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Women, Rule-Breaking, and The Triple Bind

June Carbone, Naomi Cahn** & Nancy Levit****

ABSTRACT

Two growing literatures critique Hobbesian corporate cultures. Management analyses document the way high-stakes/zero-sum bonus systems undermine, rather than enhance, productivity as they subvert teamwork, valorize self-interested behavior, and weaken ethical standards. This literature treats negative effects of such systems, including lawless and unethical behavior, as the unintended consequences of efforts to shake up complacent institutions or replace an insular old guard with an ambitious and meritocratic new workforce. A second, darker literature terms such Hobbesian environments “masculinities contests” that select for those executives who best exemplify masculine traits such as a single-minded focus on professional success, physical strength, and the willingness to engage in no-holds-barred competition. This literature treats the rule-breaking environment that results as an incidental byproduct of the way that such cultures valorize masculine traits. Drawing on insights from criminology, psychology, and feminist theory, this Article suggests another possibility: that certain management cultures intentionally design the competitions to facilitate breaking the rules with impunity.

In a Hobbesian world, where some profit handsomely from defying convention, zero-sum competitions play a role that extends beyond valorizing alpha males. They select for leaders who will lie, shortchange their families, and break the law to get results—and do so without explicit orders that might subject upper management to accountability for the practices. In such a world, women fall behind not necessarily because of misogyny, though such environments often breed it. Instead, they lose because of a triple bind. First, women cannot prevail in such competitions unless they can outmaneuver men, credibly display greater devotion to the job, or more brazenly flout the laws. Second, they are disproportionately disliked and punished for displaying the self-centered, rule-breaking behavior of men. Third, women become less likely to seek positions because they correctly perceive that they could not thrive and are more likely than men to decide they do not wish to do so on such terms, reinforcing the male-identified character of such environments. Where these companies’ business models depend not just on the ability to upend traditional

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practices, but to break the law, the companies cannot address gender disparities without addressing the business model itself. The Article concludes that gender inequality is intrinsically intertwined with the evisceration of the rule of law in corporate America.

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INTRODUCTION

Zoe Cruz was one of the most powerful and highly paid women on Wall Street.¹ Many people thought she was being groomed to be the next head of Morgan Stanley, one of the most prominent New York investment banking firms.² By 2005, she had backed the winning side in a management shake-up at the company and was earning 30 million dollars a year.³ She was named copresident of Morgan Stanley

¹ See Landon Thomas, Jr., *Top Ranks of Women on Wall Street Are Shrinking*, N.Y. TIMES (Dec. 1, 2007), <https://www.nytimes.com/2007/12/01/business/01wall.html> [<https://perma.cc/HK6F-R9XM>]; Dan Wilchins, *Zoe Cruz Steps Down as Morgan Stanley Co-President*, REUTERS (Nov. 29, 2007, 7:28 PM), <https://www.reuters.com/article/us-morganstanley-management/zoe-cruz-steps-down-as-morgan-stanley-co-president-idUSN2924721520071130> [<https://perma.cc/E7U3-643P>].

² See Thomas, Jr., *supra* note 1.

³ See Joe Hagan, *Only the Men Survive: The Crash of Zoe Cruz*, N.Y. MAG. (Apr. 27,

and oversaw institutional securities along with wealth management; her nickname was “Cruz Missile.”⁴ When the financial crisis hit, however, Cruz’s unit, which had invested heavily in subprime mortgages and loans to private equity funds, faced billions in losses.⁵ Cruz had done no worse than many others on Wall Street, and some thought she had seen the crisis coming earlier than many others.⁶ Nonetheless, when the Morgan Stanley board wanted someone to take the fall for the bank’s losses, she became expendable.⁷ According to a friend of her mentor, John Mack, his thoughts on Cruz were, “It’s you or me. And guess what? I choose you.”⁸ One day after the board approved his decision to terminate her, Mack called her into his office and said, “I’ve lost confidence in you. I want you to resign.”⁹ *New York Magazine* titled its account of her termination “Only the Men Survive.”¹⁰ Downturns are a particularly treacherous time for female executives, particularly executives who take the same kind of risks as men.¹¹

In 2008, Sallie Krawcheck was perhaps even better known than Zoe Cruz. She had risen to become Chief Financial Officer and then head of wealth management at Citigroup (“Citi”).¹² Citi stood to lose even more than Morgan Stanley as a result of the crisis, and it brought in a new Chief Executive Officer (“CEO”), Vikram Pandit from Morgan Stanley.¹³ Pandit forced Krawcheck out in large part because she

2008), <http://nymag.com/news/business/46476/> [<https://perma.cc/852V-3PUA>]; Wilchins, *supra* note 1.

4 Michele Chandler, *Zoe Cruz: Being Shoved out of Your Comfort Zone Has Advantages*, STAN. GRADUATE SCH. OF BUS. (May 15, 2010), <https://www.gsb.stanford.edu/insights/zoe-cruz-being-shoved-out-of-your-comfort-zone-has-advantages> [<https://perma.cc/ZL6H-JGZU>].

5 *See id.*

6 *See* Hagan, *supra* note 3; *see also* Nathaniel Popper, *Morgan Stanley in \$2.6 Billion Settlement over Crisis in Mortgages*, N.Y. TIMES: DEALBOOK (Feb. 25, 2015), <http://www.nytimes.com/2015/02/26/business/dealbook/morgan-stanley-in-2-6-billion-mortgage-settlement.html> [<https://perma.cc/HZY8-KF2T>] (suggesting that Morgan Stanley’s exposure was less than other large banks).

7 *See* Thomas, Jr., *supra* note 1.

8 Hagan, *supra* note 3.

9 *Id.*

10 *Id.*

11 *See* Kyle Stock, *Ranks of Women on Wall Street Thin*, WALL STREET J. (Sept. 20, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704858304575498071732136704> [<https://perma.cc/CJ68-MSNR>] (finding women bore the brunt of the downturn after the financial crisis).

12 Geraldine Fabrikant, *When Citi Lost Sallie*, N.Y. TIMES (Nov. 15, 2008), <https://www.nytimes.com/2008/11/16/business/16sallie.html> [<https://perma.cc/QZC8-U8S7>].

13 David Ellis, *Citi Splits Job, Names Pandit CEO*, CNN MONEY (Dec. 11, 2007, 5:54 PM) <https://money.cnn.com/2007/12/11/news/companies/citigroup/index.htm> [<https://perma.cc/9XR7-3BJR>].

wanted to do more to protect customers in her unit who lost money due to Citi's actions during the mortgage bubble.¹⁴ After this, Krawcheck seemed to land on her feet. A year later, Bank of America ("BofA") hired her to run its wealth management unit.¹⁵ In the middle of the financial crisis, she turned it into one of BofA's profit centers.¹⁶ BofA, however, wanted more. It encouraged Krawcheck's brokers to engage in cross-selling, persuading their clients to buy "BofA banking products like debit cards, online bill pay and credit cards."¹⁷ When asked about the practice by the press, Krawcheck responded that she didn't even like the term "cross-selling" because it sounds like something "we do to rather than for you."¹⁸ BofA clearly did not like her response. She was soon gone after two years on the job.¹⁹

In 2016, Krawcheck mused that she just did not share "the guy's club worldview that prevails in finance," and the differences might well be "rooted in gender," with women "more focused on relationships and long-term outcomes than men."²⁰ She speculated that greater diversity in executive ranks might strengthen finance.²¹ Empirical studies suggest there may be some truth to her armchair observations; corporate boards that include more women appear to produce better results, and funds run by women outperform those run by men.²²

Cruz's and Krawcheck's stories might seem very different from each other. Cruz went along with the boys despite reservations and was fired in part because of it.²³ Krawcheck expressed her reserva-

¹⁴ See Fabrikant, *supra* note 12.

¹⁵ See Halah Touryalai, *Sallie Krawcheck Out at Bank of America Merrill Lynch*, FORBES (Sept. 6, 2011, 6:24 PM), <https://www.forbes.com/sites/halahtouryalai/2011/09/06/sallie-krawcheck-out-at-bank-of-america-merrill-lynch/#cd7babe7d807> [<https://perma.cc/W7B6-CZD6>].

¹⁶ See Brian Choi, *Banktown: Assessing Blame for the Near-Collapse of Charlotte's Biggest Banks*, 15 N.C. BANKING INST. 423, 451 (2011) (observing that "Merrill's profits are propping up Bank of America, which is awash in credit card and other losses").

¹⁷ Touryalai, *supra* note 15.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jeff J. Roberts, *I Was Fired for Being a Woman, Sallie Krawcheck Tells Crowd*, FORTUNE (Oct. 8, 2016), <http://fortune.com/2016/10/08/sallie-krawcheck-fired/> [<https://perma.cc/M3D8-UAHM>].

²¹ See *id.*

²² See, e.g., Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 860–61, 864 (2011) (discussing the difference between the "business case" and "rhetorical case" for diversity on corporate boards); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 160 (2019).

²³ See Hagan, *supra* note 3. After Cruz left, Morgan Stanley settled claims of wrongdoing stemming from the mortgage crisis for \$3.2 billion, and while Cruz was not necessarily directly

tions, fought for her customers, and was fired twice in large part because she did so.²⁴ Yet, what brings the subjects of these stories together is their gender. In a world where some men make enormous sums by breaking the rules and getting away with it, most women are at a disadvantage if they do not play on the same terms as men and are perhaps at a greater disadvantage if they do.

This Article explores the gendered implications of corporate cultures built on the idea of “breaking the rules” and expecting to get away with it. The first Part considers the shift in corporate business models that have come with the exaltation of shareholder interests over the interests of other stakeholders.²⁵ This Part shows first, how the change in focus from long-term to short-term corporate objectives and the related increase in high-stakes bonus systems rewards “winning” more than rule compliance, and second, how a growing critique in management literature documents the ways such practices produce unethical and often counterproductive behavior. This Part then compares these management critiques with what gender theorists call “masculinity contests”²⁶ and the ways that such contests valorize masculine traits like competition, risk-taking, and win-at-all-cost mentalities. Finally, this Part argues that while both the management critiques and gender theories treat rule-breaking as a predictable, if not necessarily intentional, byproduct of masculinities contests, some corporate cultures make it central to their business models. These companies use intensely competitive bonus systems to produce insular “young boys’ clubs” that promote a culture of rule-breaking; that is, the management systems deliberately and instrumentally select for alpha males who will flout the laws that stand in the way of these otherwise profitable business models.

The second Part provides an in-depth examination of Wal-Mart’s managerial practices as an illustration of this system.²⁷ It analyzes the practices detailed in the nationwide class action brought against Wal-Mart alleging sex discrimination that the Supreme Court rejected in a

involved in this wrongdoing, she oversaw some of those who were. See Camila Domonoske, *Morgan Stanley Will Pay \$3.2 Billion for Contributing to Mortgage Crisis*, NPR (Feb. 11, 2016, 11:32 AM), <https://www.npr.org/sections/thetwo-way/2016/02/11/466399992/morgan-stanley-will-pay-3-2-billion-for-contributing-to-mortgage-crisis> [<https://perma.cc/BJZ9-6UE8>]; Hagan, *supra* note 3.

²⁴ Touryalai, *supra* note 15.

²⁵ See *infra* Part I.

²⁶ See, e.g., Jennifer L. Berdahl et al., *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 423 (2018).

²⁷ See *infra* Part II.

5-4 vote on procedural grounds in 2011.²⁸ As the Part shows, the same practices that discouraged women from moving up in Wal-Mart's managerial ranks also enabled Wal-Mart's widespread flouting of wage and hour laws, with Wal-Mart paying out more than one billion dollars in fines since 2000.²⁹ The dismantling of the regulations³⁰ that once constrained corporate misbehavior allows companies like Wal-Mart—itsself the world's largest retailer—to select for managers who will exploit workers for the benefit of management, use wage theft to increase their bonuses, and violate the law while insulating Wal-Mart's upper management from accountability. This Part shows why Wal-Mart's actions should be seen as a product of a uniform and intentional set of national practices that disadvantage women, even if disadvantaging women is not the primary purpose of these practices.³¹

The third Part returns to the financial sector and shows how Wall Street practices of enriching financiers at the expense of their custom-

²⁸ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

²⁹ PHILIP MATTERA, *GOOD JOBS FIRST, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS' WAGES 2* (2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report.pdf [<https://perma.cc/V6LS-KQQE>] (“Among the dozen most penalized corporations[] [is] Walmart[] with \$1.4 billion in total settlements.”). Wal-Mart has paid more than any other employer in resolving actions for wage theft, which involves violating minimum wage and overtime laws, miscounting work hours, and wrongfully taking employees' tips. Lauren Weber, *Banks Pay out Some of the Biggest Settlements in Wage Disputes*, WALL STREET J. (June 5, 2018, 5:00 AM), <https://www.wsj.com/articles/banks-pay-out-some-of-the-biggest-settlements-in-wage-disputes-1528189200> [<https://perma.cc/S9AF-L8VD>].

³⁰ William Black refers to this in the banking context as the “three des”: deregulation, desupervision, and de facto decriminalization. William K. Black, *Wallison and the Three “Des” — Deregulation, Desupervision, and De Facto Decriminalization*, NEW ECON. PERSP. (Feb. 6, 2011), <http://neweconomicperspectives.org/2011/02/wallison-and-three-des-deregulation.html> [<https://perma.cc/9PLL-X43F>]. In the Wal-Mart context, it refers to deunionization, the evisceration of effective enforcement of existing wages and hours laws, and the obstruction of legislative efforts to raise the minimum wage. See Laura Clawson, *This Week in the War on Workers: Walmart Loses \$54 Million Wage Theft Lawsuit*, DAILY KOS (Nov. 26, 2016), <https://www.dailykos.com/story/2016/11/26/1603451/-This-week-in-the-war-on-workers-Walmart-loses-54-million-wage-theft-lawsuit> [<https://perma.cc/B9WU-WWW4>]; Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051/> [<https://perma.cc/GE7U-YQQ9>]. As this article goes to press, there is some indication that Wal-Mart is attempting to raise pay to reduce employee turnover. See Bryan Pearson, *Wal-Mart's Employment Deployment and 6 Ways to Curb Retail Turnover*, FORBES (Jan. 24, 2017), <https://www.forbes.com/sites/bryanpearson/2017/01/24/wal-marts-employment-deployment-and-6-ways-to-curb-retail-turnover/#298d3edf1008> [<https://perma.cc/39SC-A548>].

³¹ See Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 471 (2018) (observing that because business practices that disadvantage women have multiple motives, they become harder to address through antidiscrimination law).

ers contributes to the continuing paucity of women in management.³² Wall Street has long been described as an old boys' culture that selects for testosterone-fueled traders who thrive on adrenaline highs produced by the daily efforts to buy low and sell high.³³ It also provides stark reminders of the importance of the rule of law, as the savings and loan crisis of the 1980s and the mortgage crisis of the 2000s both followed the ill-considered loosening of regulations imposing oversight and accountability on the financial sector.³⁴ This Part examines how much of modern finance generates some of the highest salaries in the modern economy through financial practices intended to fleece unwary customers. It also examines how the triple bind that disproportionately punishes both the women who engage in such practices and those who refuse to do so contributes to gender disparities on Wall Street.

The Article concludes that the practices that promote rule-breaking cultures also tend to exclude women and that the absence of diversity in today's corporate workplaces should trigger greater legal scrutiny for reasons that go beyond the impact on women and others disadvantaged by these cultures.³⁵

I. ENRON REVISITED: HOW YOUNG BOYS BREAK THE RULES

Two separate literatures assess the rule-breaking cultures that produced Cruz's and Krawcheck's dismissals. The first is an intensifying critique of internal corporate competitions and their results.³⁶

³² See *infra* Part III.

³³ See generally MAUREEN SHERRY, *OPENING BELLE* (2016).

³⁴ See, e.g., CLAIRE A. HILL & RICHARD W. PAINTER, *BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT* 78–79 (2015) (arguing that the elimination of the New York Stock Exchange rule requiring investment banks to be held in partnership form was a major factor in the mortgage crisis). See generally WILLIAM K. BLACK, *THE BEST WAY TO ROB A BANK IS TO OWN ONE* (1st ed. 2005) (explaining the role of deregulation in the savings and loan crisis and the importance of “reregulation” in ending it).

³⁵ See *infra* Part IV. In this Article, we focus specifically on women and gender in rule-breaking business cultures. In some cases, our analysis suggests that all outsider groups will be at a disadvantage, reducing racial as well as gender diversity. See, e.g., Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 *RUTGERS L.J.* 1, 37–38 (2003) (describing more politicized decisionmaking and in-group favoritism as results of employee ranking and inequitable salaries). In other cases, however, similar dynamics have the effect of punishing women generally and Asian, but not necessarily other, men for dominance displays because of the failure to conform to stereotypes. See, e.g., Berdahl et al., *supra* note 26, at 431–32. Because the dynamics underlying racial and gender diversity are somewhat different, this Article focuses on the impact of women with the recognition that some, but not all, of the dynamics we describe also apply to other forms of diversity.

³⁶ See generally Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Gov-*

While management scholars lauded the rise of pay-for-performance bonus cultures in the early years,³⁷ a growing dissent links such practices to greater risk-taking, less collaboration and cooperation, and more unethical—if not always outright illegal—conduct.³⁸

The second and more nascent literature, drawn from feminism and masculinities analysis, considers the gendered aspects of these developments in corporate culture and identifies them as “Masculinity Contest Cultures.”³⁹ This literature roots the nature of the practices in the construction of hierarchies that define men’s positions in response to one another and increase suspicion of outgroups, exacerbating gender and other biases.⁴⁰ The two critiques agree that these cultures produce a greater degree of rule-breaking than traditional management cultures, but they treat the rise of more ethically dubious behavior as an incidental byproduct of “win or die” competitions.

Based on these two literatures, we observe that when corporations normalize the narcissism that arises from masculinity contests, greater toleration of rule-breaking—and greater gender disparity—is a predictable consequence. Nonetheless, not all rule-breaking cultures are the same. Some, like Microsoft in the Steve Ballmer era, find that zero-sum corporate compensation systems in fact produce negative-sum results, while others, such as Wal-Mart, carefully nurture labor suppression as a core element of the firm’s distinctive business model.⁴¹

A. *The Celebration of Rule-Breaking*

The idea of “breaking the rules” and “getting away with it” requires explanation. This Article uses the term rule-breaking in two senses: (1) to describe intentional law-breaking, and (2) to refer to a mindset that dismisses or trivializes conventions like ethical precepts,

ernance, 37 J. CORP. L. 265 (2012) (discussing how short-termism has become pervasive in corporate cultures).

³⁷ “Pay-for-performance bonus cultures” tend to combine two separate elements. First, they link CEO pay to short-term changes in stock performance. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 351 (1976). Second, CEOs adopt competitive evaluation systems for executives and other managers that compare employees to each other. See June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 100203 (2017). Both contribute to the effect we describe and both systems have similar effects on motivation, but this Article focuses primarily on the internal bonus systems. See *infra* text accompanying notes 61–78.

³⁸ Dallas, *supra* note 36, at 268, 273, 316–17.

³⁹ See Berdahl et al., *supra* note 26, at 422.

⁴⁰ See *id.* at 427.

⁴¹ See *infra* notes 175–244 and accompanying text.

internal institutional controls, respect for customers, teamwork, and restraints on the use of devious or manipulative behavior to elevate an individual's stature. "Getting away with it" does not require that every rule breaker act with impunity. It simply requires that the rule breakers *believe* they can get away with it.⁴² It is true that the occasional white-collar criminal does go to jail; ask Enron CEO Jeff Skilling, who was released from prison in 2018.⁴³ The more important statistic, however, is the number of high fliers charged in the financial crisis: none among those most responsible, and just one if you consider a larger group.⁴⁴ Rule-breaking pays off when it produces large short-term gains and the odds of having to disgorge those gains are small.⁴⁵

The modern culture of rule-breaking is perhaps best understood in opposition to the more staid corporate culture of the managerial age, which emphasized lifetime employment and long-term corporate objectives.⁴⁶ Within these management cultures, the "organization man's" principal rewards came from the success of his company, which depended on the strength of the company's collective decision-making procedures and the individual's ability to fit into groups that penalized self-aggrandizing conduct.⁴⁷

In the 1960s, John Kenneth Galbraith argued that large corporations depended on principles of scientific management, which he

⁴² Donald Trump perhaps best exemplifies the mindset. *See, e.g.*, David Leonhardt, Opinion, *Trump Keeps Breaking the Rules*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/michael-cohen-trump.html> [<https://perma.cc/K368-CJMB>].

⁴³ Chris Morris, *Former Enron CEO Jeff Skilling Released from Prison*, FORTUNE (Aug. 31, 2018), <http://fortune.com/2018/08/31/enron-ceo-jeff-skilling-released-prison/> [<https://perma.cc/M323-8KN9>]. It is notable that Skilling actually served time.

⁴⁴ *See* Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), <https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html> [<https://perma.cc/SSLK-MVMQ>]. The New York Times Magazine described Kareem Serageldin as the one executive convicted for a crime associated with the financial crisis. *Id.* Serageldin was convicted for misstating the value of his company's securities to the tune of \$100 million during a period when his former employer revised its past financial statements to account for \$2.7 billion that should have been reported. He cannot be ranked among those most responsible for the crisis. *Id.*

⁴⁵ *See generally* George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit* (Nat'l Bureau of Econ. Research, Working Paper No. R1869, 1994), <https://ssrn.com/abstract=227162> [<https://perma.cc/W4CC-L5ST>].

⁴⁶ For a fuller explanation, see Carbone & Levit, *supra* note 37, at 975–81.

⁴⁷ Both factors in a company's success illustrate "bureaucratic" decisionmaking, which originally meant the rational ordering of decisionmaking within complex organizations in accordance with expertise, rather than personal relationships. *See* MAX WEBER, *ECONOMY AND SOCIETY* 956–63 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1922) (linking the rise of "bureaucracy" to increased power for those with expertise and making such expert-based decisionmaking more opaque).

lauded as the “technostructure.”⁴⁸ Corporate officers acted as company stewards who linked company objectives to technocratic norms that made the quality of their stewardship an indication of professional standing.⁴⁹ William Whyte’s 1950s classic *The Organization Man* described the same management style as “collectivist” and maintained that it produced risk-averse executives who enjoyed secure sinecures as long as they followed the rules and played it safe.⁵⁰ Both agreed that executive positions in that era tended to involve job security, selection of upper management from within the company’s ranks, celebration of professional expertise and collaboration, status tied to individual reputation rather than monetary incentives or reductionist measures, loyalty to organizations, and objectives linked to long-term institutional growth.⁵¹ Galbraith observed that business enterprise should “only be understood as an effort, wholly successful, to synthesize by organization a group personality far superior *for its purposes* to a natural person,”⁵² and that acting on self-interest was just not what “a good company man” did.⁵³ Whyte noted that company training programs during this time promoted “democratic values,” like the one at General Electric (“GE”) that taught a man “[t]o get ahead, he must [cooperate] with the others—but [cooperate] *better* than they do.”⁵⁴ In both accounts, the institution was more important than the individual and encouraging “teamwork” was paramount.⁵⁵ Individuals who bristled at the need for consultation or the refusal of the team to embrace ambitious, risky, or corner-cutting proposals often found themselves out of the game.⁵⁶

By the 1970s, however, this system was under increasing assault. Facing growing competition from abroad and “stagflation” triggered by the Arab oil embargo, American companies increasingly seemed

48 See JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 71 (1967).

49 See Harwell Wells, “Corporation Law Is Dead”: *Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 323–24 (2013) (explaining the influence of the stewardship ideal).

50 See WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* 3–4, 72–77 (1956).

51 Carbone & Levit, *supra* note 37, at 980; see also RICK WARTZMAN, *THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA* 312 (2017).

52 GALBRAITH, *supra* note 48, at 61.

53 *Id.* at 117.

54 Gary Sernovitz, *What “The Organization Man” Can Tell Us About Inequality Today*, *NEW YORKER* (Dec. 29, 2016), <https://www.newyorker.com/business/currency/what-the-organization-man-can-tell-us-about-inequality-today> [<https://perma.cc/EM3Q-LCZT>].

55 See GALBRAITH, *supra* note 48, at 130.

56 See NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, *SHAFTED* (forthcoming 2020).

complacent, bureaucratic, and uncompetitive in the global market.⁵⁷ Over the next 30 years, the “agency-cost”⁵⁸ revolution transformed management from an emphasis on steady growth and long-term objectives to more rapid innovation and the maximization of short-term increases in share prices.⁵⁹ To realign management incentives, these theorists advocated “pay-for-performance” approaches that would use bonus systems linking executive compensation to short-term measures.⁶⁰ Reliance on stock options increased and CEO compensation skyrocketed, aligning executive and shareholder interests much more closely and refocusing corporate attention on short-term boosts in earnings rather than longer term institutional objectives.⁶¹

Corresponding to the change in corporate objectives was a change in business models. With greater emphasis on the need to quickly increase profits, many companies sought ways to produce immediate gains with less concern for their long-term sustainability.⁶² And management, particularly new management, sought ways to transform what had been bureaucratic and recalcitrant institutions.⁶³ The result exchanged the risk-averse “organization man” for the win-at-any-cost, “me-first” corporate survivor.⁶⁴ Jack Welch, who oversaw GE for 20 years starting in the early 1980s, was the master of this new system. During the 18-year bull market that characterized most of Welch’s tenure, GE’s revenue grew 385% and its stock market value rose 4,000%,⁶⁵ while Welch’s income quadrupled. Welch attributed much of his success to a new management system. Dubbed “rank-and-yank,” the system instituted performance evaluations that ranked employees on a forced curve.⁶⁶ The bottom group (roughly 10% of the

57 See LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM*, at xxxvi (Gregory Elliott trans., 2004) (describing the relationship among global competition, innovation, and “lean” production principles that emphasize innovation).

58 See Jensen & Meckling, *supra* note 37, at 308.

59 See Dallas, *supra* note 36, at 268.

60 Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of “Pay for Performance”*, 39 J. CORP. L. 525, 533 (2014) (observing that between 1993 and 2014, the percentage of CEO compensation attributable to incentive pay increased from 35% to 85%).

61 See Dallas, *supra* note 36, at 320–21.

62 See Larry Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 9 (2002).

63 *Id.*

64 *Id.* (describing executives as the “hyper-motivated survivors of a highly competitive tournament” and as prevaricating, Machiavellian, and narcissistic).

65 Barry Ritzholtz, *Judging GE’s Jeff Immelt Versus Jack Welch*, BLOOMBERG (June 12, 2017, 12:45 PM), <https://www.bloomberg.com/view/articles/2017-06-12/judging-ge-s-jeff-immelt-versus-jack-welch> [<https://perma.cc/F4L8-K2PS>].

66 Jack Welch, “Rank-and-Yank”? *That’s Not How It’s Done*, WALL STREET J. (Nov. 14,

workforce) was informed that their performance was inadequate and they would be fired if it did not improve.⁶⁷ A top group (roughly 20%) received top bonuses and prospective promotions if they continued to excel.⁶⁸ This annual competitive pay, performance, and termination system was designed to shake up the company and reorient its priorities.⁶⁹ Welch emphasized that “[i]t’s about aligning performance with the organization’s mission and values. It’s about making sure that all employees know where they stand.”⁷⁰ It also made it easier to shed employees and often entire divisions—loyalty to long-term employees disappeared.⁷¹

Given GE’s success, Welch’s management system became widely adopted. At one point, more than half of publicly traded companies employed some version of the system.⁷² Since 2009, those numbers have declined as companies have moved away from rigidly ordered approaches, particularly those mandating termination of a fixed percentage of the workforce every year, but competitive ranking systems that compare employees to each other remain common.⁷³

The system has also been the subject of scathing reviews. The soul searching started with the Enron and World.com scandals that followed the dot.com bust in the early 2000s. Enron CEO Jeff Skilling fostered a corporate culture described as “survival of the fittest—or the nastiest.”⁷⁴ His version of rank-and-yank fired the bottom 20% of employees and lavishly rewarded others, including himself.⁷⁵ At one time, Enron was among the most admired companies in America,

2013), <https://www.wsj.com/articles/8216rankandyank8217-that8217s-not-how-it8217s-done-1384473281> [<https://perma.cc/JES2-F7MM>].

⁶⁷ *Id.*

⁶⁸ Alan Murray, *Should I Rank My Employees?*, WALL STREET J. GUIDES, <http://guides.wsj.com/management/recruiting-hiring-and-firing/should-i-rank-my-employees/> [<https://perma.cc/7Q99-AULE>].

⁶⁹ *Id.*

⁷⁰ Welch, *supra* note 66.

⁷¹ Murray, *supra* note 68.

⁷² *Id.*

⁷³ Max Nisen, *Why Stack Ranking Is a Terrible Way to Motivate Employees*, BUS. INSIDER (Nov. 15, 2013, 12:36 PM), <http://www.businessinsider.com/stack-ranking-employees-is-a-bad-idea-2013-11> [<https://perma.cc/4NRB-7HRL>] (observing that 49% of companies reported that they used “stack ranking systems” in 2009). Nisen states that by 2011, only 14% of companies reported using forced ranking systems, but that most employees are still rated or ranked within competitive systems. *Id.*

⁷⁴ *Jeffrey Skilling*, FORBES, <https://www.forbes.com/2002/03/19/jskilling.html#274e77a46843> [<https://perma.cc/Z7ZM-WLSD>].

⁷⁵ *Id.*; see also PETER C. FUSARO & ROSS M. MILLER, *WHAT WENT WRONG AT ENRON: EVERYONE’S GUIDE TO THE LARGEST BANKRUPTCY IN U.S. HISTORY* 51–52 (2002).

lauded for its innovation.⁷⁶ “Jeff Skilling was incredibly charismatic,” Sherrod Watkins, an Enron Vice President, observed. “You were certain he was just the brightest guy around, but in hindsight I really feel we were somewhat like cult followers.”⁷⁷ The combination of the appearance of success, produced by manipulating the firm’s complex structure and accounting reports, intense internal competition, and high-stakes bonuses made it easy for Skilling to impose his stamp on the company and persuade those under him to do his bidding, regardless of whether his “bidding” served company interests.⁷⁸

In 2001, Enron’s stock price, which had soared over the preceding years to more than \$80 per share, tanked following a series of revelations about its irregular accounting procedures.⁷⁹ Skilling left in August 2001, claiming he wanted to spend more time with his family.⁸⁰ After Enron’s complete collapse, Skilling was convicted of securities fraud and lying to auditors and sent to prison.⁸¹

In the autopsies that followed, management experts identified Enron’s evaluation system as a significant factor in its downfall.⁸² Their studies found that systems that use rankings to justify large disparities in compensation encourage greater emphasis on self-interest, higher levels of distrust that undermine teamwork, greater homogeneity in the selection of corporate management, less managerial accountability, and more politicized decisionmaking.⁸³ Although advocates like Welch and Skilling hailed the bonus systems as meritocratic, critics charge that they really produce a “young boys’ club” that protects insiders at the expense of outsiders.⁸⁴ More recent studies indicate

76 Nicholas Stein, *The World’s Most Admired Companies: How Do You Make the Most Admired List? Innovate, Innovate, Innovate. The Winners on This Year’s List, Compiled by the Hay Group Consultancy, Tell How They Do It*, FORBES (Oct. 2, 2002), http://archive.fortune.com/magazines/fortune/fortune_archive/2000/10/02/288448/index.htm [<https://perma.cc/99PT-BH73>].

77 Lesley Curwen, *The Corporate Conscience*, GUARDIAN (June 21, 2003, 5:11 PM), <https://www.theguardian.com/business/2003/jun/21/corporatefraud.enron> [<https://perma.cc/6VBV-CJK3>].

78 *Id.*

79 See Dan Ackerman, *Enron Trades Itself*, FORBES (Nov. 8, 2001, 8:47 AM), <https://www.forbes.com/2001/11/08/1108topenron.html#4f1ca4042833> [<https://perma.cc/7JHN-7SNA>].

80 See Jeffrey Skilling, *supra* note 74.

81 United States v. Skilling, Court Docket Number: H-04-025-SS, U.S. DEP’T OF JUSTICE (June 21, 2013), <https://www.justice.gov/criminal-vns/case/skillingjk> [<https://perma.cc/8L4C-3N7P>].

82 FUSARO & MILLER, *supra* note 75, at 52.

83 Dallas, *supra* note 35, at 37 (describing how Enron management used its bonus system to reorient company behavior in counterproductive ways).

84 Companies with such systems tend to recruit ambitious (and relatively young) new hires

that incentive pay generally, not just rank-and-yank systems that threaten dismissal, have been “linked with opportunistic, unethical, and even illegal executive behavior, including earning manipulations, accounting frauds, and excessive risk-taking.”⁸⁵

This behavior may be the point of such systems. These were not aberrations or untoward negative consequences, but an integral component of GE’s and Enron’s business models. Jack Welch, in justifying his management approach, thought of business as a competition to be won, and he “had, both morally and practically, to come first.”⁸⁶ Welch defied the conventions of his era by shutting down plants, selling off divisions, and reducing the GE workforce by 25% his first few years on the job.⁸⁷ He also broke the law *and* the rules of ethical business management. Accounting sleights of hand made it possible for Welch to beat earnings expectations, and after he left, GE paid a \$50 million penalty to the Securities and Exchange Commission (“SEC”) to settle accounting fraud charges from the Welch era.⁸⁸

Perhaps as tellingly, GE is struggling today in part because of Welch’s reliance on GE Capital. While this GE division generated a substantial share of GE’s earnings during the Welch era—and helped to manipulate the earnings reports that allowed Welch to consistently beat earnings expectations—it collapsed during the financial crisis and may have ultimately doomed GE’s survival.⁸⁹

Enron, of course, was much worse. With the deregulation of the energy market, it switched from producing pipelines to trading in en-

“who want [] to make a lot of money fast.” Dallas, *supra* note 35, at 50. The new employees, especially if they have limited experience elsewhere, more readily buy into shifts in corporate orientation directed from the top. *Id.* at 49.

⁸⁵ Stout, *supra* note 60, at 534.

⁸⁶ Richard Bernstein, *Books of the Times; Winning the Business Game with a Few Basic Principles*, N.Y. TIMES (Sept. 14, 2001), <http://www.nytimes.com/2001/09/14/books/books-of-the-times-winning-the-business-game-with-a-few-basic-principles.html> [<https://perma.cc/SS4G-PQAW>].

⁸⁷ *Id.*; James B. Stewart, *Did the Jack Welch Model Sow Seeds of G.E.’s Decline?*, N.Y. TIMES (June 15, 2017), https://www.nytimes.com/2017/06/15/business/ge-jack-welch-immelt.html?_r=0 [<https://perma.cc/8MGT-C4N2>]; Jack Welch, CNBC 25: REBELS, ICONS, AND LEADERS (Apr. 29, 2014), <https://www.cnbc.com/2014/04/29/25-jack-welch.html> [<https://perma.cc/ASZ8-SACT>].

⁸⁸ See Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges General Electric with Accounting Fraud (Aug. 4, 2009), <https://www.sec.gov/news/press/2009/2009-178.htm> [<https://perma.cc/2YWG-2ZFK>].

⁸⁹ See *id.*; Stewart, *supra* note 87. For a description of GE Capital’s involvement in the mortgage boom that resulted in a \$1.5 billion fine, see Jonathan Stempel, *GE’s WMC Mortgage Unit, Felled by Financial Crisis, Files Chapter 11 Bankruptcy*, REUTERS (Apr. 23, 2019, 11:04 AM), <https://www.reuters.com/article/us-ge-wmc-bankruptcy/ges-wmc-mortgage-unit-felled-by-financial-crisis-files-chapter-11-bankruptcy-idUSKCN1RZ1OI> [<https://perma.cc/T6F4-LK3H>].

ergy futures, with fraud becoming pervasive throughout much of the company's operations.⁹⁰ Enron's leaders expressed disdain for corporate oversight and financial regulatory rules, regarding them as obstacles that hindered innovation and creativity.⁹¹ This disdain extended not only to the law, but also to company rules and authority. In overseeing the company's transformation, CEO Jeff Skilling "set employees loose, encouraging them to push the edge of every rule, even without their supervisors' knowledge."⁹² Critics emphasize that Enron's uncomfortably competitive corporate ethos, which continually challenged (and threatened) workers, made it easier for employees to rationalize their unethical conduct as successful business practices.⁹³ While Enron generated more than its share of whistleblowers, its whistleblowing records demonstrate the impact of competitive evaluation systems. Reports of fraudulent activities dropped in the months just prior to the annual review process and then rose dramatically once the process was completed.⁹⁴ The fear of negative performance reviews not only discouraged complaints, it also made it easier to discredit the dissenters and reward those who went along with the program.⁹⁵

The rise of unethical behavior does not just occur in companies promoting outright fraud. It also affects the ethos of more traditional companies.⁹⁶ When Steve Ballmer succeeded Bill Gates as CEO of Microsoft, for example, he too adopted a forced ranking system in an effort to distinguish his management of the company from that of his predecessor.⁹⁷ As with Welch's experience at GE and Skilling's at Enron, the system did help Ballmer take charge of the company and refocus its efforts. After Microsoft abandoned the system in 2013,

⁹⁰ See John A. Byrne et al., *The Environment Was Ripe for Abuse*, BUS. WK., Feb. 25, 2002, at 118–19.

⁹¹ See *id.*

⁹² David Streitfeld & Lee Romney, *Enron's Run Tripped by Arrogance, Greed*, L.A. TIMES (Jan. 27, 2002), <https://www.latimes.com/archives/la-xpm-2002-jan-27-mn-25002-story.html> [<https://perma.cc/Y4NS-L897>].

⁹³ See FUSARO & MILLER, *supra* note 75, at 51–52.

⁹⁴ Lynn Brewer, *Is There a Little Bit of Enron in All of Us?*, 30 J. QUALITY & PARTICIPATION 26, 28 (2007).

⁹⁵ *Id.*

⁹⁶ Even after the financial crisis, 42% of 3,000 executives interviewed for a 2016 survey said that they "could justify unethical behavior to meet financial targets." Hui Chen & Eugene Soltes, *Why Compliance Programs Fail*, HARV. BUS. REV., Mar.-Apr. 2018, <https://hbr.org/2018/03/why-compliance-programs-fail> [<https://perma.cc/HZG8-TYPZ>].

⁹⁷ See Kurt Eichenwald, *Microsoft's Lost Decade*, VANITY FAIR (Aug. 2012), <http://www.vanityfair.com/news/business/2012/08/microsoft-lost-mojo-steve-ballmer> [<https://perma.cc/84CK-S9UD>].

however, *Vanity Fair* published an article on “Microsoft’s Lost Decade” that attributed much of Microsoft’s failure to remain competitive to its evaluation system.⁹⁸ A Microsoft engineer explained:

The behavior this [rank and yank] engenders, people do everything they can to stay out of the bottom bucket People responsible for features will openly sabotage other people’s efforts. One of the most valuable things I learned was to give the appearance of being courteous while withholding just enough information from colleagues to ensure they didn’t get ahead of me on the rankings.⁹⁹

As a result, potential market-changing innovations like e-book and smartphone technology “were killed, derailed, or delayed amid bickering and power plays.”¹⁰⁰ Management experts who systematically study such environments conclude that these workplaces encourage “unethical behavior, because some individuals are willing to pay to improve their rank by sabotaging others’ work or by increasing artificially their own relative performance.”¹⁰¹ Michael Jensen, the Harvard Business School professor who initially proposed pay-for-performance, has since recanted.¹⁰² In an article entitled *Paying People to Lie*, he observed that using targets like earnings in an organization’s performance measurement and compensation systems simply encourages employees to game those systems.¹⁰³

The more recent poster child for toxic management is Uber. It started with the goal of disrupting the taxi industry¹⁰⁴ It made little effort to comply with potentially applicable regulations and its “business model is predicated on lawbreaking”—giving it a competitive advantage over taxi companies that follow the rules.¹⁰⁵ Uber has been accused of everything from flouting local taxi regulations to using

⁹⁸ *Id.*

⁹⁹ *Id.* (internal quotations omitted).

¹⁰⁰ *Id.*

¹⁰¹ Gary Charness et al., *The Dark Side of Competition for Status*, 60 MGMT. SCI. 38, 41 (2014).

¹⁰² Compare Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It’s Not How Much You Pay, But How*, HARV. BUS. REV., May–June 1990, at 139–41, with Michael C. Jensen, *Paying People to Lie: The Truth About the Budgeting Process*, 9 EUR. FIN. MGMT. 379 (2003).

¹⁰³ See generally Jensen, *supra* note 102.

¹⁰⁴ See, e.g., Justin Bariso, *Why Does Uber Keep Breaking the Law? Because They’re Disrupting, of Course*, INC. (Dec. 19, 2016), <https://www.inc.com/justin-bariso/why-does-uber-keep-breaking-the-law-because-theyre-disrupting-of-course.html> [<https://perma.cc/J4JP-SU8K>].

¹⁰⁵ Benjamin Edelman, *Uber Can’t Be Fixed—It’s Time for Regulators to Shut It Down*, HARV. BUS. REV. (June 21, 2017), <https://hbr.org/2017/06/uber-cant-be-fixed-its-time-for-regulators-to-shut-it-down> [<https://perma.cc/64FC-FKB8>] (“Uber succeeded in making lawbreaking normal and routine by celebrating its subversion of the laws relating to taxi services.”).

burner phones and fake paperwork to disrupt competitors with cancelled rides.¹⁰⁶ These types of activities have made it the subject of numerous investigations in the United States and abroad,¹⁰⁷ yet at least to date, it has been more successful in bending the rules to its liking than regulators have been in calling it to account.¹⁰⁸ The company deliberately created a “Hobbesian environment . . . in which workers are sometimes pitted against one another and where a blind eye is turned to infractions from top performers.”¹⁰⁹ A whistleblower reported that every manager seemed to be “fighting their peers and attempting to undermine their direct supervisor so that they could have their direct supervisor’s job.”¹¹⁰ Managers even boasted about their exploits against one another, and the company seemed to encourage their infighting.¹¹¹ Top executives and top performers faced no consequences for their misdeeds, and sexual exploits became part of the company’s culture, representing rewards for success.¹¹² This

¹⁰⁶ See ADAM LASHINSKY, *WILD RIDE: INSIDE UBER’S QUEST FOR WORLD DOMINATION* 34, 119 (2017); Shirley Li, *Uber Accused of Booking Thousands of Fake Rides to Mess with Rival Lyft*, ATLANTIC (Aug. 12, 2014), <https://www.theatlantic.com/technology/archive/2014/08/uber-accused-of-booking-thousands-of-fake-rides-with-rival-lyft/375936/> [<https://perma.cc/2AZK-HT82>].

¹⁰⁷ See Biz Carson, *Uber Faces Investigations for Potentially Violating Foreign Bribery Laws*, FORBES (Aug. 29, 2017, 6:34 PM), <https://www.forbes.com/sites/bizcarson/2017/08/29/uber-is-under-investigation-for-potentially-violating-foreign-bribery-laws/#697e708d5e01> [<https://perma.cc/5W6P-Y7JQ>] (describing investigation of foreign bribery laws); Megan Rose Dickey, *Uber Faces Potential \$13.5 Million Lawsuit over Data Breach*, TECHCRUNCH, <https://techcrunch.com/2018/03/05/uber-data-breach-lawsuit/> [<https://perma.cc/G483-YTQX>] (describing action in Pennsylvania alleging violation of data breach notification laws); Hyunjoo Jin, *South Korea Court Says Uber Violated Transport Law, Latest Setback for U.S. Firm*, REUTERS (Apr. 25, 2017, 11:23 PM), <https://www.reuters.com/article/us-uber-tech-southkorea-idUSKBN17S09F> [<https://perma.cc/2QCX-YZRQ>] (describing South Korean action finding Uber violated Korean bribery laws); Eric Newcomer, *Uber Pushed the Limits of the Law. Now Comes the Reckoning*, BLOOMBERG (Oct. 11, 2017, 4:11 AM), <https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning> [<https://perma.cc/UN3V-YS3R>] (stating Uber is facing five criminal investigations in the United States).

¹⁰⁸ Edelman, *supra* note 105. Uber has even been accused of designing a new app to hide its drivers from regulatory scrutiny. See Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES, (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html> [<https://perma.cc/VE7S-2RD2>].

¹⁰⁹ Mike Isaac, *Inside Uber’s Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html> [<https://perma.cc/8R7V-L9PM>]. Not coincidentally, Uber has faced numerous sexual harassment allegations. See, e.g., Greg Bensinger, *Uber’s Top Deal Maker Resigns After Misconduct Allegations Revealed*, WALL STREET J. (Oct. 22, 2018, 5:58 PM), <https://www.wsj.com/articles/ubers-top-dealmaker-cameron-poetscher-resigns-1540238793> [<https://perma.cc/687X-C7SN>].

¹¹⁰ Isaac, *supra* note 109.

¹¹¹ See *id.*

¹¹² See *id.*

shows that keeping employees focused on their internal competitions increases the unaccountability of those at the top.¹¹³ While CEO Travis Kalanick was eventually forced out as head of the company, he retains a net worth of over four billion dollars in large part because of his exploits.¹¹⁴

In this atmosphere, all bets do not pay off, but the competition is intense, the perception of risk increases intensity, and the focus of these competitions is on immediate returns.¹¹⁵ In the process, such environments reduce executive tenure.¹¹⁶ In a system that continually asks “what did you do for me today?”, each job may simply become a stepping stone to the next. Companies that are not loyal to their employees do not command loyalty in return.¹¹⁷ Larry Ribstein described the executives who thrive in such an environment as

hyper-motivated survivors of a highly competitive tournament . . . who have proven their ability to make money while putting on a veneer of loyalty to the firm. At least some of the new breed appear to be Machiavellian, narcissistic, prevaricating, pathologically optimistic, free from self-doubt and moral distractions, willing to take great risk as the company moves up and to lie when things turn bad, and nurtured by a corporate culture that instills loyalty to insiders, obsession with short-term stock price, and intense distrust of outsiders.¹¹⁸

¹¹³ See Dallas, *supra* note 35, at 37.

¹¹⁴ See Grace Donnelly, *Travis Kalanick Net Worth Tops \$4 Billion with Sale of Uber Stock*, FORTUNE (Jan. 19, 2018), <http://fortune.com/2018/01/19/travis-kalanick-net-worth/> [https://perma.cc/GG3X-389T].

¹¹⁵ See, e.g., Dallas, *supra* note 36, at 268.

¹¹⁶ See, e.g., HILL & PAINTER, *supra* note 34, at 99–100.

¹¹⁷ See BOLTANSKI & CHIAPPELLO, *supra* note 57, at 93–95; WARTZMAN, *supra* note 51, at 305–06, 312; Guy Berger, *Will This Year's College Graduates Job-Hop More Than Previous Grads?* LINKEDIN: OFFICIAL BLOG (Apr. 12, 2016), https://blog.linkedin.com/2016/04/12/will-this-year_s-college-grads-job-hop-more-than-previous-grads [https://perma.cc/4R62-BSU6] (“Over the last 20 years, the number of companies people worked for in the first five years after they graduated has nearly doubled.”). See generally Matthew J. Bidwell, *What Happened to Long-Term Employment? The Role of Worker Power and Environmental Turbulence in Explaining Declines in Worker Tenure*, 24 ORG. SCI. 1061 (2013).

¹¹⁸ Ribstein, *supra* note 62, at 9 (footnote omitted). Indeed,

[t]he system rewards those who put their own interests ahead of the group and who focus more on immediate financial rewards than on either a service orientation or the institution's long-term interests. The new system is responsible for the shift from the pyramid structure of compensation in the manufacturing age to a more steeply banked system in which those at the top earn dramatically more than anyone else does.

Cahn, Carbone & Levit, *supra* note 31, at 454 (footnote omitted).

Ultimately, in companies that value “winning” at all costs, those who win by breaking the rules and getting away with it can be handsomely rewarded.¹¹⁹ Their rule-breaking helps ensure loyalty not to the company, but to the insiders who protect their backs.¹²⁰ It also produces the intense distrust of anyone perceived to be an outsider who might not be so willing to look the other way.¹²¹ Customers, employees, and even the company itself become pieces on a chess board useful to the extent they help those caught up in corporate contests win.

B. *Why Only the Men Survive*

A more recent critical literature has analyzed the growth of these environments as “masculinity contests.”¹²² Feminism has long critiqued hierarchy and described the relationship between the lust for and payoffs of power in terms of opportunities for sexual access.¹²³ Masculinities theorists emphasize, however, that while patriarchy is ordinarily thought of in terms of the assertion of male power over women, “it is also a system that valorizes the creation of hierarchies that give men power over other men.”¹²⁴ While the oppression of women is certainly an important consequence of patriarchy, it may paradoxically not be the central point.¹²⁵ War, deprivation, competition, and uncertainty increase the intensity of the fight for scarce resources and the stakes of ending up at the losing end of male status hierarchies.¹²⁶ The insecure seek to assert control over their environments as

119 See Ribstein, *supra* note 62, at 9.

120 See *id.*

121 See *id.*

122 See Berdahl et al., *supra* note 26.

123 See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 174 (1987); Jessica A. Clarke, *Inferring Desire*, 63 *DUKE L.J.* 525, 599 (2013) (arguing that “unwanted sexual aggression is a form of masculine dominance” and “harassment is about power, not desire”).

124 June Carbone & Naomi Cahn, *Unequal Terms: Gender, Power, and the Recreation of Hierarchy*, in 69 *STUD. IN L., POL., & SOC'Y* 189, 195 (Austin Sarat, Maxine Eichner & Clare Huntington eds., 2016) (quoting A.G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 26 (2007)).

125 *Id.*; see also David Brooks, Opinion, *Two Cheers for Feminism! What Girls and Women Get Right About Empathy and Connection*, *N.Y. TIMES* (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/opinion/feminism-gender-empathy-psychology.html> [<https://perma.cc/6HW7-V3PE>] (stating that “for thousands of years social thinking has been dominated by men—usually alpha men—who saw life as a place where warriors and traders went out and competed for wealth and power”).

126 See, e.g., FIONNUALA NÍ AOLÁIN, DINA FRANCESCA HAYNES & NAOMI CAHN, *ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS* 51 (2011) (discussing how hypermasculinity during conflict results in male dominance power struggles).

both their best defense against loss and humiliation, and the surest route to gain what they desire.¹²⁷ Yet, to the extent some succeed in gaining control over others, they increase the insecurity of those below them, further increasing the intensity of the conflict over resources. In this sense, the Hobbesian claim that the “[b]usinessse [of the World], consisteth almost in nothing else but a perpetuall contention for Honor, Riches, and Authority”¹²⁸ becomes a description of the stakes in corporate tournaments, particularly those that artificially inflate the payoffs in competitive bonus systems and deliberately manipulate worker insecurity. Feminism and masculinities theory then describe how the resulting struggle for “Honor, Riches and Authority” plays out in gendered terms, and how the gendered nature of the competition increases with the dismantling of what had been state-sponsored sources of security and predictability through the imposition of the rule of law and adherence to established customs and procedures.

In our previous article, we showed how work environments that operate like tournaments disadvantage women—and most men—by selecting for narcissists who thrive in such environments at the expense of others and making it harder for women and other outsiders to play by the same rules as insider men.¹²⁹ The more recent gender theory literature complements this analysis by explaining how competitive environments with high-stakes pay-for-performance cultures create “masculinity contest cultures,”¹³⁰ with such “contests [] most prevalent—and vicious—in male-dominated occupations where extreme resources (fame, power, wealth) or precarious resources . . . are at stake”¹³¹ These environments increase feelings of vulnerability and intensify aggression, risk-taking, sexual harassment, and homophobia.¹³²

Today, work is an important site for determining status, particularly male status. Relative status determines access to resources, socie-

¹²⁷ See Berdahl et al., *supra* note 26, at 428 (“[B]ecause manhood is socially attained (e.g., being dominant over others, being a breadwinner), it depends on others’ views and deference, which makes manhood conditional and tenuous.”).

¹²⁸ THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH: ECCLESIASTICALL AND CIVILL* 389 (Andrew Cooke ed., 1651).

¹²⁹ See Cahn, Carbone & Levit, *supra* note 31, at 445–59.

¹³⁰ Kenneth Matos, Olivia (Mandy) O’Neill & Xue Lei, *Toxic Leadership and the Masculinity Contest Culture: How “Win or Die” Cultures Breed Abusive Leadership*, 74 J. SOC. ISSUES 500, 502 (2018) (listing four dimensions of “masculinity contest cultures,” including “Show No Weakness”).

¹³¹ Berdahl et al., *supra* note 26, at 429.

¹³² *Id.* at 428.

tal standing, mating behavior, and the ability to control others.¹³³ As societal inequality has grown, a higher percentage of all wage increases has tended to go competitive, bonus-based, and overwhelmingly male-dominated sectors, including finance, upper management, tech, and the upper ranks of professions.¹³⁴ In these “win or die” environments, “the spoils of winning, or the cost of losing,[] are particularly high.”¹³⁵ The result tends to conflate what it means to be a man with the traits necessary to succeed in such environments.

The results of these competitions do not necessarily correlate with better performance for the organization.¹³⁶ Instead, performance evaluations focus on traits associated with masculinity.¹³⁷ “In this zero-sum game, men compete at work for dominance by showing no weakness, demonstrating a single-minded focus on professional success, displaying physical endurance and strength, and engaging in cut-throat competition.”¹³⁸ The goal of these internal competitions is not so much to improve a company’s competitive position over its external rivals as to choose the “real men” who will become part of the small network that works to outmaneuver rivals to gain control of that company’s resources.¹³⁹

Within these environments, women and other outsiders can play supporting roles. On Wall Street, for example, women often enjoy greater opportunities as lawyers rather than traders.¹⁴⁰ Women and

133 See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 2* (2014).

134 See Cahn, Carbone & Levit, *supra* note 31, at 456–57.

135 Berdahl et al., *supra* note 26, at 429.

136 See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 85–94 (1995) (describing the persistence of counterproductive traits in the selection of police officers (aggressiveness, self-assuredness and reliance on physical strength) and attributing it to the definition of the police office role in terms of stereotypical masculine traits even when other approaches to policing that emphasize different traits (e.g., the de-escalation of conflict) are more effective).

137 See Berdahl et al., *supra* note 26, at 430.

138 *Id.*; see also Naomi Cahn, June Carbone & Nancy Levit, *Discrimination by Design*, 51 *ARIZ. ST. L.J.* 1 (2019); Interview by June Carbone with Nikki D. Pope, Managing Dir., High Tech Law Inst., Santa Clara Univ. Sch. of Law (Sept. 23, 2018).

139 See Berdahl et al., *supra* note 26, at 433.

140 Compare Jennifer Cheeseman Day, *Number of Women Lawyers at Record High but Men Still Highest Earners*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html> [<https://perma.cc/TBP6-M6RS>] (noting that 38% of lawyers are women), with Anna Irrera, *Wall Street Wants More Female Traders, but Old Perceptions Die Hard*, REUTERS (June 14, 2018, 1:04 AM), <https://www.reuters.com/article/us-banks-trading-gender/wall-street-wants-more-female-traders-but-old-perceptions-die-hard-idUSKBN1JA0DF> [<https://perma.cc/AKC2-GAQC>] (noting that women account for about 28% of Financial Industry Regulatory Authority-registered traders).

people of color also report they are assigned higher rates of “office housework” than more glamorous roles.¹⁴¹ Nikki Pope, for example, notes that she worked at a company where female engineers were assigned to accompany marketing staff to trade shows because the male engineers viewed attending trade shows as beneath them.¹⁴² When trade shows proved successful in generating substantial income, however, male engineers replaced the lone female.¹⁴³ At the same time, women and minorities are more likely “to report pushback for assertiveness, self-promotion and anger, all of which are key weapons in the masculinity contest.”¹⁴⁴ In a business model that rewards employees who can successfully outmaneuver others, women are handicapped not just because they are not boys, but because cold-blooded competition breeds distrust, particularly of outsiders.¹⁴⁵

This sets up what we have previously identified as a triple bind. To win in these negative-sum competitions requires “ambition, ruthlessness, and domination.”¹⁴⁶ Women and at least some minorities, however, are much more likely to be disliked and punished if they display such traits.¹⁴⁷ They become particularly suspect if they band together with each other in alliances designed to outflank the in-group.¹⁴⁸ They may also be less valuable partners for members of the dominant group if they are perceived as having less clout.¹⁴⁹ Women and minorities who correctly perceive the game as rigged become less likely to apply, which, in turn, increases the reality of the environment as predominately white and male.¹⁵⁰ The triple bind suggests that women lose if they do not play by the same terms as the men, lose if they do try to play on the same terms by being disproportionately punished

¹⁴¹ Berdahl et al., *supra* note 26, at 431.

¹⁴² Interview by June Carbone with Nikki D. Pope, *supra* note 138.

¹⁴³ *Id.*

¹⁴⁴ Berdahl et al., *supra* note 26, at 431.

¹⁴⁵ See Ribstein, *supra* note 62, at 20.

¹⁴⁶ Berdahl et al., *supra* note 26, at 432.

¹⁴⁷ *Id.* (observing that Asian men are also punished for dominance displays where they conflict with stereotypical expectations); see Peggy Klaus, *Neither Men nor Mice*, N.Y. TIMES (Mar. 6, 2010), <https://www.nytimes.com/2010/03/07/jobs/07preoccupations.html> [<https://perma.cc/8MBL-UB3T>]; see also DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 67–68 (2007) (noting women starting to climb the corporate ladder are actually walking a tightrope because they must be sufficiently aggressive to excel, but not overly aggressive because they will be perceived as pushy).

¹⁴⁸ See, e.g., Bethany M. Coston & Michael Kimmel, *White Men as the New Victims: Reverse Discrimination Cases and the Men's Rights Movement*, 13 NEV. L.J. 368, 377 (2013).

¹⁴⁹ Cahn, Carbone & Levit, *supra* note 31, at 447.

¹⁵⁰ *Id.*

for displaying the self-centered, rule-breaking behavior of the men, and over time become less likely to apply for such positions and thus more likely, individually and as a group, to be perceived as lacking what it takes to succeed in such environments.¹⁵¹

As a result, such environments become associated with stereotypically masculine traits.¹⁵² Moreover, as these cultures celebrate winning as an end by itself, they also dismantle the constraints designed to protect both men and women from unscrupulous behavior. In cases like Uber, this may mean that managers who undercut other managers are rewarded for their brashness rather than chastised for undermining the company.¹⁵³ In other companies, as we will discuss below,¹⁵⁴ rule-breaking may be carefully channeled in directions that pay off for those at the top at the expense of everyone else.¹⁵⁵ In this sense, bonus cultures may quite intentionally select for managers who, for example, set punch clock software to round down on entered time and make automatic break deductions, or who simply cut short employees' breaks.¹⁵⁶ These latter cultures do not necessarily reward employees at any level who flout management directives, but they carefully select for those who care more about maximizing their bonuses than ensuring employee well-being.¹⁵⁷

Both types of cultures—those where the rule-breaking is a by-product of a masculinity competition as an end in itself and those where high-stakes bonuses and other forms of competition are instrumentally employed to break the law while immunizing senior management from accountability—may value the abilities to deceive, exploit, and oppress, as markers of dominance.¹⁵⁸ Both cultures also exacerbate gender inequality. In considering the prospects for gender equality and corporate reform, however, notable differences arise from

¹⁵¹ See *id.* at 446–47.

¹⁵² These traits, however, can also be described by personality analyses that do not explicitly reference gender. See, e.g., Michael C. Ashton & Kibeom Lee, *The HEXACO Model of Personality Structure and the Importance of the H Factor*, 2 SOC. & PERSONALITY PSYCHOL. COMPASS 1952, 1958 (2008), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1751-9004.2008.00134.x> [<https://perma.cc/CK2E-JCJ4>] (discussing the drive to power and its correlation with personality type high in narcissism and low in honesty and humility).

¹⁵³ See *supra* notes 104–14 and accompanying text.

¹⁵⁴ See *infra* Parts II, III.

¹⁵⁵ See *infra* Section II.A. See generally Matos et al., *supra* note 130.

¹⁵⁶ Elizabeth C. Tippett, *How Employers Profit from Digital Wage Theft Under the FLSA*, 55 AM. BUS. L.J. 315, 316, 320–21 (2018) (stating that at a Houston, Texas medical center, “interrupted meal breaks were so common that employees referred to them as ‘NFL days,’ which stood for No F***ing Lunch”).

¹⁵⁷ See *id.*

¹⁵⁸ See Dallas, *supra* note 35, at 45–52.

treating rule-breaking as an incidental byproduct of more intense competition instead of seeing the structure as one carefully designed to break the law and get away it.

C. *In the Long Term, We Will All Be Dead; in the Medium Term, We Will Be Working Elsewhere*

Despite the celebration of these competitive atmospheres, the existing management literature agrees that such environments do not produce better results. Gender scholars describe such dog-eat-dog internal competitions as “zero-sum,”¹⁵⁹ but criminologists prefer the term “negative-sum.”¹⁶⁰ In “negative-sum” competitions, participants compete against each other to become the winner entitled to appropriate a larger proportion of the company’s resources for themselves at the expense of others, and the terms of the competition may reduce the overall value of the company.¹⁶¹ Moreover, when a company succeeds in law evasion, as Uber has with taxi regulations, the result resets the market and forces other companies to compete on the new terms. The result creates a “Gresham’s dynamic,” or a race to the bottom in which honest companies find they cannot compete with ethically compromised ones.¹⁶²

Management scholars have documented these negative consequences. For example, one study administered to 500 respondents found that workplaces ranking high in masculinity contest norms reported more dysfunctionality, worse coworker behavior, and poor individual outcomes.¹⁶³ Given the importance of teamwork to almost all organizational success, environments that encourage ruthless competition also tend to promote individual self-interest at the expense of organizational goals.¹⁶⁴ Other studies indicate that such environments undercut loyalty to the organization and produce higher levels of burnout and turnover, further reducing employee tenure and discouraging management investment in worker training.¹⁶⁵

¹⁵⁹ See, e.g., Sophie L. Kuchynka et al., *Zero-Sum Thinking and the Masculinity Contest: Perceived Intergroup Competition and Workplace Gender Bias*, 74 J. SOC. ISSUES 529, 530 (2018).

¹⁶⁰ See Ric Simmons, *Ending the Zero-Sum Game: How to Increase the Productivity of the Fourth Amendment*, 36 HARV. J.L. & PUB. POL’Y 550, 553 (2012).

¹⁶¹ See Eichenwald, *supra* note 97.

¹⁶² George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489–90 (1970).

¹⁶³ See generally Peter Glick, Jennifer L. Berdahl & Natalya M. Alonso, *Development and Validation of the Masculinity Contest Culture Scale*, 74 J. SOC. ISSUES 449 (2018).

¹⁶⁴ See Berdahl et al., *supra* note 26, at 434.

¹⁶⁵ *Id.* at 434–35.

Moreover, studies find that such environments select for “toxic” managers more eager to demonstrate their own success than to look out for the interests of their workers.¹⁶⁶ Organizations that rank high in masculinity contest traits are likely to select for managers who identify strength with bullying behavior and exploit weaker employees.¹⁶⁷ Such managers tend to identify with the workers who display strength and “promote exclusion and harassment toward historically disadvantaged groups and men with resistant masculinities.”¹⁶⁸ In these environments, managers are often selected for their masculinity displays rather than for greater competence in the task at hand.¹⁶⁹ Scholars also find that workers in such environments are more likely to experience sexual or racial harassment and report a more sexist culture.¹⁷⁰ It is hardly a wonder, therefore, that more diverse companies do better. A study of almost 22,000 companies reported that businesses with more equal gender leadership have a “15 percent boost to profitability.”¹⁷¹ To produce greater diversity requires greater cooperation and trust, which promotes better teamwork, and better teamwork pays off. It is not necessarily the presence of women that increases performance; instead, the organizational qualities that produce greater productivity may also promote diversity.¹⁷² The question therefore becomes why such toxic and negative-sum environments persist.

¹⁶⁶ See Matos et al., *supra* note 130, at 503.

¹⁶⁷ See Berdahl et al., *supra* note 26, at 435.

¹⁶⁸ See *id.* at 435.

¹⁶⁹ See Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), <https://hbr.org/2013/08/why-do-so-many-incompetent-men> [<https://perma.cc/S5ED-V4NJ>] (summarizing research literature on gender differences in selection and performance); see also Case, *supra* note 136, at 86–87.

¹⁷⁰ See Glick et al., *supra* note 163, at 466.

¹⁷¹ Marcus Noland et al., *Is Gender Diversity Profitable? Evidence from a Global Survey* 4, 8–9 (Peterson Inst. for Int’l Econ., Working Paper No. 16-3, 2016), <https://piiie.com/publications/wp/wp16-3.pdf> [<https://perma.cc/ZA43-8P5B>]; Aimee Picchi, *In Business, More Women at the Top Means More Profits*, CBS NEWS (Feb. 9, 2016, 2:53 PM), <https://www.cbsnews.com/news/more-women-more-profits/> [<https://perma.cc/DB4C-6WZH>].

¹⁷² See Fairfax, *supra* note 22, at 862. This position, in a sense, sidesteps the debate between the business case and the moral argument for diversity because it maintains that a commitment to transparency, ethical leadership, and trust are necessary to produce more than a token commitment to diversity, and that a genuine commitment to diversity is also likely to produce greater commitment to transparency, ethical leadership, and trust. *Id.* In contrast, there is no reason to believe that the inclusion of individual minority or female representatives per se is likely to transform business cultures. See *id.*

II. WOMEN AND AN “OPPRESS THE EMPLOYEES” BUSINESS MODEL: *WAL-MART STORES, INC. v. DUKES* REVISITED

*Wal-Mart Stores, Inc. v. Dukes*¹⁷³ was the largest class action in history: 1.5 million current and former female Wal-Mart employees from stores across the country joined lead plaintiff Betty Dukes in claiming that the company systematically discriminated against women, particularly in awarding promotions.¹⁷⁴ They maintained that Wal-Mart had a “uniform ‘corporate culture’” in which managers’ biases against women ran rampant.¹⁷⁵ Although women made up more than two-thirds of Wal-Mart’s hourly employees and almost 90% of its customer services managers, they were less than 20% of store managers at the time when discovery in the case ended.¹⁷⁶ Even when women entered the supervisory ranks, they were paid less than men.¹⁷⁷ Male store managers earned an average of \$16,400 per year more than female managers; male district managers earned \$62,000 more than female district managers, and male regional vice presidents earned a staggering \$140,000 more than their female counterparts.¹⁷⁸ Moreover, while Wal-Mart claimed to give its managers a measure of autonomy, the gender differences were remarkably consistent across the country.¹⁷⁹ The results lagged far behind other retailers who typically reported that women held more than 50% of management positions.¹⁸⁰

Wal-Mart also has been fined more for shortchanging its workers than any other company in the country.¹⁸¹ As a retailer, Wal-Mart employs a large, relatively unskilled workforce, and with 2.3 million employees, is the largest private employer both in the United States and the world.¹⁸² Its business model depends on keeping prices low. Founder Sam Walton liked to brag, “‘We’re going to be successful, but

¹⁷³ 564 U.S. 338 (2011).

¹⁷⁴ *Id.* at 344.

¹⁷⁵ *Id.* at 345.

¹⁷⁶ Brad Seligman, *Patriarchy at the Checkout Counter: The Dukes v. Wal-Mart Stores, Inc., Class Action Suit*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 237–38 (Nelson Lichtenstein ed., 2006).

¹⁷⁷ *Id.* at 236–37.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 239–40.

¹⁸⁰ *Id.* at 238–39.

¹⁸¹ MATTERA, *supra* note 29, at 2 (“The employer that has paid far and away the most in wage theft penalties is Walmart, with more than \$1.4 billion in fines and settlements since 2000.”); *id.* at 8.

¹⁸² Lauren Weber, *Some of the World’s Largest Employers No Longer Sell Things, They Rent Workers*, WALL STREET J. (Dec. 18, 2017, 11:46 AM), <https://www.wsj.com/articles/some-of-the-worlds-largest-employers-no-longer-sell-things-they-rent-workers-1514479580> [https://perma.cc/JH8A-V2YA].

the basis is a very low-wage, low-benefit model of employment.’”¹⁸³ To do that, the company hired primarily women in its hourly ranks, starting with the pool of displaced farm women eager for employment in the rural Arkansas communities where Wal-Mart started in the late 1940s.¹⁸⁴

As worker protections expanded in the 1960s to boost the wages of overwhelmingly female retail employees, Wal-Mart worked much harder to evade them. Walton ruthlessly fought unionization, and he and his successors devoted “enormous skill and energy to the avoidance or emasculation of almost every other governmental mandate . . . that sought to regulate the price and quality of [] labor.”¹⁸⁵ To do that, Wal-Mart needed a managerial force that would identify with the company’s obsessive suppression of labor rights rather than the workers they supervised.¹⁸⁶ The Wal-Mart manager selection practices that favored men and the business model that depended on minimizing labor costs reinforced each other. Like Enron executives, Wal-Mart lobbyists spent considerable sums on efforts to weaken regulatory enforcement, and when faced with inconvenient regulations, they often just ignored them, encouraging labor practices that minimized costs regardless of whether they complied with wages and standards laws.¹⁸⁷ As a result, the company has paid out more than one billion dollars in fines and settlements for violations of the Fair Labor Standards Act, including \$242 million in 2016 alone.¹⁸⁸ These violations include paying workers less than minimum wage, mischaracterizing hours worked to avoid overtime rates, and in some cases failing to ensure workers were paid for hours worked.¹⁸⁹

The *Dukes* sex discrimination case did not mention wage theft. It presented a largely statistical account that showed how Wal-Mart systematically paid its female employees less than men and failed to promote them on a comparable basis with male employees.¹⁹⁰ The district

¹⁸³ NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS* 320 (2009).

¹⁸⁴ *Id.* at 59.

¹⁸⁵ *Id.* at 90.

¹⁸⁶ *Id.* at 89–90.

¹⁸⁷ See Catherine Ruetschlin, *How Walmart and Home Depot Are Buying Huge Political Influence*, AM. PROSPECT (Dec. 3, 2014), <http://prospect.org/article/how-walmart-and-home-depot-are-buying-huge-political-influence> [<https://perma.cc/ZY6K-RHR9>].

¹⁸⁸ Lauren Weber, *Bank Pays Out Some of the Biggest Settlements in Wage Disputes*, WALL STREET J. (June 5, 2018, 5:00 AM), <https://www.wsj.com/articles/banks-pay-out-some-of-the-big-gest-settlements-in-wage-disputes-1528189200> [<https://perma.cc/S9AF-L8VD>].

¹⁸⁹ *Id.*; MATTERA, *supra* note 29, at 4–5, 8.

¹⁹⁰ See generally *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

court issued a 52-page opinion finding the plaintiffs' case to be overwhelming.¹⁹¹ To the extent the case commented on the reasons for the discrimination, it presented a picture of a bunch of Arkansas-influenced "rednecks" who just could not see women in supervisory roles.¹⁹² The Supreme Court rejected the class action in a 5-4 decision.¹⁹³ It bought Wal-Mart's argument that each store made individual hiring and promotion decisions and that the plaintiffs' proposed class was too big to have enough common questions of law and fact.¹⁹⁴ In the course of the litigation, the plaintiffs never raised the issue of Wal-Mart's labor practices; they never asked whether Wal-Mart's efforts to exploit its employees might explain Wal-Mart's poor record of hiring female managers. There is every reason to believe, however, that these factors are directly related.

A. *Wage Theft and Wal-Mart's Management Practices*

Whether or not Wal-Mart sought to discriminate against women, it consciously designed its selection of managers to keep wage costs low. The process did not necessarily result in the "best" managers in any objective sense, but instead promoted those who would fit into a corporate culture that legitimized Wal-Mart's hierarchical structure, emphasized keeping costs low at the expense of its employees, and "insulate[d] most employees from other calls upon their loyalty."¹⁹⁵ The result also created a culture of marginalized—and overwhelmingly female—hourly employees clustered just above the minimum wage and an overwhelmingly male managerial group selected to keep the hourly employees from bettering their lot.¹⁹⁶

First, Wal-Mart sought to create a distinctive corporate culture, one that supplied identity and commanded loyalty.¹⁹⁷ This is not un-

¹⁹¹ See *id.*

¹⁹² LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART* 39 (2005).

¹⁹³ *Dukes v. Wal-Mart Stores, Inc.*, 564 U.S. 338 (2011).

¹⁹⁴ *Id.* at 359–60.

¹⁹⁵ Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First Century Capitalism*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM*, *supra* note 176, at 17.

¹⁹⁶ "[I]n 2001, 67% of all hourly workers and 78% of hourly department managers were women. By contrast, only 35.7% of assistant managers, 14.3% of store managers, and 9.8% of district managers were female." Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 49 (2009) (footnotes omitted).

¹⁹⁷ Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 *CORNELL L. REV.* 1209, 1216 (2011); Lichtenstein, *supra* note 195, at 16–22.

sual, as the earlier discussion of “the organization man” illustrates.¹⁹⁸ Identification as insiders confers status, motivates devotion to the firm, and primes employees to discount criticisms of a company’s business practices. Wal-Mart, however, also consciously sought to promote employees who had little experience and few opportunities outside of Wal-Mart,¹⁹⁹ increasing the company’s ability to shape its managers’ views of appropriate business practices, including the often-unlawful suppression of employee interests. Walton himself did not care either about college degrees or specialized training.²⁰⁰ As one Wal-Mart scholar notes, “The first requirement for promotion at Wal-Mart has always been commitment and dedication to the company and the job. Skill and knowledge are far less important than ‘attitude’ and identification with the Wal-Mart culture.”²⁰¹ When the company did recruit college graduates, it often deliberately sought out the B and C students at denominational colleges and the branch campuses of state universities in the South and Midwest.²⁰² Wal-Mart wanted “young men, and a few women” with modest career ambitions who would accept the low salaries and fully commit to the company ethos.²⁰³ The cultivation of such an in-group mindset, however, also tends to be associated with “a highly aggressive, opportunistic stance toward outsiders” and tends to be “fairly commonplace in hypercompetitive industries like retail, financial services, and computer technology.”²⁰⁴ That mindset thus sets the stage for Wal-Mart’s business practices and the maintenance of an old boys’ network implementing them.²⁰⁵

198 See *supra* notes 46–56 and accompanying text; David W. Hart & Jeffery A. Thompson, *Untangling Employee Loyalty: A Psychological Contract Perspective*, 17 *BUS. ETHICS Q.* 297 (2007) (emphasizing that identity and loyalty used to involve reciprocal bonds in the context of companies that invested in their employees, but that while today’s companies still try to demand loyalty from their employees, they are no longer as loyal in return).

199 See LICHTENSTEIN, *supra* note 183, at 96.

200 *Id.*

201 *Id.*

202 *Id.* at 21.

203 *Id.* at 21.

204 Langevoort, *supra* note 197, at 1216.

205 The term “old boys’ club” or network refers to “an informal system of friendships and connections through which men use their positions of influence by providing favors and information to help other men.” Audrey Nelson, *Women and the Good Ole Boys Club*, *PSYCHOL. TODAY* (Mar. 28, 2017), <https://www.psychologytoday.com/us/blog/he-speaks-she-speaks/201703/women-and-the-good-ole-boys-club> [<https://perma.cc/J2D8-PX2F>]. By contrast, we use the term “young boys’ club” to describe the deliberate selection of employees with oversized ambitions and little experience who will do management’s bidding, however ethically dubious, because these employees tend to be young and male.

Once Wal-Mart recruited such employees, the second critical element in the company's system was its use of bonuses as a large component of manager compensation. Around the time of the *Dukes* litigation, the base pay for a Wal-Mart manager was about \$60,000 per year, but managers could triple that amount in bonuses if they "hit their numbers."²⁰⁶ The managers were "relentlessly and mercilessly graded on their capacity to hold labor costs below a fixed ratio of the sales generated by their store in any given week."²⁰⁷ Supervisors had more control over wages than sales, and those who succeeded in keeping down such costs received the largest bonuses.²⁰⁸ If their labor costs rose beyond the limits Wal-Mart set, "the hours worked by associates [we]re slashed, wages [we]re frozen, and the regional vice president t[old] the store manager to relinquish his keys and find another job."²⁰⁹ Even in periods in which Wal-Mart did well, "10 to 15 percent of store managers were demoted each year."²¹⁰ This made the store manager's job one of Wal-Mart's most difficult and critical positions.²¹¹

The bonus culture easily could have contributed both to wage suppression and gender differences in compensation and promotion. Wal-Mart, like Wall Street, did not loudly proclaim it was encouraging its employees to cheat its workers, though it certainly proclaimed its devotion to keeping labor costs low.²¹² It created incentives for managers to minimize labor costs, and senior management did not inquire too closely into the methods used to do so. Former Wal-Mart managers consistently report that this system signals a willingness to promote people who will enforce questionable labor practices,²¹³ and those managers were overwhelmingly male.²¹⁴ Those managers spe-

206 LICHTENSTEIN, *supra* note 183, at 92.

207 *See id.* at 88.

208 *See* Hamilton Nolan, *A Walmart Manager Describes Walmart's Mismanagement*, GAWKER (Aug. 22, 2014, 11:51 AM), <http://gawker.com/a-walmart-manager-describes-walmarts-mismanagement-1625530679> [<https://perma.cc/LHF6-DZBP>] ("I've often had to cut associates hours in order to ensure that all of the salaried managers would receive our annual bonuses.").

209 LICHTENSTEIN, *supra* note 183, at 88.

210 *Id.* at 92.

211 *See* Seligman, *supra* note 176, at 236-37.

212 *See* LICHTENSTEIN, *supra* note 183.

213 *See* Jared Cram, *Ten Things Wal-Mart Doesn't Want You to Know*, GENERATION PROGRESS (May 9, 2005), <http://genprogress.org/voices/2005/05/09/14117/ten-things-walmart-doesnt-want-you-to-know/> [<https://perma.cc/TTGZ-ERAU>] ("According [to] a former Wal-Mart manager in Alabama and Mississippi, Wal-Mart's central office threatened to write up managers who didn't reduce labor costs and this led to managers leaning on assistant managers to falsify time sheets and force employees to work without pay.").

214 *Id.*

cialized in “nickel and diming” workers,²¹⁵ suppressing unionization,²¹⁶ and not only ruling out overtime (a complete no-go at Wal-Mart) but even evading the minimum wage.²¹⁷ When journalist Barbara Ehrenreich went undercover to work in hourly retail sales at Wal-Mart, she reported the assistant manager railed at workers for “time theft” if they gathered to talk to each other.²¹⁸ These practices sometimes went so far as failing to pay employees for work they had performed.²¹⁹ For example, some managers who faced chronic understaffing and the inability to ask other employees to put in more hours pressured workers to clock out and then go back to work or continue working through breaks or lunch hour.²²⁰ Other managers simply “adjusted” the time cards of workers who reported more than 40 hours a week, unilaterally adding rest breaks or increasing meal periods.²²¹ Wal-Mart’s business model depended on systematic and relentless attention to reducing labor costs in any possible way.²²² Given that manager pay overwhelmingly consisted of bonuses tied to the ratio of sales over labor costs and that women’s net pay was lower

215 See generally BARBARA EHRENRICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 135–52, 173, 183–91 (2001).

216 Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convince-its-employees-not-to-unionize/395051/> [<https://perma.cc/WA5F-H5U9>] (“Walmart maintains a steady drumbeat of anti-union information at its more than 4,000 U.S. stores, requiring new hires—there are hundreds of thousands each year—to watch a video that derides organized labor.”).

217 WARTZMAN, *supra* note 51, at 331.

218 See EHRENRICH, *supra* note 215, at 146.

219 See Laura Clawson, *This Week in the War on Workers: Walmart Loses \$54 Million Wage Theft Lawsuit*, DAILY KOS (Nov. 26, 2016, 6:55 PM), <https://www.dailykos.com/story/2016/11/26/1603451/-This-week-in-the-war-on-workers-Walmart-loses-54-million-wage-theft-lawsuit> [<https://perma.cc/G5RX-Z5WG>]. As this Article goes to press, there is some indication that Wal-Mart is attempting to raise pay to reduce employee turnover. See Bryan Pearson, *Wal-Mart’s Employment Deployment and 6 Ways to Curb Retail Turnover*, FORBES (Jan. 24, 2017, 5:11 PM), <https://www.forbes.com/sites/bryanpearson/2017/01/24/wal-marts-employment-deployment-and-6-ways-to-curb-retail-turnover/#298d3edf1008> [<https://perma.cc/7HDU-CD9P>].

220 Steven Halebsky, *The Retail Revolution*, 27 SOC. F. 255, 256 (2012) (reviewing LICHTENSTEIN, *supra* note 183).

221 LICHTENSTEIN, *supra* note 183, at 107.

222 And it still does. See, e.g., Lauren Thomas, *As Wal-Mart Blitzes Internet Retail, Debate Rages over Company’s Impact on U.S. Wages*, CNBC (Apr. 22, 2017, 11:01 AM), <https://www.cnbc.com/2017/04/20/wal-mart-still-front-and-center-of-debate-over-minimum-wages.html> [<https://perma.cc/Y9SA-UV55>] (“Wal-Mart’s business model is pretty simple The company pays its workers poverty wages. It offers few benefits, and it manipulates workers’ hours and understaffs its stores That low-wage business model serves one purpose: It’s so the company can maximize profits that go to some of the wealthiest people on the planet.”).

than men's, Wal-Mart's presumption that men would be more willing to do in their workers than women may have been accurate.

Third, Wal-Mart's efforts to eliminate management's fingerprints from these harmful practices helps explain the persistence practices unfriendly to women, such as its relocation policy. Wal-Mart required anyone interested in a managerial position to be "willing to relocate . . . whenever and wherever [Wal-Mart] needed them," often with no more than a couple of weeks' notice.²²³ In his 1992 autobiography, Walton wrote, "[W]e've had the attitude that if you wanted to be a manager at Wal-Mart, you basically had to be willing to move at a moment's notice" and that's "not really appropriate anymore."²²⁴ Prodded by his wife and daughter, he acknowledged the requirement "really put good, smart women at a disadvantage in our company because at that time they weren't as free to pick up and move as many men were."²²⁵ However, while Walton claimed to have "seen the light," the Supreme Court acknowledged the relocation policy remained in place at the time of the *Dukes* decision in 2011.²²⁶ The district court in *Dukes* found that, on average,

each Store Manager is transferred to a different store 3.6 times after achieving that title. A majority of these transfers are into different districts and are often into different regions. . . . This degree of mobility . . . help[ed] ensure that a uniform Wal-Mart Way culture operates consistently throughout all stores.²²⁷

Managers who move repeatedly do not develop overly close ties to the employees they supervise, their individual stores, or the communities in which they live.²²⁸ They understand that their primary fo-

²²³ Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759, 759–60 (2013).

²²⁴ FEATHERSTONE, *supra* note 192, at 29.

²²⁵ *Id.*

²²⁶ See LICHTENSTEIN, *supra* note 183, at 102. The Supreme Court expressly acknowledged the relocation policy in its decision. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 343 (2011) (noting "a willingness to relocate" as a condition of promotion).

²²⁷ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004); see also FEATHERSTONE, *supra* note 192, at 69–70.

²²⁸ See Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L.J.F. 458, 466 (2017), <https://www.yalelawjournal.org/forum/stuck-or-rooted> [<https://perma.cc/D894-PXTX>] ("Strong workplace ties also provide emotional support and care that can contribute to performance. Strong ties with coworkers even serve as a bulwark against workplace harassment, and can help workers better cope with harassment or mistreatment if it occurs.").

cus needs to be on Bentonville's metrics of success, not on their employees' well-being.²²⁹

Fourth, the construction of managerial jobs to require that managers fill in the gaps left by hourly employees contributes further to the undesirability of these positions for women. With Wal-Mart's chronic understaffing and an employee base that includes many new, part-time, or disaffected workers, meeting store needs can be challenging.²³⁰ Inevitably, some employees will quit, fail to show up, or call in sick on short notice.²³¹ Salaried supervisors who do not receive overtime pay are expected to fill in the gaps.²³² Nelson Lichtenstein describes assistant managers as "the shock troops" who hold the system together.²³³ He reports they work "a minimum of forty-eight [hours] a week, but more likely fifty-five and sixty, eating on the fly and never quite sure when they'll leave for the evening."²³⁴ These hours increase during the Christmas shopping season.²³⁵ Wal-Mart's refusal to adequately staff its stores or pay overtime to its hourly employees required managers willing to put their devotion to Wal-Mart ahead of family needs.²³⁶

Fifth, maintenance of this culture came through selection of those with the appropriate mindset.²³⁷ Wal-Mart could not exactly advertise for those willing to suppress wages through whatever means necessary or for managers willing to break the law without instructions from Bentonville.²³⁸ Instead, it adopted what seemed to be a "redneck network" in which existing managers tapped the anointed to become part of the management team without ever posting the positions or adopting formal selection criteria.²³⁹ In the *Dukes* litigation, the district

²²⁹ *Id.* at 468; see also Aine Cain, *Walmart Employees Dish on What It's Actually Like to Work at the Retail Giant*, BUS. INSIDER (Aug. 2, 2018, 9:51 AM), <https://www.businessinsider.com/walmart-store-employees-describe-working-retail-giant-2018-7> [<https://perma.cc/3FB7-LKJP>]. One employee who had worked for Wal-Mart for 15 years said "they felt the management of their store tended to be 'scared to death' of those above them in the corporate chain of command." *Id.*

²³⁰ See Cain, *supra* note 229.

²³¹ *Id.*

²³² *Id.*

²³³ LICHTENSTEIN, *supra* note 183, at 103.

²³⁴ *Id.*

²³⁵ *Id.* at 93.

²³⁶ Ellen Israel Rosen, *How to Squeeze More out of a Penny*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 176, at 243, 253–54 (describing understaffing and the pressure it creates on managers).

²³⁷ *Id.* at 253 (describing the youth of the men selected as store managers).

²³⁸ See *id.* at 254.

²³⁹ See *id.* at 253. "It is undisputed that, until January 2003, Wal-Mart did not post job

court found that plaintiffs provided “significant evidence of company-wide corporate practices and policies, which include excessive subjectivity in personnel decisions, gender stereotyping, and maintenance of a strong corporate culture.”²⁴⁰ The preservation of discretion in managerial hiring in the face of an otherwise carefully scripted corporate ethos contributed to Wal-Mart’s half century of success in suppressing wages.²⁴¹

The *Dukes* plaintiffs argued that the system produced an old boys’ club based on affinity; the defendants argued the system reflected business considerations made at individual stores across the country.²⁴² Neither mentioned wage theft. Other commentators have emphasized, however, that Wal-Mart policies informally encouraged its managers “to break the rules that Wal-Mart formally upheld.”²⁴³ If managers met their goals for high sales and low wages, no one inquired too closely into how they did so.²⁴⁴ If the managers did not meet the goal, they were subject to audits, investigations, and potential demotion.²⁴⁵ The informal and subjective selection process was almost certainly designed to select managers who fit into such a system and to protect the backs of the managers who selected them, managers who probably flourished because of their willingness to promote their own interests at the expense of their employees.

B. *Why Only the Wal-Mart Men Thrive*

Wal-Mart, with its Arkansas roots and (young and old) boys’ networks, may well have engaged in traditional forms of sex discrimination in the selection of its managers, overlooking well-qualified women who were willing to join the men in nickel and diming their employees.²⁴⁶ Yet, the system Wal-Mart adopted to suppress wages also seemed guaranteed to select for male managers.

Wal-Mart’s bonus system, emphasizing the bottom line at the expense of personal relationships or compliance with the law, fits the

vacancies for its Assistant Management Training Program, and it posted only a small number of vacancies for the Co-Manager position.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 149 (N.D. Cal. 2004).

²⁴⁰ Seligman, *supra* note 176, at 241.

²⁴¹ *See id.* at 240.

²⁴² *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 343–44 (2011).

²⁴³ Rosen, *supra* note 236, at 254.

²⁴⁴ *See id.*

²⁴⁵ *See id.* at 254–55.

²⁴⁶ Indeed, although *Dukes* was unsuccessful in class certification, subsequent claims of sex discrimination have been settled. *See CAHN, CARBONE & LEVIT, supra* note 56, at 25.

stereotypes describing prototypically masculine competitive values versus feminine relationship-focused values; it is easier to find more men than women who care enough about money, power, and status to be willing to shortchange their employees.²⁴⁷ Earlier studies among entrepreneurs, who presumably have greater interest in increased compensation than the average employee, showed men were more likely than women to cite the opportunity for increased compensation as a reason they would switch jobs, although the differences were smaller.²⁴⁸

Compounding the gendered effects is the degree of risk. Wal-Mart artificially increased the pressure on its managers by encouraging them to “beat yesterday”; that is, to always outperform the preceding year even though the ability to do so was not always within the managers’ control.²⁴⁹ Their ability to do so determined not only the size of their bonuses, but the possibility they would be demoted and moved to another store.²⁵⁰ Stereotypes suggest women are more risk averse,²⁵¹ though more rigorous studies show that among professionals, there are no significant gender differences in risk propensities or in success at managing risk.²⁵² Nonetheless, jobs that build in the type of artificial competition that Wal-Mart encouraged tend to discourage women from applying.²⁵³ Laboratory studies using a general popula-

²⁴⁷ See Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1774 (1991).

²⁴⁸ See Stanley Cromie, *Motivations of Aspiring Male and Female Entrepreneurs*, 8 *J. OCCUPATIONAL BEHAV.* 251, 255, 257 (1987) (finding female entrepreneurs are less interested in money than male entrepreneurs); see also VENKAT KUPPUSWAMY & ETHAN MOLLIK, *SECOND THOUGHTS ABOUT SECOND ACTS: GENDER DIFFERENCES IN SERIAL FOUNDING RATES* 1, 3 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752689 [<https://perma.cc/BDW7-WYBJ>] (finding women founded 25.3% fewer entrepreneurial ventures than men, and attributing this differential at least in part to male hubris and female humility).

²⁴⁹ Rosen, *supra* note 236, at 254.

²⁵⁰ *Id.* at 254–55.

²⁵¹ See, e.g., JULIE A. NELSON, *GENDER AND RISK-TAKING: ECONOMICS, EVIDENCE, AND WHY THE ANSWER MATTERS* 12, 19 (2018).

²⁵² See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 42 (Nat’l Bureau of Econ. Research, Working Paper No. 21913, 2016), <http://www.nber.org/papers/w21913.pdf> [<https://perma.cc/3X2K-N66Z>] (indicating male and female managers and entrepreneurs did not differ in risk propensities); see also CORDELIA FINE, *TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY* 115–16 (2017) (challenging the relationship between testosterone and risk-taking propensity).

²⁵³ Blau & Kahn, *supra* note 252, at 38 n.60, 41 (indicating that controlling for differences in attitudes toward competition among business students accounted for part of the gendered wage gap, and describing a study that found “the more heavily the compensation package tilted towards rewarding the individual’s performance relative to a coworker’s performance, the more the applicant pool shifted to being more male dominated”).

tion indicate that the effect of competition on gender-based preferences may be independent of the individual's orientation toward risk or confidence in her performance.²⁵⁴ For example, when given a choice between performing a task on a noncompetitive piece-rate basis versus in a contest, 73% of the men selected the contest, while only 35% of the women did so.²⁵⁵

Wal-Mart's managerial jobs, moreover, did not just build in greater risk, they also rewarded those managers willing to put their own interests ahead of those of others. They accordingly gave the greatest bonuses to managers lacking in empathy, particularly empathy for those employees whose hours needed to be involuntarily cut or who needed to be encouraged to forgo breaks or merited overtime.²⁵⁶ Women are not generally unwilling to compete, but men tend to be more attracted to competitions that involve domination and control over others, while women are more likely to be "personal development competit[ors]" who are concerned with the feelings and welfare of others.²⁵⁷

Finally, the selection of managers willing to do what is necessary to shortchange their employees (all while the top executives look the other way) also tends to favor men over women. A 2018 article in *Psychology Today* showing a picture of a boy indicated that children who break the rules are more likely to grow up to be rich because they thrive on competition.²⁵⁸ *Forbes* ran a lengthy article explaining how breaking the rules is necessary to executive success and how women are less likely to do it.²⁵⁹ Wal-Mart managers, in pursuing their bo-

254 See Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q.J. ECON. 1067, 1078 (2007); see also Jeffrey A. Flory, Andreas Leibbrandt & John A. List, *Do Competitive Workplaces Deter Female Workers? A Large-Scale Natural Field Experiment on Job Entry Decisions*, 82 REV. ECON. STUD. 122, 124 (2015) ("[T]he gender gap in applications more than doubles when a large fraction of the wage (50%) depends on relative performance," reflecting greater female than male aversion to such environments.).

255 See Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 264 (2013).

256 Rosen, *supra* note 236, at 253.

257 See Richard M. Ryckman et al., *Values of Hypercompetitive and Personal Development Competitive Individuals*, 69 J. PERSONALITY ASSESSMENT 271 (1997); see also FINE, *supra* note 252, at 151–72 ("The Myth of the Lehman Sisters"). We are addressing gendered male and female attributes without addressing whether they are socially constructed or biologically driven.

258 See Amy Morin, *Why Kids Who Break the Rules Are More Likely to Become Rich*, PSYCHOL. TODAY (Mar. 29, 2018), <https://www.psychologytoday.com/us/blog/what-mentally-strong-people-dont-do/201803/why-kids-who-break-the-rules-are-more-likely-become> [<https://perma.cc/DJ66-G232>].

259 See Barbara Apple Sullivan, *Women and Rule Breaking: Why It's Essential for Business Success*, FORBES (Oct. 28, 2011, 12:48 PM), <https://www.forbes.com/sites/forbeswomanfiles/2011/>

nuses, violated numerous social norms and sometimes the law without first asking permission from Bentonville.²⁶⁰ In doing so, they played out the gendered tendencies *Psychology Today* traced to early childhood.

Wal-Mart's selection of managers involved practices like frequent moves and long, unpredictable hours that discouraged women from applying. Its old boys' network also involved a measure of gender stereotyping and outright sexism.²⁶¹ Yet, the most important factor in producing both worker exploitation and overwhelmingly male managers may have been a business model that depended on keeping wage costs low. In the process, Wal-Mart found that selecting managers based on certain stereotypically male traits paid off.

Wal-Mart is in many ways a curious example of a rule-breaking culture. It rose to fame initially for its use of bar codes to micro-manage inventory and tight control over a carefully planned network of stores.²⁶² Sam Walton liked to emphasize its down-home culture, with small-town, working-class roots.²⁶³ However, Wal-Mart never believed that wage and hours laws should apply to its employees, and it built its low-wage empire on the ability to never pay overtime, permit unions to form, or pay a cent more than necessary in labor costs.²⁶⁴ It accordingly chose from the same playbooks as Enron and Uber in using a relatively high-stakes bonus system to select for those willing to break wages and hours laws while insulating Bentonville from accountability.

III. WALL STREET REVISITED: WHERE BLOWING UP YOUR CUSTOMERS IS THE NAME OF THE GAME

Wal-Mart is not alone in adopting a business model premised on the exploitation of others and selecting a predominately male workforce because of it. Wall Street has never been hospitable to women. From the time women first fought their way into Wall Street

10/28/women-and-rule-breaking-why-its-essential-for-business-success/#72e2855b4d26 [https://perma.cc/ND5G-Z8RF].

²⁶⁰ See *supra* Section II.A.

²⁶¹ See FEATHERSTONE, *supra* note 192, at 39.

²⁶² See Sandra S. Vance & Roy V. Scott, *Sam Walton and Wal-Mart Stores, Inc.: A Study in Modern Southern Entrepreneurship*, 58 J. SOUTHERN HIST. 231, 234, 245 (1992).

²⁶³ See Leah Goldman, *The Incredible Story of Walmart's Expansion from Five & Dime to Global Megacorp*, BUS. INSIDER (July 20, 2011 1:48 PM), <https://www.businessinsider.com/the-incredible-story-of-walmarts-expansion-from-five-and-dime-to-global-megacorp-2011-7> [https://perma.cc/828G-C2ZX].

²⁶⁴ See Greenhouse, *supra* note 216.

firms, stories about sexual harassment were commonplace. One of the most famous concerned the “boom-boom room.”²⁶⁵ In the 1990’s, the brokerage firm Smith Barney had an office in Garden City, New York with a basement room.²⁶⁶ Women entered at their peril. It “was decorated in ‘fraternity house style,’ with a toilet bowl hanging from the ceiling and Bloody Marys served from a trash can.”²⁶⁷ Pamela Martens, a Smith Barney broker who was told when she was hired in the 1980s that the firm was “bias[ed] in favor of male brokers,” described how on the only occasion she entered the room, the branch manager “forcibly kissed” her.²⁶⁸ That manager often entertained clients in the “boom-boom room,” but female brokers did not dare venture there. Martens led a class action of 22,000 potential claimants alleging sex discrimination against Smith Barney, and the firm eventually settled.²⁶⁹

In the years leading up to this lawsuit, women had successfully increased their Wall Street ranks. The number of female stock analysts at brokerage firms rose from five percent in the 1970s to 20% in the late 1980s.²⁷⁰ Yet, even as Smith Barney settled its case, the percentage of women plunged following the dot-com bust.²⁷¹ After 2000, the absolute number of women on Wall Street fell, and it took until the recovery from the next financial crisis for the numbers to return to their 1990s levels.²⁷²

Perhaps the most perplexing part of women’s Wall Street losses is their failure to make more progress in areas where they should have

²⁶⁵ See Susan Antilla, *Decades After “Boom-Boom Room” Suit, Bias Persists for Women*, N.Y. Times: Dealbook (May 22, 2016), <https://www.nytimes.com/2016/05/23/business/dealbook/decades-after-boom-boom-room-suit-bias-persists-for-women.html> [<https://perma.cc/J6BP-LB97>].

²⁶⁶ See *id.*

²⁶⁷ *Proposed Settlement in Smith Barney Harassment Case Includes Mediation: Martens v. Smith Barney, Inc.*, 3 ANDREWS SEXUAL HARASSMENT LITIG. REP. 8 (1997).

²⁶⁸ *Id.*

²⁶⁹ See *Martens v. Smith Barney, Inc.*, 2003 WL 21543506, No. 96 Civ. 3779 (JGK), at *1 (S.D.N.Y. July 9, 2003), *vacated sub nom. Martens v. Thomann*, 273 F.3d 159, 164 (2d Cir. 2001); Complaint at 1, *Martens v. Smith Barney, Inc.*, 194 F.R.D. 113 (S.D.N.Y. 2000) (No. 96 Civ. 3779 (CBM)); SUSAN ANTILLA, *TALES FROM THE BOOM-BOOM ROOM: WOMEN VS. WALL STREET*, at xiv (2002).

²⁷⁰ Margo Epprecht, *The Real Reason Women Are Leaving Wall Street*, QUARTZ (Sept. 5, 2013), <https://qz.com/121085/the-real-reason-women-are-opting-out-of-wall-street/> [<https://perma.cc/GG3U-MLKP>].

²⁷¹ *Id.*

²⁷² Alexander Eichler, *Gender Wage Gap Is Higher on Wall Street than Anywhere Else*, HUFFINGTON POST (Mar. 19, 2012, 11:09 AM), http://www.huffingtonpost.com/2012/03/19/gender-wage-gap-wall-street_n_1362878.html [<https://perma.cc/T9KY-H3QL>].

excelled: brokerage and advising. The traits necessary to succeed in financial advising and wealth management read like a description tailored for women: relationship building, strong communication skills, and rapport with a diverse group of clients and customers.²⁷³ While comfort with finance and risk management is necessary, math genius is not; humanities and history majors are welcome to apply.²⁷⁴ Yet, relatively few of the professionals in this field—by some accounts just 13%—are women.²⁷⁵ Personal financial advisors show the largest gender gap in compensation in the entire economy.²⁷⁶ A significant reason is the method of compensation. Financial advisors tend to be paid based on “the amount of assets under management . . . or by commissions on product sales, as opposed to less tangible outcomes such as client satisfaction.”²⁷⁷ This emphasizes not only the need to aggressively build investment portfolios, but to engage in practices that may involve intrinsic advisor-customer conflicts of interest.

These conflicts have a long history in finance, one that offers another take on how to promote oneself at the expense of others—this time at the expense of another major corporate stakeholder: the customer.

A. *Bringing Back Predatory Financial Practices*

Financial crises have often been attributed to the predatory behavior of those marketing financial instruments. Indeed, the “roaring twenties,” which created the bubble ending in the Stock Market Crash of 1929, marked the first time ordinary citizens flooded into the stock market, and the first time a majority of shareholders in many major American corporations were women.²⁷⁸ When Congress sought to determine the causes of the Great Depression, it put a large part of the

²⁷³ CERTIFIED FIN. PLANNER BD., MAKING MORE ROOM FOR WOMEN IN THE FINANCIAL PLANNING PROFESSION 7 (2014), https://www.cfp.net/docs/about-cfp-board/cfp-board_win_web.pdf [<https://perma.cc/5VDD-SW2L>]; Helen Bostock, *Broad Range of Skills Needed in Wealth Management*, FIN. TIMES (Mar. 23, 2011), <https://www.ft.com/content/77be8a96-553a-11e0-87fe-00144feab49a> [<https://perma.cc/2XMH-VHRD>].

²⁷⁴ CERTIFIED FINANCIAL PLANNER BOARD, *supra* note 273, at 18–19.

²⁷⁵ Mindy Diamond, *Why Aren't More Women in Wealth Management?*, WEALTH MGMT. (May 14, 2014), <http://www.wealthmanagement.com/careers/why-aren-t-more-women-wealth-management> [<https://perma.cc/G8KG-R9G7>].

²⁷⁶ See Derek Thompson, *Why the Gender-Pay Gap Is Largest for the Highest-Paying Jobs*, ATLANTIC (Dec. 17, 2014), <http://www.theatlantic.com/business/archive/2014/12/the-sticky-floor-why-the-gender-wage-gap-is-lowest-for-the-worst-paying-jobs/383863/> [<https://perma.cc/7ZYL-NPH2>].

²⁷⁷ CERTIFIED FINANCIAL PLANNER BOARD, *supra* note 273, at 21.

²⁷⁸ See WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 129 (Little, Brown & Co. 1927) (1927) (“For a surprisingly large number of great corporations more than half of the share-

blame on the financiers who pushed the sale of securities on the unwary and vulnerable.²⁷⁹ Charles Mitchell, the head of National City (the predecessor to Citigroup), personified these practices.²⁸⁰ During the 1920s, Mitchell pushed the integration of City Bank's commercial banking activities with National City's securities operations.²⁸¹ During that period, Mitchell presided over an eightfold increase in the Bank's capital and used it "to acquire other banks and trust companies," stationing bonds salesmen in each new branch and office.²⁸² By the mid-1920s, City Bank had become the largest bank (and one of the biggest companies) in the United States, with record profits and foreign offices around the world.²⁸³ Congressional hearings in the 1930s demonstrated Mitchell's role in engineering the stock market boom of the previous decade, which ensured riches for City's executives at the expense of customers, who were knowingly sold worthless securities.²⁸⁴ These revelations contributed to the New Deal securities and banking reforms, particularly Glass-Steagall, which mandated the separation of investment and commercial banking.²⁸⁵

The deregulatory era of the later part of the 20th century has seen the return of financial crises fueled by predatory sales practices.²⁸⁶ Almost all involve the exploitation of customers. This new era started with the repeal of a New York Stock Exchange rule mandating that investment banks that traded on the exchange be held in partnership form, ensuring the firm partners would have personal liability for bank misdeeds.²⁸⁷ Salomon Brothers, a leading investment banking

holders are women—in American Telephone for 1926, 200,000 of the 366,000 were on the distaff side.”).

²⁷⁹ See *id.* at 196–97.

²⁸⁰ See MICHAEL PERINO, *THE HELLHOUND OF WALL STREET* 77 (2010) (describing Mitchell's reputation as “the greatest bond salesman who ever lived”).

²⁸¹ See *id.* National City owned City Bank. See *id.*

²⁸² *Id.* at 80.

²⁸³ See *id.* at 81.

²⁸⁴ See *id.* at 78–81; see also Thomas F. Huertas & Joan L. Silverman, *Charles E. Mitchell: Scapegoat of the Crash?*, 60 *BUS. HIST. REV.* 81, 88 (1986).

²⁸⁵ See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 2 (3d ed. 2003) (“President Roosevelt, personally, would attribute to the Pecora hearings a decisive role in making possible the legislation of the First Hundred Days of his administration.”). For discussion of the repeal of Glass-Steagall, see Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 *WAKE FOREST J. BUS. & INTELL. PROP. L.* 441, 444 (2017).

²⁸⁶ See generally A.W. MULLINEUX, *BUSINESS CYCLES AND FINANCIAL CRISES* (2011), <https://hvtc.edu.vn/Portals/0/files/635826563558646918business-cycles-and-financial-crises.pdf> [<https://perma.cc/AM7Y-9BF3>].

²⁸⁷ See Claire Hill & Richard Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 *SEATTLE U. L. REV.* 1173,

firm and “Wall Street fortress for most of the twentieth century,” rose to new prominence with the change.²⁸⁸ Michael Lewis’s 1989 book *Liar’s Poker* captured the new Wall Street culture and the celebration of what he called the “big swinging dick.”²⁸⁹ Lewis described this well-paid class of traders, hired right out of Ivy League colleges, as acting “more like students in a junior high school.”²⁹⁰ This ethos combined a glorification of cleverness and gamesmanship with “sign[s] of . . . masculinity.”²⁹¹ In this environment, Salomon Brothers’ management style became “one of warring individuals and factions.”²⁹² Serving customers was not part of the path toward advancement.²⁹³ The firm created complex, opaque financial products and sought to profit from them at the expense of less sophisticated customers.²⁹⁴ Traders bragged about “blowing up a client,” or persuading the client to buy a product certain to decline in value and then forcing the client out of the market.²⁹⁵ Potential clients who were often at the losing ends of these trades nonetheless sought to be associated with the winners of these high-stakes status competitions.²⁹⁶ “Winning”—and the size of the bonus at the end of the year—is what mattered in the hothouse investment culture that came to dominate Wall Street.²⁹⁷

1177–78 (2010); cf. Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1408–09 (1992) (reflecting on the role of limited liability for shareholders generally as increasing the willingness to take risks).

²⁸⁸ Carrie Hojnicky, *The Spectacular Rise and Fall of Salomon Brothers*, BUS. INSIDER (July 3, 2012, 10:53 AM), <http://www.businessinsider.com/salomon-brothers-treasury-bond-scandal-2012-7?op=1/#lomon-brothers-was-founded-in-1910-1> [<https://perma.cc/P8D5-P4H4>].

²⁸⁹ MICHAEL LEWIS, *LIAR’S POKER* 46 (1989).

²⁹⁰ *Id.* at 98.

²⁹¹ *Id.* at 99; see also Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street’s Social and Cultural Response to Women Has Shaped Securities Regulation*, 44 HARV. J.L. & GENDER 175, 177 (2010) (describing the trading desk as “a highly competitive and male-dominated environment where posters of pinup girls and strip club outings were not unheard of”).

²⁹² Richard L. Stern, *Book and Business; Overpaid and Guilt-Ridden*, N.Y. TIMES (Oct. 29, 1989), <http://www.nytimes.com/1989/10/29/books/book-business-overpaid-and-guilt-ridden.html> [<https://perma.cc/H3RL-FDEK>] (reviewing LEWIS, *supra* note 289).

²⁹³ HILL & PAINTER, *supra* note 34, at 102–03 (describing Goldman Sachs’s practices of fleecing its customers and noting that neither the individual trader’s nor the bank’s reputation was necessarily hurt by being associated with this conduct so long as the behavior was associated with the “smartest” bankers).

²⁹⁴ See *id.* at 85–86, 90 (describing the perceived connection among “cleverness” and “winning,” sophisticated products, and appetite for risk).

²⁹⁵ See LEWIS, *supra* note 289, at 204.

²⁹⁶ See HILL & PAINTER, *supra* note 34, at 19 (indicating the emphasis on selling the most complex products to the least sophisticated parties).

²⁹⁷ *Id.* at 85–86, 107.

Salomon's downfall came in the 1990s when it too egregiously broke the law. Paul Mozer, a Salomon trader, tried to reap extra profits for the firm by effectively "'cornering' the market" in government securities, allowing the firm to "command[] a premium price" from other brokers who could then obtain the bonds only from Salomon Brothers.²⁹⁸ To combat the practice, the Treasury Department adopted new rules limiting the percentage of the bonds any one buyer could purchase.²⁹⁹ Mozer responded by submitting bids under his customers' names, thus disguising Salomon's stake in the purchases.³⁰⁰ Mozer told Salomon's management that he had faked the bids, but management, who had been informed that Mozer's actions were illegal and needed to be reported, did nothing for months.³⁰¹ By then, Treasury had figured it out, triggering a crisis that forced the resignation of Salomon's top management.³⁰² The firm ultimately paid a \$290 million fine to the SEC, one of the largest fines ever issued against an investment bank at the time.³⁰³

The crisis at Salomon Brothers is striking in many respects and illustrates the break-the-rules culture. Mozer's violations of the law were almost certainly prompted by hubris; he sought to circumvent a Treasury that he believed, probably correctly, was aimed at him.³⁰⁴ Treasury is likely to have discovered and pursued the violation because it was an act of defiance, one that undermined the integrity of the entire Treasury bond market. In the meantime, Salomon higher-ups saw no reason to take action even after Mozer told them he had faked bids in the name of clients who knew nothing about his actions and who stood to lose from what he had done.³⁰⁵ While the criminal violations had consequences—Mozer spent four months in jail and the stars of *Liar's Poker* lost their jobs³⁰⁶—it did not fundamentally

²⁹⁸ Robert J. McCartney, *Salomon Says Trader Challenged Treasury*, WASH. POST (Sept. 5, 1991), https://www.washingtonpost.com/archive/business/1991/09/05/salomon-says-trader-challenged-treasury/149ea8f3-5155-4ba0-bc6f-95e8d647329e/?utm_term=.0891ae0b0a43 [<https://perma.cc/QC6F-CC9M>].

²⁹⁹ *Id.*

³⁰⁰ *See id.*

³⁰¹ *Id.*

³⁰² Stephen Labaton, *Salomon to Pay Phony-Bid Fine of \$290 Million*, N.Y. TIMES (May 21, 1992), <https://www.nytimes.com/1992/05/21/business/salomon-to-pay-phony-bid-fine-of-290-million.html> [<https://perma.cc/9PCF-FM9K>].

³⁰³ *Id.*

³⁰⁴ *See* Bernice Kanner, *Saving Solomon*, N.Y. MAG., Dec. 9, 1991, at 42.

³⁰⁵ *See* Deborah A. DeMott, *The Stages of Scandal and the Roles of General Counsel*, 2012 WIS. L. REV. 463, 478–82 (describing how Mozer told his superiors about his fake bids and how they failed to restrict his activities).

³⁰⁶ *See* Keith Bradsher, *Former Salomon Trader to Pay \$1.1 Million Fine*, N.Y. TIMES (July

change Wall Street culture.³⁰⁷ One account concluded it was part of a more general shift “from a context of relationships to a context of transactions.”³⁰⁸

By the time of the more recent housing bubble and financial crisis that followed, Goldman Sachs (“Goldman”) had replaced Salomon Brothers as the darling of Wall Street.³⁰⁹ The most lucrative part of finance had long since shifted from servicing clients to designing and selling complex financial instruments, such as the mortgage-backed collateralized debt obligations that precipitated the financial crisis.³¹⁰ Greg Smith, a Goldman Vice President who left in 2012, explained that Goldman’s practices had a lot in common with those Salomon Brothers pioneered in the 1980s: “[G]etting an unsophisticated client was the golden prize. The quickest way to make money on Wall Street is to take the most sophisticated [financial] product and try to sell it to the least sophisticated client.”³¹¹ The stars in the new show were those who made the most money, and they tended to be those who created and sold the most opaque instruments for the highest markups.³¹² With the housing boom in the early 2000s, this fueled increasing demand for new mortgages that could be converted into securities and fueled a wave of predatory practices.³¹³

Mortgage brokers, who earned commissions on every mortgage loan issued, encouraged buyers to purchase homes the mortgage brokers knew these buyers could not afford, often without accurately dis-

15, 1994), <https://www.nytimes.com/1994/07/15/business/former-salomon-trader-to-pay-1.1-million-fine.html> [<https://perma.cc/8JNC-PNB3>].

³⁰⁷ The remaining Salomon brokers merged with Smith Barney in the 1990s, became part of Citigroup after the repeal of Glass-Steagall, then oversaw Citi’s ventures into mortgage-backed financial products during the housing bubble. See HILL & PAINTER, *supra* note 34, at 84, 99. Citi eventually paid seven billion dollars to settle federal and state claims arising from its involvement in mortgage related securities. Nate Raymond, *Exclusive: Citigroup Executives Avoid U.S. Charges over Mortgage Bonds—Document*, REUTERS (Mar. 4, 2016, 12:34 PM), <https://www.reuters.com/article/us-citigroup-mbs-idUSKCN0W626D> [<https://perma.cc/7DSU-2E43>]. A Federal Housing Finance Agency inspector general report found that “Citigroup knowingly and purposefully purchased and securitized loans that did not meet representation and warranties or in many cases were outright fraudulent loans.” *Id.*; see also HILL & PAINTER, *supra* note 34.

³⁰⁸ Neal Lipschutz, *Moral Outrage Attends the Probe of the U.S. Bond-Market Scandal*, BALT. SUN (July 11, 1993), http://articles.baltimoresun.com/1993-07-11/news/1993192091_1_salo-mon-government-bonds-martin-mayer [<https://perma.cc/3UTC-BE4M>].

³⁰⁹ See HILL & PAINTER, *supra* note 34, at 102.

³¹⁰ See *id.* at 5, 82–84 (describing investment banks’ move from brokerage activities and underwriting corporate securities to designing and trading new securities on their own accounts).

³¹¹ *Id.* at 19.

³¹² *Id.* at 102.

³¹³ See *id.* at 2.

closing the terms of the mortgages.³¹⁴ Predatory lending practices were commonplace.³¹⁵ The mortgage originators then bundled the loans and sold them to investment banks, which repackaged them into complex securities that disguised the level of risk.³¹⁶ Rating agencies gave the securities Triple A ratings, often without reviewing the supporting files and even when the file samples they reviewed indicated a level of risk that belied the ratings.³¹⁷ When the market began to collapse, the institutions in a position to see the crisis coming protected themselves by shortchanging their customers.³¹⁸ At each of these stages, sophisticated parties misrepresented the products they were selling in ways that violated the rules (like standard underwriting practices) that had governed home mortgages for decades.³¹⁹ They

³¹⁴ See Binyamin Appelbaum, *How Mortgage Fraud Made the Financial Crisis Worse*, N.Y. TIMES: THE UPSHOT (Feb. 12, 2015), <https://www.nytimes.com/2015/02/13/upshot/how-mortgage-fraud-made-the-financial-crisis-worse.html> [<https://perma.cc/2APK-4JZF>]; *Wall Street's Role in the U.S. Mortgage Crisis Examined*, PBS NEWSHOUR (Aug. 20, 2008, 6:30 PM), <https://www.pbs.org/newshour/show/wall-streets-role-in-the-u-s-mortgage-crisis-examined> [<https://perma.cc/6GK7-HWTC>].

³¹⁵ See Sumit Agarwal et al., *Predatory Lending and the Subprime Crisis*, 113 J. FIN. ECON. 29, 31 (2014). Lenders also charged struggling homeowners unjustified fees after the fact. See Press Release, Fed. Trade Comm'n, Countrywide Will Pay \$108 Million for Overcharging Struggling Homeowners; Loan Servicer Inflated Fees, Mishandled Loans of Borrowers in Bankruptcy (June 7, 2010), <https://www.ftc.gov/news-events/press-releases/2010/06/countrywide-will-pay-108-million-overcharging-struggling> [<https://perma.cc/A4LY-ED7X>].

³¹⁶ FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011), <https://fcic.law.stanford.edu/> [<https://perma.cc/SCP7-T6FP>]. In some cases, the mortgage bankers bought the bundled mortgages even when their employees warned them of the lack of underwriting and substandard practices. See Terry Carter, *Will Those Who Led the Financial System into Crisis Ever Face Charges?*, A.B.A. J. (Feb. 1, 2016, 5:10 AM), http://www.abajournal.com/magazine/article/will_those_who_led_the_financial_system_into_crisis_ever_face_charges [<https://perma.cc/X9ER-EAM7>].

³¹⁷ See Claire Hill, *Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?*, 71 U. PITT. L. REV. 585, 591–92 (2010).

³¹⁸ Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS, Nov. 10, 2011, at 23, <https://www.nybooks.com/articles/2011/11/10/should-some-bankers-be-prosecuted/> [<https://perma.cc/G6ZD-ZWE2>]; see also HILL & PAINTER, *supra* note 34, at 3 (observing that Goldman Sachs “apparently reduced its own risk by selling part of its mortgage exposure to its clients and customers”).

³¹⁹ See, e.g., STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, 112TH CONG. REP. ON WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (2011) (providing case studies on several institutional investment banks that misrepresented to clients information about their packages); William Black, *Oral Testimony of William K. Black*, NEW ECON. PERSP. (Feb. 8, 2015), <http://neweconomicperspectives.org/2015/02/oral-testimony-william-k-black.html> [<https://perma.cc/6TLS-HYGC>].

often deliberately targeted the vulnerable and bragged about it while reaping handsome rewards for their rule-breaking.³²⁰

The SEC's civil securities fraud case against Goldman illustrates these abuses.³²¹ In 2010, the SEC announced that Goldman would pay a \$550 million fine (the largest the SEC had secured up to that time) to settle charges that "Goldman misled investors in a subprime mortgage product just as the U.S. housing market was starting to collapse."³²² The SEC also decided to bring individual civil fraud charges against "the lowest man on the totem pole," a young, "midlevel Goldman trader" and French citizen named Fabrice Tourre.³²³ Tourre had made the mistake of joking about his role in the crime. In an email to his girlfriend, he boasted that he sold toxic mortgage bonds to "widows and orphans that I ran into at the airport,"³²⁴ though in fact the customers were more sophisticated and more targeted than the email suggested.³²⁵ In a different email, he wrote, "The whole building is about to collapse anytime now . . . Only potential survivor, the fabulous Fab . . . standing in the middle of all these complex, highly leveraged, exotic trades he created without necessarily understanding all the implications of those monstrosities!!!"³²⁶ The SEC charged that Tourre had "put together a complicated financial product that was secretly designed to maximize the likelihood that it would fail, and marketed and sold it to investors without appropriate disclosure."³²⁷ When the deal unraveled as Goldman expected it would, investors suffered about one billion dollars in losses.³²⁸ The investment banking

³²⁰ Even those who didn't get away with these behaviors entirely pocketed large sums of money they never had to pay back. *See, e.g.,* Madrick & Partnoy, *supra* note 318, at 23 (describing how fines the SEC levied against Mozilo paled in comparison with the profits he made in a single year of his mortgage operations).

³²¹ *See, e.g.,* Complaint at 7–11, SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147 (S.D.N.Y. Apr. 16, 2010) (No. 10-CV-3229); *see also* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511 (2011).

³²² *See* Press Release, U.S. Sec. & Exch. Comm'n, Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), <https://www.sec.gov/news/press/2010/2010-123.htm> [<https://perma.cc/L2Z8-PHK9>]. For an account of the failure to prosecute these activities, *see* Jesse Eisinger, *Why the S.E.C. Didn't Hit Goldman Sachs Harder*, NEW YORKER (Apr. 21, 2016), <https://www.newyorker.com/business/currency/why-the-s-e-c-didnt-hit-goldman-sachs-harder> [<https://perma.cc/BPR3-9T3F>].

³²³ Eisinger, *supra* note 322.

³²⁴ Sam Gustin, *Not So 'Fabulous' Fab: Ex-Goldman Sachs Trader Fabrice Tourre Found Liable for Fraud*, TIME (Aug. 1, 2013), <http://business.time.com/2013/08/01/not-so-fabulous-fab-ex-goldman-sachs-trader-found-liable-for-fraud/> [<https://perma.cc/GEK8-P42X>].

³²⁵ *See* Buell, *supra* note 321, at 513 (describing the customer as a German bank).

³²⁶ Gustin, *supra* note 324.

³²⁷ *Id.*

³²⁸ Ben Protess, *Former Goldman Trader Tourre Says He Will Not Appeal*, N.Y. TIMES:

firm, however, “made millions of dollars in fees on the deal,” and Tourre received \$1.7 million from Goldman in the year the project went through.³²⁹ Goldman’s excuse was caveat emptor—the fine print in its disclosure clearly said that Goldman assumed no responsibility for the success of the securities it created and sold.³³⁰ Goldman settled its case with the SEC, but Tourre lost at trial; he ended up paying more than \$800,000 in fines, though Goldman did pick up the tab for his legal fees.³³¹

The cases brought against Mozer and Tourre are rare in targeting individuals for financial misconduct in environments where such actions are commonplace. Even then, higher-ups in a position to know about and profit from their activities were not charged in the individual actions. At the same time, the whistleblowers who tried to warn against Wall Street’s excesses often now find themselves unemployed in the industry.

B. *Compensation and Conflicts of Interest: Why Environments Hostile to Customers Favor Men*

Wealth management and personal financial advisers are in a somewhat different position from traders and investment bankers. Unlike the latter, they have fiduciary obligations to their clients,³³² and they are more likely to enter into ongoing, personalized relationships with many clients.³³³ Nonetheless, these advisers are lightly regulated at best, and critics conclude that “[t]he regulatory structure for financial advice now tolerates incentives motivating financial advisers to manipulate and deceive retail investors.”³³⁴

The most obvious conflicts arise from the fee structure. Benjamin Edwards observes that “[c]ommission compensation structures may lead even well-meaning financial advisers to recommend unwise in-

DEALBOOK (May 27, 2014, 4:49 PM), <https://dealbook.nytimes.com/2014/05/27/former-goldman-trader-tourre-says-he-will-not-appeal/> [<https://perma.cc/Z224-FTXT>].

³²⁹ Gustin, *supra* note 324.

³³⁰ See Madrick & Partnoy, *supra* note 318, at 25.

³³¹ Gustin, *supra* note 324; Protesse, *supra* note 328.

³³² See generally Donald C. Langevoort, *Brokers as Fiduciaries*, 71 U. PITT. L. REV. 439 (2010) (describing the increasingly blurry line between financial advisers who owe fiduciary obligations and brokers who do not); U.S. SEC. & EXCH. COMM’N, *STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS* (2011), <http://www.sec.gov/news/studies/2011/913studyfinal.pdf> [<https://perma.cc/ZRE7-PA3Q>].

³³³ See Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 WASH. L. REV. 707, 756 (2012) (documenting that brokerage firms have long advertised they provide personalized advice).

³³⁴ Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181 (2017).

vestments to their clients.”³³⁵ These advisors may be tempted to steer their clients toward products that offer higher sales commissions or involve greater advisor involvement, generating higher fees.³³⁶ The consequent losses for ordinary savers are estimated at \$17 billion per year.³³⁷

These conflicts may be exacerbated in large institutions when financial advisers experience pressure to sell the bank’s other products. Wells Fargo, for example, was caught up in a major scandal because its employees “opened millions of ‘ghost’ bank and credit card accounts for existing customers.”³³⁸ Out of fear for their jobs and because of pressure to sell additional bank products, these employees, “with their supervisors’ acquiescence, [] created accounts without the customers’ consent,” often targeting Native American tribes, undocumented residents, and other vulnerable customers unlikely to complain.³³⁹

The customers ended up not only paying for services they did not want, but also being “charged for insufficient funds or overdraft fees because there wasn’t enough money in their original accounts” to cover the charges.³⁴⁰ One of the former Wells Fargo bankers commented, “The analogy I use was that it was like lions hunting zebras They would look for the weakest, the ones that would put up the least resistance.”³⁴¹ Another explained that “the whole foundation of Wells Fargo is cross-sell, cross-sell, cross-sell.”³⁴² And Wells Fargo was not alone in these practices.³⁴³

These abuses provide insights into women’s difficulties in finance. Incentive-based compensation systems do not just provide incentives to work harder. They also encourage earning larger salaries at the cus-

335 *Id.* at 183.

336 *See id.* at 184 & n.12.

337 *See id.* at 184.

338 Claire A. Hill, *Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda*, 74 WASH. & LEE L. REV. 973, 975 (2017).

339 *Id.* at 976.

340 Jim Nortz, *The Anatomy of a Corporate Scandal Unauthorized Credit Cards, Greasy Cup Holders and a Surefire Recipe for a Corporate Scandal*, Jan./Feb. 2017, 35 ASS’N CORP. COUNS. DOCKET, at 71.

341 Merric Kaufman, “Lions Hunting Zebras”: *The Wells Fargo Fake Accounts Scandal and Its Aftermath*, 36 REV. BANKING & FIN. L. 434, 438 (2017).

342 Nortz, *supra* note 340, at 72. “Cross-selling” refers to “the bank’s sales approach of offering customers with a checking account many other types of products—including credit cards, home loans, and lines of credit.” *Id.*

343 Forty other medium to large banks encouraged their employees to create millions of fake accounts to meet sales goals. Matt Egan, *Wells Fargo Isn’t the Only Bank with Fake Accounts, Regulators Say*, CNN BUS. (June 6, 2018, 1:56 PM), <https://money.cnn.com/2018/06/06/news/companies/wells-fargo-fake-accounts-banks-occ/index.html> [<https://perma.cc/B935-DBY9>].

tomers's expense.³⁴⁴ Reports on the shortage of women in financial advising find that the compensation system is a factor in discouraging women, but these studies do not say whether women are discouraged by a failure to earn more or a refusal to do what it takes to short-change clients.³⁴⁵ What is nonetheless clear is that those women who make it into the profession experience the largest wage gap of any employment category in the economy.³⁴⁶

At Wells Fargo, for example, complaints about selling customers short have tended to dovetail with complaints about sexism. Whistleblowers have complained that, for years, financial advisers in the bank's wealth management division were pressured to steer wealthy clients into services that generated higher fees, even though these services often carried higher risks and were not necessarily appropriate for the client's investment objectives.³⁴⁷ Justice Department, SEC, and Labor Department investigations are pending.³⁴⁸ More recently, women in the same division have complained about a glass ceiling blocking them from promotion into the unit's top ranks.³⁴⁹ Twelve out of the 45 regional managers in the wealth management division are women.³⁵⁰ Yet, all seven of the senior managing directors

³⁴⁴ See Edwards, *supra* note 334, at 183 (arguing that such compensation systems create intrinsic conflicts of interests in financial advising).

³⁴⁵ See CERTIFIED FINANCIAL PLANNER BOARD, *supra* note 273, at 21. Carol Gilligan's classic work suggests that gendered female behaviors involve greater attention to personal relationships. Carol Gilligan, *In a Different Voice: Women's Conception of Self and of Morality* (1982), in *THE FUTURE OF DIFFERENCE* (Hester Eisenstein & Alice Jardine eds., 1985); see Niobe Way, Alisha Ali, Carol Gilligan & Pedro Noguera, *Introduction: The Crisis of Connection*, in *THE CRISIS OF CONNECTION: ROOTS, CONSEQUENCES, AND SOLUTIONS* 1, 6–7 (Way et al. eds., 2018) (exploring Gilligan's paradigm-shifting recognition of connection).

³⁴⁶ Thompson, *supra* note 276.

³⁴⁷ Emily Glazer, *Whistleblowers Detail Wells Fargo Wealth Management Woes*, WALL STREET J. (July 27, 2018, 4:14 PM), https://www.wsj.com/articles/whistleblowers-detail-wells-fargo-wealth-management-woes-1532707096?mod=article_inline [<https://perma.cc/8GLY-LW8Y>].

³⁴⁸ Matt Egan, *Wells Fargo in Talks to Settle SEC, DOJ Fake-Account Investigations*, CNN BUS. (Mar. 1, 2019, 1:00 PM), <https://www.cnn.com/2019/03/01/business/wells-fargo-justice-department-sec-settlement/index.html> [<https://perma.cc/JT9Q-JQ6E>]; Emily Glazer, *Justice Department Widens Wells Fargo Sales Investigation to Wealth Management*, WALL STREET J. (Mar. 16, 2018, 6:49 PM), <https://www.wsj.com/articles/justice-department-widens-wells-fargo-sales-investigation-to-wealth-management-1521215076> [<https://perma.cc/FG6J-XRNP>].

³⁴⁹ See Emily Glazer, *At Wells Fargo, Discontent Simmers Among Female Executives*, WALL STREET J. (Aug. 31, 2018, 10:53 AM), <https://www.wsj.com/articles/at-wells-fargo-discontent-simmers-among-female-executives-1535707801> [<https://perma.cc/H4K8-G6JZ>].

³⁵⁰ *Id.*

above them are men.³⁵¹ The 12 women have alleged gender bias in the promotion opportunities.³⁵²

Substantial evidence exists that women face the same triple bind in finance that they do elsewhere. As suggested above, it may be harder to find women eager to sell out their customers.³⁵³ Sallie Krawcheck, after all, was fired not once but twice for her unwillingness to push the kind of cross-selling that got Wells Fargo into so much trouble.³⁵⁴ Initial reports suggested she had too intensely tangled with the new Citi CEO at the height of the financial crisis.³⁵⁵ More detailed reports indicated they disagreed not just about protecting Citi's investment clientele from losses involving ill-advised mortgage products.³⁵⁶ The new CEO Pandit wanted Citigroup investment advisers to "push largely Citigroup products," while Krawcheck thought the advisers she supervised "should be free to pitch products from a variety of other companies" better suited to their clients' needs.³⁵⁷ That same lack of devotion to cross-selling is what cut short her tenure at BofA.³⁵⁸ Pitching Citi or BofA products is not the same as opening bank accounts without the customer's permission.³⁵⁹ However, putting customer interests ahead of the bank's bottom line appears to be disqualifying for higher financial management positions. When Krawcheck later mused that perhaps women did see the world differently, what she almost certainly meant in emphasizing women's greater focus on relationships is that they are more like old-time (and exclusively male) bankers; they believe that the job ought to be about looking out for their customers' interests.³⁶⁰

Women also face difficulties if they try to play the game the same way men do.³⁶¹ Allison Schieffelin, for example, filed a sex discrimination suit against Morgan Stanley in 2004.³⁶² She maintained that

351 *Id.*

352 *Id.*

353 *See supra* text accompanying note 343.

354 *See supra* text accompanying notes 12–22.

355 *See* Fabrikant, *supra* note 12.

356 *Id.*

357 *Id.*

358 *See* Touryalai, *supra* note 15.

359 *See* Edwards, *supra* note 334.

360 *See* HILL & PAINTER, *supra* note 34, at 101; Roberts, *supra* note 20.

361 *See, e.g.,* Joann S. Lublin, *Women Managers Have Little Margin for Error*, WALL STREET J. (Oct. 23, 2018), <https://www.wsj.com/articles/women-managers-have-little-margin-for-error-1539966227> [<https://perma.cc/C38S-3MSH>].

362 Complaint of Plaintiff-Intervenor Allison Schieffelin at 1, *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451 (S.D.N.Y. 2004) (No. 01 CV 8421 (RMB)).

“whereas male colleagues were praised for being aggressive and competitive, . . . she was criticized for being ‘snippy’ and ‘too emotional.’”³⁶³ When she did not do as well as the men around her, her supervisor told her she “‘shouldn’t be so focused on Morgan Stanley,’ and she should instead direct her energy toward ‘the important things in life’ like ‘having a family.’”³⁶⁴ Morgan Stanley excluded her from the social events, retreats, and strip club outings that facilitated male bonding with clients,³⁶⁵ and when she threatened to file suit, the firm retaliated.³⁶⁶ Morgan Stanley eventually paid \$54 million to settle her case, with \$12 million to Schieffelin personally.³⁶⁷

Even though women engage in misconduct much less than men, women face the worst challenges when they do break the rules and their bosses need scapegoats. John Mack, the boss and mentor who fired Zoe Cruz, is also the one who insisted she more heavily involve Morgan Stanley in riskier securities.³⁶⁸ Studies indicate that the worst time for women in competitive systems is during downturns.³⁶⁹

A 2016 study of personal financial advisors documents the risks women face. That study found that “[r]oughly 7% of financial advisors [in the U.S.] have a past record of misconduct”³⁷⁰—a remarkably high number for any industry, and one that suggests that misconduct is rife. The study found that male advisors are more than three times as likely to engage in misconduct, and more than twice as likely to be repeat offenders as their female counterparts.³⁷¹ The offenses they commit are much costlier for their employers to settle. Once the misconduct is reported, though, the female advisors are 20% more likely to be fired, and 33% less likely to find a new job in the industry compared to the men.³⁷² The study also found Wells Fargo was one of the worst performers. The bank was 25% more likely to fire women than men for misconduct.³⁷³

³⁶³ Chung, *supra* note 291, at 231.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 233.

³⁶⁸ *See supra* INTRODUCTION.

³⁶⁹ *See supra* note 11 and accompanying text.

³⁷⁰ Mark L. Egan, Gregor Matvos & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct* 2 n.2 (Nat’l Bureau of Econ. Research, Working Paper No. 23242, 2017), https://www.nber.org/papers/w23242?utm_campaign=ntw&utm_medium=email&utm_source=ntw [<https://perma.cc/4GSA-7AJ8>].

³⁷¹ *Id.* at 8.

³⁷² *Id.* at 12.

³⁷³ *Id.* at 14; *see also* Annalyn Kurtz, *Wells Fargo 25% More Likely to Punish Women Em-*

Additionally, the source of the complaints is different for men and women. For men, customers initiate 57% of misconduct complaints compared to 28% initiated by employers.³⁷⁴ For the women, employer-initiated misconduct complaints are almost as common as customer-initiated complaints (41% versus 48%), and employers initiate more misconduct complaints against female employees (41%) than against male employees (28%).³⁷⁵ The study cannot fully identify the reasons for the gender disparities other than to note that the disparities shrink in firms with more women owners.³⁷⁶ These findings are consistent with other observations about why women do not do well in finance. If the business model depends on shortchanging customers, women do not do as well. They are less likely to view cynically racking up unnecessary commissions as a sport; their customers may be less forgiving if they do not live up to stereotypes about how women provide more selfless services; and employers who benefit from the additional fees may be less inclined to back women who generate customer complaints.³⁷⁷ Being able to shortchange customers or otherwise break the rules requires supervisor support, and men in finance are more likely to be in that position than women.³⁷⁸ Former trader Maureen Sherry explains “[g]ood producers’ tend to be arrogant and entitled, and also immunized from discipline. ‘The rainmakers don’t get fired, ever, for bad behavior.’”³⁷⁹ The result creates reinforcing tendencies in which the Goldman traders who most egregiously sell out their customers enjoy greater fame and fortune than those who do so by simply following orders.

The major investment banking firms may, in spirit, have much in common with Enron and Uber. Salomon Brothers sought to disrupt what was a relatively staid investment banking environment and recruited traders who would thrive in a no-holds-barred business that

ployees than Men, Study Says, FORTUNE (Mar. 13, 2017), <http://fortune.com/2017/03/13/wells-fargo-financial-advisers-gender-discrimination/> [<https://perma.cc/FSG9-XB6T>] (describing Wells Fargo as producing some of the greatest gender disparities).

³⁷⁴ See Egan, Matvos & Seru, *supra* note 370, at 8–9.

³⁷⁵ *Id.* at 9.

³⁷⁶ *Id.* at 4–5.

³⁷⁷ “Women’s workplace weaknesses are overplayed or punished excessively, while men’s shortcomings often are ignored . . .” Lublin, *supra* note 361.

³⁷⁸ *Id.*

³⁷⁹ Michael Hiltzik, *Wall Street and High-Tech Sex Harassment Scandals Offer a Lesson for Hollywood: Change Won’t Happen Quickly*, L.A. TIMES (Oct. 26, 2017, 5:25 PM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-harassment-hollywood-20171027-story.html> [<https://perma.cc/9NY8-LT9Y>].

rewarded cleverness and success.³⁸⁰ Personal financial advisers, however, are supposed to be different. They have longer-term customers with ongoing and more personal relationships.³⁸¹ Yet, the intrinsic conflicts of interest and the commission- and fee-based compensation system produces similar results.³⁸² Winning is what matters, and those who excel at “Liar’s Poker”—the ability to lie, bluff, cheat, and win—are still the stars of Wall Street.³⁸³

IV. ANTIDISCRIMINATION LAW CANNOT REACH THE TRIPLE BIND

The types of discriminatory behavior that form the triple bind posed above are virtually unreachable through legal doctrines in the employment discrimination realm. Moreover, it is hard to argue that the objective of antidiscrimination law should be to claim that women should be equally able to join men in breaking the law at the expense of others. Turn to Wal-Mart and consider two options. The first is allowing a nationwide class action that would compel hiring more female managers, but otherwise leaving Wal-Mart’s labor practices intact. The result might be an increase in the number of female managers who succeed in stealing the wages of their primarily female employees. The second is strictly sanctioning Wal-Mart for wage theft and threatening the company with draconian sanctions for new violations. While the first option might lead to a few more female managers, the second would give Wal-Mart a greater incentive to hire women—and to dismantle the practices that discourage women from applying.³⁸⁴

³⁸⁰ HILL & PAINTER, *supra* note 34, at 98–99.

³⁸¹ Larry Roth, *Fee or Commission-Based Service: What Kind of Relationship Should You Have with Your Financial Advisor?*, FORBES (Apr. 20, 2016, 2:40 PM), <https://www.forbes.com/sites/larryroth/2016/04/20/fee-or-commission-based-service-what-kind-of-relationship-should-you-have-with-your-financial-advisor/#1e6ec5d71749> [<https://perma.cc/5NKQ-6CLM>].

³⁸² See HILL & PAINTER, *supra* note 34, at 97.

³⁸³ *Id.*

³⁸⁴ Bradley Keoun & Anders Keitz, *The Goldman Sachs Board Remains Old Boys’ Club Even as Rivals Promote Women*, STREET (May 1, 2018, 3:24 PM), <https://www.thestreet.com/investing/as-companies-add-more-women-to-boards-goldman-sachs-keeps-a-pair-14574319> [<https://perma.cc/SK4U-SGQ6>] (“The thesis that a higher percentage of female directors can improve corporate performance is supported by an organization called the 30% Club,” which includes “the money managers BlackRock Inc. [], State Street Corp. [], Vanguard Group,” and “Warren Buffett, the billionaire CEO of Berkshire Hathaway Inc.”); see also Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms’ Risk Oversight?*, 70 SMU L. REV. 327, 332 (2017) (surveying empirical literature regarding gender diversity and risk management and concluding that gender diversity on boards leads to better risk management decisions).

The impact would be much greater with both limits on executive compensation and gender equity in its distribution.³⁸⁵ In the alternative, consider what accurate sex discrimination claims would look like.

The first leg of this oppressive triad is that men are succeeding through narcissistic, self-interested behaviors. Corporations hand-somely reward characteristics that are the upsides of narcissism: charisma, ability to influence (manipulate) people, and risk-taking. The downsides of unethical conduct and backstabbing may be somewhat unintended consequences.³⁸⁶ The primary difficulty of framing this as a sex discrimination suit is that, although narcissism has both gendered roots and consequences, it does not sharply differ between the sexes. While in general men tend to be more narcissistic than women, there are many men who are not, and there are some females who are.³⁸⁷ Competitive, self-aggrandizing behaviors may be linked to gender (whether through socialization or biology or both), but the behavioral manifestations of narcissism occur in individuals and are not inexorably tied to gender identity.³⁸⁸ Therefore, it is possible the lawyers who brought the class action against Wal-Mart did not mention wage theft because it changed the case from one based on gender to one serving Wal-Mart's (not entirely legitimate) business interests.³⁸⁹

The second leg of the triad is that women who act atypically for their gender are punished. A wealth of psychosocial literature supports the phenomenon that both men and women suffer penalties for their departures from gender norms.³⁹⁰ However, when women sue for sex discrimination based on penalties for gender nonconformity, their lawsuits typically involve employers imposing stereotypes on women by, for example, sorting them into caregiving occupations.³⁹¹ Although allegations that an employer discriminated against an employee for

³⁸⁵ See generally T. Leigh Anenson & Donald O. Mayer, "Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation, 12 U. PA. J. BUS. L. 947 (2010).

³⁸⁶ See Emily Grijalva et al., *Narcissism and Leadership: A Meta-Analytic Review of Linear and Nonlinear Relationships*, 68 PERSONNEL PSYCHOL. 1, 3-4 (2015).

³⁸⁷ See Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-Analytic Review*, 141 PSYCHOL. BULL. 261, 262 (2015).

³⁸⁸ *Id.* at 263.

³⁸⁹ See *supra* Section II.A.

³⁹⁰ See, e.g., Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOLOGIST 109, 113 (2001); Paul Kivel, *The Act-Like-a-Man Box*, in MEN'S LIVES 148-50 (Michael S. Kimmel & Michael A. Messner eds., 2007); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 389, 393-94 (2004).

³⁹¹ See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003); see also *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 126 (2d Cir. 2004).

her failure to conform to sex stereotypes theoretically can establish a viable Title VII claim,³⁹² these suits are difficult to win even when based on a specifically sex-coded employer action, such as grooming standards.³⁹³ A lawsuit claiming that an employer's rule has a disparate impact based on sex-stereotypic behavior is an unusual framing: "Recent Supreme Court constraints on implicit bias and disparate impact theories have been in the context of cases seeking class-wide relief, whereas sex stereotyping theories have been successful mostly in cases seeking individual relief."³⁹⁴

At the same time, it is also hard to win a case based on disparate treatment of wrongdoers. Ellen Pao for example, had at least some jury members in her Silicon Valley sex discrimination case convinced that she had been fired for the same personality flaws as many of the men, but the jury still voted against her.³⁹⁵

The third leg of the triple bind—that when women ahead of them are ousted from jobs or discriminated against in promotions, other women get discouraged—is not something that is legally actionable, if it is even calculable. Women become disheartened when they see other women fail, and when they become aware of gender stereotypes, they tend to internalize beliefs about their own abilities and modify their career aspirations in negative ways.³⁹⁶ Moreover, any claim that women simply do not want the jobs because they are designed to appeal to the unscrupulous undercuts allegations of sex discrimination.³⁹⁷

This triple bind—of narcissistic behaviors correlating inexactly with gender, subtle discrimination against women who act atypically for their gender, and women making career choices based on perceptions about group treatment—is a behavioral triad that antidiscrimination law cannot reach. Antidiscrimination law is at its weakest in trying to remedy subjective biases.³⁹⁸ When subjectivity affects layers of decisions and multiple decisionmakers as well as critical self-assessments, disparate treatment law's requirements—of intentional dis-

³⁹² See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

³⁹³ See, e.g., *Jespersion v. Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004).

³⁹⁴ Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 925 (2016).

³⁹⁵ See Cahn, Carbone & Levit, *supra* note 31, at 426–27, 467, 473, 476.

³⁹⁶ See Shelley J. Correll, *Constraints into Preferences: Gender, Status, and Emerging Career Aspirations*, 69 AM. SOC. REV. 93, 95–96, 100 (2004).

³⁹⁷ See *EEOC v. Sears*, 839 F.2d 302, 313–14, 322, 326 (7th Cir. 1988).

³⁹⁸ See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 780 (2006).

criminy treatment of a comparator and identification of a specific business practice that has a statistically differential impact—are difficult to meet.³⁹⁹ Moreover, while companies can defend the search for people who will ruthlessly pursue company goals as a business purpose, maybe it is not a legitimate or necessary one.⁴⁰⁰ These actions accordingly become meaningful only when they combine a repudiation of break-the-rules practices with recognition of their impact in perpetuating gender disparities.

CONCLUSION

When companies can break the rules and get away with it so long as senior management enjoys plausible deniability, it pays to select for the ruthless, narcissistic, and unprincipled. The negative consequences become acceptable so long as the short-term gains are high.⁴⁰¹ Adopting such practices in turn leads to hugely gendered consequences. The resulting triple bind provides a lens on the winner-take-all features of society, the economy, and corporate and political life. Women are the canaries in the coal mine indicating that companies that flourish by creating hostile environments for women have fundamental problems that go well beyond their gender biases.

The ultimate success of women in the higher ranks of the economy depends not just on equal access—allowing women to act unethically, stab their colleagues in the back, and shortchange their customers on the same terms as men. Instead, it depends on fundamental reforms. That solution requires both internal and external rules, and rule enforcement. If rule-breaking is seen as illegitimate, it cannot be a legitimate business purpose as a defense in a sex discrimination case.⁴⁰²

Women's success depends on dismantling cultures where the greatest rewards go to those who act with impunity. The ability to “get away with it” stems from the combination of deregulation, weakening the formal rules that constrain self-interested behavior, decriminalization, the use of individual criminal sanctions waning over time, and the weakening of enforcement agencies who might effectively chal-

³⁹⁹ See Cahn, Carbone & Levit, *supra* note 31, at 477–81; see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3, 8 (2006) (discussing how “it may be difficult, if not impossible, for a court to go back and reconstruct the numerous biased evaluations and perceptions that ultimately resulted in an adverse employment decision”).

⁴⁰⁰ See Cahn, Carbone & Levit, *supra* note 31, at 481.

⁴⁰¹ See Akerlof & Romer, *supra* note 45.

⁴⁰² See Cahn, Carbone & Levit, *supra* note 31, at 481.

lunge these practices before they get out of hand.⁴⁰³ In the Wal-Mart context, for example, the store manager strategy pays off because of the politically motivated evisceration of wages and hours enforcement.⁴⁰⁴ Wal-Mart women as a whole would benefit greatly from enforcement of minimum wage laws both because they disproportionately hold minimum wage jobs and because they are likely to find greater opportunities to move into management in a system that does not depend to the same degree on subterfuge.⁴⁰⁵

The #MeToo movement has called more attention to abusive cultures. Most sexual harassers like Harvey Weinstein and Roger Ailes oppress and exploit others in ways having nothing to do with sexual harassment. Focusing attention on their abuses of women, which most observers find to be intrinsically objectionable, helps make the related abuses of power, which may not necessarily involve either sex or women, more visible. The #MeToo movement therefore has the potential to spark a more general movement to reform the winner-take-all cultures that have taken root in today's culture. The shift away from mandatory arbitration of sexual harassment represents one of the positive outcomes of #MeToo,⁴⁰⁶ although the "successes" and buyouts of those accused of harassment show that breaking the rules still pays.

The easiest reforms to implement involve changes in compensation. Reductionist compensation systems that encourage single-minded attention to the bottom line and subjective systems that allow supervisors to create old boys' networks both work to women's disadvantage.⁴⁰⁷ In contrast, more holistic systems that look at performance

⁴⁰³ See William Black, *Banks Should Welcome Rules*, N.Y. TIMES (Oct. 19, 2011), <https://www.nytimes.com/roomfordebate/2011/10/19/have-regulations-hurt-bank-profits/banks-should-welcome-rules> [<https://perma.cc/36LU-NK97>]. Black uses the term "desupervision," which has particular significance in the banking contexts where regulators have traditionally supervised banks. See Black, *supra* note 30. We describe instead the weakening of enforcement of all rules, which had more general application.

⁴⁰⁴ LICHTENSTEIN, *supra* note 183, at 242.

⁴⁰⁵ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 370 (2011) (Ginsburg, J., dissenting) (noting "[w]omen fill 70 percent of the hourly jobs in the retailer's stores but make up only '33 percent of management employees'" (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146 (N.D. Cal. 2004))).

⁴⁰⁶ Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [<https://perma.cc/9KVW-R56V>]; Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html> [<https://perma.cc/6THQ-EAX6>] (noting Microsoft and Uber had previously done away with arbitration in this context).

⁴⁰⁷ See, e.g., Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formal-*

over longer periods work to women's—and companies'—longer-term advantages.⁴⁰⁸ This is particularly true in financial advising, where rules that reinforce the identification between advisors and customers have broad potential payoffs.⁴⁰⁹

Other solutions involve implementing more gender-diversity friendly policies, with the carrot that this is correlated with higher profitability⁴¹⁰ and the stick of legal enforcement.⁴¹¹

The ultimate solutions, however, involve delegitimizing the masculinity contests that take up too much of the energies of corporate America.⁴¹² In this context, Michael Lewis's suggested reforms of Wall Street may have greater applicability. He wrote more colorfully than most in 2014 that:

Men are more prone to financial risk-taking, and overconfidence. . . . Trading is a bit like pornography: Women may like it, but they don't like it nearly as much as men, and they certainly don't like it in ways that create difficulties for soci-

ization and Sex-Related Earnings Effects, 13 ORG. SCI. 601, 601 (2002) (finding bonus pay systems produce more gender disparities than systems that give greater weight to base pay); Paul Gompers et al., *Gender Effects in Venture Capital* 5 (May 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445497 [<https://perma.cc/K3JX-W6E4>] (observing that women tend to do better in more formal or "bureaucra[ti]c" pay systems).

⁴⁰⁸ See, e.g., GEORGE A. AKERLOF & RACHEL E. KRANTON, *IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING* 59 (2010) (describing how identification with the company provides a superior form of motivation than monetary incentives); DONALD HISLOP, *KNOWLEDGE MANAGEMENT IN ORGANIZATIONS* 230 (3d ed. 2013) (describing how the most effective way to deal with problems like employee turnover is to develop institutional identity and employee loyalty, and observing that institutional identity that encourages employees to identify with firm objectives creates stronger loyalty than instrumental measures, such as merit pay or bonuses); Lynn Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay for Performance"*, 39 J. CORP. L. 525, 533 (2014) (describing the counterproductive effectiveness of modern executive compensation).

⁴⁰⁹ See Edwards, *supra* note 334, at 184–85 (proposing reforms for brokers and financial advisors).

⁴¹⁰ E.g., Vivian Hunt et al., *Delivering Through Diversity*, MCKINSEY & CO. (Jan. 2018), <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity> [<https://perma.cc/5RQK-4WWH>]; Karsten Strauss, *More Evidence That Company Diversity Leads to Better Profits*, FORBES (Jan. 25, 2018, 3:59 PM), <https://www.forbes.com/sites/karstenstrauss/2018/01/25/more-evidence-that-company-diversity-leads-to-better-profits/#623712821bc7> [<https://perma.cc/ZW5M-ZWLS>].

⁴¹¹ See, e.g., David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Boards, Sexual Harassment, and Gender Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 26, 2018), <https://corpgov.law.harvard.edu/2018/01/26/corporate-governance-update-boards-sexual-harassment-and-gender-diversity/> [<https://perma.cc/LJ42-CPYA>].

⁴¹² In this sense, Kellye Testy's emphasis in 2002 that the dialogue addressing corporate reform must take place as part of a complex, interdisciplinary approach has proved prescient. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1251 (2002).

ety. Put them in charge of all financial decision-making and the decisions will be more boring, but more sociable.⁴¹³

Greater sociability would promote more cooperative relationships among coworkers, greater willingness to follow transparent rules that apply to everyone, and greater respect for the customers companies purport to serve.⁴¹⁴ No one should be able even to think about the ability to shoot someone on Fifth Avenue and get away it.⁴¹⁵

⁴¹³ Michael Lewis, *Eight Things I Wish for Wall Street*, BLOOMBERG (Dec. 15, 2014, 5:00 AM), <https://www.bloomberg.com/opinion/articles/2014-12-15/michael-lewis-eight-things-i-wish-for-wall-street> [<https://perma.cc/X5BF-K6AW>].

⁴¹⁴ Sue Shellenbarger, *The Best Bosses Are Humble Bosses*, WALL STREET J. (Oct. 9, 2018, 9:35 AM), <https://www.wsj.com/articles/the-best-bosses-are-humble-bosses-1539092123> [<https://perma.cc/7B4S-ZFE3>] (observing that companies that hire bosses who demonstrate honesty and humility inspire closer teamwork, better performance, lower turnover, and less absenteeism). Another study of 105 IT companies found greater humility in their CEOs was associated with greater leadership; team integration; collaboration, and cooperation; and flexibility in strategic orientation. Amy Y. Ou, David A. Waldman & Suzanne J. Peterson, *Do Humble CEOs Matter? An Examination of CEO Humility and Firm Outcomes*, 44 J. MGMT. 1147 (2018).

⁴¹⁵ See Reena Flores, *Donald Trump: I Could "Shoot Somebody and I Wouldn't Lose Any Voters*, CBS NEWS (Jan. 23, 2016, 3:37 PM), <https://www.cbsnews.com/news/donald-trump-i-could-shoot-somebody-and-i-wouldnt-lose-any-voters/> [<https://perma.cc/2YP7-FPNJ>].