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TOWARD FAIR GAINSHARING AND A QUALITY WORKPLACE FOR EMPLOYEES:

HOW A RECONCEIVED COMPENSATION COMMITTEE MIGHT HELP MAKE CORPORATIONS MORE RESPONSIBLE EMPLOYERS AND RESTORE FAITH IN AMERICAN CAPITALISM

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Toward Fair Gainsharing and a Quality Workplace for Employees:

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by

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The Business Lawyer **(Forthcoming Winter 2020-21)**

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Abstract

In the three decades after World War II, workers and stockholders shared equitably in the nation's growing wealth. But, during the last several decades, this fair gainsharing has diminished as the power of the stock market, in the form of institutional investors, has grown, and the comparative voice and leverage of workers has declined. As a result of these and other factors, a much greater share of the gains from increased corporate profitability and productivity has gone to stockholders and top management, on the one hand, and much less to employees, on the other. Contributing to this divide has been a push to tie top management pay to total stockholder return and to create incentives for management to deliver returns to stockholders, even if that requires decreasing the share that the workers primarily responsible for corporate success get. The resulting economic insecurity and inequality have caused demands for serious change in corporate governance to give greater weight to the interests of workers. In this Essay, we focus on one practical way to move toward that worthy end: reconceiving the compensation committee. That is, a reconceived compensation committee would focus on the company's entire workforce, not just senior management, and have the responsibility for overseeing management's implementation of an effective system to compensate workers fairly, ensuring they receive a fair share when corporate productivity and profitability increases, and analyzing what allocation of compensation within the company's workforce will provide the most motivation to encourage corporate success. To accomplish this, compensation committees would be expected to understand the nation's, the industry's, and the company's traditional gainsharing practices among workers, stockholders, and top management and develop and implement a corporate strategy to ensure that gainsharing is equitable. By doing so, compensation committees will also be able to more rationally set top executive compensation and establish metrics for top management and key personnel involved in gatekeeping functions that are tied to good EESG practices and not just to stock price. And the reconceived compensation committee should also be the committee charged with compliance and EESG responsibilities in the areas most important to workers, including not just worker pay and benefits, but also safety, racial and gender equality, sexual harassment and inclusion, and training and promotion policies. Not only that, the reconceived compensation committee should monitor company practices in its supply chain to ensure that the company's adopted policies regarding fair treatment of workers extend to those workers who work for company contractors. By this evolutionary means that builds on the existing American corporate governance system, important strides can be taken toward making our capitalist system work better for the people most critical to its success: workers.

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Introduction

Growing inequality and economic insecurity during the last two decades has enhanced pressure on corporate boards to address the decline in gainsharing between employees, on the one hand, and top management and stockholders, on the other. During this era, top executive pay and stockholder returns have soared as company profits have risen, but the pay for ordinary workers has stagnated.[1] This is leading to calls for serious changes in corporate governance to give workers more voice[2] and, more generally, to hold corporations more accountable for how they treat all their stakeholders, not just those who own stock.[3] As to workers, there is an increased focus on making

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[1] Alex Edmans, *What's Right, What's Wrong, and What Could Be Fixed*? (Dec. 12, 2018), https://s3-eu-west-1.amazonaws.com/content.gresham.ac.uk/data/binary/3193/2018-12-12_AlexEdmans_ExecutivePay-T.pdf ("In the US, the average S&P 500 CEO earned $14 million in 2017, 361 times the average worker – compared to a ratio of only 42 in 1980."); Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978* (Econ. Pol'y Inst., Aug. 14, 2019), https://www.epi.org/files/pdf/171191.pdf ("From 1978 to 2018, CEO compensation grew by 1,007.5% (940.3% under the options-realized measure), far outstripping S&P stock market growth (706.7%) and the wage growth of very high earners (339.2%). In contrast, wages for the typical worker grew by just 11.9%.") This stagnation of workers' pay came at a time when both productivity and education levels of the average worker was *rising*. *The Productivity—Pay Gap* (Econ. Pol'y Inst. July 2019), https://www.epi.org/productivity-pay-gap/ ("From 1979 to 2018, net productivity rose 69.6 percent, while the hourly pay of typical workers essentially stagnated—increasing only 11.6 percent over 39 years (after adjusting for inflation)."); U.S. Census, *U.S. Population More Educated Than Ever Before*, https://www.census.gov/library/stories/2018/07/educational-attainment.html. This means that although Americans are working more productively than ever, the fruits of their labors have primarily accrued to those at the top and to corporate profits, especially in recent years.

[2] For example, Senator Elizabeth Warren's Accountable Capitalism Act would require at least 40% of directors to be elected by workers. Accountable Capitalism Act, S.3348 (115th Cong.), https://www.congress.gov/bill/115th-congress/senate-bill/3348. Likewise, Senator Tammy Baldwin and others have introduced the Reward Work Act, which would require employees to hold one-third of board seats in any company that is publicly traded. Reward Work Act, S.2605 (115th Cong.), https://www.congress.gov/bill/115th-congress/senate-bill/2605/text. And Senators Schumer and Sanders have called for prohibiting buybacks unless a company pays all of its workers at least $15 per hour. Chuck Schumer & Bernie Sanders, *Limit Corporate Stock Buybacks* (N.Y. Times, Feb. 3, 2019), https://www.nytimes.com/2019/02/03/opinion/chuck-schumer-bernie-sanders.html ("Our bill will prohibit a corporation from buying back its own stock unless it invests in workers and communities first, including things like paying all workers at least $15 an hour, providing seven days of paid sick leave, and offering decent pensions and more reliable health benefits.").

[3] Senator Warren's Accountable Capitalism Act, for example, would require, in substance, that every American business with sales over $1 billion or above become like a Delaware public benefit corporation and have a duty to "manage or direct the business and affairs of the . . . corporation in a manner that seeks to create a general public benefit and balances the pecuniary interests of the shareholders of the . . . corporation with the best interests of persons that are materially affected by the conduct of the . . . corporation." Accountable Capitalism Act, S.3348 (115th Cong.), https://www.congress.gov/bill/115th-congress/senate-bill/3348; *see also* 8 *Del. C.* § 365 ("The board of directors [of a Delaware public benefit corporation] shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."). And other thought leaders have called for corporate governance reform to require corporations to give more weight to sustainable, ethical growth and more consideration to corporate stakeholders, like workers, and not just stockholders. *See, e.g.* Marc Benioff, *We Need a New Capitalism* (N.Y. Times, Oct. 14, 2019), https://www.nytimes.com/2019/10/14/opinion/benioff-salesforce-capitalism.html; Lynn Stout, *The Shareholder*

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sure that corporations operate workplaces where sexual harassment and where discrimination on the basis of race, gender, or sexual orientation are not tolerated, and where inclusion and diversity are promoted.[4] A company cannot be a good corporate citizen without being fair to the stakeholders most important to its success, its employees. That reality should be clear in the new buzzword that refers to the need for corporations to be socially responsible, ESG for Environmental, Social, and Governance. Right now, employees are denied their own letter and said to be buried in the "S."[5] We believe that employee concerns are of paramount importance to the question of whether a corporation is functioning in a way that is positive for society. To make the importance of employees inescapable and as prominent as it should be, we refer to EESG—the initial and extra "E" referring to employees.

Too little, however, has been done to help boards of directors and managers sensibly address society's demand for a higher level of responsibility, and to identify methods for them to set up efficient and effective board and management structures enabling them to implement sustainably profitable business strategies while conducting business in a manner that is fair to all their stakeholders. In this Essay, we focus on one aspect of this issue — employees — and how a reconceived compensation committee might better position corporate boards and managers to do better by the people whose hard work is primarily responsible for wealth creation in our society. By helping to do so, reconceived compensation committees could restore greater faith in our

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Value Myth (Berrett-Koehler 2012); Lenore Palladino, *The Economic Argument for Stakeholder Corporations* (Roosevelt Inst., June 2019), https://rooseveltinstitute.org/wp-content/uploads/2019/06/RI_Economic-Argument-for-Stakeholder-Corporations_Working-Paper_201906.pdf ; Judith F. Samuelson, *Did the Business Roundtable Sound the Death Knell for Shareholder Primary?* (Aspen Inst., Aug. 26, 2019), https://www.aspeninstitute.org/blog-posts/did-the-business-roundtable-sound-the-death-knell-for-shareholder-primacy/; Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford 2018); Fredrick H. Alexander, *Benefit Corporation Law and Governance* (Berrett-Koehler 2017).

[4] For an overview of corporate law's relevance to addressing sexual harassment in the workplace and the boardroom, *see generally* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 Colum. L. Rev. 1583 (2018).

[5] *See, e.g.*, Alastair Marsh, *'Social Washing' Is Becoming Growing Headache for ESG Investors* (Bloomberg, Apr. 9, 2020), https://www.bloomberg.com/news/articles/2020-04-09/-social-washing-is-becoming-growing-headache-for-esg-investors (noting that, in the wake of the COVID-19 pandemic, "ESG-focused managers say they're now increasing their emphasis on the 'S,'" including by "assessing issues such [as] how employers deal with contract workers, whether they cut loose employees or keep paying them during the pandemic, whether they provide adequate medical insurance and if they allow working from home").

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market system, reduce pressures for more intrusive government regulation, and create more durably valuable businesses.

In the pages that follow, we explain why boards of directors are facing increasing pressure to become directly involved in issues concerning employee pay and fair treatment, and why it is most efficient and effective to respond to that pressure by reconceiving the compensation committee's role.[6] We then conclude with some practical suggestions for how a reconceived compensation committee might organize its duties to promote fair treatment of and fair gainsharing with its workforce.

I. A Decline in Gainsharing with Workers and Corresponding Increase in Economic Inequality and Insecurity Drive a Demand for Board Level Attention to Fair Treatment of Employees — And So Do Concerns About Sexual Harassment and Inclusion

It is indisputable that, during the last forty years, profound changes have occurred in the gainsharing between employees of large business entities, on the one hand, and their stockholders and top management, on the other, that characterized the period from the end of World War II until the 1970s. That prior era was seen, both in the United States and in many of its OECD ally nations, as a remarkable period of economic success, during which the gains from a market based economy were shared more widely.[7] A stable middle class emerged, and many were lifted into prosperity.

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[6] In another piece, one of us proposes a comprehensive set of regulatory strategies to address this issue. *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* (Working Paper, Oct. 11, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924.

[7] Bertrall L. Ross II, *Addressing Inequality in the Age of* Citizens United, 93 N.Y.U. L. Rev. 1120, 1131–32 (2018) ("The era of declining economic inequality . . . was rather remarkable. The share of total income accruing to the top 1% declined from about 24% in the mid-1920s to a low of about 9% in the early 1970s."); Anne Applebaum, *The Lure of Western Europe*, 66 N.Y. Rev. Books (June 6, 2019) (book review) ("In the early years, this gigantic and unprecedented experiment in democracy and integration brought immediate benefits for all of the members of the West. What the French called les trentes glorieuses—the thirty years of steady growth and expansion of social benefits from the 1940s to the 1970s—had its echo elsewhere in the bloc. Germany had its Wirtschaftswunder, led by Adenauer's finance minister, Ludwig Erhard; Italy had its boom economico, an extraordinary transformation that saw incomes double and triple within a generation. Even in the dictatorships of the Iberian Peninsula, which did not join European institutions until the 1970s, postwar growth was remarkable: in Spain, GDP per capita rose by a factor of ten between 1960 and 1975. Growth and industrialization were accompanied by a parallel growth in social benefits: universal health care, free education, and government safety nets became the norm everywhere in Western Europe.").

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Yet, as the economy globalized but the domestic rules of the game that encouraged this gainsharing did not, the power of one corporate constituency — stockholders — grew immensely as that of labor and communities declined. As labor unions waned in influence,[8] powerful institutional investors reaggregated equity capital and began to exert enormous pressure on public companies to be responsive to their desires for immediate returns.[9] To this end, these institutions

[8] After the passage of the several labor-related laws as part of FDR's New Deal, the percentage of employees who were union members jumped from 11% in 1933 to 26% in 1940. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. Pa. L. Rev. 581, 604-05 (2007). The level of union density remained roughly constant for the next forty years. Megan Dunn & James Walker, U.S. Bureau of Labor Statistics, Union Membership In The United States 2 (2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf ("[T]he union membership rate was 20.1 percent in 1983."). But starting in the 1980s and accelerating thereafter, union membership declined such that today only 11.1% of employees are in unions and most union membership decline came from private sector—not public sector—unions. *Id*. ("In 2015, there were 7.6 million union members in the private sector, 4.4 million fewer than in 1983. Public-sector union membership, however, has remained fairly constant over time; in 2015, there were 7.2 million public-sector union members, 1.5 million more than in 1983."). Although several events caused union membership to decline, including the rise of right to work laws, globalization combined with a stockholder-centric worldview of most U.S. corporations also played a key role. Because globalized free trade allowed companies to locate operations anywhere but a lack of globalized labor standards allowed those same companies to pay their foreign workers less under worse working conditions, many U.S. companies outsourced union jobs to foreign countries that did not allow their workers to bargain and failed to protect their workers from abhorrent working conditions. David Autor et al., *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, 8 Ann. Rev. Econ. 205, 206 ("Of course, introductory trade theory also teaches us that international trade is not generally Pareto improving. . . . '[I]nternational trade tends to make low-skilled workers in the United States worse off—not just temporarily, but on a sustained basis.'"); Julien Martin & Isabell Mejean, *Low-Wage Country Competition and the Quality Content of High-Wage Country Exports*, 93 J. Int'l Econ. 140 (2014) (finding that "competition from low-wage countries leading developed countries to specialize within industries in the production of higher quality goods," suggesting that low-skill or low-wage workers in high-income countries are harmed by free trade); AFL-CIO, *Responsibility Outsourced: Social Audits, Workplace Certificate and Twenty Years of Failure to Protect Workers Rights* 9 (2014), https://aflcio.org/sites/default/files/2017-03/CSReport.pdf ("Since at least the 1980s, major multinationals have become more globalized, building ever-longer, more flexible and complex globalized supply chains while avoiding whenever possible the limits placed on them by the state and unions. Since the 1990s, this only has accelerated. As manufacturing work has left countries in which there were laws, collective bargaining and other systems in place to reduce workplace dangers, jobs instead have gone to countries with inadequate laws, weak enforcement and precarious employment relationships with limited workers' voices to defend day-to-day worker interests or raise the alarm before disaster strikes. The improvements made in an earlier era in industrialized countries were achieved by unions, collective bargaining and state regulation. Yet workers, the supposed beneficiaries of these current CSR programs, rarely have much of a role in the CSR monitoring and certification system as it currently exists."); *Child Labour "Rampant" in Bangladesh Factories, Study Reveals* (The Guardian, Dec. 7, 2016), *Not Yet a Workers' Paradise: Vietnam's Suppression of the Independent Workers' Movement* (Human Rights Watch, May 4, 2009), https://www.hrw.org/report/2009/05/04/not-yet-workers-paradise/vietnams-suppression-independent-workers-movement; *see also generally* Robert E. Baldwin, *The Decline of US Labor Unions and The Role of Trade* (PIIE 2003) (finding that globalization has led to the decline of unionization among the least educated workers); Matthew J. Slaughter, *Globalization and Declining Unionization in the United States*, 46 Indus. Relations 329 (2007) (observing a "significant correlation between failing union coverage and greater numbers of inward FDI [Foreign Direct Investment] transactions," used as a proxy for rising globalization, and concluding that this finding is "consistent with research on how rising capital mobility raises labor-demand elasticities and alters [labor's] bargaining power").

[9] During the 1950s and 1960s, institutional investors represented a small fraction of stockholders. SEC Commissioner Luis A. Aguilar, *Institutional Investors: Power and Responsibility*, SEC) (Apr. 19, 2013), https://www.sec.gov/news/speech/2013-spch041913laahtm (" The proportion of U.S. public equities managed by

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institutions has risen steadily over the past six decades, from about 7 or 8% of market capitalization in 1950, to about 67% in 2010."). Today, they are the dominant stockholders. *Id.* ("In 2009, institutional investors owned in the aggregate 73% of the outstanding equity in the 1,000 largest U.S. corporations."); John C. Coates, IV, *The Future of Corporate Governance Part I: The Problem of Twelve* (Working Paper, Sept. 20, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 ("The 'Big Three,' as they are known—Vanguard, State Street, and BlackRock—controlled approximately 15% of the S&P 500 in 2017—a much greater share of U.S. public companies than any three single investors have ever previously done."); John D. Morley, *Too Big To Be Activist*, 82 S. Cal. L. Rev. 1407, 1409-10 (2019) ("If we combined the holdings of Vanguard, BlackRock, and State Street, they would collectively be the largest shareholder in 88 percent of all firms on the S&P 500 BlackRock and Vanguard manage one of the ten largest stakes in 65 percent of all publicly traded firms, State Street in 35 percent, and Fidelity in 28 percent. As of March 2016, BlackRock was the beneficial owner of 5 percent or more of the stock of 2,632 different companies—more than half of all publicly listed companies in the United States. Vanguard and Fidelity controlled 5 percent or more of 1,855 and 1,309 publicly listed companies, respectively."). And they have used their increased heft to advocate for increased power for stockholders. *See, e.g.*, Cydney S. Posner, *Proxy Access and Leverage* (Harv. L. Sch. F. Corp. Gov., Oct. 21, 2019), https://corpgov.law.harvard.edu/2019/10/21/proxy-access-and-leverage/ (documenting NYC Comptroller Scott Stringer's successful push for proxy access at companies the NYC Pension Plan invests in). The more concentrated nature of the corporate stockholder base has seen its power increase at the same time that labor's membership and overall power declined. Andy Green, Christian E. Weller & Malkie Wall, *Corporate Governance and Workers* (Ctr. Am. Progress, Aug. 14, 2019), https://www.americanprogress.org/issues/economy/reports/2019/08/14/473095/corporate-governance-workers/ ("Worker power over corporations [in the 1950s, 1960s, and 1970s] was substantially assisted by the relative inability of Wall Street to make demands on a company's returns. Investors overall tended to be far more dispersed, with retail investors a larger percentage of shareholders in companies than today. Those retail shareholders tended to be more passive in their demands on company management than the institutional shareholders of more recent times. Although this was not without costs on corporate performance and executive accountability, it cleared the way for other actors, outlined above, to exert greater demands on boards and management.") (citing L. Josh Bivens & Christian E. Weller, *The "Job-Loss" Recovery: Not New, Just Worse*, 40 J. Econ. Issues 603 (2006)).

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demanded that top executives be paid in ways that encouraged them to be an instrument of the stock market,[10] even if that hurt the company's other constituencies, including workers.[11] This shift came at a time when businesses already had to address competition from nations with low

[10] Victor Fleischer, *The Executive Paycheck Myth* (N.Y. Times, Nov. 4, 2015), https://www.nytimes.com/2015/11/05/business/dealbook/the-executive-paycheck-myth.html (observing that, during the 1980s, the push from corporate buyout specialists and other investors pushed. boards "to align the executives' fortunes with those of the shareholders. The measure of a chief executive was the price of a company's common stock, then and forever more."); Brian J. Hall & Jeffrey B. Liebman, *Are CEOs Really Paid Like Bureaucrats?*, 113 Q.J. Econ. 653, 654 (1998) ("produc[ing] a precise and comprehensive measure of the relationship between firm performance and CEO pay and [ ] document[ing] the large increase in CEO holdings of stock and stock options that occurred between 1980 and 1994"). In the latter part of the 20th century, institutional investors increasingly argued for top corporate management to be paid in forms of equity, like stock options, that would give them an incentive to increase the company's stock price and align their interests with stockholders. Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, Harv. Bus. Rev. (May/June 1990) (arguing that top executives should have substantial equity ownership in the companies they manage to align their priorities with stockholders); Tod Perry & Marc Zenner, *CEO Compensation in the 1990s: Shareholder Alignment or Shareholder Expropriation?*, 35 Wake Forest L. Rev. 123, 127 (2000) (highlighting the role institutional investors, including CalPERS, played in tying executive compensation to stock price performance). By now, that thinking is mainstream among institutional investors and the largest of them—BlackRock, State Street, and Vanguard—all now advocate for executive pay that is tied to stockholder returns. *See* BlackRock Investment Stewardship: Global Corporate Governance & Engagement Principles (Jan. 2020), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf ("BlackRock believes that there should be a clear link between variable pay and company performance that drives shareholder returns); State Street, *Global Proxy Voting and Engagement Principles* (Mar. 2019), https://ssga.com/investment-topics/environmental-social-governance/2019/03/proxy-voting-and-engagement-guidelines-principles.pdf ("We may oppose remuneration reports where pay seems misaligned with shareholders' interests."); Vanguard, *Proxy Voting Guidelines for U.S. Portfolio Companies* (Apr. 1, 2019), https://about.vanguard.com/investment-stewardship/portfolio-company-resources/proxy_voting_guidelines.pdf ("Appropriately designed stock-based compensation plans, administered by an independent committee of the board and approved by shareholders, can be an effective way to align the interests of long-term shareholders with the interests of management, employees, and directors."). Executive compensation focused on stockholder returns remains pervasive despite the growing emphasis on EESG. Vijay Govindarajan & Anup Srivastava, *We Are Nowhere Near Stakeholder Capitalism* (Harv. Bus. Rev., Jan. 30, 2019) ("CEOs continue to be hired, fired, and compensated based on metrics, such as revenues, profits, and share prices. Fund managers, who make investment decisions on behalf of dispersed investors, continue to be rewarded based on how their investments performed relative to the market. The board of directors continue to be selected by shareholders to protect their interests. So, how likely is it that a CEO would get up one day and suddenly change his or her focus from revenues, profits, and stock prices toward wider Environmental, Social, and Governance (ESG) goals? Some CEOs might, but for most, the predominant objective would continue to be to maximize shareholder value while keeping ESG objectives in mind, instead of the other way around.").

[11] Mishel & Wolfe, *supra* note [1] ("This escalation of CEO compensation, and of executive compensation more generally, has fueled the growth of top 1.0% and top 0.1% incomes, leaving less of the fruits of economic growth for ordinary workers and widening the gap between very high earners and the bottom 90%."); Karen Brettell, David Gaffen & David Rohde, *Stock Buybacks Enrich the Bosses Even When Business Sags* (Reuters, Dec. 10, 2015) ("As corporate America engages in an unprecedented buyback binge, soaring CEO pay tied to short-term performance measures like EPS is prompting criticism that executives are using stock repurchases to enrich themselves at the expense of long-term corporate health, capital investment and employment."); Annie Lowrey, *Are Stock Buybacks Starving the Economy?* (The Atlantic, July 31, 2018), https://www.theatlantic.com/ideas/archive/2018/07/are-stock-buybacks-starving-the-economy/566387/ (observing that low-wage industries aggressively buy back stock when those same dollars could go to fund pay increases for workers).

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wage workforces and minimal environmental and other regulatory constraints, and when offshoring production of even service jobs became a standard managerial tactic.[12]

The causal story is complex, but the underlying decline in gainsharing is indisputable. During the period before the 1980s, when corporate profits increased, companies shared the gains between their workers (in the form of pay raises and other forms of compensation, including retirement and health benefits) and stockholders (in the form of higher dividends and other forms of payouts).[13] During the 1950s, 1960s and 1970s, corporate executives "saw their role as one of balancing the interest of various groups that touched their companies—customers, employees, suppliers, shareholders, and the community at large."[14] This manifested itself most clearly in the connection between worker productivity and wages during this period. From 1948 to 1979, worker productivity grew by 108.1% and wages grew in rough tandem by 93.2%.[15] That is, as workers' productivity enhanced the value of the corporate enterprise, they shared in the benefits of those productivity gains. Top executives were much better paid than the typical worker, but at a ratio that was merely substantial, not astronomical. For example, the CEO-to-worker pay ratio was 20-to-1 in 1965.[16] And stockholders also reaped good returns during this era of fairer gainsharing as the S&P 500 rose 554% from 1948 to 1979. In other words, when a company succeeded, so did its workers, and in many ways so did the communities in which the company operated.[17]

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[12] James Burke, Gerald Epstein & Minsik Choi, *Rising Foreign Outsourcing and Employment Losses in U.S. Manufacturing, 1987-2002* (Working Paper, 2004), https://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_51-100/WP89.pdf (documenting the acceleration in outsourcing that took place at the end of the 20th century); Manu Joseph, *How India Became an Outsourcing Magnet* (N.Y. Times, Mar. 28, 2012), https://www.nytimes.com/2012/03/29/world/asia/29iht-letter29.html (documenting how India became a giant in service-related outsourcing at the turn of the century).

[13] Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality* (Ctr. for Budget & Pol'y Priorities), https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf ("The years from the end of World War II into the 1970s were ones of substantial economic growth and broadly shared prosperity.").

[14] Jeffrey Pfeffer, *Shareholders First? Not So Fast . . .* (Harv. Bus. Rev. July–Aug. 2009), https://hbr.org/2009/07/shareholders-first-not-so-fast.

[15] Econ. Pol'y Inst., *supra* note [1]. Indeed, "[c]ensus family income data show that from the late 1940s to the early 1970s, incomes across the distribution grew at nearly the same pace." Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality* (Ctr. for Budget & Pol'y Priorities, Jan. 13, 2020), https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf.

[16] Econ. Pol'y Inst., *supra* note [1].

[17] *See, e.g.*, *54 Years After Closing, Studebaker's Impact Still Visible in South Bend* (South Bend Tribune, May 5, 2017), https://www.southbendtribune.com/news/studebaker/years-after-closing-studebaker-s-impact-still-visible-in-south/article_4cc67c96-2eb3-11e7-933e-37b00c9b43aa.html (documenting South Bend's growing prosperity as

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Since the 1980s, however, that gainsharing has eroded. During that period, when company productivity and profitability increased, a much higher percentage of the gain went to the stockholders, and one small class of workers — top management. The numbers are stark. From 1979 to 2018, worker productivity rose by 69.6%, but the wealth created by these productivity gains went predominately to executives and stockholders, with worker pay rising by only 11.6% during this period, while CEO compensation grew by 940%.[18] In terms of the split between the average worker and stockholders, the movement was even more profound: stockholders began taking a huge slice of the pie, with the S&P 500 gaining over 2,400% from 1979 to 2018.

One of the factors contributing to this substantial change in the gainsharing between workers and stockholders is that institutional investors successfully pressed for executive compensation systems linking top management's fate to delivering for one constituency in particular—stockholders—and decoupled them from the rest of the workforce. The focus in particular was on tying top management pay to some form of total stock return.[19] Incentives

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Studebaker moved in and built a plant and its slow steady decline since Studebaker left the city in the 1960s); Salena Zito, *The Day That Destroyed The Working Class and Sowed the Seeds of Trump* (NY Post, Sept. 16, 2017), https://nypost.com/2017/09/16/the-day-that-destroyed-the-working-class-and-sowed-the-seeds-for-trump/ (documenting the negative effects the massive layoffs in the steel industry during the 1970s had on Youngstown, Ohio); *see also* Steven Pearlstein, *When Shareholder Capitalism Came to Town* (Am. Prospect, Apr. 19, 2014), https://prospect.org/economy/shareholder-capitalism-came-town/ (observing that in the 1950s and 1960s, companies' wealth was used to benefit stockholders, workers, and the communities in which they operated, but noting that this began to decline in the 1970s).

[18] Econ. Pol'y Inst., *supra* note [1]. And although in recent decades top management's compensation has heavily shifted towards stock-based payments, the ratio of CEO cash compensation to the cash compensation of the average worker has nonetheless grown from 28-to-1 in 1970 to 115-to-1 in 2005. Kevin J. Murphy & Jan Zabojnik, *Managerial Capital and the Market for CEOs*, *1 (Working Paper, May 8, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984376. These numbers also fail to take into account the fact that during this time the number of American workers receiving secure retirements in the form of pension plans (or more technically, defined benefit plans) plummeted. *See* Monique Morrissey, *Private-Sector Pension Coverage Fells by Half Over Two Decades* (Econ. Pol'y Inst., Jan. 11, 2013), https://www.epi.org/blog/private-sector-pension-coverage-decline/.

[19] Kevin J. Murphy & Michael C. Jensen, *The Politics of Pay: The Unintended Consequences of Regulating Executive Compensation*, *7 (Working Paper, Apr. 18, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153147 (documenting the substantial shift away from cash-based compensation for CEOs during the last three decades toward compensation dominated by forms of equity like options, restricted stock, and performance shares); John Bizjak et al., *The Role of Peer Firm Selection in Explicit Relative Performance Awards* (Working Paper, May 2017), http://www.fmaconferences.org/Boston/RPE_Peer_Group_Selection_9-1-2016.pdf (observing that, for executive compensation plans, "Total stock returns (TSR) are the most common measure of performance."); John Roe, *2019 U.S. Executive Compensation Trends* (Harv. L. Sch. F. Corp. Gov., Aug. 16, 2019), https://corpgov.law.harvard.edu/2019/04/16/2019-u-s-executive-compensation-trends/ ("Long-term incentive plans use a wide variety of performance metrics at different weights, with TSR, earnings, and returns being the most popular performance measure categories."); CalPERS, *CalPERS' Executive Compensation Analysis Framework* (Apr. 2019),

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matter, and powerful ones in particular. When senior management is rewarded for delivering for one corporate constituency, it is unsurprising when that constituency sees the rewards for improved corporate performance largely directed to it.[20] This tilt in gainsharing toward stockholders and top management, on the one hand, and the bulk of corporate workers, on the other, generated growing economic inequality[21] and a general anxiety among working people that our system of capitalism is now stacked against them.[22]

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https://www.calpers.ca.gov/docs/executive-compensation-analysis-framework.pdf (noting that one of its "three main objectives of [its] executive compensation analysis framework" [is] "[t]o assess whether pay is aligned with performance as measured by total shareholder return (TSR) over a 5-year cumulative period").

[20] *See* Nuno Fernandes, Miguel A. Ferreira & Kevin J. Murphy, *Are U.S. CEOs Paid More? New International Evidence*, 26 Rev. Fin. Stud. 323, 356 (2013) ("CEOs in firms with high institutional ownership are pressed to perform . . . . Therefore, institutional ownership causes the CEO to take some actions that he would not have taken otherwise (*e.g.*, working harder, downsizing, shareholder distributions, selling the firm"); F. Scott Bentley, Ingrid S. Fulmer & Rebecca R. Kehoe, *Payoffs For Layoffs? An Examination of CEO Relative Pay and Firm Performance Surrounding Layoff Announcements*, 72 Personnel Psychology 81 (2019) (finding "that the relationship between layoffs and subsequent changes in CEO relative pay depends on post-layoff changes in firm performance, with CEOs in firms with the largest performance gains receiving the largest increases in relative pay"); Jeffrey T. Brookman, Saeyoung Chang & Craig G. Rennie, *CEO Cash- and Stock-Based Compensation, Changes, Layoff Decisions, and Shareholder Value*, 42 Fin. Rev. 99 (2007) (finding that "[t]he chief executive officers (CEOs) of firms announcing layoffs receive 22.8% more total pay in the subsequent year than other CEOs. The pay increases result almost entirely from increases in stock-based compensation and are found to persist"); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility after* Citizens United, 89 N.C. L. Rev. 1197, 1200 (2011) ("[S]hareholder primacy also pushes managers to exploit non-shareholders in pursuit of shareholder gains. For example, directors can put downward pressure on wages and benefits for corporate employees. Workers, having made firm-specific investments of their human capital and having made community-specific investments in other areas of their lives, may find it impossible to punish, or credibly threaten to punish, directors for such opportunistic conduct by exiting to other firms or labor markets."); Sarah Anderson, John Cavanagh & Chuck Collins, *Executive Excess 1998: CEOs Gain From Massive Downsizing* (Inst. Pol'y Stud., Apr. 23, 1998) (finding that CEO compensation increased at firms that saw layoffs of more than 3,000 workers).

[21] In 1968, the top 5% of households earned 16% of total income; today, that number is 23%. Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.* (Pew Research Center, Feb. 7, 2020), https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/. "[B]eginning in the 1970s, income disparities began to widen, with income growing much faster at the top of the ladder than in the middle or bottom. . . . [F]rom 1979 to 2007 (just before the financial crisis and Great Recession), average income after transfers and taxes quadrupled for the top 1 percent of the distribution. The increases were much smaller for the middle 60 percent and bottom 20 percent of the distribution." Stone, *supra* note [13]. The real median household income since 1984 has grown by only 22% while the top 1%'s income has grown by over 180%. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, NBER Working Paper tbl. 2 (Oct. 2014), https://www.nber.org/papers/w20625.pdf. And workers' current average hourly wage—$22.65—has not seen any material improvement since the mid-1970s. Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, Pew Research Center (Aug. 7, 2018), https:// www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barelybudged-for-decades/ ("After adjusting for inflation, however, today's average hourly wage has just about the same purchasing power it did in 1978, following a long slide in the 1980s and early 1990s and bumpy, inconsistent growth since then. In fact, in real terms, average hourly earnings peaked more than 45 years ago: The $4.03-an-hour rate recorded in January 1973 had the same purchasing power that $23.68 would today.")

[22] Americans increasingly view the economy as favoring the wealthy. Despite recent modest wage growth and an expanding economy before the COVID-19-induced recession, 70% of Americans still believed that the economic

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The resulting anxiety led, in part, to a 2016 election in which several of the states hardest hit by this change favored the one general election candidate who spoke directly about economic insecurity, Donald J. Trump.[23] In the EU, nativist arguments of the kind President Trump made also became prevalent, as some blamed the growing inequality on immigrants and sought to shut down borders. Most notably, BREXIT symbolized this concern.[24]

Within the realm of corporate governance itself, less nativist voices began to call for reforms that were grounded in the intuition that a material source of the change in gainsharing was the substantial increase in the power of stockholders over public companies[25] and the substantial decrease in the power of worker voices.[26] Historically, unions served as a "countervailing power"

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system unfairly favors the powerful. Ruth Igielnik, *70% of Americans Say U.S. Economic System Unfairly Favors the Powerful* (Pew Research Center, Jan. 9, 2020), https://www.pewresearch.org/fact-tank/2020/01/09/70-of-americans-say-u-s-economic-system-unfairly-favors-the-powerful/.

President Trump's victory was due, in part, to victories in Michigan, Ohio and Wisconsin, three states that have the greatest amount of factory jobs at risk due to the increasing pressures of globalization to outsource. *See* John W. Schoen, *Factory Slowdown Hits These States Hardest* (CNBC, Jan. 28, 2016), https://www.cnbc.com/2016/01/28/factory-slowdown-hits-these-states-hardest.html; *see also* Robert Griffin & Ruy Teixeira, *The Story of Trump's Appeal: A Portrait of Trump Voters*, 8 (2017) ("Among general election voters, Trump supporters were twice as likely as Clinton supporters to have said their personal finances were getting worse (52 to 26 percent) and four times as likely to have said the economy was getting worse (59 to 15 percent). And on both of these questions, 40 percent of Obama to Trump switchers thought things were getting worse."); Adam Tooze, *Shockwave*, 42 London Rev. Books (Apr. 16, 2020), https://www.lrb.co.uk/the-paper/v42/n08/adam-tooze/shockwave ("The mini-recession in US manufacturing that hit industrial regions like Michigan and Wisconsin was an underappreciated factor in setting the stage for Trump's surprise victory in 2016.").

[24] Heather Stewart, *UK Politics Becoming Mired in 'Culture Wars,' Study Suggests*, The Guardian (Dec. 7, 2016), https://www.theguardian.com/politics/2016/dec/07/study-finds-ukpolitics-mired-culture-wars-brexit-donald-trump ("60% of people who said the[y] were 'just getting by' [financially] voted to leave the EU, as did 70% of those who said they were 'finding it quite or very difficult'"); May Bulman, Brexit: *People Voted to Leave EU Because They Feared Immigration, Major Survey Finds*, The Independent (June 28, 2017), https://www.independent.co.uk/news/uk/home-news/brexit-latest-news-leave-eu-immigration-main-reason-european-union-survey-a7811651.html ("Nearly three-quarters (73 per cent) of those who are worried about immigration voted Leave, compared with 36 per cent of those who did not identify this as a concern.").

[25] In this new stockholder-centric governance world, activist investors were a major force in pushing for corporate strategies likely to involve layoffs and other efforts to reduce compensation expenses for the benefit of stockholders. Diane Del Guercio & Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism*, 52 J. Fin. Econ. 293 (1999) (finding that firms targeted by activists are more likely to conduct layoffs); Alon Brav, Wei Jiang & Hyunseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes* (NBER Working Paper, Oct. 2011), https://www.nber.org/papers/w17517.pdf (finding that after an activist intervenes in a stock, there is a "decline in work hours and stagnation in wages post-intervention").

[26] During this era, there has been a sharp decline in unionization, especially in the United States. *See* footnote [●] (collecting data on the decline in union density). As one response to this decline in labor influence, there have been increasing calls for more worker leverage within the context of the corporation itself. *See, e.g.*, Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 Seattle U. L. Rev. 697 (2019) (calling on states to adopt corporate laws that allow, or mandate, workers have a role on a company's board of directors); Susan R. Holmberg, *Workers on Corporate Boards? Germany's Had Them for Decades* (N.Y. Times, Jan.

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against corporate power, and ensured that workers shared in economic prosperity.[27] Private sector unionization declines coincided with decreased gainsharing and growing inequality. In response, new strains of corporate governance reform emerged seeking a restoration of the framework that characterized the New Deal and European Social Democratic approaches to capitalism and, among other things,[28] seek to reform the power dynamic within the corporate polity itself to enhance worker-shareholder voice.[29]

6, 2019), https://www.nytimes.com/2019/01/06/opinion/warren-workers-boards.html ("These proposals [for co-determination] are part of a fundamental rethinking of whom corporations should serve, but they are not new. American companies were once run with the interests of people other than just shareholders — workers, customers, the public — in mind."); Lenore Palladino, *Worker Representation on U.S. Corporate Boards* (Working Paper, Nov. 7, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476669 (arguing that workers should have representation on corporate boards).

[27] *See generally* John Kenneth Galbraith, *American Capitalism* (1952).

[28] These advocates also typically call for labor law reform to restore the intended effectiveness of the NLRB, the fulfillment of Franklin Roosevelt's and others' vision that the international trading regime would include protections for labor and the environment, and a stronger regulatory regime to limit corporate externalities harming the environment, consumers, workers, and communities. *See* Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2 (2016) (making the case for sectoral bargaining); Hiba Hafiz, *Picketing in the New Economy*, 39 Cardozo L. Rev. 1845 (2018) (discussing improvements to the NRLB in light of the gig economy); Julius G. Getman, *The NRLB: What Went Wrong and Should We Try to Fix It*, 64 Emory L.J. 1495 (2015) (calling for changes to the NRLB to overturn a doctrine that gives employers the right to not only hire scabs but give them superior rights to striking workers); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. L. Rev. 656 (2010) (proposing changes to union election rules to allow for secret ballots cast at home or over the telephone and other types of reforms); Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken* (N.Y. Times, Feb. 19, 2020), https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html (showing how the existing labor law regime in the United States inadequately protects workers' right to choose a union and bargain); William E. Forbath & Brishen Rogers, *A New Type of Labor Law for a New Type of Worker* (N.Y. Times, Sept. 4, 2017), https://www.nytimes.com/2017/09/04/opinion/labor-laws-workers.html (arguing that an improved labor system in the United States "could ensure that organized workers can bargain with the companies that actually profit from their work by expanding the legal definition of employment to cover more categories of workers [including, for example, contract workers]").

[29] *See, e.g.*, Beth Baltzan, *A New Deal for this New Century: Restoring FDR's Vision for Global Trade* (Working Paper, Sept. 2019), https://www.law.nyu.edu/sites/default/files/Baltzan%20Beth%20-RESTORING%20FDRS%20VISION%20FOR%20GLOBAL%20TRADE.pdf (advocating for "a comprehensive set of rules governing global conditions of competition," including "enforceable labor standards, disciplines on foreign investors behavior," "a comprehensive set of rules against anticompetitive behavior" and "a regime to redress currency manipulation"); David H. Webber, *Wielding Labor's Capital: Updating ERISA & Preserving Collective Investment Structures to Amplify Worker-Shareholder Voice* (Working Paper, Sept. 2019), https://www.law.nyu.edu/sites/default/files/Webber--Wielding%20Labor%27s%20Capital%20%28002%29_0.pdf (arguing that ERISA and other retirement-related laws need to be updated to allow workers to pool their capital together to jointly exercise their voice in corporate governance); Suresh Naidu, *Worker Collective Action in the 21st Century Labor Market* (Working Paper, Sept. 2019), https://www.law.nyu.edu/sites/default/files/Naidu%20Suresh%20-%20Worker%20Collective%20Action%20in%20the%2021th%20Century%20Labor%20Market.pdf (showing the enormous positive effects of increased union density and proposing strategies to increase worker power); Tamara Belinfanti, *Citizen Capitalism – A Proposal for a New Way Forward* (Working Paper, Sept. 2019),

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Notable examples of this include two bills introduced in Congress, the Accountable Capitalism Act and the Reward Work Act, both of which call for the United States to embrace a form of co-determination and to require large business entities to allocate a percentage of the board to directors elected in some way by the workers.[30] In the United Kingdom, the new corporate governance code requires that public companies either have a director elected by the workforce, a director charged with advocating for the workforce, or a board committee with the responsibility to address the well-being of the company's employees.[31]

The heightened scrutiny of whether our capitalist system was working as well as it should for the many was also a major motivating force behind the Business Roundtable's ("BRT's") revised statement on corporate governance, which voiced a recognition that it was the responsibility of corporate leadership to treat all the corporation's stakeholders fairly. In particular, the new BRT guidance made plain that consideration of employee well-being and fair compensation was a central issue for corporate management:

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https://www.law.nyu.edu/sites/default/files/Belinfanti%20Tamara%20-%20Citizen%20Capitalism%20-%20A%20Proposal%20for%20a%20New%20Way%20Forward.pdf (aiming to address inequality by proposing a universal basic income). One of us has called for such reform for many years. *See* Leo E. Strine, *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for theEffective Regulation of Corporate Behaviour*, 58 U. Toronto L. J. 241 (2008); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interest of Managers and Labor in a More Rational System of Corporation Governance*, 33 J. Corp. L. 1 (2007); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673 (2005).

[30] Accountable Capitalism Act, S.3348 (115th Cong.), https://www.congress.gov/bill/115th-congress/senate-bill/3348; Reward Work Act, S.2605 (115th Cong.), https://www.congress.gov/bill/115th-congress/senate-bill/2605/text. Notably, these Acts are vague about what workers would vote and how votes would be allocated. In most EU nations with co-determination, only workers in the chartering nation get to vote. Court of Justice of the European Union, *According to Advocate General Saugmandsgaard Oe, The German Law on Employee Participation is Compatible with EU Law* (May 4, 2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170043en.pdf ("[T]he German law on employee participation . . . provid[es] that only employees of the group employed in Germany may elect the members of the supervisory board representing the employees and stand for election."); *Deutschland AG Rethinks Workers' Role in Management* (The Economist, Feb. 1, 2020), https://www.economist.com/business/2020/02/01/deutschland-ag-rethinks-workers-role-in-management ("[C]o-determination ignores German multinationals' foreign workers, whose interests may differ from domestic ones."). Other notable bills include the Workforce Investment Disclosure Act of 2020, which would require the SEC to issue rules mandating publicly traded companies to disclose information about the compensation of their workforce, including workforce compensation. H.R.5930 (116th Cong.), https://www.congress.gov/bill/116th-congress/house-bill/5930/text?r=2&s=1.

[31] The UK Corporate Governance Code (July 2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf ("For engagement with the workforce, one or a combination of the following methods should be used: [1] a director appointed from the workforce; [2] a formal workforce advisory panel; [or 3] a designated non-executive director.").

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> We commit to . . . [i]nvesting in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.[32]

This focus on fair gainsharing has only made top management compensation an even more controversial subject.[33] After decades where institutional investors pushed relentlessly for senior executives to be paid in forms of compensation that placed a predominant priority on pumping up the stock price, and succeeded in having those executives profoundly change the gainsharing split between workers and stockholders in the stockholders' favor, institutional investors are now recognizing that concern for all stakeholders, including employees, must be central to any corporation that is going to generate sustainable wealth and play a positive role in society.[34]

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[32] *Statement on Corporate Purpose* (Bus. Roundtable, Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2020/03/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf ("We commit to . . . [i]nvesting in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.").

[33] The BRT's statement focuses on compensating workers "fairly." We employ the word gainsharing to focus on worker pay and prosperity not just in the absolute sense of being fair, but also being fair relative to the economic prosperity generated by the corporation and how that wealth is shared amongst its constituencies. . All workers deserve fair pay, but they also deserve to share fairly in the spoils of economic prosperity relative to the other members of the corporate team, such as top management and the company' stockholders.

[34] *See* Andrew Ross Sorkin, *World's Biggest Investor Tells C.E.O.s Purpose Is the 'Animating Force' for Profits* (N.Y. Times, Jan. 17, 2019), https://www.nytimes.com/2019/01/17/business/dealbook/blackrock-larry-fink-letter.html (highlighting that Larry Fink, the CEO of BlackRock, told CEOs that "it was crucial that businesses also made 'a positive contribution to society'"); Bill McNabb, *The Purpose Debate: Former Vanguard CEO Weighs in on 'Purpose' & ESG* (Boards & Directors), https://www.directorsandboards.com/articles/singlepurpose-debate-former-vanguard-ceo-weighs-%E2%80%98purpose%E2%80%99-esg (former Vanguard CEO acknowledging that he "always said that in business, if you do the right thing, you win. A purpose provides a company with a 'true north' – a way to ensure any decision made serves a company's collective goal. Often, a company's core principles align with an effort to serve a greater good. For example, at Vanguard, that purpose was, and remains, putting people over profits by taking a stand for investors, treating them fairly, and giving them the best chance for investment success."). Of course, institutional investors are unlikely to admit that their own policies have been the largest driving force behind the gigantic jump in CEO compensation, but it was in fact institutional investors, and their academic allies, who pushed for the idea of paying CEOs in less certain forms of compensation, especially stock options with asymmetric risk and that are not aligned with the interests of regular stockholders or company workers, and making plain that the way to get rich was to focus on stock price, stock price, stock price. Jay C. Hartzell & Laura T. Starks, *Institutional Investors and Executive Compensation*, 58 J. Fin. 2351 (2003) (finding "that institutional ownership concentration is positively related to pay-for-performance sensitivity of executive compensation and negatively related to the level of compensation, even after controlling for firm size"); Fernandes, Ferreira & Murphy, *supra* note [20] (showing that higher institutional ownership by U.S. institutional investors is associated with both higher pay and increased use of equity based compensation for CEOs of both U.S. and non-U.S. firms). Notably, the period of the post-war era in which stockholders were less influential was one in which CEOs and top managers were paid far less, were much more aligned with the rest of the workforce, and where CEO pay was not a salient political issue because there was no plausible basis for concern. And institutional investors are not alone in this critique. As Professor David Webber

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Whether because of a belated recognition that they hold the capital of American workers who need a capitalist system that creates good jobs at good wages if they are to build wealth, the fact that these worker-investors need corporations to focus on sustainable, long-term wealth creation to provide a sound basis for their retirements,[35] or because institutional investors are feeling political pressure themselves, mainstream mutual funds are beginning to speak up about the social responsibility of corporations — so-called EESG.

There is also a societal concern about an important issue. The living wage movement is putting pressure on corporations not only to pay their own lowest-wage workers more fairly, but

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has noted, the pension plans of unionized workers have also contributed to a corporate governance system that is far more responsive to stockholders needs than the needs of its other constituents. *See generally* David Webber, *The Other Janus and the Future of Labor's Capital* 72 Vand. L. Rev. 2087 (2019); David Webber, *The Use and Abuse of Labor's Capital*, 89 NYU L. Rev. 2106 (2014).

[35] During the last three decades, the percentage of Americans who have come to rely on the stock market's performance for their retirement has rapidly increased as the percentage of American's enrolled in pension (or defined benefit) plans has declined substantially. Monique Morrissey, *The State of American Retirement* (Econ. Pol'y Inst., Mar. 3, 2016), https://www.epi.org/publication/retirement-in-america/#chart1; *see also generally* William A. Birdthistle, *Empire of the Fund* (Oxford 2016). Because "[c]ompensation is the largest source of income for all but the highest income groups, accounting for roughly two-third of total [expanded cash income]," American workers' wealth and ability to put money into 401(k) plans for retirement comes from their access to continued employment. Joseph Rosenberg, *Measuring Income for Distributional Analysis*, Tax Pol'y Ctr. 4–5 (2013), https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/412871-Measuring-Income-for-Distributional-Analysis.PDF. After wage income, for all but the riches Americans, government transfer payments account for the rest of their income. *Id.* ("Transfer payments are an important income source for the bottom quintiles, but provide smaller shares of income for higher income groups. Business and investment income represent less than 10 percent of ECI for taxpayers in the bottom 80 percent of the income distribution, but more than 50 percent of income for taxpayers in the top 1 percent. Retirement income remains fairly constant as a share of income throughout most of the income distribution, accounting for slightly less than 10 percent of [expanded cash income] for taxpayers between the 20th and 95th percentiles."). Therefore, wage increases are much more important to them than stock returns. But these American worker-investors are, by federal policy, effectively required to turn over a part of their salary to institutional investors to hold until the worker-investors hit age 59. Anne Tucker, Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United, 61 Case W. Res. L. Rev. 497, 537 (2011) ("Stock ownership is no longer a voluntary activity . . . . The rapid rise in stock ownership has been fueled by the proliferation of defined-contribution retirement plans provided by employers."); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in A More Rational System of Corporate Governance*, 33 J. Corp. L. 1, 4 (2007) ("[M]ost ordinary Americans have little choice but to invest in the market. They are in essence 'forced capitalists,' even though they continue to depend for their economic security on their ability to sell their labor and to have access to quality jobs.") It is these institutional investors, not the worker-investors, who determine how the capital of these investors is deployed and its voting power wielded. Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 Yale L.J. 1476, 1485 (2015) (noting that "[t]he most common type of investment options in 401(k) plans are mutual funds" and that "[a] typical 401(k) menu provides around fourteen investment options," most of which are mutual funds). Unlike defined benefit plans, which guarantee workers a stable source of income through retirement, the modern trend towards defined contribution plans (that is 401(k) plans) means that workers ability to retire—and have their savings grow—depends on stock market gains (and having a well-paying job that allows them to save for retirement).

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to insist that company contractors do the same.[36] High-profile situations in which top corporate management engaged in sexual harassment or discrimination have led to increased calls for corporations to operate workplaces where employees do not face unwelcome conduct and that are tolerant of diversity in beliefs and sexuality.[37] Recognition that we have far from overcome our history of racial discrimination has led to renewed focus on inclusion.[38]

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[36] Chauna Brocht, *The Forgotten Workforce* (Econ. Pol'y Inst., Nov. 2000), https://www.epi.org/files/page/-/old/briefingpapers/livingwage/livwage.pdf (calling attention to the fact that more than one in 10 federal contract workers earns less than a living wage); Jonathan Cowan & Jim Kessler, *A Smarter Minimum Wage* (N.Y. Times, Nov. 17, 2017), https://www.nytimes.com/2017/11/17/opinion/a-smarter-minimum-wage.html (calling for a living wage that adjusts based on where people reside); California Assembly Bill 5 (2020) (requiring companies such as Uber, Lyft, DoorDash and others to reclassify independent contractors as employees and provide them with benefits and wage protections that employees receive); Fair Wages for New Yorkers Act (June 28, 2012) (requiring companies that receive over $1 million from New York City to pay their employees a living wage); Original Living Wage Act, H.R.122 (116th Cong), https://www.congress.gov/bill/116th-congress/house-bill/122/all-info (amending the Fair Labor Standards Act to calculate minimum wage based on the federal poverty threshold for a family of four); Protecting Independent Contractors from Discrimination Act of 2019, H.R.4235 (116th Cong.), https://www.congress.gov/bill/116th-congress/house-bill/4235/all-info (amending Title VII, the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Americans with Disabilities Act, among other laws, to provide that independent contractors shall be treated as employees under those laws).

[37] *See, e.g.*, Thomas Ivey, Leif King & Sonia Nijjar, *The California Board Diversity Requirement* (Harv. L. Sch. F. Corp. Gov., Oct. 16, 2018), https://corpgov.law.harvard.edu/2018/10/16/the-california-board-diversity-requirement/ (noting that California is the first state to mandate that publicly held corporations headquartered in California include female directors on their boards); Anna Windemuth, Note, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 Yale L.J. 488 (2019) (documenting the rise of representations in M&A contracts related to sexual harassment); David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo* N.Y.L.J. (Sept. 2018) (highlighting that the "pension fund giant CalPERS revised its corporate governance principles, adding a new policy emphasizing the board's role 'in setting a high-performance corporate culture,' and urging every public company board to 'develop and disclose its efforts towards establishing effective corporate culture, including its anti-harassment policy.' The new policy supports disclosure of all settlements, including sexual harassment settlements, involving an executive or member of the board. CalPERS also added language to its policy on human capital management practices to specifically emphasize the importance of preventing 'harassment of any kind, including sexual harassment.'"); *see also generally* James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. Rev. 901 (2011); Jill E. Fisch & Steven Davidoff Solomon, Centros, *California's "Women on Boards" Statute and the Scope of Regulatory Competition.* Eurp. Bus. Org. L. Rev. (Forthcoming), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3077&context=faculty_scholarship; Yaron Nili & Darren Rosenblum, *Board Diversity by Term Limits?* 71 Ala. L. Rev. 211 (2019).

[38] *See, e.g.*, *Comptroller Stringer, NYC Pension Funds Launch National Boardroom Accountability Project Campaign – Version 2.0* (Sept. 8, 2017) (announcing that NYC pension funds were "calling on the boards of 151 U.S. companies to disclose the race and gender of their directors"); Amelia Tan, *Inclusion and Diversity* (BlackRock), https://www.blackrock.com/uk/individual/insights/blog/investing-in-inclusion-diversity?switchLocale=y&siteEntryPassthrough=true (making the case that diversity and inclusion affect the companies' long-term performance); Cheryl L. Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 Loyola U. Chi. L.J. 611 (2018) (arguing that "[b]usiness leaders can design more effective diversity programs and ethical and compliant corporate cultures that promote rather than suppress racial equity if they understand the impact that continuing societal discrimination has on corporate cultures"); Mike Chen, George Mussalli & Yosef Zweibach, *Decoding Quant ESG* (Harv. L. Sch. F. Corp. Gov., Nov. 10, 2018), https://corpgov.law.harvard.edu/2018/11/10/decoding-quant-esg/ (including racial equality as part of the "S" in ESG).

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And a business reality has come to the fore. For many businesses in the newer tech-driven economy, the primary kind of capital relevant to their profitability is human capital.[39] Business leaders are beginning to realize that the costly cycle of replacing workers with new workers in a dynamic market is wasteful, and that, with appropriate investments, American workers — who have never been more educated, productive, or capable of learning new skills — can transition to the new roles the company needs to stay competitive if the company provides them with the relevant training to make the transformation.[40] And of course, the American people are smart enough to recognize that if productivity gains are not keeping track with the past for good reasons — the difference in gains for society between the next-generation iPhone and the current one is not as seismic as when computers became functional, cars replaced horses, and dishwasher, refrigerators, and washer/dryers became ubiquitous[41] — then there is no reason that the top managers with the most control over production techniques should be rewarded with huge increases while other workers are not.

The human and economic crisis caused by the COVID-19 pandemic is likely to make issues related to the fair treatment and economic security of American workers even more salient. Within days of public health required shutdowns, huge public companies that had benefited from a substantial tax cut and 10 years of economic recovery laid off workers because they did not have

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[39] *See* Alan Krueger, *Human Capital in the 21st Century* (Milken Inst. Rev., Jan. 20, 2015), https://www.milkenreview.org/articles/human-capital-in-the-21st-century ("In modern economies, the returns to human capital account for the lion's share of national income, and investment in human capital drives economic growth."); Jay Clayton, *Remarks to the Economic Club of New York* (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09 ("[I]ntangible assets, and in particular human capital, often are a significant driver of long-term value in today's global economy.").

[40] *See* Eco. Pol'y Inst., *the Productivity—Pay Gap* (July 2019), https://www.epi.org/productivity-pay-gap/ (showing that from 1979 to 2018, American worker productivity grew by 69.6%, whereas compensation rose by only 11.6%, compared to the period of 1948 to 1979 when productivity grew by 108.1% and wages grew commensurately at 93.2%); Pew Research Center, *Overall Educational Attainment* (Nov. 2012), https://www.pewsocialtrends.org/2012/11/05/section-1-overall-educational-attainment/ (showing that Americans are more educated than ever, with 57% of Americans over 25 having some college compared to only 22% in 1971); Austan Goolsbee, Glenn Hubbard & Amy Ganz, *A Policy Agenda to Develop Human Capital for the Modern Economy* (Aspen Inst., Feb. 4, 2019), https://www.aspeninstitute.org/longform/expanding-economic-opportunity-for-more-americans/a-policy-agenda-to-develop-human-capital-for-the-modern-economy/ (proposing, for example, using community colleges as opportunities for companies to provide their workforce with mid-career training opportunities); Joseph B. Fuller, et al., *Your Workforce Is More Adaptable Than You Think*, Harv. Bus. Rev. (May/June 2019) (arguing that workforces are ready to adapt to the changing economic and technologic climate if corporations provide the appropriate culture of learning and support).

[41] *See generally* Robert J. Gordon, *The Rise and Fall of American Growth* (Princeton 2016).

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reserves to weather even a short period without revenues.[42] That many of these companies had used the benefits they received from the tax cuts to engage in large stock buybacks and otherwise deliver returns to stockholders, but could not protect their workers, was not lost on the public or policy makers.[43] The unexpected human and economic emergency caused by the COVID-19 pandemic will only increase societal concern about the fair pay and safety of workers, especially because the workers who were expected to continue to work during the shutdown and expose themselves to a heightened risk of exposure tended to be at the low end of the wage scale.[44] And the pandemic has only underscored the continuing racial inequality in our nation, with black people being much more likely to be an essential worker and much more likely to make lower than typical wages.[45]

For all these reasons, it seems likely that corporate boards will be required in the coming decade to dedicate more time to considering how their companies treat their entire workforce, how inclusive their workforce is, the appropriate incentive systems that should exist not just for top management, but the whole employee complement, and the appropriate gainsharing that should exist among the company's employees, stockholders, and top management.[46] Situating this

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[42] *See, e.g.*, Ben Casselman, Sapna Maheshwari & David Yaffe-Bellany, *Layoffs Are Just Starting, and the Forecasts Are Bleak* (N.Y. Times, Mar. 17, 2020), https://www.nytimes.com/2020/03/17/business/economy/coronavirus-layoffs.html ("Marriott International, the hotel operator, said Tuesday that it would begin furloughing tens of thousands of employees worldwide.").

[43] *See* William Lazonick, *CEOs Gorged on Buybacks for Years. Now They Want Bailouts* (Barron's, Mar. 26, 2020), https://www.barrons.com/articles/ceos-gorged-on-buybacks-for-years-now-they-want-bailouts-51585258543. The recently enacted CARES Act places strict limits on companies receiving funds, including limiting dividends and buybacks and requiring the receipt to remain neutral in union organizing efforts. Coronavirus Aid, Relief, and Economic Security Act, H.R.748 (116th Cong), https://www.congress.gov/bill/116th-congress/house-bill/748/text?q=%7B%22search%22%3A%5B%22hr748%22%5D%7D&r=1&s=2#HC4E177B8A9324DF4A4EC6D3F0E678441.

[44] Susan Lund et al., *Lives and Livelihoods: Assessing the Near-Term Impact of COVID-19 on US Workers* (McKinsey, Apr. 2020) (finding that 86% of vulnerable jobs — that is jobs that could be lost, cut, or furloughed because of the COVID-19 pandemic — paid less than $40,000 per year).

[45] *See* Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality* (Econ. Pol'y Inst. June 1, 2020), https://www.epi.org/publication/black-workers-covid/ (documenting how the pandemic has disproportionally affected Black Americans); David Gelles, *Corporate American 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 (observing that "many of the same companies expressing solidarity have contributed to systemic inequality, targeted the black community with unhealthy products and services, and failed to hire, promote and fairly compensate black men and women").

[46] Of course, just because boards will be pushed to consider workers does not foreclose increased governmental regulation to protect workers, increases to the social safety net and increases to minimum wages. Indeed, one of us has called for increased regulation to protect workers' ability to unionize and increase wages. *See* Leo E. Strine, Jr.,

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responsibility, and the corresponding concerns regarding HR issues like diversity and employment law compliance, will require careful thought if it is not to contribute to pressures to proliferate another board committee and to expand board size.

In the American context, it also seems more likely that the demand for more worker voice and leverage within the corporate polity itself will manifest itself in a call for board committee reform and enhanced mandates than in a statute giving workers the right to elect directors. And for business leaders who do not embrace co-determination and wish to avoid it, effective action is the best way to show that a more fundamental alteration of the corporate power structure is not required.

II. One Part of an Effective and Efficient Answer: A reconceived compensation committee with a broader, more comprehensive mandate.

To address the increased demand that boards give more focus to how the company treats it workforce in an efficient and effective way, the most sensible answer is for the mandated board committee that is required to address the related area of top management compensation — the compensation committee — to expand its perspective and become a committee focused on the company's workforce as a whole.[47] We hesitate to call for this reconception of the compensation committee to be deemed a "human capital" committee for two reasons. First, we have always balked at referring to human beings as capital, because that seems reductive and demeaning. Second, it is critical to the best interests of workforces that boards of directors and top management be directed to consider more directly the adequacy and fairness of the pay received by the company's overall workforce. For that reason, and without denying others the chance to come up with a better name, we will hew to the traditional compensation committee label and explain why an appropriately expanded set of duties for this key board committee would make sense.

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 (Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924. This Essay, however, is just focused on what boards can do to promote greater equality within their workforce.

[47] Both NYSE and NASDAQ rules require public company boards to have, effectively, an independent compensation committee. *See* NYSE Listed Company Manual Section 303A.05*;* Nasdaq Listing Rule 5605(d)(2).

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Reconceptualizing the compensation committee starts with the committee and the whole board understanding how the company's gainsharing among stockholders, top management, and the overall workforce has changed over time, and establishing metrics to track the workforce's share of gains in productivity and profitability going forward, with a firm historical baseline in mind.[48] That baseline should also include historical data regarding the entire economy and relevant industries during the last half century, so the company can make decisions with an awareness of the full context. It is difficult to engage in fair gainsharing if you are blind to the facts about it. The reconceived compensation committee should consider what balance is fair and will best align the interests of all stakeholders in sustainable wealth creation, and develop compensation plans for the board that implement that goal. Those plans should, of course, recognize that stockholders have a right to expect the company to deliver them a solid, long-term return, and seek to encourage employees to work hard to achieve that objective, realizing that no constituency has a deeper incentive to secure the sustainable profitability of the company than its workers. This alignment should take into account the need for workers to primarily share in gains through increases in their pay, but could involve using corporate stock to match employee contributions to 401(k) programs and other supplemental means that increase employee ownership. But at bottom, what is required is that the reconceived compensation committee understand how the company shares gains among top management, workers, and stockholders, and oversees the implementation of compensation policies that reflect the value determination the committee, and the board as a whole, have made about that fundamental issue. In this respect, the requirement under Section 953(b) of the Dodd-Frank Act that public companies disclose the CEO-to-median worker pay ratio was a step in the right direction,[49] but more detailed and nuanced

[48] For instance, several metrics in the academic literature measure the sensitivity of top management's compensation relative to stock price and the company's value. *See* Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. Pol. Econ. 225, 226 (1990) (discussing the dollar-on-dollar metric, which measures how much a $1,000 increase in firm value increases executive compensation); Brian J. Hall & Jeffrey B. Liebman, *Are CEOs Really Paid Like Bureaucrats?*, 113 Q.J. Econ. 653, 671-72 (1998) (discussing the equity returns proxy, which measures the change in the executive's stock and stock options for every 1% increase in firm value). Similar metrics, appropriately tailored to the size, complexity, and composition of the company's workforce could likewise be developed on a basis that is relevant to specific companies in specific industries.

[49] *See* Pay Ratio Disclosure, 80 Fed. Reg. 50,104 (Aug. 18, 2015) (adding the CEO-to-median worker pay disclosure requirements to existing executive compensation disclosure requirements); *see also* Leo E. Strine, Jr. Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance, 33 J. Corp. L. 1, 13-14 (2007) (advocating for "[a]dditional disclosure requirements" such as "comparing [CEO] pay in present and historical terms to the median pay provided to the corporation's workers").

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information will be required to fully understand the existing gainsharing between the companies workers, stockholders, and executives.[50]

This information base and value judgment should be of huge merit when it comes to top management pay itself. Put bluntly, boards (and institutional investors) will be more likely to constrain top management pay in sensible ways when they are able to situate that pay in the broader context of how the company pays its overall workforce and rewards it for increases in productivity and profitability, or requires it to sacrifice when times are hard. If, for example, the company's workforce is getting no raise, does it really make sense to give top management an increase for "managing through tough times"? And if the company is doing well after a period of employee sacrifice, are their raises keeping up with gains for stockholders and the CEO? Does the company have a goal of paying its CEO and top management at or above the 75th percentile on the industry average? If so, does this goal extend to all company management? To all company employees? Or just to top management? If the latter, why?

If the board has a better sense of how the entire workforce is compensated, and the importance of the workforce to the company's plan for selling products and services, the board is also better positioned to understand what will have the most important effect on productivity. Is it increases to top executive compensation? Or increases that motivate a much greater number of company employees? An additional $5 million to a CEO is five thousand one thousand-dollar bonuses or sustainable increases for the many. What use of funds is more likely to help the company be sustainably profitable?

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[50] An excellent article explains how the implementation of this mandate has been less helpful than it could have been.Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 Boston C. L. Rev. 1123, 1156-61 (2019). In their articles. Professors Bank and Georgiev argue that the failure of the federal government to provide guidance on how companies should make this diclosure has undermined its utility and comparability, because companies have been given the discretion to use a wide variety of different approaches. By contrast, the authors note that the UK has adopted a more promising approach, which "requires firms to relate CEO pay to the pay of not one but three different employees—the median employee, the 25th percentile employee, and the 75th percentile employee, and to report three pay ratios. In addition, the UK rule defines three consistent methodologies for calculating the ratio and requires firms to identify which methodology they have followed. The UK rule also calls for narrative disclosure on 'whether the company believes that [the CEO-to-median worker pay ratio] is consistent with the company's general employee pay, reward and progression policies and, if so, why'. This approach can be expected to result in disclosures that have higher informational integrity." Steven A. Bank & George S. Georgiev, *The Growing Global Appeal of CEO Pay Ratios and Lessons from the US Experience* (Oxford Business Law Blog, February 27, 2019), https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/growing-global-appeal-ceo-pay-ratios-and-lessons-us-experience.

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This broader focus will result in directors who have a better grasp on how human talent matters for the company's business strategy and operations. Perhaps it is just the magic four or five at the top who really have a bottom line impact, or perhaps, and much more likely, the overall workforce's productivity is more vital to the company's profitability, and that providing all the company's workers with quality pay and the opportunity for continuous training, employment, and advancement makes good business sense.[51] And, of course, it is not illegitimate for the board to use its discretion over business affairs to reward employees when there are funds that allow doing so that the corporation's long-term value and success is better assured due to a resultingly more loyal and dedicated workforce. But without taking a bigger picture view when doing so, boards have seemed to use this discretion primarily to drive ever-increasing levels of top executive pay and create an ever-widening chasm between the C-Suite and the rest of the workforce.

There are other functional reasons why a broader mandate for the compensation committee makes sense. A core area of legal compliance involves the workforce. Legal regimes require that workers be accorded a minimum wage, federally mandated health benefits, safe working conditions, overtime for extra hours, and other protections. Refreshingly, concern about corporate social responsibility has grown to embrace workers, and organizations evaluating corporate EESG performance are including dimensions relating to the company's treatment of its workforce.[52] To address these integrally related tasks effectively and efficiently, it makes sense to vest responsibility for them in a committee with an existing mandate in the compensation area, and that should therefore be more expert and familiar with employment-related issues, and that should have an ongoing reporting relationship to key company officers in the HR space.

By this means, it is more feasible to identify directors with skills relevant to doing a good job in the area of managing the company's workforce, and to create a company-wide plan

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[51] Timothy R. Hinkin & J. Bruce Tracey, *The Cost of Turnover* (Cornell Hotel & Restaurant Admin. Q., 2000), https://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?referer=http://scholar.google.com/&httpsredir=1&article=1446&context=articles (finding that companies that reducing turnover leads to increased profitability).

[52] *See, e.g.*, S&P Global, *What is the "S" in ESG*?, https://www.spglobal.com/en/research-insights/articles/what-is-the-s-in-esg (noting that "[s]ocial factors to consider in sustainable investing include a company's strengths and weaknesses in dealing with social trends, *labor*, and politics") (emphasis added); BlackRock, *ESG Integration*, https://www.blackrock.com/institutions/en-us/solutions/sustainable-investing/esg-integration ("Social (S) [i]ncludes labour issues and product liability, risks such as data security, and stakeholder opposition."); Vanguard, *ESG Investing: Where Your Money Can Reflect What Matters to You*, https://investor.vanguard.com/investing/esg/ ("Social [includes] [r]elationships with employees, suppliers, clients & communities.").

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culminating in a board that is best designed to meet the standards the company sets for itself. This allocation of responsibility will also spread the work of the board more evenly and avoid having other committees of the board, notably the audit committee, bear too much weight, and minimize the risk that non-financial risks in the HR area receive too little attention.

Similarly, to the extent that society has begun to recognize that companies have an ethical and moral responsibility to not just their own direct employees, but to those of the contractors that it regularly uses, the compliance and EESG functions in that area also belong in a reconceived compensation committee. A company cannot hold itself out as paying a living wage if it outsources the daily maintenance of its facilities to contractors who do not pay such a wage. A company cannot say it provides a safe and non-hostile working environment if it outsources production to contractors who operate dangerous facilities, and that subject their line workers to harassment from their bosses. When a company sets standards for itself, that should include those whom its contractors regularly employ, and the adherence to those standards should be tracked in a coherent way by company management and the board.

III. Practical Steps Toward an Effective and Efficient Reconceived Compensation Committee

For all these reasons, the efficiency and quality case for a reconceived compensation committee is compelling. But, you might ask, how might one consider the mission of a reconceived compensation committee, one that has a mandate not just to set top management pay, but to ensure that the company has good and fair practices to compensate its workforce top to bottom? What is feasible if we recognize that it is unlikely to be realistic or efficient for a board committee to enmesh itself in the details of company pay and promotion practices throughout all its operations?

As with any complex human endeavor, issues of balance emerge that require the exercise of judgment. For a board committee to be effective, it must have a solid grasp of the essentials, but avoid becoming ensnarled in the particulars and confusing its role with that of management. Candidly, however, the area of employee compensation seems to be one where there is little risk of the board going overboard to get into details and where there is strong evidence that boards currently know too little about their company's pay and overall workforce and labor strategies.

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Because we are so far from perfection, it is likely best for the reconceived committee to focus on getting a good lens on the big picture, in terms of how the company pays and treats its workforce. The committee could ask for company management and advisors to identify, both as a company-wide matter, and as to major business lines, data like the mean and median pay and benefits package of:

- the top 10 employees;
- the top 10%;
- the top 25% and each quartile thereafter; and
- the bottom 10%.[53]

This information should be placed in the context of the information the compensation committee has gathered regarding gainsharing with stockholders and growth in company productivity and profitability, allowing for a more thoughtful determination of what compensation plan is not only fairest, but most likely to provide the most overall impetus for sustainable profitability.

Similar data, adjusted for the realities of the contracting situation, should be developed for the workers of company contractors who regularly work for the company. For example, if company facilities are regularly cleaned and maintained by the employees of a contractor, their pay and benefits should be identified, known and situated within the company's pay and benefit structure. Likewise if the company's customer call center is staffed by contract employees. And over time, the reconceived compensation committee should go further and understand the treatment of workers throughout its supply chain, including workers employed by key suppliers. A company cannot be a good corporate citizen by treating only its employees fairly, while allowing workers crucial to its production and supply chain to receive substandard wages and to work in unsafe conditions. Corresponding to this data should be basic information of the type and number

[53] For an incisive essay on how more information about what workers throughout the company are paid could improve the well-being of workers generally and promote fairer corporate practices, *see* Benjamin Harris, *What If Companies Were Required To Tell Workers What Their Colleagues Earned?* Harv. Bus. Rev. (Mar. 14, 2018), https://hbr.org/2018/03/what-if-companies-were-required-to-tell-workers-what-their-colleagues-earn.

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of the key employee in each category in terms of their function, educational level and skill set, and relevance to the business line in which they are employed. The same type of information would be identified for contracted workers in the company's supply chain.

This information would provide the compensation committee with an appropriate level of detail about the company's deployment of its workforce and how it relates to management's business strategy. Such information will also assist the board with answering pertinent and relevant questions, such as: What are the employee functions most critical to the company's ongoing vitality? And how is the company treating the workers essential to its operations? As the reconceived compensation committee functions over time, one can imagine the discussions broadening to include big picture discussions of turnover rates, the extent to which the company retrains existing workers to master new skills or engages in replace and rehire strategies, and other inquiries that could help ensure that the company has a well-qualified, productive, and fairly compensated workforce.

To promote coherence and work toward common objectives, the board should also understand the basic process management engages for setting employee compensation and the extent to which the company in fact bargains with workers or gives them any leverage. If there are metrics that management uses in this process, the board should understand them. These can then be compared and lined up against the board's own approach in setting top management pay.

For example, has the board discussed the company's philosophy toward its employees' right to form a union? Has the board determined, as part of its EESG goal-setting process, whether it is consistent with a fair regard for its employees to be anti-union? And if it determines that due regard for its workers should mean facilitating their free right to choose a union and not impeding it, has the company implemented procedures and policies to ensure that management is faithful to that approach?[54]

[54] In 1952, an important person in our economy said, "Labor Unions are woven into our economic pattern of American life, and collective bargaining is a part of our democratic process. I say recognize this fact not only with our lips but with our hearts." Was it a labor leader? No, it was Erik Johnston, who was the President of the U.S. Chamber of Commerce. Frank Levy & Peter Temin, *Inequality and Institutions in the 20th Century* *21 (NBER Working Paper 13106, May 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984330. One would find it difficult to identify a similar public statement in recent decades emanating from a major CEO or leader of a business organization in the United States.

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By contrast, if the company decides to adopt an anti-union approach, it should reconcile that with whatever EESG commitments it is making to workers, and be prepared to reconcile them to the workforce and the public. But it should also reconcile that approach with other company practices. For example, if the company opposes unionization, does it nonetheless pay for a negotiator-lawyer for the CEO to bargain against the company for higher pay? Why does the board consider it okay to oppose worker voice but accord the CEO a highly paid negotiator? And why is the company against unionization and is that consistent with its overall commitment to good EESG practices?

Inquiries of this kind will assure a top to bottom coherence and yield valuable insights into the company's business strategy and its actual adherence to rhetoric about its regard for its workforce. By way of further example, the reconceived compensation committee should ask this specific question: Is the board using metrics and factors as to top management pay and not applying the same metrics to company employees? As was adverted to previously, there has long been an obsession with paying CEOs at or above the 75th percentile of the industry,[55] an obsession that creates a ratchet effect. If metrics like these apply at the top, why do they not sensibly apply throughout the workforce? Perhaps they don't sensibly apply at all to any class of employees, but the point is that by examining the incentive system in a more comprehensive way, the board should be able to make better decisions itself, and as important, encourage the managers, who will necessarily make the bulk of decisions, to themselves think more deeply and incisively about how they are treating and motivating their workforce.

Of most salience to society, by means of this kind, the board will be better situated to analyze the basic question of gainsharing among employees, top management, and stockholders

[55] John Bizjak, Michael Lemmon & Thanh Nguyen, *Are All CEOs Above Average? An Empirical Analysis of Compensation Peer Groups and Pay Designs* 100 J. Fin. Econ. 538 (2011) (reporting that, "[a]ccording to RiskMetrics Group 99.5% of firms in the S&P 1500 targeted pay at our above the median of their peer group"). *See also* Steven Clifford, *How Companies Actually Decide What to Pay CEOs* (The Atlantic, June 14, 2017), https://www.theatlantic.com/business/archive/2017/06/how-companies-decide-ceo-pay/530127/ ("And every board I have ever sat on or researched benchmarked itself at the 50th, 75th, or 90th percentile, therefore targeting CEO pay at similarly exalted levels. Benchmarking below the 50th percentile says, *We are a lousy company and don't even aspire to be better*. So in this sense all CEOs are above average: To be benchmarked at or above the 50th percentile, they need not do anything other than report to a board that considers its own company exceptional."); Ron A. Laschever, *Keeping up with the CEO Jones: Benchmarking and Executive Compensation*, 93 J. Econ. Behavior & Org. 78 (2013) (finding "that companies prefer to choose as their benchmark peers with similar firm characteristics, for CEO compensation, this effect is countered by a preference for firms with higher-than-own CEO compensation").

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we view as fundamental and to make more enlightened decisions. When the board sets top management pay, it will not be able to avoid examining whether the top management's pay makes sense in light of how the company is paying other employees, whether incremental additions to pay will have the most effect if concentrated at the top or spread more widely, and whether the workforce as a whole, and not just top management, is being fairly compensated when the company's productivity and profitability improves.

Furthermore, the compensation committee's thinking about worker pay and fair gainsharing should also include considering whether the company is fairly treating historically disadvantaged groups, such as people of color and women. Companies have a legal obligation to pay all workers performing equivalent work equally, but there is evidence that Black workers and women still get short-changed in the workplace.[56] For that reason, there is an increased recognition that to operate a fair and inclusive workplace, a company must ensure that workers are not underpaid or denied promotional and training opportunities on the basis of their race or gender. To do so, the compensation committee should work with its human resources professionals to develop and refine metrics about pay that allow it to assess whether the company is fairly and equally paying all workers.

And as the compensation grows more comfortable in its role, it should involve the board in determining other important business issues relevant to both productivity and fairness to the workforce. By way of example, many companies have terminated existing employees only to bring on board new employees to handle new functions as the business have evolved. This process has great cost in terms of dollars but also human costs. An enlightened, businesslike approach would involve the company in considering whether it is more fair and more profitable to invest in its workers' skill development on an ongoing basis and to make its first option in transitioning the

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[56] *The Gender Wage Gap: 2018* (Inst. Women's Pol'y Research, Mar. 2019), https://iwpr.org/wp-content/uploads/2019/03/C478_Gender-Wage-Gap-in-2018.pdf ("In 2018, the ratio of women's to men's median weekly full-time earnings was 81.1 percent . . . . Hispanic women's median weekly earnings in 2018 were $617 per week of full-time work, only 61.6 percent of White men's median weekly earnings, but 85.7 percent of the median weekly earnings of Hispanic men (because Hispanic men also have low earnings). The median weekly earnings of Black women were $654, only 65.3 percent of White men's earnings, but 89.0 percent of Black men's median weekly earnings."); *Racial, Gender Wage Gap Persist in U.S. Despite Some Progress* (Pew Research Center, July 1, 2016), https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/ ("Among full- and part-time workers in the U.S., blacks in 2015 earned just 75% as much as whites in median hourly earnings and women earned 83% as much as men."); *see also generally* Caroline Criado Perez, *Invisible Women: Data Bias in a World Designed for Men,* (Abrams 2019).

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business, a decision to re-train its current workers, who have reservoirs of company-specific knowledge and loyalty, to handle the new tasks that an evolution in corporate direction require.

A disciplined focus on EESG demands that the board determine and disclose its policy for fair gainsharing so that workers receive their due share of increases in productivity and profitability. Likewise, that focus requires ensuring that employees are treated with respect and dignity, and have a workplace that is welcoming and inclusive. To further aid in this thought process, the compensation committee should be sure to do what it does in other areas. Boards are often keenly aware of ISS policies about corporate governance, credit ratings agency ratings, and analyst reports about stock price.[57] But there are also surveys that bear on how companies treat their employees.[58] There are surveys that rank the best and worst employers.[59] The labor movement produces reports and comments on employers who do not respect the legal rights of workers to organize.[60] Organizations that promote diversity and inclusion, and the oppose discrimination and sexual harassment, engage in efforts to monitor corporate behavior.[61] The compensation committee should require management to brief it on the reputation the company has in these areas, and to provide it with copies of relevant reports and commentary. And, as important, the committee should be briefed on objective data within the company's control regarding key issues relevant to the well-being and productivity of its workforce and the effectiveness of the company's practices.[62] Information of this kind should all help management understand that tone

[57] If institutional investors and their proxy advisors seek to be fair stewards for the worker-investors whose long term capital they control and encourage a more equitable level of gainsharing going forward, they should encourage boards to measure and disclose the metrics discussed in this Essay, such as the pay of workers at various percentiles within the organization.

[58] *See, e.g.*, Yusuf George, *Top 10 Companies That Treat Employees Best* (Just Capital, Nov. 19, 2019) (reporting the result of an annual survey on just business behavior, including treatment of workers).

[59] *See, e.g.*, Grant Suneson & Samuel Stebbins, *What Are The Worst Companies to Work For? New Report Analyzes Employee Reviews* (USA Today, June 15, 2018), https://www.usatoday.com/story/money/business/2018/06/15/worst-companies-to-work-for-employee-reviews/35812171/.

[60] *See, e.g.*, Dama Athreya, *Worst Companies for Union Organizing Highlighted for International Human Rights Day* (International Labor Rights Forum, Dec. 10, 2009), https://laborrights.org/releases/worst-companies-union-organizing-highlighted-international-human-rights-day.

[61] *See, e.g.*, NAACP, *Opportunity & Diversity Report Card*, https://www.naacp.org/wp-content/uploads/2011/09/OpportunityDiversityReportCard.pdf.

[62] Information of this kind might address (a) workforce satisfaction levels (obtained through surveys of workers); (b) employee turnover and retention; (c) percentage of managerial jobs filled by promotion from within versus hiring from the outside; (d) annual training budget and priorities; (e) ability to maintain current workforce at existing pay

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at the top on fair treatment of employees, openness or hostility to unions, and the atmosphere in the workplace in terms of diversity and freedom from harassment emanates from a board-level decision, and that management must adhere to that decision in its treatment of employees at all levels of the organization.[63] To aid in comprehending this data, particularly in the early stages of its broadened role, the reconceived compensation committee may turn on external experts—similar to what they currently do in the executive compensation realm—to help collect, aggregate, and analyze the data, in concert with the company's internal human resource professionals.

This point is important in light of another reality. There is an increasing recognition that top management pay should depend in part on the company's adherence to high standards of integrity, responsibility to other stakeholders, and society.[64] Thus, the broader information base suggested will give the board more than just a good read on the employee issues in EESG, but a better basis to decide on the incentive systems that exist within the organization.[65] Incentives can either bring out the better angels of our nature, or our devilish side.

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levels in the event of a recession; workforce safety (including aggregate data on injuries, reports of harassment, claims of unfair treatment); and (f) racial and gender diversity within the workforce.

[63] Current SEC regulation focuses almost exclusively on disclosures about executive compensation. *See generally* Regulation S-K, 17 C.F.R. § 229.10 et al. Although outside the scope of this Essay, mandatory disclosure around workforce-related issues would itself encourage directors to consider questions about gainsharing between employees and stockholders. *Cf.* Robert J. Jackson, Jr., *Private Equity and Executive Compensation*, 60 UCLA L. Rev. 638, 667-68 (2013) (observing that regulation the focuses on one type of disclosure causes boards to concentrate on those items at the expense of perspectives on the problem). One of us has called for such disclosure in the past. 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* (Working Paper, Oct. 11, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924. And a bill pending in Congress would mandate disclosure of this kind. Workforce Investment Disclosure Act of 2020, H.R.5930 (116th Cong.), https://www.congress.gov/bill/116th-congress/house-bill/5930/committees?r=2&s=1.

[64] Matteo Tonello, *CEO and Executive Compensation Practices: 2019 Edition* (Harv. L. Sch. F. Corp. Gov., Nov. 22, 2019), https://corpgov.law.harvard.edu/2019/11/22/ceo-and-executive-compensation-practices-2019-edition/ (observing that "[s]ome companies are embedding non-financial metrics relating to environmental, social, and governance (ESG) factors in their executive incentive plans" but also noting that "ESG-related performance goals currently remain far from common in senior executives' compensation packages."). For example, Verizon has announced that executive annual bonuses will, in part, be tied to Verizon achieving a workforce that is almost 60% diverse. Verizon Communications Inc., Schedule 14A (Mar. 23, 2020), https://www.sec.gov/Archives/edgar/data/732712/000119312520082431/d781927ddef14a.htm (reporting that 5% of executives' short-term bonus awards are related to achieving diversity and environmental targets).

[65] *See, e.g.*, Sarah E. Needleman, *Airbnb to Tie Employee Bonuses to Guest Safety* (Wall St. J., Jan. 17, 2020), https://www.wsj.com/articles/airbnb-to-tie-employee-bonuses-to-guest-safety-11579281028.

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If the balance of top management compensation is tilted toward the stock price and risk taking, that can undercut the company's commitment to good EESG practices. And the same can be true if, for example, the company's salesforce and its managers have to pump up sales to get good salaries, as that creates incentives for selling customers things they do not need.[66] Likewise, there are also key executives within the company whose very reason for being is to constrain overreaching and to assure legal compliance and a high ethical culture.[67] Does the company's compensation system appropriately recognize the importance of these executives? Or does it hold them down in pay because they do not run "profit centers"?[68]

As to other HR-related issues of compliance and EESG, the reconceived compensation committee should do an exercise to create an alignment matrix that identifies overlapping areas of legal compliance and EESG concern and to use that matrix to develop a plan for adopting company principles and goals, and corresponding standards and metrics that track whether the company is living up to its objectives. For example, to the extent that the company has set EESG objectives for worker health and safety, its plan for tracking attainment of those objectives should be integrated with its plan for ensuring compliance with legal requirements designed for that same purpose, such as OSHA. The same is true of company goals for a diverse workforce, who labor in workplaces free from harassment and discrimination. These goals should be lined up with the company's plan for tracking compliance with key statutes, like Title VII, Title IX, and corresponding state statutes and laws of other nations where the company operates.

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In this way, the reconceived compensation committee will become the subset of the board most deeply engaged in all aspects of the company's relationship with its workforce, and in efficiently ensuring that the company has a sensible plan for retaining and motivating human talent to achieve its business objectives. The compensation committee then also must have the clear

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[66] *See, e.g.*, Julia Lurie, *"I Was Directed to Market OxyContin": A Purdue Pharma Rep Tells How He Was Paid to Push Opioids* (Mother Jones, May 4, 2018), https://www.motherjones.com/politics/2018/05/i-was-directed-to-market-oxycontin-a-purdue-pharma-rep-tells-how-he-was-paid-to-push-opioids/.

[67] Think the General Counsel, the Chief Risk Officer or the Chief Compliance Officer.

[68] And does it hold similar line employees in these functions down in pay because they are not in profits centers, thereby potentially undermining the quality of the function itself?

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mandate to make sure whatever obligations society imposes on the company to be a responsible employer, and whatever higher obligations of fairness and concern the company itself undertakes, are taken seriously and infuse the company's business approach toward all those human beings whose labor is critical to the company's success. Perhaps most of all, to the extent that corporate America wants capitalism to work for the many and to avoid more intrusive government action, a reconceived compensation committee can position companies to restore fair gainsharing, so that the people whose sweat and ingenuity is the largest contributor the creation of wealth through the corporate form again receive their fair share. Nothing would do more to prove that the recent Business Roundtable was not just high-minded talk, but a reflection of a genuine commitment by business leaders to do the right thing.

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