public good.<sup>55</sup> Originally, corporations were public benefit corporations by nature—formed only by special charter from the sovereign for activities that benefited the public or nation and required a large amount of capital.<sup>56</sup> Over time that has changed, so that a corporation can be formed under state law for any general purpose that is not illegal, with no requirement that it serve a purpose benefiting the public.<sup>57</sup> Perhaps now is a time to return to these roots and expect actions and activities of corporations to benefit the public—or at the very least not harm or be detrimental to society. This is especially compelling as the country grapples with the COVID-19 pandemic and climate change. Because of the devastation wrought by the pandemic, employees are even more important as stakeholders.<sup>58</sup> They bear the brunt of economic effects, and they are risking their lives to ensure the economy is maintained.<sup>59</sup> Also, the effects of climate change add to the call for corporations to be accountable to more constituencies than their shareholders.<sup>60</sup>

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<https://corpgov.law.harvard.edu/2020/01/16/embracing-the-new-paradigm> [<https://perma.cc/8RBK-AB54>].

55. See Nicholas Benes, *Redesigning Corporations: Incentives Matter*, Harv. L. Sch. F. on Corp. Governance (June 15, 2020), <https://corpgov.law.harvard.edu/2020/06/15/redesigning-corporations-incentives-matter/> [<https://perma.cc/A85E-94GL>].

56. *Id.*

57. *Id.*

58. See George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 Tul. L. Rev. 639, 701 (2021) (noting that the health and safety of workers during the COVID-19 pandemic has added momentum to the Human Capital Management movement, which advocates for a broader focus on workers and employees). But see Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. Corp. L. 1, 66–67 (2020) (arguing that, despite adopting stakeholder primacy, several corporations have taken actions during the COVID-19 pandemic that hurt workers).

59. See, e.g., Tyler Jett, *In New Allegation, Lawsuit Says Tyson Officials Lied to Interpreters About COVID-19 Dangers in Waterloo Plant*, Des Moines Reg. (Nov. 30, 2020), <https://www.desmoinesregister.com/story/money/business/2020/11/30/lawsuit-tyson-managers-lied-interpretors-covid-19-threat-waterloo-iowa-plant/6464310002/> [<https://perma.cc/LTP3-K6CP>]; Brian Fung, *Fired Amazon Worker Sues Over Pandemic Working Conditions*, CNN Bus. (Nov. 12, 2020), <https://www.cnn.com/2020/11/12/tech/amazon-worker-law-suit/index.html> [<https://perma.cc/9CME-J3XV>]; Frank Miles, *Tyson, JBS Plants Targets of Coronavirus Lawsuits Alleging Racial Discrimination*, Fox Bus. (July 9, 2020), <https://www.foxbusiness.com/markets/worker-advocacy-groups-file-meat-plants-civil-rights-complaint-against-tyson-foods-jbs-for-coronavirus-response> [<https://perma.cc/9MRD-3JK5>]; Black Workers See Higher Rates of Employer Retaliation for Raising COVID Safety Concerns, Nat'l Emp. L. Project (June 10, 2020), <https://www.nelp.org/news-releases/black-workers-see-higher-rates-employer-retaliation-raising-covid-workplace-safety-concerns/> [<https://perma.cc/9CU9-CCY4>].

60. See, e.g., Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 Bus. Law. 363, 365 (2021) (noting that climate change advocacy has added to attacks against shareholder primacy).

This turn to stakeholder primacy was heralded by the Business Roundtable in their August 2019 Statement on the Purpose of a Corporation.<sup>61</sup> In this short statement, some of the most prominent Fortune 500 leaders proclaimed that the corporation owes a duty not only to the long-term investment of shareholders but also to customers, employees, suppliers, and communities.<sup>62</sup> Although this statement is aspirational and not legally binding, it sent shockwaves throughout the corporate law community, as it upended the traditional notion of shareholder primacy.<sup>63</sup> If this is indeed the new turn in corporate law, then it is imperative that we not overlook the people and communities of color included in the corporation's stewardship of resources on behalf of customer, employee, and supplier groups. In this way, holding corporations accountable to dismantle racism is not a revolution, but instead part of the evolution in the conception of corporate purpose.

Finally, taking a step back and viewing corporations as a significant part of American society, there is a larger reason to hold corporations accountable for tackling racism. According to business scholar Rebecca Henderson, our democratic form of government is connected to capitalism.<sup>64</sup> More importantly, however, a functioning democracy requires "inclusive capitalism," where "everyone can play."<sup>65</sup> Per her research, American democracy is in decline (possibly leading to a more populist style of government, complete with an autocratic ruler), and part of the decline is tied to an extractive economy, one in which institutions concentrate political and economic power in the hands of a powerful elite.<sup>66</sup> Beginning a few decades ago with the so-called "Powell Memo," business

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61. Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans', Bus. Roundtable (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/V7EC-UAET] [hereinafter Business Roundtable, Purpose of a Corporation]. The Business Roundtable is an association comprised of CEOs from leading corporations. About Us, Bus. Roundtable, <https://www.businessroundtable.org/about-us> [https://perma.cc/HF5H-BX2W] (last visited Aug. 27, 2021).

62. Business Roundtable, Purpose of a Corporation, *supra* note 61. For a discussion on the purpose of the corporation, see *supra* note 51 and accompanying text.

63. See David Gelles & David Yaffe-Bellany, Shareholder Value Is No Longer Everything, *Top C.E.O.s Say*, N.Y. Times (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> (on file with the *Columbia Law Review*); Leslie N. Silverman, Arthur H. Kohn & David Lopez, The Purposes of a Corporation and the Role of the Board, *Cleary M&A & Corp. Governance Watch* (Aug. 21, 2019), <https://www.clearymawatch.com/2019/08/the-purposes-of-a-corporation-and-the-role-of-the-board/> [https://perma.cc/7CR2-JMDJ].

64. Rebecca Henderson, The Business Case for Saving Democracy: Why Free Markets Need Free Politics, *Harv. Bus. Rev.* (Mar. 10, 2020), <https://hbr.org/2020/03/the-business-case-for-saving-democracy> (on file with the *Columbia Law Review*).

65. *Id.*

66. *Id.*

interests have waged war against the government and undermined the institutions that support democracy, such as the educational, tax, social welfare, and electoral systems.<sup>67</sup> This has led to an extractive economic system.<sup>68</sup> Taken together, the more businesses undermine (or at least refuse to support) democratic institutions and the functioning of government, the more political and economic power is concentrated at the top, and therefore, the more democracy erodes.<sup>69</sup> And the more democracy erodes, the theory goes, the more chaotic and unsettled society will become. Henderson posits that businesses (and by extension corporations) can no longer ignore the need for capitalism to be more inclusive.<sup>70</sup> A “democracy in decline means businesses are going to be in decline.”<sup>71</sup> Part of this story is the systematic racial injustice grounded in economics and dating back centuries. Undermining democratic institutions has involved the oppression of Black Americans. By dismantling systemic racism intentionally, corporations can progress toward strengthening democratic institutions and moving closer to inclusive capitalism.

It is time for corporations to reckon with the fact that there is systemic racism in America. It cannot continue to exist, and there is a need for corporations to intentionally address and dismantle it. There are two steps for corporations to do just that. First, there is confession. Then, there is repair.

#### B. *Repentance*

The second action for corporations to address systemic racism is repentance. To repent means to confess wrongdoing and to turn away from such wrongdoing. Accordingly, it is important for corporations and society to understand fully the role that corporations have played in creating, perpetuating, and maintaining systemic racism in this country. Part of creating a new regime to hold corporations accountable for dismantling racism is the transparent accounting for each corporation’s past dealings and present interactions with racism. This section of the Piece highlights the type of information companies would need to provide.

1. *Confession.* — If it is true that confession is good for the soul, then corporate owners and managers will greatly benefit from an accounting of their corporation’s involvement in creating and maintaining racist structures from early American history until now. The history that needs to be uncovered relates to slavery, Jim Crow segregation, convict leasing, anti-

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67. See *id.* (describing the “Powell Memo” and its political influence).

68. See *id.* (“The result is often an extractive system, one in which institutions concentrate political and economic power in the hands of a powerful elite that runs the state (and the market) for its own benefit.”).

69. See *id.*

70. See *id.*

71. Rob Walker, *The Case for Stakeholder Capitalism—Even in a Financial Crisis*, *Marker* (June 22, 2020), <https://marker.medium.com/its-time-for-ceos-to-emerge-from-their-bunkers-b696cfdc678e> (on file with the *Columbia Law Review*).

Black violence, concerted opposition to the Civil Rights Movement, and financial oppression (such as the sharecropping system, forced migration, and redlining).<sup>72</sup> Corporations had a hand in all of these practices.

Disclosure would lay bare all of the practices surrounding racial oppression by corporations in this country, followed by an understanding of how these practices affected the course of race relations well into the future. Once the history of Black oppression is fully known and understood, it will be easier to adopt remedies to effectively address race discrimination. As constitutional scholar Neil Gotanda says, “Once the historical context of racial subordination has been acknowledged, remedies that explicitly consider race become constitutionally possible.”<sup>73</sup>

Several companies have acknowledged, and in some instances apologized for, their histories of participating in and maintaining racist practices. For example, Aetna Inc. was involved in the economic structure of slavery. In a reparations lawsuit against the insurance giant, the plaintiff (a descendant of slaves) claimed that Aetna’s corporate predecessor “unjustly profited from the institution of slavery” by insuring “slave owners against the loss of their human chattel.”<sup>74</sup> The insurance policies insured slave owners against losses resulting from loaning their slaves to businesses engaged in dangerous work, such as mining or building railroads.<sup>75</sup> By providing insurance to planters, Aetna enabled infrastructure, and thus the economy, to grow at the expense of sacrificing human life. Aetna’s involvement with slavery allowed it to grow into the company it is today—a

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72. Sharecropping was a legal arrangement involving agricultural land in which a landowner, usually white, allowed Black tenants to use the land in return for a share of the crops produced on that land. See Julia F. Hollreiser, Note, Closing the Racial Gap in Financial Services: Balancing Algorithmic Opportunity With Legal Limitations, 105 *Cornell L. Rev.* 1233, 1237–45 (2020) (providing descriptions of sharecropping, migration, and redlining). Forced migration of Black Americans from the southern United States to the north was a result of racial policies, loss of land, and better economic opportunities. *Id.* Redlining was the practice of excluding nonwhites from purchasing homes in certain areas and neighborhoods by limiting mortgages and creating restrictive covenants. *Id.* This practice included actions by the federal government and mortgage industry and had the effect of creating ghettoized areas for people of color, as well as severely limiting generational wealth. See Tanehisi Coates, *The Case for Reparations*, *Atlantic* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (on file with the *Columbia Law Review*) (providing a detailed description of redlining). See generally Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration* (2010) (providing a detailed study of the migration of Black Americans between 1915 and 1970); Joseph D. Reid, Jr., Sharecropping in History and Theory, 49 *Agric. Hist.* 426 (1975) (providing an economic analysis explaining why sharecropping persisted as a major organizational form in agriculture).

73. Neil Gotanda, A Critique of “Our Constitution is Color-Blind”, 44 *Stan. L. Rev.* 1, 66 (1991).

74. Complaint at 9, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 1-02-01862-NGG (E.D.N.Y. Mar. 26, 2002).

75. Claudia Irene Janssen, Addressing Corporate Ties to Slavery: Corporate Apologia in a Discourse of Reconciliation, 63 *Comm’n Stud.* 18, 18, 24 (2012).

large company that influences and shapes our healthcare system. It is currently a subsidiary of CVS Health Corporation.<sup>76</sup> As such, CVS is now part owner of Aetna's past practices that maintained and perpetuated a racist system. Aetna has acknowledged this history and has committed to improving diversity in the workplace and pledging donations to various endeavors that would improve the lives of Black Americans.<sup>77</sup> However, the leadership structure of Aetna/CVS is still overwhelmingly white.<sup>78</sup> Further, there continue to be highly problematic issues of racial disparities in the health and insurance coverage of Black Americans, of which Aetna plays a part.<sup>79</sup>

Although a powerful example, Aetna was by no means the only insurance company involved with slavery at the time, nor was the insurance industry the only industry using and benefitting from the slave system. Industries involved in slavery include, to name a few: tobacco, insurance, publishing, transportation, finance, banking, manufacturing, energy, and mining.<sup>80</sup> Besides the obvious exploitation of labor inherent in the slave system, companies were involved in practices such as collecting duties and fees on slave ships, lending money to slave traders, and publishing ads for the sale of slaves and for the capture of runaway slaves.<sup>81</sup>

To date, the following companies have acknowledged or been notified that either they used slave labor or were involved in the slave economy in some way:

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76. CVS Health Corp., Annual Report (Form 10-K) 70 pt. IV, item 15, exhibit 21.1 (Feb. 28, 2019), <https://www.sec.gov/Archives/edgar/data/0000064803/000006480319000013/cvs-2018231x10k.htm> [<https://perma.cc/U3KK-254J>]; About Us, Aetna, <https://www.aetna.com/about-us.html> (on file with the *Columbia Law Review*) (last visited Aug. 27, 2021).

77. CVS Health, Corporate Social Responsibility Report 19, 21–26 (2020), [https://s2.q4cdn.com/447711729/files/doc\\_downloads/2021/03/CVS-2020-CSR-Report.pdf](https://s2.q4cdn.com/447711729/files/doc_downloads/2021/03/CVS-2020-CSR-Report.pdf) [<https://perma.cc/7JBX-DGHQ>]; Addressing Systemic Racism and Inequality, CVS Health (July 8, 2020), <https://cvshealth.com/news-and-insights/articles/addressing-systemic-racism-and-inequality> [<https://perma.cc/5WAQ-NJ58>].

78. Based on a review of the “Investors” section of the company website, only two out of twenty current officers appear to be nonwhite, and only two out of thirteen current board members appear to be nonwhite. Corporate Governance: Board of Directors, CVS Health, <https://investors.cvshealth.com/investors/corporate-governance/board-of-directors/default.aspx> [<https://perma.cc/25HG-3N6S>] (last visited Aug. 27, 2021).

79. See Patricia Hassett, Taking on Racial and Ethnic Disparities in Health Care: The Experience at Aetna, 24 *Health Affs.* 417, 417 (2005) (“[I]t was understood that race and ethnicity were associated with variations in the quality of care.”).

80. See Janssen, *supra* note 75, at 19; James Cox, Corporations Challenged by Reparation Activists, *USA Today* (Feb. 21, 2002), <http://usatoday30.usatoday.com/money/general/2002/02/21/slave-reparations.htm> [<https://perma.cc/US48-MK8R>]; Zoe Thomas, The Hidden Links Between Slavery and Wall Street, *BBC* (Aug. 29, 2019), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/7BPG-5YU5>]; 15 Major Corporations You Never Knew Profited from Slavery, *Atlanta Black Star* (Aug. 26, 2013), <https://atlanta.blackstar.com/2013/08/26/11-major-companies-never-knew-benefited-slavery/> [<https://perma.cc/A7RR-SPTT>].

81. *Id.*

- **Insurance:** Aetna Inc.; American International Group (AIG); New York Life Insurance Company; Southern Mutual Insurance Company
- **Banking/Finance:** JPMorgan Chase & Co.; FleetBoston Financial; Bank of America; Lloyd's of London; AFSA Data Corporation; Brown Brothers Harriman & Co.; Bank One Corporation; Lehman Brothers; Wachovia; Rothschild & Co.; Barclays plc; Citibank
- **Tobacco:** R.J. Reynolds Tobacco Company; Brown & Williamson; Liggett Group; Lorillard Tobacco Company
- **Transportation:** Canadian National Railway; CSX Corporation; Norfolk Southern Corporation; Union Pacific Railroad
- **Retail:** WestPoint Home
- **Publishing:** Knight Ridder; Tribune; Media General; Advance Publications, Inc.; E.W. Scripps Co; Gannett<sup>82</sup>

Disclosure of corporate history would also be useful to help understand the role corporations played after the Thirteenth Amendment declared slavery unconstitutional. Corporations continued to engage in racially oppressive practices and systems that demeaned Black citizens and negated their opportunity for wealth creation and economic prosperity. Forced labor is one example.<sup>83</sup> A full vetting of corporations' histories is necessary to better understand the legacy of racism in this country.

2. *Turning Away.* — The second part of repentance is turning away from the wrongdoing. In dismantling systemic racism, the best way for corporations to turn away from racist practices and ensure such practices never happen again is to not only acknowledge that racial practices occurred (or are occurring) but also to investigate and disclose all information regarding such practices (if such information is available) and to acknowledge the ways such practices inform the current status of Black people in America today.

Again, Aetna provides a useful case study for the need to develop a full regime for corporations to address systemic racism. Once Aetna's involvement in slavery came to light in 2000, it publicly apologized on several occasions for its past acts.<sup>84</sup> However, during the course of issuing these public statements, the company transitioned from promising to provide restitution for the harm it inflicted, to defensively stating that it had already apologized, had already committed to donating money to several initiatives involving the Black community, and was already committed to diversity—insinuating that no further action was needed on its part.<sup>85</sup> The

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82. *Id.*

83. See William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 *J.S. Hist.* 31, 55–57 (1976).

84. Janssen, *supra* note 75, at 26–30 (“Among the 15 corporations sued, Aetna most extensively addressed its past and is one of the few organizations that actually apologized.”).

85. *Id.* at 27.

company maintains the position that the actions of its predecessor during slavery were in the distant past, and nothing further needs to be done. For Aetna, its commitment to diversity was proof that it was no longer racist.<sup>86</sup>

There are several problems with Aetna's approach. First, it did not provide complete information on its involvement. Although it acknowledged that there is evidence that Aetna issued insurance coverage for twenty-four slaves, it did not investigate or provide information on the names of the slaves, the outcome of the policies (e.g., whether the slave owners ever needed to file a claim), the amount of money Aetna made from these policies and how it affected their bottom line, or the company's place in the insurance industry at that time.<sup>87</sup> Second, the company attempted to shift the remedy for past actions to only one necessary action—increasing diversity. While one would be hard-pressed to deny the importance of a diverse, multiracial workforce, increasing the number of Black employees is but one tool to dismantle racism. Much more is needed.

The final problem with Aetna's approach to addressing racist past actions is the way the company disconnected the historical practice of slavery from the current racial wealth gap and diminished flourishing of Black people.<sup>88</sup> Such disconnection focuses on the actions of individual corporations and allows for them to decide whether they have atoned for past actions fully, without acknowledging the systemic and structural racism their actions created or perpetuated. Considering the list of industries and companies mentioned above, it is clear that it was not just a handful of companies engaging in business practices during slavery. Instead, this list speaks to the fact that slavery was the foundation of economic growth for our country and is wholly ingrained in society.

One need only consider the role of cotton in the nineteenth century to understand this point. Historian Edward E. Baptist notes that from 1801 to 1862 the amount of cotton picked daily by an enslaved person increased by 400%.<sup>89</sup> Such growth of this industry included the extreme exploitation of free labor to maximize efficiency, a large network of bankers and accountants to control the flow of money generated from the trade, financiers to extend credit and mortgages for plantations and ships involved in the trade and to approve the use of slaves as collateral for that credit, and insurers to protect the slave cargo on ships.<sup>90</sup> This industry involved not

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86. Id.

87. See id. at 28–29.

88. See id.; supra section II.A.1.

89. P.R. Lockhart, How Slavery Became America's First Big Business, *Vox* (Aug. 16, 2019), <https://www.vox.com/identities/2019/8/16/20806069/slavery-economy-capitalism-violence-cotton-edward-baptist/> [https://perma.cc/FFB3-GG26].

90. Virginia Groark, Slave Policies, *N.Y. Times* (May 5, 2002), <https://www.nytimes.com/2002/05/05/nyregion/slave-policies.html> (on file with the *Columbia Law Review*); Michael Ralph & William Rankin, Decoder: The Slave Insurance Market, *Foreign Pol'y* (Jan. 16, 2017), <https://foreignpolicy.com/2017/01/16/decoder-slave-insurance-market-aetna->

only the centers for the production of cotton in the South, but transportation to the Northern merchants for processing and then shipping to the United Kingdom for textile manufacture.<sup>91</sup> The production and sale of cotton encompassed every aspect of the economic system. In fact, profits from the cotton trade transformed the American economy into the second leading economy in the world by the end of the nineteenth century.<sup>92</sup> Slavery turned this country into the financial juggernaut it currently is, and corporations were the drivers. The structural nature of racist practices, like slavery, call for a systematic approach to dismantle racism. It is incumbent that corporations account for their role in a large and complex economic system.

Aetna has provided one of the most comprehensive public apologies for slave practices to date out of all companies who have acknowledged historical practices (and to be sure, not all companies have done so). The fact that Aetna's apology and acknowledgement is inadequate is very telling about the level of accountability by corporations when it comes to confronting our collective racial history.

Disclosure of past historical racist practices is an important way for corporations, like Aetna, to account for their past and present interactions with racism. The next step is the action necessary to dismantle this racism and hold corporations accountable for doing so.

### C. *Restitution*

Restitution is the final part for corporations to begin truly dismantling racism. Restitution involves repairing the damage wrought by the wrongdoing. Accordingly, corporations can take concrete steps to repair the damage of systemic racism. This requires doing more than acknowledging past harmful practices or increasing the number of Black people on the board of directors or in the employee ranks. It is not enough for corporations to be "not racist;" they must instead be antiracist and adopt an intentional approach to dismantling racism.<sup>93</sup> This approach would include enforcement to ensure that companies are taking the necessary steps to address racism, with consequences if they do not, as well as developing

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aig-new-york-life/ (on file with the *Columbia Law Review*); Joshua D. Rothman, *The Men Who Turned Slavery Into Big Business*, Atlantic (Apr. 20, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/men-who-made-slavery-big-business/618628/> (on file with the *Columbia Law Review*); Lockhart, *supra* note 89; Thomas, *supra* note 80.

91. See Rothman, *supra* note 90 (explaining how brigs often brought cotton, sugar, and other commodities back for delivery to merchants from New York to Virginia); Lockhart, *supra* note 89 (noting that when Britain began its process of industrialization and its focus on cotton textiles, enslavers in the South realized that they had a new market for cotton).

92. Lockhart, *supra* note 89.

93. See Ibram X. Kendi, *How to Be an Antiracist* 11 (2019) ("The opposite of 'racist' isn't 'not racist.' It is 'antiracist.' What's the difference? . . . One either allows racial inequities to persevere, as a racist, or confronts racial inequities, as an antiracist.").

certain metrics to gauge whether racism is diminishing. This section proposes a new regime that would outline these enforcement mechanisms and metrics for application to every public corporation,<sup>94</sup> with the goal of ensuring flexibility for each corporation to develop its own strategy.

1. *A New Regime Under Federal Securities Law.* — For the reasons outlined above, corporations as a whole have been unwilling or unable to address the fundamental nature of racism in American society. They do not have a convincing track record that they will voluntarily undertake the significant steps required to dismantle it. As such, there must be external pressure brought to bear on the corporation.

This section proposes a legislative response modeled after previous legislation that expanded regulation on corporate governance and provided enhanced disclosure requirements. The Sarbanes–Oxley Act and the Dodd–Frank Act are two primary examples. The Securities and Exchange Commission (SEC) already has authority for oversight of public corporations and accredited investors. Indeed, one of its mandates is to maintain fair, orderly, and efficient markets.<sup>95</sup> However, the history of racist business practices throughout the nation's history prevents our economic markets from being truly “fair.” As such, it is within the SEC's purview to provide oversight of corporations as they contend with being antiracist. This proposal contains four parts: (1) disclosure requirements specifically related to the corporation's past and current interactions with racism; (2) requirement for a new board of directors committee related to antiracism efforts; (3) creation of an SEC task force, including an advisory committee, related to antiracism; and (4) enforcement of these new requirements. Each of these parts will be described below.

a. *Disclosure Requirements.* — Corporations under the jurisdiction of the SEC are currently required to give periodic disclosures on a variety of aspects related to the functioning of the corporation.<sup>96</sup> These disclosure requirements should be expanded to encompass past and current policies and practices related to racism and would include a variety of areas, including information on demographics and policies.

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94. This proposal refers to public corporations in broad terms, but “public corporation” should not be taken to be limited to those corporations that are technically publicly traded. As I develop this project, I will expand the focus to those corporations that have a large societal impact (regardless of whether they are public or private). See Donald C. Langevoort & Robert B. Thompson, “Publicness” in Contemporary Securities Regulation After the JOBS Act, 101 *Geo. L.J.* 337, 352–86 (2013) (discussing the public–private divide in securities regulation and the need to change this approach).

95. About the SEC, SEC, <https://www.sec.gov/about.shtml> [<https://perma.cc/G4VV-9ZUM>] (last modified Nov. 22, 2016).

96. See What We Do, SEC, <https://www.sec.gov/about/what-we-do#section1> [<https://perma.cc/U6UF-AZ8S>] (last modified Dec. 18, 2020) (explaining that the SEC requires “public companies, fund and asset managers, investment professionals, and other market participants to regularly disclose significant financial and other information”).

There would be three major areas for disclosure. First, full disclosure of past practices during the slave system, Jim Crow era, and any other financial practices related to racial oppression (e.g., redlining). As section II.B.1 discusses, this would require the corporation to conduct a full investigation into past practices not only for the current iteration of the company but also for any legacy firms it acquired. The second area of disclosure is related to new metrics based on environmental, social, and governance (ESG) factors, as proposed below.<sup>97</sup> This Piece proposes expanding the ESG system to not only include a focus on employees<sup>98</sup> but also to add an antiracism focus to all measurements. For instance, this updated ESG system would include disclosure of EEO-1 data (a mandatory disclosure requirement under Title VII, which currently only applies to corporations with 100 employees or more, pertaining to the demographics of all of the corporation's employees, including the racial composition of board directors and senior management); disclosure of environmental policies that disproportionately impact communities of color; disclosure of the disproportionate marketing and promotion of certain consumer goods to communities of color; and disclosure of the racial composition, practices, and policies of its institutional investors.<sup>99</sup> The third and final area of disclosure includes compliance with antidiscrimination policies and programs and an audit of the efficacy of these programs.

The SEC could require disclosure of the information referenced above to be included in the Form 10K, 10-Q, and 8-K filings on an annual basis. In this way, corporations are providing information on an ongoing, consistent basis, as opposed to the occasional public statement or apology whenever new information comes to light.

b. *New Board Committee.* — Under this part, each public corporation would be required to create a special committee on the board of directors dedicated to antiracism oversight.<sup>100</sup> The requirements of this board committee would be mandated by law and enforced by the SEC, akin to the rules for audit committees established under the Sarbanes–Oxley Act.<sup>101</sup> The committee would be tasked with oversight for disclosure of the new

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97. Institutional investors use ESG factors to assess a corporation's impact on these matters, especially as it relates to capital investment risk. See Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 *Stan. L. Rev.* 381, 392–97 (2020) (describing the development of ESG from the socially responsible investing movement).

98. See *infra* note 117 and accompanying text.

99. For further description, see *infra* section II.C.2.

100. This new board committee implicates fiduciary duty under state law. For discussion on fiduciary law implications, see *infra* section II.C.3. I will develop the contours of this committee, including power of enforcement, ensuring compliance with achieving required metrics, and remedies for noncompliance, in future work.

101. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 407, 116 Stat. 745, 790 (codified at 15 U.S.C. § 7265 (2018)); Listing Standards Relating to Audit Committees, 17 C.F.R. § 240.10a-3 (2020); Standards Relating to Listed Company Audit Committees, SEC Release No. 33-8220 (Apr. 9, 2003).

metrics regime and development of the goals and actions to improve such metrics. It would be this committee's responsibility to ensure the company's antiracism priorities align with the company's strategy and planning. The law would require the president of the board of directors and the chief executive officer to be a member of this committee. To ensure stakeholder perspectives are included, this committee would require independent directors. Such directors would represent a variety of interests, such as employee representation, local community interests where the corporation has its largest operations, and advocacy for Black entrepreneurs, like members of the National Black Chamber of Commerce.<sup>102</sup>

c. *Creation of New SEC Task Force and Advisory Committee.* — The third part of this proposal calls for a special task force to be created at the SEC. A good model for this task force is the recently created “Climate and ESG Task Force” in the SEC Division of Enforcement.<sup>103</sup> This task force is led by a division deputy director and includes members of various SEC offices and specialty units. It “identif[ies] any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules” and “analyze[s] disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies,” while it “develop[s] initiatives to proactively identify ESG-related misconduct.”<sup>104</sup> Given the importance of antiracism work, coupled with the need for expertise related to various aspects of such work, the proposed task force should include a special advisory committee consisting of experts and professionals working in areas outside of the SEC. The model for this is the “Investor Advisory Committee” created by the Dodd–Frank Act.<sup>105</sup> This committee is comprised of members from the SEC and financial services professionals, as well as scholars.<sup>106</sup> It advises the

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102. The National Black Chamber of Commerce is a nonprofit organization dedicated to the economic empowerment of Black Americans. About Us, Nat'l Black Chamber of Com., <https://www.nationalbcc.org/about-us> [<https://perma.cc/RXE5-VMTJ>] (last visited Aug. 27, 2021).

103. SEC Announces Enforcement Task Force Focused on Climate and ESG Issues, SEC (Mar. 4, 2021), <https://www.sec.gov/news/press-release/2021-42> [<https://perma.cc/CG3C-ZS46>].

104. *Id.*

105. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); see also Spotlight on Investor Advisor Committee, SEC, <https://www.sec.gov/spotlight/investor-advisory-committee.shtml> [<https://perma.cc/9S4V-HJ5R>] (last visited Aug. 28, 2021).

106. Section 39 of the Exchange Act, as modified by Dodd–Frank, states:

The members of the Committee shall be—

- (A) the Investor Advocate;
- (B) a representative of State securities commissions;
- (C) a representative of the interests of senior citizens; and
- (D) not fewer than 10, and not more than 20, members appointed by the Commission, from among individuals who—
  - (i) represent the interests of individual equity and debt investors, including investors in mutual funds;

Commission on a number of matters related to investor protection and provides findings and recommendations for review and consideration by the Commission.

I propose the creation of a task force on corporate antiracism efforts, led by a division director of the SEC and comprised of members from specialty units of the SEC. There would be an antiracism advisory committee drawn from professionals from the following fields:

- private nonprofits already working to hold corporations accountable, such as JUST Capital;<sup>107</sup>
- government agencies, such as Departments of Commerce, Labor, Housing and Justice (Civil Rights Division);
- business leaders committed to stakeholder primacy, such as members of the Business Roundtable;<sup>108</sup>
- employee interest groups, such as the largest unions;
- investor groups, such as the Council of Institutional Investors;<sup>109</sup>
- commentators, such as business and law scholars;
- members of the National Black Chamber of Commerce;<sup>110</sup>
- groups supporting diversity in raising capital in emerging industries; and
- nonprofits and community groups with a history of advocating for racial justice.

The mandate of the task force would consist of three primary responsibilities. The first is to review the required disclosures related to antiracism, as described above. Then, based on that review, the task force would prepare an annual report of their findings. Finally, the task force would make recommendations to the SEC Commissioners on initiatives for corporations to improve racial justice, such as ways to increase access to capital by members of the Black community, the efficacy of tying executive

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- (ii) represent the interests of institutional investors, including the interests of pension funds and registered investment companies;
  - (iii) are knowledgeable about investment issues and decisions; and
  - (iv) have reputations of integrity.

15 U.S.C. § 78pp(b)(1) (2018).

107. JUST Capital is an association founded by leaders from business, finance, and civil society to “measure and rank companies based on issues important to Americans,” such as fair pay and equitable treatment of workers. About, JUST Capital, <https://justcapital.com/about/> (on file with the *Columbia Law Review*) (last visited Aug. 28, 2021).

108. See *supra* note 61 and accompanying text.

109. The Council of Institutional Investors is a “nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion.” About CII, Council of Institutional Invs., <https://www.cii.org/about> [<https://perma.cc/5UAN-JZHM>] (last visited Aug. 28, 2021).

110. See *supra* note 102 and accompanying text.

compensation to the success of hitting certain metrics (as described below), and whether to suggest specific actions certain corporations can take to address their specific practices related to racism (e.g., providing specific suggestions for Aetna to adopt to address disparities in the insurance market). The SEC Investor Advisory Committee provides an example of the type of recommendations the new task force could undertake in its “Recommendations Regarding Minority and Underserved Inclusion in Investment and Financial Services.”<sup>111</sup> This supports the idea that the SEC already has experience considering non-traditional priorities for investors and has the infrastructure to support corporations’ efforts at dismantling racism.

d. *Enforcement of New Requirements.* — Enforcement is necessary to ensure that corporations are held accountable for dismantling racism. In addition to the standard enforcement actions for not producing the required disclosure, it is important that the newly created antiracism special committee of the board be required to review the annual findings of the SEC task force as part of its mandate to create priorities and goals for the corporation.

2. *Metrics.* — A big component of the new proposed law would require annual disclosure of the new metrics regime related to antiracism, including an expansion of ESG metrics and data related to the experience of racism by Black Americans. As such, it is important to detail the proposal regarding metrics.

The work of dismantling racism is complex and will take many years. It is necessary to have metrics to determine whether corporations as a whole, and individually, are successful in their attempts to diminish racism. This is the crux of the proposed new regime—how are we to know whether corporations are actually doing the work and achieving the desired outcome? As Darren Walker, the president of the Ford Foundation, succinctly states, “[O]nly when companies and management are accountable in ways that are quantifiable will we see real systemic transformation of corporate America.”<sup>112</sup>

One readily available set of metrics that could be used are ESG metrics. As noted previously, companies voluntarily report on ESG measurements as a means to assist investors in evaluating companies’ progress on these issues. Currently, companies will report on categories addressing dignity, equality, diversity, inclusion, discrimination, community, ethical behavior, human rights and social impact/vitality, as well as employee engagement, human capital, and compliance.<sup>113</sup> The law firm Wachtell, Lipton, Rosen & Katz

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111. SEC Inv. Advisory Comm., Recommendations Regarding Minority and Underserved Inclusion in Investment and Financial Services (Mar. 11, 2021), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210311-minority-and-underserved-inclusion-recommendation.pdf> [<https://perma.cc/C855-VL8Y>].

112. Gelles, *supra* note 6.

113. See Adam O. Emmerich, David M. Silk & Sabastian V. Niles, Using ESG Tools to Help Combat Systemic Racism and Injustice, Harv. L. Sch. F. on Corp. Governance (June

suggests these measurements could be revised to address antiracism, racial justice, and equality.<sup>114</sup>

The framework of ESG is in flux now. There is currently an initiative underway to merge the various ESG frameworks created by different organizations and create a universal set of metrics.<sup>115</sup> Further, the SEC is considering whether to make ESG metrics part of the disclosure regime.<sup>116</sup> Also, in light of the COVID-19 pandemic and its effect on employees, there should be a heightened focus on adding another imperative to the framework—that of “E” for employment (EESG). This view is championed by former Delaware Supreme Court Chief Justice Leo Strine, Jr., who advocates greater focus on employees as a means to creating a more sustainable capitalist system.<sup>117</sup> Since the concept of ESG is already undergoing review and revision, now is a good time to retool it to include the antiracist approach corporations need to take. I propose a new framework called “A(EESG),” where the “A” stands for antiracism. Racism affects and influences each aspect of employment, environment, social, and governance, and the metrics for each of these categories should be revamped to disclose this influence. While this type of information may already be captured in preexisting metrics, it is important to explicitly call it out and name it as relating to racism.<sup>118</sup>

Although the ESG framework provides a good starting place to begin developing metrics, the framework is limited. For one thing, until the universal framework is in place, ESG reporting is varied and subjective, with different groups, like the Sustainability Accounting Standards Board and

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12, 2020), <https://corpgov.law.harvard.edu/2020/06/17/using-esg-tools-to-help-combat-systemic-racism-and-injustice/> [<https://perma.cc/2XAN-NCM5>].

114. *Id.*

115. See CDP, Climate Disclosure Standards Bd., Glob. Reporting Initiative, Int’l Integrated Reporting Council, & Sustainability Acct. Standards Bd., Statement of Intent to Work Together Towards Comprehensive Corporate Reporting 2 (2020), <https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf> [<https://perma.cc/EZU5-4Y4Z>] (“[F]ive framework- and standard-setting institutions of international significance have come together to help resolve . . . confusion and to show a commitment to working towards a comprehensive corporate reporting system.”).

116. See SEC Inv. Advisory Comm., Recommendation of the SEC Investors Advisory Committee Relating to ESG Disclosure (May 21, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf> [<https://perma.cc/PE42-H5LE>]; John Coates, ESG Disclosure—Keeping Pace With Developments Affecting Investors, Public Companies and the Capital Markets, SEC (Mar. 11, 2021), <https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121> [<https://perma.cc/4QSA-PGTM>].

117. Strine, *supra* note 54, at 3 (“[I]nstitutional investors who manage human investors’ money need to factor EESG considerations into their investing and voting decisions, and emphasize the vital missing “E”—the interests of companies’ employees . . . who need not just sustainable corporate profits, but also good jobs, clean air, and safe products.”).

118. For a preliminary list of suggestions for the type of metrics that could be developed using the new scheme of A(EESG), see *infra* Appendix I.

the Global Reporting Initiative, providing their own form of disclosure.<sup>119</sup> Another issue is the voluntary nature of the reporting. Companies are free to choose whether they will provide information, and when they do, it is left up to them to decide how and what to report.<sup>120</sup> A third issue is the lack of incentive for executives and directors to adopt these measures, as their tenure with the company often does not last longer than a few years.<sup>121</sup> These issues can be cured, however, as the reporting becomes standardized and investors exert pressure on the companies to disclose this information.<sup>122</sup>

The more important problem with ESG reporting is that it is limited to the individual actions and status of each company. As the intention is to address racism on a systemic level, in addition to metrics for individual corporations, a set of metrics should be developed that help determine whether racism is diminishing on a system-wide basis. This would mean gauging whether racism as a whole is diminishing on a nationwide basis. I propose developing a specific set of metrics centered on the experience of Black Americans by using the work of nonprofit groups tracking the perception of racism by Blacks and racial progress along specified measurements. I would begin building these metrics based on the Pew Research Center and the work of the National Urban League. The Pew Research Center routinely conducts surveys and analyses of racial progress as perceived by different racial groups.<sup>123</sup> Further, the National Urban League produces an annual report called “State of Black America,” in which it tracks racial inequality using an “Equality Index.”<sup>124</sup> The League created the Equality Index to provide “a way to document progress toward [economic empowerment] for Black and Hispanic Americans relative to whites.”<sup>125</sup> They measure progress (or lack thereof) in the areas of economics, health, education, social justice, and civic engagement. There are specific measurements for each of these areas using data compiled from a variety of sources, like the U.S. Census Bureau. The League has provided this report since 1976 and has noted that there has been slow, incremental

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119. See CDP et al., *supra* note 115, at 2 (describing corporate reporting services and listing the groups providing this service).

120. *Id.*

121. See Strine, *supra* note 54, at 19–20 (“No one who cares about America’s worker-investors believes that corporate executives should be paid based on year-to-year incentives. Management should be rewarded for helping to create sustainable corporate profits, and their pay contracts should therefore be long term in nature.”).

122. *Id.* at 14–15.

123. Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, Pew Rsch. Ctr. (Apr. 9, 2019), <https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/> [<https://perma.cc/MU56-PFFH>].

124. See *State of Black America*, <https://soba.iamempowered.com> (on file with the *Columbia Law Review*) (last visited Aug. 28, 2021).

125. Nat’l Urb. League, *National Equality Indexes, State of Black Am.*, <https://soba.iamempowered.com/national-equality-index> (on file with the *Columbia Law Review*) (last visited Aug. 28, 2021).

progress from that time until now.<sup>126</sup> Incorporating metrics used in this report as well as survey data from the Pew Research Center into a new regime of corporate accountability would provide good benchmarks as to whether racial progress is being achieved.<sup>127</sup>

Developing metrics to gauge racial progress and the dismantling of racism is a key component of the new regime to hold public corporations accountable. In future work, I will provide a robust framework for these metrics.<sup>128</sup> Once the metrics are established, they can serve as a baseline to judge actions corporations take to dismantle racism.

3. *Complimentary Enforcement Mechanisms.* — In addition to the federal securities law regime, there are other mechanisms for holding corporations accountable for dismantling racism. This section outlines the constituencies that could provide additional pressure on corporations to address racism, in addition to federal regulators.

a. *State Regulators.* — State law could provide a mechanism for holding corporations accountable. California provides a useful model in that it is developing corporate law to further diversity efforts. It created a law a few years ago addressing gender diversity at the board level, and the state legislature recently passed a similar law addressing racial diversity.<sup>129</sup> The newest law mandates that each domestic and foreign corporation operating in the state have a specified number of board members from marginalized groups, which include race, ethnicity, and sexuality. Although it only addresses diversity, and only at the board level, it is the first state law of its kind and expands the possibilities of how society can hold corporations more accountable in order to achieve goals beyond shareholder wealth maximization.

Another part of state law which could have a significant impact on corporate accountability is fiduciary duty law. Adopting the stakeholder theory in which corporate managers consider a wide variety of constituencies in their decisionmaking on behalf of the corporation creates tension with longstanding conceptions of the duty owed by these managers to the corporation.<sup>130</sup> This tension is expanded once the corporation becomes

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126. Nat'l Urb. League, 40 Years: The State of Black America, 1976–2016, State of Black Am., Nat'l Urban League, <http://soba.iamempowered.com/40-years-state-black-america-1976-2016> (on file with the *Columbia Law Review*) (last visited Sept. 26, 2021).

127. For a sample list of metrics provided by the Pew Research Center survey and the National Urban League's State of Black America, see *infra* Appendix II.

128. This framework will include a cost-benefit analysis of the means by which corporations gather the required information and apply it to these metrics.

129. Cal. Corp. Code §§ 301.3–4 (2021). But see Theo Francis, Appeals Court Revives Challenge to California Law Mandating Women Board Members, *Wall St. J.* (June 21, 2021), <https://www.wsj.com/articles/appeals-court-revives-challenge-to-california-law-mandating-women-board-members-11624317002> (on file with the *Columbia Law Review*).

130. See Lipton et al., *supra* note 54 (“[S]takeholder governance is fully consistent with well-established principles of corporate law and the existing fiduciary duty framework for directors.”).

responsible for dismantling racism, including adding a new board committee with oversight for antiracism efforts.<sup>131</sup> As such, there are implications concerning fiduciary law and the ways it could possibly be reshaped. Below are a few of the questions related to fiduciary duty that will need to be addressed as part of this new regime of corporate accountability:

- Will the stakeholder primacy theory governing the new regime be hard or soft (i.e., mandatory, in that corporations are required to consider the interests of other constituencies, or permissive, in that corporations are allowed but not required to consider the interests of other constituencies)?
- Will stakeholders beyond shareholders have a cause of action against the corporation for failure to adequately address racism?
- What actions taken by corporate managers receive protection under the traditional business judgment rule (BJR)?
- Should BJR be the standard for antiracist policies of a corporation, as well as the standard for a corporation NOT taking any antiracist actions?
- Would one need heightened review (i.e., import a strict scrutiny approach) but not the other?
- Should BJR be the standard for actions taken to counter/oppose antiracism actions?
- Considering research that suggests BJR has implicit biases (i.e., a male-normative bias), is BJR even the right approach? Is there also a white supremacy bias that needs to be addressed?

b. *Shareholders.* — There has been growth in the power of shareholders over time, particularly institutional shareholders, and they have a role to play as well. There should be an increase in disclosure for these investors regarding their accountability for racism (e.g., racial demographics, metrics, etc.). Further, institutional shareholders have the ability to hold corporations accountable along the lines of hedge funds pushing for more accountability for climate change and gender diversity (e.g., Blackrock, Coalition for Inclusive Capital), or even investment banks, like Goldman Sachs, who will no longer underwrite IPOs for companies that do not include women on their boards. Further, there is hope as several institutional investors have called for corporations to address racism after George Floyd's murder. It would be an important step if these investors could first begin with cleaning their own house and then use their strength and take bolder steps, such as specifically tying executive compensation to achieving antiracist metrics or any measure to force a loss of investment and capital if corporations do not boldly and concretely address racism.

Shareholder derivative lawsuits are an additional means for shareholders to push accountability. Almost immediately after the global uprising against American racism began, there were three separate suits filed in

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131. For a discussion of this new committee, see *supra* section II.C.1.

California federal courts against the directors and officers of Oracle Corporation, Facebook, Inc., and Qualcomm, Inc., respectively.<sup>132</sup> The lawsuits allege that the boards and executive management teams of the companies failed to deliver on their commitments to diversity, despite SEC filings to the contrary, as evident by their mostly white and male boards and teams. By doing so, each corporation violated its *Caremark* duty by failing to adhere to compliance and antidiscrimination laws.<sup>133</sup> More lawsuits against other companies were filed later in 2020 (all are represented by the same law firm).<sup>134</sup> While the allegations are novel and have not been successful thus far,<sup>135</sup> one can imagine that this is the beginning of shareholders seeking redress for corporations' failure to act against racism over many years. They could include demands for remedies modeled after the California suits, such as replacing current directors with diverse directors; creating a fund dedicated to hiring, promoting and retaining people of color; tying a specific amount of executive pay to diversity goals; and board directors donating a portion or all of their compensation to organizations advancing Black people.<sup>136</sup> It would behoove corporations to address racism now instead of waiting for their failures to play out in court.

#### CONCLUSION

Aunt Jemima's resignation marks the beginning of corporations issuing statements, pledging money, and retiring racist brands in the wake of George Floyd's murder. These statements and actions give rise to the hope that corporations would be part of the solution to address the racism that plagues, and has always plagued, our country. This Piece proposes a new regime for holding all public corporations accountable for dismantling

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132. See Complaint, *Klein v. Ellison*, No. 3:20-cv-04439-JSC (N.D. Cal. July 2, 2020), 2020 WL 3816836 (Oracle Complaint); Complaint, *Ocegueda v. Zuckerberg*, No. 3:20-cv-04444-LB, 2020 WL 3642982 (Facebook Complaint); Complaint, *Kiger v. Mollenkopf*, No. 20-cv-01355-LAB-MDD (S.D. Cal. filed July 17, 2020) (Qualcomm Complaint); see also Francesca Odell, Victor Hou & James Langston, *Shareholder Complaints Seek to Hold Shareholders Liable for Lack of Diversity*, Harv. L. Sch. F. on Corp. Governance (Aug. 11, 2020), <https://corpgov.law.harvard.edu/2020/08/11/shareholder-complaints-seek-to-hold-directors-liable-for-lack-of-diversity/> [<https://perma.cc/FG86-FMBV>].

133. See *In re Caremark Int'l. Inc. Deriv. Lit.*, 698 A.2d 959, 971 (Del. Ch. 1996) (recognizing one of the fiduciary duties of directors is a duty of oversight, monitoring corporate compliance with all laws and regulations).

134. See *Court Dismisses Board Diversity Suit Against Facebook Directors*, Paul, Weiss (Mar. 24, 2021), <https://www.paulweiss.com/practices/litigation/securities-litigation/publications/court-dismisses-board-diversity-suit-against-facebook-directors?id=39643> [<https://perma.cc/UK9P-Q42R>].

135. See Lydia Beyoud, *Oracle Wins Dismissal of Shareholders' Board Diversity Suit*, Bloomberg L. (May 25, 2021), <https://news.bloomberglaw.com/esg/oracle-wins-dismissal-of-shareholders-board-diversity-suit> [<https://perma.cc/WKJ4-LLYJ>]; see also *Klein v. Ellison*, No. 20-cv-04439-JSC, 2021 WL 2075591, at \*9 (N.D. Cal. May 24, 2021) (dismissing the complaint against Oracle); *Ocegueda v. Zuckerberg*, 526 F. Supp. 3d 637, 652 (N.D. Cal. 2021) (dismissing the complaint against Facebook).

136. See *supra* note 132 and accompanying text.

systemic racism. I will further develop this regime of “reckoning,” “repentance,” and “restitution” for the corporate person in future work. I invite fellow business law scholars to join me in this endeavor.

## APPENDIX I: PRELIMINARY PROPOSAL FOR NEW A(EESG) SCHEME

Below is a proposal of preliminary suggestions for the type of metrics that could be developed using the new scheme of A(EESG):<sup>137</sup>

**(Antiracist) Employment**

- demographics of workers, including recruitment, retention, and promotion of Blacks
- demographics of internship classes and the sponsors and mentors provided
- wage data by racial, gender, and ethnic breakdown

**(Antiracist) Environmental**

- pollution metrics for communities of color compared to predominantly white communities
- the development and operation of waste landfills near historically Black and economically depressed neighborhoods
- health outcomes for the population near pollution sites

**(Antiracist) Social**

- access to markets by underrepresented communities
- representation of people of color in contracts with third-party contractors, suppliers, vendors, and consultants
- annual support of organizations supporting racial justice and education of Black communities (e.g., HBCUs, National Urban League, NAACP Legal Defense Fund, United Negro College Fund, Color of Change)
- involvement with political lobbying, including the amount of money spent and the causes supported
- marketing strategies and policies targeted for and at the Black population

**(Antiracist) Governance**

- demographics of directors and officers
- representation of people of color on executive committees
- demographics of institutional investors
- investment policies and practices related to addressing racism

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137. See *supra* notes 115–122 and accompanying text.

## APPENDIX II: SAMPLE LIST OF METRICS

Below is a sample list of metrics provided by the Pew Research Center survey, followed by a sample of the measurements tracked by the National Urban League's State of Black America.<sup>138</sup>

**Sample of data provided by Pew Research Center:**

- Perception of progress of race relations
- Legacy of slavery and its current effects
- Whether Blacks currently have equal rights with whites
- Whether Blacks will ever have equal rights with whites
- Whether discrimination prevents Blacks from getting ahead
- Advantages of being white

**Sample of data collected by the National Urban League:**

- Economics
  - Median income
  - Poverty
  - Employment issues
  - Housing and wealth
  - Digital divide
  - Transportation
- Health
  - Death rates and life expectancy
  - Physical condition
  - Substance abuse
  - Mental health
  - Access to care
  - Elderly health care
  - Pregnancy and maternal health
  - Children's health
- Education
  - Teacher quality
  - Course quality
  - Testing scores
  - Student risk factors
- Social Justice
  - Equality before the law
  - Victimization/mental anguish
- Civic Engagement
  - Community participation
  - Democratic process

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138. See *supra* notes 123–127 and accompanying text.