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## Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality

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## Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality

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*Since the 1970s, antidiscrimination advocates have approached Title VII as though the impact of the law on minorities and women could be considered in isolation. This Article argues that this is a mistake. Instead, Gender and the Tournament attempts to reclaim Title VII's original approach, which justified efforts to dismantle segregated workplaces as necessary to both eliminate discrimination and promote economic growth. Using that approach, this Article is the first to consider how widespread corporate tournaments and growing gender disparities in the upper echelons of the economy are intrinsically intertwined, and how they undermine the core promises of antidiscrimination law. The Article draws on a case filed in 2014 challenging the "rank-and-yank" evaluation system at Microsoft, as well as social science literature regarding narcissism and stereotype expectations, to illustrate how consideration of the legitimacy of competitive pay for performance schemes is essential to combating the intrinsically gendered nature of advancement in the new economy.*

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### Introduction

Ellen Pao galvanized attention to the plight of women in the financial world by suing Kleiner Perkins, Silicon Valley's storied venture capital firm, for sex discrimination. Only 6% of venture capital partners are women,<sup>1</sup> and Perkins enticed Pao to the firm with promises of advancement. Yet, after seven years in her job, she found the promises hollow. She alleged that men were promoted ahead of women, that the firm embraced men's business promotion more readily than women's, and that it provided little support for women who experienced sexual harassment, a not uncommon occurrence in the financial world. Pao charged that Kleiner Perkins was a "boys' club," with gender-coded evaluations and different standards of advancement for men and women.<sup>2</sup> While the firm claimed to prize initiative and drive, Pao's

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1. Davey Alba, *Ellen Pao Ends Her Lawsuit Against Kleiner Perkins*, WIRED BUS. (Sept. 10, 2015), <http://www.wired.com/2015/09/ellen-pao-ends-lawsuit-kleiner-perkins/> [https://perma.cc/Z9AZ-43PS]. And that number represents a drop from 10% in 1999 to 6% in 2015. CANDIDA G. BRUSH ET AL., WOMEN ENTREPRENEURS 2014: BRIDGING THE GENDER GAP IN VENTURE CAPITAL—EXECUTIVE SUMMARY 11 (2014).

2. Ruth Reader, *Ellen Pao's Lawyer Concludes: Kleiner Perkins Is a Boys' Club*, VENTURE BEAT (Mar. 24, 2015), <http://venturebeat.com/2015/03/24/ellen-paos-lawyer-concludes-kleiner-perkins-is-a-boys-club/> [https://perma.cc/MP62-5T9S].

performance reviews dinged her for being “sharp elbowed,”<sup>3</sup> a trait rarely criticized among the men. Following a five-week trial in 2015, she lost.<sup>4</sup>

In September 2014, Katherine Moussouris and two other women filed a class action lawsuit against Microsoft.<sup>5</sup> They claimed that Microsoft’s “stack ranking” system, which graded technical and engineering employees on a forced curve, discriminated against women. The system identifies a top group in line to receive bigger bonuses and promotion opportunities, a middle group of adequate employees, and a bottom group that the company encouraged to leave. The ranking system created internal competition that supposedly aligned employee objectives with the company mission, but it has also been the subject of a withering management analysis that found the system destructive. Although Microsoft abandoned the system after Moussouris filed the class action, a large number of Fortune 500 companies use similar ranking systems.<sup>6</sup> And the action against Microsoft has involved multi-year litigation.<sup>7</sup>

\* \* \*

Two literatures increasingly take aim at the worlds of Ellen Pao and Katherine Moussouris—and the workplaces that have contributed the most to increasing gender inequality. The first involves macro-level challenges to practices in the new economy, such as the corporate “tournament,”<sup>8</sup> that valorizes intense competition either as an end in itself or as an aid to the pursuit of reductionist, short-term objectives. While many continue to defend

3. Patrick Kulp, *5 Things We Learned About Silicon Valley Culture from the Ellen Pao Trial*, MASHABLE (Mar. 29, 2015), <http://mashable.com/2015/03/29/ellen-pao-trial-recap/#obaH6S8iSkq5> [perma.cc/5W5F-N9VJ].

4. Pao v. Kleiner Perkins Caulfield & Byers LLC, No. CGC-12-520719, 2015 WL 1726539, at \*4 (Cal. Super. Ct. Apr. 3, 2015). See generally ELLEN K. PAO, RESET: MY FIGHT FOR INCLUSION AND CHANGE (2017) (discussing Pao’s experience at Kleiner Perkins).

5. Class Action Complaint, Moussouris v. Microsoft Corp., No. C15-1483JLR, 2015 WL 5460411 (W.D. Wash. Sept. 16, 2016).

6. Jeanne Sahadi, *Amazon Workplace Story Raises Dread of ‘Rank and Yank’ Reviews*, CNN MONEY (Aug. 17, 2015), <http://money.cnn.com/2015/08/17/news/amazon-performance-review/> [https://perma.cc/AMU3-3P4B].

7. Moussouris v. Microsoft Corp., No. C15-1483JLR, 2016 WL 4472930, at \*13 (W.D. Wash. Oct. 14, 2016) (granting in part and denying in part Microsoft’s motion to dismiss, strike, and for a more definite statement). On May 2, 2017, the court appointed a Special Master to make discovery recommendations. Moussouris v. Microsoft Corp., No. C15-1483JLR, 2017 WL 1652910 (W.D. Wash. May 2, 2017).

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

These executives are 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.

the system<sup>9</sup> as necessary to create more dynamic corporate environments in a rapidly changing world of technological change and globalization, an increasing number of scholars maintain that the new system has not outperformed the earlier managerial model<sup>10</sup> and has arguably contributed both to a decline in productivity growth and to greater societal inequality.<sup>11</sup> More critically, a growing chorus of management experts specifically identifies the emphasis on “sharp elbows” that such systems produce as counterproductive. Even some of the original champions of these corporate “reforms” describe the hypercompetitive practices that have resulted as negative-sum competitions that destroy teamwork, undermine ethical practices,<sup>12</sup> and reduce long-term institutional health.<sup>13</sup> Indeed, *Forbes* referred to Microsoft’s rank-and-yank system as “The Management Approach Guaranteed to Wreck Your Best People.”<sup>14</sup>

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9. See, e.g., Jack Welch, *Jack Welch: ‘Rank-and-Yank’? That’s Not How It’s Done*, WALL STREET J. (Nov. 14, 2013), <http://www.wsj.com/articles/SB10001424052702303789604579198281053673534> [<https://perma.cc/E4MC-SXCS>] (outlining the positive aspects of differentiation and explaining how it benefits companies).

10. See Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1178–81 (2013) (arguing that short-termism provides a reason to believe that shareholder primacy has resulted in both diminished investors’ returns and in the demise of the public corporation).

11. See, e.g., RETHINKING CAPITALISM: ECONOMICS AND POLICY FOR SUSTAINABLE AND INCLUSIVE GROWTH 7 (Michael Jacobs & Mariana Mazzucato eds., 2016) (linking “secular stagnation,” or low productivity growth, to short-termism and a decline in investment).

12. Perhaps the most notable scholar to recant is Michael C. Jensen, who helped usher in modern executive compensation systems. See Michael C. Jensen, *Paying People to Lie: The Truth About the Budgeting Process*, 9 EUR. FIN. MGMT. 379, 379–80 (2003) (observing that using budgets or targets in organizations’ performance measurement and compensation systems has encouraged gaming the system); see also Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of ‘Pay for Performance’*, 39 J. CORP. L. 525, 535 (2014) (describing the counterproductive effects of modern executive compensation).

13. The impact on institutional health is a product of three overlapping forces. First is the emphasis on shareholder primacy and the short-termism associated with it. See RETHINKING CAPITALISM, *supra* note 11, at 7 (explaining how “secular stagnation” or low productivity growth is connected to short-termism and declines in investment); Stout, *supra* note 10, at 1176 (explaining that shareholder primacy is extremely profitable for many corporate executives since stock price is easy to manipulate in the short term). Second is pay-for-performance and the perverse incentives it creates. See Stout, *supra* note 12, at 535 (noting the link between companies that have adopted incentive pay compensation plans and outbreaks in corporate fraud, scandal, and even firm failure at those companies). Third is financialization, both because of the promotion of short-termism in publicly traded companies and because of the incentives in financial firms to promote opaque products at the expense of customers and long-term institutional health. See, e.g., CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT 102–03 (2015) (describing some unethical business practices that contributed to the financial crisis and explaining how lack of attention to clients’ needs reduces institutional health over time).

14. Erika Andersen, *The Management Approach Guaranteed to Wreck Your Best People*, FORBES (July 6, 2012), <https://www.forbes.com/sites/erikaandersen/2012/07/06/the-management-approach-guaranteed-to-wreck-your-best-people/#27fc6eb5743> [<https://perma.cc/JY9-YS6P>].

A second literature looks at the failure of antidiscrimination law to address the increasing gender gaps in the new economy.<sup>15</sup> To be sure, overall gender disparities, including the wage gap between men's and women's earnings, have narrowed.<sup>16</sup> Yet the trends have moved in the opposite direction at the top. Controlling for a broader range of factors, such as education and hours worked, the extent to which men have outpaced women has been particularly dramatic for those with earnings above the ninetieth percentile of income.<sup>17</sup> Today, the greatest gender disparities occur in portions of the economy that have shown the greatest growth in compensation—including the upper management ranks of companies like Microsoft and of the financial sector generally. This second literature overwhelmingly concludes that these gender disparities arise from structural forces that Title VII has had difficulty addressing.<sup>18</sup>

Legal scholars, courts, and legislatures have developed these two literatures as separate discourses.<sup>19</sup> This Article is the first to consider how the negative-sum competition and growing gender disparities in the upper echelons of the economy are intrinsically intertwined and how they then undermine the core promises of antidiscrimination law. As it shows, so long

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15. See, e.g., Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 SETON HALL L. REV. 393, 394 (2017) (stating that “although women work for more hours on [a digital] platform, women’s average hourly rates are significantly lower than men’s”); Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 26 (2010) (noting that female CEOs of nonprofits earn nearly 35% less than their male counterparts); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, DIVERSITY IN HIGH TECH 2 (2016), <https://www.eeoc.gov/eeoc/statistics/reports/hightech/> [<https://perma.cc/JX5W-A2Q3>] (finding that women are underrepresented in the “high tech” sector as compared to private industry as a whole).

16. See Sonja C. Kassenboehmer & Mathias G. Sinning, *Distributional Changes in the Gender Wage Gap*, 67 INDUS. & LAB. REL. REV. 335, 335, 348, 355 (2014) (noting that the gender wage gap has steadily fallen since the 1970s and providing further evidence that the gap is narrowing more for the bottom percentiles of wage earners than at the top percentiles).

17. See ELISE GOULD ET AL., WHAT IS THE GENDER PAY GAP AND IS IT REAL? 9, 11 (2016), <http://www.epi.org/files/pdf/112962.pdf> [<https://perma.cc/J4ST-XLNR>] (finding that female wage earners at the 95th percentile are paid 73.8% of the wages that men at the 95th percentile are paid).

18. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460, 462–65 (2001) (labeling structural forces that lead to workplace biases as “second generation” discrimination and calling for a regulatory framework to disrupt these biases); cf. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) (arguing that a structural approach to antidiscrimination law is unlikely to be successful under the current statutory framework). See generally Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 91–101 (2015) (proposing that the goal of antidiscrimination law should be to target systemic, structural forms of bias, as opposed to a goal of protecting immutable traits).

19. A limited exception is the literature that developed following the financial crisis commenting on the relative dearth of women in the decision-making centers most responsible for the crisis. See generally SCANDALOUS ECONOMICS: GENDER AND THE POLITICS OF FINANCIAL CRISES (Aida A. Hozic & Jacqui True eds., 2016). This literature, however, does not address antidiscrimination law or the potential legal remedies.

as the discourses remain separate, counterproductive business practices that contribute to societal inequality and entrench group-based disparities escape censure because these practices simply look like routine, legally justifiable business decisions.

This Article argues for a substantive engagement with the legitimacy of the business practices that systematically produce gender disparities.<sup>20</sup> It concludes that such an engagement is the first step in moving towards a redefinition of equality in substantive terms, which returns to the origins of antidiscrimination law and recasts it as part of a broader effort to address the structural forces that simultaneously entrench group-based disparities *and* restrain economic growth. Equality law involves the identification of substantive employment practices inconsistent with a commitment to economic equality and the delegitimization of these practices as inappropriate when applied to any employee.<sup>21</sup> Consequently, our approach combines traditional antidiscrimination analysis with consideration of substantive justifications that determine the legitimacy of inequality-enhancing practices.

Part I explores the history of Title VII, showing that the Civil Rights Act of 1964 was enacted to dismantle the racially and sex-segregated workplaces of midcentury America through the combination of antidiscrimination law, economic stimulus, and education and training. As this history shows, Title VII needs to be interpreted in light of the economic realities of the employment systems in which it is operating if it is to remain effective in combating discrimination.

Part II examines the new structural forces that simultaneously increase income inequality in the economy<sup>22</sup> and gender disparities in the economic sectors that have produced the greatest income growth. The new economy, which has arisen with the information revolution and globalization, has replaced the lock-step career ladders and relatively egalitarian tiers of the

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20. This Article focuses only on the relationship between negative-sum workplace competitions and gender disparities because of the distinctive interaction between gender and negative-sum workplace competitions. Similar practices may influence disparities based on race, age, or other legally actionable categories. *See, e.g.,* *Karraker v. Rent-a-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005) (prohibiting the use of a personality inventory as a basis for promotion because of its impact on those with disabilities).

21. This Article, however, does not take a position on whether “equality” in some abstract sense should always be favored at the expense of other objectives. Nor does it suggest that the fact that a practice increases inequality is grounds to consider it illegitimate *per se*. Instead, the Article maintains only that where practices contribute to overall economic inequality or to race, gender, and other disparities, their substantive justifications on business terms should be interrogated rather than assumed.

22. *See, e.g.,* Timothy Noah, *Income Inequality: Panel on Financialization, Economic Opportunity, and the Future of American Democracy*, 18 N.C. BANKING INST. 57, 60–61 (2013) (arguing that income inequality has risen worldwide but that its growth has been particularly pronounced in the United States).

industrial era with workplaces that valorize individualism and competition.<sup>23</sup> These workplaces generate much more steeply banked income hierarchies<sup>24</sup> that threaten to undermine teamwork, productivity, and investment in the future.

The new economy also creates a triple bind for women who become less likely to seek out these newer workplaces, less likely to be seen as having the qualities necessary to succeed within them, and more likely to be penalized when they display the same self-interested qualities as the men, further discouraging future female applicants.<sup>25</sup> This section establishes the links between the new management system and the exacerbation of gender disparities, showing the need for a reorientation in the focus of antidiscrimination law.

Part III shows how these structural changes explain the failure of antidiscrimination law to deal with individual cases similar to the one Ellen Pao brought against Kleiner Perkins, while opening the door to more effective claims such as Katherine Moussouris's class action suit against Microsoft. Pao's suit took the Kleiner Perkins evaluation system as a given, requiring an intrinsically subjective evaluation of whether her contributions to the company outweighed her "sharp elbows" in the same way they did for the men. In contrast, the Moussouris case made the validity of the underlying business practices the central legal issue. The case focused attention not just on Microsoft's failure to create an environment in which women could thrive, but also on the systemic links between negative-sum competitions and gender disparities. This section thus argues that antidiscrimination efforts, to be more effective, need to challenge the background business practices that are embedded in corporate cultures.

The conclusion explores how equality law might be remade. The original passage of antidiscrimination law took aim at the structural factors that produced segregated workplaces and sought not just to outlaw discrimination but to address the economic forces that perpetuated market segmentation. In contrast, modern antidiscrimination discourse has tended to

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23. See June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 1000, 1002–05, 1008–09, 1029 (2017) (recognizing the increasingly competitive and individualistic market that has arisen since the industrial era).

24. *Id.* at 1002.

25. Of course, not all women act in the same way, and many of the stereotypes about women are just that—stereotypes. See, e.g., CORDELIA FINE, TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY 86–87, 107 (2017) (demonstrating that patterns of behavioral characteristics depend on a mosaic of factors and circumstances other than genetic and hormonal factors determined by sex); Coren Apicella & Johanna Mollderstrom, *Women Do Like to Compete—Against Themselves*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/opinion/sunday/women-do-like-to-compete-against-themselves.html> [https://perma.cc/R7K5-C2ST] (reviewing a study that found women are just as competitive as men when they were choosing to compete against their own past performance).



separate consideration of the structural factors producing the tournament mentality from the greater inequality the tournament creates, treating the resulting gender disparities as either presumptively valid or outside of the scope of Title VII altogether.<sup>26</sup> The re-creation of a substantive equality approach would identify the structural forces that produce inequality and consider the legitimacy of the underlying practices. Where the practices cannot be justified, they should be rooted out through the combination of antidiscrimination law and structural reforms.<sup>27</sup> This Article is thus a first step toward reuniting equality promotion with antidiscrimination approaches.

### I. Antidiscrimination Law and the Ideal of Equality

Congress enacted Title VII and related laws at the height of the Civil Rights movement of mid-twentieth-century America.<sup>28</sup> Yet, while these laws clearly condemned discrimination in employment, they did not just seek to promote racial and gender equality in isolation. Instead, their proponents aspired to address what they saw as a broad-based structural issue: the segmentation of the economy that marginalized women and minority workers and obstructed economic growth.<sup>29</sup> White men during this period already enjoyed a remarkable degree of economic equality, security, and wage

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26. See Sturm, *supra* note 18, at 466, 468–69 (asserting that modern antidiscrimination results “as a byproduct of ongoing interactions shaped by the structures of day-to-day decision-making and workplace relationships” rather than as a “consequence[] of a long-standing structure of job segregation”); Bagenstos, *supra* note 18, at 3 (“[S]tructural employment inequalities cannot be solved without going beyond the generally accepted normative underpinnings of antidiscrimination law.”).

27. For an example of different voter structures that are unrelated to gender disparities, see Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541, 576–77, 579 (2016).

28. This was a period in which income inequality had fallen markedly, led primarily by gains for working class white men and more restrained executive and professional incomes. See Claudia Goldin & Robert A. Margo, *The Great Compression: The U.S. Wage Structure at Mid-Century*, 107 Q. J. ECON. 1, 2–6, 9 (1992) (analyzing America’s wage structure using Census data to show that inequality took a dramatic plunge during the 1940s and rose only slightly in the 1950s and 1960s). The Gini coefficient—the most widely accepted statistical measure of income inequality in a country—shows a four-decade rise in America’s income inequality since the late 1960s to today. *The Major Trends in U.S. Income Inequality Since 1947*, POLITICAL CALCULATIONS (Dec. 4, 2013), <http://politicalcalculations.blogspot.com/2013/12/the-major-trends-in-us-income.html#> [<https://perma.cc/XJR6-7NVF>].

29. See, e.g., Harwell Wells, “Corporation Law Is Dead”: *Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 322 (2013) (noting the role of “labor-management concordat” following World War II in which “labor unions received income and benefits sufficient to carry their members into the middle class”). For data showing the steady increase in household income between 1950 and 1965, see U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, SER. P-60, NO. 43, CURRENT POPULATION REPORTS: INCOME OF FAMILIES AND PERSONS IN THE UNITED STATES: 1963, at 1 (1964) (concluding that “[m]edian family income in current dollars . . . more than doubled in the postwar period” between 1947 and 1963).

growth,<sup>30</sup> so the goal was to make these opportunities available to other groups.<sup>31</sup> President Kennedy initially proposed what became the Civil Rights Act of 1964, as well as other antidiscrimination measures, as part of a multifaceted approach that linked antidiscrimination efforts to economic equality and national prosperity.<sup>32</sup>

Modern Title VII scholars argue that today's limits on the advancement of women and minorities have become "structural" in nature, following from the change in promotion practices from lockstep advancement to performance pay and lateral moves that rest on "patterns of interaction, informal norms, networking, mentoring, and evaluation."<sup>33</sup> Yet, Title VII's origins indicate that it sought to delegitimize a much more explicit form of structural inequality—the segmentation of the labor market into white male jobs with security, benefits, and lockstep patterns of advancement, and other less attractive jobs for black men, white women, and black women.

This section reviews the development of antidiscrimination employment laws. It first explores the legislative history that demonstrates the structural nature of the antidiscrimination efforts, Congress's focus on opening portals to jobs that provided security and advancement, and the nature of the links between those laws and the parallel efforts to promote economic growth. Second, it examines the early cases interpreting Title VII and their relationship to the structural purpose of the legislation. Third, the section assesses the success of the antidiscrimination efforts, demonstrating that their principal successes came from the structural reforms they produced.

#### A. *Title VII's Structural Approach*

Advocates of the enactment of Title VII, designed to focus on discrimination in employment, recognized that the restricted access to "good jobs"<sup>34</sup> helped to keep wages for these positions high by restricting the pool

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30. See generally CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010*, at 170–83 (2012) (documenting the stability of white men's jobs during the 1960s).

31. See, e.g., 110 CONG. REC. 2705, 2732 (1964) (statement of Rep. Nix).

32. See John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963), [https://www.jfklibrary.org/Asset-Viewer/LH8F\\_0Mzv0e6Ro1yEm74Ng.aspx](https://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx) [<https://perma.cc/JLK5-H6PT>]:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

33. Sturm, *supra* note 18, at 458.

34. See ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S*, at 5–6 (2011) (laying out the different dimensions of a "good job," which include compensation and fringe benefits, job security and opportunities for advancement, and the ability to control work activities and schedules).

of potential employees.<sup>35</sup> This had the further effect of discouraging investment in the human capital of those excluded and meant that general efforts to boost employment through macroeconomic policies did not necessarily reach the entire country. As a result, discrimination hurt not just those treated unfavorably by the discrimination but the economy as a whole.<sup>36</sup>

In 1963, President Kennedy proposed antidiscrimination legislation that framed the effort to prohibit employment discrimination in terms of promoting greater economic growth. He entered office during a recession, persuaded Congress to adopt tax cuts and other stimulus measures, and yet was frustrated by the fact that while corporate profits soared, unemployment remained stubbornly high.<sup>37</sup> Indeed, the legislative history of Title VII identified the expansion of the labor market to include full utilization of the country's human resources as a matter of national interest—and full employment as a national policy—separate and apart from antidiscrimination as an important objective.<sup>38</sup>

Kennedy saw the solution as a three-part effort to reduce inequality. First, he introduced Title VII, which sought to dismantle racially segregated workplaces that Kennedy argued served to obstruct economic growth.<sup>39</sup> Second, he proposed continuation of the economic stimulus that had already boosted business profits, implicitly recognizing that without jobs for everyone, antidiscrimination efforts might simply lower the benefits associated with white male workplaces.<sup>40</sup> Third, he advocated education and training efforts for African Americans so that non-job-related disparities in the qualifications of potential employees could not be used to justify

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35. See Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 MICH. J.L. REFORM 397, 401–02, 410–15 (1979) (noting that despite increases in total employment representation, women and minorities were still channeled into traditionally segregated occupations and were paid discriminatorily depressed wages).

36. See 110 CONG. REC. 2705, 2737 (1964) (consideration of H.R. 7152, statement of Rep. Libonati) (“To permit a continuance of these practices of discrimination is to destroy the ambitions of a race of Americans and stunt our economy.”).

37. See President John F. Kennedy, Message to Congress Presenting the President's First Economic Report (Jan. 22, 1962) (beginning his remarks by noting that the economy had “regained its momentum” but emphasizing his dedication to combating prolonged unemployment).

38. See, e.g., 110 CONG. REC. 2705, 2732 (1964) (consideration of H.R. 7152, statement of Rep. Nix) (“[T]he economic health of the Nation would be improved through fuller and fairer utilization of available and potential manpower.”).

39. See Kennedy, *supra* note 32 (imploring Americans to support civil rights legislation).

40. See President John F. Kennedy, Special Message to the Congress: Program for Economic Recovery and Growth (Feb. 2, 1961) (proposing federal intervention to reverse economic recession, including, among other things, special tax incentives to spark investment, federal investment in human resources and natural resources, and government action to manage labor productivity and price stability).

segregated workplaces.<sup>41</sup> All three efforts focused on opening what had been “narrow portals” into entry-level employment opportunities.<sup>42</sup> This structural focus on the American economy framed the legislation.

Although Title VII did not originally address sex discrimination, the inclusion of “sex”—on the floor of the House of Representatives<sup>43</sup>—served as a recognition that women faced many of the same forms of explicitly discriminatory practices as racial minorities. The want ads of the day, after all, listed job openings under “male” and “female” categories, signaling the gendered nature of employment.<sup>44</sup> Moreover, career advancement depended to a much greater degree than today on winning access to entry-level positions in a relatively smaller number of large corporations.<sup>45</sup> Howard Smith of Virginia, who proposed the addition of sex discrimination to the bill, appeared to be motivated by the structural nature of the legislation.<sup>46</sup> He

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41. See Kennedy, *supra* note 32 (discussing the importance of providing educational opportunities to African Americans in order to eradicate workplace disparities). Kennedy’s original proposal did not address sex discrimination. *Id.*

42. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99–100 (2003) (citing Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 535 (2001) (describing midcentury American jobs as “characterized by job ladders, limited ports of entry, and implicit contracts for long-term job security”).

43. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (citing 110 CONG. REC. 2547, 2577–84 (1964) (amendment offered by Rep. Smith)).

44. *Want Ads*, STATE (June 1, 1958), <http://www.teachingushistory.org/trove/wantads.htm> [<https://perma.cc/4GM4-MRA4>]. For a broader discussion of the nature of sex segregation before and after passage of the antidiscrimination acts, see Blumrosen, *supra* note 35, at 415, concluding that even after passage of Title VII, sex-segregated jobs accounted for as much or more of the gendered wage gap as unequal treatment within the same jobs.

45. See Blumrosen, *supra* note 35, at 412 (observing that white and minority men both enjoy upward wage trajectories over time (with smaller gains for minority men) while women’s income curves tend to remain flat).

46. See 110 CONG. REC. 2547, 2577 (1964) (statement of Rep. Smith). Although the conventional story is that the addition of “sex” was an afterthought, designed to sink the legislation, this appears to be a myth. Some commentators maintain that the amendment to add “sex” by racist Representative Howard Smith of Virginia was intended to mock the bill and thwart its passage. Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/the\\_50th\\_anniversary\\_of\\_title\\_vii\\_of\\_the\\_civil\\_rights\\_act\\_and\\_the\\_southern.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/the_50th_anniversary_of_title_vii_of_the_civil_rights_act_and_the_southern.html) [<https://perma.cc/GKQ8-XLR8>]. *But see* Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1339 (2014) (arguing that Smith in fact supported women’s rights). In the House of Representatives, the amendment passed by a somewhat anemic vote of 168 to 133. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 442 (1966); *see also* Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 94 (2016) (discussing the vote on the Smith amendment); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 718–21 (2015) (providing insight into the intersectional arguments offered during passage for the inclusion of sex discrimination protections); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN

supported women's rights (as well as the racism common in the Virginia of his day), and observed that he "did not want 'his' women to take second place to men and women of other races."<sup>47</sup> He thus understood that a principal effect of antidiscrimination law would be to increase access to a larger number of good jobs, tempting employers in need of low-wage workers to look to women to fill the gaps—unless the law prohibited both race and sex discrimination.<sup>48</sup>

Similarly, African-American women saw racial and gender equality as linked for analogous reasons.<sup>49</sup> Discrimination on the basis of race *and* sex relegated them out of more desirable jobs altogether.<sup>50</sup> Pauli Murray argued that segregated workplaces allowed employers to pit workers against each other.<sup>51</sup> Antidiscrimination law, by breaking down the barriers that segmented these workplaces by race and gender, and while continuing an economic stimulus that kept the pressure on wage growth, promised to lift the floor, allowing all workers to enjoy the same benefits as white males and eliminating the existence of marginalized groups who could be hired for less and set in opposition to each other.<sup>52</sup>

#### B. *The Judicial Construction of Title VII and the Antidiscrimination Principle*

By the early seventies, the integration of antidiscrimination law with efforts to promote more general economic equality largely came to an end.

& L. 137, 137–38 (1997) (providing further support for the view that the sex discrimination amendment was not added as a "joke" or political ploy, but instead added as a result of political pressure from various actors in support of women's rights).

47. Case, *supra* note 46, at 1340.

48. Congresswoman Martha Griffiths, who supported the amendment, also claimed that without it, "white women will be last at the hiring gate." 110 CONG. REC. 2547, 2578–80 (1964) (statement of Rep. Griffiths).

49. While tensions existed from the beginning between advocates of racial and gender equality, African-American women embraced the new law. Even before the antidiscrimination law passed, black women were more likely to be in the workplace, more likely to be single mothers, and less likely to enjoy protections available to blue-collar men or to more privileged women. They thus saw antidiscrimination laws as providing a vehicle to fight the marginalization of the positions open to them. See, e.g., Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1326–27 & n.87 (2012) (reviewing the debate over the inclusion of "sex" in Title VII); Serena Mayeri, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1058 (2001) (highlighting the link scholars observed between low occupational attainment and social discrimination).

50. See Mayeri, *supra* note 46, at 718–21 (noting that African-American women advocated for a sex discrimination prohibition during the Title VII passage).

51. *Id.* at 720–21.

52. See *id.* at 723–24 (observing that early legal victories contributed to the elimination of marginalized groups in the workplace); see also Ruth Gerber Blumrosen, *Remedies for Wage Discrimination*, 20 U. MICH. J.L. REFORM 99, 102 (1986) (observing that under "ordinary Title VII analysis, proof that the employer segregated women and minorities in low-paying positions would be sufficient to establish a prima facie case of discrimination").

Stagflation, rather than recession, dogged the economy, and the Nixon Administration distanced itself from the “War on Poverty’s” more ambitious equality-enhancing measures.<sup>53</sup> The antidiscrimination principle remained important, however, and the courts refined the Title VII approach through judicial decisions that continued the efforts to dismantle segregated workplaces.

These decisions reflected Title VII’s structural origin as an effort to delegitimize all-white and all-male workplaces. The courts questioned some business practices, such as written examinations, that they saw as designed to maintain the racially identified workplaces of the pre-Title VII era. We maintain, however, that the courts were unwilling to engage the substantive legitimacy of other practices, such as the unavailability of temporary leaves; not only did the courts not see these practices as part of a system of male-identified workplaces, but they also accepted, as a legitimate business justification, that employers do not have an obligation to extend temporary leaves, regardless of the reason.<sup>54</sup> As we will illustrate below, significant progress in this arena came only with substantive consideration of the question of whether employers should bear the cost of such accommodations, not from the antidiscrimination principle operating in isolation.

The early cases addressing sex discrimination illustrate the tensions. Given the relatively late addition of the category “sex” to the statute, there was little legislative history to guide the courts and, in particular, no expression of congressional intent with respect to women’s family obligations.<sup>55</sup> The courts, however, interpreted sex discrimination in much the same way as they interpreted race discrimination, that is, as barring explicit barriers to hiring. Thus, the first U.S. Supreme Court case to interpret Title VII reasoned that the law proscribed a sex-based classification that prohibited hiring mothers (though not fathers) with preschool age children,<sup>56</sup>

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53. Brian C. Kalt, *Wade H. McCree, Jr., and the Office of the Solicitor General, 1977–1981*, 1998 DET. C.L. MICH. ST. U. L. REV. 703, 709 (noting that “[t]he relative economic prosperity of the Sixties, which had allowed for the bold liberal social experiments of the Great Society, had given way to the ‘stagflation’ of the Seventies, which was less conducive to progressive policy”).

54. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (ruling that Title VII does not include pregnancy discrimination). Not until 2007 did the EEOC explain how to approach “family responsibilities discrimination.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <https://www.eeoc.gov/policy/docs/caregiving.html#background> [<https://perma.cc/RE9X-8XPF>].

55. From the beginning, advocates of this era drew analogies between race discrimination and sex discrimination with respect to workplace segregation. See Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 239 (1965) (arguing that sex discrimination, like race discrimination, treated women as inferior and created a caste-like status that justified occupational segregation and discrimination).

56. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (describing the policy as an explicit gender-based classification).

and a subsequent case upheld a prohibition on male and female want ads against a First Amendment challenge.<sup>57</sup> At the same time, however, the Court rejected efforts to consider different treatment based on pregnancy as a form of discrimination, leaving the issue to Congress.<sup>58</sup> The Supreme Court of that era saw pregnancy as a matter of individual choice;<sup>59</sup> it did not treat pregnancy as a structural obstacle to women's workplace access of a kind with the types of barriers Congress intended Title VII to address.<sup>60</sup>

The same dichotomy runs through the courts' allocation of the burden of proof. Once employers moved away from explicitly race- or sex-based classifications, the courts struggled with the question of what proof would establish discriminatory intent. They became more likely to infer wrongful intent where the practice itself could be discredited, and more reluctant to do so where the business practice was treated as presumptively legitimate.<sup>61</sup>

In individual cases alleging disparate treatment, the Supreme Court established a burden-shifting framework that finds "comparator" evidence to be "[e]specially relevant."<sup>62</sup> In these cases, courts allowed plaintiffs—who otherwise lacked sufficient direct evidence of bias—to prove discrimination by establishing unequal treatment between two employees; an inference of discrimination would arise if the employer treated the member of the protected class, such as a woman, less favorably than a comparably situated

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57. See *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 387–89 (1973) (finding the want ads to be illegal commercial activity, similar to hypothetical ads captioned "Narcotics for Sale" or "Prostitutes Wanted," and holding that any First Amendment interest served by the advertisements was absent).

58. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076.

59. See *Gilbert*, 429 U.S. at 136 (agreeing that pregnancy is unlike illnesses and more like a voluntary condition); *Geduldig*, 417 U.S. at 494–95 (noting that a state cannot be compelled to recognize normal pregnancies as physical disabilities for purposes of insurance plans).

60. At the time Title VII was passed, only 30% of married mothers with children under the age of eighteen were in the labor force. Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, MONTHLY LAB. REV., Feb. 2007, at 10, <https://www.bls.gov/opub/mlr/2007/02/art2full.pdf> [<https://perma.cc/XQ6Z-94RD>]. The big increases in women's labor force participation would come between 1980 and 2000. *Id.* Since then, there has been much greater commitment to women's workplace inclusion, and recognition that full inclusion of women in the workplace requires treating pregnancy and family responsibilities as a matter of workplace structure. See, e.g., JOAN WILLIAMS, UNBENDING GENDER 85 (2000) (citing surveys from the 1990s, including one in which 80% of corporations responded that they did not believe they could remain competitive without addressing work–family and diversity issues).

61. See *infra* text accompanying notes 62–101.

62. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); see also Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 942 (2016) ("Over time, such 'comparator' evidence became expected and even required by some federal courts, posing a challenge for plaintiffs alleging second generation discrimination, particularly in an era of occupational segregation.").

male employee.<sup>63</sup> The Court emphasized that while a prospective employee must show that she met the qualifications for the job, Title VII required “the removal of artificial, arbitrary, and unnecessary barriers to employment” that discriminated on the basis of race or other impermissible classifications.<sup>64</sup>

The comparator test tied proof of discriminatory motive to assumptions about segregated workplaces. The foundational case, *McDonnell Douglas Corp. v. Green*,<sup>65</sup> involved a large industrial workplace with many employees performing relatively similar duties.<sup>66</sup> The Court assumed that where such an employer announced an opening, rejected a qualified African-American applicant, and kept the position open, then the plaintiff has met the “initial burden under the statute of establishing a prima facie case of racial discrimination.”<sup>67</sup> The Court allowed the employer to rebut the inference through the articulation of a legitimate, nondiscriminatory reason for the rejection of the African-American applicant.<sup>68</sup> Typically, in these cases, an employer who could show a practice of interracial hiring had an easier time rebutting the inference than one who maintained an all-white workforce.<sup>69</sup> The ordering of the burden of proof thus reinforced the presumptive illegitimacy of all-white workplaces and the rejection of otherwise qualified African-American applicants, tying both to an inference of discriminatory motive.

The *McDonnell Douglas* framework and the later expansion of the idea of comparing the rejected plaintiff to the person hired were intended as sorting devices—to sort plausible cases from implausible ones. Suzanne Goldberg and other scholars have argued that this comparator requirement does not work well in modern workplaces, which are much less likely to employ only white males or to have standardized assignments of responsibility.<sup>70</sup> Indeed, in the context of employer actions that may be intrinsically individualized and subjective, courts have adopted strict

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63. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745–46 (2011) (detailing the rise of the “comparator” methodology and arguing against courts’ reliance on these evaluative devices).

64. *McDonnell Douglas*, 411 U.S. at 801 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971)).

65. 411 U.S. 792 (1973).

66. *Id.* at 794; see Goldberg, *supra* note 63, at 755 (observing that this system had the potential to work well in “large, Tayloresque workplaces, where multiple workers engage in tasks that are susceptible to relatively straightforward comparison”).

67. *McDonnell Douglas*, 411 U.S. at 802.

68. *Id.*

69. See, e.g., *Nieto v. L&H Packing Co.*, 108 F.3d 621, 623–24 (5th Cir. 1997) (observing that the fact that 88% of the work force was comprised of minorities undercut the plaintiff’s claim of discriminatory motive).

70. See Goldberg, *supra* note 63, at 755–56 (noting that the comparator theory is mismatched with the modern workplace because of “the flexible and dynamic nature of many contemporary jobs”).



requirements for comparators who can establish the requisite employer intent without more direct proof of discriminatory motive.<sup>71</sup> While the need for comparators in these terms limits the ability of antidiscrimination law to reach cases of disparate treatment, the real problem is the absence of a substantive equality ideal supported by government mandates<sup>72</sup>—or identification of specific practices of wrongful conduct. Since employers no longer create entirely white or entirely male workforces, however, the wrongful conduct is no longer connected to practices, such as examinations that were historically used to exclude protected groups; instead, the determination of when a business practice is “illegitimate” because it disproportionately affects protected groups requires reconsideration.

A comparable dichotomy underlies disparate impact law, the second means the Supreme Court developed for addressing the subtler forms of discrimination. Disparate impact analysis differs from disparate treatment cases in that given sufficient proof that an employment practice has a disparate impact on a suspected class, no proof of discriminatory intent is necessary.<sup>73</sup>

The Supreme Court initially set out the elements of the disparate impact doctrine in *Griggs v. Duke Power Co.*<sup>74</sup> Before Title VII, the Duke Power Company, headquartered in Charlotte, N.C., “had intentionally segregated its workforce, restricting its African American employees to generally undesirable jobs.”<sup>75</sup> During the fifties, the company imposed a high school degree requirement for assignment to the company’s better-paid positions, and after Title VII became effective, it required those seeking employment or transfers to pass two written examinations.<sup>76</sup> Only one of the African Americans in a position to seek reassignment was a high school graduate,<sup>77</sup>

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71. See, e.g., *Haywood v. Locke*, 387 F. App’x 355, 359 (4th Cir. 2010):

Plaintiffs are required to show that they are similar in all relevant respects to their comparator. Such a showing would include evidence that the employees ‘dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.’

72. See, e.g., Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1096, 1101 (2015) (illustrating courts’ reluctance to read antidiscrimination provisions as mandating pregnancy accommodations, however important such accommodations might be to women’s workforce participation; such accommodations have been viewed as special treatment rather than equal treatment).

73. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06 (2006).

74. 401 U.S. 424, 431 (1971).

75. See Selmi, *supra* note 73, at 717 (citing *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227–29 (4th Cir. 1970) (“Until 1966, no Negro had ever held a position at [the plant] in any department other than the Labor Department.”)).

76. *Griggs*, 401 U.S. at 427–28.

77. Selmi, *supra* note 73, at 717 n.63.

and whites passed the tests nearly ten times as often as African Americans.<sup>78</sup> A unanimous Supreme Court found the tests to be discriminatory, and the case set the paradigm for a successful disparate impact suit.<sup>79</sup> Disparate impact analysis has been criticized as encouraging employers to create quotas; only with an integrated workforce can employers insulate themselves from the threat of litigation. Yet in the context of workplaces, like Duke Power Company, that have a long history of discrimination, that is exactly what antidiscrimination law sought to accomplish.<sup>80</sup>

Feminists and other antidiscrimination scholars have argued for an expansion of disparate impact theory to reach a variety of employment practices that have a differential impact on protected groups.<sup>81</sup> This has been difficult, as Michael Selmi explains, because the Supreme Court adopted the disparate impact approach “to deal with specific practices, seniority systems and written tests, that were perpetuating past intentional discrimination” and that “the reality has been that the theory has proved an ill fit for any challenge other than to written examinations . . . .”<sup>82</sup> In contrast with the written examination cases, courts routinely reject disparate impact challenges to “part-time work, light duty requests, and disability policies [based on a failure] to accommodate pregnancy . . . .”<sup>83</sup> Indeed, courts do not interpret Title VII or the Family and Medical Leave Act “to require disturbing core business practices as a means of eradicating the disadvantage women suffer as a result of their childbearing and childrearing responsibilities.”<sup>84</sup>

Efforts to extend disparate impact doctrine failed for the same reasons as efforts to extend disparate treatment cases to pregnancy. Yet the question of whether employers must “disturb core business practices” is not one about

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78. *Griggs*, 401 U.S. at 430 n.6.

79. See Selmi, *supra* note 73, at 723–24 (describing that although *Griggs* was initially seen as a case about the validity of testing requirements, cases soon emerged that followed *Griggs* and broadened the application of disparate impact liability).

80. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 234–35 (1995) (arguing that proposed antidiscrimination legislation created an “incentive structure” to “induce employers to adopt quotas on their own in order to minimize liability under the disparate impact rules”). This purpose continues to animate disparate impact cases. In *Ward’s Cove Packing v. Antonio*, 490 U.S. 642 (1989), the Supreme Court attempted to water down the business necessity standard, complaining that it created an incentive for employers to adopt quotas. *Id.* at 653. Congress responded by amending Title VII in 1991, effectively overturning at least parts of *Ward’s Cove*. See Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(k)(1) (2012)). Disparate cases, such as the firefighters’ litigation in New Haven, continue to address written-test requirements that have a disproportionately exclusionary effect on African Americans. *Briscoe v. City of New Haven*, 654 F.3d 200, 201–02 (2d Cir. 2011) (discussing African-American firefighters’ claims that oral and written promotion exams caused an impermissible discriminatory impact under Title VII).

81. Selmi, *supra* note 73, at 704 & n.12 (collecting sources).

82. *Id.* at 705.

83. *Id.* at 750.

84. *Id.* at 751.

impact on women or other protected groups standing in isolation. Instead, it requires establishing the principle that employers should accommodate any type of temporary disability for reasons that go beyond the needs of women alone, identifying pregnant workers with other workers experiencing temporary inability to lift heavy objects or to stand on their feet for long periods, and building coalitions rather than emphasizing women's uniqueness in attempting to win workplace reforms.<sup>85</sup>

Based on this core concept, the argument for recognition of pregnancy-based discrimination claims thus became much stronger after Congress amended the ADA to broaden its coverage to include temporary and minor impairments, including lifting restrictions.<sup>86</sup> Extending workplace protections for pregnant women requires seeing such protections not just as a component of discrimination against women, but as part of a more general effort to require employers to accommodate temporary disabilities.<sup>87</sup> Such accommodations can be expensive, and they follow from a conclusion that the employer, rather than the employee or a state insurance fund, is the right recipient of the cost. Without the principle that employers must accommodate disabilities, however, pregnancy accommodations involve “disturbing [otherwise legitimate] core business practices”<sup>88</sup> or they become what the Supreme Court termed “most-favored-[employee]” status, requiring the extension of workplace benefits to pregnant women in accordance with the most favorable of those available to other employees, an approach the Court rejected.<sup>89</sup>

We thus classify disability (including pregnancy) accommodation as one example of a substantive approach to “equality law”: that is, the identification of particular employment practices inconsistent with a commitment to economic equality, and delegitimization of these practices as appropriate when applied to any employee. This approach requires not just examination of the disparate impact on protected groups, but also substantive engagement with the legitimacy of the practice on its own terms and a vision of what equality (aside from freedom from overt discrimination) means.<sup>90</sup>

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85. Schultz, *supra* note 72, at 1096, 1101.

86. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555 (2008) (expanding the definition of “disability” under the ADA and clarifying that the “definition of disability . . . shall be construed in favor of broad coverage”); Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 486–87 (2012) (arguing that because those with limitations similar to pregnant women can receive ADA benefits, coverage should be broadened to pregnant women).

87. See Schultz, *supra* note 72, at 1096 (advocating a refusal to distance the problems of pregnant workers from those faced by employees with other disabilities).

88. Selmi, *supra* note 73, at 751.

89. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1439 (2015).

90. This conclusion is different from the sameness versus difference debate that has long occupied feminists. That debate addresses the question of whether antidiscrimination law should

The signature accomplishment of feminist scholars—sexual harassment law—illustrates this approach. Catharine MacKinnon successfully argued that sexual harassment in the workplace constitutes sex discrimination and that it should come within the purview of Title VII.<sup>91</sup> Yet, sexual harassment, once made visible, is illegitimate as a business practice for reasons that go beyond the impact on its victims; where it is pervasive enough to constitute a hostile work environment, it is also almost always an indication of poor management practices.<sup>92</sup> Thus, a legal conclusion that sexual harassment constitutes sex discrimination combines a judgment that it is both discriminatory and unacceptable.

In this section, we have argued that antidiscrimination doctrine reflects underlying judgments about the substantive acceptability of workplace practices that have disparate effects on protected groups. Thus, antidiscrimination law initially reflected a substantive determination not just to outlaw bias, but to dismantle the market segmentation that created exclusively white male, black male, white female, and black female workplaces. In the early days of Title VII, the courts consistently refined and extended the doctrine where necessary to advance that purpose, thus making it easier to dismantle white male workplaces such as those at McDonnell Douglas and Duke Power. Since then, when courts have cut back, Congress has reaffirmed the principle in its amendments to Title VII.

The passage of antidiscrimination law did not, however, involve any comparable commitment to addressing either the means of advancement within integrated workplaces or the particular challenges that attend

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seek to define discrimination in terms of treatment on the same terms as men or in terms of equal results that take gender differences such as pregnancy into account. This approach is different in that it identifies full economic inclusion as an appropriate societal objective and asks whether a practice that marginalizes some workers, such as a refusal to grant temporary leaves, can be justified in light of its marginalizing impact. The remedy can then take the form of both congressional mandates such as the one in the ADA and policing of such mandates through antidiscrimination as well as other efforts in appropriate cases.

91. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986). Patricia J. Barry and Catharine A. MacKinnon wrote the brief for the successful respondent, Mechelle Vinson. *Id.* at 58.

92. See, e.g., Mike Isaac, *Inside Uber's Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html> [<https://perma.cc/YZX2-D46H>] (summarizing criticism of Uber's "aggressive culture" and problems with its management); Valentina Zarya, *In the Fight Against Sexual Harassment, Money Trumps Morals*, FORTUNE (June 21, 2017), <http://fortune.com/2017/06/21/uber-kalanick-resigns/> [[perma.cc/D9H4-TSAJ](https://perma.cc/D9H4-TSAJ)] (noting that multiple companies implemented changes after sexual harassment claims were perceived to affect the company's revenue). The practices that allowed Harvey Weinstein to perpetrate sexual abuse over three decades included hush money, blacklisting, "draconian nondisclosure agreements, and the cooptation of entities (such as agents and publishers) that would otherwise prevent such abuse." Brent Lang & Elizabeth Wagmeister, *Judgment Day: Harvey Weinstein Scandal Could Finally Change Hollywood's Culture of Secrecy*, VARIETY (Oct. 2017), <http://variety.com/2017/film/news/harvey-weinstein-game-over-judgment-day-scandal-culture-secrecy-1202591437/> [<https://perma.cc/BD5J-U7L3>].

discrimination based on a failure to respond to (“accommodate”) pregnancy and family responsibilities. While, as this section has shown, Congress did eventually recognize pregnancy discrimination as illegal, progress in structuring employment to deal with family responsibilities has occurred most consistently when Congress or the courts have engaged the underlying legitimacy of the practices, explicitly or implicitly. With the waning of the more general efforts to promote economic equality in the postwar years, substantive engagement with the forces producing economic inequality has been limited. Legal scholars and other advocates have therefore tried to extend the antidiscrimination principle to do more of the heavy lifting necessary to achieve greater equality, but where those efforts have not been combined with a substantive discussion of the propriety of the practices themselves, the success of such efforts has been limited. Thus, the courts have been willing to use disparate impact theory to strike down employment tests where they have the effect of perpetuating segregated workplaces, which are clearly illegitimate under Title VII. Courts have been unwilling, however, to address the failure to provide pregnancy accommodations in the absence of either a more general requirement to include pregnant women in the workplace or to accommodate all temporary physical limitations. The distinction is not really about “disparate impact”—both sets of policies have a disparate impact on certain groups. Instead, it involves a substantive conception of the employer’s responsibility to promote equality—and of the substantive propriety of business practices that pose obstacles to full inclusion in the workplace.

### C. *The Story of Title VII’s Success*

The antidiscrimination laws of the sixties have been successful in reducing gender- and race-based inequality by opening positions that had previously been exclusively for white men to women and minorities.<sup>93</sup> In the first decade following adoption of Title VII, African Americans moved into positions that had been closed to them, with corresponding gains in income.<sup>94</sup> During that decade, women increased their workforce participation to a greater degree than other workers but did so overwhelmingly in the growing number of predominately female clerical and service positions, and saw no substantial income gains vis-à-vis white men.<sup>95</sup> The major advances for

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93. See, e.g., Sturm, *supra* note 18, at 460 (observing that overt, race- and gender-based classifications have become “things of the past” now that “[m]any employers . . . have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies”).

94. Blumrosen, *supra* note 35, at 413; Gavin Wright, *The Regional Economic Impact of the Civil Rights Act of 1964*, 95 B.U. L. REV. 759, 766–78 (2015) (demonstrating black economic gains, particularly associated with the decline in low-paying, primarily black workplaces in the South).

95. Blumrosen, *supra* note 35, at 412–13. The gender wage gap was 58.2% in 1968, 59.4% in 1978, and decreased to 66% in 1988. NAT’L COMM. ON PAY EQUITY, *The Wage Gap over Time: In*

women would come instead during the eighties as they increased their education levels and entered into the professions.<sup>96</sup>

Both minorities' gains in the sixties and seventies, and women's gains in the eighties,<sup>97</sup> vindicated the assumptions associated with the passage of antidiscrimination laws.<sup>98</sup> These laws opened up the "limited portals of entry" into good jobs, allowed those who made it through the door to participate in the career ladders available once inside, and did so without necessarily undercutting the wages of white men who worked beside them.<sup>99</sup> These assumptions all began to give way with the changing nature of workplaces.

By the end of the seventies, an assault began on the unionized workplaces that had produced the relative income equality and seniority-based advancement of the postwar era.<sup>100</sup> Although women who pursued higher education in the seventies began to gain access to higher paying jobs during this period, they did so as economic conditions created the basis for much greater income inequality among white males as well as in the economy more generally. And as the economy changed, judges grappled with the question of the underlying meaning of antidiscrimination law: did it simply mandate equal treatment by dismantling the racial and gender classifications of earlier eras that limited access to "ports of entry,"<sup>101</sup> or could it be extended to address the new forms of subordination women and minorities continued to face within the organizations to which they had gained entry? Before examining courts' responses, we turn to an analysis of how corporate law and certain business practices facilitate gender discrimination in the contemporary economy.

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*Real Dollars, Women See a Continuing Gap* (Sept. 2016), <http://www.pay-equity.org/info-time.html> [<https://perma.cc/75U3-RNWA>].

96. See Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 749–50 (2002) (detailing the dramatic climb in female entrants to law schools, medical schools, and professional programs starting in the 1970s).

97. Women benefitted more than blacks did, but blacks won the lawsuits. See Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOC'Y FOR HUM. RESOURCE MGMT. (May 21, 2014), <https://www.shrm.org/publications/hrmagazine/editorialcontent/2014/0614/pages/0614-civil-rights.aspx#sthash.g69i4wLm.dpuf> [<https://perma.cc/9DUR-LM2Y>] (explaining that "[i]n terms of sheer numbers, women have arguably benefitted the most from the civil rights law").

98. See 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> [<https://perma.cc/FD6C-SXHQ>] (providing possible explanations for the delay in wage gains realized by women under antidiscrimination laws).

99. MURRAY, *supra* note 30, at 175 fig.9.4 (showing the working-class white-male unemployment rate to be below the national unemployment rate until after 1980).

100. See JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* 234 (2010) (reasoning that "faith in the unions was down" in the mid-1970s in part because "individual advancement was in tension with stable income").

101. Green, *supra* note 42, at 99–100.

## II. Competition and Gender in the New Economy

When Congress enacted Title VII, it saw segregated workplaces as an impediment to racial and gender equality and an obstacle to further economic growth. Today, formal segregation has been dismantled, and women and minorities enjoy much greater access to the entry-level positions of the new economy. Yet, the source of economic inequality and of racial and gender disparities has changed, creating new challenges for antidiscrimination law, economic productivity, and societal equality.

Central to these changes is the transformation of the means of advancement in the highly paid tiers of the new economy. Women have won access to jobs as prison guards, and men can be flight attendants,<sup>102</sup> but gaining a foothold into entry-level jobs does not ensure security or advancement. Instead, advancement depends to a much greater extent on competition and individualism, with management structures designed to reward such behavior.<sup>103</sup>

As other scholars have argued, the law's failure to keep up with the structural changes in the workplace has undermined the effectiveness of antidiscrimination efforts.<sup>104</sup> They link antidiscrimination law's failings to two factors that have changed the nature of career advancement: the greater role of flexible and subjective workplace interactions in determining raises, promotions, and bonuses and the persistence of subtle or unconscious biases that reinforce gender stereotyping.<sup>105</sup>

Missing from their explanations, however, is an examination of the forces that drive the selection process, their merits in supposedly neutral business terms, and their supposedly unconscious biases. The scholarly accounts suggest that accurate evaluations of individual employees would eliminate the disparities, but do not consider *why* gender disparities not only

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102. See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (holding that being a female is not a "bona fide occupational qualification" for a flight attendant job); cf. *Dothard v. Rawlinson*, 433 U.S. 321, 331, 336–37 (1977) (holding that Alabama's minimum weight and height requirements for prison guards were discriminatory against females, but that based on the circumstances of the particular prison, sex fell within the "bona-fide-occupational-qualification" exception of Title VII, and thus further concluding that Alabama was not prohibited from excluding women for "contact" positions in a maximum-security male prison).

103. Robert L. Laud & Matthew Johnson, *Upward Mobility: A Typology of Tactics and Strategies for Career Advancement*, 17 CAREER DEV. INT'L 231, 241 (2012); see also Maxine Eichner, *Market-Cautious Feminism*, 69 STUD. L. POL. & SOC'Y 141, 160 (2016) ("[T]he workplace should not be conceptualized as a sphere free from hierarchy or constraint.").

104. See, e.g., Sturm, *supra* note 18, at 537–38 (describing firms' structural focus on "formal compliance and avoidance of liability" and the judiciary's deference to those internal structures as "undercut[ting] the development and viability of a structural approach" to antidiscrimination efforts); Bagenstos, *supra* note 18, at 3 (arguing that "courts and legislatures have proven unwilling or unable" to take steps necessary to address biases inherent in the modern "boundaryless workplace").

105. Bagenstos, *supra* note 18, at 4–5.

persist, but have in many cases increased most in the parts of the economy that have enjoyed the greatest income growth. It is only with this understanding, together with a willingness to engage the business merits of the practices, that a new substantive equality approach can address these structural forces that undermine Title VII's effectiveness. In this section, we analyze how the new economy has changed the terms of competition, producing a disparate impact on women.

Section A explains how the structure of workforces has changed to emphasize competition and individualism without necessarily benefiting institutions. Section B documents how these changes have produced a shift in the gendered wage gap, with the greatest disparities now occurring in a relatively few places in the economy—those that have produced large income disparities. Section C uses the analysis of the new economy to explain the gender gap. It proposes that gender disparities have increased as women are subjected to a reinforcing triple bind: they are less attracted to these competitive workplaces; they are perceived as less able to compete on the terms of the new economy; and they are disproportionately penalized for displaying the same competitive traits the men demonstrate, reinforcing the disinclination to apply for jobs (or promotions in) the most competitive environments.

#### A. *Valorizing the Tournament*

When Congress passed Title VII, large employers organized workers into a system of tiers that made it relatively easy to base antidiscrimination litigation on the use of comparators demonstrating disparate treatment of otherwise similarly situated employees. A workplace based on tiers creates pyramid-like systems of employee relationships that encourage employees within each tier to identify with each other and, assuming stable employment, with the institution itself.<sup>106</sup> Many of the largest employers were manufacturers,<sup>107</sup> union membership was high,<sup>108</sup> and workers at all levels of income experienced similar growth.<sup>109</sup> Moreover, even within managerial

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106. See Carbone & Levit, *supra* note 23, at 1012, 1015 (observing that this pyramid-like system creates three groups with different identifications with the firm: (1) a management elite, (2) a skilled group of largely fungible workers, and (3) a skilled group with company-specific experience).

107. *1961 Full List*, FORTUNE 500, [http://archive.fortune.com/magazines/fortune/fortune500\\_archive/full/1961/](http://archive.fortune.com/magazines/fortune/fortune500_archive/full/1961/) [<https://perma.cc/HN29-5T24>].

108. Almost one-third of workers belonged to unions, compared to 10% today. Quoc Trung Bui, *50 Years of Shrinking Union Membership in One Map*, NPR (Feb. 23, 2015), <http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> [<https://perma.cc/6S9Z-U5U4>].

109. Consider that shortly after the Civil Rights Act, more than one-quarter of the workforce was employed in the manufacturing sector; today, it is under 10%. Jennifer L. Raynor, *Comparative*



ranks, employees tended to be promoted from below, and they identified with company rather than individualistic aims.<sup>110</sup> Monetary incentives were modest, if they existed at all, and corporate teams constrained self-interested behavior that did not serve the collective interests of the group.<sup>111</sup> The company “man” took with him the status that came from association with a successful company;<sup>112</sup> he had little ability to cash in and leave for greener pastures.<sup>113</sup>

In contrast, the new system of steeply banked hierarchies encourages top management to identify more with quarterly earnings (and higher share price-motivated) shareholders than with their subordinates, employees to compete against each other, and both groups (managers and employees) to focus on short-term individual advancement rather than longer term institutional health. Consequently, the “employers’ compact” with workers has changed, providing much less protection.<sup>114</sup> Executive compensation has become much more variable, and those enjoying the greatest gains do so in ways that have become more portable.<sup>115</sup> Within this system, it may make

*Civilian Labor Force Statistics, 10 Countries: A Visual Essay*, MONTHLY LAB. REV., Dec. 2007, at 32, 37. With regards to growth,

[t]he 1940s to the late 1970s, while by no means a golden age (as evidenced, for example, by the perpetuation of gender, ethnic, and race discrimination in the job market), was a period in which workers from the lowest-paid wage earner to the highest-paid CEO experienced similar growth in incomes. This was a period in which “a rising tide” really did lift all boats.

ESTELLE SOMMEILLER & MARK PRICE, *THE INCREASINGLY UNEQUAL STATES OF AMERICA: INCOME INEQUALITY BY STATE, 1917 TO 2012*, at 6 (2015), <http://www.epi.org/publication/income-inequality-by-state-1917-to-2012/> [<https://perma.cc/5N5F-BDVH>].

110. Carbone & Levit, *supra* note 23, at 978; *see also* Wells, *supra* note 29, at 323–24 (observing that even the Harvard Business School emphasized this idea of stewardship).

111. *See* JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 116–17 (1967) (observing that while corporate officers often owned stock or stock options, and had access to information from which they could personally benefit, they rarely acted to advance their individual pecuniary interests at the expense of the firm).

112. Carbone & Levit, *supra* note 23, at 977 n.58 and accompanying text.

113. *See, e.g.*, LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 94 n.lxix (Gregory Elliott trans., 2005) (observing that the strength of firm identity and corresponding employee loyalty weaken as firms become more dynamic and employee career paths involve more lateral moves).

114. RICK WARTZMAN, *THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA* 312 (2017). For arguments that employee tenure, from the C-suite to the factory floor, has diminished over the past thirty years, *see* Matthew J. Bidwell, *What Happened to Long-Term Employment? The Role of Worker Power and Environmental Turbulence in Explaining Declines in Worker Tenure*, 24 *ORG. SCI.* 1061, 1061, 1077–78 (2013) (studying the theories behind a “persistent decline in the average duration of employment relationships within the United States”); Guy Berger, *Will this Year’s College Graduates Job-Hop More than Previous Grads?*, LINKEDIN BLOG (Apr. 12, 2016), [https://blog.linkedin.com/2016/04/12/will-this-year\\_s-college-grads-job-hop-more-than-previous-grads](https://blog.linkedin.com/2016/04/12/will-this-year_s-college-grads-job-hop-more-than-previous-grads) [<https://perma.cc/4R62-BSU6>] (stating that the number of companies young adults worked for in the first five years after college graduation doubled over the last twenty years).

115. WARTZMAN, *supra* note 114, at 305–06.

(personal, even if not institutional) sense for executives to adopt practices that advance short-term objectives even if the process undermines the company's long-term institutional health.<sup>116</sup>

The new system involves three mutually reinforcing practices. First, the managerial system has been replaced with a system that promotes “shareholder primacy,”<sup>117</sup> thereby changing the institutional focus of publicly traded corporations away from the long-term interests of the institutions and toward the short-term interests of higher-stock-price-motivated shareholders.<sup>118</sup> “Short-termism”<sup>119</sup> separates the interests of shareholders and executives from those of other corporate constituents such as employees and customers.<sup>120</sup> It also undermines the link between institutions and investment in the future, as corporate officers focus to a greater degree on immediate payoffs and less on investment in either employee training or research with longer term payoffs.<sup>121</sup> A 2005 survey of 401 financial executives, for example, reported that an overwhelming majority (78%)

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116. See, e.g., June Carbone, *Once and Future Financial Crises: How the Hellhound of Wall Street Sniffed Out Five Forgotten Factors Guaranteed to Produce Fiascos*, 80 UMKCL. REV. 1021, 1027 (2012) (“If the owners can realize sufficient benefit today, the fact that the company will be worth nothing tomorrow will not matter and it will skew their decision-making in favor of activities that increase short term profits even at the expense of the company’s survival.”) (citing George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit*, BROOKINGS PAPERS ON ECON. ACTIVITY, no. 2, 1993, at 10).

117. Lynn Stout describes shareholder primacy as an “ideology” that “led to a number of individually modest but collectively significant changes in corporate law and practice that had the practical effect of driving directors and executives in public corporations to focus on share price as their guiding star.” Stout, *supra* note 10, at 1177. While this dogma increased the emphasis on share price as the principal measure of company (and thus executive) success, it also had the effect of increasing CEO power vis-à-vis other company stakeholders such as employees. See William K. Black & June Carbone, *Economic Ideology and the Rise of the Firm as a Criminal Enterprise*, 49 AKRON L. REV. 371, 397 & n.155 (2016). The ideology, however, does not necessarily advance the interest of all shareholders. “As many have observed, (1) shareholders have different ‘investment horizons’ based on the planned duration of shareholding; (2) shareholders with shorter investment horizons have different interests from those with longer investment horizons; and (3) the different interests of short-term shareholders lead to different corporate governance and policy preferences from those of longer-term shareholders.” Robert Anderson IV, *The Long and Short of Corporate Governance*, 23 GEO. MASON L. REV. 19, 23 (2015).

118. Carbone & Levit, *supra* note 23, at 966.

119. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 268 (2012) (defining “short-termism,” which is also referred to as “earnings management” or “managerial myopia,” and demonstrating its contributory role in the 2008 financial crisis).

120. See, e.g., HILL & PAINTER, *supra* note 13, at 102–03 (noting how bankers are more willing to behave in ways that will increase short-term payout even if it means the bank’s long-term reputation will suffer).

121. See *infra* note 333 and accompanying text. These pressures have contributed to the creation of a more contingent workforce as companies mechanize or outsource labor (whether overseas or to the janitorial firm down the street) to transfer the costs associated with variable demand to others. See BOLTANSKI & CHIAPELLO, *supra* note 113, at 73–75 (describing this outsourcing as part of the process of creating “leaner” organizations).

would take actions that lowered the value of their companies to create a smooth earnings stream.<sup>122</sup> More than 80% of the respondents stated that they would decrease spending on advertising, maintenance, and research and development to meet short-term objectives such as earnings targets.<sup>123</sup> This short-termism feeds competition, undermines cooperation, and promotes winner-take-all business practices, all of which are not only bad ways to run a business, but also have distinctly gendered effects.<sup>124</sup> Another study, which looked at 6,642 companies in a variety of industries during the period from 1986 to 2005, similarly found an emphasis on short-termism: the firms increased reported earnings, which in turn influenced stock prices, by cutting support for research and development and marketing, even where such practices did not advance the firms' medium- to longer-term interests.<sup>125</sup>

Within this system, executive compensation has become exponentially higher and more steeply banked in the upper-management ranks in an effort to align executive and shareholder interests.<sup>126</sup> The increase in the ratio of chief executive officer compensation to average worker pay, for example, went from 20:1 in 1965 to 347:1 in 2016.<sup>127</sup> The principal component of executive compensation takes the form of stock options, which increase in value with quarterly earnings, which in turn influence share price in publicly traded companies.<sup>128</sup> Moreover, corporate boards, which have become more

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122. John R. Graham et al., *Value Destruction and Financial Reporting Decisions*, FIN. ANALYSTS J., Nov.–Dec. 2006, at 27, 33.

123. *Id.* at 31.

124. *See supra* text accompanying notes 13–14, 121–27; *infra* text accompanying notes 294–99, 338–41.

125. Dallas, *supra* note 119, at 280 (citing Natalie Mizik, *The Theory and Practice of Myopic Management*, 47 J. MARKETING RES. 594, 599–601 (2010)).

126. *See* Biagio Marino, *Show Me the Money: The CEO Pay Ratio Disclosure Rule and the Quest for Effective Executive Compensation Reform*, 85 FORDHAM L. REV. 1355, 1362 (2016) (discussing the effects of an upward trend in executive compensation since the 1980s); Robert J. Rhee, *Intrafirm Monitoring of Executive Compensation*, 69 VAND. L. REV. 695, 697–700 (2016) (arguing that while shareholders now have a legal right to participate in executive compensation decisions under Dodd-Frank, corporations should use employees as intrafirm monitors of executive performance and pay to legitimize compensation and provide the corporate boards with private information relevant to executive performance). *See generally* Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,104 (Aug. 18, 2015) (codified at 17 C.F.R. pts. 229, 240 & 249).

127. *Executive Paywatch*, AM. FED'N LAB. & CONG. INDUS. ORGS., <https://aflcio.org/paywatch> [<https://perma.cc/6QDK-4YVJ>] (discussing 2016 data); ALYSSA DAVIS & LAWRENCE MISHEL, ECON. POL'Y INST., *CEO PAY CONTINUES TO RISE AS TYPICAL WORKERS ARE PAID LESS* (2014), <http://www.epi.org/publication/ceo-pay-continues-to-rise/> [<https://perma.cc/P222-TLLC>] (representing 1965 data).

128. *See generally* MICHAEL DORFF, *INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT* (2014) (discussing the process underlying increases in CEO compensation); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 704 (2005) (noting that “stock options are perhaps the best-known contracting technique for linking executive pay and corporate performance”).

influential, emphasize share value as a measure of CEO success,<sup>129</sup> while hedge funds and other activist investors use share value to target what they perceive to be underperforming firms.<sup>130</sup> The result creates powerful incentives that separate the interests of CEOs and shareholders from those of other corporate stakeholders.

Second, this emphasis on the CEO's need to produce immediate results contributes to the adoption of merit pay and bonus systems that rank employees and introduce greater pay variations among employees at comparable levels of an organization.<sup>131</sup> These incentive systems allow a CEO to reorient a firm's priorities,<sup>132</sup> rewarding employees who quickly adopt management aims, even if such objectives are ill-considered or at odds with the company's established ethos or ethical standards.<sup>133</sup> The incentive systems may use subjective evaluations that increase management discretion or reductionist evaluations tied to easily measured factors such as sales or unit profitability.<sup>134</sup> Perhaps the most notorious of these evaluation systems is "rank-and-yank," which was introduced at General Electric by Jack Welch and is the system at the core of the Microsoft litigation.<sup>135</sup> The "yank" part of

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129. See Dallas, *supra* note 119, at 268 (defining this as "short-termism").

130. Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 75, 80–81 (2011) (noting that a high percentage of publicly traded companies experience pressure to increase short-term earnings because of the role of hedge funds and other activist investors).

131. See *infra* text accompanying notes 129–33, 326.

132. See, e.g., William K. Black, *The Department of Justice "Chases Mice While Lions Roam the Campsite": Why the Department Has Failed to Prosecute the Elite Frauds That Drove the Financial Crisis*, 80 UMKC L. REV. 987, 992 (2012) (observing that CEOs control a company's compensation systems and "can reserve bonuses for those who 'get with the program,' demoralizing others or persuading them to leave."); see also Welch, *supra* note 9 (defending such systems as a way to encourage employees to define their efforts in terms of management objectives).

133. See 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 used its bonus system to reorient company behavior in counterproductive and unethical ways).

134. Both, for example, have led to greater gender disparities in doctor's compensation. Where reductionist measures are used, such as the number of Medicare procedures billed, male doctors tend to bill more procedures than female doctors do, in part because male doctors care more about compensation. Andrew Fitch, *Why Women Doctors Make Half of What Men Do: Medicare's Doctor Gender Pay Gap*, NERDWALLET (Apr. 22, 2014), <https://www.nerdwallet.com/blog/health/doctor-salary-gender-pay-gap/> [<https://perma.cc/YK2H-J7VU>] (finding that male doctors on average were paid 88% more in annual Medicare reimbursements than female doctors). Where subjective evaluations determine salaries, male doctors also fare better than female doctors do. See Louise Marie Roth, *A Doctor's Worth: Bonus Criteria and the Gender Pay Gap Among American Physicians*, 3 SOC. CURRENTS 3, 3 (2016).

135. Jack Welch, who justified "rank-and-yank" as a way of aligning employee incentives with firm objectives, is notorious for the use of earnings management to manipulate short-term share prices. See ROGER F. MARTIN, *FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL* 29, 97 (2011) (detailing that during the Jack Welch-era, General Electric was able to meet or beat earnings forecasts an unbelievable 96% of the time, with earnings

the system, which seeks to repeatedly cull low-performing employees, has received the sharpest criticism, and many companies have abandoned it, although they have retained ranking in some form.<sup>136</sup> Yet, the ranking part of the system has negative effects even if the company does not seek to fire or replace employees. Lynne Dallas observes that systems that use rankings to justify large disparities in compensation tend to produce greater emphasis on self-interest, higher levels of distrust that undermine teamwork, greater homogeneity in the selection of corporate management, less managerial accountability, and more politicized decision-making.<sup>137</sup> In short, supposedly meritocratic bonus systems have been found to replicate many of the attributes of old boys' clubs that protect insiders at the expense of outsiders.<sup>138</sup>

Third, these changes in corporate orientation alter the qualities that lead to career advancement. The modern CEO-selection process prizes the "charismatic" leader, who is seen as having "the power to perform miracles—to bring a dying company back to life, for instance, or to vanquish much larger, more powerful foes."<sup>139</sup> As companies place greater confidence in the external executive market, they also invest less in their own managers and increase the emphasis on lateral hires at more junior levels as well.<sup>140</sup> The ability to move, in turn, becomes necessary to upward advancement.<sup>141</sup> And the ability to move drives up the wages of the mobile and creates incentives to look out for self-interest rather than invest in the company.<sup>142</sup> This system

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from 89% of those quarters hitting analysts' forecasts to the exact penny). Enron also used the rank-and-yank system. See PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 51–52 (2002).

136. 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, by 2011, only 14% used them). Nisen reports, however, that most employees are still rated or ranked, just not on a mandatory curve. *Id.*

137. Dallas, *supra* note 133, at 37.

138. Although, as Dallas emphasizes, the system often produces a young boys' club in which CEOs recruit ambitious new hires who "want to make a lot of money fast." Dallas, *supra* note 133, at 50. The new employees, especially if they have limited experience elsewhere, more readily buy into shifts in corporate orientation. *Id.* at 49.

139. Rakesh Khurana, *The Curse of the Superstar CEO*, HARV. BUS. REV., Sept. 2002, at 60, 62.

140. See RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR: THE IRRATIONAL QUEST FOR CHARISMATIC CEOs 196 (2002) (describing the erosion of institutional commitment to managers and the increased reliance on search firms for lower-level executives).

141. See Naomi Schoenbaum, *Mobility Measures*, 2012 B.Y.U. L. REV. 1169, 1174 ("The benefits of mobility are not shared equally within the family, and the burdens tend to be borne disproportionately by women."); see also text accompanying notes 266–67.

142. See Roland Bénabou & Jean Tirole, *Bonus Culture: Competitive Pay, Screening, and Multitasking*, 124 J. POL. ECON. 305, 323 (2016) (explaining that increased competition for talented agents makes their performance-based pay rise more than proportionately to their marginal product, thus leading to less long-term investment and diminished prosocial efforts inside firms).

further redefines the qualities associated with the ideal executive who can impress in an interview and the process that determines compensation, as a larger part of overall compensation depends on negotiated salaries or annual bonuses.<sup>143</sup> Moreover, it builds in rewards for those who can have an immediate impact and then move on to the next position. Loyalty to an institution no longer matters.<sup>144</sup>

The financial sector, whose influence has also disproportionately grown with these changes,<sup>145</sup> has shifted toward such norms at least as dramatically if not more than other companies have. Michael Lewis, for example, in his 1989 book about Salomon Brothers, *Liar's Poker*, wrote about the celebration of the “Big Swinging Dick.”<sup>146</sup> He described his well-paid class of traders, hired right out of Ivy League colleges, as acting “more like students in a junior high school . . . .”<sup>147</sup> The ethos, as the name big swinging dick suggests, combined a glorification of cleverness and gamesmanship with signs of masculinity;<sup>148</sup> serving customer interests was not part of the path toward advancement.<sup>149</sup> The change came not only with the switch from partnership to corporate form in Wall Street firms,<sup>150</sup> but with the ability to create complex, opaque financial products and to profit from them at the expense of less sophisticated customers.<sup>151</sup> Potential clients, who were often

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143. See *id.* at 310–11 (describing the theory that competition is altering the structure of top-level compensation toward high-powered incentives); see also BOLTANSKI & CHIAPELLO, *supra* note 113, at 93–95 (observing that acquisition of experience increases “personal capital” and thus “employability,” but that it also increases opportunism and self-interested behavior).

144. WARTZMAN, *supra* note 114, *passim*; see also Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759, 765 (2013) (discussing how Wal-Mart’s relocation policy is harmful to female employees).

145. See, e.g., William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can Be Regained*, 36 SEATTLE U. L. REV. 857, 859–60 (2013) (arguing that “financialization” of the American corporation has resulted in an organizational failure that eschews long-term investment in innovation and is complicit in the disappearance of middle-class jobs).

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

147. HILL & PAINTER, *supra* note 13, at 98.

148. *Id.* at 99; see also Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street’s Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J.L. & GENDER 175, 177 (2010) (describing the trading desk as “a highly competitive and male-dominated environment where posters of pinup girls and strip club outings were not unheard of”).

149. See HILL & PAINTER, *supra* note 13, at 102–03 (documenting what one ex-Goldman Sachs executive described as the recent deterioration of its client relationships).

150. 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).

151. See HILL & PAINTER, *supra* note 13, at 19, 85–86, 90 (quoting an ex-Goldman Sachs executive as saying “[t]he quickest way to make money on Wall Street is to take the most sophisticated product and try to sell it to the least sophisticated client”).

at the losing ends of the trades, nonetheless sought to be associated with the winners of these high-stakes status competitions.<sup>152</sup>

The changes within professions have been less dramatic, but they are not immune from the tournament mentality. Law firms have become more like businesses,<sup>153</sup> and differences in doctors' compensation have also become more variable.<sup>154</sup>

Taken together, these changes create more hierarchical and capricious compensation systems; no two employees in a company necessarily earn the same salary, with disparities increasing as one climbs the management ladder.<sup>155</sup> In addition, they often change corporate workplaces that once prized loyalty and teamwork into competitive contests that pit workers against each other and turn the executives who emerge from the process into "hyper-motivated survivors" of the contest-like evaluation process.<sup>156</sup> 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.<sup>157</sup> 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. While this new system arguably disadvantages the majority of workers at the expense of the few, it

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152. See *id.* at 103 (discussing the fact that 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).

153. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 752 (2010) (analyzing big law firms as a type of business and advocating for the structuring of these firms' business model to avoid failure); see also Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2245, 2263–64 (2010) (observing that the "competitive meritocracy" is being replaced by a "hypercompetitive ideology" that, compared with its predecessor, disadvantages women and puts more emphasis on 24/7 client-centered representation, complete loyalty and devotion to the firm and its clients, and maximizing profit per partner, and less emphasis on meritocracy, the exercise of professional judgment, and cultivation of professional culture).

154. See Bonnie Darves, *Physician Compensation Models: The Basics, the Pros, and the Cons*, NEJM CAREER CTR. (Oct. 18, 2011), <http://www.nejmcareercenter.org/article/physician-compensation-models-the-basics-the-pros-and-the-cons/> [https://perma.cc/U68Q-8QVL] (indicating that physician compensation plans now have some type of bonus or incentive component).

155. See Eisenberg, *supra* note 15, at 26 (chronicling how the most educated women who have achieved the highest level of professional status experience a more substantial wage gap than those in lower wage jobs).

156. Ribstein, *supra* note 8, at 9.

157. See David W. Hart & Jeffery A. Thompson, *Untangling Employee Loyalty: A Psychological Contract Perspective*, 17 BUS. ETHICS Q. 297, 302–03, 306 (2007) (observing that employee loyalty is harder to come by in companies that do not offer secure employment, income, and benefits); see also HILL & PAINTER, *supra* note 13, at 102–03 (describing how Goldman Sachs's "proud history of serving clients" has deteriorated in recent years).

also imperils the gains women have made in the workforce and will undermine their position even more in the future.

*B. The New Economy and the Gender Wage Gap*

The changing workplace has created dramatically greater income inequality in American society, with increasing concern about the staggering increases in top salaries, compression at the bottom, and the hollowing out of the middle class.<sup>158</sup> The subject of much less commentary, however, has been the impact on women. Women have lost ground in the areas of the economy where incomes have increased most.

Nonetheless, looking at overall measures of the gendered gap in income would seem to tell a story of progress: the gap has narrowed substantially over the last half-century. Yet, as a measure of women's economic standing, the composite numbers are misleading. While the wage gap has narrowed, it has done so overwhelmingly at the bottom, in part because of the drop in blue-collar male wages.<sup>159</sup> Since 1990, the gendered wage gap has grown where it matters most—at the top. In 1990, the gendered gap in wages did not vary much by education; to the extent that there was a difference, college-graduate women earned a slightly higher percentage of the male wage than less educated women.<sup>160</sup> Today, that relationship has reversed; the percentage of the male wage that female college graduates earn has declined, while it has increased for all other women.<sup>161</sup>

This is precisely where there has been the most substantial growth in income inequality in the United States. Between 2000 and 2014, weekly wages for the top 10% of the workforce rose by 9.7%, the place where women had “lost substantial ground,” while falling 3.7% for workers in the lowest tenth of the earnings distribution, and 3% for those in the lowest quarter.<sup>162</sup>

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158. See Lazonick, *supra* note 145, at 857–59 (describing U.S. employment trends since the 1990s); see also Noah, *supra* note 22, at 57 (addressing income inequality more generally).

159. 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] (graphing women's earnings as a percentage of men's earnings for the ten lowest paying and ten highest paying jobs in the country).

160. June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 880 (2013).

161. See June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 872 (2011) (documenting this shift in the gendered wage gap).

162. Drew DeSilver, *For Most Workers, Real Wages Have Barely Budged for Decades*, PEW RES. CTR. (Oct. 9, 2014), <http://www.pewresearch.org/fact-tank/2014/10/09/for-most-workers-real-wages-have-barely-budged-for-decades/> [https://perma.cc/5DLB-AR2V].



The most dramatic changes in income were at the absolute top,<sup>163</sup> the place where women are the least represented. By 2014, total average CEO compensation for the largest firms reached \$16.3 million.<sup>164</sup> These increases in compensation between the late 1970s and 2014 constituted an increase of 997%, double the increase in the stock market and the 10.9% growth in average compensation over the same period.<sup>165</sup> Women's representation in these ranks has remained small. Although women constitute almost half of all workers, they are only 4% of the CEOs of Fortune 500 Companies,<sup>166</sup> "8.1% of the country's top earners," and only 14–16% "of corporate executive officers, law firm equity partners, and senior management in Silicon Valley."<sup>167</sup> Even if they make it into the CEO ranks, women "earn 46% less than their male counterparts, after adjusting for age and education."<sup>168</sup>

The financial sector exhibits a similar pattern of disproportionate increases in compensation and a widening gender gap. In the postwar era, compensation in the financial sector increased in step with other industries,<sup>169</sup> while between 1982 and 2007 average annual compensation in the financial sector doubled at a time when compensation in the rest of the economy grew only modestly.<sup>170</sup> Yet the financial sector shows greater gender disparities than anywhere else. An analysis of personal financial advisors, for example, shows that women earn 58.4 cents on the dollar compared to men, a larger

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163. See Noah, *supra* note 22, at 62–63 (describing increases in compensation in the financial sector and the top executive ranks as the primary sources of income inequality in the country).

164. LAWRENCE MISHEL & ALYSSA DAVIS, TOP CEOs MAKE 300 TIMES MORE THAN TYPICAL WORKERS (2015), <http://www.epi.org/publication/top-ceos-make-300-times-more-than-workers-pay-growth-surpasses-market-gains-and-the-rest-of-the-0-1-percent/> [<https://perma.cc/897B-CFW5>]. As with other sectors, the disparities between top firms and others often exacerbate differences in compensation. See *Executive Paywatch*, AM. FED'N LAB. & CONG. INDUS. ORGS., <https://aflcio.org/paywatch> [<https://perma.cc/6QDK-4YVJ>] (noting the high CEO-to-worker pay ratio).

165. MISHEL & DAVIS, *supra* note 164.

166. Valentina Zarya, *The Percentage of Female CEOs in the Fortune 500 Drops to 4%*, FORTUNE (June 6, 2016), <http://fortune.com/2016/06/06/women-ceos-fortune-500-2016/> [<https://perma.cc/U8NP-PMFZ>].

167. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 923 (2016).

168. Eisenberg, *supra* note 15, at 25.

169. June Carbone, *Once and Future Financial Crises: How the Hellhound of Wall Street Sniffed Out Five Forgotten Factors Guaranteed to Produce Fiascos*, 80 UMKCL. REV. 1021, 1057 (2012).

170. *Id.* at 1057–58. Earnings in the top executive ranks of the financial sector increased even more. "By 2005, executive pay in the financial industry averaged \$3.5 million a year, the highest of any industry." *Id.* at 1058. And while financial sector income plummeted in the immediate wake of the financial crisis, earnings have since rebounded. See Donald Tomaskovic-Devey & Ken-Hou Lin, *Financialization: Causes, Inequality Consequences, and Policy Implications*, 18 N.C. BANKING INST. 167, 175–76 (2013) (documenting U.S. income redistribution into the finance sector from the 1950s to the 2010s).

gap than among men when the same measurements are used.<sup>171</sup> Another survey finds similar gaps among insurance agents, security sales agents, financial managers, and clerks.<sup>172</sup> Moreover, as compensation within the financial sector soared, the representation of women has declined. During the nineties, women initially won access to key financial jobs through litigation, but despite increasing numbers of female MBAs, their numbers on Wall Street dropped after 2000,<sup>173</sup> as did their representation in venture capital firms like Kleiner Perkins.<sup>174</sup>

Outside of these top positions, incomes—and gender disparities—have also steadily risen in the professional and managerial positions that command the highest salaries—and that tend to be the most competitive.<sup>175</sup> For example, following financial sector positions, the next-highest disparities tend to come for marketing and sales managers, who are often paid on commission, where it is 67%, followed by physicians and surgeons, 64%, management analysts, 80%, and lawyers, 79%.<sup>176</sup>

Doctors provide a particularly puzzling example because gender gaps have grown not only in total income,<sup>177</sup> but also in starting salaries, even after controlling for education, specialty, and hours worked.<sup>178</sup> As with other positions, the disparities among doctors tend to be the highest in the most profitable specialties, such as orthopedic surgery and other surgical subspecialties.<sup>179</sup> Moreover, gender differences are greatest in markets, such

171. Thompson, *supra* note 159. For more recent figures, see AM. ASS'N UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 18 (Fall 2017 ed.) (showing the financial sector as still exhibiting the largest gender gaps in compensation).

172. 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](http://www.huffingtonpost.com/2012/03/19/gender-wage-gap-wall-street_n_1362878.html) [<https://perma.cc/VKZ4-NJQE>] (citing Frank Bass, *Shining Shoes Best Way Wall Street Women Outearn Men*, BLOOMBERG (Mar. 15, 2012), <https://www.bloomberg.com/news/articles/2012-03-16/shining-shoes-best-way-wall-street-women-outearn-men> [<https://perma.cc/R8YY-F5E9>]); see also Jeff Kauflin, *The 10 Industries With The Biggest Gender Pay Gaps*, FORBES (Dec. 6, 2016), <https://www.forbes.com/sites/jeffkauflin/2016/12/06/the-10-industries-with-the-biggest-gender-pay-gaps/#c9d94dd51d4f> [<https://perma.cc/K8SY-9B9F>] (noting that finance and insurance have the largest pay gaps of all professions).

173. Eichler, *supra* note 172.

174. See Giang, *supra* note 1 (reporting that the number of female decision-makers in venture capital firms has dropped from 10% in 1999 to 6% in 2014).

175. See Paul Ovenberg & Janet Adamy, *What's Your Pay Gap?*, WALL STREET J. (May 17, 2016), <http://graphics.wsj.com/gender-pay-gap/> [<https://perma.cc/S6JT-7LJY>] (documenting gender pay gaps for 422 professions and categories with data from the U.S. Census Bureau).

176. *Id.*

177. Indeed, looking at doctors as a group, the gendered wage is worse than for other professions, with female physicians and surgeons making only 64% of the incomes earned by their male peers. *Id.*

178. Anthony T. Lo Sasso et al., *The \$16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More than Women*, 30 HEALTH AFF. 193, 193 (2011).

179. See Anupam B. Jena et al., *Sex Differences in Physician Salary in US Public Medical Schools*, 176 JAMA INTERNAL MED. 1294, 1294, 1300–01 (2016) (finding, after controlling for

as Charlotte, North Carolina, that have the highest average levels of physician pay, replicating the patterns in other industries of the highest gender gaps existing for the most lucrative jobs.<sup>180</sup> In addition, studies find gender disparities where compensation is based on subjective evaluations or reductionist measures of procedures billed.<sup>181</sup>

Among lawyers, overall pay has increased since 1990 in accordance with a double-humped system in which the compensation of top law firm partners grew substantially while other lawyers saw more modest increases in salaries.<sup>182</sup> While there is a gender wage gap of 22.6% among female and male lawyers as a whole,<sup>183</sup> among partners in the largest firms there is a 44% differential in pay.<sup>184</sup> As is true of other highly paid sectors, the gender gap is highest at the high end of the pay scale.

In light of the increasing gender pay differences in the sectors of the economy that have contributed the most to growing inequality, the question is whether antidiscrimination law can address these differences. The answer involves further examination of the shift to more negative-sum competitions and individualist employment environments.

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various factors, the estimated adjusted salary among men exceeded that of women and was statistically significant in nine of eighteen specialties and finding surgical subspecialties demonstrated the largest difference with an absolute adjusted gap of \$43,728 in salary).

180. “Researchers found that the average national gender pay gap among survey respondents was 26.5 percent, or more than \$91,000 a year, after controlling for specialty, geography, years of experience, and reported weekly work hours.” Christina Cauterucci, *The Gender Pay Gap in Medicine Is Abominable. Here’s Where It’s Worst*, SLATE (Mar. 26, 2017), [http://www.slate.com/blogs/xx\\_factor/2017/04/26/the\\_gender\\_pay\\_gap\\_in\\_medicine\\_is\\_abominable\\_here\\_s\\_where\\_it\\_s\\_worst.html](http://www.slate.com/blogs/xx_factor/2017/04/26/the_gender_pay_gap_in_medicine_is_abominable_here_s_where_it_s_worst.html) [<https://perma.cc/YK25-GUGR>].

181. By “reductionist,” we mean measures such as procedures billed without controlling for other considerations, such as whether the procedures were medically indicated or otherwise appropriate. A. Charlotta Weaver et al., *A Matter of Priorities? Exploring the Persistent Gender Pay Gap in Hospital Medicine*, 10 J. HOSP. MED. 486, 487 (2015) (indicating that at least part of the explanation was that women doctors prioritized pay less than male doctors did). Indeed, the disparities are particularly large in Medicare reimbursements, where female doctors make half of what male doctors do, in large part because male doctors, who appear to be more focused on the bottom line, perform more procedures and see more patients. See Fitch, *supra* note 134 (reporting that male doctors saw 60% more patients, performed more services per patient treated, and made 24% more money per patient treated).

182. Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 610 (2016).

183. Debra Cassens Weiss, *Full-Time Female Lawyers Earn 77 Percent of Male Lawyer Pay*, ABA J. (Mar. 17, 2016), [http://www.abajournal.com/news/article/pay\\_gap\\_is\\_greatest\\_in\\_legal\\_occupations/](http://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations/) [<https://perma.cc/7PNV-5UTB>] (“Median pay for full-time female lawyers was 77.4 percent of the pay earned by their male counterparts, according to data for 2014 released earlier this month by the U.S. Census Bureau.”).

184. Elizabeth Olson, *A 44% Pay Divide for Male and Female Law Partners, Survey Says*, N.Y. TIMES: DEALBOOK (Oct. 12, 2016), <http://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html?mabReward=CTM&action=click&pgtype=Homepage&region=CColumn&module=Recommendation&src=rechp&WT.nav=RecEngine> [<https://perma.cc/7GT2-NYY3>].

C. *The New System of Negative Competition and Gender*

Most analyses of the “glass ceiling” that blocks the movement of women into upper management positions center on ways to ensure the promotion of women on the same terms that apply to men.<sup>185</sup> Such an approach to gender discrimination focuses on the seeming neutrality of the more competitive marketplace, thus placing the structure of those marketplaces outside of the scope of Title VII law.

Instead, this section shows that the more general forces that produce the new marketplace—and greater economic inequality—are deeply gendered, and are thus subject to challenge under Title VII. Yet antidiscrimination efforts, which decry the gender disparities, have not directly engaged the validity of the practices associated with greater inequality (winner-take-all bonus systems, short-termism, and highly competitive workplaces). It is the separation of the two that intrinsically limits the effectiveness of antidiscrimination approaches.

This section begins by examining the gendered impact of the shift toward more competitive workplaces. Second, it explores the impact on the qualities associated with the winners of such competitions. And third, it considers the negative evaluation of women in such environments. This means that women face a triple, not just a double, bind.<sup>186</sup>

1. *Selection Effects Part I: Gender Differences in Competitive Environments.*—The primary question for purposes of the intersection between anti-inequality and antidiscrimination law is accounting for the growth of gender disparities in the highest paid professions. Almost all of the accounts, whether they view these changes as pernicious or benign,<sup>187</sup> emphasize that as differences in compensation have become more extreme and competition for top jobs has increased,<sup>188</sup> the increased competition produces greater gender differences.<sup>189</sup> This section considers why simply

185. See generally SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013) (suggesting strategies for women to advocate for themselves individually in the workplace).

186. See *supra* text accompanying notes 24–25 (defining the triple bind).

187. See *supra* notes 14–17 (describing the current gender inequality literature).

188. See, e.g., Dallas, *supra* note 133, at 50, 53 (describing the effect of Enron’s bonus system in undermining teamwork, increasing the focus on self-interest, and making employees more competitive toward and distrustful of each other).

189. 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, 601 (2002) (finding that bonus-pay systems produce more gender disparities than systems that give greater weight to base pay); Paul A. Gompers et al., *Gender Effects in Venture Capital* 5 (May 12, 2014) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445497](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445497) [<https://perma.cc/9BX3-W2A2>] (observing “that women tend to perform better in firms that have more formal processes and greater bureaucracy”).

increasing the level of competition to get, keep, and prosper from these jobs may have gendered effects.

The conventional explanation for the disproportionate lack of women in the highest earning sector in the economy is that women are less likely to apply because of the emphasis on long hours, greater risk, and even differences in taste for competition. Each of these explanations may have a degree of plausibility; but each also cloaks the artificial nature of the competitions that have been created. These competitions often discourage women from applying not because they involve competition per se, but because the competitions valorize stereotypically male traits associated with the promotion of self-interest at the expense of collaboration.<sup>190</sup> The emphasis on male-defined competition then produces self-reinforcing effects that create even less supportive environments for women. To the extent that women accurately perceive that they will not be treated fairly in such environments—or may not wish to work in such environments even if they are welcomed—they are that much less likely to apply.

First, when it comes to working longer hours,<sup>191</sup> women, particularly those with young children, often do not apply.<sup>192</sup> Longer hours certainly provide part of the answer.<sup>193</sup> As the economy has shifted toward more

190. Mary Anne Case provides a particularly effective example by describing how the stereotypically male definition of the police officer role persists due to valuing counterproductive traits (aggressiveness, self-assuredness, and reliance on physical strength) in the selection process despite other policing methods that emphasize different traits (e.g., ability to de-escalate conflict) being more effective. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 85–94 (1995). Case further notes some of the most effective recommendations for reform came from recognition of the abuses that led to the Rodney King case, rather than simply consideration of women's interests taken in isolation. *Id.*

191. See generally Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, AM. ECON. J.: APPLIED ECON., July 2010, at 228, 230 (finding differences in weekly hours worked between men and women with MBAs to be a proximate factor in gender wage gaps).

192. Cordelia Fine provides the results of one psychological survey:

[A survey of] more than eight hundred managers at a major consultancy firm . . . found that women on average were less willing than men to make sacrifices for their career, and take career risks in order to get ahead. Closer examination revealed that this was because women tended to perceive less benefit in taking risks and making sacrifices. But this was not because they were simply less ambitious. Rather, they had lower expectations of success, fewer role models, less support, and less confidence that their organization was a meritocracy.

FINE, *supra* note 25, at 121.

193. More competitive environments which increase the emphasis on long or inflexible hours disadvantage women more than men. In some cases, such as women's decisions to select pharmacy as a profession, hours are a decisive factor controlling for other measures. See, e.g., Claudia Goldin & Lawrence F. Katz, *The Most Egalitarian of All Professions: Pharmacy and the Evolution of a Family-Friendly Occupation* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 18410, 2012) (concluding that the decline of independent pharmacies in place of large national chains and hospitals has resulted in the more egalitarian, family-friendly pharmacy profession). In many cases,

winner-take-all compensation systems, part of the competition has taken the form of hours—and the longer the hours, the more women tend to drop out of the competition.<sup>194</sup> Hours have in fact increased, and they have increased most at the top of the income ladder.<sup>195</sup> During the Great Compression from the '40s through the '70s, blue-collar workers and white-collar workers worked about the same number of hours.<sup>196</sup> Today, the highest earning employees work much longer hours than the average worker does.<sup>197</sup> Women still bear disproportionate responsibility for child care,<sup>198</sup> and when women's hours exceed forty-five a week, it undermines their relationships.<sup>199</sup> Elite men continue to be more likely to earn more than their wives to a greater degree than other working couples, increasing the pressure on high-income wives to cut back.<sup>200</sup> These are, of course, so much more than just private choices. Indeed, Wisconsin repealed its Equal Pay Act, with a state senator who backed the measure insisting that men and women have different goals in life and money “is more important for men” while women refuse to work fifty or sixty hours a week because of their greater involvement in childrearing.<sup>201</sup>

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though, long hours become a product of competition itself rather than an inevitable job characteristic. See Sylvia Ann Hewlett & Carolyn Buck Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV., Dec. 2006, at 49, 52–53 (citing “competitive pressures” as one of the motivations for working high hours).

194. See Claudia Goldin & Lawrence F. Katz, *Transitions: Career and Family Life Cycles of the Educational Elite*, AM. ECON. REV., Jan. 2008, at 363, 367 (noting the negative relationship between a woman's income and number of children is entirely accounted for by the number of hours worked); see also Claudia Goldin & Lawrence F. Katz, *The Cost of Workplace Flexibility for High-Powered Professionals*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 2011, at 45, 49 (noting that an eighteen-month break during fifteen years of working results in decreased earnings of 41% for MBAs).

195. See Peter Kuhn & Fernando Lozano, *The Expanding Workweek? Understanding Trends in Long Work Hours Among U.S. Men, 1979-2004* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 11895, 2005) (finding that between 1979 and 2004, the frequency of long work hours increased by 11.7% among the top quintile of wage earners, but fell by 8.4% for the lowest quintile).

196. *Id.* at 2.

197. *Id.* at 5, 34.

198. See Claudia Goldin, *A Grand Gender Convergence*, 104 AM. ECON. REV. 1091, 1111–13 (2014) (documenting the effects of motherhood on the professional lives of women with MBAs); Valentina Zarya, *Working Long Hours Is Way Worse for Women's Health than for Men's*, FORTUNE (June 17, 2016), <http://fortune.com/2016/06/17/women-health-work/> [<https://perma.cc/V48B-AMXP>] (positing that women may experience greater health consequences than men for working longer hours because of the disproportionate burden of childcare).

199. PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 104 (2009).

200. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 98 (2014) (noting that in dual-earner families in the bottom quintile of wages the wife earns more than the husband in 70% of marriages, while in the top 20%, the wife earns more than the husband in only 34% of marriages).

201. JOANNA L. GROSSMAN, *NINE TO FIVE: HOW GENDER, SEX, AND SEXUALITY CONTINUES TO DEFINE THE AMERICAN WORKPLACE* 299 (2016).

An actual job-based need to work longer hours, however, cannot provide the entire answer for increasing gender disparities in top positions. For one thing, gender disparities persist even when researchers examined only white college graduates with fifteen years of experience who worked fulltime.<sup>202</sup> The long hours themselves may reflect more competitive environments rather than increased productivity.<sup>203</sup> In addition, managers cannot necessarily tell whether workers who claim to work longer hours are in fact doing so, and one study found that men were three times more likely than women to ease up on hours without having it effect their performance reviews; in short, they were more likely to “pass” as workaholics.<sup>204</sup> Consequently, while long hours do affect gender disparities, the longer hours may reflect increased competition as much as, if not more than, workplace needs.

Numerous management studies focus on other gender differences in corporate advancement. Some suggest, for example, that women are more risk averse than men or that they lack the confidence (some would say hubris) that comes from success.<sup>205</sup> These studies, however, have been subject to withering criticism<sup>206</sup> and do not necessarily take context into account. Male and female entrepreneurs and managers, for example, do not vary in risk propensities or in their success in managing risk.<sup>207</sup>

Many social science explanations focus on the taste for competition itself. In fact, almost all studies show that higher pay tied to performance measures and want ads emphasizing competitive environments increase the

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202. See Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence*, 60 INDUS. & LAB. REL. REV. 45, 61–62 (2006) (discussing the unexplained gender pay gap among white college graduates with fifteen years of experience working full time); see also Goldin, *supra* note 198, at 1096 (presenting data from a similar sample of full-time, college-graduate, men and women with 16-plus years of schooling).

203. See Sarah Green Carmichael, *The Research Is Clear: Long Hours Backfire for People and for Companies*, HARV. BUS. REV. (Aug. 19, 2015), <https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies> [<https://perma.cc/W2YW-MG7E>] (discussing research that shows that multiple days of overwork results in diminished productivity for the vast majority of workers); Wald, *supra* note 153, at 2271–72 (explaining the emphasis on long hours at law firms as the product of an ideological shift).

204. Neil Irwin, *How Some Men Fake an 80-Hour Workweek, and Why It Matters*, N.Y. TIMES: THE UPSHOT (May 4, 2015), <http://www.nytimes.com/2015/05/05/upshot/how-some-men-fake-an-80-hour-workweek-and-why-it-matters.html> [<https://perma.cc/5LHN-K3YR>] (citing Erin Reid, *Embracing, Passing, Revealing, and the Ideal Worker Image: How People Navigate Expected and Experienced Professional Identities*, 26 ORG. SCI. 997 (2015)).

205. Blau & Kahn, *supra* note 98, at 42–44 (surveying literature on confidence and risk aversion).

206. See generally JULIE A. NELSON, GENDER AND RISK-TAKING: ECONOMICS, EVIDENCE, AND WHY THE ANSWER MATTERS (2017) (criticizing the academic literature on “gender and risk,” especially the economic literature, as plagued by confirmation bias and publication bias).

207. Blau & Kahn, *supra* note 98, at 42–43 (citing Rachel Croson & Uri Gneezy, *Gender Differences in Preferences*, 47 J. ECON. LIT. 448 (2009)).

percentage of men who apply.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> Yet, these studies do not necessarily take the level and type of competition into account. For example, some studies distinguish between "hypercompetitives," who strive for domination and control over others, versus "personal development competitors," who are concerned with the feelings and welfare of others.<sup>211</sup>

Nonetheless, these differences in preferences, whatever their sources, can affect the gender composition of workplaces. Advertising that emphasizes competitive traits, for example, tends to increase the percentage of male applicants,<sup>212</sup> and the greater percentage of men may make the environments less attractive to women for reasons that go beyond a taste for competition.<sup>213</sup> Some workplaces may deliberately manipulate the perception of competitiveness to increase employee insecurity and alignment with company objectives; other positions, such as those involved with commission

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208. *Id.* at 36–38, 38 n.60 (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").

209. Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q. J. ECON. 1067, 1078, 1097–98 (2007); see also Jeffrey Flory et al., *Do Competitive Workplaces Deter Female Workers? A Large-Scale Natural Field Experiment on Job Entry Decisions*, 82 REV. ECON. STUD. 122, 124 (2015) (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).

210. Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 264 (2013) (citing Niederle & Vesterlund, *supra* note 209, at 1078, 1097).

211. Richard M. Ryckman et al., *Values of Hypercompetitive and Personal Development Competitive Individuals*, 69 J. PERSONALITY ASSESSMENT 271, 280 (1997).

212. See, e.g., Flory et al., *supra* note 209, at 124, 146 (concluding that gender differences in preferences over uncertainty and potentially competition per se were the most likely explanations for applicant composition).

213. Danielle Gaucher et al., *Evidence that Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality*, 101 J. PERSONALITY & SOC. PSYCHOL. 109, 116–18 (2011) (finding that advertisements with highly masculine wording received a larger share of male applicants with women reporting that they found these jobs less appealing and concluding that this result was mediated by feelings of "belongingness").



sales, may have long been designed in such terms.<sup>214</sup> Both tend to result in fewer women applying.<sup>215</sup>

In short, these “choices” by women not to engage in competition or apply for particular jobs are choices made within particular contexts. Creating bonus systems with large wage disparities tends to attract not only those more drawn to money, but workers who are less likely to be supportive of colleagues.<sup>216</sup> Employers who emphasize the competitive nature of such positions can expect to attract more men than women,<sup>217</sup> but they are also signaling that they will tolerate certain types of behavior that may disadvantage women, such as in-group favoritism or lack of mentoring.<sup>218</sup> The emphasis on long hours then challenges women who make choices under the constraints of familial responsibilities (which in turn become employer-enforced stereotypes).<sup>219</sup> Moreover, these workplaces will “crowd out” values, such as concern for others or adherence to ethical principles, that many women (and men) might prefer.<sup>220</sup>

Accordingly, these are choices that are steered by the ways employers structure<sup>221</sup> and advertise<sup>222</sup> jobs, and choices made when women know their

214. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1307 (N.D. Ill. 1986) (noting that there was a lack of interest from women for commission sales positions at Sears based on the number of women who rejected these positions when offered), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

215. These studies further indicate that an emphasis on reductionist monetary incentives, as opposed to other values such as teamwork or customer satisfaction, are also more likely to appeal to men than to women. See generally Francine Blau & Lawrence Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7 (2007) (finding that men place greater emphasis on money and competition within positions); Nicole M. Fortin, *The Gender Wage Gap Among Young Adults in the United States: The Importance of Money Versus People*, 43 J. HUM. RESOURCES 884 (2008) (indicating that men’s greater emphasis on money is a factor exacerbating the wage gap).

216. Dallas, *supra* note 133, at 37.

217. See Claire Cain Miller, *Job Listings that Are Too ‘Feminine’ for Men*, N.Y. TIMES: THE UPSHOT (Jan. 16, 2017), <https://www.nytimes.com/2017/01/16/upshot/job-disconnect-male-applicants-feminine-language.html> [<https://perma.cc/Q2VJ-94HY>] (discussing how job listings with feminine language attract women and deter men); Emily Peck, *High-Paying Job Listings Are Written to Attract Men, Study Finds*, HUFFINGTON POST (Mar. 17, 2017), [http://www.huffingtonpost.com/entry/job-listings-study\\_us\\_58c990b7e4b0be71dcf100f7?95yb0fgu253eah5mi&](http://www.huffingtonpost.com/entry/job-listings-study_us_58c990b7e4b0be71dcf100f7?95yb0fgu253eah5mi&) [<https://perma.cc/3MZD-TF7H>] (explaining how high-paying job listings use language that attracts male candidates).

218. See Dallas, *supra* note 133, at 37 (describing Enron’s ultra-competitive workplace as incentivizing employees to spend significant time “battering up” superiors at the local Starbucks).

219. Schoenbaum, *supra* note 144, at 778–79 (arguing that employers that act on sex stereotypes violate Title VII and entrench such stereotypes).

220. Stout, *supra* note 12, at 529 (observing that pay-for-performance rules crowd out “concern for others’ welfare and for ethical rules, making the assumption of selfish opportunism a self-fulfilling prophecy”).

221. Schultz, *supra* note 72, at 1058.

222. Miller, *supra* note 217; Peck, *supra* note 217.

actions will be viewed differently than men's.<sup>223</sup> The result is a set of cascade effects. CEOs may make workplaces more competitive as a way to achieve short-term goals. Doing so tends to attract more men than women. The shift in workplace composition can then have reinforcing effects, defining the nature of the competition in stereotypical male terms and, as we will show below, accurately persuading women that they will be less likely to succeed.

2. *Selection Effects Part II: The Redefinition of the Company "Man."*—The change from career ladders and the "company man" to competitive contests involves a shift from technocratic managers to "leaders."<sup>224</sup> A large management literature describes the importance of assertive executives who have confidence in their vision for a company, the ability to inspire others, and the determination to implement their vision no matter what obstacles get in the way.<sup>225</sup> This same literature, however, recognizes that leaders who possess such traits are also likely to suffer from hubris, lack of empathy, and the willingness to cut corners.<sup>226</sup> Indeed, Larry Ribstein described the tournament survivors as "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

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223. Dallas, *supra* note 133, at 37; *see also* Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073, 1082 (discussing the suggestion that women combat workplace discrimination by conforming their behavior to gender stereotypes).

224. *See* Khurana, *supra* note 139, at 69 (describing the shift away from the typical "organizational man" senior manager who worked his way up the ranks toward charismatic CEOs who are typically either entrepreneurial founders or are brought into the company from the outside).

225. And the literature describes those most likely to display such traits as narcissists. *See, e.g.*, Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable Cons*, HARV. BUS. REV., Jan. 2004, at 92, 94 (arguing that narcissism is overall a plus in business leadership, as it contributes to the ability to "push through the massive transformations" and to supply the charm necessary to win over the masses); Charles A. O'Reilly III et al., *Narcissistic CEOs and Executive Compensation*, 25 LEADERSHIP Q. 218, 218 (2013) (describing narcissists as more likely to be "inspirational, succeed in situations that call for change, and be a force for creativity").

226. *See, e.g.*, James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 475 n.130 (2004) ("U.S. companies place too much emphasis on the possession of such traits as optimism and control in top executives, when in fact those exhibiting these traits have severe forms of cognitive biases, which are disastrous for decision making because they lead individuals to take action uncritically."); O'Reilly et al., *supra* note 225, at 218 (describing narcissistic leaders as "more likely to violate integrity standards, have unhappy employees and create destructive workplaces, and inhibit the exchange of information within organizations" (citations omitted)); Paredes, *supra* note 128, at 675 (positing that CEOs that suffer from overconfidence may be more prone to believe they have more control over results than they actually possess).

bad.”<sup>227</sup> Like Ribstein, both management supporters and their critics label this collection of traits “narcissistic”<sup>228</sup>—and as stereotypically male.<sup>229</sup>

What these changes in both finance and upper management do is place an emphasis on stereotypically male leadership traits, defining the ideal traits in gendered terms. The result rewards those perceived to possess such traits and minimizes the downside associated with them.<sup>230</sup> This creates a set of reinforcing effects that aggravates gender disparities.

First, leadership has been defined in terms of traits such as energy, dominance, self-confidence, and charisma—traits that are associated with narcissism, and narcissists are both more likely to apply for and be selected for such positions.<sup>231</sup>

Second, men are more likely to be identified with such traits.<sup>232</sup> Psychological studies show that while both men and women display such traits, men do so to a much greater degree than women.<sup>233</sup> Moreover, in looking only at narcissists, researchers found that men were more likely than women to desire power and to be attracted to positions that promised money, status, and authority. Indeed, the single largest gender difference the researchers found among those they classified as narcissists was the

227. Ribstein, *supra* note 8, at 9; *see also* O’Reilly et al., *supra* note 225, at 219 (noting the increasing evidence that narcissistic individuals often become leaders).

228. *See, e.g.*, Maccoby, *supra* note 225, at 93–94 (describing traits common to narcissists and providing examples of narcissistic leaders from history).

229. *See* Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-Analytic Review*, 141 PSYCHOL. BULL. 261, 264 (2015) (surveying the relevant literature and concluding that societal pressure that occurs in response to violations of gender norms results in women suppressing displays of narcissism more than men, because it is seen as more socially acceptable for men to behave as narcissists). Ann McGinley also emphasizes the normalization of male behavior within the workplace that involves “competitive efforts between men to establish superior standing and/or resources.” Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 442 (2000).

230. Mary Anne Case emphasizes that this is true even where stereotypically masculine traits are associated with worse performance and greater exposure to liability for the employer. Case, *supra* note 190, at 86–87 (documenting this overvaluation of masculine traits in the context of policing).

231. *See, e.g.*, O’Reilly et al., *supra* note 225, at 219–20 (indicating that leadership traits, such as energy, dominance, self-confidence, and charisma, are associated with narcissism and that narcissists, especially on first impression, are therefore characterized by others (including interviewers, business journalists, and other leaders) as having the requisite characteristics to be an effective leader). “In a meta-analysis of 187 studies of individual differences proposed to be relevant to effective leadership, . . . seven traits were reliably and significantly associated with leader effectiveness . . . all of which are characteristics associated with narcissism.” *Id.* at 220.

232. Grijalva et al., *supra* note 229, at 262, 280 (coming to this conclusion after reviewing 31 years of narcissism research with over 355 independent samples and 470,846 participants).

233. *Id.* Indeed the term “narcissism” is often associated with gender-stereotyped behavior such as “physical expressions of anger, a strong need for achievement, and an authoritative leadership style . . . .” ANNIKA LORENZ, ACQUISITION VS. ALLIANCE: THE IMPACT OF HUBRIS ON GOVERNANCE CHOICE 25 (2011).

willingness to demand greater rewards for themselves and to use greater status to exploit others.<sup>234</sup>

Third, the selection of top management for their narcissistic qualities is also selection for those who will be more inclined to see compensation as a measure of merit, to feel that the compensation they receive is justified, and to use whatever tactics they have at their disposal to increase their leverage in negotiations.<sup>235</sup> A study of tech firms found that the more narcissistic CEOs—rated in accordance with an employee evaluation of personality traits—received “more total direct compensation (salary, bonus, and stock options), have more money in their total shareholdings, and have larger discrepancies between their own (higher) compensation and the other members of their team.”<sup>236</sup>

In short, the selection for narcissistic traits favors men, who are more likely than women to desire power; to be attracted to positions that promise money, status, and authority; to be willing to demand greater rewards for themselves; and to use greater status to exploit others.

3. *Selection Effect Part III: Gender and “Sharp Elbows.”*<sup>237</sup>—While the valorization of narcissistic traits often leads to the willingness to overlook many of its negative traits, women do not benefit to the same degree from the expression of these traits nor do they escape scrutiny to the same extent as men. Women also do not receive as much benefit as they might otherwise from stereotypically female management traits, which may pay off for companies in different—or better—ways.

The antidiscrimination literature has long shown that women are in a double bind with respect to traditionally masculine and aggressive tactics. If women do display “elbows” (as did Ellen Pao), they are judged harshly for

234. Grijalva found that the largest gender differences involved men’s greater willingness “to exploit others and to believe that they themselves are special and therefore entitled to privileges.” Grijalva et al., *supra* note 229, at 280. For examples of the willingness to exploit others in the financial sector, see HILL & PAINTER, *supra* note 13, at 123–24 (2015). This may go beyond narcissism to psychopathy. See Tom Loftus, *What Your CEO Is Reading: My CEO, My Psychopath; Hwy. 101 Road Rage; Reengineering for Women in Tech*, WALL STREET J. (Mar. 17, 2017), <http://blogs.wsj.com/cio/2017/03/17/what-your-ceo-is-reading-my-ceo-my-psychopath-hwy-101-road-rage-reengineering-for-women-in-tech/> [<https://perma.cc/RK5T-6MMB>] (“Recent studies show that four to eight percent of high-level executives are psychopaths, compared to just 1% of the population.”).

235. See, e.g., Paredes, *supra* note 128, at 679 (describing those who see high rates of compensation as indication of professional success or personal self-worth as also likely to see the actions that produce the compensation as self-validating); see also HILL & PAINTER, *supra* note 13, at 116 (describing the crowding-out effect in bankers).

236. O’Reilly et al., *supra* note 225, at 218.

237. “#ambitious #aggressive #pushy #competitive #cutthroat #disregardful #tenacious.” *Sharp Elbows*, URBAN DICTIONARY (Apr. 5, 2015), <http://www.urbandictionary.com/define.php?term=Sharp%20Elbow> [<https://perma.cc/Q4HJ-FFNJ>].

not conforming to gender stereotypes, but if they do not, they may be viewed as lacking leadership potential.<sup>238</sup> The association of more positive narcissistic traits such as “motivation to lead, desire for authority, and self-perceived leadership ability” with men tends to reinforce what may be subconscious gender stereotypes.<sup>239</sup> At the same time, women tend to be criticized for deviation from expected feminine roles, even when they display the more positive traits,<sup>240</sup> and punished more severely than men for having negative traits associated with narcissism, such as self-entitlement and willingness to exploit others.<sup>241</sup> Women at Amazon, for example, attributed the lack of a single woman on the company’s top leadership team to its competitive evaluation system. Sounding much like Ellen Pao, they believed that they could lose out on promotions because of intangible criteria like the failure to “earn trust” or disagreeing with colleagues.<sup>242</sup> “Being too forceful, they said, can be particularly hazardous for women in the workplace.”<sup>243</sup>

This traditional double bind further influences the negotiations that have become a much greater factor in determining higher end salaries. If women fail to negotiate or to press hard in negotiations, they fall behind in salaries with potentially career-long consequences. Yet employers are also more likely to view women as negotiating over-aggressively, especially in

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238. When women defy gender role expectations, they face numerous repercussions in the workplace. Emily A. Leskinen et al., *Gender Stereotyping and Harassment: A “Catch-22” for Women in the Workplace*, 21 PSYCHOL. PUB. POL’Y & L. 192, 192 (2015) (finding that women that took on stereotypically masculine behavior experienced a greater risk of harassment). See DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 161 (2007) (arguing that 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); Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84, 95 (2007) (finding that both male and female evaluators penalized women who negotiated for more compensation because “they appeared less nice and more demanding”). Also see the discussion of Ellen Pao’s lawsuit, *supra* notes 1–3 and accompanying text.

239. For a summary of the literature on the mutually reinforcing effects of such stereotypes, see McGinley, *supra* note 229, at 441 (describing the way men frame women “as lacking legitimacy to hold powerful positions”).

240. *Id.* at 436–39 (describing how women are treated more negatively when they demonstrate leadership skills).

241. Grijalva et al., *supra* note 229, at 264 (collecting research supporting this punishment defined as the “dominance penalty” for women). McGinley also emphasizes the normalization of male behavior within the workplace that involves “competitive efforts between men to establish superior standing and/or resources.” McGinley, *supra* note 229, at 442. These behaviors include vying for attention, self-promotion, efforts to control or dominate others, and taking credit for the work of others. *Id.*

242. Indeed, Dallas, *supra* note 133, at 36–37, observes that competitive evaluation systems create incentives to undermine employees perceived as untrustworthy.

243. Jodi Kantor & David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N.Y. TIMES (Aug. 15, 2015), <https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html> [<https://perma.cc/AFV8-QFNV>].

negotiations without clear standards for the results.<sup>244</sup> And even when women do negotiate at the same rate as men, they are less likely to receive raises or promotions.<sup>245</sup>

In industries that reward taking risks by breaking the rules and hoping to get away with it, the double bind may be particularly pernicious. For example, a study of the financial industry demonstrates that misconduct is prevalent: “roughly one in thirteen financial advisers in the U.S. has a record of misconduct.”<sup>246</sup> Gender differences in the misconduct are rife. Male advisers are more than three times as likely to engage in misconduct, and more than twice as likely to be repeat offenders, than female advisers. Male advisers commit offenses that turn out to be 20% more costly for firms.<sup>247</sup> Once misconduct is reported, female advisers are 20% more likely to lose their jobs and 30% less likely to find new ones compared to male advisers.<sup>248</sup> These patterns correspond with the representation of women in senior management; “firms in which males comprise a greater percentage of executives/owners are more likely to punish female advisers more severely and hire fewer females with a record of past misconduct.”<sup>249</sup> In an industry in which misconduct charges are frequent and risk-taking includes a willingness to break the rules, the stakes for women in getting caught are substantially greater.<sup>250</sup>

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244. See, e.g., Benjamin Artz et al., *Do Women Ask?* 3 (Warwick Econ. Research Papers, Working Paper No. 1127, 2016) (explaining that, contrary to other research, women ask for higher salaries, but do not receive them); Blau & Kahn, *supra* note 98, at 40 (summarizing the literature on gender differences in negotiation); Laura Cohn, *Women Ask for Raises as Much as Men—but Get Them Less Often*, FORTUNE (Sept. 6, 2016), <http://fortune.com/2016/09/06/women-men-salary-negotiations/> [<https://perma.cc/8P79-V6BM>] (reporting on a study of Australian workplaces that found that women asked for pay raises as often as men, but were less likely to receive them).

245. Artz et al., *supra* note 244, at 11–13; Daniel Victor, *Research Suggests Women Are Asking for Raises, but Men Get Them More*, N.Y. TIMES (Sept. 6, 2016), [https://www.nytimes.com/2016/09/07/business/research-suggests-women-are-asking-for-raises-but-men-get-them-more.html?\\_r=0](https://www.nytimes.com/2016/09/07/business/research-suggests-women-are-asking-for-raises-but-men-get-them-more.html?_r=0) [<https://perma.cc/GX6P-K4EK>].

246. Mark Egan et al., *When Harry Fired Sally: The Double Standard in Punishing Misconduct 2* (Mar. 2017) (unpublished manuscript) (available on the Social Science Research Network website), <https://ssrn.com/abstract=2931940> [<https://perma.cc/3PM6-RGMX>].

247. *Id.* at 3.

248. *Id.* at 12, 30. The study observes further that part of the reason for the discrepancy is the sources of the complaints. 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%). *Id.* at 4. These findings are consistent with the study’s finding that firms with more women owners and managers reduce the gender disparities. *Id.* at 4–5.

249. *Id.* at 30.

250. Ben Steverman, *Proof Wall Street Is Still a Boys’ Club: Financial Advisory Firms Are Far More Lenient with Men Who Break the Rules, a New Study Says*, BLOOMBERG (Mar. 14, 2017), <https://www.bloomberg.com/news/articles/2017-03-14/proof-wall-street-is-still-a-boys-club> [<https://perma.cc/Z3CL-3STW>] (citing Egan et al., *supra* note 246).

Given these discriminatory practices, it is hardly surprising that fewer women apply to these positions. What some men may perceive as an opportunity to thrive in a competitive environment, many women may see as a “heads I win, tails you lose” game in which they may be less likely to enjoy the benefits of outsized risks, but more likely to experience their negative consequences.<sup>251</sup>

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Large companies today rely heavily on pay-for-performance systems, with competitive evaluations that rank employees.<sup>252</sup> Managers often introduce such systems to shake up an organization, reorient it toward new management objectives, or prepare for layoffs.<sup>253</sup> The systems, even when they strive to be objective, are subject to favoritism and gamesmanship.<sup>254</sup> Such workplaces encourage “unethical behavior, because some individuals are willing to pay to improve their rank by sabotaging others’ work or by increasing artificially their own relative performance.”<sup>255</sup> And there is no evidence they improve performance. Pay-for-performance systems remain entrenched in large companies, partly because competition, rankings, and bonuses are standard management norms<sup>256</sup> and partly because the systems

251. These practices involve huge risks of a predictable nature. *See, e.g.*, William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1360 (2002) (describing Enron’s pressure to maximize shareholder value and its culture of winning, together creating an environment that encouraged “risk-prone decision making”).

252. Enron, for example, used the “rank-and-yank” performance management system initially developed at GE to rank their employees and then terminate the bottom 15%. This created an uncomfortably competitive corporate ethos that made workers rationalize their illegal conduct as successful business practices. *See, e.g.*, PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 51–52 (2002) (describing the pitfalls of Enron’s “rank-and-yank” performance management system); *see also* Nancy B. Rapoport, “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY’S J. LEGAL MAL. & ETHICS 42, 44 n.2 (2014) (“Want people to turn on their colleagues rather than encourage teamwork? Use a ‘rank and yank’ system that routinely drops the bottom 10% of high achievers off the payroll.”).

253. Steve Bates, *Forced Rankling*, HR MAG. (June 1, 2003), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0603bates.aspx> [<https://perma.cc/E5YR-J7BQ>].

254. *Id.*

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

256. *See, e.g.*, Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 89 (1999) (observing seemingly rational individuals “might repeatedly ignore their own inclinations, preferring instead to emulate their predecessors. More specifically, the cascades literature posits that strategic actors may rationally prefer emulation, presuming (frequently incorrectly) that their own information is unreliable measured against the stock of that revealed from their predecessors’ actions”). For an example of this in the sex-stereotyping literature, *see* Case, *supra* note 190, at 86–87, describing the report of a commission examining police practices:

The Commission reported that while female officers’ greater tendency to manifest feminine and avoid masculine behaviors actually caused them to outperform male officers, the stereotypical expectation of male officers that policing called for

deliver short-term pay-offs to ambitious CEOs.<sup>257</sup> Even if a growing literature documents the long-term disadvantages of these practices, companies focused on the short term may have little incentive to change.

At the same time, the emphasis on individual rather than institutional advancement often crowds out other values<sup>258</sup> and undermines the importance of what women do well. Stereotypically female leadership styles (whether implemented by men or women) are more associated with transformational approaches that take group cohesion into account rather than transactional approaches that focus only on the bottom line, and the management literature finds that such leadership delivers more successful results.<sup>259</sup> Yet these qualities are less rewarded in the competitive environments, such as those in tech and finance, that offer the highest rates of compensation.

Further compounding these results is the fact that women are often less geographically mobile than men and thus more likely to invest in job-specific traits rather than preparation for the next move.<sup>260</sup> And modern workplaces,

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masculine traits and that female officers lacked these traits caused male officers systematically to underrate the female officers' performance.

257. See Dallas, *supra* note 133, at 37–38 n.222 (noting tradeoffs between short-term objectives and long-term effects).

258. HILL & PAINTER, *supra* note 13, at 116. Studies of bankers, who are part of an industry associated with money, indicate that their identity as bankers make them more likely to cheat in research experiments. *Id.* at 115. Women, in contrast, tend to be generally less tolerant of illegal or unethical behavior, though woman managers in institutions in which such behavior is normalized exhibit fewer differences than other workers. See ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS 46 (2007) (indicating that women are less tolerant than men of unscrupulous negotiating tactics such as misrepresenting facts or promising something without planning to keep the promise).

259. See Alice H. Eagly, *Women as Leaders: Leadership Style vs. Leaders' Values and Attitudes*, Harvard Business School Research Symposium, Gender & Work: Challenging Conventional Wisdom (2013), <http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/eagly.pdf> [<https://perma.cc/UCJ9-G53Z>] (describing meta-data analysis showing that female managers are more transformational than male managers); *Do Women Make Better Bosses?*, N.Y. TIMES (Aug. 2, 2009), [http://roomfordebate.blogs.nytimes.com/2009/08/02/do-women-make-better-bosses/?\\_r=0#alice](http://roomfordebate.blogs.nytimes.com/2009/08/02/do-women-make-better-bosses/?_r=0#alice) [<https://perma.cc/Z53P-EXSF>] (illustrating characteristics of female managers that can make them more effective leaders than men); Claire Shipman & Katty Kay, *Women Will Rule Business*, TIME (May 14, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1898024\\_1898023\\_1898078,00.html](http://content.time.com/time/specials/packages/article/0,28804,1898024_1898023_1898078,00.html) [<https://perma.cc/GBU7-MGJF>] (describing the female management style as one of the factors leading to more productive and efficient businesses).

260. See, e.g., Karen S. Lyness & Donna E. Thompson, *Climbing the Corporate Ladder: Do Female and Male Executives Follow the Same Route?*, 85 J. APPLIED PSYCHOL. 86, 88 (2000) (explaining that women may have limited geographic mobility because some employers hold stereotypical views that women have dual-careers or are constrained by familial obligations); Audrey J. Murrell, Irene Hanson Frieze & Josephine E. Olson, *Mobility Strategies and Career Outcomes: A Longitudinal Study of MBAs*, 49 J. VOCATIONAL BEHAV. 324, 324–25 (1996) (noting the prevailing view among new college graduates that career advancement involves movement from company to company).



with their emphasis on landing rising stars rather than on investing in their own, provide greater rewards for those willing to move, both within institutions and to new positions elsewhere.<sup>261</sup>

Overall, these shifts in corporate culture have deeply gendered effects.<sup>262</sup> Qualities such as the emphasis on competition rather than cooperation, individual rather than group interests, and short-term rather than longer term or more holistic aims correspond to well-documented gender disparities.<sup>263</sup> The more sophisticated studies show that the disparities tend to be less about capacity and performance, and more about stereotypical assumptions about leadership.<sup>264</sup> The “tournament” tends to attract those most “willing to take great risk as the company moves up and to lie when things turn bad . . . .”<sup>265</sup> The fact that the characteristics associated with these positions tend to be gendered ones further encourages stereotyped evaluations of employee performance,<sup>266</sup> with reinforcing effects as women become even less likely to apply or to succeed if they are hired.

Antidiscrimination law, in its current incarnation, is ill-equipped to deal with these background business incentives that promote inequality.

### III. Restructuring Antidiscrimination Law

The history of antidiscrimination law shows that it sought to combat not just individual instances of discrimination, but also structural factors that had created white-male-only “good” jobs and segregated “bad” jobs dominated by African Americans, women, or other minorities. In doing so, antidiscrimination law both depended on earlier equality-enhancing

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261. Flory et al., *supra* note 209, at 154–55. Note, for example, that even in low-level positions, the great majority of workers receive evaluations and whether they are able to apply for promotions or move within an organization often depends on those evaluations.

262. *See supra* subpart II(C).

263. *See, e.g., supra* text accompanying note 252.

264. Managers with a more stereotypically female approach, whether they are men or women, often do better than narcissists. *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).

265. Ribstein, *supra* note 8, at 9.

266. *See* BRANSON, *supra* note 238, at 68 (describing how women starting to climb the corporate ladder are actually walking a proverbial tightrope because they must be sufficiently aggressive to excel, but not overly aggressive because they will be perceived as pushy); Bowles et al., *supra* note 238, at 95 (finding that both male and female evaluators penalized women who negotiated for more compensation because “they appeared less nice and more demanding”); *see also* Ben DiPietro, *Survey Roundup: Women Take Step Back in Board Representation*, WALL STREET J. (June 23, 2017), <https://blogs.wsj.com/riskandcompliance/2017/06/23/survey-roundup-women-take-step-back-in-board-representation/> [<https://perma.cc/T9U3-8Y75>] (“A report from executive search firm Heidrick & Struggles found 28% of board seat appointments at Fortune 500 companies in 2016 went to women, down from 30% in 2015.”).

measures, such as unionization,<sup>267</sup> and focused new scrutiny on other practices, such as sexual harassment or qualification tests that had been previously treated as routine workplace practices. In many cases, these practices became harder to justify once subject to scrutiny that showed both disparate impact on the basis of factors such as race and gender *and* the lack of workplace justifications.

In today's economy, courts have similarly viewed the shift toward winner-take-all compensation systems and the negative-sum competitive mindset in management and finance as routine and outside the appropriate ambit of judicial scrutiny in antidiscrimination suits. So long as they do, individual lawsuits like Ellen Pao's cannot address the systemic factors that underlie such cases; her case simply amounts to a claim that Kleiner Perkins should welcome women with sharp elbows alongside the men.<sup>268</sup>

This section looks at the ability of antidiscrimination law to address systemic business practices that have discriminatory effects. First, it shows how existing disparate treatment law is ill-suited to address the interconnections between individual employee evaluations and the shift in business cultures. Second, it considers the degree to which cases like the ones against Microsoft—which use antidiscrimination law to challenge business practices themselves—can be more effective.

This section concludes that where companies adopt competitive evaluation schemes associated with increased executive compensation and gender disparities, and where these systems do not correspond to evidence of increased firm performance, such practices should be subject to greater judicial scrutiny. The form that scrutiny takes would depend on the nature of the individual case, but it would only fit into Title VII through an approach that engages the substantive legitimacy of discriminatory business practices. The conclusion suggests that the most effective approaches combine antidiscrimination efforts with substantive reforms designed to address systemic business practices that have discriminatory effects.

#### A. *The Limited Reach of Current Antidiscrimination Doctrine*

Antidiscrimination scholars correctly observe that the law has failed to keep up as workforces have changed from narrow portals of entry and lockstep career ladders to easier entry into unskilled positions and more subjective and individualized pathways to advancement.<sup>269</sup> As these theorists

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267. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 13–24 (2016) (documenting the decline in union strength).

268. Nitasha Tiku, *Five Uncomfortable Truths About the Ellen Pao Verdict*, VERGE (Apr. 2, 2015), <http://www.theverge.com/2015/4/2/8328115/ellen-pao-kleiner-perkins-venture-capital-verdict> [<https://perma.cc/RB7L-G78R>].

269. See, e.g., Green, *supra* note 42, at 91 (noting changes in the years after Title VII veered away from the “well-defined, hierarchical, bureaucratic structures delineating clear paths for

argue, proving that an employer has treated an individual employee unfairly because of sex discrimination has become increasingly difficult.<sup>270</sup>

Ellen Pao's case provides an example of the limitations of Title VII as a check on the determinations made within such a system when the case is framed solely as one of unequal treatment of an individual woman in accordance with the ordinary norms of a competitive workplace.<sup>271</sup> Her case generated attention to the lack of women in venture capital firms, but Pao's lawsuit took the Kleiner Perkins evaluation system as a given and argued that she was unfairly evaluated in accordance with it. This type of case poses intrinsic limitations: such individual cases do not fundamentally challenge the nature of the competition that underlies the system.

Some scholars argue that Title VII was never intended to deal with either the type of evaluation system a firm uses or the business decisions made under them.<sup>272</sup> A principal part of Pao's case, for example, involved the firm's decision not to sponsor her proposed investment in Twitter in 2007, at the very beginning of the social media era. Kleiner Perkins showed interest in Twitter only when a male employee proposed it in 2010, well after other venture capital firms had gotten in on the early funding rounds.<sup>273</sup> But relying on hindsight to show that a firm passed up what turned out to be an incredibly lucrative investment because of gender bias is intrinsically difficult.

Moreover, disparate treatment is hard to prove without a comparator, and exact comparators are hard to find in individual cases. The prima facie case model for contemporary antidiscrimination law relies principally on comparison evidence demonstrating that an employer treated a plaintiff less favorably than a similar worker from a different group, because of a protected characteristic.<sup>274</sup> Among top level and professional jobs, there may simply be

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advancement within institutions" that characterized workplaces at the beginning of the antidiscrimination efforts); Sturm, *supra* note 18, at 469 (observing that "[e]xclusion increasingly results not from an intentional effort formally to exclude, but rather as a byproduct of ongoing interactions shaped by the structures of day-to-day decisionmaking and workplace relationships").

270. Sturm, *supra* note 18, at 468–69; *see also* Selmi, *supra* note 73, at 780 (pointing out the difficulty in remedying subtle forms of discrimination).

271. Indeed, the *New York Times* referred to Kleiner Perkins, one of Silicon Valley's premier venture capital firms, as "one of those clans where everyone is fighting for power and wealth." David Streitfeld, *Kleiner Perkins Portrays Ellen Pao as Combative and Resentful in Sex Bias Trial*, N.Y. TIMES (Mar. 11, 2015), <https://www.nytimes.com/2015/03/12/technology/kleiner-perkins-portrays-ellen-pao-as-combative-and-resentful-in-sex-bias-trial.html> [https://perma.cc/YBT3-5SHF].

272. Bagenstos, *supra* note 18, at 9 (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").

273. Tiku, *supra* note 268.

274. *See* Franklin, *supra* note 49, at 1317, 1367; Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. (forthcoming 2017); *supra* text accompanying notes 61–72.

no one else in a small unit.<sup>275</sup> Even among middle management positions there may be no one who performs the same duties.<sup>276</sup> In an Equal Pay Act case, a federal trial court observed that:

These are Senior Vice Presidents in charge of different aspects of Defendant's operations; these are not assembly-line workers or customer-service representatives. In the case of such lower-level workers, the goals of the Equal Pay Act can be accomplished due to the fact that these types of workers perform commodity-like work and, therefore, should be paid commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims.<sup>277</sup>

Moreover, in today's workplaces, routine duties have become increasingly mechanized or outsourced, with the remaining employees performing varied and discretionary tasks.<sup>278</sup>

In Pao's case, she complained that her compensation was low because of her failure to be promoted, the way the firm allocated carried interest from its investment fund, and the failure to fully compensate her for the value she delivered.<sup>279</sup> Kleiner Perkins responded that Pao was "treated better than her

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275. See, e.g., *Morgan v. Cty. Comm'n of Lawrence Cty.*, No. 5:14-CV-01823-CLS, 2016 WL 3525357, at \*6 (N.D. Ala. June 20, 2016) (explaining that during the plaintiff's career at an emergency management agency, the "agency was staffed by three persons, holding the positions of Director, Deputy Director, and TVA Planner"); SALLY E. ANDERSON, SPECIAL CONSIDERATIONS FOR SOLE AND SMALL FIRM PRACTITIONERS 1 <http://www.abanet.org/legalservices/lpl/downloads/soleandsmallfirm.pdf> [<https://perma.cc/A5N7-96WB>] ("[N]early 80 percent of lawyers in the United States currently practice in firms of [one to five lawyers].").

276. See, e.g., *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 894 (7th Cir. 2001) (finding that instances identified by the plaintiff in which "male attorneys seemingly received more assistance were cases that were either more complex, or were not contingent fee cases, or took place in Chicago and therefore did not entail the same travel expenses"); *Byrd v. Ronayne*, 61 F.3d 1026, 1032 n.7 (1st Cir. 1995) (holding that the plaintiff was unable to find an apt comparator because she had "not shown that *any other associate—male or female—who failed to conform with the firm's professional standards, had ever been considered for partnership*").

277. *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002); see also *Keener v. Universal Cos.*, 128 F. Supp. 3d 902, 907–08 (M.D.N.C. 2015) (discussing the plaintiff's contention that as a shipping and receiving clerk, she was expected to perform some supervisory duties without appropriate pay, but noting that the comparators identified by the plaintiff did not perform comparable supervisory duties); Eisenberg, *supra* note 15, at 40 (quoting *Georgen-Saad*, 195 F. Supp. 2d at 857).

278. Goldberg, *supra* note 63, at 755–56 (describing the prevalence of assembly-line workplaces in the manufacturing era in comparison with today's more varied assignment of responsibilities).

279. Complaint for Damages at 8, *Pao v. Kleiner Perkins Caufield & Byers LLC*, No. CGC-12-520719 (Cal. Super. Ct. May 10, 2012) [hereinafter *Pao Complaint*].

alleged male peers and was, in fact, paid more during key periods at issue.”<sup>280</sup> Pao’s allegations, however, ultimately depended on, not a snapshot of compensation with male peers at a particular point in time, but rather on the cumulative effect of a series of subjective decisions.

In addition, while stereotyping goes to the heart of Pao’s claims, the way the law on gender-stereotyping discrimination has developed makes claims of unconscious, subjective, or cumulative bias difficult to prove.<sup>281</sup> In the original U.S. Supreme Court case on stereotyping, *Price Waterhouse v. Hopkins*,<sup>282</sup> the plaintiff, Ann Hopkins, was a candidate for partnership at an accounting giant, and she had an outstanding record of obtaining major contracts.<sup>283</sup> In denying her partnership, the partners’ criticism of her included that she cursed, could use a “course at charm school,” and that if she wanted to make partner at a later time, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>284</sup> The Supreme Court observed that “it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course in charm school.’”<sup>285</sup> The Court distinguished language that it deemed gender stereotyping—terms like “macho” and “masculine”—from language it perceived as gender neutral, but unfavorable—such as “overly aggressive” and “unduly harsh.”<sup>286</sup>

Yet, since 1989, employers have become more adept at avoiding references to “charm school” and other explicitly gendered comments.<sup>287</sup> Instead, sex stereotyping more typically involves unconscious biases that may “sneak up” on a decision-maker. Biases “affect perceptions and evaluations of an employee in i[n]numerable encounters that occur well

280. Trial Brief of Def. Kleiner Perkins Caufield & Byers LLC at 10, *Pao v. Kleiner Perkins Caufield & Byers LLC*, No. CGC-12-520719 (Cal. Super. Ct. Feb. 17, 2015) [hereinafter *Kleiner Perkins Trial Brief*].

281. See Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 43 (2016) (“[B]ecause most Americans embrace equality ideals, they discriminate in subtle, obfuscated, and sometimes unconscious ways . . .”); Sturm, *supra* note 18, at 460 (“Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.”).

282. 490 U.S. 228 (1989).

283. *Id.* at 233–34.

284. *Id.* at 235.

285. *Id.* at 256.

286. *Id.* at 235.

287. In the *Pao* case, formal performance reviews did not contain such language, but testimony at trial indicated that one partner told an investigator that Pao had a “female chip on her shoulder,” while another partner said “women should not be invited to a dinner with former Vice President Al Gore because they ‘kill the buzz’”; another partner “joked to a junior partner that she should be ‘flattered’ that a colleague showed up at her hotel room door wearing only a bathrobe.” David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (Mar. 27, 2015), <https://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html> [https://perma.cc/LXQ3-Z9BJ].

before any discrete moment of work-assignment, promotion, or discharge . . . . By the time the manager actually makes such a decision, the die may have already been cast by the earlier biased perceptions.”<sup>288</sup>

Pao’s claims follow the classic scenario: she alleged that the firm discriminated against her through a series of actions that had a cumulative effect,<sup>289</sup> while the jurors ultimately held against her the fact that her performance reviews deteriorated over time such that her termination came as the end result of a long period of difficulties.<sup>290</sup>

Kleiner Perkins effectively used those evaluations against Pao because they established that she had been on notice of the firm’s concerns about her performance and failed to make the necessary adjustments.<sup>291</sup> The evaluations referred to “pushing too hard to establish herself, instead of being collaborative,”<sup>292</sup> being too territorial and untrustworthy, pursuing her own agenda, and not being “a team player.”<sup>293</sup> A central part of Pao’s response, however, was that such behavior was typical of male employees and that the perception that she was not a team player resulted in part from her complaints about the firm’s hostile atmosphere for women. Indeed, one of the jurors most favorable to Pao, who believed that she had been the victim of discrimination, commented that the male junior partners at Kleiner “had those same character flaws that Ellen was cited with,” but they were promoted anyway.<sup>294</sup> In short, Pao’s claim was that she could not get away with the same self-interested, competitive behavior as the men.

Competitive workplaces intrinsically involve a balance between self-promotion that benefits the company (how many top clients did Pao land?) and competitive characteristics that alienate others (Pao’s purported “sharp elbows”). Indeed, *Liar’s Poker* described investment banking houses as celebrating traders’ ability to manipulate others and get away with it.<sup>295</sup> Pao’s claim, presented as an individual case, amounted to an assertion that Kleiner Perkins got the balance wrong. Yet, her case attracted attention because it symbolized the limited presence of women in the venture-capital world. In the context of such a case, Pao, who very much wanted to be in that world,

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288. Bagenstos, *supra* note 18, at 8.

289. Pao’s allegations included the exclusion of women from important meetings, the failure to give her credit for work she had done, the failure to sponsor projects she proposed, and other actions that limited her ability to demonstrate her value to the firm. *See* Pao Complaint, *supra* note 279, at 9, 12.

290. Streitfeld, *supra* note 287.

291. Streitfeld, *supra* note 271.

292. Kleiner Perkins Trial Brief, *supra* note 280, at 3.

293. *Id.* at 6.

294. Streitfeld, *supra* note 271.

295. *See* LEWIS, *supra* note 146, at 215–17 (describing how Michael Lewis “completely reassessed corporate America” in part by exploiting the fact that insider-trading laws applied only to stocks and not bonds).

could not truly represent the women who never applied because they found the entire environment hostile. Nor could Pao present what may well be the most compelling claim against such a system—that the system itself is intrinsically flawed. The next section will explain how antidiscrimination cases can combine challenges to the legitimacy of competitive management systems with claims of disparate gender impact and how they can enhance the impact of antidiscrimination law in the process.

*B. Antidiscrimination Law and a Structural Equality Approach*

As we discussed above, Congress initially adopted Title VII to eliminate discriminatory employment practices based on a structural analysis that identified segregated workplaces not only as a source of racial and gender inequality, but also as an impediment to economic growth. Antidiscrimination law has stalled in the new era because it is not tied to a comparable structural analysis of the new sources of inequality and a commitment to evaluate them on their own terms. Consequently, antidiscrimination law has been unable to address the promotion processes that determine the benefits of the new economy.

This section argues that reaching these gendered business practices requires a new approach: substantively engaging the propriety of those practices and linking them to counterproductive workplace practices *and* gender disparities. The immediate impact of doing so sets up disparate impact cases like the one against Microsoft. But the longer term effect of such an approach, as with the delegitimization of segregated workplaces, may be greater judicial willingness to extend existing legal doctrines to reach such practices.

This section frames the analysis of how to move forward by parsing the elements of disparate impact—first, showing the disparate impact associated with certain business practices. Then, in anticipation of a corporation's defense, this section demonstrates that these practices cannot be justified by business necessity, especially given the wealth of business literature showing that those practices have detrimental effects on companies and their employees. As for the third element of a disparate impact case, this section shows that less discriminatory alternatives exist, and they are ones that comparably serve employers' purposes.

To prove a disparate impact claim, plaintiffs must show that an employer uses a particular employment practice that has an adverse impact on women.<sup>296</sup> Courts have adopted the EEOC test for what constitutes a

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296. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *see also* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658 (1989) (considering disparate impact in the context of racial discrimination); Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789, 1795–96 (2016) (providing the elements of a disparate impact claim).

“sufficiently substantial” disparity:<sup>297</sup> when the selection rate for one group is less than 80% of the selection rate for another group.<sup>298</sup> While the employer may argue that the statistical analysis must trace to the specific employment practice, plaintiffs can use bottom-line statistics—the end results of hiring or promotional practices—if “the elements of a respondent’s decision-making process are not capable of separation for analysis . . . .”<sup>299</sup> Once the plaintiff shows disparate impact, the employer can satisfy its burden by showing a business necessity, “an overriding legitimate, non-[gender-based] business purpose.”<sup>300</sup> Plaintiffs can still succeed if they prove that the employer could have adopted alternative practices that would comparably serve the employer’s purposes without resulting in the same gender disparities.<sup>301</sup>

The conventional practices challenged in disparate impact litigation include height and weight requirements, background checks, and pencil-and-paper tests.<sup>302</sup> Importantly, there is no legal requirement that disparate impact analysis apply only to formal or written policies; a subjective form of assessment can be considered a particular employment practice.<sup>303</sup> Yet, until this Article, completely missing from the discrimination literature is whether the traits that form the basis for selection can themselves be the basis for disparate impact litigation.

The competitive promotional practices we are discussing have been under the radar simply because they look like background business decisions. In an early comparable-worth case brought as a disparate impact claim, *American Federation of State, County, & Municipal Employees, AFL-CIO (AFSCME) v. Washington*,<sup>304</sup> the plaintiffs had difficulty challenging an entire state-selected system of compensation based on market structure.<sup>305</sup>

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297. See Elliot Ko, Note, *Big Enough to Matter: Whether Statistical Significance or Practical Significance Should Be the Test for Title VII Disparate Impact Claims*, 101 MINN. L. REV. 869, 871 (2016) (discussing this test).

298. 29 C.F.R. § 1607.4 (2010).

299. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2012).

300. *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 989 (5th Cir. 1969). This is the paradigmatic statement of a business necessity. See *Selmi*, *supra* note 73, at 711 (noting that “the business necessity language entered the [discrimination] analysis” in *Papermakers*).

301. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012); *Sperino*, *supra* note 296, at 1796.

302. See, e.g., *Dothard v. Rawlinson*, 443 U.S. 321, 324 (1977) (addressing the disparate impact of height and weight requirements); *EEOC v. Freeman*, 778 F.3d 463, 465 (4th Cir. 2015) (discussing the disparate impact caused when the employer required job applicants to submit to background checks); *Briscoe v. City of New Haven*, 654 F.3d 200, 201–02 (2d Cir. 2011) (discussing alleged disparities created by the weighting of oral and written portions of an exam).

303. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

304. 770 F.2d 1401 (9th Cir. 1985).

305. *Id.* at 1406 (“A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by *Dothard* and *Griggs*; such a compensation system . . . does not constitute a single practice that suffices to support a claim under disparate impact theory.”).



Yet, challenging forced-competition and artificial-stacking practices is different from assailing market structures.<sup>306</sup> Within companies, managers are making intentional decisions to implement appraisal systems that value competition and that have a disparate impact on women.<sup>307</sup>

Seniors have filed and settled several class action lawsuits against major corporations, such as Ford and Goodyear, arguing that forced-ranking systems were simply disguises for purposeful age-based discrimination.<sup>308</sup> In the case against Ford, the plaintiffs showed that older workers were so disproportionately placed in the lowest category that Ford faced an “almost impossible” burden in showing “that the forced ranking was job-related and consistent with business necessity.”<sup>309</sup>

The systems of negative-sum competition, such as stack ranking or rank-and-yank, can be shown to have a disparate impact on vulnerable groups.<sup>310</sup> In a Monte Carlo style simulation study with organizations of various sizes, researchers determined that a forced-ranking system selecting for termination would have racially disparate effects. In a small organization, if 10% of the workforce was laid off, the chance of a disparate impact violation would be 5.1%, “and this increases to an 11.8% likelihood of an [adverse impact] flag when 15% of the workforce is laid off.”<sup>311</sup> In addition, a forced-ranking system insulates subjective reasons for an assessment behind the cloak of a numerical value, and the system itself may be used when there is an insufficient number of employees to make a curving process valid.<sup>312</sup> While few comprehensive studies have been undertaken, evidence is emerging that rank-and-yank methods have gendered effects. For example, a 2016 study showed that the largest factor correlating with gaps in women’s

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306. Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 951–52 (2011) (describing how the market has transformed into a business defense for paying women less).

307. See, e.g., Elvira & Graham, *supra* note 189, at 601 (finding that bonus-pay systems produce more gender disparities than systems that give greater weight to base pay).

308. See, e.g., *Write Them Up and Get Them Out: Age Discrimination Through Forced Ranking Systems*, 2 ANN. 2004 ATLA–CLE 1794 (July 2004) (addressing corporate forced-ranking systems).

309. Tom Osborne & Laurie A. McCann, *Forced Ranking and Age-Related Employment Discrimination*, HUM. RTS., Spring 2004, at 6, 7 [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol31\\_2004/spring2004/hr\\_spring04\\_forced.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol31_2004/spring2004/hr_spring04_forced.html) [<https://perma.cc/QCQ6-Z373>].

310. Gary W. Giunetti et al., *Forced Distribution Rating Systems: When Does “Rank and Yank” Lead to Adverse Impact?*, 100 J. APPLIED PSYCHOL. 180, 180, 190 (2015) (implying that diverse organizations would benefit from avoiding pure forced-distribution rating systems).

311. *Id.* at 188.

312. See John Edward Davidson, Note, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA. L. REV. 1605, 1611, 1613 (1995) (“No one asks, and the appraiser does not say, how or why she rated a particular employee’s performance in a particular manner.”).

duration of work in the information–technology industry was whether a firm used rank-and-yank methods.<sup>313</sup>

If employers seek to justify such systems as a business necessity, they should find it difficult. The Civil Rights Act of 1991 puts the burden of proof on the employer to establish this defense by showing that the challenged practice is job-related and “consistent with business necessity.”<sup>314</sup> In the original disparate impact case of *Griggs v. Duke Power*,<sup>315</sup> for example, the Supreme Court held that the requirement of a high school diploma was not “significantly related to successful job performance” for blue-collar workers at a power-generating facility.<sup>316</sup> The EEOC has recently developed a new guidance to more strongly interrogate blanket refusals to hire people with any criminal background.<sup>317</sup>

By contrast, negative-sum management strategies have been treated as neutral. When female and African-American plaintiffs in a 2001 case against Microsoft, *Donaldson v. Microsoft*,<sup>318</sup> challenged its forced ranking system, the court denied class certification, finding that the results of an individualized rating system meant that the class claims were not common.<sup>319</sup> The court also dismissed the disparate impact claims in that suit, finding an absence of statistical evidence supporting the plaintiffs’ theories. In this earlier Microsoft case, the plaintiffs simply were not able to show disparities in compensation or promotion decisions regarding putative class members.<sup>320</sup> Yet, in part, the court prevented that demonstration by accepting Microsoft’s

313. Shuo Yan & Chunmian Ge, Gender Differences in Competition Preference and Work Duration in the IT Industry: LinkedIn Evidence 9 (2016) (unpublished research) (presented at the Thirty-Seventh International Conference on Information Systems, Dublin 2016), <http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1361&context=icis2016> [<https://perma.cc/9H9S-X4MU>] (“[C]hanges of level of competition in the workplace will change the gender gap in the work duration. The removing of ‘rank and yank’ system, which is a highly competitive performance appraisal system, increases female employees’ work duration in the IT industry.”).

314. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

315. 401 U.S. 424 (1971).

316. *Id.* at 426.

317. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 3 (2012) [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [<https://perma.cc/9XZ4-HUWX>] (“The Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs . . . because of their criminal records.”); see, e.g., Press Release, U.S. Equal Emp’t Opportunity Comm’n, Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm> [<https://perma.cc/B5LZ8FFG>] (“[T]he EEOC found reasonable cause to believe that the criminal background check policy formerly used by Pepsi discriminated against African Americans in violation of Title VII of the Civil Rights Act of 1964.”).

318. 205 F.R.D. 558 (W.D. Wash. 2001).

319. *Id.* at 568.

320. *Id.* at 567.

claim that its assessment system was a “meritocracy” akin to a grading curve,<sup>321</sup> and denying the plaintiffs the ability to aggregate their numbers in a class action to supply precisely the proof that the court said was missing. It does not appear that the *Donaldson* plaintiffs challenged the competition itself as a gendered metric of evaluation.

Almost fifteen years later, in *Moussouris v. Microsoft*,<sup>322</sup> the court was initially dismissive of similar claims, holding that the plaintiffs did not explain why a forced curve would systematically undervalue women in the tech professions.<sup>323</sup> Yet, the court allowed the case to proceed after the plaintiffs filed an amended complaint targeting the stack ranking system Microsoft used between 2011 and 2013 as an invalid performance instrument that has gendered effects.<sup>324</sup> The amended pleading pointed out that 80% of the managers who were calibrating their employees’ performance were men—while only 17% of the tech employees whose performances were being rated were women—and also detailed the system’s gender-based pay and promotion effects.<sup>325</sup> In October of 2016, the court denied Microsoft’s second motion to dismiss, holding that the plaintiffs had identified a specific employment practice—the stack ranking system—that had a disparate impact on female tech workers.<sup>326</sup>

The typical employer response to such a claim is that the system can be justified as a “business necessity.”<sup>327</sup> The Microsoft environment, however, does not seem conducive to improving economic performance.<sup>328</sup> Indeed,

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321. *Id.* at 562, 566:

The bi-annual evaluations are conducted on a bell curve, with personnel in similar jobs competing against one another for “grades.” However, the subjectivity inherent in such a review process is tempered by a requirement that employee goals and objectives be mapped out well in advance, in order to allow the employee the opportunity to meet articulated job expectations.

322. No. 2:15-CV-01483, 2016 WL 4472930 (W.D. Wash. Mar. 7, 2016).

323. *Id.* at \*9.

324. Second Amended Class Action Complaint at 5–6, *Moussouris v. Microsoft Corp.*, No. 2:15-CV-01483 (W.D. Wash. Apr. 6, 2016) (“The stack ranking process forces a distribution of performance ratings outcomes (from 1 through 5) regardless of whether there are meaningful performance differences between individual employees within a particular peer group.”).

325. *Id.* at 7.

326. *Moussouris v. Microsoft Corp.*, No. C15-1483JLR, 2016 WL 4472930, at \*13 (W.D. Wash. Oct. 14, 2016).

327. See Christina O’Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2811–12 (2015) (noting that courts have expanded what qualifies as a “business necessity” to satisfy the defense, making it easier for employers to defeat discrimination claims).

328. Examinations of Microsoft, e.g., found behavior similar to what Charness et al., *supra* note 255, found in the lab, with one employee acknowledging that:

“The behavior this engenders, people do everything they can to stay out of the bottom bucket,” one Microsoft engineer said. “People responsible for features will openly sabotage other people’s efforts. One of the most valuable things I learned was to give

*Vanity Fair*, commenting on Microsoft's use of the system challenged in the litigation described above, observed that: "Potential market-busting businesses—such as e-book and smartphone technology—were killed, derailed, or delayed amid bickering and power plays."<sup>329</sup>

As the management literature indicates, these ultracompetitive management systems are bad business practices.<sup>330</sup> And even where these practices may have some effectiveness in selecting lower performing workers for termination in the first year or two, the reliability and validity effects diminish very sharply over time.<sup>331</sup> Moreover, investors and shareholders are beginning to understand the shortcomings of negative-sum competitions, which are often tied to short-term measures of business performance.<sup>332</sup> Larry Fink, the CEO of BlackRock, the world's largest global investment management company, wrote a letter to the CEOs of other leading companies urging a move-away from practices that have led to the maximization of short-term profits at the expense of the long-term health of businesses.<sup>333</sup> And studies repeatedly show that employers can adopt a less discriminatory alternative that could achieve their purposes.<sup>334</sup> Management experts have identified numerous alternative systems that could serve employer goals of effective employee performance in a comparably effective manner to the challenged practices. For example, employers could set achievement goals and role-specific strategies, provide more immediate feedback—both positive and negative—to enhance project performance, and create action plans rather than move to immediate termination.<sup>335</sup> In short, management

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the appearance of being courteous while withholding just enough information from colleagues to ensure they didn't get ahead of me on the rankings."

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].

329. *Id.*

330. For example, Development Dimensions International, Inc. "found that only 39 percent of companies using forced ranking systems found them even moderately effective." Tom Osborn & Laurie McCann, *Forced Ranking and Age-Related Employment Discrimination*, HUM. RTS., Spring 2004, at 6, 10; see also Rapoport, *supra* note 252, at 44 n.2 ("Want people to turn on their colleagues rather than encourage teamwork? Use a 'rank and yank' system that routinely drops the bottom 10% of high achievers off the payroll.").

331. Steven E. Scullen et al., *Forced Distribution Rating Systems and the Improvement of Workforce Potential: A Baseline Simulation*, 58 PERSONNEL PSYCHOL. 1, 20 (2005) ("Annual improvement averaged approximately 16% for the first 2 years, but fell quickly to about 2% in year 6 and 1% in year 10. After year 20, there was no improvement.").

332. Indeed, rank-and-yank has often been associated with business abuses, including Jack Welch's earnings management system and Enron. See MARTIN, *supra* note 135, at 29, 97.

333. Matt Turner, *Here Is the Letter the World's Largest Investor, BlackRock CEO Larry Fink, Just Sent to CEOs Everywhere*, BUS. INSIDER (Feb. 2, 2016), <http://www.businessinsider.com/blackrock-ceo-larry-fink-letter-to-sp-500-ceos-2016-2> [https://perma.cc/A35X-A78H].

334. See *infra* notes 335–36 (discussing less discriminatory alternative business practices).

335. Pawan Alamchandani, *Forced Ranking Performance Appraisal Method: Is It Really Required?*, HR.COM (Jan. 30, 2014), [http://www.hr.com/en/magazines/all\\_articles/forced-ranking-](http://www.hr.com/en/magazines/all_articles/forced-ranking-)

practices that are associated with gender disparities are also bad for business, and consequently, they are (or should be<sup>336</sup>) indefensible under Title VII.

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Disparate impact theory has been limited in its effectiveness for the reasons indicated in Part I. That is, lawsuits have been effective when tied to a determination to root out a discredited practice and ineffective when they seek to extend Title VII without a substantive analysis that links particular practices not just to disparate impact per se but to systemic practices that deserve scrutiny.<sup>337</sup>

A victory for the Microsoft plaintiffs is therefore likely to encourage technical evasions. It is difficult to obtain statistical evidence necessary to prove a disparate impact violation, and companies can ensure that rank-and-yank evaluations do not cross the disparate impact threshold.<sup>338</sup> Alternatively, employers can eliminate the “yank” part of rank-and-yank while otherwise keeping competitive rankings. While courts should find it difficult to hold that a discredited practice meets the business necessity defense, defendants can, nonetheless, more easily defend a newly reconfigured practice that lacks, at least for the time being, the same degree of notoriety or established negative effects.<sup>339</sup> Nonetheless, this Article suggests that business practices that emphasize destructive competition over collaboration (or other forms of competition)—especially when they influence recruitment practices, evaluation and promotion measures, or termination procedures—can be expected to produce similar gender disparities, and like rank-and-yank, they too should be illegal absent a demonstration of business necessity. Of course, simply emphasizing competition does not always produce such disparities

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performance-appraisal-method-is-it\_hr26wbz9.html [https://perma.cc/8NQ6-9F99]; Coren Apicella & Johanna Mollerstrom, *Women Do Like to Compete—Against Themselves*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/opinion/sunday/women-do-like-to-compete-against-themselves.html> [https://perma.cc/48ZV-39F8].

336. Michael Selmi makes the important point that the nature of discrimination has changed, and courts tend to defer to employer justifications, particularly when it comes to routine business practices, even though competitive evaluation systems appear to be discriminatory. Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 947 (2015) (noting that courts give deference to employers by reasoning that they are most competent in determining how to best restructure their business practices). This Article builds on those insights by arguing, in contrast, that substantive engagement with counterproductive business practices that produce gender disparities can—and should—be found illegal.

337. Selmi, *supra* note 73, at 705–06.

338. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257 (2011) (“It is today very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory.”).

339. See O’Connell, *supra* note 327, at 2811–12 (noting that defendants can more easily meet the business necessity defense when they do not consider applicants as unique individuals but instead institute general hiring policies).

nor is it always unjustified.<sup>340</sup> It is the illegitimacy of the underlying practice, coupled with the statistically disparate gender effects, that creates the systemic challenge.

For the approach suggested in this Article to be effective, it requires not just focus on rank-and-yank, but a broader inquiry into the sources of greater inequality. A true structural analysis must simultaneously engage gender disparities and economic inequality. Consequently, this transformative use of antidiscrimination law is not just an extension of existing law—it is fundamentally different in conception from earlier assumptions about Title VII. The analysis goes to the heart of what are, at once, metrics that produce gender inequalities and that are also indefensible as appropriate business practices. Indeed, at times, innovations in governing law prompt social and educational changes much larger than their doctrinal effects.<sup>341</sup> Regardless of whether disparate impact claims succeed in any individual case, they provide a basis for reviving the vision of antidiscrimination law as promoting equality both within and outside of the workplace and as challenging prohibited classifications and systemic economic inequality.

### Conclusion

The management revolution that greatly increased executive compensation and contributed to the financialization of American business has also produced worsening societal inequality—and dramatically exacerbated gender disparities at the top of the American income ladder. The creation of these disparities has been the subject of increasing criticism.<sup>342</sup> New studies demonstrate that companies that have adopted the more competitive and share-focused corporate culture have performed worse than the supposedly bureaucratic business entities of midcentury America.<sup>343</sup>

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340. See, e.g., Stout, *supra* note 12, at 558 (“Of course, some businesses—used car dealerships, hedge funds—may want to attract selfish opportunists, because employees perform tasks that are relatively simple, the desired outcome is certain, and employee performance is easy to observe . . .”).

341. See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1283 (2011) (“Sexual harassment law has changed cultural norms and eliminated many forms of egregious workplace behavior.”); Selmi, *supra* note 73, at 781 (concluding that social support is necessary for the expansion of antidiscrimination doctrine).

342. See, e.g., Lazonick, *supra* note 145, at 858 (“As the U.S. economy struggles to recover from the Great Recession, the erosion of middle-class jobs and the explosion of income inequality have endured long enough to raise serious questions about whether the U.S. economy is beset by deep structural problems.”).

343. See Stout, *supra* note 12, at 534–35, 558 (maintaining that “experts who have surveyed the empirical literature . . . conclude that it provides little or no support for the claim that incentive plans reliably contribute to better corporate performance” and has performed worse than the managerial era in generating returns for investors). In addition, “incentive pay has been statistically linked with opportunistic, unethical, and even illegal executive behavior, including earning manipulations, accounting frauds, and excessive risk-taking.” *Id.* at 534.

Once these practices take hold, they do not stop with slowing growth or counterproductive business models. They also have reinforcing sets of effects on who gains power, how they conduct business, and the consequences for society a whole. As this Article demonstrates, the focus on outsized money and power attracts a select few. These environments encourage competitive practices that favor men over women.

The absence of women in top management, the financial sector, and elsewhere thus serves as a symptom of something more than just the failure of individual women to ascend to the higher paying positions in American society. It is also a symptom of a much more deeply unequal society that affects numerous other groups. After all, the survival-of-the-fittest culture that produced gender disparities at Microsoft, also contributed to the scandals at Enron.<sup>344</sup> And numerous studies find that large salaries and concentration of power breed overconfidence, egotism, hubris, and arrogance.<sup>345</sup>

These factors then touch off a series of consequences with reinforcing effects. The top corporations focus more on earnings reports than investment in new plants, research, or employees. Companies often slash training programs or move operations overseas, even when doing so produces a loss of otherwise needed expertise and the destruction of well-paying middle-class jobs in the United States.<sup>346</sup> Retail companies like Wal-Mart experience pressure to pay their employees little unless forced by a tighter labor market to go beyond these rock-bottom salaries. The same forces contribute to greater corporate and economic instability because the search for the next unicorn encourages often unjustified risk-taking. For example, the incentives to play accounting games decrease the reliability and transparency of American business practices.<sup>347</sup>

It is not a solution to simply add women to the upper echelons of corporations without changing the backdrop template of evaluation. Ellen Pao's claim, after all, is that her self-interested behavior should have been tolerated alongside the men's. And Carly Fiorina became CEO at Hewlett-Packard in large part because she had previously been CEO of a smaller company (Lucent Technologies), the stock of which had soared because of

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344. See, e.g., Lynn Brewer, *Is There a Little Bit of Enron in All of Us?*, J. QUALITY & PARTICIPATION, Spring 2007, at 26, 28 ("Just prior to the review process in April and May, both in 2000 and 2001, [whistle-blowing] reports dropped significantly, and then began to rise again dramatically in June right after reviews were completed." Brewer then notes that "[t]his would suggest that, at least for a time, employees were silenced out of fear—until they realized what an injustice had occurred. Eventually, the more employees were rewarded for the unethical behavior generated for the company, the more the behavior became acceptable.").

345. Paredes, *supra* note 128, at 675, 717–18.

346. See Lazonick, *supra* note 145, at 858 ("From the early 2000s, globalization, characterized by the movement of employment offshore, left all members of the U.S. labor force, even those with advanced educational credentials and substantial work experience, vulnerable to displacement.").

347. See Black & Carbone, *supra* note 117, at 380, 390 n.103, 396–97.

“creative accounting and liberal financing of sales to customers.”<sup>348</sup> Instead, the failure to include women in upper management should be seen as a sign that management tolerates the types of environments that contribute to greater inequality, instability, and efforts to rig the game.<sup>349</sup>

The ultimate reform of the system will require not only inclusion of women, but also greater efforts to include pro-social and institution- (rather than self-) promoting qualities.<sup>350</sup> These qualities include attention to employee morale, creation of collaborative work environments that make employee contributions more than the sum of their parts,<sup>351</sup> longer term horizons, and reciprocal notions of loyalty that tie employers and employees closer together.

Antidiscrimination efforts, which once assumed a more level playing field for white men, were designed to ensure women and minorities access to the “good” jobs in the economy. Today, antidiscrimination efforts that target competitive evaluation systems that discriminate could play a dual role. They could help to ensure fairer systems for everyone. They could also become a vehicle for identifying the counterproductive practices that have made the corporate tournament a zero-sum enterprise.

The doctrinal proposal we make here is intended to reverse the foreground and background of workplace decisions. For too long, antidiscrimination lawsuits have focused on individual instances of unequal treatment that have taken place against a backdrop of negative-sum workplace competitions where merit is measured by short-term successes in intensely competitive environments. One example of this is the stacked ranking system challenged in *Moussouris* for its gendered effects. Our project is broader—we hope to encourage courts to embrace a commitment to equality that will inform the interpretation of antidiscrimination law in ways that can withstand the coming era of a conservative Supreme Court.

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348. KHURANA, *supra* note 140, at 109.

349. See SCANDALOUS ECONOMICS, *supra* note 19, at 26 (“[I]n the United States women accounted for only about 18 percent of corporate officers in the finance and insurance industries in 2008, and for 7.3 percent of chief financial officers in Fortune 500 companies.” (citations omitted)); June Carbone & Naomi Cahn, *Unequal Terms: Gender, Power, and the Recreation of Hierarchy*, 69 *STUD. L. POL. & SOC’Y (SPECIAL ISSUE)* 189, 197, 208 (2016) (“In 2012, women held only a little over 14% of the executive officer positions in *Fortune* 500 companies, and more than 25% of these companies had no female executive officers.” (footnote omitted)).

350. See Eagly, *supra* note 259, at 8–9 (indicating that transformational leadership styles associated with women may also work better for men).

351. See, e.g., Stout, *supra* note 12, at 560 (“Experimental tests of compensation arrangements that rely on employee trust and employer trustworthiness . . . show that they can be more effective than ex ante incentive contracts at inducing employee effort in repeated interactions.”); Eagly, *supra* note 259, at 8 (“There are . . . multiple indications that women, compared with men, enact their leader roles with a view to producing outcomes that can be described as more compassionate, benevolent, universalistic, and ethical, thus promoting the public good.”).



Antidiscrimination law historically had two components: a moral one—discrimination is wrong—and a structural one that sought to promote equality for workers collectively through efforts to keep in place the factors supporting good jobs. The legal and economic infrastructure of good jobs that characterized the mid-twentieth century is gone. For antidiscrimination law to serve its original purposes, society must once again create a way for equality efforts and antidiscrimination law to operate in tandem. This Article offers a beginning to that effort.