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

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Recommended Citation

Levit, Nancy and Carbone, June and Cahn, Naomi, Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality (March 6, 2017). Texas Law Review, Forthcoming; Minnesota Legal Studies Research Paper No. 17-09; GWU Law School Public Law Research Paper No. 2017-13; GWU Legal Studies Research Paper No. 2017-13. Available at SSRN: <https://ssrn.com/abstract=2928352>

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

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

Abstract

Since the 1970's, 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 pending case 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 six percent of venture capital partners are women,¹ 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

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/>. And that number represents a drop from 10% in 1999 to 6% in 2015. Vivian Giang, *Why the Few Women Venture Capitalists Often Give up*, FAST COMPANY (Feb. 4, 2015), <https://www.fastcompany.com/3041862/strong-female-lead/why-the-few-women-venture-capitalists-often-give-up>.

standards of advancement for men and women.² While the firm claimed to prize initiative and drive, Pao’s performance reviews dinged her for “sharp elbows,”³ a trait rarely criticized among the men. Following a five-week trial in 2015, the trial court dismissed her case.

In September 2014, Katherine Mousouris and two other women filed a class action lawsuit against Microsoft.⁴ 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 whom 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 finds it destructive. Although Microsoft abandoned the system after Mousouris filed the class action, a large number of Fortune 500 companies use similar systems.⁵ And the action against Microsoft is continuing.⁶

* * *

Two literatures increasingly take aim at the worlds of Ellen Pao and Katherine Mousouris – and the workplaces that have most contributed to increasing gender inequality. The first challenges practices in the new economy, such as the corporate “tournament”⁷ that valorizes intense competition either as an end in itself

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/>.

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>.

⁴ Complaint, Sept 16, 2015 Docket No. 2:15-cv-01483 (W.D. Wash. Sept 16, 2015).

⁵ Jeanne Sahadi, *Amazon Workplace Story Raises Dread of ‘Rank and Yank’ Reviews*, MONEY (Aug. 17, 2015), <http://money.cnn.com/2015/08/17/news/amazon-performance-review/>.

⁶ Mousouris v. Microsoft Corp., Case No. C15-1483JLR, Order at 4 (W.D. Wash., Oct. 14, 2016). On May 2, 2017, the court appointed a Special Master to make discovery recommendations. Mousouris v. Microsoft Corp., Case No. C15-1483JLR, Order Appointing Special Master (W.D. Wash.), <http://www.leagle.com/decision/In%20FDCO%2020170503G54/MOUSOURIS%20v.%20MICROSOFT%20CORPORATION>.

⁷ 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

or as an aid to the pursuit of reductionist short-term objectives. While many continue to defend the system⁸ 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 model⁹ and has arguably contributed, both to a decline in productivity growth and to greater societal inequality.¹⁰ 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,¹¹ and reduce long-term institutional health.¹² Indeed, *Forbes Magazine* referred to Microsoft’s rank-and-yank system as “The Management Approach Guaranteed to Wreck Your Best People.”¹³

A second literature looks at the failure of antidiscrimination law to address the increasing gender gaps in the new economy.¹⁴ To be sure, overall gender

corporate culture that instills loyalty to insiders, obsession with short-term stock price, and intense distrust of outsiders.

⁸ See, e.g., *Commentary: Jack Welch, ‘Rank-and-Yank?’ That’s Not How It’s Done*, WALL ST. J., Nov. 14, 2013, <http://www.wsj.com/articles/SB10001424052702303789604579198281053673534>.

⁹ 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, 1171 (2013).

¹⁰ 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)

¹¹ 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 (2003) (observing that using budgets or targets in an organization’s performance measurement and compensation systems has encourages gaming the system); see also Lynn Stout, *Killing Conscience: The Unintended Behavioral Consequences of ‘Pay for Performance’*, 39 J. CORP. L. 529, 533 (2014) (describing the counterproductive effects of modern executive compensation).

¹² 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 *supra* notes 9 and 10. Second is pay for performance and the perverse incentives it creates. See *supra* notes 11 and 12. 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 as 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 the practices that led to the financial crisis).

¹³ Erika Anderson, *The Management Approach Guaranteed to Wreck Your Best People*, *FORBES* (July 2012).

¹⁴ See, e.g., Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig Economy*, 47 SETON HALL L. REV. 393 (2017); Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMUL. REV. 17, 26 (2010); U.S. Equal Employment Opportunity Commission, *Diversity in High Tech*,

disparities, including the wage gap between men and women's earnings, have narrowed.¹⁵ 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 90% income percentile.¹⁶ Today, the greatest gender disparities occur in the portions of the economy that have shown the greatest growth in compensation, including the upper management ranks, such as those at Microsoft, and the financial sector, which includes the venture capital world of Kleiner Perkins. Overwhelmingly, this second literature concludes that these gender disparities arise from "structural forces" that Title VII has had difficulty addressing.¹⁷

Legal scholars, courts, and legislatures have developed these two literatures as separate discourses.¹⁸ 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 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. The Article argues for a substantive engagement with the legitimacy of the business practices that systematically produce gender disparities.¹⁹ It concludes that this is the first step in

<https://www.eeoc.gov/eeoc/statistics/reports/hightech/> (last visited Jan. 23, 2017); Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1, 1–2 (2016).

¹⁵ Eisenberg, *supra* note 14, at 24.

¹⁶ Elise Gould, Jessica Schieder, & Kathleen Geier, *What Is the Gender Pay Gap and Is It Real?*, Figs. B, D (2016), <http://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/>.

¹⁷ See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 458 (2001) (defining these forms of bias); cf. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006) (observing that "structural employment inequalities cannot be solved without going beyond the generally accepted normative underpinnings of antidiscrimination law"); see generally Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 93 (2015) (describing the structural approach).

¹⁸ 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, e.g., SCANDALOUS ECONOMICS: GENDER AND THE POLITICS OF FINANCIAL CRISES ch. 2, 3 (Aida A. Hozić & Jacqui True, eds. 2016). This literature, however, does not address anti-discrimination law or the potential legal remedies.

¹⁹ This article focuses only on the relationship between negative sum workplace competitions and gender disparities, because 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 (7th Cir. 2005), on remand, 2005 WL 2001511 (C.D. Ill. Aug. 12, 2005), on remand, 2005 WL 297652 (C.D. Ill. Nov. 7, 2005) (prohibiting use of a personality inventory as a basis for promotion because of its impact on those with disabilities).

moving towards “equality law,” 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 delegitimization of these practices as inappropriate when applied to any employee.²⁰

Part I excavates 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, to be effective in combating discrimination, has to be interpreted in light of the economic realities of the employment systems in which it is operating.

Part II examines the new structural forces that simultaneously increase income inequality in the economy²¹ 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 industrial era with workplaces that valorize individualism and competition,²² generating much more steeply banked income hierarchies²³ that threaten to undermine teamwork, productivity, and investment in the future. It also creates a triple bind for women, who become less likely to seek out such workplaces, less likely to be seen as having the qualities necessary to succeed within them, and more likely to penalized when they display the same self-interested qualities as the men, further discouraging future applications.²⁴ This section establishes the links between the new management system and the exacerbation of gender disparities, requiring a reorientation in the focus of antidiscrimination law.

²⁰ The term “equality law” is used here to describe approaches that arise from combining traditional antidiscrimination analysis with consideration of the substantive justifications that determine the legitimacy of inequality enhancing practices. 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, it 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.

²¹ See, e.g., Timothy Noah, *Income Inequality: Panel on Financialization, Economic Opportunity, and the Future of American Democracy*, 18 N.C. BANKING INST. 57, 57-58 (2013).

²² Am. Ass’n Univ. Women, *The Simple Truth About the Gender Pay Gap* (2013), <http://www.aauw.org/files/2013/03/the-simple-truth-about-the-gender-pay-gap-2013.pdf>.

²³ June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 1031 (2017).

²⁴ 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 (2017); 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>.

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 Mousouris'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 Mousouris case makes the validity of the underlying business practices the central legal issue. The case focuses attention not just on Microsoft's failure to create an environment in which women can 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 interrogate 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 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.²⁵ The recreation of an equality law approach would identify the structural forces that produce inequality and consider the legitimacy of the practices. Where the practices cannot be justified, equality law would root them out through the combination of antidiscrimination law and structural reforms.²⁶ 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 other laws at the height of the Civil Rights movement of mid-twentieth century America.²⁷ Yet, while these laws clearly condemned discrimination in employment, they did not just seek to promote racial

²⁵ See Sturm, *supra* note 17.

²⁶ For an example of possible structural forms unrelated to gender disparities, see Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541 (2016).

²⁷ This was a period in which income equality 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 (Feb. 1992). The Gini coefficient—the most widely accepted statistical measure of income inequality in a country—shows a four decades' rise in America 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#V3xWYk32aUI>.

and gender equality in isolation. Instead, their proponents sought 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.²⁸ White men during this period already enjoyed a remarkable degree of economic equality, security and wage growth,²⁹ so the goal was to make these opportunities available to other groups. President Kennedy, who initially proposed what became the Civil Rights Act of 1964 and other antidiscrimination measures,³⁰ did so as part of a multi-faceted approach that linked antidiscrimination efforts to economic equality and national prosperity.

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."³¹ Yet, Title VII's origins indicate that it addressed a much more explicit form of structural inequality – the segmentation of the labor market into white male jobs, with security, benefits, and lock-step patterns of advancement, and other less attractive jobs for black men, white women and black women – and sought to delegitimize this segmentation.

This Section reviews the development of antidiscrimination employment laws. It first explores the legislative history that demonstrates the structural nature of the antidiscrimination efforts, their focus on opening the 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

²⁸ 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 steady increase in household income between 1950 and 1965, see *United States Median Household Income: 1950-1990*, <http://web.stanford.edu/class/polisci120a/immigration/Median%20Household%20Income.pdf> (last visited Nov. 29, 2016).

²⁹ See, e.g., CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960-2010 (2013) (documenting the stability of white men' jobs).

³⁰See John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963), https://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx.

³¹ Sturm, *supra* note 17, at 458.

Advocates of Title VII, which focuses on discrimination in employment, recognized that the restricted access to “good jobs”³² helped to keep wages for these positions high by restricting the pool of potential employees.³³ This further had the 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.

In 1963, President Kennedy proposed antidiscrimination legislation that framed the effort to prohibit employment discrimination in terms of the promotion of greater economic growth. He had entered office during a recession, persuaded Congress to adopt tax cuts and other stimulus measures, and yet had been frustrated by the fact that while corporate profits soared, unemployment remained stubbornly high.³⁴ 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.³⁵

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 maintained obstructed economic growth.³⁶ 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.³⁷ Third, he advocated education and training efforts for African-American so that disparities in the qualifications of potential employees could not be used to justify segregated workplaces.³⁸ All three efforts focused on opening what had been “narrow portals” into entry-level employment opportunities.³⁹ This structural focus on the American economy framed the legislation.

³² See ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970s-2000s at 5-6 (2011)(defining good jobs as those that pay well, offer benefits and provide security).

³³ See Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 MICH. J. L. REFORM 397, 401-15 (1979) (describing impact of segmented workforce on wages).

³⁴ See, e.g., 110 CONG. REC. 2730, 2732 (1964), file:///C:/Users/ncahn/Downloads/CR-1964-0210-PL88-352-H.pdf. (“the economic health of the Nation would be improved through fuller and fairer utilization of available and potential manpower”).

³⁵ *Id.*

³⁶ See Kennedy, *supra* note 30.

³⁷ See, e.g., Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC’Y REV. 79 (1994).

³⁸ Kennedy’s original proposal did not address sex discrimination. See *infra* discussion in text at notes 41-49.

³⁹ 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*

Although Title VII did not originally address sex discrimination, its inclusion—on the floor of the House of Representatives⁴⁰—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 the employment.⁴¹ Moreover, career advancement depended to a much greater degree than today on winning access to the entry-level positions in a relatively smaller number of large corporations.⁴² 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.⁴³ He 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.”⁴⁴ He thus understood that a principal effect of antidiscrimination law would be to increase access to a larger number of good

Workplace for Labor and Employment Law, 48 UCLA L. REV. 519, 535 (2001)(describing the jobs of the era as “characterized by job ladders, limited ports of entry, and implicit contracts for long-term job security.”).

⁴⁰ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (citing 110 CONG. REC. 2577–2584 (1964)).

⁴¹ *Ads From The State Seeking “Male Help” and “Female Help,”* (June 1958), TEACHING AMERICAN HISTORY IN SOUTH CAROLINA, <http://www.teachingushistory.org/ttrove/wantads.htm> (last visited Nov. 6, 2016). For a broader discussion of the nature of sex segregation before and after passage of the antidiscrimination acts, see. Blumrosen, *supra* note 33, at 402-15 (concluding that even after passage of Title VII, sex-segregated jobs account for as much or more of the gendered wage gap than unequal treatment within the same jobs).

⁴² Blumrosen, *supra* note 33, at 412 (observing that white and minority men both enjoyed upward wage trajectories over time (with smaller gains for minority men) while women’s income curves tended to remain flat).

⁴³ 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, 12:54 PM), 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. 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 bill 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); 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 & L. 137 (1997); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history*, 95 B.U. L. REV. 713, 718-21 (2015).

⁴⁴ Case, *supra* note 43, at 1339.

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.⁴⁵

Similarly, African-American women saw racial and gender equality as linked for similar reasons.⁴⁶ Discrimination on the basis of race *and* sex relegated them out of more desirable jobs altogether.⁴⁷ Pauli Murray argued that segregated workplaces allowed employers to pit workers against each other.⁴⁸ Antidiscrimination law, by breaking down the barriers that segmented these workplaces by race and gender while continuing 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.⁴⁹

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. Stagflation, rather than recession, dogged the economy, and the Nixon Administration distanced itself from the “war on poverty’s” more ambitious equality enhancing measures.⁵⁰ 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 origins as an effort to delegitimize all-white and all-male workplaces. Like the legislative debate,

⁴⁵ Congresswoman Martha Griffiths, who supported the amendment, also claimed that without it, “white women would be last at the hiring gate.” 110 CONG. REC. 2577, 2578-2580 (1964) (statement of Rep. Griffith).

⁴⁶ 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 protection from either the 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, 1327 (2012); Serena Mayeri, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045, 1058 (2001).

⁴⁷ Mayeri, *Intersectionality*, *supra* note 46, at 717-21.

⁴⁸ *Id.* at 721.

⁴⁹ *Id.* at 723-24; see also Ruth Gerber Blumrosen, *Remedies for Wage Discrimination*, 20 U. MICH. J.L. REFORM 99, 102 (1986) (observing that “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”).

⁵⁰ 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.”)

however, these decisions expressed ambivalence about efforts to use antidiscrimination law to address pregnancy and childcare responsibilities – or any number of other practices that had differential effects on various groups.⁵¹ The subsequent judicial history has thus been most consistent in applying antidiscrimination law where the courts conclude both that the employer’s action obstructs an agreed upon objective (e.g., dismantling segregated workplaces) and where the differential effect on a protected class is part of a pattern of discriminatory conduct. They have been most contentious, in contrast, where there is no agreed upon objective (e.g., accounting for parental responsibilities), even where the differential effect on a protected class is part of a pattern of conduct that disproportionately affects women.

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.⁵² The courts, however, interpreted sex discrimination in much the same way as they interpreted racial discrimination, that is, as barring explicit barriers to hiring. Thus, the first U.S. Supreme Court case to interpret Title VII ruled that the law prohibited a sex-based classification that prohibited hiring mothers (though not fathers) with preschool age children,⁵³ and a subsequent case upheld a prohibition on male and female want ads against a First Amendment challenge.⁵⁴ 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.⁵⁵ The Supreme Court of that era saw pregnancy as a matter of individual choice;⁵⁶ it did not treat pregnancy as a

⁵¹ See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (ruling that Title VII does not include pregnancy discrimination). Not until 2007 did the EEOC explain how to approach “family responsibilities discrimination.” EEOC Guidance on Family Responsibilities (2007), <https://www.eeoc.gov/policy/docs/caregiving.html#background>

⁵² From the beginning, advocates of this era drew analogies between racial discrimination and sex discrimination with respect to workplace segregation. See, in particular, 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 racial discrimination, treated women as inferior and creating a caste-like status that justified occupational segregation and discrimination).

⁵³ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544–45 (1971) (describing the policy as an explicit gender-based classification).

⁵⁴ See *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376 (1973) (upholding prohibitions of sex-segregated help-wanted advertisements in the face of a First Amendment challenge).

⁵⁵ *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), superseded by statute, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076.

⁵⁶ *Gilbert*, 429 U.S. at 136; *Geduldig*, 417 U.S. at 489-92 (observing that pregnancy is a choice, unlike illnesses that constitute similar temporary physical disabilities).

structural obstacle to women's workplace access of a kind with the types of barriers Congress intended Title VII to address.⁵⁷

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 the proof necessary to 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.⁵⁸

In individual cases alleging disparate treatment, the Supreme Court established a burden-shifting framework that required a "comparator."⁵⁹ In these cases, courts allowed plaintiffs to prove discrimination where they otherwise lacked sufficient direct evidence of bias by establishing unequal treatment between two employees, creating an inference of discrimination if the employer treated the member of the protected class, such as a woman, less favorably than the employer treated a comparably situated male employee.⁶⁰ 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.⁶¹

The comparator test tied proof of discriminatory motive to assumptions about segregated workplaces. The foundational case, *McDonnell-Douglas Corp. v. Green*, involved a large industrial workplace, with many employees performing relatively similar duties.⁶² The Court assumed that where such an employer announced an opening, rejected a qualified African-American applicant, kept the position open, and then hired a similarly qualified white applicant, discriminatory motive was a reasonable inference. The Court allowed the employer to rebut the inference through the articulation of a legitimate good faith reason for the rejection of the African-American applicant. Typically, in these cases, an employer who could show a practice of interracial hiring had an easier time rebutting the inference

⁵⁷At the time Title VII was passed, only 30% of married mothers with children under the age of 18 were in the labor force. Sharon R. Cohany & Emy Sok, *Trends in Labor Participation by Married Mothers of Infants*, MONTHLY LABOR REV. (Feb. 2007), <https://www.bls.gov/opub/mlr/2007/02/art2full.pdf>. The big increases in women's labor force participation would become between 1980 and 2000. *Id.* at Chart 1. 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 matter of workplace structure. See, e.g., JOAN WILLIAMS, UNBENDING GENDER (2000).

⁵⁸ See *infra* text at notes 59-93.

⁵⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

⁶⁰ Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745-46 (2011).

⁶¹ *Id.* at 801.

⁶² See *id.* at 755 (observing that "[t]his system had the potential to work well in the large industrial workplaces of the manufacturing age Tayloresque workplaces, where multiple workers engage in tasks that are susceptible to relatively straightforward comparison").

than one who maintained an all-white workforce.⁶³ 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.

Suzanne Goldberg and other scholars have argued that this comparator requirement does not work terribly well in modern workplaces, which are much less likely to employ only white males or to have standardized assignments of responsibility.⁶⁴ In the context of employer actions that may be intrinsically individualized and subjective, the courts have adopted strict requirements for comparators who can establish the requisite employer intent without more direct proof of discriminatory motive.⁶⁵ 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 mandates⁶⁶ – or identification of specific practices with 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 more subtle 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.⁶⁷

The Supreme Court initially set out the elements of disparate impact doctrine in *Griggs v. Duke Power Co.*⁶⁸ Before Title VII, the Duke Power Company, headquartered in Charlotte, N.C., “had intentionally segregated its workforce,

⁶³ See, e.g., *Nieto v. L&H Packing Co.*, 108 F.3d 621, 623 (5th Cir. 1997) (observing that the fact that eighty-eight percent of the work force was comprised of minorities undercut plaintiff’s claim of discriminatory motive).

⁶⁴ Goldberg, *supra* note 60, at 756 (describing “the flexible and dynamic nature of many contemporary jobs”).

⁶⁵ 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.’”).

⁶⁶ For example, the courts have always been reluctant to read antidiscrimination provisions as mandating pregnancy accommodations, however important such accommodations might be to women’s workforce participation; such accommodation has been viewed as special treatment rather than equal treatment. *See Vicki Schultz, Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1096, 1101 (2015).

⁶⁷ Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06 (2006).

⁶⁸ 401 U.S. 424, 427-28 (1971).

restricting its African American employees to generally undesirable jobs.”⁶⁹ 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.⁷⁰ Only one of the African-Americans in a position to seek reassignment was a high school graduate and whites generally outperformed African-Americans on the tests by three to one.⁷¹ A unanimous Supreme Court found the tests to be discriminatory, and the case set the paradigm for a successful disparate impact suit.⁷² 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 with a long history of discrimination that is exactly what antidiscrimination law sought to accomplish.⁷³

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.⁷⁴ This has been difficult, as Mike 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.”⁷⁵ 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.”⁷⁶ 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.”⁷⁷

Efforts to extend disparate impact doctrine did not succeed for the same reasons that efforts to extend disparate treatment cases to pregnancy failed. The

⁶⁹ See *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”).

⁷⁰ 401 U.S. at 427-28

⁷¹ Selmi, *supra* note 67, at 718.

⁷² *Id.* at 723-24.

⁷³ See, e.g., Selmi, *supra* note 67, at 714. This purpose continues to animate disparate impact cases. In *Ward’s Cove Packing v. Antonio*, 490 U.S. 642, 653, (1989), the Supreme Court attempted to water down the business necessity standard, complaining that it created an incentive for employers to adopt quotas. Congress responded by amending Title VII in 1991, effectively overturning at least parts of Ward Cove. See Pub. L. No. 102-166, § 105, 105 Stat. 1071 (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.

⁷⁴ Selmi, *supra* note 67, at 704.

⁷⁵ *Id.* at 795.

⁷⁶ *Id.* at 759.

⁷⁷ *Id.* at 751.

question of whether employers must “disturb core business” practices is not one about 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.⁷⁸

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.⁷⁹ 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.⁸⁰ 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 place to impose the cost. Without the principle that employers must accommodate disabilities, however, pregnancy accommodations involve “disturbing (otherwise legitimate) core business practices”⁸¹ 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.⁸²

We thus identify disability (including pregnancy) accommodation as one example of “equality law,” that is, the identification of substantive employment practices inconsistent with a commitment to economic equality, and delegitimization of these practices as appropriate when applied to any employee. This approach, however, requires not just examination of the disparate impact on protected groups, but 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.

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.⁸³ Yet, sexual harassment, once made visible, is

⁷⁸ Schultz, *supra* note 66, at 1096, 1101.

⁷⁹ See ADA Amendments Act of 2008, § 4, 122 Stat. at 3555-56 (expanding the definition of “disability” under the ADA and clarifying that the “definition of disability . . . shall be construed in favor of broad coverage”); Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,014 (Mar. 25, 2011); see 29 C.F.R. § 1630.2(j) (2011); Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 487 (2012).

⁸⁰ Schultz, *supra* note 66, at 1096 (advocating a refusal to distance the problems of pregnant workers from those faced by employees with other disabilities.).

⁸¹ Selmi, *supra* note 67, at 751.

⁸² Young v. United Parcel Serv., 135 S. Ct. 1338 (2015).

⁸³ Sturm, *supra* note 17, at 480-81 (describing history of sexual harassment law).

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.⁸⁴ Thus, a legal conclusion that it constitutes sex discrimination combines a judgment that it is both discriminatory and that the impact on women follows from unacceptable conduct.

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 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 winning employment structuring 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. Yet, 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. They 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 responsibility to promote equality – and of the

⁸⁴ 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>; Valentina Zarya, *In the Fight Against Sexual Harassment, Money Trumps Morals*, FORTUNE (June 21, 2017), <http://fortune.com/2017/06/21/uber-kalanick-resigns/>.

substantive propriety of the 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 what had previously been exclusively white male positions to women and minorities.⁸⁵ 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.⁸⁶ 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.⁸⁷ The major advances for women would come instead during the eighties as women increased their educational levels and moved into the professions.⁸⁸

Both minority gains in the sixties and seventies, and women's gains in the eighties⁸⁹ vindicated the assumptions associated with the passage of antidiscrimination laws.⁹⁰ 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 the white men who worked beside them.⁹¹ 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

⁸⁵ See, e.g., Sturm, *supra* note 17, at 460 (observing that overt, race and gender based classifications have become a "thing of the past" that '[m]any employers now have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies")

⁸⁶ Blumrosen, *supra* note 33, at 412; Gavin Wright, *The Regional Economic Impact of The Civil Rights Act of 1964*, 95 B.U. L. REV. 759, 776-83 (2015) (demonstrating black economic gains, particularly with the decline in low paid, primary black workplaces in the South).

⁸⁷ *Id.* The gender wage gap was 58.2% in 1968, 59.4% in 1978, and had decreased to 66% in 1988. National Committee on Pay Equity, *The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap* (Sept. 2016), <http://www.pay-equity.org/info-time.html>.

⁸⁸ 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).

⁸⁹ Women benefitted more than blacks did, but blacks won the lawsuits. Tamara Lytle, *Title VII Changed the Face of the American Workplace*, 51 SHRM (May 21, 2014), <https://www.shrm.org/publications/hrmagazine/editorialcontent/2014/0614/pages/0614-civil-rights.aspx#sthash.g69i4wLm.dpuf>

⁹⁰ See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 44 (2016), <http://www.nber.org/papers/w21913.pdf> (finding that Title VII had little effect on women's wages immediately after it was passed, but did decrease racial disparities).

⁹¹ MURRAY, *supra* note 29, at 175, Fig. 9.4 (showing working class white male unemployment rate to be below the national unemployment rate until after 1980).

the post-war era.⁹² Much greater income inequality, among white males as well as in the economy more generally, became the norm. And as the economy changed, judges grappled with the question of the underlying meaning of antidiscrimination law: did it simply mandate equal treatment, dismantling the racial and gender classifications of earlier eras that limited access to “ports of entry,”⁹³ 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’ response, we turn to an analysis of how corporate law and practices facilitate gender discrimination in the contemporary economy.

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,⁹⁴ 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.⁹⁵

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.⁹⁶ 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

⁹² See JEFFERSON COWIE, STAYIN’ ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS (2010).

⁹³ Green, *supra* note 39, at 99.

⁹⁴ See Dothard v. Rawlinson, 433 U.S. 321 (1977); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

⁹⁵ Robert L. Laud & Matthew Johnson, *Upward Mobility: A Typology of Tactics and Strategies for Career Advancement*, 17 CAREER DEVEL. INT’L. 231 (2012). See also Maxine Eichner, *Market-Cautious Feminism*, 69 STUD. L., POL. & SOC’Y 141, 160 (2016) (“the workplace should not be conceptualized as a sphere free from hierarchy or constraint”).

⁹⁶ See, e.g., Sturm, *supra* note 17, at 460 (describing the structural changes as a result of patterns of interaction, informal norms, networking, mentoring, and evaluation.”) Cf. Bagenstos, *supra* note 17, at 2-3 (expressing skepticism about the ability of antidiscrimination law to reach such subjective evaluations).

bonuses and the persistence of subtle or unconscious biases that reinforce gender stereotyping.⁹⁷

Missing from their explanations, however, is an examination of the forces that drive the selection process and the supposedly unconscious biases. Their accounts suggest that accurate evaluations of individual employees would eliminate the disparities – but do not consider *why* gender disparities not only 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 that a new “equality law” that seeks to address these structural forces can be envisioned and that Title VII can remain effective. In this section, we analyze how the new economy has a disparate impact on women, the first step in moving towards a reconceptualization of the interaction between structural inequality and antidiscrimination law.

Section A explains how the structure of workforces has changed to emphasize competition and individualism. 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 subject 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 economy; and they are disproportionately penalized for displaying the same competitive traits the men demonstrate, reinforcing the disinclination to apply for 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 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.⁹⁸ Many of the largest employers were manufacturers, union membership was high,⁹⁹ and workers at all levels of income experienced similar growth.¹⁰⁰ Moreover, even within managerial

⁹⁷ Bagenstos, *supra* note 17, at 4-5.

⁹⁸ Carbone & Levitt, *supra* note 23, at 1044-45, 1047.

⁹⁹ Almost one-third of workers belonged to unions, compared to 10% today. *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>.

¹⁰⁰ 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%. U.S. Dep’t of Labor, Bureau of Labor Statistics, *Employment by Industry, 1910 and 2015* (Mar. 3, 2016), <https://www.bls.gov/opub/ted/2016/employment-by-industry-1910-and-2015.htm>. “The 1940s to the late 1970s, while by no means a golden age (as evident, for example, by gender,

ranks, employees tended to be promoted from below, and they identified with company rather than individualistic aims.¹⁰¹ 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.¹⁰² The company “man” took with him the status that came from association with a successful company;¹⁰³ he had little ability to cash in and leave for greener pastures.¹⁰⁴

In contrast, the new system of steeply banked hierarchies encourages top management to identify more with shareholders than with their subordinates, employees to compete against each other, and both groups 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.¹⁰⁵ Executive compensation has become much more variable, and those enjoying the greatest gains do so in ways that have become more portable.¹⁰⁶ Within this system, it may make (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.¹⁰⁷

ethnic, and racial 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 Somelleir & Mark Price, *The Increasingly Unequal States of America: Income Inequality by State, 1917 to 2012*, ECON. POL’Y INST. (Jan. 26, 2015), <http://www.epi.org/publication/income-inequality-by-state-1917-to-2012/>.

¹⁰¹ Carbone & Levit, *supra* note 23, at 1045 n.61 and accompanying text; *see also* Wells, *supra* note 27, at 323-24 (2013) (observing that even Harvard Business School emphasized this idea of stewardship).

¹⁰² JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 147 (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).

¹⁰³ Carbone & Levit, *supra* note 23, at 1047 n.78 and accompanying text.

¹⁰⁴ See, e.g., LUC BOLTANSKI & EVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM 94 n. lxix (Gregory Elliott trans., 2007).

¹⁰⁵ 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 Bidwell, *What Happened to Long-Term Employment? The Role of Worker Power and Environmental Turbulence in Explaining Declines in Worker Tenure*, 24 ORG. SCI. 1061 (2013); *see also* Guy Berger, *Will This Year’s College Graduates Job-Hop More Than Previous Grads?* (Apr. 12, 2016), <https://blog.linkedin.com/2016/04/12/will-this-year-s-college-grads-job-hop-more-than-previous-grads> (over the last twenty years, the number of companies college graduates worked for in the first five years after graduation doubled).

¹⁰⁶ WARTZMAN, *supra* note 105, at 305-06.

¹⁰⁷ 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 UMKC L. 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-

The new system involves three mutually reinforcing practices. First, the managerial system has been replaced with a system that promotes “shareholder primacy,”¹⁰⁸ 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 shareholders.¹⁰⁹ “Short-termism”¹¹⁰ separates the interests of shareholders and executives from those of other corporate constituents such as employees and customers.¹¹¹ 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.¹¹² A 2005 survey of 401 financial executives, for example, reported that an overwhelming majority (78%) would take actions that lowered the value of their companies to create a smooth earnings stream.¹¹³ More than 80% of the respondents further stated that they would decrease spending on advertising, maintenance, and research and development expenses to meet short-term objectives such earnings targets.¹¹⁴ 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 influence stock prices, by cutting support for research and development and

making in favor of activities that increase short term profits even at the expense of the company's survival.”).

¹⁰⁸ Lynn Stout describes shareholder primary 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 9, at 1177–78. 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 employers. 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). And since it does not necessarily promote long term institutional health, it is not necessarily in the interests of the interests of all shareholders. See Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 320-21 (2012).

¹⁰⁹ Carbone & Levit, *supra* note 23, at 1034.

¹¹⁰ See Dallas, *supra* note 108, at 320-21.

¹¹¹ See, e.g., HILL & PAINTER, *supra* note 12, at 102-03 (describing change in banking that emphasizes making money at customers' expense).

¹¹² See *infra* in text at note 312 the discussion of the BlackRock Letter. These pressures have also 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 104, at 73-74 (describing this outsourcing as part of the process of creating “leaner” organizations).

¹¹³ John R. Graham, Campbell R. Harvey, & Shiva Rajgoapl, et al., *Value Destruction and Financial Reporting Decisions*, 62 FIN. ANALYSTS J. 27, 33 (2006).

¹¹⁴ *Id.* at 31.

marketing, even where such practices did not advance the firms' medium to longer term interests.¹¹⁵

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. The increase in the ratio of chief executive officer compensation to average worker pay, for example, went from twenty in 1965 to 331 in 2013.¹¹⁶ The principle component of executive compensation takes the form of stock options, which increase in value with quarterly earnings, which in turn influence share price in publically traded companies.¹¹⁷ Moreover, corporate boards, which have become more influential, emphasize share value as a measure of CEO success,¹¹⁸ while hedge funds and other activist investors target what they perceive to be underperforming firms.¹¹⁹ The result creates powerful incentives that separate the interests of CEOs and shareholders from other corporate stakeholders.

Second, this emphasis on the CEO's need to produce immediate results has contributed 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. These incentive systems allow a CEO to reorient a firm's priorities,¹²⁰ 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.¹²¹ The incentive systems may employ subjective evaluations that

¹¹⁵ Dallas, *supra* note 108, at 280.

¹¹⁶ *Executive Paywatch: High-Paid CEOs and the Low-Wage Economy*, AFL-CIO, <http://www.aflcio.org/Corporate-Watch/Paywatch-2014> (last visited Nov. 11, 2016); Pay Ratio Disclosure, Securities Act Release No. 9877, Exchange Act Release No. 75610, 80 Fed. Reg. 50,104 (Aug. 18, 2015); Biagio Marino, Note, *Show Me the Money: The CEO Pay Ratio Disclosure Rule and the Quest for Effective Executive Compensation Reform*, 85 FORDHAM L. REV. 1355 (2016); Robert J. Rhee, *Intrafirm Monitoring of Executive Compensation*, 69 VAND. L. REV. 695, 696 (2016).

¹¹⁷ See generally MICHAEL DORFF, INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT (2014) (discussing the process underlying increase 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 (2005).

¹¹⁸ See Dallas, *supra* note 108, at 267(calling this "short-termism").

¹¹⁹ Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 75, 80-82 (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).

¹²⁰ 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 the CEOs controls the company's compensation systems and "can reserve bonuses for those who 'get with the program,' demoralizing others or persuading them to leave."); see also Commentary: Jack Welch, 'Rank-and-Yank?' That's Not How It's Done, *supra* note 8 (defending such systems as way to encourage employees to define their efforts in terms of management objectives).

¹²¹ 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

increase management discretion or reductionist ones tied to easily measured factors such as sales or unit profitability.¹²² Perhaps the most notorious of these evaluation systems is “rank and yank,” a system Jack Welch initially introduced at General Electric, and the type of system at the core of the Microsoft litigation.¹²³ The “yank” part of 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.¹²⁴ 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.¹²⁵ 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.¹²⁶

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

RUTGERS L.J. 1, 37 (2003) (describing how Enron management using its bonus system to reorient company behavior in counterproductive ways).

¹²² 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/>. Where the subjective evaluations determine salaries, male doctors also do better than female doctors do. See Anupam B. Jena et al., *Sex Differences in Physician Salary in US Public Medical Schools*, 176 JAMA INTERN MED. 1294 (2016), <http://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2532788>.

¹²³ 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 terms share prices. See ROGER F. MARTIN, FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL 29, 97 (2011). Enron also used the rank and yank system. See, e.g., PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 51-52 (2002).

¹²⁴ 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> (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.*

¹²⁵ Dallas, *supra* note 121, at 37.

¹²⁶ 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.” *Id.* at 50. The new employees, especially if they have limited experience elsewhere, more readily buy into shifts in corporate orientation. *Id.* at 49.

foes.”¹²⁷ 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.¹²⁸ The ability to move in turn becomes necessary to upward advancement. 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.¹²⁹ This 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.¹³⁰ 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.¹³¹

The financial sector, whose influence has also disproportionately grown with these changes,¹³² 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.”¹³³ 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.”¹³⁴ The ethos, as the name big swinging dick suggests, combined a glorification of cleverness and gamesmanship with signs of masculinity;¹³⁵ serving customer interests was not part of the path toward advancement.¹³⁶ The change came not only with the switch from

¹²⁷ Rakesh Khurana, *The Curse of the Superstar CEO*, HARV. BUS. REV. 60, 62 (Sept. 2002).

¹²⁸ RAKESH KHURANA, CORPORATE SAVIOR: SEARCHING FOR A CORPORATE SAVIOR 196 (2002) (describing the erosion of institutional commitment to managers and the increased reliance on search firms for lower level executives).

¹²⁹ Roland Bénabou & Jean Tirole, *Bonus Culture: Competitive Pay, Screening, and Multitasking* (Mar. 2013), <http://www.princeton.edu/~rbenabou/papers/Multitasking%20March%202019%20paper.pdf>.

¹³⁰ *Id.* at ix (describing shift from emphasis on internal to external candidates); *see also* BOLTANSKI & CHIAPELLO, *supra* note 104, at 93, 94-95 (observing that “acquisition of experience increases personal capital and thus employability,” but that it also increases opportunism and self-interested behavior).

¹³¹ WARTZMAN, *supra* note 105, *passim*; *see* Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759 (2013)

¹³² *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, 858 (2013) (describing financialization in terms in the increased influence of institutional investors and hedge funds on corporate policy).

¹³³ MICHAEL LEWIS, LIARS POKER 56 (1989).

¹³⁴ HILL & PAINTER, *supra* note 12, at 98.

¹³⁵ *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”).

¹³⁶ HILL & PAINTER, *supra* note 12, at 102-03 (describing Goldman Sachs’s practices of fleecing its customers and noting that neither the individual trader’s nor the bank’s

partnership to corporate form in Wall Street firms,¹³⁷ but with the ability to create complex, opaque financial products— and to profit from them at the expense of less sophisticated customers.¹³⁸ Potential clients, who were often at the losing ends of the trades, nonetheless sought to be associated with the winners of these high stakes status competitions.¹³⁹

The changes within professions have been less dramatic, but they are not immune from the tournament mentality: big law firms have become more like businesses,¹⁴⁰ and differences in doctors' compensation have also become more variable.¹⁴¹

Taken together, these changes create more hierarchical and variable compensation systems; no two employees in a company may necessarily earn the same salary, with disparities increasing as one climbs the management ladder.¹⁴² 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.¹⁴³ 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.¹⁴⁴ The

reputation was necessarily hurt by being associated with this conduct so long as the behavior was associated with the “smartest” bankers).

¹³⁷ 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).

¹³⁸ HILL & PAINTER, *supra* note 12, at 85-86, 90 (describing the perceived connection between “cleverness” and “winning,” sophisticated products and appetite for risk).

¹³⁹ *Id.* at 19 (indicating the emphasis on selling the most complex products to the least sophisticated parties); 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).

¹⁴⁰ Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751 (2010). 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, 2263 (2010) (observing that “competitive meritocracy” is being replaced by a “hypercompetitive ideology” that, compared with its predecessor, 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 and maintaining a sustainable work-life balance and this shift disadvantages women).

¹⁴¹ 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/> (indicating that physician compensation has become more based on bonuses).

¹⁴² Eisenberg, *supra* note 14, at 26.

¹⁴³ Ribstein, *supra* note 7, at 9.

¹⁴⁴ See David W. Hart & Jeffery A. Thompson, *Untangling Employee Loyalty: A Psychological Contract Perspective*, 17 BUS. ETHICS Q. 297-323 (2007) (observing that

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 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.¹⁴⁵ The subject of much less commentary, however, has been the impact on women. They have lost ground in the areas of the economy where incomes have increased most.

Looking at overall measures of the gendered gap in income would seem to tell a story of progress; that 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.¹⁴⁶ 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.¹⁴⁷ Today, that relationship has reversed; the percentage of the male wage that female college graduates earns has declined, while it has increased for all other women.¹⁴⁸

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.¹⁴⁹

employee loyalty is harder to come by in companies that do not offer secure employment, income, and benefits).

¹⁴⁵ See Lazonick, *supra* note 132, at 857-59; see also Noah, *supra* note 21 (addressing economic inequality more generally).

¹⁴⁶ 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/>.

¹⁴⁷ RETHINKING CAPITALISM, *supra* note 10.

¹⁴⁸ 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 a shift in the gendered wage gap).

¹⁴⁹ Drew Desilver, *For Most Workers, Real Wages Have Barely Budged for Decades*, Pew Research Center (Oct. 9, 2014), <http://www.pewresearch.org/fact-tank/2014/10/09/for-most-workers-real-wages-have-barely-budged-for-decades/>.

The most dramatic changes in income were at the absolute top, the place where women are the least represented.¹⁵⁰ By 2014, total average CEO compensation for the largest firms had reached \$16.3 million.¹⁵¹ These increases in compensation between the late seventies 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.¹⁵² 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,¹⁵³ "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."¹⁵⁴ Even if they make it into the CEO ranks, the women "earn 46% less than their male counterparts, after adjusting for age and education."¹⁵⁵

The financial sector exhibits a similar pattern of disproportionate increase in compensation and a widening gender gap. In the post-war era, compensation in the financial sector increased in step with other industries,¹⁵⁶ 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.¹⁵⁷ 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 gap than among men when the same measurements

¹⁵⁰ Noah, *supra* note 21 (describing increases in compensation in the financial sector and the top executive ranks as the primary sources of income inequality in the country.).

¹⁵¹ As with other sectors, the disparities between top firms and others often exacerbate differences in compensation. *Executive Paywatch: High-Paid CEOs and the Low-Wage Economy*, AFL-CIO, <http://www.aflcio.org/Corporate-Watch/Paywatch-2014> (last visited Nov. 11, 2016).

¹⁵² Lawrence Mishel & Alyssa Davis, *Top CEOs Make 200 Times More than Typical Workers*, ECON. POL'Y INST. (June 21, 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/>.

¹⁵³ Catalyst, *Statistical Overview of Women in the Workforce* (2016), <http://www.catalyst.org/knowledge/statistical-overview-women-workforce>.

¹⁵⁴ Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 923 (2016).

¹⁵⁵ Eisenberg, *supra* note 14, at 25.

¹⁵⁶ June Carbone, *Once and Future Financial Crises: How the Hellhound of Wall Street Sniffed Out Five Forgotten Factors Guaranteed to Produce Fiascos*, 80 UMKC L. REV. 1021, 1057 (2012).

¹⁵⁷ *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 in the United States. *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).

are used¹⁵⁸ and other surveys find similar gaps among insurance agents, security sales agents, financial managers, and clerks.¹⁵⁹ 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 M.B.A.s, their numbers on Wall Street dropped after 2000,¹⁶⁰ as did their representation in venture capital firms like Kleiner Perkins.¹⁶¹

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.¹⁶² For example, following the financial sector positions, the next highest disparities tend to come for marketing and sales managers, who are often paid on commission, where it is 65.8%, followed by physicians and surgeons, 71.0, management analysts 74.9, and lawyers 77.1.¹⁶³

Doctors provide a particularly puzzling example because gender gaps have grown not only in total income,¹⁶⁴ but also in starting salaries, even after controlling for education, specialty, and hours worked.¹⁶⁵ As with other positions, the disparities among doctors tend to be the highest in the most profitable specialties, such as orthopedic surgery and among other surgical subspecialties.¹⁶⁶ Moreover, gender differences are greatest in the markets, such as Charlotte, S.C., that have the highest average levels of physician pay, replicating the patterns in other industries of the highest gender gaps in the most lucrative jobs.¹⁶⁷ In addition, studies find

¹⁵⁸ See Thompson, *supra* note 146. For more recent figures, see Am. Ass'n Univ. Women *supra* note 22 (showing financial sector as still characterized by the largest gender gaps in compensation).

¹⁵⁹ Indeed, this study found that the six occupations with the largest gender gaps were all in the financial sector. 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.

¹⁶⁰ *Id.*

¹⁶¹ Giang, *supra* note 1.

¹⁶² See Am. Ass'n Univ. Women, *supra* note 22.

¹⁶³ *Id.*

¹⁶⁴ Indeed, looking at doctors as a group, the gendered wage is worse than for other professions, with female physicians and surgeons making only 59.1% of the incomes earned by their male peers. Eisenberg, *supra* note 14, at 24.

¹⁶⁵ 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. 193201 (2011).

¹⁶⁶ Anupam B. Jena et al., *Sex Differences in Physician Salary in US Public Medical Schools*, 176 JAMA INTERNAL MED. 1294 (2016), <http://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2532788> (finding gender-based differences in compensation after controlling for physician age, years of experience, specialty, faculty rank, several measures of research productivity, and payments by Medicare).

¹⁶⁷ “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*

gender disparities where compensation is based on subjective evaluations or reductionist measures of procedures billed.¹⁶⁸

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.¹⁶⁹ While there is a gender wage gap of 22.9% among female and male lawyers as a whole, among partners in the largest firms, there is a 44% differential in pay.¹⁷⁰ 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.

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 focus on ways to ensure the promotion of women on the same terms that apply to the men.¹⁷¹ Such an approach to gender discrimination focuses on the seeming neutrality of the more competitive marketplace, thus placing its impact 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

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.

¹⁶⁸ 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. Charlotta Weaver et al., *A Matter of Priorities? Exploring the Persistent Gender Pay Gap in Hospital Medicine*, 10 J. HOSP. MED. 486 (2015) (indicating that at least part of the explanation was that women doctors cared less about money). 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. Fitch, *supra* note 122.

¹⁶⁹ Elizabeth Olson, *A 44% Pay Divide for Male and Female Law Partner, Survey Says*, N.Y. TIMES (Oct. 13, 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®ion=CColumn&module=Recommendation&src=rechp&WT.nav=RecEngine>.

¹⁷⁰ *Id.*

¹⁷¹ SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

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, explores the impact on the qualities associated with the winners of such competitions, and third, considers the negative evaluation of women in such environments. This means that women face a triple, not just a double, bind.¹⁷²

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,¹⁷³ emphasize that as differences in compensation have become more extreme, the competition for top jobs has increased,¹⁷⁴ and that increased competition produces greater gender differences.¹⁷⁵ This section considers why simply 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.¹⁷⁶

¹⁷² See *supra* text at notes 23-24 (defining the triple bind).

¹⁷³ See *supra* sources in notes 7-11.

¹⁷⁴ See, e.g., Dallas, *supra* note 121, 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).

¹⁷⁵ See, e.g., Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects*, 13 ORG. SCI. 601 (2002) (finding that bonus pay systems produce more gender disparities than systems that give greater weight to base pay); Paul Gompers et al., *Gender Effects in Venture Capital* 5 (May 12, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445497 (observing that women tend to do better in more formal or “bureaucratic” pay systems).

¹⁷⁶ Mary Anne Case provides a particularly effective example of this when she describes how the persistence of counterproductive traits in the selection of police officers (aggressiveness, self-assuredness and reliance on physical strength) reflected the definition of the police office role in terms of stereotypical masculine traits even when other approaches to policing that emphasized different traits (e.g., the de-escalation of conflict) were 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 notes further some of the most effective recommendations for reform came from recognition of the

The emphasis on male-defined competition then produces self-reinforcing effects that create even less supportive environments for women. Women who 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 – become that much less likely to apply.¹⁷⁷

First, when it comes to working longer hours,¹⁷⁸ women, particularly those with young children, often do not apply.¹⁷⁹ Longer hours certainly provide part of the answer.¹⁸⁰ As the economy has shifted toward more 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.¹⁸¹ Hours have in fact increased, and they have increased most at the top of the income ladder.¹⁸² During the Great Compression from the forties through the seventies, blue-collar workers and white-collar workers worked about the same number of hours.¹⁸³ Today, the highest earning employees work much longer hours than the

abuses the led to the Rodney King case rather than simply consideration of women's interests taken in isolation. *Id.*

¹⁷⁷ E.g., FINE, *supra* note 24, at 121 (in one study of a consulting firm, “women on average were less willing than men to make sacrifices for their career, and to take career risks in order to get ahead. Closer examination revealed that this was because women tend 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”).

¹⁷⁸ Marianne Bertrand, Claudia Goldin & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J.: APPLIED ECON. 228 (2010), <http://www.aeaweb.org/articles.php?doi=10.1257/app.2.3.228>.

¹⁷⁹ See, e.g., Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 264 (2013) (citing Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete too Much?*, 122 Q.J. ECON. 1067, 1078, 1097 (2007)).

¹⁸⁰ More competitive environments which increase the emphasis on long or inflexible hours disadvantage women more than men. In some cases, such as women's decision to elect 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*, Nat'l Bureau Econ. Res. Working Paper No. 18410 (Sept. 2012), <http://www.nber.org/papers/w18410>. In many cases, though, long hours become a product of competition itself rather than an inevitable job characteristic. See Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, 56 REV. SOC. ECON. 442, 457 (1998) (describing the way that changes in hours worked corresponds with income inequality).

¹⁸¹ Claudia Goldin & Lawrence F. Katz, *Transitions: Career and Family Life Cycles of the Educational Elite*, 98 AM. ECON. REV. 363 (2008) (an 18-month break during ten years of working results in decreased earnings of 41%); see also Claudia Goldin & Lawrence F. Katz, *The Cost of Workplace Flexibility for High-Powered Professionals*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 45 (2011).

¹⁸² Bertrand, Goldin & Katz, *supra* note 178.

¹⁸³ Jacobs & Gerson, *supra* note 180, at 457 (observing that in 1965, leisure time did not vary by class).

average worker does.¹⁸⁴ Women still bear disproportionate responsibility for child care,¹⁸⁵ and when women's hours exceed 45 hours a week, it undermines their relationships.¹⁸⁶ 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.¹⁸⁷ 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 50 or 60 hours a week because of their greater involvement in childrearing.¹⁸⁸

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.¹⁸⁹ The long hours themselves may reflect more competitive environments rather than increased productivity.¹⁹⁰ 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.¹⁹¹ Consequently, while long hours do affect gender disparities, the longer hours may reflect increased competition as much 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

¹⁸⁴ David R. Francis, *Why High Earners Work Longer Hours*, National Bureau of Economic Research, <http://www.nber.org/digest/jul06/w11895.html> (last visited Jan. 22, 2017).

¹⁸⁵ Claudia Goldin, *A Grand Gender Convergence*, 104 AM. ECON. REV. 1091, 1111-13; (2014); *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/>.

¹⁸⁶ PAUL R. AMATO, ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 104 (2009).

¹⁸⁷ See *id.*; JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 98 (2014).

¹⁸⁸ JOANNA GROSSMAN, *NINE-TO-FIVE* 299 (2016).

¹⁸⁹ Goldin, *supra* note 185, at 1116-17; see also Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990's: Slowing Convergence*, 60 INDUS. & LAB. REL. REV. 45, 62 (2006), <http://dataspace.princeton.edu/jspui/handle/88435/dsp01gb19f581g>.

¹⁹⁰ 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>; Wald, *supra* note 140, at 1271-72 (explaining the emphasis on long hours at law firms as the product of an ideological shift).

¹⁹¹ Neil Irwin, *How Some Men Fake an 80 Hour Workweek and Why It Matters*, N.Y. TIMES (May 5, 2015), <http://www.nytimes.com/2015/05/05/upshot/how-some-men-fake-an-80-hour-workweek-and-why-it-matters.html>.

from success.¹⁹² These studies, however, have been subject to withering criticism¹⁹³ 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.¹⁹⁴

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 wants ads emphasizing competitive environments increase the percentage of men who apply.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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,¹⁹⁹ and the greater percentage of men may make the environments less attractive to

¹⁹² Blau & Kahn, *supra* note 90, at 42-44 (surveying literature on confidence and risk aversion).

¹⁹³ See, e.g., JULIE A. NELSON, GENDER AND RISK-TAKING: ECONOMICS, EVIDENCE, AND WHY THE ANSWER MATTERS (2017).

¹⁹⁴ Blau & Kahn, *supra* note 189 (indicating that male and female managers and entrepreneurs did not differ in risk propensities).

¹⁹⁵ *Id.* at 36 n.60, 37-38, (indicating that controlling for differences in attitudes toward competition among business students accounted for part of the gendered wage gap); *id.* at 41 (describing study that found that "the more heavily the compensation package tilted towards rewarding the individual's performance relative to a coworker's performance, the more the applicant pool shifted to being more male dominated.").

¹⁹⁶ Niederle & Vesterlund, *supra* note 179, at 1078, 1097; see also Jeffrey Flory, Andreas Leibbrandt, & John A. List, *Do Competitive Workplaces Deter Female Workers? A Large-Scale Natural Field Experiment on Gender Differences on Job Entry Decisions*, 82 REV. ECON. STUD. 122 (2014)(indicating the gender gap in applications more than doubles when a large fraction of the wage (50%) depends on relative performance, reflecting greater female than male aversion to such environments).

¹⁹⁷ Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 264 (2013) (citing Niederle & Vesterlund, *supra* note 179, at 1078, 1097).

¹⁹⁸ Richard M. Ryckman, Cary R. Libby, Bart Van Den Borne, Joel A. Gold, Marc A. Lindner, *Values of Hypercompetitive and Personal Development Competitive Individuals*, 69 J. PERSONALITY ASSESSMENT 271 (1997); see also FINE, *supra* note 24, at 151-72 ("The Myth of the Lehman Sisters").

¹⁹⁹ See, e.g., Flory et al., *supra* note 196, at 124, 146.

women for reasons that go beyond a taste for competition.²⁰⁰ 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 sales may have long been designed in such terms.²⁰¹ Both tend to result in fewer women applying.²⁰²

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.²⁰³ Employers who emphasize the competitive nature of such positions can expect to attract more men than women,²⁰⁴ 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.²⁰⁵ The emphasis on long hours then challenges women who make choices under the constraints of familial responsibilities (which in turn become employer-enforced stereotypes).²⁰⁶ Moreover, these workplaces will “crowd out” values such as concern for others or adherence to ethical principles that many women (and men) might prefer.²⁰⁷

Accordingly, these are choices that are steered by the ways employers structure²⁰⁸ and advertise²⁰⁹ jobs, and choices made when women know their actions

²⁰⁰ Danielle Gaucher, Justin Friesen, & Aaron Kay, *Evidence that Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality*, 101 J. PERSONALITY & SOC. PSYCHOL. 109 (July 2011).

²⁰¹ EEOC v. Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

²⁰² 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, e.g., Francine Blau & Lawrence Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7, Table 7 (Feb. 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).

²⁰³ Dallas, *supra* note 121, at 37.

²⁰⁴ Claire Cain Miller, *Job Listings that Are too Feminine for Men*, N.Y. TIMES (Jan. 16, 2017), <https://www.nytimes.com/2017/01/16/upshot/job-disconnect-male-applicants-feminine-language.html>; 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&.

²⁰⁵ Dallas, *supra* note 121, at 37.

²⁰⁶ Schoenbaum, *supra* note 131, at 778 (2013); see also FINE, *supra* note 24, at 151-72

²⁰⁷ Stout, *supra* note 11, at 529 (observing that emphasis on performance pay crowds out “concern for others’ welfare and for ethical rules, making the assumption of selfish opportunism a self-fulfilling prophecy”).

²⁰⁸ Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1058 (2015).

²⁰⁹ Miller, *supra* note 204.

will be viewed differently than men's.²¹⁰ 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.”²¹¹ 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 it whatever obstacles get in the way.²¹² 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.²¹³ 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

²¹⁰ Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2011).

²¹¹ Khurana, *supra* note 127, at 69.

²¹² 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*, 82 HARV. BUS. REV. 92 (2004) (arguing that narcissism is overall a plus in business leadership as it contributes to the ability to “push through massive transformations” and to supply the charm necessary to win over the masses); Charles A. O'Reilly III, Bernadette Doerr, David F. Caldwell & Jennifer A. Chatman, *Narcissistic CEOs and Executive Compensation*, 25 LEADERSHIP Q. 218, 218 (2013), <http://dx.doi.org/10.1016/j.lequa.2013.08.002> (describing narcissists as more likely to be “inspirational, succeed in situations that call for change, and be a force for creativity”).

²¹³ See, e.g., James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 475 (2004) (observing that “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 189, 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.”); Paredes, *supra* note 117, at 675 (describing the hubris of CEOs who see their high pay as an indication of self-worth).

bad.”²¹⁴ Like Ribstein, both management supporters and their critics label this collection of traits “narcissistic”²¹⁵ – and as stereotypically male.²¹⁶

What these changes in both finance and upper management do is to 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.²¹⁷ 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 that are associated with narcissism, and narcissists are both more likely to apply for and be selected for such positions.²¹⁸

Second, men are more likely to be identified with such traits.²¹⁹ Psychological studies show that while both men and women display such traits, men do so to a much greater degree than women.²²⁰ 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 was in the willingness to demand greater rewards for themselves, and to use greater status to exploit others.²²¹

²¹⁴ Larry Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 9 (2002); see also O'Reilly et al., *supra* note 212, at 218 (noting the increasing evidence that narcissistic individuals often become leaders).

²¹⁵ See, e.g., Maccoby, *supra* note 212.

²¹⁶ See Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-analytic Review*, 141 PSYCHOL. BULL. 261, 264 (Mar 2015), <http://dx.doi.org/10.1037/a0038231> (summarizing the literature). 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 Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 441 (2000).

²¹⁷ Mary Ann 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 176, at 86.

²¹⁸ See, e.g., O'Reilly et al., *supra* note 191, 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.

²¹⁹ Grijalva et al., *supra* note 216, at 262, 280.

²²⁰ *Id.* Indeed the term “narcissism” is often associated with gender-stereotyped behavior such as “physical expressions of anger, a strong need for power, and an authoritative leadership style.” ANNIKA LORENZ, ACQUISITION VS. ALLIANCE: THE IMPACT OF HUBRIS ON GOVERNANCE CHOICE 25 (2011).

²²¹ 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 216, at 280. For examples of the willingness to exploit

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 received is justified, and to use whatever tactics they have at their disposal to increase their leverage in negotiations.²²² 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.”²²³

In short, the selection for narcissistic traits favors men who are more likely than women are to desire power, to be attracted to positions that promised 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”²²⁴

While the valorization of narcissistic traits often leads to the willingness to overlook many of the negative traits associated with it, women do not benefit to the same degree from the expression of these traits nor escape scrutiny to the same extent as the men. At the same time, neither do they 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 not conforming to gender stereotypes—but if they do not, they may be viewed as lacking in leadership potential.²²⁵ The association of the more positive narcissistic traits such as

others, see HILL & PAINTER, *supra* note 12, at 123-24 (2015) (describing such traits in the financial sector). This may go beyond narcissism to psychopathy. Tom Loftus, *What Your CEO Is Reading: My CEO, My Psychopath; Hwy. 101 Road Rage; Reengineering for Women in Tech*, Wall St. 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/> (“Recent studies show that four to eight percent of high-level executives are psychopaths, compared to just 1% of the population”).

²²² See, e.g., Paredes, *supra* note 117, at 675 (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 12, at 116 (describing crowding out effect in bankers).

²²³ O'Reilly et al., *supra* note 189, at 218.

²²⁴ #ambitious #aggressive #pushy #competitive #cutthroat #disregardful #tenacious,” *Sharp Elbows*, URBAN DICTIONARY (Apr. 5, 2015), <http://www.urbandictionary.com/define.php?term=Sharp%20Elbow>.

²²⁵ When women defy gender role expectations, they face numerous repercussions in the workplace. Emily A. Leskinen, Verónica Caridad Rabelo, & Lilia M. Cortina, *Gender Stereotyping and Harassment: A “Catch-22” for Women in the Workplace*, 21 PSYCHOL. PUB. POL'Y & L. 192 (2015). See DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW

“motivation to lead, desire for authority, and self-perceived leadership ability” with men tends to reinforce what may be subconscious gender stereotypes.²²⁶ At the same time, women tend to be criticized for deviation from expected feminine roles even when they display the more positive traits²²⁷ and punished more severely than men for the more negative traits associated with narcissism, such as self-entitlement and willingness to exploit others.²²⁸ Women at Amazon, for example, attribute 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 in promotions because of intangible criteria like the failure to “earn trust” or disagreeing with colleagues.²²⁹ “Being too forceful, they said, can be particularly hazardous for women in the workplace.”²³⁰

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. At the same time, employers are more likely to view women than men negotiating aggressively, especially in negotiations without clear

CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 68 (2007) (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. DEC. PROCESSES 84, 95 (2007) (both male and female evaluators penalized women who negotiated for more compensation because “they appeared less nice and more demanding”). See also the discussion of Ellen Pao’s lawsuit, *supra* notes 1-3 and accompanying text.

²²⁶ For a summary of the literature on the mutually reinforcing effects of such stereotypes, see McGinley, *supra* note 216, at 441 (describing the way men frame women men “as lacking legitimacy to hold powerful positions”).

²²⁷ *Id.* at 436-39 (describing how women are treated more negatively when they demonstrate leadership skills).

²²⁸ See Grijalva, et al., *supra* note 216, at 264. McGinley also emphasizes the normalization of male behavior within the workplace that involves “competitive efforts between men to establish superior standing and/or resources.” These behaviors include vying for attention, self-promotion, efforts to control or dominate others, and taking credit for the work of others. McGinley, *supra* note 216, at 441.

²²⁹ Indeed, Dallas, *supra* note 121, at 36-37, observes that competitive evaluation systems create incentives to undermine employees perceived as untrustworthy.

²³⁰ Jodi Kantor & David Streifeld, *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>.

standards for the results.²³¹ And even if they do negotiate at the same rate as men, they are less likely to receive promotions.²³²

In industries that reward taking risks by breaking the rules and hoping to get away with it, the double bind may be particularly pernicious. A study of the financial industry demonstrates, for example, that misconduct is prevalent: “roughly one in thirteen financial advisers in the U.S. has a record of misconduct.”²³³ Gender differences in the misconduct are rife. Men are three times as likely to engage in misconduct, twice as likely to be repeat offenders, and commit offenses that turn out to be 20% costlier to their employers.²³⁴ Yet, once misconduct is reported, the women are 20% more likely to lose their jobs and 30% less likely to find new ones compared to the men.²³⁵ 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.”²³⁶ 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.²³⁷

Given these 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 a “heads I win, tails you lose game” in which

²³¹ See e.g., Benjamin Artz et al., *Do Women Ask?* (Sept. 2016), http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2016/twerp_1127_owald.pdf; Blau & Kahn, *supra* note 90, at 37 (summarizing 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/> (study of Australian workplaces found that women asked for pay raises as often as men, but were less likely to receive them).

²³² Artz et al., *supra* note 231; Daniel Victor, *Research Suggests Women Are Asking for Raises, but Men Get Them More*, *N.Y. TIMES* (Sept. 7, 2016), https://www.nytimes.com/2016/09/07/business/research-suggests-women-are-asking-for-raises-but-men-get-them-more.html?_r=0.

²³³ Mark Egan, Gregor Matvos, & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct* 2 (Mar. 12, 2017), <https://ssrn.com/abstract=2931940> or <http://dx.doi.org/10.2139/ssrn.2931940>.

²³⁴ *Id.* at 3.

²³⁵ *Id.* at 12-14, 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.

²³⁶ *Id.* at 30.

²³⁷ 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>.

they may be less likely to enjoy the benefits of outsized risks, but more likely to experience their negative consequences.²³⁸

* * *

Large companies today rely heavily today on pay for performance systems, with competitive evaluations that rank employees.²³⁹ Managers often introduce such systems to shake up an organization, reorient it toward new management objectives, or prepare for layoffs.²⁴⁰ The systems, even when they strive to be objective, are subject to favoritism and gamesmanship.²⁴¹ Such workplaces encourage “unethical behavior, since some individuals are willing to pay to improve their rank by sabotaging others’ work or by increasing artificially their own relative performance.”²⁴² And there is no evidence they improve performance. Yet, they remain entrenched partly because competition, rankings and bonuses have become associated with standard management norms and are self-reinforcing while entrenching double-bind detriments²⁴³ and partly because they do deliver short term

²³⁸ 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 a culture of winning creating an environment that encourages “risk-prone decision making”).

²³⁹ Enron, for example, used the “rank and yank” performance management system initially developed at GE to rank their employees and then terminate the bottom 10%. 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); 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, 42 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”).

²⁴⁰ Steve Bates, *Forced Ranking*, HR MAG. (June 1, 2003), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0603bates.aspx>.

²⁴¹ *Id.*

²⁴² Gary Charness, David Masclet, & Marie Claire Villeval, *The Dark Side of Competition for Status*, 60 MGMT. SCI. 38, 42 (2014).

²⁴³ See, e.g., Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999) (observing that “(ostensibly) independent decisions, 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 204, at 86-7, 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

pay-offs to ambitious CEOs.²⁴⁴ Even if a growing literature documents the long term disadvantages of these practices, companies focused on the short terms may have little incentive to change.

At the same time, the emphasis on individual rather than institutional advancement often crowds out other values²⁴⁵ and undermines the importance of what women do well. Stereotypically female leadership styles 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.²⁴⁶ 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.²⁴⁷ Yet, modern workplaces, with their emphasis on landing rising stars rather than on investing in their own, provide

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

²⁴⁴ Dallas, *supra* note 121, at 37, n.222 (noting tradeoffs between short-term objectives and long term effects).

²⁴⁵ HILL & PAINTER, *supra* note 12, 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 laboratory 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 HENDRICKSON EAGLY & LINDA LORENE CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS 46(2014) (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).

²⁴⁶ 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>; Alice Eagly et al., *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; 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.

²⁴⁷ 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 (2000); 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).

greater rewards for those willing to move, both within institutions and to new positions elsewhere.²⁴⁸

Overall, these shifts in corporate culture have deeply gendered effects.²⁴⁹ 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.²⁵⁰ The more sophisticated studies show that the disparities tend to be less about capacity and performance, and more about stereotypical assumptions about leadership.²⁵¹ The “tournament” tends to attract those most “willing to take great risk as the company moves up and to lie when things turn bad.”²⁵² The fact that the characteristics associated with these positions tend to be gendered ones further encourages stereotyped evaluations of employee performance,²⁵³ 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

²⁴⁸ Flory, et al., *supra* note 196, at 154-55, note for example that, even in low level positions, the great majority of workers receive evaluations and may be able to apply for promotions or moves within an organization that depend on these evaluations.

²⁴⁹ See *supra* notes 171-253 and accompanying text.

²⁵⁰ See, e.g., *supra* note 246 discussion of transformative v. transactional leadership styles.

²⁵¹ Managers with a more stereotypically female approach, whether they are men or women, often do better than the 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> (summarizing research literature on gender differences in selection and performance).

²⁵² Ribstein, *supra* note 9, at 9.

²⁵³ See DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 68 (2007) (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. DEC. PROCESSES 84, 95 (2007) (if the evaluator was female, women were not less included to negotiate; however, 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 ST. J. (June 23, 2017), <https://blogs.wsj.com/riskandcompliance/2017/06/23/survey-roundup-women-take-step-back-in-board-representation/>. (“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”).

The history of antidiscrimination law shows that it sought to combat not just individual instances of discrimination, but 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 measures, such as unionization,²⁵⁴ 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, the practices, which were initially viewed as routine, became hard 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 cases 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.²⁵⁵

This section looks at the ability of antidiscrimination to address the systemic practices. 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 Microsoft, that use discrimination law to challenge the 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 will depend on the nature of the individual case, but it will only fit into Title VII through an approach that engages the substantive legitimacy of the practices. The conclusion suggests that the most effective approaches, however, combine antidiscrimination efforts with substantive reforms designed to address the practices.

A. The Limited Reach of Current Antidiscrimination Doctrine

Anti-discrimination 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

²⁵⁴ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 13-24 (2016) (documenting the decline in union strength).

²⁵⁵ 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>.

individualized pathways to advancement.²⁵⁶ As these theorists argue, proving that an employer has treated an individual employee unfairly because of sex discrimination has become increasingly difficult.²⁵⁷

Ellen Pao's case provides an example of the limitations of Title VII as a check on the determinations made within such as 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.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ Yet, 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

²⁵⁶ See, e.g., Green, *supra* note 39, at 100 (noting change in the years after Title VII away from the “well-defined, hierarchical, bureaucratic structures delineating clear paths for advancement within institutions” that characterized workplaces at the beginning of the antidiscrimination efforts.); Sturm, *supra* note 17, 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”).

²⁵⁷ Sturm, *supra* note 17, at 468-69; see also Selmi, *supra* note 67, at 780 (pointing out the difficulty in remedying subtle forms of discrimination).

²⁵⁸ 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?action=click&contentCollection=Technology&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

²⁵⁹ Bagenstos, *supra* note 17, at 8 (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”).

²⁶⁰ Tiku, *supra* note 255.

worker from a different group, because of a protected characteristic.²⁶¹ Among top level and professional jobs, there may simply be no one else in a small unit.²⁶² Even among middle management positions there may be no one who performs the same duties.²⁶³ 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.²⁶⁴

Moreover, in today's workplaces, routine duties have become increasingly mechanized or outsourced, with the remaining employees performing varied and discretionary tasks.²⁶⁵

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

²⁶¹ See *supra* discussion in text at notes 58-66; Franklin, *supra* note 46, at 1317, 1367; Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, __ WIS. L. REV. __ (forthcoming 2017).

²⁶² 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) (emergency management agency director; the "agency was staffed by three persons, holding the positions of Director, Deputy Director, and TVA Planner"); Sally E. Anderson, *Special Considerations for Solo and Small Firm Practitioners*, <http://www.abanet.org/legalservices/lpl/downloads/soleandsmallfirm.pdf> (last visited July 9, 2016) ("nearly 80 percent of lawyers in the United States currently practice in firms of this size [one to five lawyers]").

²⁶³ See, e.g., Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C., 277 F.3d 882, 894 (7th Cir. 2001) (a female attorney who sued her firm for failing to provide adequate staffing on her cases was unable to find similar cases in which male attorneys had received better staffing. The court found that the cases she identified for comparison "on 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.")

²⁶⁴ Georgen-Saad v. Tex. Mut. Ins. Co., 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002); see also Keener v. Universal Cos., Inc., 128 F. Supp. 3d 902, 907 (M.D.N.C. 2015) (plaintiff who was a shipping and receiving clerk complained that she had to perform some of the job duties of a shipping and receiving supervisors, but could not identify a comparator); Eisenberg, *supra* note 14, at 40.

²⁶⁵ Goldberg, *supra* note 60, 755-56 (describing the prevalence of assembly line workplaces in the manufacturing era in comparison with today's more varied assignment of responsibilities).

investment fund, and the failure to fully compensate her for the value she delivered.²⁶⁶ Kleiner-Perkins responded that Pao was “treated better than her alleged male peers and was in fact paid more during key period at issue.”²⁶⁷ Pao’s allegations, however, ultimately depended, 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.²⁶⁸ In the original U.S. Supreme Court case on stereotyping, *Price Waterhouse v. Hopkins*,²⁶⁹ the plaintiff, Ann Hopkins was a candidate for partnership at an accounting giant, and she had an outstanding record of obtaining major contracts. 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 later time, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²⁷⁰ 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.’”²⁷¹ The Court separated language that it deemed gender stereotyping—such as terms like “macho” and “masculine,” from language it perceived as gender neutral, but an unfavorable evaluation of her—that she was “overly aggressive” and “unduly harsh.”²⁷²

Yet, since 1989, employers have become more adept at avoiding references to “charm school” and other explicitly gendered comments.²⁷³ Instead, sex

²⁶⁶ Complaint, Paragraphs, 24-26, file:///C:/Users/jcarbone/Downloads/org.sfsuperiorcourt.CGC12520719.79.0.pdf

²⁶⁷ Trial Brief of Defendant Kleiner Perkins Caufield & Byers LLC, Superior Court of California, County of San Francisco Case No. CGC 12 520719 Ellen Pao v. Kleiner Perkins Caufield & Byers LLC et al., file:///C:/Users/jcarbone/Downloads/org.sfsuperiorcourt.CGC12520719.196.0%20(1).pdf, at 10.

²⁶⁸ Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 43 (2016) (“because most Americans embrace equality ideals, they discriminate in subtle, obfuscated, and sometimes unconscious ways”); Sturm, *supra* note 17, at 460 (“Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality”).

²⁶⁹ 490 U.S. 228 (1989).

²⁷⁰ *Id.* at 235.

²⁷¹ *Id.* at 256.

²⁷² *Id.* at 235.

²⁷³ 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 Streifeld, *Ellen Pao Loses Silicon Valley Bias Case Against*

stereotyping more typically involves unconscious biases that may “sneak up” on a decisionmaker. Biases “affect perceptions and evaluations of an employee in innumerable encounters that occur well before any ultimate moment of work-assignment, promotion, or discharge decision. By the time the manager actually makes such a decision, the die may have already been cast by the earlier biased perceptions.”²⁷⁴

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,²⁷⁵ while the jurors ultimately held against her the fact that her performance reviews deteriorated over time, so that her termination came as the end result of a long period of difficulties.²⁷⁶

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. The evaluations referred to “pushing too hard to establish herself, rather than being collaborative,”²⁷⁷ being too territorial and untrustworthy, pursuing her own agenda, and not being “a team player.”²⁷⁸ A central part of Pao’s response, however, was that such behavior was typical and tolerated by male employees, and that some of the perception that she was not a team player came 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.²⁷⁹ 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, *Liars’ Poker* described investment banking houses as celebrating traders’ ability to lie – and get away with it. 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, could not truly represent the women who never applied because they found the entire environment hostile. Nor could Pao present what may be well

Kleiner Perkins, N.Y. TIMES (Mar. 28, 2015),
<https://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html>.

²⁷⁴ Bagenstos, *supra* note 17, at 8.

²⁷⁵ Her allegations including the exclusion of women from important meeting, 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* Complaint, *supra* note 266.

²⁷⁶ Streitfeld, *supra* note 258.

²⁷⁷ Trial Brief, *supra* note 267, at 3.

²⁷⁸ Trial Brief, *supra* note 267, at 6.

²⁷⁹ Streitfeld, *supra* note 258.

be the most compelling claim against such a system – the claim 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 the practices and linking them to counterproductive workplaces practices *and* gender disparities. The immediate impact of doing so sets up disparate impact cases such as 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.

The section frames the analysis of how to move forward by parsing the elements of disparate impact, first, showing the disparate impact associated with these business practices. Then, in anticipation of a corporation’s defense, this section demonstrates that these practices cannot be justified by business necessity because a wealth of business literature shows that the practices have detrimental effects on companies and their employees. As for the third element of a disparate income case, the 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.²⁸⁰ Courts have adopted the EEOC test for what constitutes a “sufficiently substantial” disparity: when the selection rate for one group is less than 80% of the selection rate for another group.²⁸¹ 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

²⁸⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 658 (1989); *see* Sandra F. Sperino, *Justice Kennedy’s Big New Idea*, 96 B.U. L. REV. 1789, 1795-96 (2016)(discussing elements of a disparate impact claim)..

²⁸¹ 29 C.F.R. § 1607.4 (2010); *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).

decision-making process are not capable of separation for analysis.”²⁸² 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.”²⁸³ The plaintiffs can still succeed if they prove that the employer could have adopted an alternative practices that would comparably serve the employer’s purposes but not result in the same gender disparities.²⁸⁴

The conventional practices challenged in disparate impact litigation have been things like background checks, height and weight requirements, or pencil and paper tests.²⁸⁵ 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.²⁸⁶ 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 because they simply look like background business decisions. In an early comparable worth case, *American Federation of State, County, & Municipal Employees, AFL-CIO (AFSCME) v. Washington*, brought as a disparate impact claim, the plaintiffs had difficulty challenging an entire state-selected system of compensation based on the market structure.²⁸⁷ Yet, these challenges to forced competition and artificial stacking practices are different from assailing market structures.²⁸⁸ Within companies, managers are making intentional decisions to implement appraisal systems that value competition and that have a disparate impact on women.²⁸⁹

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.²⁹⁰ In the case against

²⁸² 42 U.S.C. § 2000e-2(k)(1)(B)(i).

²⁸³ *United States v. Papermakers*, 416 F.2d 980, 989 (5th Cir. 1969). This is the paradigmatic statement of a business necessity. *See Selmi, supra* note 67, at 711.

²⁸⁴ *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Sperino, supra* note 280, at 1830.

²⁸⁵ *Dothard*, 433 U.S. 321; *EEOC v. Freeman*, 778 F. 3d 463 (4th Cir. 2015); *Briscoe v. City of New Haven*, 654 F.3d 200, 205-09 (2d Cir. 2011).

²⁸⁶ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

²⁸⁷ 770 F.2d 1401, 1406 (9th Cir. 1985) (“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.”).

²⁸⁸ Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951 (2011).

²⁸⁹ *See, e.g.*, Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects*, 13 ORGANIZATION SCI. 601 (2002) (finding that bonus pay systems produce more gender disparities than systems that give greater weight to base pay).

²⁹⁰ *See, e.g.*, *Write Them up and Get Them out: Age Discrimination Through Forced Ranking Systems*, 2 ANN. 2004 ATLA –CLE 1794 (July 2004).

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.”²⁹¹

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.²⁹² 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 were 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.”²⁹³ 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 are an insufficient number of employees to make curving process valid.²⁹⁴ While few comprehensive studies have been undertaken, evidence is emerging that rank-and-yank methods have gendered effects. For example, in the information technology industry, a 2016 study shows that the largest factor correlating with gaps in women’s duration of work in the IT industry was whether a firm used “rank and yank” methods.²⁹⁵

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.”²⁹⁶ In the original disparate impact case of *Griggs v. Duke Power*,²⁹⁷ for example, the Supreme Court held that the requirement of a high school diploma was not “significantly related to successful

²⁹¹ Tom Osborn & Laurie McCann, *Forced Ranking and Age-Related Employment Discrimination*, 41 HUM. RTS. (Spring 2004), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vo131_2004/spring2004/hr_spring04_forced.html.

²⁹² Gary W Giumetti et al., *Forced Distribution Rating Systems: When Does “Rank and Yank” Lead to Adverse Impact*, 100 J. APPLIED PSYCHOL. 108, 108 (Jan. 2015).

²⁹³ *Id.* at 188.

²⁹⁴ John Edward Davidson, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA. L. REV. 1605, 1611, 1613 (1995) (noting that “[n]o one asks, and the appraiser does not say, how or why she rated a particular employee’s performance in a particular manner.”).

²⁹⁵ Shuo Yan & Chunmian Ge, *Gender Differences in Competition Preference and Work Duration in the IT Industry: LinkedIn Evidence*, Thirty-Seventh Int’l. Conf. on Information Sys., Dublin (2016), <http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1361&context=icis2016> (concluding that “changes 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.”).

²⁹⁶ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

²⁹⁷ 401 U.S. 424 (1971).

“job performance” for blue collar workers at a power-generating facility.²⁹⁸ The EEOC has recently developed a new guidance to more strongly interrogate blanket refusals to hire people with any criminal background.²⁹⁹

By contrast, the negative sum management strategies have been treated as neutral. When female and African American plaintiffs in a 2001 case against Microsoft, *Donaldson v. Microsoft*, 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.³⁰⁰ 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.³⁰¹ Yet, in part, the court prevented that demonstration by accepting Microsoft’s claim that its assessment system was a “meritocracy” akin to a grading curve,³⁰² 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*, 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.³⁰³ 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.³⁰⁴ The amended pleading points 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 the amended complaint detailed the system’s

²⁹⁸ *Id.* at 426.

²⁹⁹ See EEOC, EEOC Enforcement Guidance 915.002, at 3 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf; EEOC, *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://www1.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

³⁰⁰ *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001).

³⁰¹ *Id.* at 567.

³⁰² *Id.* at 562; see also *id.* at 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.”).

³⁰³ Case 2:15-cv-01483-JLR (Mar. 7, 2016)—U.S. Dist. Ct. W.D. Wash. <http://lchbdocs.com/pdf/Microsoft-order-20160307.pdf>.

³⁰⁴ Case 2:15-cv-01483-JLR, at 5-6 (Apr. 6, 2016)—U.S. Dist. Ct. W.D. Wash. (“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.”).

gender-based pay and promotion effects.³⁰⁵ 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.

Microsoft will presumably claim that the system can be justified as a "business necessity."³⁰⁶ The Microsoft environment, however, does not seem conducive to improving economic performance.³⁰⁷ Indeed, *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."³⁰⁸

As the management literature indicates, these ultra-competitive management systems are bad business practices.³⁰⁹ 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.³¹⁰ Moreover, investors and shareholders are beginning to understand the shortcomings of negative sum competitions, which are often tied to short-term

³⁰⁵ *Id.* at 7.

³⁰⁶ 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).

³⁰⁷ Examinations of Microsoft, e.g., found behavior similar to what Charness, et al, *supra* note 242, 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 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>.

³⁰⁸ *Id.*

³⁰⁹ 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*, 41 HUM. RTS. (Spring 2004), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vo131_2004/spring2004/hr_spring04_forced.html; see also Rapoport, *supra* note 239, at 42 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.").

³¹⁰ Steven E. Scullen et al., *Forced Distribution Rating Systems and the Improvement of Workforce Potential: A Baseline Simulation*, 58 PERSONNEL PSYCHOL. 1 (Spring 2005), <http://onlinelibrary.wiley.com/doi/10.1111/j.1744-6570.2005.00361.x/full> ("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").

measures of business performance.³¹¹ 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.³¹² And studies repeatedly show that employers can adopt a less discriminatory alternative that could achieve their purposes.³¹³ 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.³¹⁴ In short, these management practices that are associated with gender disparities are also bad for business, and, consequently, they are – or should be³¹⁵ – indefensible under Title VII.

* * * *

Disparate impact theory has been limited in its effectiveness, for the reasons indicated in Section I. That is, the suits have been effective where tied to a determination to root out a discredited practice and ineffective where 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.³¹⁶

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

³¹¹ Indeed, rank and yank has often been associated with business abuses, including Jack Welch's earnings management system and Enron. See MARTIN, *supra* note 123, at 29, 97.

³¹² 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>.

³¹³ 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

³¹⁴ 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-performance-appraisal-method-is-it- hr26wbz9.html; 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>.

³¹⁵ Michael Selmi makes the important point that the nature of discrimination has changed, and that courts tend to defer to employer justifications, particularly when it comes to routine business practices, as most competitive evaluation systems appear to be. See Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 947. This Article builds on those insights to argue in contrast that with substantive engagement with counterproductive business practices that produce gender disparities, the practices can – and should – be found to be illegal.

³¹⁶ Selmi, *supra* note 67, at 705.

do not cross the disparate impact threshold.³¹⁷ 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.³¹⁸ Nonetheless, this article suggests that the practices that emphasize destructive competition over collaboration (or other forms of competition), 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, nor is it always unjustified.³¹⁹ It is the illegitimacy of the underlying practice, coupled with the statistically disparate gender effects, that creates the systemic challenge.

For this approach suggested in this Article to be effective, therefore, 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, but 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.³²⁰ Regardless of whether disparate impact succeeds in any individual case, it provides a basis for reviving the vision of antidiscrimination law as promoting equality both within and outside of the workplace, as challenging prohibited classifications and systemic economic inequality.

³¹⁷ 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”).

³¹⁸ See O’Connell, *supra* note 306, at 2811–12.

³¹⁹ See, e.g., Stout, *supra* note 11, 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, making it feasible to design relatively complete employment contracts with few gaps for employees to exploit.”)

³²⁰ 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 67, at 781 (concluding that social support is necessary for the expansion of antidiscrimination doctrine).

CONCLUSION

The management revolution that greatly increased executive compensation (and overall societal inequality), contributed to the financialization of American business, and dramatically worsened gender disparities at the top of the American income ladder has been the subject of increasing criticism³²¹. New studies demonstrate that companies that have adopted the more competitive and share-focused corporate culture have performed worse than the supposed bureaucratic business entities of mid-century America.³²²

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 powers attracts the select few. The competitive practices that such environments encourage 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 the creation of a much more deeply unequal society in ways that go beyond gender. The same practices that produced gender disparities at Microsoft, after all, also contributed to the scandals at Enron.³²³ And numerous studies find that large salaries and the concentration of power breeds overconfidence – and egotism, hubris, and arrogance.³²⁴

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. The companies often slash training program or move operations overseas even when that produces a loss of otherwise needed expertise – and the decimation of well-paying mid-range jobs in the United States.³²⁵ Retail companies like Wal-Mart experience pressure to pay their employees little unless forced by a tighter labor market to pay more than rock bottom salaries. The same forces contribute to greater corporate and economic instability as the search for the next unicorn encourages often unjustified risk-taking, and as the incentives to play

³²¹ See, e.g., Lazonick, *supra* note 132, at 858 (observing that “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”).

³²² Stout, *supra* note 11, at 558-59.

³²³ Lynn Brewer, *Is There a Little Bit of Enron in All of Us?*, 30 J. QUALITY & PARTICIPATION 26 (2007) (finding that Enron’s whistle-blowing records demonstrate that reports of fraudulent activities dropped in the months just prior to the annual review process. Complaints then rose dramatically once the process was completed—suggesting the silence was caused by a fear of negative performance reviews.).

³²⁴ Paredes, *supra* note 117, at 717-18.

³²⁵ Lazonick, *supra* note 132, at 858.

accounting games decrease the reliability and transparency of American business practices.³²⁶

It is not a solution simply to 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 been previously CEO of a smaller company (Lucent Technologies) whose stock had soared because of "creative accounting and liberal financing of sales to customers."³²⁷ Instead, the failure to include women in upper management should be seen as a sign of management toleration of the types of environments that contribute to greater inequality, instability, and efforts to rig the game.³²⁸

The ultimate reform of the system will require, however, not just the inclusion of women but greater efforts to include pro-social and institution- (rather than self-) promoting qualities.³²⁹ These qualities include attention to employee morale, the creation of collaborative work environments that make employee contributions more than the sum of their parts,³³⁰ 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 minority 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 just beginning to be challenged in the Moussouris litigation 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.

Antidiscrimination law has historically had two components: a moral one – discrimination is wrong – and a structural one, that sought to promote equality for

³²⁶ See Black & Carbone, *supra* note 128, at 380, 402.

³²⁷ KHURANA, *supra* note 128, at 109.

³²⁸ See SCANDALOUS ECONOMICS, *supra* note 18; June Carbone & Naomi Cahn, *Unequal Terms: Gender, Power, and the Recreation of Hierarchy*, 69 STUD. IN LAW, POLITICS, & SOC'Y 189 (2016).

³²⁹ See Eagly, *Women as Leaders*, *supra* note 246 (indicating that transformational leadership styles associated with women also work better for men).

³³⁰ Stout, *supra* note 11, at 559-60; Eagly, *Women as Leaders*, *supra* note 246.

workers collectively through efforts to keep in place the factors supporting good jobs. The legal and economic infrastructure of good jobs at mid-century is gone. For antidiscrimination law to serve its original purposes means once again creating a way for equality efforts and antidiscrimination law to operate in tandem. This article offers a beginning to that effort.