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# Feminism and the Tournament

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# Texas Law Review Online

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## Response

### Feminism and the Tournament

Jessica A. Clarke<sup>\*</sup>

#### Introduction

Naomi Bishop, the protagonist of the 2016 film *Equity*, is the rare “she-wolf of Wall Street.”<sup>1</sup> At the beginning of the film, Bishop appears on a panel at an alumni event. She explains her career choices to the young women in the audience as follows:

I like money. I do. I like numbers. I like negotiating. I love a challenge. Turning a no into a yes. But I really do like money. I like knowing that I have it. I grew up in a house where there was never enough. I was raised by a single mom with four kids. I took my first job on Wall Street so I could put my little brothers through college. But I am not going to sit here and tell you that I only do what I do to take care of other people, because it is okay to do it for ourselves. For how it makes us feel. Secure? Yeah. Powerful? Absolutely. I am so glad that it’s finally acceptable for women to talk about ambition openly. But don’t let money be a dirty word. We can like that too.<sup>2</sup>

The movie portrays its female characters as driven and disciplined, but not any more scrupulous than the men. In *Equity*’s vision of Wall Street, the main difference between male and female bankers is the impossible standard that the women are held to. Bishop learns early in the film that she has hit the glass ceiling, with the only explanation being “the perception”

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1. Peter Travers, ‘*Equity*’ Review: *The She-Wolf of Wall Street*, ROLLING STONE (July 27, 2016) <http://www.rollingstone.com/movies/reviews/equity-review-w430932> [<https://perma.cc/98M9-2W45>].

2. *EQUITY* (Sony Pictures Classics 2016).

that she “rubbed some people the wrong way.”<sup>3</sup> The screenwriters heard many versions of this story when doing research for the film.<sup>4</sup> Female executives in Silicon Valley tell similar stories.<sup>5</sup>

*Gender and the Tournament*, by Naomi Cahn, June Carbone, and Nancy Levit, offers a new account of the glass ceiling, connecting the phenomenon with shoddy corporate governance and rising income inequality in general.<sup>6</sup> The Article criticizes the winner-take-all tournament model for corporate advancement that has taken hold on Wall Street and in Silicon Valley. This tournament resembles the sales competition from David Mamet’s *Glengarry Glen Ross*: “First prize is a Cadillac Eldorado. Anybody wanna see second prize? Second prize is a set of steak knives. Third prize is, you’re fired.”<sup>7</sup>

*Gender and the Tournament* argues that this model of advancement is “intrinsically gendered.”<sup>8</sup> It privileges traits traditionally associated with men, such as aggressiveness, overconfidence, and narcissism.<sup>9</sup> This leadership mold not only disadvantages women, it also increases income inequality. The winners keep winning, widening the gulf between the one percent and everyone else.<sup>10</sup> And the tournament is bad for the economy as a whole—encouraging employees to promote their own careers rather than the good of the business.<sup>11</sup> It incentivizes short-term gains at the expense of long-term growth.<sup>12</sup> *Gender and the Tournament* advocates for the use of Title VII’s disparate impact theory to challenge tournament-style management practices that serve no business function and weed out women.<sup>13</sup> Professors Cahn, Carbone, and Levit’s argument is compelling and insightful, and their Article makes a valuable contribution to Title VII scholarship.

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3. *Id.* She was also told, “It’s just not your year.” *Id.*

4. Laura Jacobs, *The Women of Wall Street: How Two Female Producers Got the Equity to Make Equity*, VANITY FAIR (July 14, 2016) <http://www.vanityfair.com/hollywood/2016/07/equity-women-wall-street-movie> [perma.cc/AT3W-LK92] (reporting that the producers and screenwriter stated that “the one story they heard over and over again was how women get to a certain level on Wall Street, then are slowly (or not so slowly) pushed out”).

5. Trae Vassalo et al., ELEPHANT IN THE VALLEY, <https://www.elephantinthevalley.com/> [https://perma.cc/28CA-8UUD] (reporting the results of an informal survey taken in 2015 of 210 women in leadership roles in technology).

6. 96 TEXAS L. REV. 425, 425 (2017).

7. *Glengarry Glen Ross* (New Line Cinema 1992).

8. Cahn et al., *supra* note 6, at 425.

9. *Id.* at 465–67.

10. *Id.* at 455.

11. *Id.* at 454.

12. *Id.* at 450.

13. *Id.* at 478.

This Response asks some preliminary questions about the risks and rewards of *Gender and the Tournament*'s project for feminists.<sup>14</sup> It concludes that feminists should take seriously the Article's call for a reinvigoration of disparate impact law—particularly considering the severe limitations of other Title VII theories in promoting sex equality in the workplace. *Gender and the Tournament*'s purpose, however, is not just to propose a legal theory.<sup>15</sup> It also asks a broader audience to think more critically about the connections between destructive competition, growing income inequality, and women's disadvantage in the workforce. This project may have rewards for feminists in linking sex equality with progressive economic causes. It may complement work describing the ways the corporate-tournament model perpetuates racial and other forms of inequality.<sup>16</sup>

But *Gender and the Tournament* also poses risks for feminists. This Response identifies two. First, the Article's critique of the new economy's tournament mentality may lack appeal for those men and women who love the competition and cannot envision a satisfactory way to restructure the labor market. Second, the argument that toxic competition is intrinsically gendered might be mistaken for the one that women are intrinsically uninterested in (and no good at) competition. These are the very stereotypes that justify women's lack of representation in high-earning occupations. *Gender and the Tournament*'s argument could inadvertently backfire for those women who, like Naomi Bishop, want to compete in the tournament but find their efforts undermined by double standards. This Response therefore urges feminists not to give up on challenging the double standards, double binds, and sex stereotypes that confront ambitious women, in addition to the new legal strategies suggested by *Gender and the Tournament*.

## I. Potential Rewards

*Gender and the Tournament* joins a growing chorus of legal scholars and social scientists frustrated by the ineffectiveness of Title VII in

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14. By feminist, I mean a project that seeks to advance sex equality. There are a wide variety of feminist legal theories. See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). But for my purposes, a simple definition will suffice.

15. Cahn et al., *supra* note 6, at 485 (discussing how “innovations in governing law prompt social and educational changes much larger than their doctrinal effects”).

16. See, e.g., *id.* at 481–82 (discussing how certain corporate ranking systems may have racially disparate effects); David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 61 (1998) (arguing for legal reform to give employers incentives to reduce racial inequality by “restructuring compensation, job assignments, and career pathways to provide equal opportunities for professional achievement to all employees”).

accomplishing social change.<sup>17</sup> The Article highlights an important nuance: since 1990, the pay gap between men and women has increased the most at the upper end of the economy.<sup>18</sup> While CEO compensation has increased almost 1,000% since the 1970s, women are only four percent of CEOs of Fortune 500 companies.<sup>19</sup> In lower wage jobs, men's wages are leveling down to come closer to women's because of the decline in traditionally male manufacturing jobs.<sup>20</sup> The point is not to disregard the persistence of discrimination against women at the bottom end of the income spectrum but to inquire into why the disparities at the top are so stark and what might be done about it.<sup>21</sup>

Title VII allows for two main types of sex discrimination claims: disparate treatment and disparate impact.<sup>22</sup> Disparate treatment claims allege that a worker was treated differently because of his or her sex.<sup>23</sup> Disparate impact claims allege that an employer practice, such as a promotional test, screens out a disproportionate percentage of women and is not justified by a business necessity.<sup>24</sup> Disparate treatment claims require a showing of discriminatory motive, while disparate impact claims do not.<sup>25</sup> Disparate treatment claims predominate in Title VII litigation, while disparate impact claims are quite rare.<sup>26</sup> Almost all disparate treatment claims are brought by a single plaintiff.<sup>27</sup> This is unfortunate because there is success in numbers. Plaintiffs do better in cases alleging systemic patterns.<sup>28</sup>

Individual disparate treatment claims have severe limitations. As *Gender and the Tournament* highlights, some courts have narrowly construed the doctrine to require that every plaintiff produce a

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17. ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 269 (2017); LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 216 (2016); TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 151 (2017); SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 177 (2017).

18. Cahn et al., *supra* note 6, at 455.

19. *Id.* at 456.

20. *Id.* at 455.

21. These authors cannot be accused of inattention to class, a topic they have written on extensively elsewhere. See, e.g., June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 871 (2013).

22. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

23. *Id.*

24. Men might bring these claims too. See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004).

25. *Teamsters*, 431 U.S. at 335 n.15.

26. BERREY, *supra* note 17, at 54, 47 (in a study of 1,788 cases from 1988 to 2003, finding that only four percent of cases involved claims of disparate impact).

27. *Id.* at 58 (finding that ninety-three percent of disparate treatment cases were brought by a single individual).

28. *Id.* at 270.

“comparator”: meaning, for example, that if a woman is claiming sex discrimination, she must point to a man in a comparable job who received preferential treatment.<sup>29</sup> This type of evidence is difficult to find in the many workplaces in which every employee serves a unique function, and no two jobs are easily comparable.<sup>30</sup>

There are other limitations as well. Many employers are savvy enough not to admit to bias.<sup>31</sup> Even when they do, courts “personaliz[e]” discrimination, characterizing it as the actions of rogue employees for which the employer should not be penalized.<sup>32</sup> In litigation, individual cases become referenda on the plaintiff’s job performance, not interrogations of sexism.<sup>33</sup> Employers have every incentive to vilify plaintiffs—scrutinizing their job performances and characterizing them as malingering.<sup>34</sup> Juries accept the story that plaintiffs are villains because it is consistent with their deeply-held beliefs about the meritocracy of the American economy.<sup>35</sup> Race and sex stereotypes taint the judicial process.<sup>36</sup> Judges defer to “symbolic” compliance with civil rights law, letting employers off the hook for having nondiscrimination policies, even if those policies are ineffective.<sup>37</sup> Federal courts have invented a number of special, complex doctrines to dismiss employment discrimination cases at summary judgment.<sup>38</sup> In light of the bruising nature of litigation for plaintiffs, the poor odds of success, and the fact that recoveries are generally modest, women have little incentive to sue in the first place.<sup>39</sup> When plaintiffs do prevail, they typically agree to confidential settlements, blunting the potential for their lawsuits to bring about broader changes to the workplace.<sup>40</sup>

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29. Cahn et al., *supra* note 6, at 439 (citing Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745–46 (2011)).

30. *Id.* at 439–40, 475. The need for comparator evidence should not be overstated. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1349–50 (2008) (arguing that “the trend in Title VII law is away from courts looking for comparator evidence,” and pointing to examples in the sex-stereotyping case law).

31. Cahn et al., *supra* note 6, at 476; *but see* BERREY, *supra* note 17, at xiii (arguing that overt biases remain drivers of workplace inequality).

32. GREEN, *supra* note 17, at 48.

33. BERREY, *supra* note 17, at 192–95.

34. *Id.*

35. Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1304–11 (2012).

36. BERREY, *supra* note 17, at 229–43.

37. EDELMAN, *supra* note 17, at 168–215 (offering empirical evidence of this phenomenon, with attention to individual disparate treatment cases).

38. One book devotes four chapters to these doctrines, arguing they are not supported by Title VII’s text or purpose. SPERINO & THOMAS, *supra* note 17, at 15–123.

39. BERREY, *supra* note 17, at 19.

40. *Id.*

*Gender and the Tournament* argues that disparate impact law might have more promise. It draws on Mary Anne Case's work advocating for a new type of stereotyping claim: one that "question[s] the stereotypical gendered characteristics of the job rather than of individual applicants for it."<sup>41</sup> Case offered the example of policing. Selection processes for many police forces have focused on traditionally masculine qualities—like upper-body strength and aggressiveness.<sup>42</sup> These processes not only tend to exclude women, but also produce poor police forces by underestimating the value of qualities that can de-escalate conflicts—like interpersonal and communication skills.<sup>43</sup>

*Gender and the Tournament* applies this framework to industries like finance and technology. It argues that selection and promotion processes that focus on traditionally masculine leadership traits—greed, narcissism, and ruthlessness—are not only likely to exclude women, but also lead to destructive forms of competition that are bad for business.<sup>44</sup> It offers the example of ongoing litigation in *Moussouris v. Microsoft Corporation*, a case challenging Microsoft's "stack ranking" system that graded employees on a mandatory curve.<sup>45</sup> The plaintiffs alleged that stack ranking disproportionately harmed female engineers while not serving any legitimate business interest.<sup>46</sup> After the case was brought, Microsoft abandoned stack ranking.<sup>47</sup>

*Gender and the Tournament's* critique of the business utility of practices like stack ranking is useful as a legal argument. Ranking systems resemble the sorts of employment tests that yield easily understandable data and have traditionally lead to successful disparate impact claims.<sup>48</sup> Moreover, one reason courts have curtailed disparate impact doctrine is that judges are reticent to disrupt routine and established business practices.<sup>49</sup> This is why disparate impact challenges to "routine work hours, most leave policies, and mandatory overtime" have failed.<sup>50</sup> *Gender and the Tournament* demonstrates that some practices that disadvantage women are

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41. 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, 86 (1995).

42. *Id.* at 88–94.

43. *Id.*

44. Cahn et al., *supra* note 6, at 483.

45. *Id.* at 427.

46. First Amended Class Action Complaint at 5–6, *Moussouris v. Microsoft Corp.*, No. 15-cv-01483-JLR (W.D. Wash. Oct. 27, 2015), [http://microsoftgendercase.com/wp-content/uploads/microsoft\\_amended\\_complaint.pdf](http://microsoftgendercase.com/wp-content/uploads/microsoft_amended_complaint.pdf) [<https://perma.cc/X9G9-YVAW>].

47. Cahn et al., *supra* note 6, at 427.

48. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 716 (2006).

49. *Id.* at 751.

50. *Id.*



aberrant, harsh, and inefficient. It thus severs the presumed link between gender inequality and efficiency.

On a political level, disparate impact is, in many ways, a beautiful argument. Much resistance to civil rights law stems from zero-sum thinking—the idea that the inclusion of women comes at the expense of men. But sometimes, women are the proverbial miner’s canaries; their distress signals that the air in the mine is poisonous for everyone.<sup>51</sup> That stack ranking hurt women was a signal that it was bad for all employees and the business: harming productivity, destroying teamwork, and encouraging employees to undermine one another. Remedies for disparate impact violations emphasize injunctive relief to end the offending practice rather than individual monetary awards.<sup>52</sup> Thus, disparate impact law can benefit all workers by putting an end to odious practices. Because it has no intent requirement, an allegation of disparate impact may not sound like an accusation of misogyny. It may therefore be less likely to put the accused on the defensive and be more conducive to a problem-solving mindset.<sup>53</sup> Even without litigation, evidence that systems like stack ranking harm diversity efforts and are generally poor management practices may prompt corporate change from within.

## II. Potential Risks

While *Gender and the Tournament*’s disparate impact argument holds potential for advancing sex equality, its critique of the corporate tournament also holds peril. It risks being misunderstood as linking feminism with critiques of all forms of competition. It could have the unintended consequence of backfiring for women who want to compete on the same terms as men.

### A. *Can Feminists Hold Tournaments?*

For feminists, there’s a political risk to calling toxic competition in the new economy “intrinsically gendered.” By “gendered,” the authors seem to mean masculine, not that the competitors are always men.<sup>54</sup> The authors are not offering an essentialist concept of sex. Women can be masculine too.<sup>55</sup> Nor are they offering an essentialist concept of gender. *Gender and the Tournament* takes aim at a particular type of destructive machismo prized in

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51. Cf. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 274–83 (2002).

52. See generally Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1391 (2017).

53. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 484–89 (2001).

54. Cahn et al., *supra* note 6, at 431 n.25.

55. *Id.* at 486–87 (criticizing former Hewlett Packard CEO Carly Fiorina).

the new economy.<sup>56</sup> It does not argue that the meanings of femininity and masculinity are fixed or that femininity is necessarily superior to masculinity. As all viewers of reality television know—destructive competition can be culturally coded as feminine as well as masculine.<sup>57</sup>

If the Article might be critiqued for offering a reductive vision of anything, it is competition. While the authors are most critical of “negative-sum” practices like stack ranking and “winner-take-all” systems for executive compensation, they also criticize pressure to work longer hours, the external market for executives, increasing variability in compensation, stock options, short-term targets, tying pay to share value, merit-based bonuses, performance pay, monetary incentives, and subjective evaluations.<sup>58</sup> It is a strength of the Article that it offers such a detailed depiction of competition in the new economy, but also a weakness, as the Article might be misinterpreted as disparaging all forms of workplace competition.<sup>59</sup> Disparate impact law generally requires that plaintiffs point to the specific employment practices causing the adverse impact on women.<sup>60</sup> What aspects of the tournament are toxic? What aspects are gendered? In the workplace, some competitive structures may give employees the ability to set expectations and work toward goals.<sup>61</sup> Title VII even provides a defense to disparate impact liability for merit or production-based compensation schemes.<sup>62</sup>

On a political level, this project risks linking feminism with critiques of competition writ large. Another obvious lesson from reality television is that Americans love competition, especially the winner-take-all variety.<sup>63</sup>

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56. *Id.* at 448–55.

57. *See, e.g.*, *MEAN GIRLS* (Paramount Pictures 2004) (depicting stereotypical forms of feminine competition).

58. Cahn et al., *supra* note 6, at 448–54. The article argues, for example, that both reductionist measures for physician compensation (i.e., based on procedures billed) and subjective ones lead to gender disparities. *Id.* at 451 n.134.

59. *But see id.* at 480 n.340 (noting that there may be some types of businesses in which an emphasis on selfish competition is justified).

60. *See, e.g.*, *Martin v. Coinmach Corp.*, No. 15-CV-8137 (AJN)(SN), 2016 WL 6996182, at \*4 (S.D.N.Y. Nov. 29, 2016) (holding that, even though there is an exception in Title VII for employment practices that cannot be separated for analysis, it did not apply to the various components of that employer’s compensation system).

61. Economists have long made arguments about the efficiency of tournament structures in employee compensation. *See, e.g.*, Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981).

62. *Compare* *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 876–77 (7th Cir. 2012) (interpreting Section 703(h)’s exception for bona fide merit or production systems to bar disparate impact challenge to a bonus scheme for securities brokers based on objective production targets), *with* *Guardians Ass’n of N.Y. City Police Dep’t, Inc. v. Civil Serv. Comm’n*, 633 F.2d 232, 253 (2d Cir. 1980) (holding that a merit system is not bona fide if it “does not measure what it purports to measure” because it is not job-related).

63. *See, e.g.*, *Survivor* (CBS 2000 to present); *cf.* Eyer, *supra* note 36, at 1304 (discussing the American commitment to the ideology of meritocracy). My argument is not that there is

Many people will be skeptical of a political project that seeks to abolish a wide swath of competitive practices. Critics will ask, can feminists still hold tournaments after this critique? What would a feminist tournament look like? Would there be winners and losers or just awards for participation?

Of course, there must be some middle ground between participation awards and the Hunger Games of the new economy.<sup>64</sup> The authors seem to have an alternative model of the workplace in mind: one from mid-century, in which employees stayed with the same employer for their entire careers.<sup>65</sup> This system created incentives for corporations to invest in their people and vice versa.<sup>66</sup> Careers progressed along established ladders until retirement.<sup>67</sup> But the old economy was hardly feminist. As the authors recognize, the model only worked for a segment of white men.<sup>68</sup> Whether it would work in the information age, in which many workers value their mobility, is another debate.<sup>69</sup>

For *Gender and the Tournament's* project to persuade as cultural criticism, it requires a new vision of competition in the workplace that is both plausible and equitable. The project suggests there is promise in approaches to leadership that are more “[s]tereotypically female” in “tak[ing] group cohesion into account” rather than maintaining exclusive “focus . . . on the bottom line.”<sup>70</sup> Are there virtues in “stereotypical male” leadership approaches as well? How might we restructure employment opportunities to feature the best of both, while not confining any particular men or women to either stereotype?

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something inherent in American culture that dictates a preference for competition. The competitive structure of the U.S. labor market likely shapes Americans' hopes and dreams. But it does not follow that those preferences can easily be changed by restructuring labor markets.

64. See generally SUZANNE COLLINS, *THE HUNGER GAMES* (2008) (dystopian young adult novel about teenagers fighting to the death in a televised tournament). Another analogy might be a “game of thrones.” See *Game of Thrones: You Win or You Die* (HBO television broadcast May 9, 2011) (fantasy drama about dynastic conflict for control of a fictional continent, in which a lead female character explains, “When you play the game of thrones, you win or you die.”).

65. Cahn et al., *supra* note 6, at 447–48; see also *id.* at 487 (proposing “longer term horizons” and “reciprocal notions of loyalty” between employers and employees).

66. *Id.* at 447–48.

67. *Id.* at 445.

68. *Id.* at 447–48 n.109.

69. See, e.g., ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 9 (2013) (discussing empirical support for Nobel Laureate Kenneth Arrow's theory that “ideas travel with workers as they move between companies, thereby spreading knowledge and strengthening economies”). Moreover, problems like overwork cannot be addressed by discrimination law alone; labor standards and tax incentives pose barriers to change. See Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131 (Judy Fudge & Rosemary Owens eds., 2006).

70. Cahn et al., *supra* note 6, at 471.

B. *What About Alpha Females?*

*Gender and the Tournament* attacks the ways that jobs are gendered. But people are gendered too. Women (and men) are unfairly stereotyped.<sup>71</sup> Another risk of re-envisioning sex discrimination law to critique the tournament is that it offers no assistance to those women who want to compete in stereotypically masculine ways, but are held to a different set of rules. In doing so, it runs the risk of being misunderstood as a project that associates women with the very stereotypically female traits that are used to justify their exclusion from workplace opportunities.

Women's underrepresentation in leadership has long been explained as a result of women's own choices to turn away from workplace ambition and focus instead on domesticity, social relationships, and cooperation.<sup>72</sup> As Vicki Schultz has argued, this "lack of interest" argument presumes that workers form their preferences outside of the labor market, due to causes such as biology and early-childhood socialization.<sup>73</sup> Courts accept the "lack of interest" argument to absolve employers of responsibility for sex-segregated and sex-stratified workforces.<sup>74</sup> But empirical research demonstrates workers' preferences are not fixed at birth or in childhood; rather, they change in response to experiences and opportunities in the labor market.<sup>75</sup> For example, women who see little opportunity for advancement in a job tend to lower their sights and change their aspirations.<sup>76</sup> Men who imagine that sex segregation is natural "adopt proprietary attitudes toward 'their' jobs."<sup>77</sup> These men may harass female intruders to undermine their success, which then justifies the belief that women were not capable in the

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71. See, e.g., Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1093–96 (2017) (discussing six decades of research on stereotypes and biases in the workplace); Williams & Bornstein, *supra* note 30, at 1326–35 (discussing sex stereotypes affecting working mothers and fathers).

72. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1800–04 (1990) (analyzing Title VII sex discrimination cases in which employers raised a "lack of interest" argument to explain women's absence from high-pressure white-collar occupations). The "lack of interest" argument continues to influence judicial opinions. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357 (2011) (holding that a Title VII class-action on behalf of female Wal-Mart employees nationwide lacked common questions because, among other reasons, "[s]ome managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics").

73. Schultz, *supra* note 72, at 1816–24.

74. *Id.*

75. *Id.* at 1816–39 (discussing empirical evidence from large-scale quantitative studies of women's changing occupations and career preferences, as well as qualitative research on female Marines and women employed in blue-collar trades).

76. *Id.* at 1827–32 (discussing, among other works, ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977)).

77. *Id.* at 1832.

first place.<sup>78</sup> Women may be denied the mentoring, networking, sponsorship, and support opportunities that enabled the success of their male colleagues.<sup>79</sup> These practices deter women from seeking high-level jobs, lending credence to the belief that women were never interested in those jobs anyway.<sup>80</sup>

*Gender and the Tournament* offers evidence to support Schultz's account of the ways in which employers shape workers' preferences in high-end occupations in the new economy. It argues that women's underrepresentation results from a series of "cascade effects."<sup>81</sup> Organizations may explicitly define leadership positions "in stereotypical male terms" that discourage women from applying.<sup>82</sup> By characterizing positions as hyper-competitive, employers "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>83</sup> In industries that require rule-breaking and risk-taking, women are more likely than men to be penalized for those very behaviors.<sup>84</sup> Realizing that the game is "heads I win, tails you lose," women do not play.<sup>85</sup> This account could be helpful, not just to plaintiffs bringing disparate impact claims, but also to those crafting systemic disparate treatment challenges to workplaces with stark patterns of sex segregation.<sup>86</sup> It might also be a starting point in efforts to explain why members of certain racial groups are excluded from opportunities in the technology industry and in examining the complicated intersections between race- and sex-based marginalization.<sup>87</sup>

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78. *Id.* at 1833–35.

79. DEBORAH RHODE, *WOMEN AND LEADERSHIP* 64–65 (2016) (discussing evidence of the "old boy's network" and emphasizing that "[d]ifferences across race and ethnicity can compound the problem").

80. Schultz, *supra* note 72, at 1836–39.

81. Cahn et al., *supra* note 6, at 465.

82. *Id.*

83. *Id.* at 464.

84. *Id.* at 469.

85. *Id.* at 470.

86. On a systemic disparate treatment theory, plaintiffs may use statistical analysis of an employer's workforce to argue that the employer engaged in a "pattern or practice" of intentional discrimination. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336–39 (1977). Unlike a disparate impact claim, this theory does not require that the plaintiffs point to any particular employer policy. See GREEN, *supra* note 17, at 153–55 (discussing advantages of systemic disparate treatment claims). However, some research suggests plaintiffs have more success when they bring both systemic disparate treatment and disparate impact claims. See Selmi, *supra* note 49, at 735, 740 (analyzing 301 reported federal court decisions). Systemic disparate treatment claims are more likely to succeed when plaintiffs are able to "craft a story, a narrative, that explains how stereotyping has, in fact, affected the defendants' workplace." Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 505–07 (2011). In this regard, *Gender and the Tournament* may be helpful to advocates in thinking through the narratives that might apply to particular workplaces.

87. See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *DIVERSITY IN HIGH TECH 2* (May 2016), <https://www.eeoc.gov/eeoc/statistics/reports/hightech/upload/diversity-in->

But *Gender and the Tournament* also offers other explanations for the lack of women at the top of the new economy. Primarily, it argues that the new economy prizes “narcissistic traits” in leaders, perhaps even psychopathy.<sup>88</sup> This disadvantages women, because “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.”<sup>89</sup> The authors point to social science evidence showing population-level sex differences with respect to narcissistic traits.<sup>90</sup> But *Gender and the Tournament* does not tell a story to explain this particular sex difference.<sup>91</sup>

Instead, *Gender and the Tournament* emphasizes that it makes no business sense to promote narcissists. At this point, however, it is not clear what normative work the sex discrimination argument can do.<sup>92</sup> Of course there is something wrong with a competitive mindset in which the winners believe they are better types of humans than the losers.<sup>93</sup> If the basic moral and business cases against this leadership model have failed to convince, it seems unlikely that the disparate impact one will do the trick.<sup>94</sup>

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high-tech-report.pdf [https://perma.cc/PL85-5EYT] (reporting data on the lack of representation of African American and Hispanic workers in the technology sector, particularly in executive roles).

88. Cahn et al., *supra* note 6, at 466–67 & 467 n.234.

89. *Id.* at 466–67. The Article also argues that men are “identified with” these traits, which could be a claim about stereotypes rather than one about sex differences. *Id.* at 466.

90. *Id.* (discussing Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-analytic Review*, 141 PSYCHOL. BULL. 261, 264 (2015), <http://dx.doi.org/10.1037/a0038231> [https://perma.cc/59ZV-925X]).

91. The research it relies on, however, theorizes a complicated explanation based in the dynamic interactions of labor markets, biology, and socialization. See Grijalva et al., *supra* note 90, at 263; *id.* at 283. Part of the story may be that women are less narcissistic because they are more likely to be penalized for it, while men are more likely to be rewarded. *Id.* at 263–64.

92. Courts may refuse to question the business necessity of a qualification standard if they are persuaded that the disparity is explained by women’s own choices not to pursue money, status, and authority. In disparate impact cases, courts justify physical selection procedures that have an indisputable disparate impact on women on the ground that women could pass those tests only if they trained hard enough. Yiyang Wu, *Scaling the Wall and Running the Mile: The Role of Physical-Selection Procedures in the Disparate Impact Narrative*, 160 U. PA. L. REV. 1195, 1216 (2012) (discussing this “failure to train” reasoning).

93. This Essay focuses on the risks to feminism in linking gender to the critique of the tournament. But there is a risk that the critique of the tournament may suffer from an alliance with feminism as well. See, e.g., Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1243–45 (2011) (discussing how framing a policy as a solution to discrimination can result in “identity politics” backlash and polarization).

94. Disparate impact theory can be a hard sell in general. See, e.g., Selmi, *supra* note 49, at 782 (explaining that “disparate impact” appears to “redefine our concept of discrimination to focus on unequal results,” but “[a]s we know from our lengthy battle over affirmative action, there is no widespread public support for defining equality or discrimination in terms of results or achievements”). But see Zatz, *supra* note 52, at 1359 (arguing that disparate impact law ensures that an employee’s opportunities are not unfairly limited by her race or gender).

There are other reasons to be skeptical of the upside of this legal argument. The authors do not explain how plaintiffs in a disparate impact case might challenge hiring criteria such as “energy, dominance, self-confidence, and charisma.”<sup>95</sup> Such criteria are likely to be listed among many others as part of a subjective standard for choosing executives. While courts have held that subjective employment practices may be challenged through disparate impact law,<sup>96</sup> so few cases have succeeded on this theory that one empirical study described the litigation risk it poses as “vanishingly small.”<sup>97</sup> Moreover, “failure to hire” claims are particularly rare, due in part to the difficulty of finding accurate data about the applicant pool in the relevant labor market.<sup>98</sup> The higher up the job, the smaller the qualified labor market and the less likely that a plaintiff will be able to find an adequate sample size to support a disparate impact claim.<sup>99</sup> Additionally, courts have traditionally shown deference to subjective selection processes in upper level jobs.<sup>100</sup> One reason is their reluctance to intervene in business decisions that they consider beyond their ken.<sup>101</sup> Another is the concern that employers will respond by implementing hiring quotas.<sup>102</sup>

As a general matter, disparate impact arguments carry the risk of perpetuating stereotypes by presenting statistical evidence of sex differences.<sup>103</sup> In political discourse, distinctions between feminism, femininity, and women are slippery.<sup>104</sup> There are unique risks in linking feminist arguments with critiques of certain personality traits. Many people regard personality as hard-wired.<sup>105</sup> While the authors are not making

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95. Cahn et al., *supra* note 6, at 466.

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

97. Elizabeth Tippett, *Robbing A Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 434–35 (2012) (assessing cases from 2005 to 2011).

98. *Id.* at 460–61.

99. *Cf. Selmi*, *supra* note 49, at 741–42 & n.157 (discussing the small sample size problem generally).

100. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 976–77 (1982); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1193–94 (1988).

101. Bartholet, *supra* note 100, at 962.

102. *See, e.g., Sturm*, *supra* note 53, at 486.

103. *See* Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759, 776–83 (2013) (discussing how disparate impact challenges to policies that are not family friendly may “broadcast” the stereotype that women are less committed to work, inducing more discrimination on the basis of that generalization).

104. *Gender and the Tournament* might invite this confusion, for example, by referring to “the importance of what women do well” rather than “[s]tereotypically female leadership styles.” Cahn et al., *supra* note 6, at 471 (emphasis added).

105. *See, e.g.,* Walter Mischel, *Toward an Integrative Science of the Person*, 55 ANN. REV. PSYCHOL. 1, 1 (2004) (discussing “our intuitions—and theories—about the invariance and stability of personality” and “the equally compelling empirical evidence for the variability of the person’s behavior across diverse situations”).

claims about women's inherent natures or tendencies, evidence of sex differences in personality might be mischaracterized as support for the old story that women form their preferences for less money, status, and authority outside, rather than inside, the workplace.<sup>106</sup>

Moreover, the argument that studies show fewer women display narcissistic traits than men may easily be mistaken for a claim that women are morally superior to men. Claims of women's moral superiority appear to be inconsistent with demands for equality and are easy targets for the opposition. Arguments about women's moral superiority have a long and troubled history.<sup>107</sup> A "tacit condition" of these arguments has been the double standard: if women are morally superior, they will be held to a higher standard than men.<sup>108</sup>

My point is not to oppose the important claim advanced by *Gender and the Tournament*. Rather, it is to urge that any disparate impact argument be accompanied by continued criticism of double standards and gender stereotypes. Yet *Gender and the Tournament* offers no encouragement to female bankers in the mold of the fictional Naomi Bishop, who display the same narcissistic traits as male bankers but are held to a double standard.<sup>109</sup> The Article discusses the real-life Ellen Pao, the Silicon Valley venture capitalist who lost her high-profile sex discrimination trial against her former firm, Kleiner Perkins.<sup>110</sup> Pao "very much wanted to be" in the high-stakes world of venture capital, but she was penalized for deploying "the same self-interested, competitive behavior as the men."<sup>111</sup> Thus, the authors conclude, Pao's "case simply amounts to a

106. The authors acknowledge research suggesting organizations may influence the extent to which sex differences are manifested. See Cahn et al., *supra* note 6, at 471 n.258 ("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.") (citing ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS 46 (2007)).

107. Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790–1850*, 4 SIGNS 219, 220–21, 233 (1978) (discussing the Victorian-era view that women were sexually "passionless" and that this was the "cornerstone" of their "moral superiority"); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 14 (1989) (discussing claims of female moral superiority by suffragists).

108. Cf. Cott, *supra* note 107, at 227 (explaining that the "tacit condition" of claims of that "women under God's grace were more pure than men" was that clergy "expected not merely the souls but the bodies of women to corroborate that claim").

109. My point is not that women's preferences for cut-throat competition should be honored or celebrated. Their preferences may very well be adaptive. In other words, if they had other options, perhaps many women (and men) would prefer more cooperative business structures. My point is that women who end up in cut-throat competitions should not be held to a double standard.

110. Cahn et al., *supra* note 6, at 473–78.

111. *Id.* at 477. Today, Pao expresses ambivalence about the competitive norms of venture capital. See Ellen Pao, *This Is How Sexism Works in Silicon Valley: My Lawsuit Failed. Others Won't*, CUT (Aug. 20, 2017), <https://www.thecut.com/2017/08/ellen-pao-silicon-valley-sexism->



claim that Kleiner Perkins should welcome women with sharp elbows alongside the men.”<sup>112</sup> In bringing this claim, they argue, Pao “could not truly represent the women who never applied because they found the entire environment hostile.”<sup>113</sup> She could not put forth “the most compelling claim”: that “the system itself is intrinsically flawed.”<sup>114</sup>

Rather than debating which claim is most compelling, feminists might see utility in both disparate treatment and disparate impact arguments and explore how these theories might be complementary. Success for alpha-female plaintiffs would not achieve all the authors’ aims for Title VII, which include the return of middle-class jobs and stable economic growth.<sup>115</sup> But such cases might achieve some measure of sex equality by challenging double standards and the classic double bind for professional women: “out of a job if they behave aggressively and out of a job if they do not.”<sup>116</sup>

For all its flaws, disparate treatment law is not futile.<sup>117</sup> While Pao did not prevail at trial, she did spur discussion about the glass ceiling in Silicon Valley.<sup>118</sup> Employment lawyers interviewed after the case reported an increase in the number of women voicing concerns about discrimination, pursuing informal complaints, and entering into confidential settlements with their employers.<sup>119</sup> The integration of these women in the upper ranks

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reset-excerpt.html [https://perma.cc/TB6W-NQL3] (describing her job at Kleiner Perkins as “thrilling” but noting an “underbelly of competitiveness”).

112. Cahn et al., *supra* note 6, at 473.

113. *Id.* at 478.

114. *Id.* Although *Gender and the Tournament* does not make this argument, one could imagine a sort of white-washing objection: that the integration of a critical mass of women into the upper echelons of the new economy would legitimate hypercompetitive workplaces by making them appear to be fair and inclusive. Cf. HESTER EISENSTEIN, *FEMINISM SEDUCED: HOW GLOBAL ELITES USE WOMEN’S LABOR AND IDEAS TO EXPLOIT THE WORLD* 16 (2009) (arguing that Americans accept “widespread unemployment and other dislocations for the sake of a chance at the American dream by winning the lottery or emulating Jennifer Lopez”). And yet, hypercompetitive workplaces already enjoy legitimacy, whether despite or because of the small number of women who have managed to succeed in them.

115. Cahn et al., *supra* note 6, at 486 (arguing that “[i]t is not a solution to simply to add women to the upper echelons of corporations without changing the backdrop template of evaluation.”).

116. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

117. Pao’s case was hardly a slam-dunk for Kleiner Perkins; another plaintiff with similar facts and a different jury might have succeeded. Cahn et al., *supra* note 6, at 477 (discussing disagreement among the jurors).

118. See, e.g., Sue Decker, *A Fish Is the Last to Discover Water: Impressions From the Ellen Pao Trial*, RECODE (Mar. 26, 2015), <https://www.recode.net/2015/3/26/11560742/a-fish-is-the-last-to-discover-water-impressions-from-the-ellen-pao> [https://perma.cc/27A9-X23W] (commentary by former Yahoo president calling the Pao trial a “wake-up call” “[r]egardless of how the verdict comes out”).

119. Vivian Giang, *Silicon Valley Attorneys: Already Seeing a ‘Pao Effect,’* FORTUNE (Apr. 8, 2015), <http://fortune.com/2015/04/08/silicon-valley-pao-effect/> [perma.cc/K8P6-6756].

may have spillover effects by challenging stereotypes about women,<sup>120</sup> loosening the grips of all-male networks,<sup>121</sup> or undermining the counterproductive dynamics of tokenization.<sup>122</sup> The Pao trial inspired female executives in Silicon Valley to share their personal experiences of discrimination and demand corporate change.<sup>123</sup> Years after the trial, the media continues to cover sexism in Silicon Valley.<sup>124</sup> Even when women do not bring lawsuits, their public accounts of discrimination can prompt changes in corporate leadership.<sup>125</sup> While the ultimate results of these efforts remain to be seen, there are examples of productive organizational transformation in the Title VII literature.<sup>126</sup>

### Conclusion

*Gender and the Tournament* envisions Title VII's project as the pursuit of race and sex equality alongside broader income equality and national prosperity. But what if Title VII litigation might achieve some measure of sex or race equality but not move the needle on income equality or national prosperity? To return to the story that began this Essay, should feminists root for Naomi Bishop in her effort to shatter the glass ceiling? The timing of the movie *Equity*'s release, coinciding with the 2016 presidential

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120. See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1109–10 (2006) (discussing social science evidence on "debiasing agents"—"individual[s] with characteristics that run counter to the attitudes and/or the stereotypes associated with the category to which [they] belong[]" and the conditions under which their presence reduces discrimination); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping,* 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 648 (2004).

121. David A. Matsa & Amalia R. Miller, *Chipping Away at the Glass Ceiling: Gender Spillovers in Corporate Leadership,* 101 AM. ECON. REV. 635, 635 (2011) (finding an increase in the number of women in senior management after the addition of women to corporate boards).

122. See, e.g., RHODE, *supra* note 79, at 120–21.

123. See, e.g., VASSALO ET AL., *supra* note 5.

124. See, e.g., Liza Mundy, *Why Is Silicon Valley So Awful to Women?*, ATLANTIC (Apr. 2017), <https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788/> [<https://perma.cc/JGV4-KRTT>]; Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html> [[perma.cc/C9TA-9N29](https://perma.cc/C9TA-9N29)].

125. See Nitasha Tiku, *Why Aren't More Employees Suing Uber?*, WIRED (June 23, 2017), <https://www.wired.com/story/uber-susan-fowler-travis-kalanick-arbitration/> [<https://perma.cc/C3U7-DSWX>] (observing that many Uber employees are barred from suing the corporation by mandatory arbitration agreements, but former Uber employee Susan Fowler's online account of sex discrimination prompted an internal investigation that may have led to the resignation of Uber CEO Travis Kalanick).

126. See, e.g., Bornstein, *supra* note 71, at 1098–1102 (discussing research on a variety of effective employer interventions to reduce bias); Sturm, *supra* note 53, at 489–520 (describing programs at Deloitte & Touche, Intel Corporation, and Home Depot to demonstrate that "effective, legitimate, and accountable processes can emerge" although there is no "one-size-fits-all model").

campaign, was not coincidental.<sup>127</sup> While the producers may have had Hillary Clinton in mind, the more apt comparison is GOP candidate Carly Fiorina, former CEO of Hewlett-Packard. *Gender and the Tournament* criticizes Fiorina for self-interested behavior and corporate malfeasance.<sup>128</sup> During the campaign, then-candidate Donald Trump criticized Fiorina for a different reason. Trump said, “*Look* at that face! Would anyone *vote* for that? Can you imagine that, the face of our next *president*?!”<sup>129</sup> Trump later denied his comment had anything to do with Fiorina’s appearance. When Fiorina was asked her response in a GOP primary debate, she looked straight into the camera and stated: “[W]omen all over this country heard very clearly what Mr. Trump said.”<sup>130</sup> Fiorina may never have been my choice for president, but in that moment, I was rooting for her.

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127. See Jacobs, *supra* note 4.

128. Cahn et al., *supra* note 7, at 486–87.

129. Paul Solotaroff, *Trump Seriously: On the Trail With the GOP’s Tough Guy*, ROLLING STONE (Sept. 9, 2015), <http://www.rollingstone.com/politics/news/trump-seriously-20150909> [perma.cc/VN36-QTP4] (emphasis in original).

130. Carly Fiorina, CEO of Hewlett-Packard, et al., CNN Reagan Library Debate (Sept. 16, 2015) (transcript available at <http://cnnpressroom.blogs.cnn.com/2015/09/16/cnn-reagan-library-debate-later-debate-full-transcript/> [https://perma.cc/YJM5-WEQG]).