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 that 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 the negative effects of such systems, including their association with lawless and unethical behavior, as the unintended consequences of efforts to shake up complacent institutions or to 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 endurance, and the willingness to engage in no-holds barred competition. This literature treats the rule-breaking environments that result from such competitions, which select for dominant men at the expense of follow-the-rules women and "good guys," as an incidental byproduct of the way that such cultures valorize masculine traits as intrinsically superior. 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 companies profit handsomely from the ability to defy conventions, 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 in order 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 misogyny. Instead, they lose because of a triple bind. First, women cannot prevail in such competitions unless they can outmaneuver the men, credibly display even greater devotion to the job, or more brazenly flout the laws. Second, they lose because they are disproportionately disliked and punished for displaying the self-centered, rule- breaking behavior of the men. Third, women become, over time, less likely to apply for such positions both because they correctly perceive that they cannot thrive in such environments and because they are more likely than men to decide that they do not wish to do so on such terms, reinforcing in turn the male-identified character or such environments. Where the business models in these companies depend not just on the ability to upend traditional practices but to break the law and get away with it, the companies cannot address gender disparities without addressing the business model itself. The article concludes that issues of gender inequality are intrinsically intertwined with the evisceration of the rule of the law in corporate America.

* Robina Chair in Law, Science and Technology, University of Minnesota Law School.
** Harold H. Greene Professor of Law, George Washington University School of Law.
*** Associate Dean for Faculty and Curators' Distinguished Professor and Edward D. Ellison Professor of Law, University of Missouri – Kansas City School of Law.
We thank Lisa Fairfax for including us in this symposium and the staff of the GW Law Review. We are grateful to Bill Black, Jessica Clarke, Lynne Dallas, and Mike Selmi for their engagement with the ideas developed in this article. Thanks to Scott Dewey, Drew Greaves, Hunter Moss, and Mary Kate Hunter for research assistance.

Table of Contents

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. By 2005, she had backed the winning side in a management shake-up at the company, and was earning thirty million dollars a year.[2] She was named co-president of Morgan Stanley and oversaw institutional securities along with wealth management; her nickname was "Cruz Missile."[3] When the financial crisis hit, however, Cruz's unit, which had invested heavily in subprime mortgages and loans to private equity funds, faced

---

[1] Landon Thomas, Jr., *Top Ranks of Women on Wall Street Are Shrinking*, N.Y. TIMES, Dec. 1, 2007, at C1; Dan Wilchins, *Zoe Cruz Steps Down as Morgan Stanley Co-President*, REUTERS.COM (Nov.29, 2007), https://www.reuters.com/article/us-morganstanley-management/zoe-cruz-steps-down-as-morgan-stanley-co-president-idUSN2924721520071130.

[2] *See* Joe Hagan, *Only the Men Survive: The Crash of Zoe Cruz*, N.Y. MAG., May 5, 2008, at 32, http://nymag.com/news/business/46476/ (management fights); Wilchins, *supra* note 1 (30 million).

[3] Michele Chandler, *Zoe Cruz: Being Shoved out of Your Comfort Zone Has Advantages*, Stanford Graduate School of Business (May 15, 2010), https://www.gsb.stanford.edu/insights/zoe-cruz-being-shoved-out-your-comfort-zone-has-advantages.

billions in losses.[4] Cruz had done no worse than many others on Wall Street and some thought she had seen the crisis coming earlier than many others.[5] Nonetheless, when the Morgan Stanley board wanted someone to take the fall for the bank's losses, she became expendable. Her boss and mentor, John Mack, called her into his office. "I've lost confidence in you," he told her. "I want you to resign." The company's board of directors had authorized his decision the day before. A friend of Mack's reported his thinking about Cruz: "It's you or me. And guess what? I choose you."[6] *New York Magazine* titled its account of her termination, "Only the Men Survive."[7] Downturns are a particularly treacherous time for female executives, particularly executives who took the same kind of risks that the men did.[8]

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 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. Pandit forced Krawcheck out, in large part because she wanted to do more to protect customers in her unit who lost money because of Citi's actions during the mortgage bubble.[9] Krawcheck seemed to land on her feet. A year later, Bank of America (B of A) hired her to run its wealth management unit. In the middle of the financial crisis, she would turn it into one of the Bank's profit centers.[10] B of A, however, wanted more. It encouraged Krawcheck's brokers to engage in cross-selling, persuading their clients to buy "B of A banking products like debit cards, online bill pay and credit cards."[11] When asked about the practice by the press, Krawcheck responded that she didn't even like the term because it sounds like something "we do to rather than for you."[12] B of A clearly didn't like her response. She was soon gone after two years on the job.

In 2016, Krawcheck mused that she just did not share the guys' club worldview that prevails in finance.[13] In hindsight, she thought that the differences might well be rooted in

---

[4] Chandler, *supra* note 3.

[5] Hagan, *supra* note 2, at ___. *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-billionmortgagesettlement.html (suggesting that Morgan Stanley's exposure was less than other large banks).

[6] Hagan, *supra* note 2, at 32.

[7] *Id.*

[8] *See* Kyle Stock, *Ranks of Women on Wall Street Thin*, WALL ST. J. (Sep. 20, 2010), https://www.wsj.com/articles/SB10001424052748704858304575498071732136704 (women bore the brunt of the downturn after the financial crisis).

Add statistics on women culled after dot.com bus and Fed Study on rank and yank; https://www.wsj.com/articles/SB10001424052748704858304575498071732136704

. (Between 2000 and 2010, 2.6% of women in finance, left the industry while the number of men grew by 9.6%.).

[9] Geraldine Fabrikant, *When Citi Lost Sallie*, N.Y. TIMES (Nov. 15, 2008), https://www.nytimes.com/2008/11/16/business/16sallie.html.

[10] 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").

[11] Halah Touryalai, *Sallie Krawcheck out at Bank of America Merrill Lynch*, FORBES (Sept. 6, 2011), https://www.forbes.com/sites/halahtouryalai/2011/09/06/sallie-krawcheck-out-at-bank-of-america-merrill-lynch/#cd7babe7d807.

[12] *Id.*

[13] 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-krewcheck-fired/.

gender, with women more focused on relationships and long-term outcomes than the men.[14] She speculated that greater diversity in the executive ranks might strengthen finance. Empirical studies suggest that there may be some truth to her armchair observations; corporate boards that include more women appear to produce better results, and women-run funds outperform those run by men.[15]

Cruz and Krawcheck's stories might seem to be very different from each other. Cruz went along with the boys, despite reservations, and was fired in part because of it.[16] Krawcheck expressed her reservations, fought for her customers, and was fired (twice) in large part because she did so. Yet what brings them together is their gender. In a world where some men make enormous sums breaking the rules and getting away with it, most women are at a disadvantage if they do not play on the same terms as the men and 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 section considers the shift in corporate business models that have come with the exaltation of shareholder interests over other stakeholders. It 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 how a growing management critique documents the ways that such practices produce unethical and often counterproductive behavior. This section then compares the management critiques with what gender theorists call "masculinity contests,"[17] and the ways that such contests valorize masculine traits such as competition, risk-taking, and win-at-all-cost mentalities. Finally, the section argues that while both the management critiques and genders 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 way of these otherwise profitable business models.

Second, the article provides an in-depth examination of Walmart's managerial practices as an illustration of this system. It analyzes the practices detailed in the nationwide class action brought against Walmart alleging sex discrimination — that the Supreme Court rejected in a 5-4 vote on procedural grounds in 2011. As the section shows, the same practices that discouraged women from moving up in Walmart's managerial ranks also enabled Walmart's widespread flouting of wages and hours laws, with Walmart paying

---

[14] *Id.*

[15] *See, e.g.*, Lisa Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?,* 89 N. C. L. REV 864 (2011) (discussing the difference between the business case and more case for diversity on corporate boards); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L. J., Vol. (forthcoming),Univ. of Wisconsin Legal Studies Research Paper No. 1436.

[16]After Cruz left, Morgan Stanley ended up settling claims of wrongdoing stemming from the mortgage crisis for $3.2 billion. While Cruz was not necessarily directly involved in the wrong-doing, she oversaw some of those who were. Camila Domonoske, *Morgan Stanley Will Pay $3.2 Billion for Contributing to Mortgage Crisis*, NAT'L PUB. RADIO (Feb. 11, 2016), https://www.npr.org/sections/thetwo-way/2016/02/11/466399992/morgan-stanley-will-pay-3-2-billion-for-contributing-to-mortgage-crisis.

[17] *See, e.g.,* Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston, & Joan C. Williams, *Work as a Masculinity Contest,* 74 J. SOC. ISSUES 422 (2018),

out more than a billion dollars in fines since 2000.[18] The dismantling of the legal regulation[19] that once constrained corporate misbehavior allows companies like Walmart – itself the world's largest retailer – to select for managers who will exploit workers for benefit the management, use wage theft to increase their bonuses, and violate the law while insulating Walmart's upper management from accountability. This section shows why Walmart's actions should be seen as a product of a uniform and intentional set of national practices that disadvantage women, even if disadvantaging women in not the primary purpose of the practices.[20]

Third, the article will return to the financial sector and show how Wall Street practices of enriching financiers at the expense of their customers contributes to the continuing paucity of women in the upper reaches of finance. 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.[21] It also provides stark reminders of the importance of the rule of law as the savings and loan crisis of the eighties and the mortgage crisis of the 2000's both followed the ill-considered loosening of regulations imposing oversight and accountability on the financial sector.[22] This section examines how much of modern finance generates some of the highest salaries in the modern economy through financial practices intended to fleece unwary customers, and 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 will conclude that the practices that promote rule-breaking cultures also tend to exclude women (and often minorities) 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 the practices.

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

---

[18] Good Jobs First, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers' Wages* 2 (June 2018) ("Among the dozen most penalized corporations [is] Walmart with $1.4 billion in total settlements"). Walmart 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 ST. J. (June 5, 2018), https://www.wsj.com/articles/banks-pay-out-some-of-the-biggest-settlements-in-wage-disputes-1528189200.

[19] William Black refers to this as the three d's – decriminalization, deregulation, and desupervision – in the banking context. 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. In the Walmart 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.

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

[21] MAUREEN SHERRY, OPENING BELLE ___ (2016).

[22] *See, e.g.*, CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT (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); WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE (2d ed. 2005) (explaining the role of deregulation in the savings and loan crisis and the importance of "reregulation" in ending it).

competitions and their results. While management scholars lauded the rise of pay for performance bonus cultures[23] in their early years, a growing dissent links such practices to greater risk-taking, less collaboration and cooperation, and more unethical – if not always outright illegal – conduct. The beginning of this dissent starts with the post-Enron analysis, and the section begins there.

A more nascent literature, drawn from feminism and masculinities analysis, considers the gendered aspects of these developments and identifies them as "masculinity contest cultures."[24] This literature roots the nature of the practices in the construction of hierarchies that define men's position in response to each other and increase suspicion of outgroups, exacerbating gender and other biases. 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.

We then observe that when corporations normalize the narcissism that arises from masculinities contests, greater toleration of rule-breaking – and greater gender disparities – are 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 Walmart, carefully nurture labor suppression as a core element of the firm's distinctive business model.

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: first, to describe intentional law breaking, and, second, to refer to a mindset that dismisses or trivializes conventions, including ethical precepts, 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* that they can get away it.[25] The occasional white collar criminal does goes to jail; ask Enron CEO Jeff Skilling, due for parole in 2019.[26] The more important statistic is the number of high-fliers charged in the financial crisis: none if you focus on those most responsible and one if you if include a larger group.[27]

[23] "Pay for performance bonus cultures" tend to combine two separate elements. First, they link CEO pay to short term changes in stock performance. See discussion of Michael Jensen infra. Second, the CEOs then adopt competitive evaluation systems for executives and other managers that compare employees to each other. Both contribute to the effect we describe and both systems have similar effects on motivation, but this article focuses primarily on the internal bonuses systems. *See infra* __

[24] Berdahl, et al., *supra* note 17..

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

[26] David A. Kaplan, *White Collar Crimes: Where Are They Now?*, N.Y. TIMES, (Mar. 15, 2015), https://www.nytimes.com/interactive/2015/03/01/business/dealbook/02db-kozside-listy.html. It is important that Skilling is unusual in having served time.

[27] 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.

Rule-breaking pays off where it produces large short-term gains, and the odds of having to disgorge those gains are small.[28]

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.[29] Within these management cultures, the "organization man's" principal rewards came from the success of his company; success that 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.[30]

In the sixties, Galbraith argued that large corporations[31] depended on principles of scientific management, which he lauded as the "technostructure." 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.[32] William Whyte's fifties classic, *The Organization Man*, described the same management style as "collectivist," and maintained that it produced risk-averse executives, who enjoyed secure sinecures so long as they did not err too egregiously – in short, so long as they followed the rules and played it safe. 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.[33] 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"[34] and acting on self-interest was just not what "a good company man" did."[35] Whyte emphasized the rising popularity of training programs that promoted more democratic values, like the one at General Electric, where a young man was taught, "To get ahead, he must co-operate with the others—but co-operate better than they do."[36] In both accounts, the institution was more important than the individual, and encouraging "teamwork" was the name of the game.[37] Individuals who bristled at the need for

[28] *See* George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit* (Apr. 1994), NBER Working Paper No. R1869, https://ssrn.com/abstract=227162.

[29] For a fuller explanation, see June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 975-81 (2017).

[30] Both illustrated "bureaucratic" decision-making, which originally meant the rational ordering of decision-making within complex organizations in accordance with expertise, rather than personal relationships. *See* MAX WEBER, ECONOMY AND SOCIETY 17-22 (Guenther Roth & Claus Wittich eds., 1968) (1944) (linking the rise of "bureaucracy" to increased power for those with expertise, and making such expert-based decision-making more opaque.)).

[31] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[32] *See* Harwell Wells, *"Corporation Law Is Dead": Heroic Managerialism, The Cold War, 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).

[33] RICK WARTZMAN, THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA 312 (2017); Carbone & Levit, *supra* note 29, at 1045-47.

[34] JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 74 (1967) (emphasis in original).

[35] *Id.* at 148.

[36] Gary Sernovitz, *What "The Organization Man" Can't Tell Us About the Inequality Today*, NEW YORKER (Dec. 29, 2016), https://www.newyorker.com/business/currency/what-the-organization-man-can-tell-us-about-inequality-today.

[37] GALBRAITH, *supra* note 34, at 165-72.

consultation or the refusal of the team to embrace ambitious, risky, or corner-cutting proposals often found themselves out of the game.[38]

By the seventies, however, this system was under increasing assault. Facing growing competition from abroad and the "stagflation" triggered by the Arab oil embargo of the seventies, American companies increasingly seemed complacent, bureaucratic, and uncompetitive in the global market.[39] Over the next thirty years, the "agency-cost"[40] revolution would transform 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.[41] To realign management incentives, these theorists advocated "pay for performance" approaches that would use bonus systems that linked executive compensation to short-term measures.[42] Reliance on stock options increased, and Chief Executive Officer (CEO) compensation skyrocketed, aligning executive and shareholder interest much more closely, and refocusing corporate attention on short-term boosts in earnings rather than longer term institutional objectives.[43]

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 over their long term sustainability. And management, particularly new management, sought ways to transform what had been bureaucratic and change-resistant institutions. The result exchanged the risk-adverse "organization man" for the win at any cost, me first, corporate survivor.[44] Jack Welch, who oversaw General Electric for a twenty-year period starting in the early eighties, was the master of the new system. During the eighteen-year bull market that characterized most of Welch's tenure, GE's revenue grew 385%, while the company's stock market value rose 4,000%,[45] and 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.[46] The bottom group (roughly 10% of the work force) would be informed that their performance was inadequate and they would be fired if it did not improve. A top group of about 20% would receive top bonuses, with promotions on the horizon if they continued to excel. And this was not a one-time variation; this was the competitive pay, performance, and termination system invoked year after year. The system was designed to shake up the company and reorient its priorities. Welch emphasized that "[i]t's about aligning performance with the organization's mission and values. It's about making sure that

---

[38] *See* NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, SHAFTED ___ (forthcoming 2020).

[39] LUC BOLTANSKI & EVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM ___ (Gregory Elliott trans., 2007) (describing the relationship between global competition, innovation and "lean" production principles that emphasize innovation).

[40] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

[41] Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265 (2012).

[42] Lynn Stout, *Killing Conscience: The Unintended Behavioral Consequences of 'Pay for Performance'*, 39 J. CORP. L. 529, 533 (2014) (observing that between 1993 and 2014, the percentage of CEO compensation attributable to incentive pay increased from 35% to 85%).

[43] Dallas, *Short-Termism*, *supra* note 38, at 320-21.

[44] 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) (describing executives as the "hyper-motivated survivors of a highly competitive tournament" and as prevaricating, Machiavellian, and narcissistic).

[45] Barry Ritzholtz, *Judging GE's Jeff Immelt Versus Jack Welch*, BLOOMBERG.COM (June 12, 2017), https://www.bloomberg.com/view/articles/2017-06-12/judging-ge-s-jeff-immelt-versus-jack-welch.

[46] Jack Welch, *Jack Welch: 'Rank-and-Yank'? That's Not How It's Done*, WALL ST. J. (Nov. 14, 2013), https://www.wsj.com/articles/8216rankandyank8217-that8217s-not-how-it8217s-done-1384473281.

all employees know where they stand."[47] It also made it easier to shed employees and often entire divisions. Loyalty to long-term employees disappeared.

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.[48] 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 work force every year, but competitive ranking systems that compare employees to each other remain common.[49]

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."[50] His version of rank and yank fired the bottom 20% of employees and lavishly rewarded others – none more lavishly than Skilling himself.[51] At one time, Enron was among the most admired companies in America, lauded for its innovation.[52] "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."[53] 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 to persuade those under him to do his bidding, whether his "bidding" served company interests or not.

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. Skilling left in August of 2001, claiming he wanted to spend more time with his family. But after Enron's complete collapse, Skilling was convicted of securities fraud and lying to auditors and sent to prison.[54]

In the autopsies that followed, management experts identified Enron's evaluation system as a significant factor in its downfall.[55] 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,

---

[47] *Id.*

[48] Alan Murray, *Should I Rank My Employees?*, WALL. ST. J. GUIDES, http://guides.wsj.com/management/recruiting-hiring-and-firing/should-i-rank-my-employees/ (last visited Dec. 5, 2018).

[49] Max Nisen, *Why Stack Ranking Is a Terrible Way to Motivate Employees*, BUS. INSIDER, (Nov. 15, 2013,), http://www.businessinsider.com/stack-ranking-employees-is-a-bad-idea-2013-11 [https://perma.cc/4NRB-7HRL] (observing that while 49% of companies reported that they used "stack ranking systems in 2009.") Nisen reports 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.*

[50] *Jeffrey Skilling*, FORBES, https://www.forbes.com/2002/03/19/jskilling.html#274e77a46843 (last visited Oct. 10, 2018).

[51] *Id. See also* PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 51–52 (2002).

[52] 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.

[53] Lesley Curwen, *Corporate Conscience*, GUARDIAN (June 21, 2003), https://www.theguardian.com/business/2003/jun/21/corporatefraud.enron.

[54] United States v. Skilling, Court Docket Number: H-04-025-SS, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-vns/case/skillingjk .

[55] PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON: EVERYONE'S GUIDE TO THE LARGEST BANKRUPTCY IN U.S HISTORY 52 (2002).

less managerial accountability, and more politicized decision-making.[56] Although advocates like Welch and Skilling hailed the bonus systems as meritocratic, critics charge that what they really produce is a "young boys' club" that protects insiders at the expense of outsiders.[57] More recent studies indicate 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."[58]

There is every reason to believe that this behavior may be the point of such systems: these were not aberrations or untoward negative consequences, but an integral component of the business model. 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."[59] Welch defied the conventions of his era, shutting down plants, selling off divisions, and reducing the GE workforce by 25% his first few years on the job.[60] He also did break 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 to settle accounting fraud charges from the Welch era.[61] Perhaps as tellingly, General Electric is struggling today in part because of Welch's reliance on GE Capital to manipulate earnings reports that left the company poorly equipped to weather the financial crisis and the challenges that followed.[62]

Enron, of course, was much worse. With the deregulation of the energy market, it switched from producing pipelines to trading in energy futures, with fraud becoming pervasive throughout much of the company's operations. Indeed, Enron's leaders expressed disdain for corporate oversight and financial regulatory rules, regarding them as obstacles that hindered innovation and creativity.[63] This disdain extended not only to the law, but also to company rules and authority. In overseeing transformation of the company, Enron CEO Jeff Skilling "set employees loose, encouraging them to push the edge of every rule, even without their supervisors' knowledge."[64] 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.[65] And while Enron generated more than its share of whistle-blowers, its whistle-blowing records demonstrate the impact of competitive evaluation systems. Reports of fraudulent activities dropped in the months just prior to the annual review

---

[56] 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 (2003) (describing how Enron management using its bonus system to reorient company behavior in counterproductive ways).

[57] Companies with such systems tend to recruit ambitious (and relatively young) new hires who "want to make a lot of money fast." *Id.* 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.

[58] Stout, *supra* note 42, at534.

[59] 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.

[60] *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.

[62] *Id.*

[62] *Id.*

[63] *See* John A. Byrne et al., *The Environment Was Ripe for Abuse*, BUS. WK., Feb. 25, 2002, at 119.

[64] David Streitfeld & Lee Romney, *Enron's Run Tripped by Arrogance, Greed*, L.A. TIMES, Jan. 27, 2002, at A1.

[65] *See* PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 51-52 (2002).

process, and then rose dramatically once the process was completed. 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.[66]

The rise of unethical behavior does not just occur in companies promoting outright fraud. It also affects the ethos of more traditional companies. 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. And, 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, 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.[67] A Microsoft engineer explained that:

> 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.[68]

As a result, potential market-changing innovations such as e-book and smartphone technology "were killed, derailed, or delayed amid bickering and power plays."[69] Management experts who systematically study such environments conclude that such workplaces encourage "unethical behavior, since some individuals are willing to pay to improve their rank by sabotaging others' work or by increasing artificially their own relative performance."[70] Indeed, Michael Jensen, the Harvard Business School professor who initially proposed pay for performance, has since recanted.[71] In an article entitled "Paying People to Lie," he observed that using targets such as earnings in an organization's performance measurement and compensation systems simply encourages employees to game the system.[72]

The more recent poster child for toxic management is Uber. It started with the goal of disrupting the taxi industry.[73] It made little effort to comply with potentially applicable regulations and, indeed, its "business model is predicated on lawbreaking" – giving it a competitive advantage over taxi companies that follow the rules.[74] Uber has been accused of everything from flouting local taxi regulations to using burner phones and fake paperwork to disrupt competitors with

---

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

[67] 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].

[68] *Id.*

[69] *Id.*

[70] Gary Charness, David Masclet, & Marie Claire Villeval, *The Dark Side of Competition for Status*, 60 MGMT. SCI. 38, 42 (2014).

[71] *See* Michael C. Jensen, *Paying People to Lie: The Truth about the Budgeting Process*, 9 EUR. FIN. MGMT. 379 (2003).

[72] *Id.*

[73] Justin Bariso, *Why Does Uber Keep Breaking the Law? Because They're Disrupting, of Course*, INC.COM, Dec. 19, 2016, https://www.inc.com/justin-bariso/why-does-uber-keep-breaking-the-law-because-theyre-disrupting-of-course.html.

[74] 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 ("Uber succeeded in making lawbreaking normal and routine by celebrating its subversion of the laws relating to taxi services.").

cancelled rides.[75] It has been the subject of numerous investigations in the United States and abroad;[76] 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.[77] Within the company, it deliberately created a "Hobbesian environment . . . in which workers are pitted against one another and where a blind eye is turned to infractions from top performers."[78] A whistle blower 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." Indeed, the managers boasted about their exploits against one another and the company seemed to encourage their infighting.[79] Top executives and top performers faced no consequences for their misdeeds, and sexual exploits became part of the company culture, the rewards for success. Keeping employees focused on their internal competitions increases the unaccountability of those at the top.[80] CEO Travis Kalanick was eventually forced out as head of the company, but he retains a net worth of over $4 billion in large part because of his Uber exploits.[81]

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.[82] In the process, such environments reduce executive tenure.[83] 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.[84] Larry Ribstein described the

---

[75] ADAM LASHINSKY, WILD RIDE: INSIDE UBER'S QUEST FOR WORLD DOMINATION __ (2017).

[76] Eric Newcomer, *Uber Pushed the Limits of the Law. Now Comes the Reckoning*, BLOOMBERG (Oct. 11, 2017), https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning (Uber facing five criminal investigation in the United States); https://www.reuters.com/article/us-uber-tech-southkorea-idUSKBN17S09F (describing South Korean action finding that Uber violated Korean bribery laws); Megan R. Dickey, *Uber Faces Potential $13.5 Million Lawsuit Over Data Breach*, TECHCRUNCH.COM (Mar. 2018), https://techcrunch.com/2018/03/05/uber-data-breach-lawsuit/(describing action in Pennsylvania alleging violation of data breach notification laws); https://techcrunch.com/2018/03/05/uber-data-breach-lawsuit/ (describing investigation of foreign bribery laws).

[77] Edelman, *supra* note 71. Indeed, it has even been accused of designing a new app designed to hide its drivers from regulatory scrutiny; 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.[78] 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. Not coincidentally, Uber has faced innumerous sexual harassment allegations. *See, e.g.*, Gordon Bensinger, *Uber's Top Deal Maker Resigns After Misconduct Allegations Revealed*, WALL. ST. J., Oct .22, 2018.

[78] 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. Not coincidentally, Uber has faced innumerous sexual harassment allegations. *See, e.g.*, Gordon Bensinger, *Uber's Top Deal Maker Resigns After Misconduct Allegations Revealed*, WALL. ST. J., Oct .22, 2018.

[79] Isaac, *supra* note 78.

[80] Dallas, *Enron*, *supra* note 56.

[81] 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/.

[82] Dallas, *Short-termism*, *supra* note 41.

[83] *See, e.g.*, HILL & PAINTER, *supra* note 22, at 100.

[84] *See* BOLTANSKI & CHIAPELLO, *supra* note 39, at 93-95; WARTZMAN, *supra* note 31, at305-6, 312; Matthew 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); Guy Berger, *Will This Year's College Graduates Job-Hop More Than Previous Grads?* (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 twenty years, the number of companies college graduates worked for in the first five years after graduation doubled).

executives who thrive in such an environment as the:

> 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.[85]

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

B. Why Only the Men Survive

A more recent critical literature has analyzed the growth of these environments as "masculinity contests."[86] Feminism, of course, has long critiqued hierarchy and described the relationship between the lust for power and the payoffs in terms of opportunities for sexual access.[87] 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. While the oppression of women is certainly an important consequence of patriarchy, it may paradoxically not be the central point.[88] 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.[89] The insecure seek to assert control over their environments as both their best defense against loss and humiliation and the surest route to gain what they desire.[90] 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 "business

[85] Ribstein, *supra* note 44, at 9. Indeed, "The 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 20, at 431.

[86] Berdahl et al., *supra* note 17.

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

[88] Carbone & Cahn, *Unequal Terms*, quoting Alan Johnson (2007)*; see also* David Brooks, *Two Cheers for Feminism*, N.Y. TIMES (Oct. 11, 2018) ("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").

[89] *See, e.g.*, FIONNUALA NI AOLAIN, NAOMI CAHN, & DINA HAYNES, ON THE FRONTLINES (2013)(discussing how hypermasculinity during conflict results in male dominance power struggles among, and over, men and women).

[90] See Berdahl, et al., *supra* note 17, at 428 ("because 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").

of the World consisteth in nothing else but a perpetuall contention for Honor, Riches, and Authority"[91] 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 work, we showed how tournament-like work environments work to the disadvantage of women – and most men – by selecting for narcissists who thrive in such tournament-like environments at the expense of others, and by making it harder for women and other outsiders to play by the same rules as insider men.[92] The more recent gender theory literature complements that analysis by explaining how competitive environments, with a high stakes pay-for-performance culture, create "masculinities contest cultures"[93] with such "contests [] most prevalent—and vicious—in male-dominated occupations where extreme resources (fame, power, wealth) or precarious resources are at stake."[94] These environments, which increase feelings of vulnerability, intensify the aggression, risk-taking, sexual harassment, and homophobia associated with them.[95]

In today's society, work is an important site for determining status, particularly male status. Relative status determines access to resources, societal standing, mating behavior,[96] and the ability to control others. As societal inequality has increased, a higher percentage of all wage increases has tended to go competitive, bonus-based, and overwhelmingly male-dominated societal sectors, including finance, upper management, tech, and the upper ranks of the professions.[97] In these "win or die" environments, the spoils of winning, or the costs of losing, are particularly high.[98] The result tends to conflate what it means to be a man with the traits necessarily to succeed in such environments.

The results of these tournament-like competitions do not necessarily correlate with better performance for the organization.[99] Instead, performance evaluations focus on traits associated with masculinity. "In this zero-sum game," scholars explain, "men compete at work for dominance by showing no weakness, demonstrating a single-minded focus on professional success, displaying

---

91 THOMAS HOBBES, LEVIATHAN 389 (Andrew Cooke ed. 1651), https://quod.lib.umich.edu/e/eebo/A43998.0001.001?rgn=main;view=fulltext

92 Cahn, Carbone & Levit, *supra* note 20, at 445-59.

93 Kenneth Matos et al., *Toxic Leadership and the Masculinity Contest Culture: How "Win or Die" Cultures Breed Abusive Leadership*, 74 J. SOC. ISSUES 422, 502 (2018) (listing four dimensions, including "Show No Weakness").

94 Berdahl, et al., *supra* note 17, at 429.

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

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

97 Cahn, Carbone & Levit, *supra* note 20, at 456-57.

98 *Id.* at 469-70, 476, 482.

99 *See* Mary Anne 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).

physical endurance and strength, and engaging in cut-throat competition."[100] The goal of these internal competitions is not so much to improve the company's competitive position versus its external rivals as to choose the "real men," those who will become part of the small network that works together to outmaneuver rivals to gain control of the company's resources.

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. And women and people of color report that they are assigned higher rates of "office housework" in comparison with more glamorous roles. Nikki Pope, for example, notes that she worked at a company where the engineers viewed attending trade shows as beneath them. So they assigned the only female engineer in their ranks to go with the marketing staff to the shows. When the trade show proved successful in generating substantial income, however, male engineers replaced the lone female.[101] 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."[102] 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 distrust of outsiders.[103]

This sets up what we have previously identified as a triple bind. To win in these negative-sum competitions requires ambition, ruthlessness, and domination.[104] Women and minorities, however, are much more likely to be disliked and punished if they display such traits.[105] They become particularly suspect if they band together with each other in alliances designed to outflank the in-group.[106] And they may be less valuable partners for member of the dominant group if they are perceived as having less clout.[107] 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.[108] 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—are disproportionately punished for displaying the self-centered, rule breaking behavior of the men – and become, over time, less likely to apply for such positions and thus more likely, individually and as a group, to be perceived as lacking what it take to succeed in such environments.

---

[101] Interview with June Carbone; *See* Naomi Cahn, June Carbone & Nancy Levit, *Discrimination by Design*, __ARIZ. ST. L.J. __ (forthcoming 2019).

[101] Interview with June Carbone; *See* Naomi Cahn, June Carbone & Nancy Levit, *Discrimination by Design*, __ARIZ. ST. L.J. __ (forthcoming 2019).

[102] Berdahl, *et al.*, *supra* note 17, at 431.

[103] Ribstein, *supra* note 44, at 8.

[104] Berdahl, *supra note* 17, at 432.

[105] *Id. See* Peggy Klaus, *Neither Men nor Mice,* N.Y. TIMES (Mar. 6, 2010), https://www.nytimes.com/2010/03/07/jobs/07preoccupations.html. 2010;
see also DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 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).

[106] *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).

[107] Cahn, Carbone & Levit, *supra* note 20, at 447.

[108] *Id*.

As a result, such environments become associated with stereotypically masculine traits,[109] with ambition and ruthlessness as necessary to success. Moreover, as these cultures celebrate winning as an end by itself, they also dismantle the constraints designed to protect both men and women from the unscrupulous. In cases like Uber, this may mean that managers who undercut other managers to the detriment of the company will be rewarded for their brashness rather their chastised for undermining the company itself. In other companies, as we will discuss below, the rule-breaking may be carefully channeled in directions that pay off for those at the top at the expense of everyone else.[110] In this sense, bonus cultures may, for example, quite intentionally select for managers who will do things like set punch clock software to round down on entered time or to make automatic break deductions, whether employees take the breaks or not, or the managers may simply cut short the employees' breaks.[111] The latter cultures do not reward employees at any level who flout management directives. But they carefully select for those who care more about maximizing their bonuses than insuring employee well-being.

Both types of cultures – those where the rule-breaking is a byproduct 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 ability to deceive, exploit and oppress, as a marker of dominance.[112] And both exacerbate gender inequality. In considering the prospects for gender equality and corporate reform, however, notable differences arise from treating rule-breaking as an incidental byproduct of more intense competition versus 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 tournament-like atmospheres, the existing management literature is in agreement that such environments do not produce better results. Gender scholars describe such dog-eat-dog internal competitions as "zero-sum"[113] but criminologists prefer the term "negative-sum" competitions.[114] That is, not only do the competitors 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, the terms of the competition may reduce the overall value of the company.[115] Moreover, where a company succeeds in law evasion, as Uber has with taxi

---

[109] 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 SOCIAL & PERSONALITY PSYCHOL. COMPASS 1952 (2008),. doi:10.1111/j.1751-9004.2008.00134.x, available at https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1751-9004.2008.00134.x. (discussing the drive to power and its correlation with personality type high in narcissism and low in honesty and humility).

[110] Matos et al., *supra* note 93. *See also infra* Section II.A.

[111] Elizabeth C. Tippett, *How Employers Profit from Digital Wage Theft Under the FLSA*, 55 AM. BUS. L.J. 315, ___ (2018)("interrupted meal breaks were so common that employees referred to them as 'NFL days,' which stood for No F***ing Lunch").

[112] Dallas, *supra* note 56, at 45-52.

[113] Sophie L. Kuchynka et al., *Zero-Sum Thinking and the Masculinity Contest: Perceived Intergroup Competition and Workplace Gender Bias*, 74 J. SOC. ISSUES 529 (2018).

[114] WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE 274 (2d ed. 2005).

[115] Eichenwald, *supra* note 67.

regulations, the result resets the market with other companies forced to compete on the new terms. The result creates a "Gresham's dynamic" or a race to the bottom in which honest companies may find that they cannot compete with ethically compromised ones.[116]

Management scholars have documented these negative consequences. For example, one study administered to 500 respondents found that workplaces ranking high in masculinity contest norms were more dysfunctional, reported worse co-worker behavior, and had poor individual outcomes.[117] 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.[118] 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.[119]

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.[120] Organizations that rank high in masculinity contest traits are likely to select managers who identify strength with bullying behavior and who exploit weaker employees. Such managers tend to identify with the workers who display strength, and "to exclude or harass historically disadvantaged groups and men with resistant masculinities."[121] In these environments, managers are often selected for their masculinity displays rather than because of any greater competence in the task at hand.[122] In addition, the scholars find that workers in such environments are more likely to experience sexual or racial harassment and to report a more sexist workplace culture.[123] 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."[124] To produce greater diversity requires greater cooperation and trust, which in turn promotes better teamwork. And better teamwork pays off. It is not necessarily the presence of women that per se that increase performance; instead, the organizational qualities that produce greater productivity may also promote diversity.[125] The question therefore becomes why such toxic – and negative sum – environments persist.

[116] George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).
[117] Peter Glick, Jennifer L. Berdahl & Natalya Alonso, *Development and Validation of the Masculinity Contest Culture Scale*, 74 J. SOC. ISSUES 449 (2018).
[118] Berdahl, *supra* note 17, at 434.
[119] *Id.*
[120] Matos et al., *supra* note 93, at 503.
[121] Shannon L. Rawski & Angela Workman-Stark,, *Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions*, 74 J. SOC. ISSUES 607 (2018).
[122] *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.
[123] Glick, *supra* note 117.
[124] Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Feb. 2016), https://piie.com/publications/wp/wp16-3.pdf; Aimee Picchi, *In Business, More Women at the Top Means More Profits*, CBS NEWS (Feb. 9, 2016), https://www.cbsnews.com/news/more-women-more-profits/.
[125] *See* Fairfax, *supra* note 15. 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 is necessary to produce more than a token commitment to diversity, and that a genuine commitment to diversity is also likely to

In the next section, we will examine Walmart as a case study in how nickel and diming employees can become central to a company's business model. It turns out that the business practices Walmart adopted that functioned to limit the presence of women in the management ranks are also closely correlated with the practices that have made it the number one company in the United States in the dollar amount of fines that have been assessed against it for wage theft.

II. Women and an "Oppress the Employees" Business Model: *Wal-Mart Stores, Inc. v. Dukes* Revisited

Dukes v. Wal-Mart Stores[126] was the largest class action in history: 1.5 million current and former female Walmart employees from stores across the country joined lead plaintiff Betty Dukes in claiming that the company systematically discriminated against women, particularly in the award of promotions. They maintained that Walmart had a "uniform 'corporate culture'" in which managers' biases against women ran rampant.[127] Although women made up more than two-thirds of Walmart's hourly employees and almost ninety percent of its customer services managers, women constituted less than twenty percent of store managers at the time when discovery in the case was completed.[128] Even when women made it into the supervisory ranks, they were paid less than the men. Male store managers earned an average of $16,400 per year more than women 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.[129] Moreover, while Walmart claimed to give its managers a measure of autonomy, the gender differences were remarkably consistent across the country.[130] The results lagged far behind other retailers who typically reported that women held more than fifty percent of management positions.[131]

Walmart also has been fined more for shortchanging its workers than other company in the country.[132] As a retailer, Walmart depends a large, relatively unskilled workforce and, indeed, the company ultimately became not only the largest private employer in the United States, but in the world, with its workforce of 2.3 million workers.[133] Its business model depends on keeping prices low. Founder Sam Walton liked to brag, "'We're going to be successful, but the basis is a very

---

produce greater commitment to transparency ethical leadership and trust. 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.

[126] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 342 (2011).

[127] *Id.* at 345.

[128] 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 238 (Nelson Lichtenstein, ed. 2006).

[129] Steven Greenhouse, *Wal-Mart Faces Lawsuit over Sex Discrimination*, N.Y. TIMES (Feb. 16, 2003), http://www.nytimes.com/2003/02/16/us/wal-mart-faces-lawsuit-over-sex-discrimination.html.

[130] Seligman, *supra* note 128, at 239-40.

[131] *Id.* at 238-39.

[132] Philip Mattera, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers' Wages*, GOODJOBSFIRST.COM (June 2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report.pdf.

[133] Lauren Weber, *Some of the World's Largest Employers No Longer Sell Things, They Rent Workers*, WALL ST. J. (Dec. 18, 2017), https://www.wsj.com/articles/some-of-the-worlds-largest-employers-no-longer-sell-things-they-rent-workers-1514479580. "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." Grand Theft Paycheck, p. 8

low-wage, low-benefit model of employment.'"[134] 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 Walmart got its start in the late forties.[135]

As worker protections expanded in the sixties to boost the wages of overwhelmingly female retail employees, Walmart just worked that much harder to evade them. Walton ruthlessly fought unionization, and he and his successors devoted "enormous skill and energy to avoidance or emasculation of almost every other government mandate . . . that sought to regulate the price and quality of labor."[136] To do that, Walmart needed a managerial force that would identify with Walmart's obsessive suppression of labor rights rather than managers who would identify more closely with the workers they supervised. The Walmart manager selection practices that favored men and the business model that depended on minimizing labor costs reinforced each other. Like Enron executives, Walmart 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 whether they complied with wages and standards laws or not.[137] 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.[138] These fines include paying workers less than the minimum wage, mischaracterizing hours worked to avoid overtime rates, and in some cases failing to insure that workers were paid for hours worked. Walmart has been penalized more for cheating its workers than other company in the country.[139]

The *Dukes* sex discrimination case did not mention wage theft. It presented a largely statistical account that showed how Walmart systematically paid its female employees less than the men, and failed to promote them on a comparable basis with the male employees. The district court issued an eighty-four page opinion finding the plaintiffs' case to be overwhelming. To the extent that the case commented on the reasons for the discrimination, it presented a picture of a bunch of Arkansas influenced "rednecks" who just couldn't see women in supervisory roles.[140] The Supreme Court rejected the class action in a 5-4 decision. It bought Walmart's argument that each of its stores made individual decisions on hiring and promotion, and that the plaintiffs' proposed class was too big to have enough common questions of law and fact.[141] In the course of the litigation, the plaintiffs never raised the issues of Walmart's labor practices; they never asked

---

[135] NELSON LICHTENSTEIN, THE RETAIL REVOLUTION 63 (2009).
[136] *Id.*at 89-90.
[137] Catherine Ruetschlin & Sean McElwee, *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.
[138] Lauren Weber, *Bank Pays Out Some of the Biggest Settlements in Wage Disputes*, WALL ST. J. (June 5, 2018), https://www.wsj.com/articles/banks-pay-out-some-of-the-biggest-settlements-in-wage-disputes-1528189200.
[139] Philip Mattera, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers' Wages*, GOODJOBSFIRST.ORG (June 2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report.pdf. Walmart has paid more than double the penalties than Fed Ex, which comes in second in such payments with $502 million, and "has settled more than a dozen private lawsuits accusing it of overtime and rest break violations, often combined with misclassification issues." *Id.* at 8.[140] LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 39 (2005).
[140] LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 39 (2005).
[141] *Dukes*, 564 U.S. 338.

whether Walmart's efforts to exploit its employees might have something to do with why Walmart's record of hiring female managers was so bad.

There is every reason to believe, however, that Walmart's record of evading wages and hours laws and its failure to hire women managers may be directly related.

A. Wage Theft and Walmart's Management Practices

Whether or not Walmart 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 legitimatized Walmart's hierarchical structure, emphasized keeping costs low at the expense of its employees, and insulated "most employees from other calls upon their loyalty."[142] 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.[143]

First, Walmart sought to create a distinctive corporate culture, one that supplied identity and commanded loyalty.[144] This is in itself not unusual, as the earlier discussion of "the organization man" illustrates.[145] Identification as insiders confers status, motivates devotion to the firm, and primes employees to discount criticisms of a company's business practices. Walmart, however, also consciously sought to promote employees who had little experience and fewer opportunities outside of Walmart, increasing the company's ability to shape its managers' view of appropriate business practices, including the often unlawful suppression of employee interests. Walton himself did not care either about college degrees or specialized training. As one Walmart 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."[146] When the company did recruit college grads, 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. Walmart wanted "young men, and a few women" with modest career ambitions who would accept the low salaries and fully commit to the company ethos.[147] 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

---

[142] Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First Century Capitalism, in* WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 17 (Nelson Lichtenstein, ed. 2006).
[143] "[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*, 48 FORDHAM L. REV. 37, 48-49 (2009).
[144] Lichtenstein, *supra* note 142, at 16-22.
[144] 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 142 , at 16-22.
[145] David W. Hart & Jeffery A. Thompson, *Untangling Employee Loyalty: A Psychological Contract*, 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).
[146] LICHTENSTEIN, *supra* note 135, at 96.
[147] Lichtenstein, *supra* note 142, at 21.

commonplace in hypercompetitive industries like retail, financial services, and computer technology."[148] That mindset thus sets the stage for Walmart's business practices – and the maintenance of an old boys' network implementing them.[149]

Once Walmart had 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 Walmart manager was about sixty thousand a year, but managers could triple that amount in bonuses – if they "hit their numbers."[150] 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."[151] Supervisors had more control over wages and then sales and those who succeeded in keeping down such costs received the largest bonuses.[152] Should their labor costs rise beyond the limits Walmart set, "the hours worked by associates are slashed, wages are frozen, and the regional vice president tells the store manage to relinquish his keys and find another job."[153] Even in periods in which Walmart did well, 10 to 15% of store managers were demoted each year. This made the store manager's job one of Walmart's most difficult and critical positions.[154]

The bonus culture could easily have contributed both to wage suppression and gender differences in compensation and promotion. Walmart, like Wall Street, did not loudly proclaim that it was encouraging its employees to cheat its workers, though it certainly proclaimed its devotion to keeping labor costs low. But 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 Walmart managers consistently report that this system signals a willingness to promote people who will enforce questionable labor practices,[155] and those managers were overwhelmingly male.

---

[148] Langevoort, *supra* note 144.

[149] 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. We use the term "young boys' club" in contrast to describe the deliberate selection of employees with oversized ambitious and little experience who will do management's bidding, however ethically dubious, because these employees tend to be young and male.

[150] LICHTENSTEIN, *supra* note 135, at 93.

[151] *See* Steve Symington, *What Sam Walton Would Say About Walmart's New Minimum Wage,* MOTLEY FOOL (Mar. 28, 2015), https://www.fool.com/investing/general/2015/03/28/what-sam-walton-would-have-to-say-about-walmarts-m.aspx.

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

[153] LICHETENSTEIN, *supra* note 135, at 58.

[154] Seligman, *supra* note 128, at 236-37.

[155] 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/ ("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").

The managers specialized in "nickel and diming" workers,[156] suppressing unionization,[157] and not only ruling out overtime (a complete no-go at Walmart), but even evading the minimum wage.[158] When journalist Barbara Ehrenreich went undercover to work in hourly retail sales at Walmart, she reported that the assistant manager railed at workers for "time theft" if they gathered to talk to each other. These practices sometimes went so far as failing to pay employees for work they had performed.[159] Confronted, for example, with chronic understaffing and the inability to ask other employees to put in more hours, some managers pressured workers to clock out and then go back to work or to continue working through breaks or lunch hour.[160] Other managers simply "adjusted" the time cards of workers who report more than forty hours in a week, unilaterally adding rest breaks or increasing meal periods.[161] Walmart's business model depended on systematic and relentless attention to reducing labor costs in any possible way.[162] Given the fact that manager pay overwhelmingly consisted of bonuses tied to the ratio of sales over labor costs and that women's net pay was lower than men's, Walmart's presumption that men would be more willing to do in their workers than women may have been accurate.

Third, Walmart's efforts to eliminate management fingerprints from these practices helps explain the persistence of women unfriendly practices such as its relocation policy. . Walmart 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.[163] In his 1992 autobiography, Walton wrote, "We've had the attitude that if you wanted to be a manager at Wal-Mart, you basically had to be willing to move a moment's notice" and that's "not really appropriate anymore." Prodded by his wife and daughter, he acknowledged that 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."[164] But while Walton claimed to have "seen the light," the Supreme Court acknowledged that the relocation policy remained in place at the time of the decision in 2011.[165] The district court in *Dukes* found that, on average, "each Store Manager

---

[156] BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 135-52, 173, 183-91 (2001).

[157] Greenhouse, *supra* note 129 "("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.").

[158] WARTZMAN, *supra* note 13, at 331.

[159] 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. As this book goes to press, there is some indication that Walmart is attempting to raise pay to reduce employee turnover. 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.

[160] Steven Halebsky, *The Retail Revolution (Review)*, 27 SOCIOLOGICAL FORUM 255 (Mar. 2012).

[161] LICHTENSTEIN, *supra* note 135, at 107.

[162] And still does. *See, e.g.,* Lauren Thomas, *As Wal-Mart blitzes Internet Retail, Debate Rages over Company's Impact on US Wages*, CNBC (Apr, 20, 2017), https://www.cnbc.com/2017/04/20/wal-mart-still-front-and-center-of-debate-over-minimum-wages.html ("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.").

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

[164] FEATHERSTONE, *supra* note 140, at 29.

[165] LICHTENSTEIN, *supra* note 135, at 102. The Supreme Court expressly acknowledged the relocation policy in its decisions. *See Dukes*, 564 U.S. at 343 (noting "a willingness to relocate" as a condition of promotion).

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."[166] This degree of mobility helped ensure that a uniform Wal–Mart Way culture operates consistently throughout all stores.[167] 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.[168] They understand that their primary focus needs to be on Bentonville's metrics of success, not on their employees' well-being.

Fourth, the construction of managerial jobs to require that managers fill in the gaps left by hourly employees contributes further to their undesirability for women. With Walmart's chronic understaffing and an employee base that includes many new, part-time, or disaffected employees, meeting store needs can be challenging. Inevitably, some employees will quit, fail to show up, or call in sick on short notice. Salaried supervisors who do not receive overtime pay are expected to fill in the gaps. Nelson Lichtenstein describes assistant managers as the "shock troops" who hold the system together. He reports that 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."[169] And the hours get longer still during the Christmas shopping season. Walmart's refusal to adequately staff its stores or to pay overtime to its hourly employees required managers willing to put their devotion to Walmart ahead of family needs.[170]

Fifth, maintenance of this culture came through selection of those with the appropriate mindset.[171] Walmart 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. 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.[172] In the *Dukes* litigation, the district court found that plaintiffs provided "significant evidence of countrywide corporate practices and policies, which include excessive subjectivity in personnel decisions, gender stereotyping, and maintenance of a strong corporate culture."[173] The preservation of discretion in managerial hiring in the face

---

[166] *See* Drogin Decl. ¶ 35; Drogin Reply Decl. ¶ 24.

[167] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 152 (N.D. Cal. 2004). *See also* FEATHERSTONE, *supra* note 140, at 69-70.

[168] *See* Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L. FORUM (2017-18), https://www.yalelawjournal.org/forum/stuck-or-rooted ("Strong workplace ties also provide emotional support and care that can contribute to performance.[41] 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").

[169] *Id*. at 103.

[170] Ellen Israel Rosen, *How to Squeeze More out of a Penny*, *in* LICHTENSTEIN, *supra* note 135, at 253-54 (describing understaffing and the pressure it creates on managers).

[171] *Id*. at 153 (describing youth of the men selected as store managers).

[172] *Id.* "It is disputed that, until January 2003, Wal–Mart did not post job 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), aff'd sub nom. Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007), *opinion withdrawn and superseded on denial of reh'g*, 509 F.3d 1168 (9th Cir. 2007), *on reh'g en banc sub nom.* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), rev'd, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), *and aff'd sub nom.* Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007), and *on reh'g en banc sub nom.* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), and rev'd, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), and *aff'd and remanded in part*, 603 F.3d 571 (9th Cir. 2010), and *rev'd*, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

[173] Seligman, *supra* note 128, at 241.

of an otherwise carefully scripted corporate ethos contributed to Walmart's half-century long success in suppressing wages.

The *Dukes* plaintiffs argued that the system produced an old boys' club based on affinity; the defendants argued that the system reflected business considerations made at individual stores across the country. Neither mentioned wage theft. Other commentators have emphasized, however, that Walmart policies informally encouraged its managers "to break the rules that Wal-Mart formally upheld."[174] If managers met their goals for high sales and low wages, no one inquired too closely into how they did so.[175] If the managers did not meet the goal, they were subject to audits, investigations, and potential demotion.[176] 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 mangers who selected them, managers who had almost certainly flourished because of their own willingness to promote their own interests at the expense of their employees..

B. Why Only the Walmart Men Thrive

Walmart, with its Arkansas roots and (young and old) boys' network, 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.[177] Yet, the system Walmart adopted to suppress wages also seemed guaranteed to select for male managers.

Walmart's bonus system, emphasizing the bottom line at the expense of personal relationships or compliance with the law, fits the stereotypes describing prototypically masculine competitive values versus feminine relationship-focused values: it is easier to find men than women who care enough about money, power and status to be willing to shortchange their employees.[178] Earlier studies among entrepreneurs, who presumably have greater interest in increased compensation than the average employee, showed that men were more likely than women to cite the opportunity for increased compensation as a reason why they would switch jobs, although the differences were smaller.[179]

Compounding the gendered effects is the degree of risk. Walmart 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.[180] And their ability to do so determined not only the size of their bonuses, but the possibility that they

---

[174] Rosen, *supra* note 170, at 254.
[175] *Id*.
[176] *Id*. at 254-55.
[177] Indeed, although *Dukes* was unsuccessful in class certification, subsequent claims of sex discrimination have been settled. *See* NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, SHAFTED (forthcoming 2020).
[178] Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1774 (1991).
[179] *See* Stanley Cromie, *Motivations of Aspiring Male and Female Entrepreneurs*, 8 J. ORG. BEHAV. 3 (July 1987), https://onlinelibrary.wiley.com/doi/pdf/10.1002/job.4030080306 (finding that female entrepreneurs are less interested in money than are male entrepreneurs). *See also* Venkat Kuppuswamy & Ethan R. Mollick, *Second Thoughts About Second Acts: Gender Differences in Serial Founding Rates*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752689 (Mar. 23, 2016) (finding that women founded 25.3% fewer entrepreneurial ventures than men, and attributing this differential at least in part to male hubris and female humility).
[180] Rosen, *supra* note 170, at 254.

would be demoted and moved to another store.[181] Stereotypes suggest that women are more risk adverse, [182] though more rigorous studies show that among professionals, there are no significant gender differences in risk propensities or in success in managing risk.[183] Nonetheless, jobs that build in the type of artificial competition that Walmart encouraged tend to discourage women from applying.[184] Laboratory studies using a general population 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.[185] For example, when given a choice between performing a task on a non-competitive piece-rate basis versus in a contest, 73% of the men selected the contest, while only 35% of the women did so.[186]

Walmart'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 those lacking in empathy, particularly empathy for those employees whose hours needed to be involuntarily cut or who need to be encouraged to forgo breaks or merited overtime.[187] Women, after all, are not as a general matter 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 competitors," who are concerned with the feelings and welfare of others.[188]

Finally, the selection of managers willing to do what is necessary to shortchange their employees (all while the top executives looked 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, speculating that is because they thrive on competition.[189] *Forbes* ran a lengthy article explaining how breaking the rules is necessary to

---

[181] *Id.* at 254-55.

[182] *See, e.g.,* JULIE A. NELSON, GENDER AND RISK-TAKING: ECONOMICS, EVIDENCE, AND WHY THE ANSWER MATTERS (2017).

[183] Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 44 (Nat'l Bureau of Econ. Research, Working Paper No. 21913, 2016), http://www.nber.org/papers/w21913.pdf (indicating that male and female managers and entrepreneurs did not differ in risk propensities); *see* CORDELIA FINE, TESTOSTERONE REX 115-16 (2017) (challenging the relationship between testosterone and risk-taking propensity).

[184] Blau & Kahn, *supra* note 183, at 36 n.60, 37–38, (indicating that controlling for differences in attitudes toward competition among business students accounted for part of the gendered wage gap); *id.* at 41 (describing study that found that "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.").

[185] 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 Flory, Andreas Leibbrandt, & John A. List, *Do Competitive Workplaces Deter Female Workers? A Large-Scale Natural Field Experiment on Gender Differences on Job Entry Decisions*, 82 REV. ECON. STUD. 122 (2014)(indicating the 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).

[186] Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 264 (2013) (citing Niederle & Vesterlund, *supra* note 185, at 1078, 1097).

[187] Rosen, *supra* note 170, at 153.

[188] Richard M. Ryckman, et al., *Values of Hypercompetitive and Personal Development Competitive Individuals*, 69 J. PERSONALITY ASSESSMENT 271 (1997); *see also* FINE, *supra* note 183, 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.

[189] Amy Morin, *Why Kids Who Break the Rules Are More Likely to Become Rich*, PSYCHOLOGYTODAY.COM (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

executive success and how women are less likely to do it.[190] Walmart managers, in pursuing their bonuses, violated any number of social norms and sometimes the law without first asking permission from Bentonville. In doing so, they played out the gendered tendencies *Psychology Today* traced to early childhood.

Walmart's selection of managers involved practices such as frequent moves and long and unpredictable hours that discouraged women from applying. And its old boys' network involved at least a measure of gender stereotyping and outright sexism.[191] 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, Walmart found that selecting managers on the basis of certain stereotypically male traits paid off.

Walmart is in many ways a curious example of a rule-breaking culture. It rose to fame initially for its use of bar codes to micromanage inventory and its tight control over a carefully planned network of stores. And Sam Walton liked to emphasize its down home culture, with small town, working class roots. But Walmart 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, never permit unions to get a foot in the door, and never pay a cent more than necessary in labor costs. 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

Walmart 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 firms, stories about sexual harassment were commonplace. One of the most famous concerned the "boom-boom room."[192] In the 1990's, the brokerage firm Smith Barney had an office in Garden City, N.Y. office with a basement room. 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."[193] Pamela Martens, a Smith Barney broker who had been told when she was hired in the eighties that the firm was "biased against women," described how on the only occasion when she entered the room, the branch manager forcibly kissed her.[194] 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

---

[190] Barbara A. Sullivan, *Women and Rule Breaking: Why It's Essential for Business Success*, FORBES (Oct. 28, 2011), https://www.forbes.com/sites/forbeswomanfiles/2011/10/28/women-and-rule-breaking-why-its-essential-for-business-success/#72e2855b4d26.

[191] FEATHERSTONE, *supra* note 140, at 38.

[192] *E.g.*, Susan Antilla, *Decades After 'Boom-Boom Room' Suit, Bias Persists for Women*, N.Y. TIMES, May 22, 2016.

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

[194] *Id.*

claimants alleging sex discrimination against the brokerage firm, and the firm eventually settled the suit.[195]

In the years leading up to the lawsuit against Smith Barney, women had succeeded in increasing their Wall Street ranks. The number of stock analysts at brokerage firms rose from 5% in the seventies to 20% in the late eighties. Yet, even as Smith Barney settled its case, the percentage of women plunged, following the turn-of-the-century dot.com bust.[196] After 2000, the absolute number of women on Wall Street fell; it would take over a decade and the recovery from the next financial crisis for the numbers of women to get back up to what they were in the late nineties.[197]

Perhaps the most perplexing part of women's Wall Street losses is their failure to make more progress in areas where women should have excelled: in the brokerage and advising business. The traits necessary to succeed in financial advising and wealth management read like a description tailor-made for women: building relationships, strong communication skills, and rapport with a diverse group of clients and customers.[198] While comfort with finance and risk management is necessary, math genius is not: humanities and history majors are welcome to apply.[199] Yet, relatively few of the professionals in this field are women, by some accounts no more than 13%.[200] And personal financial advisors show the largest gender gaps in compensation in the entire economy.[201] 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."[202] 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 ordinarily citizens flooded into the stock market – and

---

[195] Complaint at 1, Martens v. Smith Barney, Inc., 194 F.R.D. 113, (S.D.N.Y. 2000) (No. 96 Civ. 3779); Martens v. Thomann, 273 F.3d 159 (2d Cir. 2001); SUSAN ANTILLA, TALES FROM THE BOOM-BOOM ROOM (2002).

[196] 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/.

[197] Alexander Eichler, *Gender Wage Gap Is Higher on Wall Street than Anywhere Else*, HUFFINGTON POST, Mar. 19, 2012, http://www.huffingtonpost.com/2012/03/19/gender-wage-gap-wall-street_n_1362878.html.

[198] https://www.ft.com/content/77be8a96-553a-11e0-87fe-00144feab49a; Certified Financial Planner Board of Standards, *Making More Room for Women in the Financial Planning Profession*, https://www.cfp.net/docs/about-cfp-board/cfp-board_win_web.pdf (2014).

[199] *Id.* at 18-19.

[200] Mindy Diamond, *Why Aren't More Women in Wealth Management?*, WEALTHMANAGEMENT.COM (May 14, 2014), http://www.wealthmanagement.com/careers/why-aren-t-more-women-wealth-management.

[201] *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].

[202] Certified Financial Planner Board of Standards, *supra* note 199, at 21.

the first time a majority of the shareholders in many major American corporations were women.[203] When Congress sought to determine the causes of the Great Depression, it put a large part of the blame on the financiers who pushed the sale of securities on the unwary and vulnerable. Charles Mitchell, the head of National City (the predecessor to Citigroup), came to personify the practices.[204] Over the course of the twenties, Mitchell had pushed the integration of the City Bank's commercial banking activities with National City's securities operations.[205] 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.[206] By the mid-twenties, City Bank had become the largest bank (and one of the biggest companies) in the United States, with record profits and foreign offices throughout the world.[207] Congressional hearings in the thirties demonstrated Mitchell's role in engineering the stock market boom of the twenties, which ensured riches for City's executives while selling its customers securities its sales representatives knew were worthless.[208] The revelation of these practices contributed to the New Deal securities and banking reforms, particularly Glass-Steagall, which mandated the separation of investment and commercial banking.[209]

The deregulatory era of the later part of the twentieth century has seen the return of financial crises fueled by predatory sales practices.[210] Almost all involve the exploitation of customers. The new era started with the repeal of what had been a New York Stock Exchange rule mandating that investment banks that traded on the exchange be held in partnership form, insuring that the firm partners would have personal liability for bank misdeeds.[211] Salomon Brothers, a leading investment banking firm and "Wall Street fortress" for most of the twentieth century, rose to new prominence with the change.[212] Michael Lewis's 1989 book, *Liar's Poker*, captured the

---

203 Christine S. Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street's Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J. L. & GENDER 175, 196-97 (2010) ("“[f]or a surprisingly large number of great corporations more than half of the shareholders are women – in American Telephone for 1926, 200,000 of the 366,000 were on the distaff side.")

204 MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE 77 (2010) (describing Mitchell's reputation as the "greatest bond salesman who had ever lived").

205 National City owned City Bank.

206 PERINO, *supra* note 204, at 80.

207 *Id.* at 81.

208 *Id.* at ___.

209 *Id.* at 4-5; *see also* 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. & INTEL. PROP. L. 441, 444 (2017).

210 A.W. MULLINEUX, BUSINESS CYCLES AND FINANCIAL CRISES (2011), https://hvtc.edu.vn/Portals/0/files/635826563558646918business-cycles-and-financial-crises.pdf.

211 Claire Hill & Richard W. Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 SEATTLE U. L. REV. 1173, 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 (1992) (reflecting on the role of limited liability for shareholders generally as increasing the willingness to take risks).

212 Carrie Hojnicki, *The Spectacular Rise and Fall of Salomon Brothers*, BUS. INSIDER (July 3, 2012), http://www.businessinsider.com/salomon-brothers-treasury-bond-scandal-2012-7?op=1/#lomon-brothers-was-founded-in-1910-1.

new Wall Street culture and the celebration of what he called the "big swinging dick."[213] 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."[214] The ethos combined a glorification of cleverness and gamesmanship with signs of masculinity.[215] In this environment, Salomon Brothers' management style became one of warring individuals and factions; every man for himself.[216] Serving customers was not part of the path toward advancement.[217] The firm created complex, opaque financial products–and sought to profit from them at the expense of less sophisticated customers.[218] Indeed, the traders bragged about "blowing up a client," that is, persuading the client to buy a product certain to decline in value and to force the client out of the market. 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.[219] "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.[220]

Salomon's downfall came in the nineties 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 others brokers who could then get the bonds only from Salomon Brothers.[221] To combat the practice, Treasury adopted new rules limited the percentage of the bonds any one buyer could purchase. Mozer responded by submitting bids under his customers' names, thus disguising Salomon's stake in the purchases. Mozer told the Salomon 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.[222] By then, Treasury had figured it out, triggering a crisis that forced the resignation of Salomon's top management. The firm ultimately paid a $290 million fine to the SEC, one of the largest ever issued against an investment bank at the time.[223]

The crisis at Salomon Brothers is striking in a number of respects that illustrate the break-the-rules culture. Mozer's violations of the law were almost certainly prompted by hubris; he sought to get around a Treasury that he believed, probably correctly, was aimed at him.[224] Treasury is likely to have discovered and pursued the violation because it was an act of defiance, one that

---

[213] MICHAEL LEWIS, LIARS POKER 56 (1989).
[214]. HILL & PAINTER, *supra* note 22, at 98.
[215] *Id*. at 99; *see also* Chung, *supra* note 203, at, 177 (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").
[216] 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.
[217] HILL & PAINTER, *supra* note 22, 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).
[218] HILL & PAINTER, *supra* note 22, at 85-86, 90 (describing the perceived connection between "cleverness" and "winning," sophisticated products and appetite for risk).
[219] *Id*. at 19 (indicating the emphasis on selling the most complex products to the least sophisticated parties); 103 (discussing the fact that the neither the individual traders 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).
[220] *Id.* at 85-86.
[221] 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.
[222] *Id*.
[223] Stephen Labaton, *Salomon to Pay Phony-Bid Fine of $290 Million*, N.Y. TIMES, May 21, 1992.
[224] Bernice Kanner, *Saving Solomon*, NEW YORK MAG., Dec. 9, 1991, at 42..

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.[225] And while the criminal violations had consequences – Mozer spent four months in jail and the stars of *Liar's Poker* lost their jobs[226] – it did not fundamentally change Wall Street culture.[227] Martin Mayer's account concluded that it was part of a more general shift "from a context of relationships to a context of transactions."[228]

By the time of the more recent housing bubble and the financial crisis that followed, Goldman Sachs had replaced Salomon Brothers as the darling of Wall Street. 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.[229] 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 eighties: "[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."[230] 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. With the housing boom in the early 2000s, this fueled increasing demand for new mortgages that could be converted in securities – and it also fueled a wave of predatory practices.

Mortgage brokers, who earned commissions on every mortgage loan issued, encouraged home buyers to buy homes the mortgage brokers knew the customers could not afford, often without accurately disclosing the terms of the mortgages. Predatory lending practices were commonplace.[231] The mortgage originators then bundled the loans and sold them to investment

---

[225] Deborah 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 take action or to restrict his activities).

[226] Keith Bradsher, *Former Salomon Trader To Pay $1.1 Million Fine*, N.Y. TIMES (July 15, 1994), https://www.nytimes.com/1994/07/15/business/former-salomon-trader-to-pay-1.1-million-fine.html.

[227] Indeed, the remaining Salomon brokers ended up merging with Smith Barney in the nineties and then becoming part of Citigroup after the repeal of Glass-Steagall. They oversaw Citi's ventures into mortgage-backed financial products during the housing bubble. Citi eventually paid $7 billion to settle federal and state claims arising from its involvement in mortgage related securities. 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." Nate Raymond, *Exclusive: Citigroup Executives Avoid U.S. Charges over Mortgage Bonds – Document*, REUTERS (Mar. 4, 2016), https://www.reuters.com/article/us-citigroup-mbs-idUSKCN0W626D. *See also* HILL & PAINTER, *supra* note 22.

[228] Martin Mayer, *Moral Outrage Attends the Probe of the U.S. Bond-Market Scandal*, BALTIMORE SUN, July 11, 1993 http://articles.baltimoresun.com/1993-07-11/news/1993192091_1_salomon-government-bonds-martin-mayer.

[229] HILL & PAINTER, *supra* note 11, at 5, 82-84 (describing investment banks' move from brokerage activities and underwriting corporate securities to designing and trading new securities on their own (as opposed to their customers') accounts).

[230] *Id.* at 19.

[231] *Countrywide Allegedly OK'd Bad Loans*, LONG BEACH PRESS TELEGRAM (July 17, 2008), https://www.presstelegram.com/2008/07/17/countrywide-allegedly-okd-bad-loans/. They also charged struggling homeowners with unjustified fees after the fact. *See* FED. TRADE COMMISSION, 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

banks, which in turn repackaged them into complex securities that disguised the level of risk.[232] Rating agencies gave the securities Triple A ratings, often in circumstances where the agencies had either not reviewed the supporting files or where the file samples they reviewed indicated a level of risk that belied the ratings.[233] And when the market began to collapse, the institutions in a position to see the crisis coming protected themselves by short-changing their customers.[234] 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.[235] They often deliberately targeted the vulnerable and bragged about it, all while reaping handsome rewards for their rule-breaking.[236]

The SEC's civil fraud case against Goldman, Sachs & Co. for securities fraud illustrates the abuses.[237] In 2010, the SEC announced that Goldman would pay a $550 million fine (the largest the SEC had secured up until that time) to settle charges that Goldman misled investors about a subprime mortgage product issued just as the U.S. housing market was starting to collapse.[238] The SEC also decided to bring individual civil fraud charges against "the lowest man on the totem pole," a midlevel Goldman trader and French citizen, Fabrice Tourre, who was in his late twenties at the time of the deal.[239] Tourre had made the mistake of joking about his role in the project. 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,"[240] though in fact the customers were more sophisticated and more targeted than the email suggested.[241] 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

---

232 FINANCIAL CRISIS INQUIRY COMMISSION, FINANCIAL CRISIS INQUIRY REPORT (2011), https://fcic.law.stanford.edu/. Of course, in some cases, the mortgage bankers bought the bundled mortgages even where 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?*, AM. B. ASS'N J. (Feb. 2016), http://www.abajournal.com/magazine/article/will_those_who_led_the_financial_system_into_crisis_ever_face_charges.

233 *See* Claire A. Hill, *Regulating the Rating Agencies*, 82 WASH. U. L. Q. 43 (2004).

234 Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS (Nov. 10, 2011), https://www.nybooks.com/articles/2011/11/10/should-some-bankers-be-prosecuted/http://www.abajournal.com/magazine/article/will_those_who_led_the_financial_system_into_crisis_ever_face_charges; *See also* HILL & PAINTER, *supra* note 22, at 3 (observing that Goldman Sachs "apparently reduced its own risk by selling part of its mortgage exposure to its clients and customers.")

235 William Black, *Oral Testimony of William Black*, NEW ECON. PERSPECTIVES (Feb. 8, 2015), http://neweconomicperspectives.org/2015/02/oral-testimony-william-k-black.html.

236 Indeed, even those who didn't get away with it entirely pocketed large sums of money they never had to pay back. *See* Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS (Nov. 10, 2011), https://www.nybooks.com/articles/2011/11/10/should-some-bankers-be-prosecuted/ (describing how fines the SEC levied against Mozilo paled in comparison with the profits he made in a single year of his mortgage operations).

237 Complaint at 7–11, SEC v. Goldman Sachs & Co., No. 10-CV-3229 (S.D.N.Y. Apr. 16, 2010). *See also* Samuel Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511 (2011).

238 U.S. SECURITIES AND EXCHANGE COMMISSION, GOLDMAN SACHS TO PAY RECORD $550 MILLION TO SETTLE SEC CHARGES RELATED TO SUBPRIME MORTGAGE CDO (2010), https://www.sec.gov/news/press/2010/2010-123.htm. For an account of the failure to prosecute for 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.

239 Eisinger, *supra* note 239.

240 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//.

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

of all these complex, highly leveraged, exotic trades he created without necessarily understanding all the implications of those monstrosities!!!"[242] 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."[243] When the deal unraveled as Goldman expected it would, investors suffered about $1 billion in losses.[244] The investment banking 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.[245] 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.[246] Goldman settled its case with the SEC, but Tourre lost at trial. His ended up paying more than $800,000 in fines, though Goldman did pick up the tab for his legal fees.[247] Since then, Tourre has received a Ph.D. in Economics from the University of Chicago, and is currently teaching as a post-doc at the Economics Department at Northwestern.[248]

The cases brought against Moser and Tourre are rare in targeting individuals for financial misconduct in environments where such actions are commonplace. At the same time, the whistle blowers who tried to warn against Wall Street's excesses often find themselves unemployable in the industry.

B. Compensation and Conflicts of Interest: Why Customer-Hostile Environments Favor Men

Wealth management and personal financial advisers, of course, are in a somewhat different position from traders and investment bankers. Unlike the latter, they may have fiduciary obligations to their clients in some circumstances,[249] and are more likely to enter into ongoing, personalized relationships with many clients.[250] Nonetheless, these advisers are lightly regulated at best, and critics conclude that "the regulatory structure for financial advice now tolerates incentives motivating financial advisors to manipulate and deceive retail investors."[251]

The most obvious conflicts arise from the fee structure. Benjamin Edwards observes that "[c]ommission compensation structures may lead even well-meaning financial advisors to recommend unwise investments to their clients."[252] These advisors may be tempted to steer their clients toward products that offer higher sales commissions, or to steer the clients toward products

---

242 *Id.*
243 *Id.*
244 Ben Protess, *Former Goldman Trade Tourre Says He Will Not Appeal*, N.Y. TIMES DEALBOOK (May 27, 2014), https://dealbook.nytimes.com/2014/05/27/former-goldman-trader-tourre-says-he-will-not-appeal/.
245 *Id.*
246 Madrick & Partnoy, *supra* note 227.
247 *Id.*
248 *Graduate Connection*, NEWSLETTER FOR DEP'T OF ECON. NW. U., (Evanston, Il) (Mar. 2018), at 1. https://www.economics.northwestern.edu/docs/graduate/newsletters/graduate-connection-23-3.pdf.
249 *See* U.S. SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS (2011) [hereinafter FIDUCIARY STUDY], http://www.sec.gov/news/studies/2011/913studyfinal.pdf [https://perma.cc/ZRE7-PA3Q]. *See also* Donald C. Langevoort, *Brokers as Fiduciaries*, 71 U. PITT. L. REV. 439 (2010) (describing the increasingly blurry line between financial advisors who owe fiduciary obligations and brokers who do not).
250 *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 that they provide personalized advice).
251 Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181 (2017).
252 *Id*. at 183.

that involve greater advisor involvement, generating higher fees.[253] The consequent losses for ordinary savers have been estimated at $17 billion per year.[254]

These conflicts may be exacerbated in large institutions when financial advisers experience pressures to sell the bank's other products. Wells Fargo, for examples, was caught up in a major scandal because its employees were found to have "opened millions of 'ghost' bank and credit card accounts for existing customers."[255] The employees so feared for their jobs that because of pressure to sell customers additional bank products that, with "their supervisors' acquiescence, they created accounts without the customers' consent," often targeting Native American tribes, undocumented residents, and other vulnerable customers unlikely to complain.[256]

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.[257] 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."[258] Another explained that "the whole foundation of Wells Fargo is cross-sell, cross-sell, cross-sell."[259] And Wells Fargo was not alone in these practices.[260]

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 customer's expense.[261] 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 the women are discouraged by a failure to earn more or a refusal to do what it takes to shortchange clients. [262] 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.[263]

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

---

[253] *Id.* at 184.
[254] *Id.* at 184, n.12.
[255] Claire A. Hill, *Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda*, 74 WASH. & LEE L. REV. 973, 975 (2017).
[256] *Id.* at 976.
[257] Jim Nortz, *The Anatomy of a Corporate Scandal Unauthorized Credit Cards, Greasy Cup Holders and a Surefire Recipe for a Corporate Scandal*, ACC DOCKET, Jan,/Feb. 2017, at 70, 71.
[258] Merric Kaufman, *Lions Hunting Zebras": The Wells Fargo Fake Accounts Scandal and Its Aftermath*, 36 REV. BANKING & FIN. L. 434, 438 (2017).
[259] Nortz, *supra* note 258, 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.*
[260] 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*, MONEY.COM (June 6, 2018), https://money.cnn.com/2018/06/06/news/companies/wells-fargo-fake-accounts-banks-occ/index.html.
[261] Edwards, *supra* note 252 (arguing that such compensation systems create intrinsic conflicts of interests in financial advising).
[262] Certified Financial Planner Board of Standards, *supra* note 199, at 21. Carol Gilligan's classic work suggests that gendered female behaviors involve greater attention to personal relationships. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); *see* Niobe Way, Carol Gilligan, Pedro Noguera, & Alisha Ali, *Introduction: The Crisis of Connection* 1, 7, *in* THE CRISIS OF CONNECTION (Way et al. eds. 2018)(exploring Gilligan's "paradigm"-shifting recognition of connection).
[263] Thompson, *supra* note .

services that generated higher fees, even though these services often carried higher risks and were not necessarily appropriate for the client's investment objectives.[264] Justice Department, SEC, and Labor Department investigations are pending.[265] More recently, women in the same division have complained about a glass ceiling, blocking women from promotion into the unit's top ranks. Twelve out of the forty-five regional managers in the wealth management division are women. Yet, all seven of the senior managing directors above them are men. The twelve women have alleged gender bias in the promotion opportunities.[266]

Substantial evidence exists that women face the same triple bind in finance that they do elsewhere. As we suggested above, it may be harder to find women rather than men eager to sell out the customers.[267] Sally 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. Initial reports suggested that she had tangled too intensely with the new Citi CEO Pandit at the height of the financial crisis. More detailed reports indicated that they disagreed not just about protecting Citi's investment clientele from losses involving ill-advised mortgage products. Pandit also wanted Citigroup investment advisers to push largely Citigroup products, while Krawcheck thought the advisors she supervised should be free to pitch products from other companies better suited to the clients' needs.[268] That same lack of devotion to cross-selling is what cut short her tenure at Bank of America.[269] Pitching Citi or B of A products, of course, is not the same as opening bank accounts without the customer's permission.[270] But putting customer interests ahead of the bank 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.[271]

Women also face difficulties if they try to play the game the same way that the men do.[272] Allison Schiefellin, for example, filed a sex discrimination against Morgan Stanley in 2004.[273] She maintained that "whereas male colleagues were praised for being aggressive and competitive, . . . she was criticized for being 'snippy' and 'too emotional."[274] When she didn't do as well as the men around her, her supervisor told her that she "shouldn't be so focused on Morgan Stanley," and should direct her energies toward "the important things in life," like "having a

[264] Emily Glazer, *Whistleblowers Detail Wells Fargo Wealth Management Woes*, WALL ST. J. (July 7, 2018), https://www.wsj.com/articles/whistleblowers-detail-wells-fargo-wealth-management-woes-1532707096?mod=article_inline.
[265] Emily Glazer, *Justice Department Widens Wells Fargo Sales Investigation to Wealth Management*, WALL ST. J. (Mar. 16, 2018), https://www.wsj.com/articles/justice-department-widens-wells-fargo-sales-investigation-to-wealth-management-1521215076.
[266] Glazer, *Whistleblowers*, *supra* note 265.
[267] *See supra* discussion in text at note 261.
[268] Geraldine Fabrikant, *When Citi Lost Sallie*, N.Y. TIMES (Nov. 15, 2008), https://www.nytimes.com/2008/11/16/business/16sallie.html.
[269] Touryalai, *supra* note 11.
[270] Edwards, *supra* note 252.
[271] HILL & PAINTER, *supra* note 22, at 101.
[272] *See, e.g.*, Joann S. Lublin, *Women Managers Have Little Margin for Error*, WALL ST. J., Oct. 19, 2018.
[273] Complaint of Plaintiff-Intervenor Allison Schieffelin at 4-5, EEOC v. Morgan Stanley & Co., 324 F. Supp. 2d 451 (S.D.N.Y. 2004) (No. 01 CV 8421).
[274] Chung, *supra* note 203, at 231.

family."[275] Morgan Stanley excluded her from the social events, retreats, and strip club outings that facilitated male bonding with clients. And when she threatened to file suit, the firm retaliated.[276] Morgan Stanley eventually paid $54 million to settle her case, with $12 million to Schieffelin personally.[277]

Even though women engage in misconduct much less than men, women face the worst challenges when they do break the rules – and their boss needs a scapegoat. 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. Studies indicate that the worst time for women in competitive systems is during downturns.

A 2016 study of personal financial advisors documents the risks women face. That study found that "roughly one in thirteen financial advisors in the U.S. has a record of misconduct"[278] – 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. 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 30% less likely to find a new job in the industry compared to the men.[279]

In addition, the source of the complaints is different for men and women. For the men, customers initiate 55% of the misconduct complaints compared to 28% by their employers. For the women, employer-initiated instances of misconduct are almost as common as customer-initiated complaints (41% versus 44%).[280] 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.[281] These findings, however, are consistent with other observations about why women do not do well in finance. If the business model depends on shortchanging your 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 the women do not live up to stereotypes about how women provide more selfless services, and employers, who benefits from the additional fees, may be less inclined to back up women who generate customer complaints.[282] Being able to dis your customers, or otherwise break the rules, requires a supervisor that has your back. Men in finance are more likely to be in that position than women. In her fictionalized portrayal of Wall Street, former trader Maureen Sherry explains, "Good producers" tend to be arrogant and entitled, and also immunized from discipline. "The rainmakers don't get fired, ever, for bad behavior."[283] 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.

---

275 *Id.*
276 *Id.*
277 *Id.* at 233.
278 Mark L. Egan & Gregor Matvos & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct*, NBER Working Papers 23242, National Bureau of Economic Research, Inc. (2017), https://ideas.repec.org/p/nbr/nberwo/23242.html.
279 *Id*. at 12, 30.
280 *Id.* at 4.
281 *Id.* at 4–5.
282 "Women's workplace weaknesses are overplayed or punished excessively, while men's shortcomings often are ignored." Lublin, *supra* note 272.
283 SHERRY, *supra* note 21, at 42.

The major investment banking firms may, in spirit, have much in common with Enron and Uber. Salomon Brothers sought to disrupt what had been a relatively staid investment banking environment and recruited traders who would thrive in a no holds barred business that rewarded cleverness and success. Personal financial advisers, however, are supposed to be a different breed. They have longer-term customers with ongoing and more personal relationships. Yet, the intrinsic conflicts of interest and the commission and fee based compensation system ends up producing similar results. Winning is what matters and those who excel at "Liar's Poker" – the ability to lie, bluff, cheat and win the day – are still the stars of Wall Street.

IV. Anti-discrimination Law Cannot Reach the Triple Bind

The types of discriminatory behavior that form the triple bind posed earlier in the article are virtually unreachable through legal doctrines in the employment discrimination realm. Moreover, we see no particular purpose in claiming women should be equally able to join men in breaking the law at the expense of others. Turn to Walmart and consider two options: the first is allowing a nationwide class action that would compel hiring more female managers, but otherwise leaving Walmart'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. Alternatively, consider what would happen if Walmart was strictly sanctioned for wage theft and threatened with draconian sanctions for new violations. We suspect that while the first option might lead to a few more female managers, the second would give Walmart far more reason to hire women – and to dismantle the practices that discourage women from applying.[284]

The impact of course would be much greater with both limits on executive compensation and gender equity in its distribution.[285] 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. Indeed, corporations handsomely 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.[286] The primary difficulty of framing this as a sex discrimination suit is that, although narcissism has both gendered roots and gendered consequences, it does not divide sharply between the sexes. While in general men tend to be more narcissistic than women, there are many men who aren't; and there

[284] Bradley Keoun & Anders Keitz, *The Goldman Sachs Board Remains Old Boys' Club Even as Rivals Promote Women*, THESTREET (May 21, 2018), https://www.thestreet.com/investing/as-companies-add-more-women-to-boards-goldman-sachs-keeps-a-pair-14574319 ("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 the CEO of 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).

[285] 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).

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

are some females who are as well.[287] In short, the competitive, self-aggrandizing behaviors may be gender-linked (whether through socialization or biology or both), but the behavioral manifestations of narcissism occur in individuals, not as inexorably tied to gender identity. Indeed, we suspect that the lawyers who brought the class action against Walmart did not mention wage theft because it changed the case from one based on gender to one serving Walmart's (not entirely legitimate) business interests.

The second leg of the triad is that women who act atypically for their gender are punished. A wealth of psychosocial literature supports that both men and women suffer penalties for their departures from gender norms.[288] 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.[289] Although allegations that an employer discriminated against an employee for her failure to conform to sex stereotypes theoretically can establish a viable Title VII claim,[290] these suits are difficult to win, even when based on a specifically sex-coded employer action, such as grooming standards.[291] 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."[292]

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 sex Silicon Valley 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.[293]

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 simply 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.[294] Moreover, any claim that women simply don't want the jobs because they are designed to appeal to the unscrupulous undercuts allegations of sex discrimination.[295]

This triple bind—of narcissistic behaviors correlating inexactly with gender, of subtle discrimination against women who act atypically for their gender, and of women making career

---

[287] Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-Analytic Review*, 141 PSYCHOL. BULL. 261 (Mar. 2015).
[288] *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 149-50 (Michael S. Kimmel et. al., eds., 2007); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 389, 393-94 (2004).
[289] *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).
[290] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[291] Jesperson v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004).
[292] Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 925 (2016).
[293] Cahn, Carbone & Levit, *supra* note 20, at 426-27,467, 473.
[294] Shelley J. Correll, *Constraints into Preferences: Gender, Status, and Emerging Career Aspirations*, 69 AM. SOCIOLOGICAL REV. 93, 95-96 (Feb. 2004).
[295] EEOC v. Sears, 839 F.2d 302 (7th Cir. 1988).

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.[296] When the subjectivity affects layers of decisions and multiple decisionmakers as well as critical self-assessments, disparate treatment law's requirements of intentionally discriminatory treatment of a comparator and disparate impact law's requirement of the identification of a specific business practice that has a statistically differential impact are difficult to meet.[297] Moreover, while companies can defend that the search for people who will ruthlessly pursue company goals is a business purpose, maybe it is not a legitimate or necessary one.[298] 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, the narcissistic, and the unprincipled. The negative consequences become acceptable so long as the short-term gains are high.[299] 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 mine indicating that the companies that flourish by creating hostile environments for women have fundamental problems that go well beyond their gendered effects.

The ultimate success of women in the higher ranks of the economy depends not just on equal access – allowing the women to act unethically, stab their colleagues in the back and shortchange their customers on the same terms as men. Instead, their success 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.[300]

Most basically, women's success depends on dismantling the 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, with the use of individual criminal sanctions waning over time, and the weakening of enforcement agencies who might effectively challenge these practices before they get out of hand.[301] In the Walmart context, for example, the store manager strategy pays off

[296] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 780 (2006).
[297] *See* Cahn, Carbone & Levit, *supra* note 20, 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").
[298] *See* Cahn, Carbone & Levit, *supra* note 20, at 481.
[299] *See* Akerlof & Romer, *supra* note 28.
[300] Cahn, Carbone & Levit, *supra* note 20, at 481.
[301] 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. Black uses the term "desupervision," which has particular significance in the banking contexts where regulators

because of the politically motivated evisceration of wages and hours enforcement.[302] Walmart 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.[303]

The #MeToo movement has called increasing attention to abusive cultures. Most sexual harassers, like Harvey Weinstein and Roger Ailes, oppress and exploit others in ways 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 sex harassment represents one of the positive outcomes from #MeToo,[304] although the "successes" and buyouts of those accused of harassment shows that breaking the rules still pay.

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.[305] In contrast, more holistic systems that look at performance over longer periods work to women's – and companies' – longer term advantages.[306] This is particularly true in financial advising, where rules that reinforce the identification between advisors and customers have broad potential payoffs.[307]

---

have traditionally supervised banks. *See* Black, *supra* note 19. We describe instead the weakening of enforcement of all rules, which had more general application.[302] LICHTENSTEIN, *supra* note 135, at 242.

302 LICHTENSTEIN, *supra* note 135, at 242.

303 *Dukes*, 564 U.S. at 370 (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.'").

304 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?rref=collection%2Fbyline%2Fkate-conger&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection; 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 (noting that Microsoft and Uber had previously done away with arbitration in this context).

305 *See, e.g.,* Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects,* 13 ORG. SCI. 601 (2002) (finding that 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 12, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445497 (observing that women tend to do better in more formal or "bureaucratic" pay systems).

306 *See, e.g*., GEORGE AKERLOF & RACHEL 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 (2013) (describing how the most effective way to deal with problems such as 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. 529, 533 (2014) (describing the counterproductive effectives of modern executive compensation).

307 See, in particular, Edwards, *supra* note 252 (proposing reforms for brokers and financial advisors).

Other solutions involve implementing more gender-diversity friendly policies, with the carrot that this is correlated with higher profitability[308] and the stick of legal enforcement.[309]

The ultimate solutions, however, involve delegitimizing the masculinity contests that take up too much of the energies of corporate America.[310] 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 society. Put them in charge of all financial decision-making and the decisions will be more boring, but more sociable.[311]

Greater sociability would promote more cooperation relationships among co-workers, greater willingness to follow transparent rules that apply to everyone, and greater respect for the customers companies purport to serve.[312] No one should be able even to think about the ability to shoot someone on Fifth Avenue and get away it.

---

[308] *E.g.*, Vivian Hunt, et al., *Delivering Through Diversity* (2018), https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity

[309] Karsten Strauss, *More Evidence that Company Diversity Leads to Better Profits*, FORBES (Jan.25, 2018), https://www.forbes.com/sites/karstenstrauss/2018/01/25/more-evidence-that-company-diversity-leads-to-better-profits/#623712821bc7.

[310] 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. must instead address both and more in a complex, interdisciplinary approach. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1251 (2002).

[311] Michael Lewis, *8 Things I Wish for Wall Street*, ZEROHEDGE (Dec. 16, 2014), https://www.zerohedge.com/news/2014-12-16/michael-lewis-8-things-i-wish-wall-street.

[312] Sue Shellenbarger, *The Best Bosses Are Humble Bosses: Organizations Are Making a Push to Hire and Promote Workers Who Lead Effectively but Don't Seek the Spotlight*, WALL ST. J, (Oct. 9, 2018), https://www.wsj.com/articles/the-best-bosses-are-humble-bosses-1539092123 (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; greater collaboration and cooperation and greater flexibility in strategic orientation. Amy Y. Ou, David A. Waldman & Suzanne K. Peterson, *Do Humble CEOs Matter? An Examination of CEO Humility and Firm Outcomes*," 44 J. MGMNT. 1147 (2018).