The Problem with Predators

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ABSTRACT

Both corporate theory and sex discrimination law start with presumptions that CEOs seek to advance legitimate ends and design the internal organization of business enterprises to achieve such ends. Yet, a growing literature questions why CEOs and boards of directors nonetheless select for Machiavellianism, narcissism, psychopathy, and toxic masculinity, despite the downsides associated with these traits. Three scholarly literatures—economics, criminology, and gender theory—draw on advances in psychology to shed new light on the construction of seemingly dysfunctional corporate cultures. They start by questioning the assumption that CEOs—even CEOs of seemingly mainstream businesses—necessarily seek to advance "legitimate" ends. Instead, they suggest that a persistent issue is predation: the exploitation of asymmetries in information and power to the disadvantage of shareholders, creditors, customers, or employees. These literatures then explore how such CEOs may rationally choose to employ seemingly dysfunctional practices, such as "masculinity contests," which reward employees more likely to buy into ethically dubious activities that range from predatory lending to sexual harassment. This Article maintains that questioning the presumption of legitimacy has profound and largely unexplored implications for corporate theory and anti-discrimination law. It extends the theory of "control fraud" central to white-collar criminology to a new concept of "control predation" that includes conduct that is ethically objectionable, if not necessarily illegal. This Article concludes that only by questioning the legitimacy of these practices in business terms can gender theory adequately address women's workplace equality.

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INTRODUCTION

Both corporate theory and sex discrimination law start with presumptions that business models seek to advance legitimate ends, and that the internal organization of business enterprises reflect reasonable efforts to achieve such ends. Yet, a growing literature questions why businesses nonetheless select for traits in their executives, such as "over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception,"[1] despite long-standing evidence demonstrating the downsides of these traits. Three scholarly literatures shed new light on the construction of seemingly dysfunctional corporate cultures. They start by questioning the assumption that businesses, even seemingly mainstream businesses, seek to advance "legitimate" ends, and seek to identify, instead, the hallmarks of business cultures that advance unscrupulous or predatory ends.[2] They then explore how such cultures may rationally choose to employ seemingly dysfunctional practices, such as "masculinity contests," that reward employees more likely to buy into ethically dubious activities that range from predatory lending to sexual harassment.[3] In this Article, we will maintain that questioning the presumption of "legitimacy" has profound and largely unexplored implications for corporate theory and anti-discrimination law.

Three bodies of work in economics, criminology, and gender theory lay the foundation for our analysis.

First, new work in economics maintains that some companies may adopt business models that depend on the use of manipulation and deception to exploit customers and employees, and that such practices may persist over time because they are so successful and profitable. In 2015, George Akerlof and Robert Shiller, both Nobel Laureates, published *Phishing for Phools: The Economics of Manipulation and Deception*. The book draws on the authors' more technical work in economics to argue, in terms accessible to a popular audience, that economic predation can become a pervasive practice and that it can come to dominate entire market sectors. While neoclassical economics assumes that markets will police deceptive practices and corporate shareholders will depress the share prices of companies that systematically fleece customers, Akerlof and

1. Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 288 (2004).

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

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

Shiller demonstrate that the opposite can also be true: if companies can prosper by cheating, they may drive more honest players from the market.[4]

Second, this work complements that of white-collar criminologists, who also study predatory business practices, and explains how they can take hold and persist in seemingly legitimate businesses. The criminologists have shown how deceptive practices, such as the type of predatory mortgage lending that led to the Great Financial Crisis (GFC), can become pervasive in an industry, persuading more conventional lenders to either adopt similar tactics or depart the field. Criminologists, borrowing a phrase from Akerlof's earlier work, describe the way that fraudulent firms drive more honest ones from the market as a "Gresham's dynamic," in which unscrupulous practices become so profitable that they place more ethical lenders at a competitive disadvantage.[5] The criminologists further explain how the head of the company (the CEO) can create powerful, perverse incentives that create a "criminogenic" environment that normalizes the use of such predatory tactics.[6] Finally, criminologists emphasize that the key to the success of such business models is their seeming legitimacy.[7]

Third, a new body of work in gender theory links gender disparities in hiring, promotion, and wages to predatory business models.[8] Of the ten occupations with the largest pay gap between men and women, four are in the finance industry, including the top category—financial advisors.[9] The literature on personal financial advisors has become increasingly critical of the conflicts of interest that arise from tying advisers' income to the commissions they generate for selling products with high fees that may not necessarily be in their clients' interests. [10] Recent studies also show that male financial advisors are more likely to commit misconduct than

4. *See* GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION 164 (2015) (describing failure to deal with consequences of deception and trickery); *see also* description of "Gresham's dynamic," *infra* note 5 and accompanying text (describing how disreputable dealers can drive honest dealers from the market).

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

6. *See* WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY 3, 5 (2d ed. 2013) [hereinafter BLACK, BEST WAY].

7. *See infra* Part II.

8. *See* Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425 (2018) [hereinafter Cahn et al., *Gender and the Tournament*]; *see also* June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and The Triple Bind*, 88 GEO. WASH. L. REV. (forthcoming 2020).

9. *See* Catherine Clifford, *These 10 Jobs Have the Largest and Smallest Pay Gaps Between Men and Women*, CNBC (Apr. 10, 2018), https://www.cnbc.com/2018/04/09/the-10-jobs-with-the-largest-and-smallest-gender-pay-gaps.html [https://perma.cc/N5HN-NQ4V].

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

female advisors but are less likely to be fired as a result of it.[11] The result creates a triple bind that limits women's success if they do not engage in the same behavior as the men, punishing them more severely when they do, and discouraging them from applying, in part because of prior women's lack of success in the enterprise.[12] Anti-discrimination suits, however, tend to take practices, such as commissions tied to unjustifiable fees, at face value.[13] If the lawsuits were to examine the connections between the predatory business models and the impact on female employees, they might find that the environments most hostile to women also display other dubious practices. The business case for diversity suggests that greater diversity improves firm performance,[14] but the studies finding an empirical correlation between diversity and performance have yet to explain which way the causal arrows run. This Article suggests that the key to both greater diversity and improved business performance may be ethical teamwork. Yet, the role of teamwork and collaboration generally as the link between the two is rarely examined.

Taken together, these three bodies of work shed new light on what seem to be dysfunctional corporate cultures and the challenges they pose to corporate theory and anti-discrimination law. As Milton Friedman observes, standard corporate theory assumes that responsible business executives, at a minimum, obey the law and, more robustly, that market forces encourage ethical practices.[15] Yet, modern economic theory demonstrates that markets may, in fact, promote unscrupulous practices in the face of legal laxity, laxity in enforcement, or simply difficulty in detection.[16] This, in turn, casts the almost century-long debate on stakeholder theory in a different light.[17] Engaging in shady practices may, in fact, increase shareholder value, at least in the short to medium term, at the expense of long-term shareholder and societal interests. In addition,

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11. Mark Egan, Gregor Matvos & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct* 2–3 (Harvard Bus. Sch., Working Paper No. 19–047, 2017), https://www.hbs.edu/faculty/Publication%20Files/19-047_be957781-c55c-4be0-994d-a29875374f32.pdf [https://perma.cc/R5F6-8JU5].

12. *See* Cahn et al., *Gender and the Tournament*, *supra* note 8, at 447.

13. *Id.* at 437 (arguing that courts rarely examine the legitimacy of business practices that disadvantage women).

14. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* 3 (Peterson Inst. for Int'l Econ., Working Paper No. 16-3, 2016); Aimee Picchi, *In Business, More Women at the Top Means More Profits*, CBS NEWS (Feb. 9, 2016), https://www.cbsnews.com/news/more-women-more-profits/ [https://perma.cc/A5CN-3BHT].

15. Milton Friedman, *A Friedman doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32.

16. *Cf.* Akerlof, *supra* note 5, at 495.

17. *See generally* Charles R.T. O'Kelley, *The Evolution of the Modern Corporation: Corporate Governance Reform in Context*, 2013 U. ILL. L. REV. 1001 (2013) (summarizing the debate over corporate purposes).

these practices may also correspond to insular and dysfunctional corporate cultures, linked to various kinds of in-group favoritism, without the practices being actionable in accordance with conventional anti-discrimination doctrines.[18]

These conclusions suggest that a rethinking of the core assumptions of market theory and their relationship to corporate stakeholder doctrine and anti-discrimination law are long overdue.

I. PREDATION, STAKEHOLDERS, AND ECONOMIC THEORY

Over the course of more than a century, corporate legal theorists have debated the question of whose interests corporations should serve: that of their shareholders or a broader group of stakeholders including workers, customers, and the broader community.[19] In the context of this debate, theorists have assumed that corporations generally pursue legitimate ends[20] but differ on the question of how corporations should approach ethically dubious practices.

In the background of that debate are two issues. First, which corporate abuses are the most concerning? In every era, theorists have viewed predation, defined as the exploitation of asymmetries in information and power through manipulation and deceit,[21] as a problem to be addressed. And in every era, theorists have been concerned with the potential for corporate form to be used as a means to exacerbate asymmetries in power and information while insulating managers from accountability.[22] But the theorists have not agreed on the priorities they assign to different types of potential abuses.

Second, how do internal corporate management and external regulation relate to each other? Predation typically involves a group of insiders using corporate form to exploit "outsiders," who may be

18. *See* Cahn et al., *Gender and the Tournament*, *supra* note 8.

19. O'Kelley, *supra* note 17, at 1002 (tracing the history from the Civil War forward).

20. Historically, however, a counter-narrative has also existed that sees corporations as instruments for criminality. *See, e.g.*, 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 741 (Edwin Cannan ed., 1776) (warning of manager's abuse of "other people's money"); *see also* Stanton Wheeler & Mitchell Lewis Rothman, *The Organization as Weapon in White-Collar Crime*, 80 MICH. L. REV. 1403 (1982).

21. *See, e.g.*, AKERLOF & SHILLER, *supra* note 4, at 164 (observing that modern economics "inherently fails to grapple with deception and trickery. People's naivete and susceptibility to deception have been swept under the rug"); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 28 (2001) (noting that because of the risk of corruption, prominent underwriters refused until the end of the nineteenth century to underwrite the common stock of industrial corporations); Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 3 (1940) (discussing role of corporate deceit).

22. *See, e.g.*, SMITH, *supra* note 20, at 741.

employees, customers, creditors, minority shareholders, or the public.[23] Should there be a clear demarcation between the fiduciary duties officers owe shareholders and external regulation for the protection of external stakeholders, of employees, customers, and the general public? Or should both types of constraints on managerial freedom of action be thought of together?

To explore these ideas, this Part will set forth the positions of Adolf Berle, Milton Friedman, George Akelof, and Robert Shiller. Berle's primary concern involved the role of control blocks, consisting of dominant shareholders and managers, who misused power to disadvantage individual shareholders, minority shareholders as a group, and by extension, the larger public. Friedman, writing in a different era, opposed the ability of managers to advance their own political or social values at the expense of shareholders' interest in profit maximization. Akerlof and Shiller express their greatest concern about business models in which the exploitation of the others is a primary objective. These theorists nonetheless agree that predation is an issue of concern and that internal governance and external regulation tend to reinforce each other in creating—and potentially combatting—abuses.

A. Round One: Berle and Means

Adolf Berle's work framed the issue, taking the position that so long as corporations exercised the type of power that made them akin to principalities, they should have obligations to a greater group of stakeholders than merely shareholders interested in maximizing profits or share prices. In taking this position, Berle's principal concern focused on the abuses of a control group of dominant shareholders and managers, who exercised power over the corporation, often to the detriment of individual shareholders and minority shareholders as a group.[24] As one commentator of the period observed, "the fat boys, no longer content with their ancient perquisite of milking the public, are now engaged in the dizzy and lofty job of squeezing their own shareholders dry!"[25] Berle, however, saw the consequences of predation on shareholders as affecting not just the shareholders themselves but also the larger community. In his influential volume with Gardiner Means, *The Modern Corporation and Private Property*, the authors wrote that:

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23. *See, e.g.*, AKERLOF & SHILLER, *supra* note 4, at 2–3, 23–45 (providing examples that range from Cinnabon enticing customers with hard to resist aromas to accounting fraud).

24. ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 244–52 (Harcourt, Brace & World, Inc. revised ed., 1968) (1932) (describing individual shareholders' diminished power within the corporation).

25. Stuart Chase, *Professor Quixote*, THE NATION, Mar. 9, 1927, at 263.

> The economic power in the hands of the few persons who control a giant corporation is a tremendous force [that] can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise—they have become more nearly social institutions.[26]

Berle accordingly argued that both fiduciary duties owed to internal stakeholders and external regulations, such as disclosure requirements, should be designed to curb such practices to promote shareholder value *and* the larger public good. Thus, in his classic debate with Merrick Dodd, he maintained that only fiduciary duties to shareholders, and not duties to a larger group of stakeholders, provided a sufficiently determinant legal standard to make enforcement realistic and mangers accountable.[27] Berle did not take this position because he necessarily favored maximizing returns for shareholders as the sole acceptable corporate purpose; instead, he saw such a standard as the only practical way to restrain managerial power.[28]

In describing corporations this way, Berle and Means saw legal regulation as more than a matter of privately enforceable fiduciary duties. Instead, they suggested that the ambit for oversight should follow the nature and power of the institutions, inviting a farther-reaching regulatory approach. The authors questioned whether, given the increased concentration of power in modern corporations, the ends of the company should be thought of, not as the maximization of profits, but as a "purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."[29] Public oversight should thus seek both to protect individual shareholders from the control group *and* to advance public ends.

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26. BERLE & MEANS, *supra* note 24, at 46.

27. *See* Adolf A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); Adolf A. Berle Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367–68 (1932) [hereinafter Berle, *For Whom Corporate Managers Are Trustees*] (responding to E. Merrick Dodd, *For Whom Corporate Managers Are Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932), arguing that corporate managers should be seen as answerable to a broader group of stakeholders).

28. *See, e.g.*, Berle, *For Whom Corporate Managers Are Trustees*, *supra* note 27, at 1367. Berle observed that when management's fiduciary obligations to shareholders weaken, "the management and 'control' become for all practical purposes absolute." *Id.*

29. *See* Harwell Wells, *"Corporation Law Is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 353–56 (2013).

Finally, in his later work, Berle argued that corporate managers should have the discretion to take broader social interests into account and that fiduciary duties should be interpreted in that light.[30] By the time he adopted this position in 1959, however, corporations were widely seen as adopting such an approach, in part, because of the greater power of unions and the state limiting management power.[31]

Berle, thus, saw corporate governance and legal regulation as operating in tandem; to the extent corporate power implicated a broader set of interests, the corporation had a duty to take those interests into account, and regulation of the corporation was considered appropriate in order to protect those interests. He argued that the concentration of power in the modern corporation was too great to expect markets to police either obligations to shareholders or to the broader community.[32]

B. Round Two: Milton Friedman

By 1970, Berle's notion that the modern corporation should be governed in accordance with public policy objectives rather than "private cupidity" was under attack. Milton Friedman lodged an early assault.[33]

In his 1962 volume on *Capitalism and Freedom*, Friedman, in a manner not so different from Berle's description of corporate fiduciary duties, saw maximizing shareholder profits as a concrete and determinant standard and saw alternative managerial objectives as subjective, inconsistent, and lacking any meaningful economic guidance.[34] Friedman, however, did not just see maximizing shareholder profits as a legal standard for fiduciary obligations; he saw it as the principle executives should use in guiding corporations. He wrote, "Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to

30. *See* ADOLF A. BERLE JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 107–10 (1959).

31. *See* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER, 141–57 (1952) (explaining the role of unions as a countervailing power); JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 140–48 (1967) (describing rise of the "technostructure" as opposed to profit maximization).

32. BERLE & MEANS, *supra* note 24, at 282–85.

33. *See, e.g.*, ROBERT CHARLES CLARK, CORPORATE LAW 679 (1986) (citing Friedman's New York Times essay and calling it "[p]erhaps the most notable justification of the strict profit-maximizing goal"); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 564 (2003) ("Milton Friedman's famous essay on corporate responsibility remains the classic statement of the shareholder primacy model."); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 149 (2004) (summarizes reaction to Friedman).

34. *See* Thomas J. Horton, *Restoring American Antitrust's Moral Arc*, 62 S.D. L. REV. 11, 15 (2017); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) (objecting to the managerial system as allowing managers to impose their value preferences on investors).

make as much money for their stockholders as possible."[35] Friedman objected to corporate managers imposing their own values (or the values of other stakeholders) on shareholders.[36]

Friedman acknowledged, however, that a business is justified in maximizing profits only so long as it "stays . . . within the rules of the game" and "engages in open and free competition, without deception or fraud."[37] This analysis raised a potential problem for his theory. Government regulation ordinarily set "the rule of the game," the terms that determine "open and free competition," and the definitions of the practices that constitute "deception or fraud."[38] Were business executives therefore compelled to engage in practices that added to profits right up to the letter of the law, exploiting legally gray areas, however odious?[39] And if so, did that invite regulators to act more aggressively to protect other stakeholders, such as employees or customers, since Friedman argued that business executives should not take their interests into consideration unless the law required it?[40]

To address these issues, Friedman amended his initial statement in an op-ed in the New York Times in 1970, advocating shareholder primacy. He wrote: "[A] corporate executive['s] . . . responsibility is to conduct the business in accordance with [shareholders'] desires, which generally will

35. FRIEDMAN, *supra* note 34, at 133.

36. *See* Fulton Friedman, *A Friednzan Doctrine* , N.Y. TIMES MAG., Sept. 13, 1970, at SM 17, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/7DVQ-PPH6] (giving the example of making "expenditures on reducing pollution beyond the amount that is in the best interests of the corporation or that is required by law in order to contribute to the social objective of improving the environment" as an illustration of managers imposing values on shareholders that they might not share).

37. FRIEDMAN, *supra* note 34, at 133.

38. *See, e.g.*, Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H.L. REV. 179, 241 (2018) (arguing that "competitive fairness, level economic playing fields, economic justice, a healthy diversity of competitors, and reduced economic concentration are actually crucial economic values in the sense that they provide the foundational underpinnings for a healthy, stable, and sustainable capitalistic economic system" and should be seen as the appropriate subject of antitrust law). "Deception and fraud" as criminal acts are defined by criminal statutes, though they may be also be actionable as part of common civil actions. For a discussion of the tensions between the legal definition of fraud as a crime and ethical and civil definitions of wrongful deceptive acts, see *infra* notes 69–76 and accompanying text, and see also Horton, *supra* note 34, at 239–42 (discussing the implications for antitrust law).

39. *See* Friedman, *supra* note 36 (indeed, his example of a corporation spending more for pollution control than the law requires suggests such a result).

40. *See, e.g.*, CLARK, *supra* note 33, at 30–32 (noting the existence of extensive regulation addressing workers, consumers, and other stakeholders); Chen & Hanson, *supra* note 33, at 55–57 (describing how shareholder primacy can coexist with protection of other stakeholder interests through legal or social protections outside of the business); Christopher Cosans, *Does Milton Friedman Support a Vigorous Business Ethics?*, 87 J. BUS. ETHICS 391, 391, 395 (2009) ("Several scholars have argued that Friedman asserts that businesses have no or minimal social duties beyond compliance with the law.").

be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[41] This later statement does two things. It further acknowledges that corporate executives do have ethical responsibilities not to maximize profits at any cost; Friedman did not endorse unscrupulous predatory practices. In addition, by rooting these "basic rules of the society" not just in law, but in ethical customs, he could deflect calls for more regulation.

Indeed, Friedman, at the same time that he argued that corporate executives should not take into account any interests other than shareholder profits, also maintained that free market principles, not regulation, provided the best protection for other interests. With respect to consumers, for example, he and Rose Friedman wrote that "market competition, when it is permitted to work, protects the consumer better than do the alternative government mechanisms that have been increasingly superimposed on the market."[42] Other free market advocates maintain that reputational interests will protect against shoddy products or oppressive working conditions.[43]

In Friedman's view, advocacy for shareholder primacy, therefore, need not be inconsistent with ethical behavior.[44] And to the extent individual companies might be tempted to cut corners, fleece customers, or oppress employees, market mechanisms and private intermediaries could be expected to respond, tarnishing the reputation of the perpetrators.[45] In Friedman's world, therefore, neither private fiduciary obligations to nonshareholder stakeholders nor public intervention were necessary to restrain private cupidity.

C. Round 3: Akerlof and Shiller

George Akerlof won the Nobel Prize in 2001 for his work on "lemons markets,"[46] that is, markets that sell defective or low-quality products. Akerlof's article began what economists call the "information revolution," which involves the rejection of the assumption that markets incorporate

41. *See* Friedman, *supra* note 36.

42. MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 222 (1980).

43. *See, e.g.*, Lynn A. Stout, *Taking Conscience Seriously*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 157–72 (Paul Zak ed., 2008) (discussing the degree to which markets take ethics into account); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 280, 283 (1991) (arguing that "a rule against fraud is not an essential or even necessarily an important ingredient of securities markets").

44. *See* Cosans, *supra* note 40, at 394–96.

45. *See* Chen & Hanson, *supra* note 33, at 55–57 (describing how shareholder primacy can coexist with protection of other stakeholder interests through legal or social protections outside of the business).

46. *See generally* Akerlof, *supra* note 5 (noting Akerlof's work on "lemons" in the market).

perfect information.[47] Instead, Akerlof, both in his 1970 article and in his more recent work with Robert Shiller, explores the way that markets deal with "asymmetrical information," that is, where one party has substantially more information than another party. This work challenges the conventional wisdom that markets police fraud and misrepresentation. Instead, Akerlof describes circumstances in which asymmetrical information makes predatory behavior profitable and market forces—rather than counter such behavior—encourage it, driving honest competitors out of the market.

To illustrate his point, Akerlof initially focused on used car markets as an example of the impact of asymmetrical information. In these markets, used car dealers are in a position to know more about the cars they are selling than customers do. They are also in a position to disguise the quality of the cars they hawk by withholding information, covering up defects, or illegally resetting odometers.[48] Before Akerlof's article, economists assumed that consumers could detect quality, or if quality was difficult to determine, dealers could distinguish their products by offering guarantees of quality, such as extended warranties or reliable third parties to provide assistance.[49]

Akerlof challenged this conventional wisdom in two critical ways. First, he introduced and named the "Gresham's dynamic," one of the most important concepts in both economics and white-collar criminology.[50] Akerlof explained the perverse result: "[D]ishonest dealings tend to drive honest dealings out of the market."[51] In plain English, market forces make fraud and predation endemic. Rather than market forces producing ways to detect fraud or facilitating the segmentation of the market into higher-quality and lower-quality goods, market forces could instead lower the quality of products in the entire market. Second, Akerlof demonstrated that no particular outcome was inevitable. One possible outcome was that the market for high quality goods could fail entirely. Consumers, unable to determine with certainty whether they were buying "lemons," would

47. *See generally* Joseph E. Stiglitz, *The Revolution of Information Economics: The Past and the Future* (Nat'l Bureau Econ. Research, Working Paper No. 23780, 2017).

48. *Odometer Fraud*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/equipment/odometer-fraud [https://perma.cc/TJS3-GD56] (federal authorities estimate that 450,000 cars a year are sold with illegally reset odometers, causing consumer losses of a billion a year).

49. *See* Akerlof, *supra* note 5, at 497–500 (describing warranties, brand-names, chains, and licensing and certification practices as the classic market-based responses to the problem in indeterminate quality and arguing that they do not prevent the existence of "lemons markets").

50 *See, e.g.*, Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay for Performance"*, 39 J. CORP. L. 525, 556 (2014).

51. Akerlof, *supra* note 5, at 495.

pay much less for used cars than new cars, driving honest dealers selling higher quality used cars out of the market entirely.[52]

Akerlof reports that he initially had trouble getting the article published. In rejecting the article that would eventually contribute to Akerlof's Nobel Prize in Economics, the editors of *The American Economic Review* and *The Review of Economic Studies* explained that their journals "did not publish papers on subjects of such triviality."[53] Akerlof and Robert Shiller wrote *Phishing for Phools: The Economics of Manipulation and Deception* to demonstrate that the problem of asymmetric information was one of more general application than merely the used car market. The book argues that markets generally do not necessarily promote the greater good. Instead, the free-market system systematically exploits our weaknesses and "manipulate[s] us through our subconscious."[54] The authors describe deception as everything from the way Cinnabon uses enticing aromas to lure airport travelers into its stores to rating agencies that contributed to the financial system boom and bust of the last decade.[55] Their overall conclusion is that businesses routinely rely on predation, manipulation, and exploitation of psychological predispositions to fatten the bottom line.[56] Joseph Stiglitz explained the potentially far-reaching implications:

> In markets with some, but imperfect competition, firms strive to increase their market power and to increase the extraction of rents from existing market power, giving rise to widespread distortions. In such circumstances, institutions and the rules of the game matter. Public policy is critical in setting the rules of the game.[57]

Stiglitz concluded further that the role of asymmetric information in preventing "perfect competition" means that markets may not be efficient and that correcting the problems that arise may be complex and costly.[58] In the meantime, the distributional effects can be significant, allowing those in a position to exploit asymmetries in information and market power

52. *Id.* at 489–90.

53. George Akerlof, *Writing the "The Market for 'Lemons'": A Personal and Interpretive Essay*, NOBEL PRIZE (Nov. 14, 2003), https://www.nobelprize.org/prizes/economic-sciences/2001/akerlof/article/ [https://perma.cc/24AQ-55MP].

54. AKERLOF & SHILLER, *supra* note 4, at 7 (observing that the free market system automatically exploits our weaknesses).

55. *See generally id.* at 2–3 (discussing Cinnabon), 23–34 (discussing role of rating agencies during the financial crisis).

56. *See* Emma Coleman Jordan, *The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures*, 2 U. PA. J.L. & PUB. AFF. 107, 180 (2017) (characterizing their conclusion as one that "the nature of free markets makes predation and manipulation inevitable features of most markets").

57. Stiglitz, *supra* note 47, at 2.

58. *Id.* at 4–6.

to profit handsomely at the expense of others, thereby undermining the effectiveness of the market as a whole.[59]

This recharacterization poses a challenge to both elements of Friedman's argument for shareholder profit maximization. First, it suggests that markets are unlikely to police corporate ethics. Akerlof and Shiller argue that, in many cases, the dividing line between ethically justifiable and illegal practices will be on a continuum, creating incentives to exploit gray areas, and, even where the dividing line is clear, market forces may make it impossible to compete in some markets without crossing those lines.[60] At the height of the mortgage boom, for example, an honest home appraiser may have found herself without many customers. Second, any suggestion that corporate officers and directors have a duty to maximize shareholder returns within such markets inevitably invites unethical behavior. And a call for deregulation makes things worse, since it might further blur the lines between ethically acceptable and unacceptable actions and make it harder for honest firms to compete at all, much less maximize profits, without engaging in unethical behavior. Friedman, of course, in his discussion of market regulation with co-author Rose Friedman, assumed that consumers might prefer cheaper options, even if it meant lesser quality.[61] Akerlof demonstrated, however, that if the consumer cannot determine quality, the effect may be what Friedman opposed: fewer consumer options.[62] In a lemons market, both the reputable seller, who might prefer to supply higher-quality goods at higher prices, and the consumer, who would prefer to buy such goods, would be at a disadvantage and could be driven from the market.[63] Indeed, Akerlof began his lemons markets article observing that asymmetric information is a major reason why many consumers buy only new cars, creating a dramatically greater price differential between new and used cars than differences in average quality alone might warrant.[64] Akerlof's publication of these points in his August 1970 article made Friedman's position on profit maximization via predation untenable. Friedman responded promptly in his September 13, 1970 op ed by stating that CEOs had an ethical duty not to predate.

59. *Id.* at 6.
60. AKERLOF & SHILLER, *supra* note 4.
61. FRIEDMAN & FRIEDMAN, *supra* note 42, at 222.
62. *See* Akerlof, *supra* note 5.
63. Akerlof, *supra* note 5, at 489–90.
64. *Id.* at 489.

Friedman's defenders can and have objected to such claims as imprecise or paternalistic.[65] Some even object that they enjoy Cinnabon. Akelof and Shiller argue, however, that the consequences are not always as benign as one thousand extra calories, noting the increased intensity of financial crises and their aftermaths, the threat from potentially dangerous drugs, and the systemic effects that might occur from undermining overall confidence in markets.[66]

The issues we explore here, though, involve the consequences for business cultures. If, in fact, markets not only fail to deter, but also actively encourage unethical behavior, how does that affect internal management? And does the answer change if predation depends on deception, that is, on maintaining the appearance of legitimate business purposes and cloaking the predatory nature of certain practices? At a minimum, this analysis suggests that fiduciary duties alone cannot address the issue and that a single-minded focus on profit maximization can make things worse.

D. Predation and Corporate Management

The possibility that corporate form can be an aid to predation changes the discussion of business purposes and the parameters of shareholder value. While theorists such as Milton Friedman and Joseph Stiglitz did not agree on much, they both recognized the dangers of predation and agreed that the limit on profit maximization should be an observation of standard ethical practices. Stiglitz recognizes that sustaining such ethical practices is not easy to do; Friedman largely ignored the question of the source of "ethical custom." If, as Akerlof and Shiller suggest, markets promote predation or ethically dubious practices more generally, these practices necessarily affect the understandings of corporate governance. The next Part examines the implications for understanding the construction of corporate cultures.

II. PREDATION, CRIMINOLOGY AND CORPORATE CULTURES

White-collar criminologists have always recognized the possibility that corporations could be used as instruments of predation,[67] and, indeed, the traditional efforts to define white-collar crime incorporate concepts very similar to Akerlof and Shiller's models of predation. In his

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65. *See, e.g.*, Alex Tabarrok, *A Phool and His Money*, THE NEW RAMBLER (2015), https://newramblerreview.com/book-reviews/economics/a-phool-and-his-money [https://perma.cc/6WPV-3Y34] (reviewing GEORGE A. AKERLOF & ROBERT SHILLER, PHISHING FOR FOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION (2015)).

66. AKERLOF & SHILLER, *supra* note 4, at 23–45 (discussing financial crisis and confidence in markets), 223, 248 (discussing dangerous drugs).

67. *See* Coffee, *supra* note 21, at 28.

presidential address to the American Sociological Association, Edwin Sutherland defined white-collar criminology as a distinct field, arguing that white-collar crime consists principally of the "violation of delegated or implied trust," most typically in the form of misrepresentation of asset values or duplicity in the manipulation of power.[68] In addition, Sutherland recognized that, like predation generally, notions of corporate wrongdoing often straddle the line between legal and illegal.[69] He emphasized that the challenge for those who would study the relationship between business entities and crime is the fact that so much of business wrongdoing is either not criminal or not viewed as criminal even when it violates the law, frustrating precise definitions of the phenomena.[70]

In the years since, modern criminology has focused on the role of the enterprise in white-collar crime, creating a structure for the examination of corporate cultures primed to engage in predation. The modern era starts with Stanton Wheeler and Mitchell Lewis Rothman's seminal article, *The Organization as Weapon in White-Collar Crime*.[71] Wheeler and Rothman argued that "the organization, size and profitably notwithstanding, is for white-collar criminals what the gun or knife is for the common criminal—a tool to obtain money from victims."[72] They emphasize that "the organizational form itself, and public perceptions warped by image-making, combine to give the organization a heightened sense of legitimacy."[73]

Later scholars would build on Wheeler and Rothman's insights to argue that corporate form plays a critical role in the seeming legitimacy of the enterprise and the ability to create the trust that Sutherland described as critical to understanding white-collar crime.[74] This work distinguishes white-collar crime, or fraud that employs the organization itself as a weapon, from fraud committed by rogue traders or embezzlers and shows that the dollar losses from the former are dramatically greater.[75] The most recent work in criminology has focused on the mechanisms that allow organizations to become "weapons" of wrongdoing, describing the creation of corporate cultures that facilitate predation and rule breaking, if not necessarily outright criminality.[76]

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68. Sutherland, *supra* note 21, at 3.

69. *Id.* at 1–3.

70. *Id.*

71. Wheeler & Rothman, *supra* note 20.

72. *Id.* at 1406.

73. *Id.* at 1424.

74. *See, e.g.*, BLACK, BEST WAY, *supra* note 6, at 4.

75. Wheeler & Rothman, *supra* note 20, at 1414, 1417–18 (showing dramatically greater losses and social impact from crimes using the organization as a weapon).

76. *See, e.g.*, Henry N. Pontell & Gilbert Geis, *The Trajectory of White-Collar Crime Following the Great Economic Meltdown*, 30 J. CONTEMP. CRIM. JUST. 70 (2014).

This Part will consider these mechanisms as they relate to predation. First, the Part will start with the concept of "control fraud" and "control predation," that is, a description of how fraud (and by extension predation) orchestrated from the top of a corporation differs from such activities undertaken by individuals. Second, it will note the importance of the appearance of legitimacy in conducting the activities. Third, it will examine the role of performance pay in creating incentives that encourage predatory conduct while preserving the appearance of legitimacy. Fourth, it will consider the combination of shareholder primacy and short-termism in encouraging the practices. Fifth, it will link these practices to corporate tolerance for seemingly dysfunctional behavior, such as the tolerance of arrogant and ineffective managers. Finally, it will link these practices to the traditional consideration of conflicts between corporations and other stakeholders and conclude that the modern emphasis on shareholder value combines with the relaxation of ethical constraints on predation to shape corporate cultures.

A. Control Fraud and Predation

The term "control fraud" refers to the use of the firm as a "weapon" for corruption or criminality.[77] For control fraud, those in charge of the firm (referred to as a matter of convenience as the CEOs) are necessarily complicit.[78] Indeed, control frauds typically occur because the CEO creates a "criminogenic environment," that is, one conducive to criminal or duplicitous behavior.[79] The CEO is particularly poised to create such environments through:

- Optimizing the firm's operations and structures for fraud;
- Setting a corrupt tone at the top, suborning internal controls, and recruiting employees, officers, and internal and external 'controls' as allies;

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77. BLACK, BEST WAY, *supr*a note 6, at 1.

78. *See* Gary R. Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings*, 51 AM. CRIM. L. REV. 293, 296–97 (2014) (discussing the ability of the CEO to set the tone, whether ethical or predatory).

79. *See, e.g.*, Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO ST. J. CRIM. L. 481, 492 (2011) ("Beginning with Sutherland, research consistently has shown that some industries are more criminogenic than others and that structural characteristics—especially those related to the political and economic environment of the market—are critical factors associated with white-collar offending."); Robert Tillman, *Making the Rules and Breaking the Rules: The Political Origins of Corporate Corruption in the New Economy*, 51 CRIM. L. & SOC. CHANGE 73, 73–74 (2009) (explaining why corporate environments have become "criminogenic").

- Converting firm assets for the CEO's personal benefit through seemingly normal corporate compensation mechanisms;[80] and
- Optimizing the external environment for control fraud, e.g., by using firm resources to lobby for favorable regulatory environments.[81]

Control fraud, thus, involves organizations where the CEO deliberately primes the organization to engage in unscrupulous conduct, and the corporate culture reflects these efforts.

Predation differs from fraud in that it is not necessarily illegal. In the context of used car markets, for example, resetting an odometer violates the law.[82] Persuading car buyers to take out a loan with an above-market interest rate ordinarily does not.[83] The ethics underlying the practices, however, may not be terribly different whether the practices involve technical legal violations or not. Both may involve targeting naïve or vulnerable customers and exploiting asymmetries in information.[84] Each practice may involve the failure to disclose information that the dealer knows that the customer would find valuable, though, in the case of the loans, dealers may stop short of engaging in the kind of active misrepresentation that would constitute actionable fraud. Finally, both involve developing a degree of rapport with the customer that encourages trust in circumstances where the dealer intends to betray that trust by selling the customer a product (in this case a high-interest loan) that benefits the dealer at the expense of the customer.[85] And, the harm from predation may be similar to, if not greater than, the harm from outright illegality.[86]

Moreover, CEOs (or other top executives) can create a firm culture encouraging these activities while deliberately insulating themselves from knowledge of the particular acts of their employees. Take, for example,

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80. *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); Sharon Hannes & Avraham Tabbach, *Executive Stock Options: The Effects of Manipulation on Risk Taking*, 38 J. CORP. L. 533, 541 (2013) (concluding that "[t]he theoretical and empirical literatures both reveal a link between equity-based compensation (especially options) and financial misrepresentation").

81. Black, *supra* note 80, at 992.

82. *See Odometer Fraud*, *supra* note 48.

83. *See, e.g.*, MARK A. COHEN, NAT'L CONSUMER L. CTR., REPORT ON THE RACIAL IMPACT OF AHFC'S FINANCE CHARGE MARKUP POLICY (2003), https://www.nclc.org/images/pdf/litigation/closed/ahfc-cohenreportappendices-a-c.pdf [https://perma.cc/7XPQ-GS5Q] (doing so in a way that targets minority buyers or deliberately misleads, however, may violate various laws and regulations); Caroline E. Mayer, *Car-Loan Rates Marked Up More for Blacks, Report Says*, WASH. POST, Oct. 1, 2003, at E01.

84. Akerlof, *supra* note 5, at 495–96.

85. COHEN, *supra* note 83.

86. *See* Stiglitz, *supra* note 47, at 18.

Goldman Sachs's activities during the financial crisis, which encouraged a firm culture that incentivized customer deception without accountability for top executives. Goldman's CEO openly joked about treating the firm's clients as "adversaries,"[87] demonstrating awareness of the culture. In 2012, Greg Smith, a former Goldman Vice President, described this mindset as a pervasive part of the firm's culture. He observed that traders prized the quickest ways to make money at the firm and termed one "hunting elephants," which involved targeting the most unsophisticated clients who could be deceived into generating the biggest profits for Goldman.[88] Smith stated, "It makes me ill how callously people talk about ripping their clients off."[89]

Consider, in turn, how such a culture could encourage such activities without top executives running afoul of the *legal* standard for fraud cases. In the aftermath of the financial crisis, the Securities and Exchange Commission (SEC) brought a civil securities fraud action against Goldman Sachs and one of its employees, Fabrice Tourre, a midlevel trader in his twenties.[90] The SEC charges involved misleading a German bank about the quality of the securities Tourre sold at a time when Goldman believed that the housing market was beginning to collapse.[91] The press described Tourre as "the lowest man on the totem pole."[92] The SEC targeted Tourre personally because he described his role in the project in emails to his girlfriend, bragging that he sold toxic mortgage bonds to "widows and orphans that I ran into at the airport."[93] The SEC complaint alleged that Tourre had "put together a complicated financial product that

87. CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT 104 (2015) (describing how the Goldman CEO joked about treating clients as "adversaries").

88. *Id.* at 102–03.

89. *Id.* at 103.

90. *Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO*, U.S. SEC. AND EXCHANGE COMMISSION (July 15, 2010) [hereinafter *Goldman Sachs*], https://www.sec.gov/news/press/2010/2010-123.htm [https://perma.cc/DP7K-W9K2]; Jesse Eisinger, *Why the S.E.C. Didn't Hit Goldman Sachs Harder*, NEW YORKER (Apr. 21, 2016), https://www.newyorker.com/business/currency/why-the-s-e-c-didnt-hit-goldman-sachs-harder [https://perma.cc/EW4C-SQBU] (for an account of the failure to prosecute for these activities).

91. *Goldman Sachs*, *supra* note 90; *see* Samuel Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 513 (2011) (describing the customer as a German bank); Ben Protess, *Former Goldman Trader Tourre Says He Will Not Appeal*, N.Y. TIMES: DEALBOOK (May 27, 2014), https://dealbook.nytimes.com/2014/05/27/former-goldman-trader-tourre-says-he-will-not-appeal/ [https://perma.cc/M6HE-TC2G] (estimating the losses at $1 billion).

92. Eisinger, *supra* note 90.

93. Sam Gustin, *Not So 'Fabulous' Fab: Ex-Goldman Sachs Trader Fabrice Tourre Found Liable for Fraud*, TIME (Aug. 1, 2013), http://business.time.com/2013/08/01/not-so-fabulous-fab-ex-goldman-sachs-trader-found-liable-for-fraud/ [https://perma.cc/8FAW-UHL4]. The customers were actually "elephants," that is, a German bank unaware that the American housing market was cooling off.

was secretly designed to maximize the likelihood that it would fail, and marketed and sold it to investors without appropriate disclosure,"[94] resulting in approximately $1 billion in losses.[95] The SEC did not bring individual charges against Tourre's supervisors because the SEC could not prove that they knew the particulars that made Tourre's actions fraudulent.[96] The SEC settled its institutional case against Goldman but won its civil case against Tourre at trial.[97]

A firm culture that encourages selling arcane financial products to unwitting customers, awards outsized bonuses for doing so, and provides little direct oversight encourages these activities. Individual employees like Tourre make the final call on which legal or ethical lines to cross.[98] To the extent that upper management engineers the culture, sets the terms for the bonuses, and determines the level of oversight—including the practices that insulate senior managers from knowledge of the details—this is control fraud. In the Tourre case, there is certainly evidence that Goldman encouraged its employees to unload mortgage-backed securities in the early days of the financial crisis.[99] Goldman, after all, profited handsomely from the fees Tourre generated in this and any number of similar transactions.[100] And even if the SEC charged Goldman as an institution with securities fraud, the executives who benefitted from Tourre's actions faced no individual liability. True "rogue traders" more typically enrich themselves at company expense.[101]

The idea of control fraud also emphasizes the power of the CEO at the expense of other corporate players, including shareholders. Consideration of CEO power in the abstract can, however, be misleading. The traditional debate in corporate theory is between the managerial age

94. *Id.*

95. *Id.*

96. *See generally* Buell, *supra* note 91, at 530.

97. Gustin, *supra* note 93 (stating that Goldman paid for Tourre's legal fees).

98. *See* FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS 3 (2003) (describing the increased difficulty of controlling rogue traders in the modern era).

99. *See* Alison Frankel, *Is This the Inside Info that Triggered Goldman's MBS "Big Short"?*, REUTERS (July 9, 2014), http://blogs.reuters.com/alison-frankel/2014/07/09/is-this-the-inside-info-that-triggered-goldmans-mbs-big-short/ [https://perma.cc/5XRB-XRWK] (in 2016, Goldman entered into a $5 billion settlement with the Justice Department, admitting its role in questionable activities involving mortgage-backed securities); Lucinda Shen, *Goldman Finally Admits it Defrauded Investors During the Financial Crisis*, FORTUNE (Apr. 11, 2016), http://fortune.com/2016/04/11/goldman-sachs-doj-settlement/ [https://perma.cc/B83M-T7WN].

100. *See* HILL & PAINTER, *supra* note 87, at 3 (observing that Goldman Sachs "apparently reduced its own risk by selling part of its mortgage exposure to its clients and customers"); Protess, *supra* note 91 (describing millions Goldman made as a result of the deals).

101. *See* PARTNOY, *supra* note 98, at 240–43 (describing lack of supervision of rogue trader who hid his losses at his employer's expense).

CEO, who is characterized as having more autonomy in the operation of the company, versus the shareholder value era CEO, who is subject to a greater degree of oversight by corporate boards protecting shareholder interests.[102] This debate, however, involves different issues from the ones involved in control fraud or predation. To the extent that a CEO uses the firm as a weapon of predation, she typically does so in ways that increase reported earnings, boosting share prices and her own compensation.[103] This, of course, is exactly what boards who act to promote shareholder interests want.[104] The CEO engaged in control fraud who uses managerial power to increase the appearance of firm profitability thereby enjoys greater freedom of action.[105] If, instead, the CEO was acting to increase the honesty of the firm's operations or to invest more in training or compensating employees at the expense of the firm's short-term bottom line, the board would be more likely to object.[106] CEO power, thus, constitutes "a one way ratchet"; it grows to the extent the CEO uses it to squeeze customers, creditors, and employees, increasing reported earnings, but it may diminish if used for other purposes. The shareholder primacy era increased the opportunities for control fraud for this and other reasons we discuss below.

B. The Appearance of Legitimacy and Plausible Deniability

All of the seminal work in white-collar criminology emphasizes the seeming legitimacy of the criminals. Indeed, Al Capone referred to such crimes as "the legitimate rackets."[107] Sutherland, in defining white-collar crime in terms of the betrayal of trust, recognized that the appearance of legitimacy was important to the creation of trust that could be betrayed.[108]

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102. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 564 (2003).

103. *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) (describing CEO compensation is set).

104. Bainbridge, *supra* note 102.

105. S*ee, e.g.*, Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 295 (2004) (noting that the "preference of the firm's *current* shareholders is for increasing profitability reflected in either dividends or stock price, which sometimes is aided by concealing the truth rather than revealing it."); *id.* at 313 (commenting that if the CEO enjoys a strong initial run, that "creates greater autonomy by both enhancing his bargaining position over time and increasing the cognitive commitment of the board to him").

106. Black & Carbone, *supra* note 103, at 397 n.155 (observing that CEO power is greater to effect control fraud than otherwise); *see also* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 320–21 (2012) (describing how executive compensation increases emphasis on short-term increases in share price).

107. Sutherland, *supra* note 21, at 3 (referring to tax, accounting and bankruptcy fraud, bribery, embezzlement, stock manipulation, and the like).

108. *Id.*

Wheeler and Rothman, in describing the organization as a "weapon," treated it as a weapon whose power came from its seeming legitimacy.[109]

Businesses engaged in predation also need to be able to command at least a measure of trust in order to exploit asymmetries in information. As Akerlof observed with respect to lemons markets, the disappearance of trust depresses prices across the entire market.[110] Moreover, when companies like Goldman engage in systematic exploitation of customers, they often operate near the gray line that separates legal predation from fraud with uncertainty about the precise location of the dividing line insulating top executives from individual liability.[111] Both objectives—preserving legitimacy and avoiding liability—involve what some have called "plausible deniability."[112]

Charles Calomiris, a proponent of financial deregulation, used the term plausible deniability to describe what took place during the financial crisis.[113] He described how at each step in the process of creating risky mortgage loans, bundling them into securities, and basing derivatives on the securities, the parties involved in creating and selling them overvalued the resulting instruments.[114] The mortgage originators often encouraged borrowers to overstate their income. The investment bankers bundling and selling the mortgages used estimated default rates based on better quality mortgages.[115] The rating agencies gave the securities triple-A ratings without taking loan quality or poor underwriting practices into account.[116] Even as evidence mounted that the market for these instruments was overvalued, those involved could rely on the stated income, estimated default rates, and agency ratings to plausibly deny just how overvalued the instruments were. The system, in fact, worked to defuse individual accountability for the results—and to keep inflating the housing bubble well beyond the point where there should have been a market correction.[117] Calomiris concluded that:

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109. Wheeler & Rothman, *supra* note 20, at 1426.

110. Akerlof, *supra* note 5, at 489–90.

111. *See* Buell, *supra* note 91, at 545–48 (discussing the elements of securities fraud and the difficulty of establishing individual liability).

112. *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, 1001–02 (2012).

113. *See* Charles W. Calomiris, *The Subprime Turmoil: What's Old, What's New, and What's Next*, J. STRUCTURED FIN., Spring 2009, at 6, 12.

114. *Id.* at 13–15.

115. *Id.* at 13–14 (indicating how default rates were based on the 2001–03 period, an anomalous period in which housing prices continued to rise despite a recession and loans were generally of better quality).

116. *Id.*

117. *Id.* at 14–15.

> Plausible deniability may have been a coordinating device for allowing asset managers to participate in the feeding frenzy at little risk of losing customers (precisely because so many participated). Because asset managers could point to market-based data, and ratings at the time as confirming the prudence of their actions on a forward-looking basis, they were likely to bear little cost from investor losses.[118]

Calomiris's description explains how mortgage brokers, traders dealing in mortgage-backed securities, derivative originators, and others engaged in what should have been seen as predatory practices. They encouraged their customers to invest in products that finance professionals should have known were overvalued, secure in the belief that they would be able to profit from the "feeding frenzy" while bearing little responsibility for investor losses.[119]

Those engaged in predation often create similar mechanisms within firms that provide incentives to engage in predatory practices while allowing senior officers and directors to maintain plausible deniability for the consequences. Hill and Painter conclude that the ability of institutions like Goldman to persist in such activities involves not only the type of "plausible deniability" that Calomiris describes but also the appearance of success—and of being known as the smartest bankers on Wall Street.[120] Control fraud often involves orchestrating prestige within and outside the firm to facilitate the unscrupulous practices—all while insulating the top corporate officials from knowledge of the details. In contrast, Ireland, following its financial crisis, has considered regulatory policies promoting healthier firm cultures rather than simply greater rule observance; it considered requiring greater individual accountability that would make it more difficult for senior officials to escape liability simply by claiming that they were unaware of wrongful acts by their subordinates.[121]

C. Performance Pay

One of the biggest changes to accompany the move from the managerial era to the shareholder value era is the change in executive compensation.[122] Performance pay is an effective way for a CEO to take

118. *Id.* at 16.

119. *Id.*

120. HILL & PAINTER, *supra* note 87, at 102–03 (concluding that Goldman Sachs's practices of fleecing its customers did not hurt either the individual trader's or the bank's reputation so long as the behavior was associated with the "smartest" bankers).

121. *See* Ciaran Walker, *The Role of the Regulator in Supervising Culture in Financial Services Firms*, *in* WHITE COLLAR CRIME IN IRELAND: LAW AND POLICY 104–05 (Joe McGrath ed. 2018) (explaining role of firm cultures); *id.* at 103–04 (discussing individual accountability).

122. *See, e.g.*, O'Kelley, *supra* note 17, at 1040–46.

charge of a company and reorient it to emphasize revised management objectives.[123] Performance pay is also a valuable tool in priming corporate personnel to engage in predatory practices while preserving upper management's plausible deniability.[124]

The ability to use performance pay in this way increased with the move to shareholder value. During the managerial era, corporate officers often saw their role as company stewards who derived their individual prestige from the long-term success and growth of their companies.[125] John Kenneth Galbraith observed that, while corporate officers often did own stock or stock options in their companies, they rarely acted to advance their own pecuniary interests at the expense of the firm.[126] Executives were expected to collaborate for the greater good of the company, not compete with each other for a cut of firm profits.[127] The CEO's income, which was not that much higher than that of other senior management officials, was substantially lower in relative terms than the CEO's income today.[128] In this environment, acting on self-interest was not what "a good company man" did; instead, corporate executives oriented their behavior in accordance with more holistic company objectives.[129]

In the shareholder value era, executive compensation changed in two mutually reinforcing ways that placed greater emphasis on individual rewards. First, to better align management and shareholder interests, top management compensation packages began to emphasize incentive pay tied overwhelmingly to stock options.[130] Between 1993 and 2014, the percentage of CEO compensation attributable to incentive pay increased from 35% to 85%,[131] and CEOs also faced greater risk of dismissal if share prices did not increase.[132] The overall disparities in the pay of top

123. *See, e.g.*, Jack Welch, *Jack Welch: 'Rank-and-Yank'? That's Not How It's Done*, WALL ST. J. (Nov. 14, 2013), https://www.wsj.com/articles/8216rankandyank8217-that8217s-not-how-it8217s-done-1384473281 [https://perma.cc/P236-BAX6] (describing how incentive pay can be used to incentivize whatever behavior management wishes to encourage).

124. *See* Black, *supra* note 112, at 989, 992, 1005, 1015 (describing the role of executive compensation in control fraud).

125. *See* Harwell Wells, *"Corporation Law Is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 323–24 (2013) (noting that this idea of stewardship even had a place in the Harvard Business School's conception of the Managerial Role).

126. JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 147 (1967).

127. *Id.* at 147–48.

128. *See id.* at 138–39; *see also* O'Kelley, *supra* note 17, at 1031.

129. GALBRAITH, *supra* note 126, at 148.

130. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 320–21 (2012).

131. Stout, *supra* note 50, at 533.

132. Executives also faced greater risk of dismissals if stock earnings did not increase. *See* Andrew C.W. Lund & Gregg D. Polsky, *The Diminishing Returns of Incentive Pay in Executive*

executives at the same company increased,[133] and between 1981 and 2013, the pay ratio between CEOs and average wage workers grew from 42:1 to 331:1.[134]

Complementing the greater emphasis on stock options and earnings-related bonuses in the top management ranks was a second shift that emphasized greater use of incentive pay throughout the managerial ranks in much of corporate America. Performance pay came to apply to everything from Walmart store managers to used car sales personnel to mid-level executives to traders like Tourre.[135] Jack Welch engineered one of the early forms of this type of evaluation system at General Electric (GE) in the 1980s.[136] The system involves stack ranking, that is, a competitive evaluation system in which everyone is compared to everyone else, with approximately the top twenty percent given outsized bonuses and groomed for promotion, while the bottom ten percent is at risk of dismissal. Welch emphasized the need for "differentiation" among employees and bragged that he could get his employees to do anything management wanted by building it into the incentive system.[137] Enron embraced the system, and former CEO Jeff Skilling used it to impose his personal stamp on the company.[138] Bonuses could compose the bulk of employee pay, and every year's bottom group was threatened with dismissal.[139]

Compensation Contracts, 87 NOTRE DAME L. REV. 677, 695 (2011) (indicating that CEO terminations can be linked to share price performance).

133. For a discussion of the move toward incentive pay, see MICHAEL DORFF, INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT 79 (2014) (discussing assumptions that incentives would spur better performance).

134. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% since 1978: Typical Worker Compensation Has Risen Only 12% During That Time*, ECON. POL'Y INST. (Aug. 14, 2019), https://www.epi.org/publication/ceo-compensation-2018/ [https://perma.cc/HM4B-KG9F]; *CEO-To-Worker Pay Ratio Ballooned 1,000 Percent Since 1950: Report*, HUFFINGTON POST (May 1, 2013), https://www.huffingtonpost.com/2013/04/30/ceo-to-worker-pay-ratio_n_3184623.html [https://perma.cc/457Y-U7JN].

135. *See, e.g.*, June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and The Triple Bind*, 88 GEO. WASH. L. REV. (forthcoming 2020).

136. *See, e.g.*, PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 51–52 (2002) (describing the pitfalls of Enron's "rank and yank" performance management system); Nancy B. Rapoport, *"Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 42, 44 n.2 (2014) ("Want people to turn on their colleagues rather than encourage teamwork? Use a 'rank and yank' system that routinely drops the bottom 10% of high achievers off the payroll.").

137. Welch, *supra* note 123.

138. Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More Than Codes)*, 45 J. BUS. ETHICS 243, 251 (2003) (describing the role of incentive pay at Enron).

139. While rank and yank did not apply to CEOs, they were not immune from threats of dismissal under the new shareholder value system. *See* Lund & Polsky, *supra* note 132, at 695 (indicating that CEO terminations can be linked to share price performance).

Postmortems at Enron describe performance pay as a major factor in the creation of the company's culture. Former Enron CEO Jeff Skilling "perpetuated a focus on short-term transactional endeavors from the very beginning by hiring employees that embodied the beliefs that he was trying to instill: aggressiveness, greed, a will to win at all costs, and an appreciation for circumventing the rules."[140] The behavior did not just involve workplace conduct—"Divorce rates among senior executives were skyrocketing as well."[141] These results reflected an emphasis on "[i]nstant gratification, both personally and professionally."[142]

Incentive pay makes it much easier to prime an organization for predation—or other kinds of fraud—while preserving management's plausible deniability. All the CEO has to do is emphasize, as Jack Welch did, "hitting the numbers," while not inquiring too closely into the methods used to produce results.[143] In Welch's case, hitting the numbers ordinarily meant beating earnings estimates. During Welch's tenure, GE's revenue grew 385%, while the company's stock market value rose 4,000%.[144] Welch beat the estimates almost every quarter for two decades,[145] and GE faced a major securities fraud investigation once he left.[146] At Enron and other places, the result was "a win-at-all costs mentality, and a willingness to cross the ethical line."[147]

In the years since its adoption at GE, incentive pay has been associated with opportunistic and predatory behavior and, even in some cases, illegal actions "including earning manipulations, accounting frauds, and excessive risk-taking."[148] Some of the most striking examples of the use of bonus pay come from the financial sector. At Citigroup, for example, in the run up to the financial crisis, employee bonuses were tied to revenue generation; the bonuses either understated risk or did not factor

140. Sims & Brinkmann, *supra* note 138, at 251.

141. *Id.*

142. *Id.*

143. *See* John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1188 (2005) (describing this process).

144. Barry Ritholtz, *Judging GE's Jeff Immelt Versus Jack Welch*, BLOOMBERG (June 12, 2017), https://www.bloomberg.com/view/articles/2017-06-12/judging-ge-s-jeff-immelt-versus-jack-welch [https://perma.cc/RK4M-LUJA].

145. ROGER L. MARTIN, FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL 97 (2011) (describing how Welch beat earnings expectations an extraordinary 96% of the time).

146. *See also* David P. Bergers, *SEC Charges General Electric with Accounting Fraud: GE Agrees to Pay $50 Million to Settle SEC's Charges*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 4, 2009), https://www.sec.gov/news/press/2009/2009-178.htm [https://perma.cc/DP7K-W9K2].

147. Sims & Brinkmann, *supra* note 138, at 252.

148. Stout, *supra* note 50, at 534; *see also* Michael C. Jensen, *Corporate Budgeting Is Broken—Let's Fix It*, HARV. BUS. REV., Nov. 2001, at 94.

it in at all.[149] William Dudley, former President of the Federal Reserve Bank of New York, concluded, "High-powered pay incentives linked to short-term profits, combined with a flexible and fluid job market, have . . . contributed to a lessening of firm loyalty—and, sometimes, to a disregard for the law—in an effort to generate larger bonuses."[150]

High stakes bonus cultures make it easy to prime a corporation for predation in reinforcing ways. First, they change the nature of the people attracted to the organization.[151] Lynn Stout emphasizes that it is reasonable to expect "employers who rely on incentives to attract more than their share of opportunistic employees" only because employees willing to cut corners may see greater opportunities to profit from such environments.[152] Second, creating a work environment that attracts the unscrupulous tends to drive out others, creating the type of Gresham's dynamic that Akerlof describes in the used car industry. Stout explains that "once a workplace begins to attract more than its share of relatively opportunistic or unethical employees, . . . it will also begin to repel the relatively prosocial and to subvert the prosocial employees who remain at the firm into committing their own ethical lapses."[153] Those who thrive in such environments tend to be simultaneously competitive and loyal, which requires a degree of "ethical plasticity"—that is, the ability "to construe what is self-serving to be reasonable, so that moral anxiety is buffered."[154] In addition, such companies often reward the unscrupulous, who quickly adapt to changing firm expectations without much resistance or guilt.[155] Third, such an environment tends to normalize predatory behavior. Donald Langevoort observes that "corruption is usually a lengthy slide down a slippery slope, as small transgressions grow larger and larger without being checked early

149. Arthur E. Wilmarth, Jr., *Citigroup: A Case Study in Managerial and Regulatory Failures*, 47 IND. L. REV. 69, 116 (2014) (observing that Citi's CEO testified that "[t]he compensation structure on Wall Street is one that many people have criticized over the years. It is for traders, for bankers and so forth, a compensation model that is based on revenue growth, not even profit growth" and that the compensation system contributed to the financial crisis).

150. William C. Dudley, President and Chief Exec. Officer, Fed. Reserve Bank of N.Y., Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry: Enhancing Financial Stability by Improving Culture in the Financial Services Industry (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html [https://perma.cc/UDE2-983B].

151. *See* Jeffrey A. Flory, Andreas Leibbrandt & John A. List, *Do Competitive Workplaces Deter Female Workers? A Large-Scale Natural Field Experiment on Job Entry Decisions*, 82 REV. ECON. STUD. 122 (2015) (finding that men were 94% more likely than women to apply for a job if its salary potential was described as being highly dependent on competition with other employees).

152. Stout, *supra* note 50, at 555.

153. *Id.* at 556.

154. Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 970 (2002).

155. *Id.*

enough either by external sanction or internal governance."[156] He concludes that at the outset, many participants would report their commitment to ethical conduct. After taking small initial ethically dubious actions, however, they become more likely to take larger ones, including the kinds of actions they would have opposed at the outset.[157] They also become more likely to rationalize their behavior as acceptable. Criminologists describe this thinking as "neutralization" techniques.[158]

Competitive pay makes all these factors easier to manipulate.[159] The CEO determines the objectives that influences bonuses.[160] These objectives often involve "meeting the numbers" without much regard to the process of getting there. Walmart, for example, fairly rigidly determines manager pay in accordance with a formula that takes total sales and divides it by labor costs.[161] Supervisors who succeed in suppressing labor costs do not experience much scrutiny.[162] Those who look out for their employees risk losing their jobs.[163] The result contributes to labor practices that have made Walmart number one in the country for wage theft,[164] generating over $200 million in fines in 2016 alone.[165] And,

156. Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 954 (2017).

157. *Id.*; *see also* Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 1 (2003); Darley, *supra* note 143, at 1185–87 (process of "entrapment"); Catherine M. Schrand & Sarah L.C. Zechman, *Executive Overconfidence and the Slippery Slope to Financial Misreporting*, 53 J. ACCT. & ECON. 311, 313 (2012) (presenting evidence of innocent, overconfident first steps that eventually lead to violations of law).

158. *See* Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 FORDHAM L. REV. 3143, 3164 (2014) (describing neutralization techniques as particularly important in white collar crime because of the greater education and sophistication of the offenders); Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 242 (2005) (observing that "offending is partially facilitated by a cognitive mindset that justifies and rationalizes criminal behavior").

159. *See* FUSARO & MILLER, *supra* note 136.

160. Welch, *supra* note 123.

161. *See* Steve Symington, *What Sam Walton Would Say About Walmart's New Minimum Wage*, MOTLEY FOOL (Mar. 28, 2015), https://www.fool.com/investing/general/2015/03/28/what-sam-walton-would-have-to-say-about-walmarts-m.aspx [https://perma.cc/W6Y8-W5QA] (describing how Walton sought to align store manager and management incentives from the early days of the company).

162. Hamilton Nolan, *A Walmart Manager Describes Walmart's Mismanagement*, GAWKER (Aug. 22, 2014), http://gawker.com/a-walmart-manager-describes-walmarts-mismanagement-1625530679 [https://perma.cc/7LJT-2TED] (A manager reported in 2014 that "I've often had to cut associates [sic] hours in order to ensure that all of the salaried managers would receive our annual bonuses.").

163. NELSON LICHTENSTEIN, THE RETAIL REVOLUTION 58 (2009).

164. PHILIP MATTERA, GOOD JOBS FIRST & JOBS WITH JUSTICE EDUCATION FUND, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS' WAGES 8 (2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report.pdf [https://perma.cc/6ZWK-2SUA].

165. Lauren Weber, *Bank Pays Out Some of the Biggest Settlements in Wage Disputes*, WALL ST. J. (June 5, 2018), https://www.wsj.com/articles/banks-pay-out-some-of-the-biggest-settlements-in-wage-disputes-1528189200 [https://perma.cc/V3RQ-TBF7].

Walmart's upper management can plausibly claim that it does not know about the individual practices that produce the wages and hours violations. In the meantime, management marginalizes dissenters by ranking them below par, and in competitive environments, they are soon gone.

The managers who participate in this behavior may also identify more with each other and less with the employees that they are shortchanging, similar to how Goldman traders came to view their customers as marks.[166] Lynne Dallas reports that competitive environments, despite their claim to merit, produce more politicized decision-making.[167] Walmart, for instance, did not post managerial openings. Instead, existing managers identified the employees thought suitable for promotion and invited them to apply.[168] These informal practices helped ensure that those selected would have the right mindset about the need to keep bonuses high and labor costs low without calling undue attention to Walmart's methods.

D. Shareholder Value and Short-termism

The move to shareholder value involves a shift not just from the interests of multiple corporate stakeholders to those of shareholders alone, but also from long-term to short-term shareholder interests.[169] Performance pay, in turn, is linked to metrics that produce short-term increases in share price,[170] with activist investors ready to challenge corporate management if they believe the corporation is undervalued.[171] The focus on short-term fluctuations in share price, like performance pay, has a series of overlapping effects that makes predation more likely.[172]

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166. Nolan, *supra* note 162.

167. Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 37 (2003) (describing how Enron management used its bonus system to reorient company behavior in counterproductive and unethical ways).

168. NICHOLAS COPELAND & CHRISTINE LABUSKI, THE WORLD OF WAL-MART: DISCOUNTING THE AMERICAN DREAM 58 (2013).

169. Dallas, *supra* note 130, at 321.

170. *Id.* at 272 n.40.

171. 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).

172. Indeed, Michael Jensen, an early proponent of incentive pay, later recanted. *See* Michael C. Jensen, *Paying People to Lie: The Truth About the Budgeting Process,* 9 EUR. FIN. MGMT. 379, 379–80 (2003) (observing that using budgets or targets in organizations' performance measurement and compensation systems has encouraged gaming the system).

First, the emphasis on producing short-term results tends to shorten CEO and other executive tenure.[173] That, in turn, creates even greater pressure to produce immediate results.[174] The results—and the corresponding CEO bonus pay—become ends in themselves, defining success and determining status.[175] The process encourages selection of narcissistic and overconfident CEOs determined to do whatever it takes to reorient the company to produce an immediate increase in profits.[176]

Second, with shorter tenures, CEOs tend to focus on actions that can have an immediate impact, even if this weakens the firm's long-term prospects. The savings and loan crisis in the 1980s involved business strategies guaranteed to bankrupt the thrifts—while making their owners incredibly rich in the process. As economists Akerlof and Romer noted, "[I]f the owners can extract more than the true economic value of the thrift, owners with a positive net worth will voluntarily choose to go bankrupt by extracting resources from it."[177] In other words, even the owners of otherwise profitable companies (those with a positive net worth) would chose to invest in enterprises with "a negative net present value"[178] if by doing so they could justify "looting" their own firms.[179] The more common examples of this involve a different kind of sleight of hand—the increase in share prices that benefits top management and short-term investors at the expense of those with longer time horizons. A 2005 survey of 401 financial executives, for example, reported that seventy-eight of them would take actions that lowered the value of their companies to create a smooth earnings stream.[180] Another study of executives in other industries found that the firms increased reported earnings by cutting support for research and development and marketing, even where such practices did

173. *See, e.g.*, RICK WARTZMAN, THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA 312 (2017) (documenting decline in worker tenure and loyalty); Matthew J. Bidwell, *What Happened to Long-Term Employment? The Role of Worker Power and Environmental Turbulence in Explaining Declines in Worker Tenure*, 24 ORG. SCI. 1061, 1063–67 (2013) (describing changes in job expectations).

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

175. Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 718 (2005) (observing that CEOs see large compensation packages as self-validating).

176. *See, e.g.*, Charles A. O'Reilly III et al., *Narcissistic CEOs and Executive Compensation*, 25 LEADERSHIP Q. 218, 218 (2013) (describing narcissists as more likely to be "inspirational, [to] succeed in situations that call for change, and be a force for creativity").

177. George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit*, BROOKINGS PAPERS ON ECON. ACTIVITY, no. 2, 1993, at 1, 10.

178. *Id.*

179. That is, "extracting more than the true economic value of the thrift." *Id.* at 11.

180. *See* John R. Graham, Campbell R. Harvey & Shiva Rajgopal, *Value Destruction and Financial Reporting Decisions*, 62 FIN. ANALYSTS J. 27, 33 (2006).

not advance the firms' medium- to longer-term interests.[181] Others firms, experiencing pressure to manipulate earnings, have engaged in outright fraud.[182]

Third, it may persuade CEOs to adopt predatory practices that produce an immediate boost to earnings at the expense of other stakeholders[183]—or the company's long-term reputation or profitability. Goldman arguably did exactly that when it sought to unload mortgage-backed securities at its customers' expense as it realized that the housing market was about to tank in the run-up to the financial crisis.[184] So did Citigroup as it emphasized revenue growth without taking risk into account.[185] Art Wilmarth describes how traders even had a term for the mindset: "IBGYBG, 'I'll be gone, you'll be gone.' It referred to deals that brought in big fees up front while risking large losses in the future."[186]

The emphasis on shareholder value, implemented through practices that focus intensely on short-term results, increases the likelihood that CEOs will create environments that encourage predation. A Commission examining these issues in the wake of the Enron and World.com scandals found that: "In sum, executive compensation has become too 'de-linked' from long-term performance goals in many corporations. There is an imbalance between unprecedented levels of executive compensation, with little apparent financial downside risk or relationship of this compensation to long-term company performance."[187] After all, executives like Welch and hedge fund activists who join corporate boards to force short-term

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181. *See* Dallas, *supra* note 106, at 280.

182. *See, e.g.*, Sharon Hannes & Avraham Tabbach, *Executive Stock Options: The Effects of Manipulation on Risk Taking*, 38 J. CORP. L. 533, 542–43 (2013) (discussing the link between executive incentive compensation, excessive risk taking, and the current financial crisis); 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) (examining Enron's ability to use the appearance of profitability to boost share price and concluding that the "accounting profession seems not to have adjusted to the transition from professional to profit-maximization norms").

183. *See* Ribstein, *supra* note 182, at 9 (observing how the ability to create the appearance of profitability benefitted Enron).

184. *See* HILL & PAINTER, *supra* note 87, at 3 (observing that Goldman Sachs "apparently reduced its own risk by selling part of its mortgage exposure to its clients and customers"); Protess, *supra* note 91 (describing millions Goldman made as a result of the deals); Lucinda Shen, *Goldman Finally Admits it Defrauded Investors During the Financial Crisis*, FORTUNE (Apr. 11, 2016), http://fortune.com/2016/04/11/goldman-sachs-doj-settlement/ [https://perma.cc/T32D-7MK5].

185. *See, e.g.*, Wilmarth, *supra* note 149, at 116.

186. *Id.* at 137 n.386.

187. THE CONFERENCE BD., COMMISSION ON PUBLIC TRUST AND PRIVATE ENTERPRISE: FINDINGS AND RECOMMENDATIONS 6 (2002), https://www.conference-board.org/pdf_free/SR-03-04-ES.pdf [https://perma.cc/UZ88-Z2DR].

boosts in earnings can keep their riches even if the company and its reputation suffer once they are gone.[188]

E. The Negative Impact on Managerial Selection

The selection not just of CEOs but of midlevel managers in corporate America should be something of a mystery. Extensive management literature identifies that the most effective managers are those with transformational, rather than transactional, leadership styles that are attentive to employee cohesion and morale.[189] Yet, the emphasis on "bold" leadership, bottom-line transactional measures of merit, and zero-sum competitive pay and evaluation systems tend to produce managers who are less effective across a number of measures. Lynne Dallas concluded 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.[190] Kurt Eichenwald, in an in-depth study of what went wrong at Microsoft during Steve Ballmer's tenure, attributed the company's "lost decade" to its competitive evaluation system.[191]

These negative assessments of competitive compensation systems began with the literature taking stock of corporate America in the wake of the Enron scandals. Ribstein concluded that the "rank and yank" era had produced a "new breed":

> 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

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188. *See, e.g.*, Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002) (arguing that executive ability to set compensation facilitates the ability to benefit from short term and "rent extraction" strategies); James B. Stewart, *Did the Jack Welch Model Sow Seeds of G.E.'s Decline?*, N.Y. TIMES (June 15, 2017), https://www.nytimes.com/2017/06/15/business/ge-jack-welch-immelt.html?r=0 [https://perma.cc/3ZU8-XKDR] (discussing Welch's role in GE's decline).

189. *See* Alice H. Eagly, *Women as Leaders: Leadership Style Versus Leaders' Values and Attitudes*, HARV. BUS. SCH. SYMP., GENDER & WORK: CHALLENGING CONVENTIONAL WISDOM (2013), http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/eagly.pdf [https://perma.cc/UCJ9-G53Z] (describing meta-data analysis showing that female managers are more transformational than male managers and that transformational styles tend to be more effective).

190. Dallas, *supra* note 167, at 37.

191. Kurt Eichenwald, *Microsoft's Lost Decade*, VANITY FAIR (July 24, 2012), http://www.vanityfair.com/news/business/2012/08/microsoft-lost-mojo-steve-ballmer [https://perma.cc/6PA4-EXQH].

> up and to lie when things turn bad, and nurtured by a corporate culture that instills loyalty to insiders, obsession with short-term stock price, and intense distrust of outsiders.[192]

Ribstein suggested that this new breed did not have the commitment to "ethical custom" to which Friedman referred, and that the Enron-era scandals further suggested the securities markets did not effectively police corporate misfeasance, particularly efforts to misstate earnings and company health.[193]

In the years since, the rank and yank evaluation system thought responsible for some of the excesses has declined in popularity,[194] but most companies have simply abandoned the "yank" part of the system while keeping high stakes bonus systems at the upper end of the curve.[195] However, "hypercompetition" corresponds to the overrepresentation in the managerial ranks of executives who lack empathy or remorse.[196] As Donald Langevoort observes, "[T]raits such as over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception are *favored* in corporate promotion tournaments."[197] They "are survival traits, not weaknesses, in a very Darwinian business world."[198] If these pathological traits are "Darwinian," it follows that traits such as "a capacity for ethical self-deception" are "fitter" for firms who value and reward unethical behavior.

Management psychologists, however, emphasize that a different set of characteristics is associated with the most effective leaders. In the early 2000s, researchers revised the big five personality characteristics to include a new one, the "H factor." The "H" stands for "honesty-humility," and it measures sincerity, modesty, and fair-mindedness—traits that stand in opposition to greed, deceitfulness, pomposity, and rule-breaking.[199] Researchers find that those who rank low in the H factor are much more

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192. Ribstein, *supra* note 182, at 9.

193. *See id.* at 7–9 (describing the executives as "unconstrained by the traditional devices" and the result as market failure).

194. *See, e.g.*, Max Nisen, *Why Stack Ranking Is a Terrible Way to Motivate Employees*, BUS. INSIDER (Nov. 15, 2013), http://www.businessinsider.com/stack-ranking-employees-is-a-bad-idea-2013-11 [https://perma.cc/G3GN-D5YB] (observing that while 49% of companies reported that they used "stack ranking systems in 2009, . . . by 2011, only 14% used them").

195. *Id.*

196. Renee M. Jones, *The Irrational Actor in the CEO Suite: Implications for Corporate Governance*, 41 DEL. J. CORP. L. 713, 744 (2017) (describing overrepresentation of psychopaths, narcissists, and others lacking empathy and the capacity for remorse).

197. Langevoort, *supra* note 1, at 288.

198. *Id.*

199. Michael C. Ashton & Kibeom Lee, *The HEXACO Model of Personality Structure and the Importance of the H Factor*, 2 SOC. & PERSONALITY PSYCHOL. COMPASS 1952, 1952 (2008) (explaining the "Conscientiousness" factor considered some aspects of these, but not in the rule-breaking extremes).

willing than those with high levels to engage in unethical business practices.[200] They also find that the executives who rate high in the H factor have compensation packages that are closer to standard employee pay—the opposite of the narcissists who tend to flourish in the corporate tournament.[201]

These findings suggest that the traits that characterize modern corporate leadership have not just changed but have changed in ways that are counterproductive to the company's long-term prospects. The results may reflect the shift from a focus on long-term effectiveness to short-term results, and from long-term company health to the interests of managers and investors more focused on immediate benefits for themselves. A new CEO, for example, chosen on the basis of his promises to produce an immediate turnaround, may use competitive evaluation systems to select for employees who will be loyal to him, and who will push through to get results in the face of ethical or legal constraints.[202] These considerations may be that much greater if the CEO is selecting managers who will implement unspoken management objectives. Consider Michael Cohen's response when the Congressional committee asked if Donald Trump had told him to engage in certain legally and ethically questionable activities, such as lying to Congress.[203] Cohen's response was that Trump did not need to ask him to do so directly; rather, Trump made clear what he wanted in other ways, and Cohen understood that his role in the Trump organization required the ability to decipher Trump's intentions and implement them without being asked to do so directly.[204] Having underlings who will do a CEO's bidding without express instruction is particularly important if the CEO is eager to preserve the appearance of legitimacy—and plausible deniability.

Corporations that select for charismatic CEOs who employ competitive bonus systems to push through transformations and focus attention on short-term results are, of course, not all engaged in fraud or

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200. *See, e.g.*, Kibeom Lee et al., *Predicting Integrity with the HEXACO Personality Model: Use of Self- and Observer Reports*, 81 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 147, 147 (2008).

201. *See, e.g.*, Amy Y. Ou, David A. Waldman & Suzanne J. Peterson, *Do Humble CEOs Matter? An Examination of CEO Humility and Firm Outcomes*, 44 J. MGMT. 1147, 1147 (2018) (examining the firm performance of 105 computer software and hardware companies and confirming that greater humility of CEOs was negatively related to pay disparities).

202. *See, e.g.*, Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable Cons*, HARV. BUS. REV., Jan. 2004, at 98 (arguing that narcissism is overall a plus in business leadership as it contributes to the ability to "push through massive transformations[,]" but that narcissists are likely to surround themselves with "yes men" loyal to them).

203. *See, e.g.*, Emma Loop, *"In His Way, He Was Telling Me To Lie": Michael Cohen Testified On Trump Moscow Cover-Up*, BUZZFEED NEWS (Feb. 27, 2019), https://www.buzzfeednews.com/article/emmaloop/cohen-trump-congress-testimony [https://perma.cc/YY3J-UXCQ].

204. *See id.*

predation. But with the normalization of these practices, corporations are primed to implement business models that do involve such activities. The executives encouraging predation do not necessarily act in unusual ways, nor do they adopt unusual methods. These executives are not easily detectable to those outside of the business itself and further normalize the predation. This very normalization, however, makes it unlikely that "ethical custom" or the market will police unacceptable practices.

In addition, during this same period, what we have referred to elsewhere as the "Three D's"—Decriminalization, Deregulation, and Desupervision—contribute to an environment that increases corporate ability to exploit "gray areas" of uncertain legality or enforceability.[205] The result resembles what economist Frédéric Bastiat described in the eighteenth century when he observed that "[w]hen plunder becomes a way of life for a group of men in a society, over the course of time they create for themselves a legal system that authorizes it and a moral code that glorifies it."[206]

F. When Plunder Becomes a Way of Life

The factors criminologists emphasize in explaining white-collar crime—the tone set at the top, the use of the corporation to promote the appearance of legitimacy, the role of incentives in priming corporate behavior, and the ability to exploit asymmetries in information and power to the disadvantage of shareholders, customers, and employees—are not new. All existed during the eras that influenced Berle, Sutherland, and Wheeler. What has changed is the role of the shareholder value model and modern executive compensation in systematizing these elements across a broader swath of corporate America and the changing legal infrastructure that reduces individual accountability for the results. Both changes contribute to the construction of corporate cultures established to facilitate predation.

To illustrate the combination of short-termism and legal impunity, consider two predatory business models made possible by the weakening of the oversight that once kept such activities in check. Start with finance. In *Infectious Greed*, Frank Partnoy explained that three major changes have remade finance since the mid-1980s in ways Bastiat might have

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205. *See* Black, *supra* note 112, at 993 (referring to deregulation, desupervision, and decriminalization). "Desupervision" refers to the failure to supervise financial institutions, but in other arenas, it can refer to the effective failure of federal and state agencies to oversee the enforcement of the law. *See, e.g.*, Tosh Anderson, *Overwork Robs Workers' Health: Interpreting OSHA's General Duty Clause to Prohibit Long Work Hours*, 7 N.Y. CITY L. REV. 85, 102 n.62 (2004) (describing similar process with respect to worker protections).

206. *Frédéric Bastiat Quotes*, GOODREADS, https://www.goodreads.com/quotes/6862167-when-plunder-becomes-a-way-of-life-for-a-group [https://perma.cc/K8MX-FJE7].

predicted. First, "financial instruments became increasingly complex and were pushed underground, as more parties used financial engineering to manipulate earnings and to avoid regulation."[207] In short, opportunities for exploiting asymmetric information increased both the ability to engage in predatory behavior and to evade accountability. Second, "control and ownership of companies moved greater distances apart,"[208] increasing management's ability to take advantage of shareholders and its difficulty in supervising employees, for better and ill.[209] This change in corporate management has increased the degree of plausible deniability, insulating senior executives from accountability. Third, "markets were deregulated, and prosecutors rarely punished financial malfeasance."[210] That is, as Bastiat suggested, the legal system increasingly tolerated predatory behavior[211] and, as Hill and Painter explain, the ability to be seen as the smartest bankers on Wall Street brought glory rather than opprobrium.[212] By the time of the financial crisis, the bankers had become "too big to jail."[213] Plausible deniability and the routinization of predatory practices meant that, while many were complicit, no one was accountable.

A second example involves predation on employees. Walmart has long been the poster child for wage theft, having been penalized more for cheating its workers than any other company in the country.[214] Given chronic understaffing, company policy against paying overtime, and bonuses tied to the suppression of labor costs, some managers pressure workers to clock out and then go back to work or to continue working through breaks or lunch hours without giving the employees credit for the extra work.[215] Other managers simply "adjust" the time cards of workers who report more than forty hours in a week, unilaterally adding rest breaks

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207. PARTNOY, *supra* note 98, at 3.

208. *Id.*

209. *Compare id.* at 177–84 (describing a trader fleecing GE), *with id.* at 12–17 (describing a trader running trades that worked to the benefit of Banker's Trust).

210. *Id.* at 4.

211. *See, e.g.*, Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG. (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html [https://perma.cc/6S2P-6A7P] (describing efforts to undermine the Bureau's efforts to regulate financial predation).

212. *See* HILL & PAINTER, *supra* note 87.

213. *See, e.g.*, Gretchen Morgenstern, *A Bank Too Big to Jail*, N.Y. TIMES (July 15, 2016), https://www.nytimes.com/2016/07/17/business/a-bank-too-big-to-jail.html [https://perma.cc/96MK-VP3N].

214. *See* MATTERA, *supra* note 164.

215. *See* Stephen Halebsky, *The Retail Revolution*, 27 SOC. F. 255, 255–57 (2012) (reviewing NELSON LICHTENSTEIN, THE RETAIL REVOLUTION (2010)).

or increasing meal periods.[216] These activities violate wage and hour laws and deprive employees of compensation owed for hours worked. Between 2000 and 2014, Walmart spent over $80 million on lobbying and campaign contributions,[217] donating to 295 different candidates in one election year alone. These contributions have contributed to a political willingness to gut wages and hours protection. Congressional Republicans, for example, have unanimously voted against minimum wage increases in recent Congresses, despite 78% public support for a higher rate, contributing to the erosion of the value of the minimum wage.[218] The beneficiaries of these contributions, which include the Bush family, have appointed union hostile labor regulators. Indeed, President George W. Bush dismissed the National Labor Relations Board (NLRB) General Counsel only days before he was to argue a major case against Walmart. The successor Bush nominated dropped the case, despite extensive evidence of Walmart's use of illegal tactics in fighting unionization of its stores during the unionization campaign in the late 1990s.[219] Since then, both Trump appointees and conservative Supreme Court appointees[220] have further undercut labor enforcement.[221]

Deregulation and weak enforcement have contributed to a company's ability to maintain the seeming legitimacy of its practices while cloaking the improprieties from view. The combination of a management ethos that encourages a predatory mindset and a public ethos that normalizes it makes it easier, as Akerlof and Shiller have claimed, for

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216. *See* Brad Seligman, *Patriarchy at the Checkout Counter: The Dukes v. Wal-Mart Stores, Inc., Class Action Suit*, *in* WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 231 (Nelson Lichtenstein ed., 2006).

217. Catherine Ruetschlin, *How Walmart and Home Depot are Buying Huge Political Influence*, AM. PROSPECT (Dec. 3, 2014), http://prospect.org/article/how-walmart-and-home-depot-are-buying-huge-political-influence [https://perma.cc/2DHH-LSHR].

218. *See* Jillian Berman, *Walmart PAC, Walton Family Political Contributions Favor Conservatives*: *Report*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2013/06/18/walmart-political-contributions_n_3461267.html [https://perma.cc/K2BU-5XNQ]; Ruetschlin, *supra* note 217.

219. Misha Petrovic & Gary G. Hamilton, *Making Global Markets: Wal-Mart and Its Suppliers*, *in* WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 107 (Nelson Lichtenstein ed., 2006), 136–37, 142–43 (describing incident).

220. *See* Jeffry Bartash, *Trump Set to Make Supreme Court Even More Pro-Business with Kavanaugh Pick*, MKT. WATCH (July 9, 2018), https://www.marketwatch.com/story/business-are-winning-big-at-the-supreme-court-a-new-trump-pick-means-theyll-keep-winning-2018-07-09 [https://perma.cc/E56U-JF75]; *see also* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013).

221. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (five-four decision upholding mandatory arbitration provisions that make challenges to predatory labor decisions more difficult); Danny Feingold, *Walmart's War Against Unions — and the U.S. Laws That Make It Possible*, HUFFPOST (Aug. 5, 2013), https://www.huffpost.com/entry/walmart-labor-laws_b_3390994 [https://perma.cc/F7GV-J2GA].

companies to profit from predatory practices. Overall, this reinforces the image of these companies as successful and further spurs the internal competitions for promotions and bonuses, creating predatory, if not always criminogenic, corporate cultures.

III. PREDATION, GENDER, AND WOMEN AS THE CANARIES IN THE COAL MINE

The gendered wage gap shrank over the course of the 1970s and 1980s,[222] but in the 1990s, something began to change. In 1990, the gender wage gap had little relationship to education levels.[223] To the extent that there were differences, women with college degrees earned a higher percentage of the wage for comparably educated men than did less-educated women.[224] Over the next twenty years, while the overall gender gap in wages continued to shrink, it increased for college graduates.[225] The overall numbers cloaked the fact that, by 2010, college-educated women were making a smaller share of the male wage than they had in 1990.[226] What happened?

The answer is that income inequality grew dramatically in the United States, and in the areas where income grew the most—particularly finance, tech, and the top corporate ranks—women lost ground.[227] The percentage of women on Wall Street and in tech jobs declined after the 1990s, and the six job categories with the greatest gender gaps in compensation were all in finance.[228] In short, women fell behind in the sectors of the economy where incentive pay—and opportunities for predation—took hold. These also happened to be the sectors of the economy enjoying the greatest overall income growth. During the same period, however, companies with

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222. *See* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 749–50 (2002).

223. *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).

224. *See id.*

225. *See id.*

226. *See id.*

227. *See, e.g.*, ELISE GOULD, JESSICA SCHIEDER & KATHLEEN GEIER, ECON. POL'Y INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? 10 (2016), https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/ [https://perma.cc/85F9-VMNM] (finding that, 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).

228. *See* Frank Bass, *Shining Shoes Best Way Wall Street Women Outearn Men*, BLOOMBERG NEWS (Mar. 15, 2012), https://www.bloomberg.com/news/articles/2012-03-16/shining-shoes-best-way-wall-street-women-outearn-men [https://perma.cc/4XA2-7F6X]; *see also* Derek Thompson, *Why the Gender-Pay Gap Is Largest for the Highest-Paying Jobs*, THE ATLANTIC (Dec. 17, 2014), http://www.theatlantic.com/business/archive/2014/12/the-sticky-floor-why-the-gender-wage-gap-is-lowest-for-the-worst-paying-jobs/383863/ [https://perma.cc/GJ34-W6SV].

greater gender diversity outperformed other companies. A study of almost 22,000 companies reported that businesses with more equal gender leadership have a "15 percent boost to profitability."[229] Empirical studies further suggest corporate boards that include more women appear to produce better results, and women-run funds outperform those run by men.[230] Businesses with greater gender diversity appear to operate in different ways, with different values, and with better results than more homogeneous firms.

In this Part, we will first explore how gender theory postulates that the shareholder value and competitive pay era have produced "masculinity contest cultures" in which employees compete to demonstrate the most masculine traits. These cultures make winning at all cost the test of success, and tolerate self-interested, unethical, and counterproductive behavior. These cultures also tend to increase workplace bullying, sexual harassment, and inattention to morale, which drives women from the workplaces, further reinforcing male dominance in such cultures. Second, we will consider how these traits align greater male domination with predatory cultures. Third, we explain how these practices constitute a triple bind for women: they cannot win if they do not engage in the same unethical behavior as men, they are punished more severely when they do engage in the same behavior, and they become less likely to apply when they see the women ahead of them fail to succeed. Finally, we will conclude that anti-discrimination efforts are not well-suited to address the gender disparities, partly because they tend to assume the legitimacy of business objectives and methods and partly because they depend on comparisons in the treatment of like workers in workplaces that increasingly treat all management-level employees on an individual basis. The result is that the same factors that encourage predation also tend to exacerbate gender disparities in the workplace, making women canaries in the coal mine for toxic workplace cultures.

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229. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* 8–9 (Peterson Inst. For Int'l Econ., Working Paper No. 16-3, 2016), https://piie.com/publications/wp/wp16-3.pdf [https://perma.cc/73YH-LBN9]; *see also* Aimee Picchi, *In Business, More Women at the Top Means More Profits*, CBS NEWS (Feb. 9, 2016), https://www.cbsnews.com/news/more-women-more-profits/ [https://perma.cc/R4HZ-FKVG].

230. *See, e.g.*, Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 864 (2011) (discussing the difference between the business case and moral case for diversity on corporate boards); Yaron G. Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145 (2019); Eric McWhinnie, *Women Are Mostly Better Investors Than Men*, USA TODAY (Mar. 9, 2014), https://www.usatoday.com/story/money/personalfinance/2014/03/09/women-better-investors-than-men/6176601/ [https://perma.cc/3RK7-4G45] (observing that women-run funds tend to do better).

A. Gender Theory and Masculinity Contest Cultures

Gender theorists have put together a body of empirical work that they use to identify "masculinity contest cultures."[231] To do so, these theorists have taken the experience with competitive workplace cultures and recharacterized it in gendered terms. In the process, they emphasize the ways that the terms of competition are often artificial and increase male dominance in the workplace, and that workplaces characterized by these masculinity contest cultures tend to result in lower morale, greater willingness to engage in unethical practices, and more sexual harassment and bullying. Gender theorists characterize such workplaces as environments where the celebration of extreme masculine traits becomes an end in itself, defining the workplace ideal in stereotypically male terms.[232] We argue, however, that the promotion of these traits also serves to refocus workplaces on predatory ends, and therefore may be understood as something more than simply gender stereotyping or misogyny.

Feminists, of course, have long sought to explore "patriarchy" as the assertion of male power over women.[233] More recently, masculinities theorists have emphasized that patriarchy is also a system that valorizes the creation of hierarchies that give men power over other men.[234] Competition, uncertainty, and high-stakes rewards increase both the intensity of the fight and the consequences of ending up at the losing end of male status hierarchies.[235] CEOs who use zero sum bonus systems to gain control of a company by definition increase competition, and to the extent that they focus it on short-term metrics, they also increase uncertainty and insecurity, intensifying the effect.[236] This theory suggests that those in power gain a greater ability to manipulate workplace cultures by dismantling what had been state-sponsored sources of security and stability (e.g., union power and labor protections) and standardization of

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231. Berdahl et al., *supra* note 3.

232. *See id.* at 430.

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

234. *See* June Carbone & Naomi Cahn, *Unequal Terms: Gender, Power and the Recreation of Hierarchy*, 69 STUD. L., POL. & SOC'Y 189 (2016); *see also* David Brooks, Opinion, *Two Cheers for Feminism*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/opinion/feminism-gender-empathy-psychology.html [https://perma.cc/SGT9-Y57A] ("[F]or thousands of years social thinking has been dominated by men — usually alpha men — who saw life as a place where warriors and traders went out and competed for wealth and power.").

235. *See, e.g.*, FIONNUALA NÍ AOLÁIN ET AL., ON THE FRONTLINES (2013) (discussing how hypermasculinity during conflict results in male dominance power struggles among, and over, men and women).

236. *See* Berdahl et al., *supra* note 3, at 429 (observing that masculinity contests are "most prevalent—and vicious—in male-dominated occupations where extreme resources (fame, power, wealth) or precarious resources . . . are at stake . . . .").

ethical custom and workplace procedures. Walmart, for example, has long waged anti-union efforts,[237] correctly perceiving that labor unions would make it more difficult to evade wage and hour laws, and in today's workplaces, anti-discrimination protections.[238]

In contrast, competitive cultures tend to create systems of personalized, rather than institutionalized power. Employees focus on the internal contests, which involve prevailing over those in the next cubicles, rather than working together to best external rivals, such as other companies.[239] These contests then select for stereotypically masculine traits, which can become ends in themselves.[240] "In this zero-sum game," the scholars explain, "men compete at work for dominance by showing no weakness, demonstrating a single-minded focus on professional success, displaying physical endurance and strength, and engaging in cut-throat competition."[241]

These environments work to the disadvantage of women—and often the organization—in a variety of ways. First, they typically emphasize confidence to the point of hubris. Jack Welch, in describing the selection of his successor, bragged that all of the candidates "thrived on change and had self-confidence to spare."[242] Yet, in an article entitled *Why Do So Many Incompetent Men Become Leaders?*, organizational psychologist Tomas Chamorro-Premuzic observed that "when it comes to leadership, the only advantage that men have over women . . . is the fact that manifestations of hubris—often masked as charisma or charm—are commonly mistaken for leadership potential, and that these occur much more frequently in men than in women."[243]

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237. *See* David Karjanen, *The Wal-Mart Effect and the New Face of Capitalism*, *in* WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 143, 147–48 (Nelson Lichtenstein ed. 2006) (quoting John Tate, Walmart's antiunion lawyer, who declared in 2004: "Labor unions are nothing but blood-sucking parasites living off the productive labor of people who work for a living").

238. *See* Elise Gould & Celine McNicholas, *Unions Help Narrow the Gendered Wage Gap*, ECON. POL'Y INST. (Apr. 3, 2017), https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap/ [https://perma.cc/N57P-HW37] (discussing union role in standardizing wages, which tends to benefit women).

239. *See* Berdahl et al., *supra* note 3, at 434 (describing consequences of such competitions).

240. *See* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 85–94 (1995) (describing the persistence of counterproductive traits in the selection of police officers and attributing it to the definition of the police officer role in terms of stereotypical masculine traits).

241. Berdahl et al., *supra* note 3, at 430.

242. JACK WELCH WITH JOHN A. BYRNE, STRAIGHT FROM THE GUT 629 (2001).

243. Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), https://hbr.org/2013/08/why-do-so-many-incompetent-men [https://perma.cc/9QBH-ZW27]; *see also* Adrian Furnham et al., *Male Hubris and Female Humility? A Crosscultural Study of Ratings of Self, Parental, and Sibling Multiple Intelligence in America, Britain, and Japan*, 30 INTELLIGENCE 101 (2001).

Second, they emphasize the willingness to work long hours, often as a demonstration of commitment to the job rather than as a reflection of business needs.[244] As high-stakes competitions in the workplace have increased, hours have also increased, mostly at the top of the income ladder.[245] At mid-century, blue-collar and white-collar workers worked about the same number of hours,[246] while today, the highest earners work much longer hours than anyone else.[247] This emphasis on long hours disproportionately affects women, given their greater family responsibilities.[248] In addition, the appearance of working long hours may matter more than productivity; one study found that men were three times more likely than women to ease up on hours without having it affect their performance reviews—superiors were more likely to view men rather than women as dedicated to the job.[249]

Third, the emphasis on the ability to engage in "cut-throat competition" bolsters in-group favoritism. Gender theorists emphasize that competitive environments attract those drawn to the ability to exercise the type of dominance associated with masculinity displays, but such environments also involve constant threats to the ability to maintain favored status.[250] These scholars conclude, "The need to repeatedly prove masculinity can lead men to behave aggressively, embrace risky behaviors, sexually harass women (or other men), and express

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244. *See* Sarah Green Carmichael, *The Research Is Clear: Long Hours Backfire for People and for Companies*, HARV. BUS. REV. (Aug. 19, 2015), https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies [https://perma.cc/SJ7Z-MA8C].

245. *See* Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J.: APPLIED ECON. 228, 233 (2010); *see also* Claire Cain Miller, *Women Did Everything Right. Then Work Got 'Greedy'*, N. Y. TIMES (Apr. 26, 2019), https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html?action=click&module=Top%20Stories&pgtype=Homepage [https://perma.cc/FXT5-QUZZ].

246. *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).

247. *See* David R. Francis, *Why High Earners Work Longer Hours*, NAT'L BUREAU ECON. RES., http://www.nber.org/digest/jul06/w11895.html [https://perma.cc/DQ84-9JFJ].

248. *See* Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1111–13 (2014).

249. *See* Neil Irwin, *How Some Men Fake an 80-Hour Workweek, and Why It Matters*, N.Y. TIMES: THE UPSHOT (May 4, 2015), http://www.nytimes.com/2015/05/05/upshot/how-some-men-fake-an-80-hour-workweek-and-why-it-matters.html [https://perma.cc/5Z4N-E4LQ].

250. *See, e.g.*, Greg Bensinger, *Uber's Top Deal Maker Resigns After Misconduct Allegations Revealed*, WALL ST. J. (Oct. 22, 2018), https://www.wsj.com/articles/ubers-top-dealmaker-cameron-poetzscher-resigns-1540238793 [https://perma.cc/BYH4-6FD8]; Mike Isaac, *Inside Uber's Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html [https://perma.cc/9JZ3-DAMQ] (describing how the company deliberately created a "Hobbesian environment . . . , in which workers are sometimes pitted against one another and where a blind eye is turned to infractions from top performers").

homophobic attitudes, when men feel that their masculinity is threatened."[251] The masculinities context studies find, specifically, that such cultures produce abusive managers, more eager to demonstrate their own success than to encourage workplace harmony or productivity.[252] They tend to identify with the workers who have the same traits they see in themselves, and to exploit others' weaknesses, leading to the "exclusion and harassment toward historically disadvantaged groups and men with resistant masculinities."[253] The very idea of a masculinity contest involves selection for the traits because they are associated with masculinity rather than because they are valuable to the task at hand.[254] Thus, Mary Anne Case demonstrated how police departments choose officers for traits such as aggressiveness, self-assuredness, and reliance on physical strength even when empirical research suggests that such traits are counterproductive, and officers with traits more likely to defuse conflict do a better job.[255]

These types of environments tend to promote those winning the masculinity contest—that is, those displaying aggressiveness, strength, endurance, and hubris—and to overlook the downside of these traits, which includes higher turnover and lower morale.[256] Scholars further report that workers in such environments are more likely to experience sexual or racial harassment and to report a more sexist workplace culture.[257]

The result both reinforces gender stereotyping by identifying the ideal worker with a male image and creating workforce cultures that drive out women and other outsiders.[258] It also creates an atmosphere easy to manipulate to produce predation; indeed, that may be why upper

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251. Berdahl et al., *supra* note 3, at 428.

252. *See* Kenneth Matos et al., *Toxic Leadership and the Masculinity Contest Culture: How "Win or Die" Cultures Breed Abusive Leadership*, 74 J. SOC. ISSUES 500, 502–03 (2018) (listing four dimensions, including "Show No Weakness").

253. Berdahl et al., *supra* note 3, at 435.

254. *See generally* Chamorro-Premuzic, *supra* note 243 (summarizing research literature on gender differences in selection and performance).

255. *See* Case, *supra* note 240, at 85–94 (describing the persistence of counterproductive traits in the selection of police officers (aggressiveness, self-assuredness and reliance on physical strength) and attributing it to the definition of the police officer role in terms of stereotypical masculine traits even when other approaches to policing that emphasize different traits (e.g., the de-escalation of conflict) are more effective).

256. *See* Peter Glick et al., *Development and Validation of the Masculinity Contest Culture Scale*, 74 J. SOC. ISSUES 449, 449 (2018).

257. *See id.*

258. *See, e.g.*, Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 642 (2004); Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Towards Female Leaders*, 109 PSYCHOL. REV. 573, 573 (2002) (describing how role expectations associated with male leaders undercut women even when they display the same traits).

management tolerates the downside of these traits. Moreover, focusing on the role of these cultures in predation changes the description of the dynamics involved in creating the culture. Gender theorists describe them as "zero-sum" contests; if one person "wins," another necessarily loses. For the company, however, they are often "negative-sum." That is, the form the competition takes may lower overall productivity.[259] Such competitions may harm teamwork and select and promote the worst officers.[260] In addition, while high-stakes corporate tournaments are often described as "winner-take-all" contests, male CEOs create handpicked teams and often richly reward the teams that support the CEO's predations.[261]

B. Predation and Masculinities Contests

Predation, almost by definition, involves callousness toward its targets. Studies of gender differences in leadership, on the other hand, tend to emphasize greater social awareness and empathy as the traits women are more likely to bring to management. Yet, more predatory environments favor managers who lack such qualities, and the result contributes to gender disparities both in the selection of top management, as well as women's promotion and success within such companies.[262]

Essential to the creation of such cultures is competition that pits employee against employee.[263] Even adopting competitive pay schemes tends to change the nature of those who apply, attracting overconfident narcissists[264] and depressing women's applications to a much greater degree than men's.[265] Granted, women can be narcissists, and both male and female narcissists like to be the center of attention.[266] Nonetheless,

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259. *See* Eichenwald, *supra* note 191.

260. *See id.*

261. *See, e.g.*, Dallas, *supra* note 167, at 37 (describing decision-making in such environments as more politicized).

262. *See generally, e.g.*, Maccoby, *supra* note 202 (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); O'Reilly et al., *supra* note 176, at 218 (describing narcissists as more likely to be "inspirational, succeed in situations that call for change, and be a force for creativity").

263. *See* Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1216 (2011) (discussing relationship between highly aggressive, opportunistic stances toward groups such as customers, and hypercompetitive industries such as financial services).

264. *See, e.g.*, Lee A. Macenczak et al., *Direct and Interactive Effects of Narcissism and Power on Overconfidence*, 91 PERSONALITY & INDIVIDUAL DIFFERENCES 113, 119 (2016) (examining the links between overconfidence and narcissism).

265. *See, e.g.*, Jeffrey A. Flory et al., *Do Competitive Workplaces Deter Female Workers? A Large-Scale Natural Field Experiment on Job Entry Decisions*, 82 REV. ECON. STUD. 122, 122 (2015).

266. *See* Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-Analytic Review*, 141 PSYCHOL. BULL. 261, 264 (2015) (summarizing literature).

male narcissists are more likely than female narcissists to be attracted to positions of power and authority, and thus more likely to seek leadership positions.[267] The largest gender differences among narcissists, however, involve the greater willingness of the men "to exploit others and to believe that they themselves are special and therefore entitled to privileges."[268] In short, male narcissists are more willing than female narcissists to demand greater rewards for themselves and to use greater status to run roughshod over others to accomplish their objectives.[269] Narcissists who think in these terms tend to view compensation as a measure of merit, to feel that the compensation they receive is justified, and to use whatever tactics they have at their disposal to increase their leverage in negotiations.[270] A study of tech firms found that the CEOs whose employees ranked the CEOs higher in narcissistic 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."[271] These qualities are almost exactly the opposite of the humility-honesty factor traits associated with the most effective leaders.[272]

These factors create self-reinforcing cycles: a company that wishes to encourage wage suppression, higher sales based on misinformation or pressure tactics, or other ethically dubious practices may use incentive pay to encourage the results.[273] Negative-sum workplace incentives, however, will increase the representation of narcissists and discourage women generally from applying.[274] The male narcissists will use harder tactics in negotiating pay and be more willing to cut ethical corners to increase their bonuses—increasing pay disparities.[275] At the same time, those who thrive in such environments tend to be more likely to harass and bully their employees, particularly women and other outsiders, driving them out and decreasing workplace diversity. These workplaces then become even more male dominant—and more willing to engage in predatory practices. The

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267. *See id.*

268. *Id.* at 280.

269. *See id.*

270. *See, e.g.*, Paredes, *supra* note 175, at 711–13 (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).

271. O'Reilly et al., *supra* note 176, at 218.

272. *See* Annette Susanne Peters et al., *Associations Between Dispositional Humility and Social Relationship Quality*, 2 PSYCHOL. 155, 155 (2011) (demonstrating that women are less likely to be seen as acting in their own self-interest and more likely to be perceived as acting in the interest of others).

273. *See* discussion *supra* notes 155–72 and accompanying text.

274. *See* discussion *infra* notes 274–80 and accompanying text.

275. *See* discussion *infra* notes 279–81 and accompanying text.

male dominance may be an incidental rather than an intended consequence of the efforts to incentivize predatory practices.

Let us return, for example, to Walmart and examine how it recruited a managerial force willing to exploit and shortchange workers. In a national class action case alleging sex discrimination against Walmart,[276] the plaintiffs demonstrated that women made up more than two-thirds of Walmart's hourly employees and almost ninety percent of its customer services managers (an hourly position), but constituted less than twenty percent of salaried store managers at the time the case was brought.[277] Women promoted into the supervisory ranks earned substantially less than the men.[278] Walmart's informal selection process and insistence that managers work long and unpredictable hours provide part of the explanation for the gender disparities.[279] Walmart also, however, based a high percentage of managerial pay on a bonus system, typically fired ten percent or more of store managers even in good years, and required as a condition of selection for its managerial trainee program that the candidates be willing to move.[280]

Even Sam Walton acknowledged that the requirement "really put good, smart women at a disadvantage in our company because at that time they weren't as free to pick up and move as many men were."[281] The advantage for Walmart is that managers who move repeatedly do not develop overly close ties to the employees they supervise, their individual stores, or the communities in which they live.[282] They identify instead with their status as a successful Walmart manager, which may be particularly important in a corporate culture that emphasizes the suppression of labor costs.[283] In such a system, self-promotion at the expense of employees and

276. *See* Seligman, *supra* note 216, at 231.

277. *Id.* at 237–39.

278. Steven Greenhouse, *Wal-Mart Faces Lawsuit over Sex Discrimination*, N.Y. TIMES (Feb. 16, 2003), http://www.nytimes.com/2003/02/16/us/wal-mart-faces-lawsuit-over-sex-discrimination.html [https://perma.cc/YTF3-5EJ5].

279. *See* Goldin, *supra* note 248 (describing impact of long hours on women).

280. Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759, 759–60 (2013); *see also* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 152 (N.D. Cal. 2004) (finding that store managers moved an average of 3.6 times each after becoming a manager, and the majority of the moves were to different districts).

281. LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 29 (2005).

282. *See* Seligman, *supra* note 216, at 96 (describing Walmart's preference for commitment and dedication to the company and the job over educational degrees or experience); Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L. F. 466 (2017) ("Strong workplace ties also provide emotional support and care that can contribute to performance. Strong ties with coworkers even serve as a bulwark against workplace harassment, and can help workers better cope with harassment or mistreatment if it occurs.").

283. Langevoort, *supra* note 263, at 1216 (observing that a "strong in-group versus out-group cultural orientation can also encourage the maintenance of a highly aggressive, opportunistic stance

callousness and lack of empathy become a condition of employment for a managerial force in a constant state of insecurity. This Walmart system can be (and was) presented as an Arkansas old boys' club, with trips to Hooters and the promotion of men over women because of sex-stereotyping,[284] but it can also be seen as a sophisticated effort to promote managers willing to engage in wage theft without explicit direction from Bentonville.

Finance, of course, is even more notorious for its predatory attitudes toward customers. Frank Partnoy recalled how the bankers he worked with used to refer to "ripping clients' faces off," which meant making high fees selling the clients something they did not understand.[285] The more striking attitudes, however, may be those of personal financial advisers. Unlike traders and many investment bankers, personal financial advisers typically have ongoing relationships with their clients. The desired traits for financial advising and wealth management include building relationships and strong communication skills—qualities often associated with women.[286] Yet, relatively few wealth managers are women,[287] and personal financial advisors show the largest gender gaps in compensation in the entire economy.[288] Compensation is an oft-cited reason for the gender disparities; financial advisors tend to be paid based on "the amount of assets under management . . . or by commissions on product sales, as opposed to less tangible outcomes such as client satisfaction."[289]

The fee structure together with the relative lack of regulatory oversight invites predatory behavior—and uses success in exploiting predation as the measure of workplace success. Critics conclude that "[t]he regulatory structure for financial advice now tolerates incentives motivating financial advisors to manipulate and deceive retail

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toward outsiders, such as customers and competitors" and that such an attitude is "fairly commonplace in hypercompetitive industries like retail, financial services, and computer technology").

284. FEATHERSTONE, *supra* note 281, at 80–84 (describing deposition testimony about managers' trips to Hooters and strip clubs).

285. HILL & PAINTER, *supra* note 87, at 124.

286. *See* CERTIFIED FIN. PLANNER BD. OF STANDARDS, INC., MAKING MORE ROOM FOR WOMEN IN THE FINANCIAL PLANNING PROFESSION (2014), https://www.cfp.net/docs/about-cfp-board/cfp-board_win_web.pdf [https://perma.cc/U3R6-MRV7].

287. *See, e.g.*, Mindy Diamond, *Why Aren't More Women in Wealth Management?*, WEALTHMANAGEMENT.COM (May 14, 2014), http://www.wealthmanagement.com/careers/why-aren-t-more-women-wealth-management [https://perma.cc/U3EH-2B3V] (estimating that only about 13% are female).

288. *See* Derek Thompson, *Why the Gender-Pay Gap Is Largest for the Highest-Paying Jobs*, THE ATLANTIC (Dec. 17, 2014), http://www.theatlantic.com/business/archive/2014/12/the-sticky-floor-why-the-gender-wage-gap-is-lowest-for-the-worst-paying-jobs/383863/ [https://perma.cc/JUG5-3SPW].

289. CERTIFIED FIN. PLANNER BD. OF STANDARDS, INC., *supra* note 286, at 21.

investors."[290] Benjamin Edwards observes more bluntly that "[c]ommission compensation structures may lead even well-meaning financial advisors to recommend unwise investments to their clients."[291] Edwards describes the way advisors may persuade clients to purchase products that offer higher sales commissions or involve greater adviser involvement tied to higher fees.[292] He estimates the losses to ordinary savers from such conduct at $17 billion per year.[293]

Perhaps the most egregious recent example of such conduct comes from Wells Fargo. A former Wells Fargo employee explained that "the whole foundation of Wells Fargo is cross-sell, cross-sell, cross-sell,"[294] which builds in conflicts of interest between advisers and customers. The bank generated enormous pressure on its employees to persuade customers to purchase additional Wells Fargo services, particularly services likely to generate overdraft or other fees.[295] Most infamously, Wells Fargo opened accounts in its customers' names without their knowledge or permission.[296] While that has presumably stopped, a survey of Wells Fargo workers in March 2019 indicated that "they remain under heavy pressure to squeeze extra money out of customers."[297] The *New York Times* reported that "[s]ome have witnessed colleagues bending or breaking internal rules to meet ambitious performance goals."[298] One of the former Wells Fargo bankers commented, "The analogy I use was that it was like lions hunting zebras . . . . They would look for the weakest, the ones that would put up the least resistance."[299] The wealth management unit responsible for some of the worst abuses is now also subject to an ongoing sex discrimination case.[300] And as we will explain in the next Part, the gender disparities in attrition are striking.

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

291. *Id.* at 183.

292. *Id.* at 184.

293. *Id.* at 184 n.12.

294. Jim Nortz, *The Anatomy of a Corporate Scandal: Unauthorized Credit Cards, Greasy Cup Holders and a Surefire Recipe for a Corporate Scandal*, ACC DOCKET, Jan.–Feb. 2017, at 72 ("Cross-selling" refers to "the bank's sales approach of offering customers with a checking account many other types of products – including credit cards, home loans, and lines of credit.").

295. *Id.* at 70–71.

296. *Id.*

297. Emily Flitter & Stacy Cowley, *Wells Fargo Says Its Culture Has Changed. Some Employees Disagree.*, N.Y. TIMES (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/business/wells-fargo-sales-culture.html [https://perma.cc/84TR-F9HE].

298. *Id.*

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

300. *See* Emily Glazer, *Whistleblowers Detail Wells Fargo Wealth Management Woes*, WALL ST. J. (July 27, 2018), https://www.wsj.com/articles/whistleblowers-detail-wells-fargo-wealth-management-woes-1532707096?mod=article_inline [https://perma.cc/J5XX-J2TG].

Masculinities contest cultures tend to attract those who thrive on competition, value compensation as a measure of self-worth, and enjoy the ability to assert dominance even at the expense of subordinates and customers. The selection for these traits favors men over women; it also makes it easier to prime such cultures for predatory activities.

C. The Triple Bind: Competition, Predation, and Punishment

The conventional discussion of why women are so underrepresented in fields like finance maintains that women just do not like competition and disproportionately fail to apply for positions in high stakes competitive cultures.[301] In fact, as we have suggested above, women have good reason to believe that such cultures will be less supportive for them personally. In addition, if the cultures encourage predatory behavior—against shareholders, customers, subordinates, or co-workers—women may find that they are more likely than men to be punished for engaging in such behavior.

The literature on competition does show marked gender differences. Laboratory studies using a general population find that women prefer less competitive reward structures.[302] When given a choice, for example, 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.[303] Other studies find that it may not be competition per se, but the purpose of the competition that produces the greatest gender differences. One study distinguished between "hypercompetitives," who were more likely to be male, versus "personal development competitives," who were more likely to be female. The hypercompetitives endorsed the value of power and control over others while the personal development

301. *See, e.g.*, Kate Conger, *Exclusive: Here's the Full 10-Page Anti-Diversity Screed Circulating Internally at Google*, GIZMODO (Aug. 5, 2017), https://gizmodo.com/exclusive-heres-the-full-10-page-anti-diversity-screed-1797564320 [https://perma.cc/S9SQ-QV7G] (reprinting "Google Guy" screed). *But see* Shuo Yan & Chunmian Ge, *Gender Difference in Competition Preference and Work Duration in the IT Industry: LinkedIn Evidence* 6 (Thirty-Seventh Int'l. Conf. on Info. Sys., Dublin, Working Paper, 2016) (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").

302. Muriel Niederle & Lise Vesterlund, *Do Women Shy Away from Competition? Do Men Compete too Much?*, 122 Q.J. ECON. 1067, 1078, 1097 (2007) (describing gender differences in preferences for competition even when controlling for even after controlling for self-confidence in the ability to perform the task); *see also* Jeffrey A. 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, 124 (2015) (indicating the gender gap in applications more than doubles when a large fraction of the wage depends on relative performance).

303. Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 264 (2013) (citing Niederle & Vesterlund, *supra* note 302, at 1078, 1097).

competitives "strongly endorsed values associated with social concern, that is, with caring about the well-being of others and with treating them with respect and as equals."[304] Not all competition is the same.

The way a position is constructed and advertised in these terms influences the gender composition of the applicant pool. Indeed, simply emphasizing monetary incentives rather than teamwork or customer satisfaction increases the percentage of male applicants.[305] So does advertising that emphasizes a competitive environment generally.[306] When ads indicate that a large fraction of the wage (50%) depends on relative performance, the gender gap in applications doubles,[307] indicating a much greater female aversion to such environments rather than simply an aversion to competition by itself.[308]

The reason may have something to do with what we have described elsewhere as the "triple bind."[309] The analysis starts with the classic double bind. If women engage in the same predatory behavior as men, they are judged harshly for not conforming to gender stereotypes,[310] but if they fail to do so, they may be viewed as lacking what it takes to succeed in competitive environments.[311] Our analysis then adds a third factor: women

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

305. *See, e.g.*, Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 38 n.60, 41 (Nat'l Bureau of Econ. Res., Working Paper No. 21913, 2016), http://www.nber.org/papers/w21913.pdf [https://perma.cc/8Y8X-L3QJ] (indicating that differences in attitudes toward competition contributed to the gendered wage gap, and that competitive compensation packages tended to depress female applications).

306. Danielle Gaucher et al., *Evidence That Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality*, 101 J. PERSONALITY & SOC. PSYCHOL. 109, 109 (2011) (showing that ads using the terms "leader, competitive, [or] dominant" were seen as more appealing to men, while words such as "support, understand, [and] interpersonal" were more associated with women).

307. *See, e.g.*, Flory et al., *supra* note 151, at 124, 146.

308. Gender differences among professionals who stay in a field are, however, much less than among the general population. *See, e.g.*, Michael Kirchler et al., *Rankings and Risk-Taking in the Finance Industry*, 73 J. FIN. 2271, 2275–76 (2018) (finding no differences in risk taking and male and female professionals).

309. Cahn et al., *Gender and the Tournament*, *supra* note 8, at 431.

310. *See, e.g.*, Berdahl, *supra* note 3, at 432 (describing women and minorities as more likely to be disliked and punished if they display the ambition, ruthlessness, and domination required to succeed in masculinities contests); *see also* Peggy Klaus, *Neither Men nor Mice,* N.Y. TIMES (Mar. 6, 2010), https://www.nytimes.com/2010/03/07/jobs/07preoccupations.html [https://perma.cc/7KE4-W2M3].

308. When women defy gender role expectations, they face numerous repercussions in the workplace. *See* DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 68 (2007) (characterizing women starting to climb the corporate ladder as actually "walking a tightrope" because they must be sufficiently aggressive to excel, but not overly aggressive because they will be perceived as pushy); Emily A. Leskinen et al., *Gender Stereotyping and Harassment: A "Catch-22" for Women in the Workplace*, 21 PSYCHOL. PUB. POL'Y & L. 192 (2015).

become less likely to apply for such positions, increasing male dominance within the workplace.[312]

Mark Egan, of the Harvard Business School, and his colleagues provide a particularly telling example in their description of misconduct among personal financial advisers—the job category that, as we mentioned above, has the largest gender gap in compensation in the economy. The study notes that misconduct in the industry is prevalent: "Roughly 7% of financial advisers have a past record of misconduct."[313] The incidence of misconduct is gendered. Men are three times more likely than women to engage in misconduct and twice as likely to be repeat offenders. In addition, their offenses are 20% more costly to their employers.[314] Yet, women are 20% more likely to lose their jobs and 30% less likely to find new ones compared to men.[315] In addition, the source of the complaints for men and women differ. Customers initiate 55% of the misconduct complaints against men while their employers initiate 28%. For women, on the other hand, employer-initiated instances of misconduct are almost as common as customer-initiated complaints (41% versus 44%, respectively).[316] In an industry in which predation against customers is common and male domination of senior management is the norm, women face greater risks than men—and a significant portion of those risks come from their employers.[317]

The data the study provided identified the financial institutions with the greatest gender gaps and generated headlines in the financial press with the finding that "female financial planners at Wells Fargo were more than 25% more likely to experience a 'job separation' after misconduct than their male counterparts."[318] The combination of predatory behavior and gender disparities appears to have been particularly intense at Wells Fargo, the bank whose employees described themselves as "lions hunting zebras."[319]

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312. Cahn et al., *Gender and the Tournament*, *supra* note 8, at 459.

313. Egan et al., *supra* note 11, at 2.

314. *Id.* at 4.

315. *Id.* at 11–14, 28.

316. *Id.* at 8–9.

317. *See* Ben Steverman, *Proof Wall Street Is Still a Boys' Club: Financial Advisory Firms Are Far More Lenient with Men Who Break the Rules, a New Study Says*, BLOOMBERG (Mar. 14, 2017), https://www.bloomberg.com/news/articles/2017-03-14/proof-wall-street-is-still-a-boys-club [https://perma.cc/2CUS-EAKL].

318. Annalyn Kurtz, *Wells Fargo 25% More Likely to Punish Women Employees Than Men, Study Says*, FORTUNE (Mar. 13, 2017), http://fortune.com/2017/03/13/wells-fargo-financial-advisers-gender-discrimination/ [https://perma.cc/DBG4-WMFV].

319. Kaufman, *supra* 299, at 438 (quoting Stacy Cowley, *'Lions Hunting Zebras': Ex-Wells Fargo Bankers Describe Abuses*, N.Y. TIMES: DEALBOOK (Oct. 20, 2016), https://www.nytimes. com/2016/10/21/business/dealbook/lions-hunting-zebras-ex-wells-fargobankers-describe-abuses.html [https://perma.cc/5SAR-U8K3]); *see, e.g.*, James R. Koren, *Former Wells Fargo Executives Say They*

Overall, numerous studies indicate that women are more likely than men to support ethical business practices.[320] While there is no agreement on why, an easy conclusion is that women may have little choice. They do not profit as much from the upsides of competitive—or predatory—environments, and they face potentially more severe consequences for their misdeeds when they do try to cash in.[321]

D. Anti-discrimination Laws Provide Little Redress

While masculinity contest cultures produce notable gender disparities, anti-discrimination laws do not provide adequate redress for three reasons. First, the courts have consistently cut back on the ability to redress sex discrimination generally. Second, the courts tend to treat business practices as legitimate and do not generally look beyond employers' stated reasons for their practices. Third, the shift from lockstep raises and promotions to more individualized assessments makes unequal treatment hard to prove. As a result, while anti-discrimination efforts might be expected to shed greater light on the intersections between predatory cultures and the negative impact on women, in fact, they do so much less than highly publicized incidents, as we saw in the #MeToo movement.

The first factor, the consistent undermining of anti-discrimination law, has been well-documented.[322] The Supreme Court has, for example, made class action treatment more difficult, upheld mandatory arbitration provisions, and generally interpreted statutory causes of action

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Were Scapegoated for Accounts Scandal, L.A. TIMES (Sept. 1, 2017), https://www.latimes.com/business/la-fi-wells-fargo-termination-20170901-story.html [https://perma.cc/VA8S-P8ZG] (describing lawsuit alleging that Wells Fargo tried to blame fake accounts on male and female employees who had complained about them, while protecting higher up males who bore greater responsibility).

320. *See* Egan et al., *supra* note 11, at 8–10; *see also* Damodar Suar & Jyotiranjan Gochhayat, *Influence of Biological Sex and Gender Roles on Ethicality*, 134 J. BUS. ETHICS 199, 200 (2016) ("In a meta-analysis of 14 studies, women were found to be more ethical than men in seven of the studies, and no difference was observed in seven other studies (Ford and Richardson 1994). In another meta-analytic study of 66 pre-career student samples, women were found to have higher ethical standards than men, but the difference between women and men declined as work experience increased (Franke et al. 1997). In still another meta-analysis of 47 studies, 49% of the studies yielded a difference between women and men in ethical behavior, 34% yielded no difference, and 17% provided mixed results (Borkowski and Ugras 1998). Furthermore, in a qualitative review of the literature, while some studies showed little or no difference between men and women, none found higher standards of ethicality among men than among women (Kennedy and Lawton 1996). Combining the empirical, meta-analytic, and qualitative studies, the weight of the evidence suggests that women are more ethical than men.").

321. *See, e.g.*, CORDELIA FINE, TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY 121 (2017) (indicating that women are less likely to take risks for career success in part because they had lower expectations of success).

322. *See, e.g.*, Epstein et al., *supra* note 220, at 1449 (documenting the pro-business bias of Republican appointees to the Supreme Court in an empirical study).

narrowly.[323] Moreover, the widespread use of non-disclosure agreements makes discrimination cases less effective in casting light on workplace abuses.[324] The legal shift is part of a more general shift favoring employers over workers and undercutting regulation in a variety of arenas.[325]

Second, anti-discrimination cases tend to assume the legitimacy of the employers' underlying business model, focusing exclusively on unequal treatment of the protected group.[326] In the Walmart litigation, for example, an extensive literature describes the company's union and wage suppression activities.[327] Further, the trial court's eighty-four page opinion extensively details the companies' gender disparities, but does not discuss the links between the policies such as frequent moves that disadvantage women and wage suppression. Our research is the first that we have found that explores the links between the two.[328] The dilemma for plaintiffs' lawyers is that the more a company's actions appear tied to its business model, the less those actions may appear to be motivated by discrimination against women—and that, of course, may be true. Walmart may have remained firm on insisting managerial moves, for example, long after it realized that it restricted the number of women managers for reasons that have very little to do with animus against women per se. Yet, Walmart may also have been reluctant to publicly discuss the real reasons for the policy, which encouraged managers not to identify with line employees and thus gave Walmart a way of implementing national policies promoting predatory labor practices while preserving upper management's plausible deniability.[329] A broader approach to either class certification or disparate impact litigation might have focused more attention on such policies.[330] In another example, a gender discrimination class action against Microsoft

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323. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 342 (2011) (restricting availability of class actions in sex discrimination cases); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (upholding mandatory arbitration provisions in a five-four decision); *see also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06 (2006) (maintaining that disparate impact cases have largely been limited to the use of examinations that exclude minorities).

324. *See* Sarah David Heydemann & Sharyn Tejani*, Legal Changes Needed to Strengthen the #Metoo Movement*, 22 RICH. PUB. INT. L. REV. 237, 262–64 (2019) (discussing effects of such agreements on sexual harassment problems); Orley Lobel, *NDA's Are out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/7CFX-NXNV] (describing employer use of nondisclosure agreements to cloak workplace problems).

325. *See generally* Landes & Posner, *supra* note 220.

326. *See* Cahn et al., *Gender and the Tournament*, *supra* note 8.

327. *See, e.g.*, Seligman, *supra* note 216.

328. *See generally* Cahn et al., *Gender and the Tournament*, *supr*a note 8.

329. *Id.*

330. A discussion of disparate impact litigation is beyond the scope of this article. *See* Selmi, *supra* note 323, at 711 (describing limits of disparate impact analysis, which with the requisite showing of a disparate impact on a protected group such as women, shifts the burden to the employer to show a business necessity for the practice).

survived preliminary defense motions on the basis of the gender disparities involved in implementing its rank and yank evaluation system.[331] The case, even in its preliminary stages, generated unfavorable publicity on the consequences of the competitive evaluation system, and persuaded Microsoft to abandon it for reasons that may have little to do with its impact on women.[332] Yet, winning such cases is difficult, and some scholars even maintain that the focus on the propriety of the business practices is not the purpose of anti-discrimination law.[333]

Third, the shift from lockstep promotions and raises to individualized evaluations and competitive pay makes disparate treatment on the basis of gender harder to establish. Individual anti-discrimination claims must show that the plaintiff was treated differently from a comparator because of her sex.[334] Yet, in workplaces where no two executives perform exactly the same job or receive the same compensation, finding an appropriate comparator and showing that the differences in treatment are due to impermissible discrimination can be extremely difficult.[335] Courts narrow the focus in these cases to the specific basis for the plaintiff's lack of a promotion or bonus; they do not generally consider issues such as why a bonus system was structured to reward revenue generation without taking risk into account.[336] And juries tend to view workplace success as reflecting meritocratic judgments.[337] The individualized nature of a competitive pay system may obscure the discriminatory impact in much the same way it may obscure the incentives for predation.[338]

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331. Cahn et al., *Gender and the Tournament*, *supra* note 8, at 481–82.

332. *See* Eichenwald, *supra* note 191 (attributing Microsoft's failure to compete with other tech giants to the evaluation system); *see also* Erika Anderson, *The Management Approach Guaranteed to Wreck Your Best People*, FORBES (July 6, 2012), https://www.forbes.com/sites/erikaandersen/2012/07/06/the-management-approach-guaranteed-to-wreck-your-best-people/#27fc6eeb5743 [https://perma.cc/3LD3-2YUE] (summarizing criticisms of rank and yank).

333. *See, e.g.*, Selmi, *supra* note 323 (describing role of disparate impact litigation in dismantling barriers that had produced all white workplaces).

334. *See* Jessica A. Clarke, *Feminism and the Tournament*, 96 TEX. L. REV. ONLINE 42, 45–46 (2018) (describing elements of disparate treatment litigation).

335. *See*, *e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006) ("[S]tructural employment inequalities cannot be solved without going beyond the generally accepted normative underpinnings of antidiscrimination law."); 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); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 458 (2001) (describing the structural factors producing greater gender disparities).

336. Bagenstos, *supra* note 335, at 9 ("[I]t 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.").

337. *See* Clarke, *supra* note 334, at 46.

338. Indeed, the effects of such systems may be to make decisions more subjective and politicized. *See, e.g.*, Dallas, *supra* note 167, at 37.

Ironically, this has made the #MeToo movement, which sparked a public uproar about serial sexual harassers, more effective than litigation in confronting abuses of power. Culprits like Roger Ailes, the head of Fox News, and Harvey Weinstein, a prominent film producer, engaged in abuses of power for decades[339] in both their corporate and sexual realms before egregious charges prompted their resignations.[340] In a similar fashion, it was sexual harassment allegations that forced out Uber head Travis Kalanick, but the abuses in Uber's management ethos extended well beyond the harassment charges.[341] These high profile sexual harassment cases in many ways capture the intersection of predatory business models and masculinity contest cultures better than any existing anti-discrimination efforts; seeing the connections between the two sheds a powerful light on how predatory workplaces manipulate and exploit both corporate and personal power.

CONCLUSION

This Article has addressed the ways that priming a corporation to exploit asymmetries in information and power for the purpose of profit maximization can create predatory cultures. Such cultures promote individualism at the expense of institutional loyalty, generate short-term earnings and share price increases at the expense of long-term company health, and create workplaces hostile to women and other outsiders. They may also undermine a variety of social ends, from confidence in markets to productivity to gender equity.

These conclusions suggest that corporate management and external regulations should be thought of together. In a society with strong regulation of predatory practices, executive interests would align more closely with creating ethical business cultures.

The analysis also suggests reconsideration of the role of gender in creating and policing workplace cultures. This is a difficult issue. On the one hand, most studies of existing managers find women to be more ethical, more altruistic, and more attentive to group cohesion and well-being.[342] On the other hand, as Theranos CEO Elizabeth Holmes

339. *See* Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [https://perma.cc/8TWF-EV6R].

340. *See* Gabriel Sherman, *The Revenge of Roger's Angels: How Fox News Women Took Down the Most Powerful, and Predatory, Man in Media*, N.Y. INTELLIGENCER (Sept. 5, 2016), http://nymag.com/intelligencer/2016/09/how-fox-news-women-took-down-roger-ailes.html?mid=nymag_press&gtm=top [https://perma.cc/9F3E-BCEV].

341. *See* Bensinger, *supra* note 250 (describing sexual harassment charges); Isaac, *supra* note 250 (detailing management culture).

342. *See* Cahn et al., *Gender and the Tournament*, *supra* note 8.

demonstrates, there are any number of narcissistic and Machiavellian women willing to enter the tournament.[343] Touting women's advantages or promoting them as a solution ("add women and stir") risks reinforcing existing sex stereotypes without fully taking on the reasons for these cultures.[344]

We argue instead for a miners' canary approach. The reason that more diverse firms do better than homogenous ones may be that maintaining diverse workforces requires greater cooperation and trust, and adherence to the "rules of society . . . embodied in ethical custom"[345]—factors that improve the operation of most firms.[346] Doing so in a large corporation involves not just substantive integrity but also procedural regularity. At one time, we have called the process "bureaucratization" and it would have been a positive term. Today, we prefer the word "institutionalization," and more generally, "the rule of law." Those engaged in predation are likely to bristle at the thought of corporate officials or government regulators who get in the way of their objectives. Sam Walton had no use for human resources (HR) specialists who would have objected to wages and hours violations. Jack Welch held little respect for auditors, who almost certainly would have objected to securities fraud. Travis Kalnick, much like the rest of Silicon Valley start-up CEOs, is unlikely to have listened to his HR specialists. Yet, adopting and maintaining transparent and consistent rules and values tends to promote both more successful institutional cultures and the ability to manage diverse workplaces.

Neither shareholder primacy nor competitive pay need to be abolished in their entirety. Instead, greater attention has to be paid to establishing the "rules of the game" in transparent and consistent ways. Shareholder value cannot promote greater societal well-being if it produces short-term profit maximization through acts of predation likely to spark public outcry or the collapse of the firm because of the lack of internal controls that promote long-term sustainability.[347] And, in this context, diversity can be framed as a public good. Lack of it ought to trigger greater scrutiny. The scrutiny should focus on something more than whether company officials engaged in intentional discrimination. Instead, the scrutiny should determine whether management culture invites

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343. *See generally* JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP (2018) (describing Holmes's fraudulent promotion of a Silicon Valley start-up promoting a product that never worked).

344. For a critique along these lines, see Clarke, *supra* note 334.

345. Friedman, *supra* note 36.

346. *See* Walker, *supra* note 121, at 21 (statement of Professor Chris Hodges and Ruth Steinholtz) ("[V]alues-driven businesses are more successful and sustainable than others.").

347. *See, e.g.*, Stewart, *supra* note 188.

politicization and favoritism that works to the exclusion of outsiders and the lack of management accountability. Ultimately, the principle that should govern is management responsibility for the predictable consequences of its acts. Without plausible deniability, predation would become a much less successful practice.