

# BOARD DIVERSITY: PEOPLE OR PATHWAYS?

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## I

### INTRODUCTION

The movement for corporate board diversity is reaching an inflection point. Publicly traded corporations have increasingly embraced the push for gender diversity,<sup>1</sup> with the number of women on their boards climbing to over 20%, a 6.5% increase over the last four years.<sup>2</sup> A Nasdaq Diversity Rule, approved by the Securities and Exchange Commission (SEC) on Aug. 6, 2021, establishes a disclosure standard designed to “encourage board diversity and to provide stakeholders with ways to track board composition.”<sup>3</sup> The report supporting the diversity proposal specifically referenced the business case for diversity, citing the literature showing that greater diversity is correlated with improved business performance, particularly “the quality of a company’s financial reporting,

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1. The case for increased board diversity extends, of course, well beyond gender. *See, e.g.*, Lisa Fairfax, *All on Board? Board Diversity Trends Reflect Signs of Promise and Concern*, 87 GEO. WASH. L. REV. 1031, 1032 (2018). This article, however, focuses on the distinctive case for gender diversity that considers the gendered nature of corporate practices that disproportionately affect women. These practices fall into three categories: an emphasis on long hours that limits opportunities for those with primary childcare responsibilities, disproportionate rewards for certain masculine traits, and the type of in-group favoritism that tends to increase in workplaces characterized by distrust. These categories involve a mix of classic discrimination against women based on sex stereotyping and rewards for gendered traits such as narcissism, rule-breaking, and risk-taking that may nonetheless be exhibited by both men and women.

2. Anne Stych, *Women Gaining Corporate Board Seats at a Faster Rate than Men, Study Shows*, BIZWOMEN (Sept. 17, 2020), <https://www.bizjournals.com/bizwomen/news/latest-news/2020/09/women-gaining-corporate-board-seats-faster-rate.html?page=all> [<https://perma.cc/6MD7-PX44>]; *see also* Julia Boorstin, *At the Current Rate, Corporate Boards Won’t Hit Gender Parity Until 2032, New Report Warns*, CNBC (Mar. 5, 2021), <https://www.cnbc.com/2021/03/05/corporate-boards-wont-hit-gender-parity-until-2032-new-report-warns.html> [<https://perma.cc/2KM8-HBFS>] (showing an increase to 23.5%).

3. *Nasdaq’s Board Diversity Rule: What Nasdaq-Listed Companies Should Know*, NASDAQ at 1 (Aug. 17, 2020), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> [<https://perma.cc/3PW6-AATE>]; *see also* SEC, *Comments on the Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity*, NASDAQ (Dec. 1, 2020), <https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf> [<https://perma.cc/7MGV-LV3E>].

internal controls, public disclosures and management oversight.”<sup>4</sup> And, following the European Union example, California has mandated greater board diversity as a matter of state law.<sup>5</sup>

With increasing board diversity, however, skepticism has increased about just how much diversity can accomplish on its own. Simply adding women and stirring, that is, increasing the representation of women on corporate boards without other changes, does not necessarily improve business performance or lead to gender equality in upper management ranks.<sup>6</sup> While the lack of gender diversity in an era that supports diversity as an intrinsic good may be a red flag for underlying management issues, the mere presence of women does not guarantee corporate reform. The reasons it does not illustrates the complex interaction between gendered traits and the fate of women in upper management. Modern corporations, over the last half century, have changed from the days of “the organization man” to a model that celebrates “tournament” victors.<sup>7</sup> The

4. *Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity*, SEC at 22 (Dec. 4, 2020), <https://www.sec.gov/rules/sro/nasdaq/2020/34-90574.pdf> [<https://perma.cc/P6AU-Q8KK>].

5. CAL. CORP. CODE § 301.3 (West 2019) (“No later than the close of the 2021 calendar year, a publicly held . . . corporation shall comply with the following: (1) If its number of directors is six or more, the corporation shall have a minimum of three female directors. (2) If its number of directors is five, the corporation shall have a minimum of two female directors. (3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.”); see also Anne Steele, *California Rolls Out Diversity Quotas for Corporate Boards*, WALL ST. J. (Oct. 2, 2020), <https://www.wsj.com/articles/168alifornia-rolls-out-diversity-quotas-for-corporate-boards-11601507471> (last accessed Jan. 8, 2022); Jennifer Rankin, *EU Revives Plans for Mandatory Quotas of Women on Corporate Boards*, THE GUARDIAN (Mar. 5, 2020), <https://www.theguardian.com/world/2020/mar/05/eu-revives-plans-for-mandatory-quotas-of-women-on-company-boards> [<https://perma.cc/5K95-UEHQ>]. Other states have introduced legislation to increase the representation of women on corporate boards. *Women on Corporate Boards: Quick Take*, CATALYST (Mar. 13, 2020), <https://www.catalyst.org/research/women-on-corporate-boards/> [<https://perma.cc/4P5X-DCYE>]. For an argument questioning the statute’s constitutionality, see, e.g., Ilya Somin, *California’s Unconstitutional Gender Quotas for Corporate Boards*, VOLOKH CONSPIRACY (Oct. 4, 2018), <https://www.reason.com/2018/10/04/californias-unconstitutional-gender-quot> [<https://perma.cc/6H6S-5CJR>] (arguing that general interest in diversity does not justify gender quotas and that such quotas are of dubious constitutional validity).

6. Indeed, many support greater diversity as a positive good without any clear indication of what the causal mechanisms might be that connect diversity on corporate boards to other outcomes. See Lissa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 805 (2011) (describing interviewees as favoring board diversity but giving vague answers on the role of diversity in improving business performance). For a review of the social science finding, see, e.g., Alice H. Eagly, *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. SOC. ISSUES 199, 201 (2016) (generally critiquing failure to establish diversity as a causal factor once appropriate controls are added); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 384 (2014) (concluding that that social science literature does not establish that the addition of women per se increases diversity); Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PENN. J. BUS. L. 429, 443 (2018) (arguing that the “big tent of instrumentalists, filled with both sincere instrumentalists and normative proponents and opponents, seems to inflate diversity’s value.”).

7. Compare WILLIAM H. WHYTE, THE ORGANIZATION MAN (1956) (criticizing mid-century executives as conformists lacking creativity, unwilling to take risks, and content to move up secure career ladders within a single company), with Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate*

organization man was thought to have been loyal, complacent, risk averse, and consensus oriented; “he” (and corporate executives in that era were almost all men) could have been a stereotypical woman. The corporate tournament, in contrast, which sometimes promotes women, nonetheless selects for traits such as “over-optimism, an inflated sense of self-efficacy, and a deep capacity for ethical self-deception,”<sup>8</sup> traits that are associated with masculine stereotypes and are in fact more common in men than women.<sup>9</sup>

This shift, however, does not just select for alpha males to the exclusion of overconfident, narcissistic, and amoral women who might willingly join in fleecing customers or stabbing colleagues in the back in the quest for the next promotion. It also does two other things that muddy the distinctions between biological sex and social gender, increasing women’s disadvantages. First, zero sum competitions that pit employees against each other often become “masculinity contests” that select for the most dominant, driven, and stereotypically male employees, even when such characteristics are unnecessary or counterproductive.<sup>10</sup> Second, such competition increases distrust. Managers may promote the employees they see as allies in outflanking the group down the hall, and in doing so, they play favorites; they prefer workers they see as sharing the same world views they hold (crush the red team!) and whose reactions they can predict. In workplaces in which all employees are insecure, and that emphasize getting results without scrutiny of the means, managers have every reason to look out for employees who will make them look good without the need to ask them directly to do something that is legally or ethically dubious and to retaliate against those who might question their tactics or authority.<sup>11</sup> In today’s competitive workplaces, such environments do not exclude women in wholesale ways, but they tend to reserve the greatest rewards for a relatively small group of alpha males. In these environments, simply adding more women does not necessarily change the dynamic, but equal outcomes for women are unlikely without

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*Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 9 (2002) (describing dynamics of corporate “tournaments”).

8. 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) (observing that “traits such as over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception are favored in corporate promotion tournaments.”).

9. See, e.g., Emily Grijalva et al., *Gender Differences in Narcissism: A Meta-analytic Review*, 141 PSYCHOL. BULL. 261, 283 (2015) (indicating that men are more likely to be narcissists than women and that men are even more likely to be the type of narcissists drawn to positions of power and authority and feeling justified in running roughshod over others in order to advance themselves).

10. See Jennifer L. Berdahl, et al., *Work as a Masculinity Contest*, 74 J. Soc. ISSUES 422, 430 (2018) (describing the dynamics involved in masculinity contests and characterizing the competition as “zero sum”). *Id.* at 433 (describing how work environments that emphasize internal competition also tend to produce higher rates of sexual harassment, bullying, and unethical behavior).

11. See Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron’s Demise*, 35 RUTGERS L. J. 1, 37 (2003) [hereinafter *Psychology of Enron*] (describing how rankings that produce large disparities in compensation encourage greater emphasis on self-interest, higher levels of distrust that undermine teamwork, greater homogeneity in the selection of corporate management, less managerial accountability, and more politicized decision).

dismantling the practices associated with toxic masculinity and corporate misfeasance.<sup>12</sup>

This article draws on the recent example of Wells Fargo's fraudulent accounts scandal – a scandal with a prominent woman overseeing the misconduct and documented gender disparities in the consequences – to provide a more in-depth evaluation of the interactions between biological sex, gendered traits, and corporate dynamics.<sup>13</sup> Wells Fargo has been the subject of a corporate scandal characteristic of the shareholder primacy era.<sup>14</sup> The bank appeared to emerge from the Great Financial Crisis unscathed, becoming the third largest bank in the United States,<sup>15</sup> with soaring share prices, which grew in response to the bank's reported success.<sup>16</sup> By 2016, however, it became apparent that Wells

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12. For a fuller review of these issues, see Naomi Cahn et al., *The Instrumental Case for Corporate Diversity*, 40 J.L. & INEQ. (forthcoming 2021); June Carbone et al., *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1109 (2019) [hereinafter *The Triple Bind*] (“[C]ompanies use intensely competitive bonus systems to produce insular ‘young boys’ clubs’ that promote a culture of rule-breaking; that is, the management systems deliberately and instrumentally select for alpha males who will flout the laws that stand in the way of these otherwise profitable business models.”); Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms’ Risk Oversight?*, 70 SMU L. REV. 327, 376 (2017) (describing the value of diversity in valuing groupthink).

13. For detailed accounts of the scandal, see *Indep. Dirs. of the Bd. of Wells Fargo & Co., Sales Pracs. Investigation Report*, WELLS FARGO (Apr. 10, 2017) [hereinafter *Indep. Dirs. Rep.*], <https://www.wellsfargo.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf> [<https://perma.cc/S37C-FRB7>]; *Lessons Learned: Rev. of Sales Pracs. at Wells Fargo*, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Apr. 19, 2017) [hereinafter *OCC Rep.*], <https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-wells-fargo-supervision-lessons-learned-41917.pdf> [<https://perma.cc/9ADR-TQGF>].

14. Shareholder primacy has been criticized, among other things, for an excessive focus on short-term increases in share price to the detriment of longer-term interests, including longer term shareholder interests. See, e.g., Michal Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104, 112–13 (maintaining that “[o]ptimism bias—the proclivity of corporate managers to overestimate the success probability of their own projects may lead corporate managers to overinvest in long term projects); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 316 (2012) (arguing that the emphasis on short-term returns is “associated with cultures that are prone to unethical behavior which includes the behavior of individuals who seek individual short-term gains at the expense of the wellbeing of their firms as a whole.”); cf. Claire A. Hill & Brett H. McDonnell, *Short and Long Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS, 397–402 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) (arguing that shareholders differ in their orientations toward shorter and longer term perspectives, orthodox economic theory maintains that short-term and long-term perspectives are not necessarily in opposition, and the debate is, in any event, more complex because of uncertainty). This article focuses less on “short-termism” per se than on how the ability to profit from apparent short-term gains, whether accurate or gamed, promotes certain management practices. For a more detailed account, see June Carbone & William K. Black, *The Problem with Predators*, 43 SEATTLE U. L. REV. 441 (2020).

15. Consol. Amended Verified S’holder Derivative Complaint ¶ 69, at 14, *In re Wells Fargo & Co. S’holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1085 (N.D. Cal. 2017) [hereinafter *S’holder Complaint*] (describing Wells Fargo as the “third largest bank in the United States by assets” and the second largest in the world by “market capitalization.”).

16. See Claudia A. Restrepo, *The Need for Increased Possibility of Director Liability: Refusal to Dismiss In re Wells Fargo & Co. Shareholder Derivative Litigation, A Step in the Right Direction*, 60 B.C. L. REV. 1689, 1713 & 1713 n.129 (2019) (on the centrality of cross-selling to Wells Fargo’s business model and how the fake accounts “gamed” the system).

Fargo had gamed the metrics that created the illusion of success. The bank had long celebrated “cross-selling,” defined in terms of the number of Wells Fargo products it sold to each household.<sup>17</sup> Upper management brought enormous pressure to bear on its employees to increase the bank’s cross-selling metrics,<sup>18</sup> and the employees responded by creating millions of fake accounts that customers had not authorized and often did not know existed.<sup>19</sup> While the fraudulent accounts generated relatively little income, the bank, its shareholders, and its top executives benefitted handsomely through the increased share prices that followed announcement of the cross-selling increases.<sup>20</sup> For years, upper management looked the other way in the face of employee complaints about the fraudulent practices, dismissing the reports as isolated incidents.<sup>21</sup> When the scandal broke, the Wells Fargo Board produced an extensive internal report<sup>22</sup> and the Office of the Comptroller of the Currency (OCC) conducted an investigation<sup>23</sup> that documented the misconduct and the Wells Fargo corporate culture that produced it. In addition, a empirical study of terminations in the financial industry found that Wells Fargo had the highest gender gap in the industry.<sup>24</sup> Although women committed less misconduct than the men and their misconduct caused the bank smaller losses, the women were substantially more likely to be fired.<sup>25</sup>

This article uses the accounts of the Wells Fargo scandal to untangle the relationship between management practices and gender diversity. First, it will assess the status of women in corporate management, showing that while women have gained access to entry level positions, they are less likely than similarly

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17. Emily Glazer, *How Wells Fargo’s High-Pressure Sales Culture Spiraled out of Control*, WALL ST. J. (Sept. 16, 2016), <https://www.wsj.com/articles/how-wells-fargos-high-pressure-sales-culture-spiraled-out-of-control-1474053044> (last accessed Jan. 8, 2022).

18. See *S’holder Complaint*, *supra* note 15, ¶ 2, at 4 (pointing out that Wells Fargo’s goal in stressing a demanding cross-selling strategy was “to show steady quarterly growth in the opening of customer accounts, maintain the Company’s industry leadership in cross-selling, and most importantly, drive up the Bank’s share price.”).

19. See Uri Berliner, *Wells Fargo Admits to Nearly Twice as Many Possible Fake Accounts—3.5 Million*, NPR (Aug. 31, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/31/547550804/wells-fargo-admits-to-nearly-twice-as-many-possible-fake-accounts-3-5-million> [<https://perma.cc/VDA4-FCCD>].

20. See, e.g., J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 931 (2017) (observing that “Wells Fargo’s share price soared based on how the fraudulent accounts ‘goosed’ the bank’s stock” and that Wells Fargo CEO John Stumpf “cashed \$155 million in stock options between 2012 and 2015 alone.”).

21. See *S’holder Complaint*, *supra* note 15, ¶ 21, at 7 (alleging that directors “turned a blind eye” to red flags regarding illegal activity as early as 2007).

22. *Indep. Dirs. Rep.*, *supra* note 12.

23. *OCC Rep.*, *supra* note 12, at 5 (finding that the Board had received Audit & Security reports on a regular basis since 2005 informing them that the majority of the calls to the internal “EthicsLine” and employee firings were connected to sales violations).

24. Mark L. Egan et al., *When Harry Fired Sally: The Double Standard in Punishing Misconduct* (Nat’l Bureau of Econ. Rsch., Working Paper No. 23242, 2018), [https://www.nber.org/system/files/working\\_papers/w23242/w23242.pdf](https://www.nber.org/system/files/working_papers/w23242/w23242.pdf) [<https://perma.cc/Z7Z7-CDGJ>].

25. *Id.*

qualified men to receive the promotions that provide access to rising income at the top of corporate hierarchies.<sup>26</sup> This section will argue that in the shareholder primacy era, corporate executives have benefitted from “rent-seeking” that concentrates disproportionate rewards in top positions.<sup>27</sup> The new system increases the competition for these positions, reduces supervisory accountability,<sup>28</sup> and does so in ways that work to women’s disadvantage.<sup>29</sup>

Second, the article will use the Wells Fargo example to show the role of gender in implementing these practices. Wells Fargo executives, in implementing the practices that led to the fake accounts scandal, adopted short-term reductionist metrics that boosted share prices.<sup>30</sup> They also met those metrics through an emphasis on sales quotas and performance pay that encouraged immediate results while looking the other way at the methods used to produce the results. The system thus rewarded performance without accountability.<sup>31</sup> This section maintains that these practices work to women’s disadvantage – increasing the emphasis on long hours, rewarding the ambitious and the amoral, and looking the other way at managers’ in-group favoritism. In the modern era, this does not produce a wholesale exclusion of women; rather it produces statistical differences in pay, promotions, and terminations.

26. See, e.g., Afra Afsharipour, *Bias, Identity and M&A*, 2020 WIS. L. REV. 471, 482–83 (observing “that women make up less than a quarter of C-level executives” and “that women are less likely to become CEOs, even when they did not differ from men on interpersonal, analytical and managerial skills, and general ability.”). The largest gender pay gaps occur among financial advisers. See 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/PT4D-2DA8>] (indicating that only 13% of financial advisors are women); Derek Thompson, *Why the Gender-Pay Gap Is Largest for the Highest-Paying Jobs*, ATLANTIC (Dec. 17, 2014), <http://www.theatlantic.com/business/archive/2014/12/the-sticky-floor-why-the-gender-wage-gap-is-lowest-for-the-worst-paying-jobs/383863/> [<https://perma.cc/7ZYL-NPH2>] (documenting the gender pay gap as the largest in the entire economy).

27. A rent is income received “in excess of what was needed to induce the person to supply labor and capital to these respective markets.” Lawrence Mishel & Josh Bivens, *The Pay of Corporate Executives and Financial Professionals as Evidence of Rents in Top 1 Percent Incomes*, ECON. POL’Y INST. (June 20, 2013), <https://www.epi.org/publication/pay-corporate-executives-financial-professionals/> [<https://perma.cc/2X4U-WEC3>]. See generally GERRIT DE GEEST, *RENTS: HOW MARKETING CAUSES INEQUALITY* (2018) (arguing that “since 1970-2015, the impact of marketing on the economy has steadily increased, transforming competitive markets into less competitive ones by making prices less transparent, splitting informed and uninformed consumers, making products incomparable, locking in consumers, or exploiting psychological biases. This has increased the amount of artificial profits in the economy—called ‘rents’ in economic jargon.”).

28. See Nelson, *supra* note 20, at 930–31 (discussing how top executives “insulate profitable fraud in the ranks of middle management to make as much money as they can from a scandal.”).

29. For a more extended discussion of the relationship between the increased gender wage gap after 1990 and changes in corporate management, see Naomi Cahn et al., *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425 (2018); *The Triple Bind*, *supra* note 12; see, e.g., Johnson, *supra* note 12.

30. *Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessments of a Civil Money Penalty*, OCC Notice N20-001 ¶ 62c, at 17 (Jan. 23, 2020) [hereinafter *OCC Notice*], <https://www.occ.gov/static/enforcement-actions/eaN20-001.pdf> [<https://perma.cc/7XAG-KCDG>].

31. *Id.* ¶ 6, at 4.

Third, the article assesses the implications for diversity policies. The Wells Fargo Board had an unusually high number of women, which did not appear to affect any aspect of the outcome. It had a senior woman who oversaw the bulk of the abusive practices. Yet, neither the CEO at the time scandal occurred, John Stumpf, nor the head of the division in which the worst abuses occurred, Carrie Tolstedt, designed the system. Instead, they had risen through the ranks, succeeding in accordance with their abilities to produce the expected metrics. Systems that select for employees willing to rig the system can find qualified women if they choose to look. Even with such women, however, these systems still produce systematic gender disparities.

The article sheds new light on the social science findings that simply adding selected women to corporate boards or upper management is unlikely to have a major impact on corporate reform.<sup>32</sup> It also supports the claims of the critics that upper management may be more important than corporate boards to both diversity efforts and corporate accountability. The most compelling findings about the relationship between the corporate culture and women's advancement, however, are that the disparities become visible only with the collection of systematic data that shows the impact across large numbers of women.<sup>33</sup> These results are often subtle and context dependent. To establish the role of gender in these disparities requires reliable data collection – something that largely does not exist in the absence of public mandates, or the in-depth investigations triggered by sex discrimination claims and corporate malfeasance. The article's ironic conclusion, therefore, is that corporate abuses and gender disparities are likely to overlap even while the relationship between them is hard to establish precisely because the lack of transparency and accountability encourages the persistence of both. Reforms that mandate accurate reporting and make it harder to suborn internal controls are therefore important to both enhanced diversity and corporate reform efforts. On these issues, corporate diversity and management reform efforts operate in tandem.<sup>34</sup>

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32. See e.g., Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 860 (2011) (concluding that “while the business case for board diversity may prove rhetorically appealing, it is insufficient on its own to ensure a full commitment to board diversity.”).

33. See, e.g., Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. F. 869, 888 (2021) (observing that despite corporations’ “long-standing statements in support of diversity within their organizations, they have traditionally disclosed very little regarding the state of demographic diversity within their ranks.”).

34. For discussion of the relationship between corporate reform, risk management, and socially conscious investing, see Michal Barzuza et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1245 (2020) (describing index fund support for gender diversity on corporate boards but not mentioning management diversity; then describing how “pursuing ESG priorities is actually value maximizing.”); Stavros Gadinis & Amelia Mizad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1401–02 (2020) (concluding that “[s]ocial risk has proven highly destructive for corporate value even when the company’s key failure is not violating laws, as the recent crises at Facebook and Uber demonstrate.”); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 398 (2020) (arguing that “risk-return ESG” analysis of a fossil

## II

## THE STATUS OF WOMEN IN CORPORATE MANAGEMENT

Women's movement into the upper management ranks stalled during the nineties—the same period in which incomes in upper management soared. The two events are related, and they have meant that women have narrower pathways into top executive positions than men. These differences frame the roles women play on corporate boards and the potential impact of greater board diversity on gender equality. This section will examine these developments in two parts. The first will explain how the dynamic underlying the large increases in pay creates a form of rent seeking,<sup>35</sup> the second maps the resulting disadvantages that narrow the pathways on which women can advance.

## A. Rent-Seeking And Women

The most dramatic gains for women occurred in the eighties as women caught up with and then exceeded men in educational attainment.<sup>36</sup> Better educated women joined men in the executive ranks and in the professions. The gendered wage gap narrowed, with female college graduates earning a higher percentage of the “male” wage than less educated women.<sup>37</sup>

Then, starting in the nineties, something happened. While the overall gender gap in wages continued to narrow, in large part because of the declining fortunes of blue-collar men,<sup>38</sup> the wage gap for college graduates began to grow and steadily increased.<sup>39</sup> Since then, the gender gap in the higher reaches of the economy has widened<sup>40</sup> and the growing female representation in the upper corporate ranks has stalled, though in the last three years the number of female CEOs has inched up to 8.1%.<sup>41</sup> The lack of progress in women's advancement

fuel company, for example, might conclude that the company's litigation and regulatory risks are underestimated by its share price).

35. See DE GEEST, *supra* note 27 (defining “rents” as artificial profits).

36. Women have earned the majority of college degree since the early eighties and by 2019 earned 57% of all college degrees. Richard Fry, *U.S. Women near Milestone in the College-Educated Labor Force*, PEW RESEARCH CENTER (June 20, 2019), <https://www.pewresearch.org/fact-tank/2019/06/20/u-s-women-near-milestone-in-the-college-educated-labor-force/> [https://perma.cc/EXS3-AVLU] (input article title in search bar on homepage).

37. Elise Gould, *State of Working America Wages*, ECON. POL'Y INST. (Feb. 20, 2019), <https://www.epi.org/publication/state-of-american-wages-2018/> [https://perma.cc/KJ3B-8GA9].

38. See June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 872 (2011) (documenting this shift in the gendered wage gap); Jacqueline DeMarco, *Study: College-Educated Women Face Larger Gender Pay Gap, Even If Women Are More Likely to Enroll and Graduate than Men*, STUDENT LOAN HERO (Apr. 13, 2021), <https://studentloanhero.com/featured/education-gender-pay-gap-study/> [https://perma.cc/83YK-2DZ7] (updating figures and showing that the decline for college graduates as a whole ended in 2013, but that gains for female college graduates with the economic recovery have not returned to the levels of the mid-nineties).

39. Gould, *supra* note 37.

40. *Id.*

41. In the last three years, however, the number of female CEOs at fortune 500 companies has inched up from a record 6% in 2018 to another record of over 8% in 2021. *Missing Pieces Report: The*

into upper management is particularly striking. While 47% of entry level executive candidates are women, women comprise only 33% of senior managers, and only 21% of those make it to the C-Suite.<sup>42</sup> Moreover, these numbers have changed relatively little over the last five years.<sup>43</sup> The numbers for women of color are even more anemic. Attrition rates for women of color in the corporate ranks, for example, are dramatically higher than for white women or minority men; women of color constitute 18% of the entry level ranks, but only 9% of senior managers, and 3% of the C-Suite.<sup>44</sup>

The striking thing about women's stalling fortunes is that they have occurred as incomes in the upper reaches of the economy have accelerated. Indeed, one simple explanation for the increased gender gap wage among college graduates is that a disproportionate share of all increases have gone to those at the top and men disproportionately hold these positions.<sup>45</sup> Since 1978, CEO pay has risen 940%, while average worker pay has grown only 12%.<sup>46</sup> Together, financial professionals and senior executives "accounted for 58 percent of the expansion of income for the top 1.0 percent of households and an even greater two-thirds share (67 percent) of the income growth of the top 0.1 percent of households."<sup>47</sup> These changes frame the entry of women into corporate management and ultimately onto corporate boards.

Economists maintain that the dramatic increases in corporate pay have produced a form of "rent-seeking."<sup>48</sup> A rent is described as income received "in excess of what was needed to induce the person to supply labor and capital to these respective markets."<sup>49</sup> A clear example is CEO pay packages.<sup>50</sup> When a board hires a new CEO, the board typically extends the offer and then deter-

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2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards, DELOITTE (Jan. 16, 2019), <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/missing-pieces-fortune-500-board-diversity-study-2018.html> [<https://perma.cc/BTC9-FHGB>]; Courtney Connley, *A Record 41 Women Are Fortune 500 CEOs— and for the First Time Two Black Women Made the List*, CNBC (June 2, 2021), <https://www.cnbc.com/> (input article title in search bar on homepage).

42. Tiffany Burns et al., *Women in the Workplace 2021*, MCKINSEY & CO. (Sept. 27, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> [<https://perma.cc/S8NN-MAPU>].

43. *Id.*

44. *Id.*

45. Gould, *supra* note 37 (showing a dramatic increase in wages at the top and a lesser increase for top women).

46. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), <https://www.epi.org/publication/ceo-compensation-2018> [<https://perma.cc/5EJZ-PQDH>].

47. Mishel & Bivens, *supra* note 27.

48. *Id.*

49. *Id.*

50. The biggest critique of the increase in CEO compensation has been that it reflects power rather than market forces. See, e.g., Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSPECTIVES 71, (2003).

mines the CEO's salary.<sup>51</sup> The CEO arranges for a compensation consultant paid to design a compensation package in line with other CEO salaries.<sup>52</sup> Boards often rubberstamp the consultant's report, particularly where the complexity of the package makes it hard to scrutinize.<sup>53</sup>

As practical matter, this means that the CEOs who land top jobs have a major say in the design of compensation packages for themselves and their top lieutenants.<sup>54</sup> They also are often in a position to manipulate the metrics that drive compensation formulas.<sup>55</sup> This makes the positions particularly valuable and intensifies the competition to obtain them.<sup>56</sup> In short, the winners of these

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51. Rick Edmonds, *The Newspaper Company CEO Pay Game – Heads I Win, Tails I Win*, POYNTER (May 3, 2019), <https://www.poynter.org/business-work/2019/the-newspaper-company-ceo-pay-game-heads-i-win-tails-i-win/> [<https://perma.cc/6WG7-EMAF>].

52. Theo Francis & Vanessa Fuhrmans, *Big Companies Pay CEOs for Good Performances – and Bad*, WALL ST. J. (May 17, 2019), [https://www.wsj.com/articles/big-companies-pay-ceos-for-good-performance-and-bad-11558085402?mod=hp\\_lead\\_pos6](https://www.wsj.com/articles/big-companies-pay-ceos-for-good-performance-and-bad-11558085402?mod=hp_lead_pos6) (last accessed Jan. 8, 2022); see also Roger Lowenstein, *Head I Win, Tails I Win*, N.Y. TIMES MAG. (June 9, 2002), <https://www.nytimes.com/2002/06/09/magazine/head-i-win-tails-i-win.html> [<https://perma.cc/EP8C-HKR4>] (describing role of consultants).

53. See Steven Clifford, *How Companies Decide CEO Pay*, ATLANTIC (June 14, 2017), <https://www.theatlantic.com/business/archive/2017/06/how-companies-decide-ceo-pay/530127/> [<https://perma.cc/MR5Q-NVW4>] (describing the consultants' role in setting executive compensation); see also Francis & Fuhrmans, *id.* (indicating that “[t]he more complicated the scheme is, it's less transparent to consumers and society . . .”).

54. Corporate reform efforts have focused on giving boards greater ability to review executive compensation packages. See 17 C.F.R. § 240.14a (2019) (giving shareholders a “say on pay.”). The result has increased pressure on boards and led to the redesign of executive incentive systems, but it has not slowed the rate of increase for Fortune 500 executives. See Theo Francis & Kristin Broughton, *CEO Pay Surged in a Year of Upheaval and Leadership Challenges*, WALL ST. J. (Apr. 11, 2021), <https://www.wsj.com/articles/covid-19-brought-the-economy-to-its-knees-but-ceo-pay-surged-11618142400> (last accessed Jan. 8, 2022) (documenting both unprecedented changes to compensation packages and surging pay); see also *CEO and Executive Compensation Practices in the Russell 3000 and S&P 500: 2020 Edition*, THE CONFERENCE BOARD 3 (2020), <https://conferenceboard.esgauge.org/assets/TCB-CEO-Executive-Compensation-Practices-2020.pdf> [<https://perma.cc/LF99-7Y9B>] (indicating that stock awards are replacing stock options as an increasing component of executive compensation to better align executive interests with longer term company performance).

55. See, e.g., ROGER F. MARTIN, *FIXING THE GAME: BUBBLES, CRASHES, AND WHAT CAPITALISM CAN LEARN FROM THE NFL* 29, 97 (2011) (detailing that during the Jack Welch-era, General Electric was able to meet or beat earnings forecasts an unbelievable 96% of the time, with earnings from 89% of those quarters hitting analysts' forecasts to the exact penny. This earnings record pushed GE's share price higher, increasing the value of Welch's stock options). Since the Welch era, CEOs have shifted to use of stock buybacks to boost share price (and executive compensation). See Nitzan Shilon, *Stock Buyback Ability to Enhance CEO Compensation: Theory, Evidence, and Policy Implications*, 25 LEWIS & CLARK L. REV. 303, 308 (2021) (producing empirical results suggesting that “the potential of buybacks to pump up long-term incentive awards has dramatically increased” and that while “in the mid-2000s buybacks could immediately improve measures responsible for an average of only 5% of CEO pay, today buybacks can enhance performance yardsticks responsible for an all-time high amount, averaging one-third of CEO pay, or almost \$4 million per CEO.”); see also Nicholas M. Guest et al., *Why Do Large, Positive Non-GAAP Earnings Adjustments Predict Abnormally High CEO Pay?*, SSRN (Jan. 6, 2021), available at <http://dx.doi.org/10.2139/ssrn.3030953> (indicating a significant portion of CEO incentive “seems attributable to opportunistic non-GAAP reporting” but that the overall impact is limited.).

56. See 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) (describing dynamics of corporate “tourna-

competitions are in a position to extract “rents,” that is, particularly lucrative, above-market compensation associated with the position.<sup>57</sup> The classic critique of rent-seeking argues that it involves:

situations where individuals expend time, money, and other resources competing for a fixed amount of wealth, in effect squabbling with each other over the size of their individual pieces of a fixed group pie. Because rent seeking itself is costly, the net result is to reduce total wealth available for distribution.<sup>58</sup>

In the corporate context, this focuses upper management attention not just on securing an advantageous position, but on maximizing the metrics such as reported earnings or changes in share price that drive compensation.<sup>59</sup> To do so, CEOs need to be able to gain control quickly of what may be a large bureaucratic organization.<sup>60</sup> Often, they respond by bringing in their own loyalists from outside the company.<sup>61</sup> But many CEOs also use incentive pay to prioritize the results that management values.<sup>62</sup> In the same period in which women’s fortunes have declined, incentive pay has spread through the executive ranks, producing large differences in compensation.<sup>63</sup> In short, within these systems, competition for these lucrative positions becomes more intense, and the goal of corporate tournaments becomes promoting the “new boys” allied with the CEOs and oth-

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ments”); CLARE A. HILL & RICHARD PAINTER, *BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT* (2015) (describing “working to bonus”). The ability to extract rents is thus not just a function of corporate pay, but also of the ability to increase metrics such as industry concentration and size, which allow greater appropriation of the surplus from other stakeholders. *See, e.g.*, Jeffrey Meli & James C. Spindler, *The Promise of Diversity, Inclusion, and Punishment in Corporate Governance*, 99 TEX. L. REV. 1387, 1397 (2021) (arguing that “if the large firms that have aggregated market share have accumulated market power, then they are likely to be extracting surplus from a variety of constituents, including labor and consumers.”).

57. *See* Lowenstein, *supra* note 52 (concluding that “By turns, a system designed to motivate became one to simply enrich.”).

58. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 n.4 (1999).

59. *See, e.g.*, MARTIN, *supra* note 55, at 97 (providing the example of earnings management at GE). *See generally* Michael C. Jensen, *Paying People to Lie: The Truth About the Budgeting Process*, 9 EUR. FIN. MGMT. 379 (2003) (arguing that such incentive systems distort corporate accounting and reporting).

60. *See* Carbone & Black, *supra* note 14, at 464–68 (describing use of incentive pay to promote management objectives).

61. *See, e.g.*, Sarah Green Carmichael, *Who New CEOs Fire First*, HARV. BUS. REV. (July 8, 2013) <https://hbr.org/2013/07/who-new-ceos-fire-first> [<https://perma.cc/7XJ8-YBD9>] (reporting how CEOs, asked what they would do differently, replied: fire people sooner).

62. Carbone & Black, *supra* note 14 (arguing that incentive pay promotes management objectives); *see also* PRINCIPLES OF COMPLIANCE AND ENF’T FOR ORGS., §§ 4.05, 4.06 reps. notes (AM. L. INST., Tentative Draft No. 2, May 17, 2021) (first on employment; then on risk culture; and then proposing to address these excesses).

63. *See* 2019 *Incentive Pay Practices Survey: Privately Held Companies*, WORLDATWORK (2019), <https://www.worldatwork.org/resources/research/surveys/incentive-pay-practices> [<https://perma.cc/XX4M-7FZA>] (indicating that 99% of publicly traded companies used some form of short-term incentive pay) (access 2019 report under “available reports” for “private companies”).

er managers calling the shots.<sup>64</sup> This has consequences for the ability of women and other outsiders to thrive in corporate America.<sup>65</sup>

## B. Rent Seeking And Gendered Pathways

The consequences of rent-seeking involve the following overlapping factors:

First, the terms of the competition take forms that disadvantage women because of their greater family responsibilities.<sup>66</sup> These competitive environments often place a premium on the willingness to work long hours, and women are more likely than men to cut back after the birth of a child, limiting their ability to compete.<sup>67</sup> Goldman Sachs provides a particularly dramatic example of long hours, with young bankers working 95 hours a week, and getting 5 hours of sleep a night.<sup>68</sup> They responded by asking for a limit of eighty hours a week.<sup>69</sup> Gender theorists argue that, in some workplaces, the long hours become an end in themselves; they become a way of demonstrating commitment to the job and stereotypical masculinity “by showing no weakness, demonstrating a single-minded focus on professional success, displaying physical endurance and strength, and engaging in cut-throat competition.”<sup>70</sup> Econometric studies find that the differences in hours is a significant factor in gender differences in pay for young professionals, particularly in finance.<sup>71</sup>

Similarly, the modern economy, which places more emphasis on plotting the next move and less on career ladders, disadvantages those unwilling or unable to move. At the height of the managerial era, promotions typically took place

64. For a recent example, see Austin Weinstein, ‘We Need to do More:’ Seven High-Ranking Black Women Leave Wells Fargo, ENTERPRISE (Oct. 15, 2020), <https://enterprise.vnews.com/2020/10/15/we-need-to-do-more-seven-high-ranking-black-women-leave-wells-fargo/> [https://perma.cc/SV84-DLP4] (describing the departure of top Black women executives after CEO Charlie Scharf brought in white males with whom he had worked previously to staff top positions and attributed it to the lack of African-American talent in finance).

65. See *The Triple Bind*, *supra* note 12 (describing corporate cultures that promote rule-breaking).

66. It is important, however, to distinguish the existence of competition from the combination of competition and rent-seeking. Increased competition, particularly in the form of long hours, may in itself disadvantage workers with family responsibilities in circumstances in which long hours are a necessary part of the job. See, e.g., 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, 240 (2010). Beyond that, however, increased competition can also serve to prime employees to accept unethical workplaces and to discredit those who object. See HILL & PAINTER, *supra* note 56, at 110–17 (explaining how this dynamic contributed the financial crisis).

67. See, e.g., Bertrand et al., *supra* note 66, at 240 (finding that both career interruptions and hours worked explain significant portions of the gender pay gap among young professionals).

68. *Young Goldman Sachs Bankers Ask for 80-hour Week Cap*, BBC BUS. (Mar. 19, 2021), <https://www.bbc.com/news/business-56452494> [https://perma.cc/W6PP-L7FX].

69. *Id.* Goldman appears to have responded by raising its entry level salaries by 30%. Orla McCaffrey, *Goldman Sachs Is Giving Entry-Level Bankers a Nearly 30% Raise*, WALL ST. J. (Aug. 2, 2021), <https://www.wsj.com/articles/goldman-sachs-is-giving-entry-level-bankers-a-nearly-30-raise-11627930285> (last accessed Jan. 8, 2022).

70. Berdahl et al., *supra* note 10, at 433.

71. See, e.g., Bertrand et al., *supra* note 66.

from within.<sup>72</sup> Career ladders were more established and secure and differences in pay were relatively small.<sup>73</sup> Today, in many industries the best way to get ahead is to move, switching divisions, companies, and cities.<sup>74</sup> Women's family ties make moves more difficult and increase the biases associated with perceptions that women are not as career oriented as men.<sup>75</sup>

Second, more competitive workplaces tend to be more toxic and to select for managers who are more likely to discriminate.<sup>76</sup> A review of incentive pay following the Enron scandals found that systems that use rankings to justify large disparities in compensation encourage greater emphasis on self-interest, higher levels of distrust that undermine teamwork, greater homogeneity in the selection of corporate management, less managerial accountability, and more politicized decision-making.<sup>77</sup> Although advocates claim that the bonus systems were meritocratic, critics charge that they protect insiders at the expense of outsiders.<sup>78</sup> In these environments, managers often look for allies in internal com-

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72. See, e.g., 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.* 965, \*3–4 (2013), [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1047&context=mgmt\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1047&context=mgmt_papers) [<https://perma.cc/XQE7-9449>] (documenting decline in tenure of male employees and observing that “in high skilled populations, workers who move across firms appear to achieve faster pay growth,” but that lateral moves also increase the opportunities for discrimination).

73. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 522 (2001) (describing the shift in mindset from expectations of long-term job tenure to more transient employment).

74. *Id.*

75. See Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 *DEPAUL L. REV.* 759, 759–60 (2013) (discussing Walmart's policy that management trainees sign an agreement indicating willingness to move and the impact of such policies on women). The data on moves, however, is limited. In 2014, one survey reported that “[m]ore than half of men – 54% – responding to an Accentemps survey said they felt switching jobs frequently would benefit their careers. Only 31% of women held the same belief.” Emma Crawford Hampel, *Men More Likely to ‘Job Hop’ Than Women, Study (with Infographic)*, *BIV* (Dec. 18, 2014), <https://biv.com/article/2014/12/men-more-likely-job-hop-women-study-infographic> [<https://perma.cc/UT2V-QTVL>]. On the other hand, some studies find that women change jobs more frequently than men, at least in part because women are more likely to be employed in industries such as media and entertainment where switching jobs is more common. See Guy Berger & Gloria Yang, *Millennials Job-Hop More than Previous Generations, but They’ll Slow Down Eventually*, *LINKEDIN* (Apr. 12, 2016), <https://www.linkedin.com/pulse/millennials-job-hop-more-than-previous-generations-guy-berger-ph-d/> [<https://perma.cc/6LH5-4CYN>]. These factors illustrate the interaction of biological sex, which contributes to women's greater family responsibilities, and gendered perceptions that men are more moveable than women.

76. See, e.g., Wei Ke & David Chung, *Stop Cross-Selling! Help Customers Buy Instead*, *SIMON KUCHER* (May 17, 2018), <https://www.simon-kucher.com/en-us/blog/stop-cross-selling-help-customers-buy-instead> [<https://perma.cc/ZL39-GUMH>]. (citing a survey of C-levels where 20% of respondents say that incentive compensation negatively impacts the organization's culture by attracting the wrong employees, focusing on short-term gains, and promoting fear of failure and poor risk-taking decisions).

77. Lynne L. Dallas, *Psychology of Enron*, *supra* note 11, at 37 (describing how Enron management used its bonus system to reorient company behavior in counterproductive ways).

78. Companies with such systems tend to recruit ambitious (and relatively young) new hires who “want to make a lot of money fast.” *Id.* at 50. The new employees, especially if they have limited experience elsewhere, more readily buy into shifts in corporate orientation directed from the top. *Id.* at 49.

pany competitions rather than advancing the best interest of the company.<sup>79</sup> In the process, they become more likely to favor those they see as like themselves.<sup>80</sup>

These results occur for several reasons. For one thing, in institutional cultures that think of themselves as meritocratic, the managers “show greater bias in favor of men over equally performing women.”<sup>81</sup> For another, high stakes competitive pay tends to select for managers who are low in empathy and high in narcissism.<sup>82</sup> Such workplaces tend to produce higher turnover, lower employee morale, and a greater incidence of sex discrimination, sexual and racial harassment, and bullying.<sup>83</sup> In addition, managers in such environments may have good reasons to feel insecure and may be wary of those they see as most likely to challenge their authority.<sup>84</sup>

Third, the classic double bind makes in-group favoritism more pernicious. Studies still routinely find that women may be treated harshly for engaging in the same behaviors that are viewed as an advantage for men.<sup>85</sup> Thriving in a competitive environment requires ambition, the ability to exert dominance, and the willingness to do what it takes to win.<sup>86</sup> Women and minorities, however, are much more likely to be disliked if they display such traits, requiring that they walk more of a tightrope in advancing than white men.<sup>87</sup> Eighty-four percent of

79. See, e.g., 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/?sh=6c4083355743> [https://perma.cc/QAW6-W394] (describing negative effects of Microsoft’s competitive evaluation system); 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/FDH9-6S8X] (same).

80. See Berdahl et al., *supra* note 10, at 428–29, 435 (observing that masculinity contests become more intense when managers need to repeatedly prove themselves, leading to more abusive managers, who identify with workers who have the same traits they see in themselves, and who exploit others’ weaknesses); Carbone et al., *supra* note 29, at 429 (describing gender dynamics of corporate “tournaments.”).

81. Emilio J. Castilla & Stephen Benard, *The Paradox of Meritocracy in Organizations*, 55 GENDER & INEQ. 543 (2010).

82. Daniel Nelson Jones & Aurelio Jose Figueredo, *The Core of Darkness: Uncovering the Heart of the Dark Triad*, 27 EUR. J. PERSONALITY 521 (2013).

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

84. See Berdahl et al., *supra* note 10, at 435 (observing that managers may also feel the need to constantly prove themselves increasing their mistreatment of subordinates).

85. See, e.g., Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks?: The Implied Communal Deficit*, 92 J. APPLIED PSYCHOL. 81 (2007); Melissa J. Williams & Larissa Z. Tiedens, *The Subtle Suspension of Backlash: A Meta-Analysis of Penalties for Women’s Implicit and Explicit Dominance Behavior*, 42 PSYCHOL. BULL. 165 (2016).

86. Berdahl et al., *supra* note 10, at 432.

87. *Id.*; see 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/UCM2-MS6F]; see also DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 68 (2007) (noting women starting to climb the corporate ladder are actually “walking a tightrope” because they must be sufficiently aggressive to excel, but not overly aggressive because they will be perceived as pushy).

women surveyed in Silicon Valley, for example, reported having been told they were “too aggressive,” a quality typically prized in the men.<sup>88</sup> Female CEOs are about 45% more likely to be fired than are their male counterparts.<sup>89</sup> The study found, moreover, what while weak company performance correlated strongly with men’s dismissals, company performance did not explain the women’s terminations.<sup>90</sup>

The double bind, however, becomes a dramatically greater liability in workplaces that value getting results without paying close attention to how the results are accomplished. In the financial industry, for example, a recent study found striking gender disparities in dismissals. Overall, “roughly 7% of financial advisers have a past record of misconduct,” a relatively high number for an industry.<sup>91</sup> Yet male advisers are more than three times as likely to engage in misconduct, and more than twice as likely to be repeat offenders as their female counterparts.<sup>92</sup> The offenses the male advisers commit are 20% costlier for their employers to settle. Once the misconduct is reported, though, the female advisers are 20% more likely to be fired, and 30% less likely to find a new job in the industry compared to the men.<sup>93</sup> The gender differences in forgiveness largely disappear, though, if women are in charge.<sup>94</sup> What these results suggest is that in industries where pushing the limits of acceptable behavior is the norm, women who engage in such tactics are at greater risk of dismissal than men, perhaps because the women who do are defying gender stereotypes and perhaps because they are less likely to have protective superiors. Sixty percent of modern sex discrimination complaints involve dismissals and, if the dismissals involve allegations of misconduct, they make it harder to prevail on discrimination claims.<sup>95</sup> Mark Egan, et al., also found that “the gender punishment gap is roughly twice

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88. *Too Hard or Too Soft*, ELEPHANT IN THE VALLEY (2015), <https://www.elephantinthevalley.com/> (last visited Oct. 19, 2021) (from homepage, scroll to section heading “Too Hard or Too Soft”).

89. Vishal K. Gupta, et al., *You’re Fired! Gender Disparities in CEO Dismissal*, 46 J. MGMT. 560 (2020), available at <https://journals.sagepub.com/doi/pdf/10.1177/0149206318810415>.

90. *Id.*

91. Egan et al., *supra* note 24, at 2 n.2; Egan et al., *The Market for Financial Adviser Misconduct*, 127 J. POL. ECON. 233 (2019).

92. *Id.*

93. *Id.*

94. *See generally id.* at 12, 30. For the men, customers initiate 55% of the misconduct complaints compared to 28% by their employers. For the women, employer-initiated instances of misconduct are almost as common as customer-initiated complaints (41% versus 44%). *Id.* at 4. These findings are consistent with the study’s finding that firms with more women owners and managers reduce the gender disparities. *See generally id.* at 4–5. Still, the study does not indicate whether women owner do not produce smaller disparities because they do not discriminate against women or because they do not tolerate misconduct from anyone.

95. Egan, et al., *supra* note 24, at 3. Also note that discrimination in terminations, particularly where the misconduct is verified, make claims of discrimination “sound hollow” and the patterns harder to detect than discrimination in hiring or compensation. *Id.*; see also Emily Glazer, *Wells Fargo Ends Investigation over Bias Against Women*, WALL ST. J. (Nov. 9, 2018), <https://www.wsj.com/articles/wells-fargo-ends-investigation-over-bias-against-women-1541759400> (last accessed Jan. 8, 2022).

as large at financial advisory firms with a history of sexual harassment.”<sup>96</sup> Gender bias linked to unequal dismissals may be associated with other forms of discrimination and harassment.<sup>97</sup>

Fourth, this shift toward more individualized determinations in hiring, compensation, and retention makes it harder to prove discrimination claims.<sup>98</sup> The Supreme Court has made it more difficult to certify class actions, even in cases in which managerial discretion may be used to cloak inappropriate conduct.<sup>99</sup> Statistical cases, moreover, are hard to establish without a sample size of at least one hundred.<sup>100</sup> Individual disparate treatment cases require a “comparator,” holding a comparable position and having qualities equivalent to the plaintiff in substantial ways, a difficult requirement to meet where every employee, especially in upper management, may have a unique or shifting set of responsibilities.<sup>101</sup> Moreover, showing discriminatory dismissals may be even harder than showing disparate treatment in hiring or compensation.<sup>102</sup>

Finally, these factors narrow the pathways into upper management as more intense competition increases the disadvantages associated with gender stereotypes. CEO tenure rates have been shortening,<sup>103</sup> and corporate boards that commit to large compensation packages seek “superstars.”<sup>104</sup> Studies repeatedly

96. Mark Egan et al., *When Harry Fired Sally: Uncovering the Gender Punishment Gap*, PRINCIPLES FOR RESPONSIBLE INV. (June 19, 2020), <https://www.unpri.org/pri-blog/when-harry-fired-sally-uncovering-the-gender-punishment-gap/5951.article> [<https://perma.cc/22PE-PWJR>] (blog).

97. *Id.* Both in-group favoritism and sexual harassment also tend to increase in masculinity contest cultures. See Berdahl, et al, *supra* note 10, 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).

98. See generally Carbone et al., *supra* note 28, at 429 (explaining why competitive corporate workplaces make it harder to prove discrimination claims).

99. See, e.g., *Wal-Mart Stores v. Dukes*, 564 U.S. 342 (2011) (dismissing certification of the largest class action in history); see also *The Triple Bind*, *supra* note 12, discussion at 1130-38 (arguing that Walmart, which micromanaged store practices except for personnel matters, used managerial discretion to cloak illegal and unethical practices such as wage theft).

100. Lucas Loafman & Andrew Little, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 AM. BUS. L.J. 251, 303 (2014) (indicating “that results are not credible unless the sample size is well over one hundred and that many companies simply do not have that many employees in a given position.”).

101. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 756 (2011) (describing the need for a comparator and the difficulty of establishing one in today’s workplaces).

102. Egan, et al., *supra* note 24, at 3. Egan, et al., also noted that discrimination in terminations, particularly where the misconduct is verified, makes claims of discrimination “sound hollow” and the patterns harder to detect than discrimination in hiring or compensation. *Id.*

103. Lauren Silva Laughlin, *Many CEO Tenures Are Getting Shorter*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/business/dealbook/ceo-tenure-kimberly-clark.html> [<https://perma.cc/Z4CD-6JCG>].

104. Rakesh Khurana, *The Curse of the Superstar CEO*, HARV. BUS. REV. (Sept. 2002), <https://hbr.org/2002/09/the-curse-of-the-superstar-ceo> [<https://perma.cc/J4NW-HFU6>] (describing the tendency to search for the superstar who can produce extraordinary returns); see also Arijit Chatterjee & Donald C. Hambrick, *It’s All About Me: Narcissistic Chief Executive Officers and Their Effects on Company Strategy and Performance*, 52 ADMIN. SCI. Q. 351 (2007) (indicating that narcissistic CEOs, defined by greater compensation and greater use of the word “I,” tend to produce more volatile results – more big wins and big losses, but not better overall results).

show that when groups lack leaders, they place more emphasis on dominant personalities<sup>105</sup> rather than the type of leadership that comes from expertise or from assuming an institutional mantle of authority.<sup>106</sup> Steve Jobs, a cofounder of Apple, for example, was lauded for his ability to produce a “reality distortion field,” in other words, an aura of such confidence that not only did he believe he could make the impossible happen, he was able to convince his followers that they could too.<sup>107</sup> Such qualities may be particularly important in new fields or start-ups, where personal drive is seen as a critical factor for success.<sup>108</sup>

Even in less rarefied settings than Silicon Valley, hiring decisions often turn on the ability to establish authority and command over a room.<sup>109</sup> Creating a strong initial impression may reflect physical dominance – height, a deeper voice, and the projection of confidence. Indeed, increased height correlates with higher salaries for both men and women, and CEOs with the deepest voices demand salaries \$187,000 a year higher than other CEOs.<sup>110</sup> Humans have bigger gender differences in voice ranges than any other primate, and deep voices correlate strongly with perceptions of dominance, particularly among men assessing the dominance of other men.<sup>111</sup>

105. See, e.g., TOMAS CHAMORRO-PREMUZIC, WHY DO SO MANY INCOMPETENT MEN BECOME LEADERS? 45 (2019) (“[I]n lab experiments with leaderless groups of a few individuals with no previous knowledge of each other, narcissists emerge more frequently as leaders.”); Amy B. Brunell et al., *Leader Emergence: The Case of the Narcissistic Leader*, 34 PERSONALITY & SOC. PSYCH. BULL. 1663 (2008); Barbora Nevicka et al., *Uncertainty Enhances the Preference for Narcissistic Leaders*, 43 EUR. J. SOC. PSYCH. 370 (2013).

106. April Eustice, *Where Is the Charisma? The Struggle for Female Leaders*, PENN STATE (Mar. 24, 2017), <https://sites.psu.edu/psy533wheeler/2017/03/24/where-is-the-charisma-the-struggle-for-female-leaders/> [<https://perma.cc/RJ7N-CS9H>].

107. John Hargrave, *How Steve Jobs Created the Reality Distortion Field (and You Can, Too)*, MEDIUM (Jan. 25, 2016), <https://medium.com/@jhargrave/how-steve-jobs-created-the-reality-distortion-field-and-you-can-too-4ba87781adba> (last accessed Jan. 9, 2022).

108. See EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS’ CLUB OF SILICON VALLEY 24 (2019) (describing selection for a “volatile mix of entitlement, hubris and risk-taking” in start-up founders); Margarita Mayo, *If Humble People Make the Best Leaders, Why Do We Fall for Charismatic Narcissists*, HARV. BUS. REV. (Apr. 7, 2017), <https://hbr.org/2017/04/if-humble-people-make-the-best-leaders-why-do-we-fall-for-charismatic-narcissists> [<https://perma.cc/CJH2-FG4P>] (describing the tendency to “favor bold actions that attract attention, resulting in big wins or big losses.”).

109. See Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable Cons*, HARV. BUS. REV. (Jan. 2004), <https://hbr.org/2004/01/narcissistic-leaders-the-incredible-pros-the-inevitable-cons> [<https://perma.cc/68MB-XZUT>] (arguing that narcissists “are good for companies in extraordinary times – those that need people with the passion and daring to take them in new directions.”).

110. M. Dittman, *Standing Tall Pays Off, Study Finds*, AM. PSYCHOL. ASS’N. (Summer 2004), <https://www.apa.org/monitor/julaug04/standing> [<https://perma.cc/X29A-6SEY>] (height and salaries); Helen Evans, *Science Explains Why Having a Deep Voice Is Critical to Our Success*, LIFEHACK, <https://www.lifehack.org/372669/science-explains-why-having-deep-voice-critical-our-success-2> [<https://perma.cc/2RHQ-U7MY>] (last visited Oct. 19, 2021).

111. David A. Puts et al., *Sexual Selection on Male Vocal Fundamental Frequency in Humans and Other Anthropoids*, 283 PROC. R. SOC. B. 20152830 (2016), available at <http://doi.org/10.1098/rspb.2015.2830> (while women also view men with deep voices as more attractive, the impact on other men’s perception of dominance is greater than the impact on women’s perceptions). In contrast, human sexual dimorphism in height is more moderate than in many large primates. Hector Reynoso, *Sexual Body Size Dimorphism*, CTR. RSCH. & TRAINING IN ANTHROPOGONY,

In the lower ranks, the greater importance of moves also places more emphasis on initial impressions. While men and women who rise through the ranks will both have colleagues in a position to evaluate their effectiveness, the ability to move depends more on networks outside the company.<sup>112</sup> This can disadvantage women in male dominated occupations, both by reducing networking opportunities and by making moves more perilous. A study of women in finance, for example, found that men fared better than women when they sought to advance by switching jobs.<sup>113</sup> The authors suggested that “gender may become more salient when people have a shorter work history with a company,” limiting women’s ability to advance laterally.<sup>114</sup> Yet, in more dynamic environments, where pay often depends on the ability to navigate a system based on favoritism, the ability to move may be critical to career advancement.<sup>115</sup>

For all these reasons, modern corporate workplaces, particularly those that prize internal competition that pits employees against each other, narrow the opportunities for women to rise to the top in pyramid-like corporate hierarchies. Indeed, statistical studies show that incentive pay generally increases gender disparities.<sup>116</sup> A 2015 study looking at thousands of executives concluded that:

[M]en benefit disproportionately from incentive pay. Female executives receive a lower share of incentive pay relative to their male counterparts, and this difference accounts for 93 percent of the gender gap in total pay. Performance pay also disproportionately rewards male executives. Researchers found that every \$1 million increase in firm value generates a \$17,150 increase in firm-specific wealth for male executives, but only a \$1,670 increase for their female counterparts.<sup>117</sup>

A major factor in this study was the fact that women were less likely to be in positions where they benefitted from the ability to determine the metrics governing compensation.<sup>118</sup> Another reason, however, is that high stakes bonus systems change company dynamics in ways that disadvantage women, heightening

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<https://carta.anthropogeny.org/moca/topics/sexual-body-size-dimorphism> [https://perma.cc/8X6X-E89N] (last visited Oct. 19, 2021).

112. See Debra Carreau, *The Ugly Truth Behind Why Men Are More Likely to Get Noticed by Job Recruiters, According to New LinkedIn Study*, CNBC (Mar. 8, 2019), <https://www.cnbc.com/2019/03/08/linkedin-study-reveals-why-men-are-more-likely-to-get-noticed-by-job-recruiters-than-women.html> [https://perma.cc/3X93-6ATS] (indicating the referrals are important to lateral moves and men are more likely to ask for them).

113. Sarah Patterson et al., *Gender and the MBA: Differences in Career Trajectories, Institutional Support, and Outcomes*, 31 GENDER & SOC’Y. 310 (2017).

114. *Id.*

115. Bidwell, *supra* note 72, at \*3–4 (suggesting that highly skilled employees gain through lateral moves).

116. See Stephanie Albanesi et al., *Incentive Pay and Gender Compensation Gaps for Top Executives: Incentives and Implications*, VOX (Dec. 21, 2015), <https://voxeu.org/article/incentive-pay-and-top-executive-gender-gaps> [https://perma.cc/BWE7-43R3].

117. STEFANIA ALBANESI ET AL., *GENDER AND DYNAMIC AGENCY: THEORY AND EVIDENCE ON THE COMPENSATION OF TOP EXECUTIVES I*, (Fed. Rsrv. Bank of N.Y., Staff Rep. No. 718, 2015), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr718.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr718.pdf) [https://perma.cc/YJ8T-S86Q].

118. *Id.*

the importance of male identified traits such as narcissism and over optimism bias and increasing distrust and in-group favoritism.<sup>119</sup> One female executive, who had “spent 30 years in Fortune 500 companies, rising to the C-suite, the pool from which the next chief executive may be chosen,” thought she had succeeded: business doubled under her leadership. But as she grew ever closer to the top, she explained that although she had not felt handicapped before she made it to the C-suite, “the next rungs of the ladder depend not only on results but also on prevailing in an environment where everyone is competing for a chance at the top job.”<sup>120</sup> Rent-seeking encourages corporate “tournaments” where coming out on top may be the only thing that matters and where winning the competition may be depend on a particularly male identified form of dominance rather than proven results.<sup>121</sup>

### III

#### WELLS FARGO: A CASE STUDY IN RENT-SEEKING CORPORATE CULTURE

Wells Fargo emerged from the Great Financial Crisis as one of the more admired large banks in the country, but since, it has been tarnished by scandal which has focused attention on its corporate culture. Between 2011 and 2015, regulators charged that Wells Fargo staff members “opened roughly 1.5 million bank accounts and applied for 565,000 credit cards that may not have been authorized by customers.”<sup>122</sup> That number later rose to 3.5 million accounts.<sup>123</sup> Some customers complained because of unexpected fees or because debt collectors called them about accounts they did not recognize, but most went unno-

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119. For a more general critique of the difficulties that women and minorities face in moving beyond mid-level positions, see Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 *FORDHAM L. REV.* 2873, 2890 (2008) (arguing that as companies hire larger numbers of women and minorities, bias increases at the senior levels); see also Ribstein, *supra* note 56 (describing the “new breed” of executives as “Machiavellian, narcissistic, prevaricating, pathologically optimistic, free from self-doubt and moral distractions, willing to take great risk as the company moves up and to lie when things turn bad, and nurtured by a corporate culture that instills loyalty to insiders, obsession with short-term stock price, and intense distrust of outsiders.”).

120. Susan Chira, *Why Women Aren't CEOs, According to Women Who Almost Were*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/sunday-review/women-ceos-glass-ceiling.html?login=email&auth=login-email> [https://perma.cc/9B3J-RBAZ].

121. See CHAMORRO-PREMUZIC, *supra* note 105, ch. 2, at 56–58 (2019) (describing how modern corporations select for male identified traits such as narcissism, charisma, and above all confidence despite the fact that such traits do not make for better leaders); 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) (observing that “traits such as over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception are favored in corporate promotion tournaments.”);

122. Michael Corkery, *Wells Fargo Fined \$185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html> [https://perma.cc/4EU7-29BQ].

123. See Uri Berliner, *Wells Fargo Admits to Nearly Twice as Many Possible Fake Accounts—3.5 Million*, NPR (Aug. 31, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/31/547550804/wells-fargo-admits-to-nearly-twice-as-many-possible-fake-accounts-3-5-million> [https://perma.cc/VDA4-FCCD].

ticed because Wells Fargo employees routinely closed the accounts shortly after opening them or used fake emails to identify the customers so that they would not receive notices from the accounts.<sup>124</sup> The scandal occurred because Wells Fargo had created a sales culture that put unrelenting pressure on its employees to cross-sell; that is, to get its existing customers to open as many accounts as possible.<sup>125</sup> Still, the bank profited from the activity less from the accounts themselves than from the effect their sales reports had on the price of Wells Fargo shares.<sup>126</sup> The scandal provides a well-reported example of the new corporate model and how that model creates the factors that shape women's roles.

The Wells Fargo scandal, of course, is unusual; fake bank accounts are not the norm. In addition, Wells Fargo is unusual in modern corporate scandals in that a woman, Carrie Tolstedt, had a substantial role in producing the results. Still, the way the scandal unfolded – and the role of women in facilitating it – demonstrates how gender shapes the pathways within the company and in some cases out of it. Moreover, while fraudulent accounts are unusual, cross-selling and high-pressure sales environments are not; Wells Fargo could have benefited from the use of cross-selling to exploit its customers without using fake accounts to game its numbers and most of the corporate dynamics at play would be largely the same. The attention that the scandal focused on Wells Fargo, however, has produced a more detailed record of standard corporate practices than is ordinarily available. Finally, the scandal underscores a more general lesson for women and corporate boards – women need not be all that different from men for statistical differences in their experiences to emerge.

This section will use Wells Fargo as a case study to discuss how high stakes, competitive environments that game numbers to advance bottom line metrics disadvantages women in distinctive ways.

#### A. Wells Fargo And Rent Seeking

The Wells Fargo scandal provides an example of rent seeking in that Wells Fargo executives used manipulation of an ethically dubious metric – cross-selling – to make the bank appear as one of the most successful banks in the country in the wake of the Great Financial Crisis, and that appearance of success artificially pumped up its share price, enriching top executives at the expense of the institution's longer-term stakeholders. When Wells Fargo CEO John Stumpf testified before Congress in 2016, Senator Elizabeth Warren ac-

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124. Corkery, *supra* note 122. Wells Fargo estimated that 190,000 of the unauthorized accounts incurred charges and fees. *Id.* The bank also reported that of the 565,000 unauthorized credit card accounts, roughly 14,000 incurred fees totaling over \$400,000 for annual fees, interest charges, and overdraft-protection fees. Matt Egan, *5,300 Wells Fargo Employees Fired Over 2 Million Phony Accounts*, CNN BUS. (Sept. 9, 2016), <https://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees/> [<https://perma.cc/F9XS-2KWL>].

125. Glazer, *supra* note 17.

126. See, e.g., *S'holder Complaint*, *supra* note 15 (alleging that Wells Fargo inaccurately reported its cross-selling metrics in order to influence share price).

cused Stumpf of increasing the value of his compensation<sup>127</sup> “thanks in part to the bank’s success in selling tons of products to customers that they didn’t need.”<sup>128</sup> Warren asked Stumpf to resign,<sup>129</sup> stating, “You squeezed your employees to the breaking point so they would cheat customers and you could drive up the value of your stock and put hundreds of millions of dollars in your own pocket.”<sup>130</sup> Had the scandal not erupted, Stumpf would have been able to walk away with a fortune worth \$200 million.<sup>131</sup> Instead, Wells Fargo announced his retirement shortly after the Congressional hearings.<sup>132</sup> He has since been banned from the banking industry for life, was forced to forfeit stock awards of \$41 million and his 2016 salary, and faced a \$28 million clawback and a \$17 million fine.<sup>133</sup> While claw backs of this sort are rare,<sup>134</sup> top management compensation tied to manipulable metrics is not.<sup>135</sup>

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127. Stumpf had exercised a large part of his stock options shortly before Wells Fargo settled with the Consumer Financial Protection Bureau a few months before the hearings. See Stacy Cowley & Jennifer A. Kingson, *Wells Fargo to Claw Back \$75 Million from 2 Former Executives*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/business/wells-fargo-pay-executives-accounts-scandal.html> [https://perma.cc/82J4-A23N].

128. Matt Egan, *Elizabeth Warren’s Epic Takedown of Wells Fargo CEO*, CNN BUS. (Sept. 21, 2016), <https://money.cnn.com/2016/09/20/investing/wells-fargo-elizabeth-warren-resign-criminal-investigation/index.html?iid=EL> [https://perma.cc/V6MY-NS77]; see also *S’holder Complaint*, *supra* note 15, ¶¶ 383–84, at 130 (alleging that Stumpf “sold or otherwise disposed of 7,067,446 shares of Wells Fargo common stock for a total of \$343,638,237.78,” and “netted over \$51.8 million in gains” from the sale of an additional 5,432,400 shares he sold to Wells Fargo at an artificially inflated price using his employee stock options.”).

129. Egan, *supra* note 128.

130. *Id.*

131. Matt Egan, *Wells Fargo CEO Walks with \$130 Million*, CNN BUS. (Oct. 13, 2016), <https://money.cnn.com/2016/10/13/investing/wells-fargo-ceo-resigns-compensation/index.html> [https://perma.cc/U23Y-PRGS].

132. See Matt Krantz, *Wells Fargo CEO Stumpf Retires with \$134M*, USA TODAY (Oct. 12, 2016), <https://www.usatoday.com/story/money/markets/2016/10/12/wells-fargo-ceo-retires-under-fire/91964778/> [https://perma.cc/N3ZB-CP5E].

133. *Id.*; Gabrielle Olya, *Former Wells Fargo CEO John Stumpf Banned from Banking Industry and Ordered to Pay \$17.5 Million*, GO BANKINGRATES (Jan. 24, 2020), <https://www.gobankingrates.com/net-worth/business-people/wells-fargo-john-stumpf-money/> [https://perma.cc/7EZ2-N6H2]; see also Sanjai Bhagat & Charles M. Elson, *Why Executive Compensation Clawbacks Don’t Work*, HARV. BUS. REV. (Mar. 22, 2021) (arguing that while clawback provisions are increasingly common in executive compensation packages, “if executives cash in their compensation and then leave the company, clawbacks can be almost impossible to enforce.”).

134. The clawbacks were the largest in banking history. Cowley & Kingson, *supra* note 127; see also Claudia A. Restrepo, *The Need for Increased Possibility of Director Liability: Refusal to Dismiss In re Wells Fargo & Co. Shareholder Derivative Litigation, a Step in the Right Direction*, 60 B.C. L. REV. 1689, 1693 (2019) (observing that corporate directors “are rarely held personally liable for their actions (or inactions).”).

135. See, e.g., Michael C. Jensen, *Paying People to Lie: The Truth About the Budgeting Process*, 9 EUR. FIN. MGMT. 379 (2003), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=267651](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=267651) (criticizing the modern executive compensation system he had previously championed because of the way it encouraged earnings management, which he argued contributed to the destruction of the value of companies).

Wells Fargo was dubbed in the banking industry the “the king of cross-sell”<sup>136</sup> because cross-selling, defined by “the number of products sold per household,”<sup>137</sup> was central to its business model.<sup>138</sup> The more Wells Fargo products (checking accounts, credit cards, mortgages, etc.) a household had, the greater the customer loyalty to the bank and the greater the bank’s profits from that household.<sup>139</sup> Particularly in the wake of the Great Financial Crisis, when more sophisticated financial products had crashed and burned, Wells Fargo billed itself as “the bank of the real economy”; it took pride in its “retail banking for everyday folks, not trading or investment banking for sophisticated investors.”<sup>140</sup> CEO John Stumpf had emphasized the cross-sell metric as an indicator of the bank’s success and a reason for continuing share price increases.<sup>141</sup> Carrie Tolstedt, who ran the Community Banking division at the heart of the fake accounts scandal, said explicitly in 2011, that the “Street rewards us for . . . cross-sell and HH [household] cross-sell [s]o expects us to excel here.”<sup>142</sup> From 2009 to 2015, the height of the fake account practices, Wells Fargo was at the top of its peer group in producing equity returns for its shareholders.<sup>143</sup>

These activities constitute a form of “rent-seeking” in at least three respects:

First, cross-selling (even without fake accounts) attempts to create a form of positional advantage in an otherwise competitive market. Cross-selling, per se, is not illegal.<sup>144</sup> There is nothing wrong with asking a bank customer who opens a checking account if they would like to obtain a credit card at the same time. The reason cross-selling is profitable, however, is that it increases customer loyalty.<sup>145</sup> Customers with multiple accounts at a bank are less likely, for example, to switch to another credit card simply because an alternative card company offers better terms. This allows banks to offer less competitive (and therefore more profitable) terms and still increase sales by offering the products to a “sticky” group of customers unlikely to switch to another provid-

136. *OCC Notice*, *supra* note 30 ¶ 60, at 16.

137. *Id.* ¶ 6, at 4.

138. See, e.g., Bill Chappell, “*You Should Resign*”: Watch Sen. Elizabeth Warren Grill Wells Fargo CEO John Stumpf, NPR (Sept. 20, 2016), <https://www.npr.org/sections/the-two-way/2016/09/20/494738797/you-should-resign-watch-sen-elizabeth-warren-grill-wells-fargo-ceo-john-stumpf> [<https://perma.cc/PRV8-YYBU>] (quoting Stumpf as saying that cross-selling is “one of the main reasons that Wells has become the most valuable bank in the world.”).

139. Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH.: F. ON CORP. GOVERNANCE (Feb. 6, 2019), <https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/> [<https://perma.cc/R7QF-U2U9>].

140. Bethany Mclean, *How Wells Fargo’s Cutthroat Corporate Culture Allegedly Drove Bankers to Fraud*, VANITY FAIR (May 31, 2017), <https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud> [<https://perma.cc/EAD3-7X26>].

141. Chappell, *supra* note 138; see also *OCC Notice*, *supra* note 30 ¶ 65, at 17.

142. *OCC Notice*, *supra* note 30 ¶ 62c, at 17.

143. Tayan, *supra* note 139.

144. Thomas Fox, *Wells Fargo Settlement Part 2: Cross-Selling*, JD SUPRA (Feb. 26, 2020), <https://www.jdsupra.com/legalnews/wells-fargo-settlement-part-2-cross-27801/> [<https://perma.cc/97P8-BUXH>]; see also Claire A. Hill, *Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda*, 74 WASH. & LEE L. REV. 973, 976 (2017) (observing that the unauthorized accounts, on the other hand, were illegal).

145. Tayan, *supra* note 139.

er.<sup>146</sup> The more Wells Fargo products a particular household had, the greater the bank's profit from that household.<sup>147</sup> Persuading customers to buy products they did not need or to do so on unfavorable terms then involved exploitation of the loyalty the bank had cultivated at the customers' expense.<sup>148</sup> And, of course, opening fake accounts on their behalf, often disguised in ways unlikely to be discovered by the customers, was worse both legally and ethically.<sup>149</sup> Thus, cross-selling at its core involves conflicts of interest between the bank and its customers, though these conflicts are on a continuum from the relatively benign (unnecessary accounts) to the unconscionable (redundant auto insurance for customers who do not know that they are already covered by a different policy).<sup>150</sup>

Second, the activities involve a form of rent-seeking by top executives. Stumpf had negotiated his compensation package with the Wells Fargo Board at the time he was hired as CEO.<sup>151</sup> That package tied some of his compensation directly to the cross-selling metric.<sup>152</sup> He benefitted in greater (and less direct) ways, however, from his ability to exercise stock options whose value rose with Wells Fargo's increases in share price.<sup>153</sup> When Wells Fargo announcements about how well the bank met cross-selling goals boosted share price,<sup>154</sup> Stumpf and other top executives benefitted personally.<sup>155</sup> Moreover, Stumpf made a point of exercising unvested stock options before agreeing to a settlement with the Consumer Financial Protection Bureau; while he lost his unvested equity interests after his resignation, he retained shares that had vested earlier.<sup>156</sup> Stumpf was later subject to fines and claw backs,<sup>157</sup> but he is still a wealthy man and the

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146. Indeed Warren Buffett, a major investor in Wells Fargo, commented that investors "underestimate how sticky customers are and how unaware they are of fees banks charge them." *Warren Buffet on Banking Business*, WARREN BUFFET ON INVESTMENT (May 23, 2016), <http://warrenbuffettoninvestment.com/on-banking-business/> [<https://perma.cc/8U8T-9TJC>].

147. *Id.*

148. And Wells Fargo often did profit from the legitimate products it marketed in ways that subjected customers to additional fees or unnecessary products like pet insurance. Matt Egan, *Another Wells Fargo Mess: Pet Insurance Ripoff*, CNN BUS. (July 20, 2018), <https://money.cnn.com/2018/07/19/news/companies/wells-fargo-pet-insurance-refund/index.html> [<https://perma.cc/23AZ-K4J8>].

149. *Id.*; see also *S'holder Complaint*, *supra* note 15 (observing that illegal practices had occurred).

150. For a list of Wells Fargo's illegal activities, see *OCC Notice*, *supra* note 30 ¶ 8, at 4–5.

151. Kristen Bahler, *Wells Fargo CEO Could Get \$134 Million on His Way Out*, MONEY (Oct 13, 2016), <https://money.com/john-stumpf-wells-fargo-exit-package/> [<https://perma.cc/26VV-ADQE>].

152. See Egan, *supra* note 131 (indicating that Stumpf received \$4 million in bonus awards tied to the accounts); *OCC Notice*, *supra* note 30 ¶ 58a, at 15 (indicating that top executives receive equity awards and that Carrie Tolstedt, in particular, who ran Community Banking "received millions of dollars annually in incentive compensation, based in part on the profitability of the Bank," with compensation awards that "explicitly took into account the Community Bank's achievement of record cross-sell ratios."); Nelson, *supra* note 20, at 931 (observing that Stumpf "cashed \$155 million in stock options between 2012 and 2015 alone" and that in 2015, "\$4 million of Stumpf's bonus was explicitly tied to the opening of new accounts.").

153. Bahler, *supra* note 151.

154. *OCC Notice*, *supra* note 30 ¶ 6, at 4.

155. Chappell, *supra* note 138 (indicating that Stumpf's shares in the company had increased by \$200 million during the period in which the fake accounts were issued); see also *OCC Notice*, *supra* note 30 ¶ 65, at 17.

156. See Bahler, *supra* note 151; Cowley & Kingson, *supra* note 127.

157. Olya, *supra* note 133.

major part of his wealth reflected terms that the Board could not have accurately valued at the time he became CEO.<sup>158</sup> If Stumpf, like his predecessor Richard M. Kovacevich, the former Wells Fargo CEO who designed the corporate culture that led to the scandal,<sup>159</sup> had retired long enough before the discovery of the fake accounts, or if Wells Fargo had boosted the cross-sell metric without reliance on unauthorized accounts, he would have kept close to \$200 million on the basis of a compensation package he shaped and whose metrics he manipulated to inflate the return from his CEO position.<sup>160</sup>

Third, the refusal to scrutinize the unauthorized activities involved rent-seeking in that senior executives advanced their own self-interest at the expense of the interests of longer term stakeholders and the institution itself.<sup>161</sup> The earnings from the accounts were negligible;<sup>162</sup> their value was their role in boosting share price.<sup>163</sup> Any immediate benefit to Wells Fargo from the accounts, moreover, was entirely disproportionate to the loss of customer confidence and billions in fines that resulted when the fake accounts were discovered.<sup>164</sup> The executives who promoted these practices effectively appropriated corporate reputation to advance short term objectives in ways that damaged the value of that reputation for Wells Fargo's longer term stakeholders.<sup>165</sup>

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158. See Bahler, *supra* note 151 (observing that the “[b]oard may have had no choice but to pay Stumpf that vast amount, as severance packages are typically negotiated as part of a CEO’s hiring contract” and that “company boards may not know the exact value of the compensation they’re providing executives, largely because they don’t account for how valuable stock options can be.”); HILL & PAINTER, *supra* note 56, at 47 (observing that executives typically diversify their holdings and investments outside of their companies are typically unaffected by their misdeeds).

159. Patrick Rucker, *The Denials of Dick Kovacevich: Wells Fargo’s Godfather of Salesmanship Says Everyone Else is to Blame*, THE FINREG BLOG (Oct. 8, 2020), <https://sites.law.duke.edu/thefinregblog/2020/10/08/the-denials-of-dick-kovacevich-wells-fargos-godfather-of-salesmanship-says-everyone-else-is-to-blame/> [<https://perma.cc/7T66-T74G>].

160. See OCC Notice, *supra* note 30 ¶ 65, at 17.

161. Whether institutions have “interests” beyond those of their shareholders is a complex and controversial issue. See Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015) (arguing that corporations serve a variety of interests that go beyond those of their shareholders). Top executives profiting at the expense of long-term shareholders can also be described as “agency costs.” Both agency costs and rent-seeking involve the use of positional power to “redistribute wealth among different groups without creating new wealth.” John A. Conybeare, “*The Rent-Seeking State and Revenue Diversification*,” 35 WORLD POLITICS. 25 (1982).

162. Egan, *supra* note 24 (estimating Wells Fargo’s earnings at \$400,000 in fees from the fraudulent accounts).

163. OCC Notice, *supra* note 30 ¶ 6, at 4.

164. Matt Egan, *U.S. Government Fines Wells Fargo \$3 Billion for Its “Staggering” Fake-Accounts Scandal*, CNN BUS. (Feb. 24, 2020), <https://www.cnn.com/2020/02/21/business/wells-fargo-settlement-doj-sec/index.html> [<https://perma.cc/TY5M-DGRB>].

165. See *Wells Fargo Pays \$3 Billion to Settle Fake Accounts Scandal*, OREGONIAN (Feb. 22, 2020), <https://www.oregonlive.com/business/2020/02/wells-fargo-pays-3-billion-to-settle-fake-accounts-scandal.html> [<https://perma.cc/3YYD-BKK5>] (observing that four years later, Wells Fargo’s reputation had not recovered); *Indep. Dir. Rep.*, *supra* note 13, at 4 (emphasizing the extraordinary harm to the bank’s reputation).

The Wells Fargo fake accounts scandal involves particularly egregious actions, but this form of rent-seeking can occur without illegality. For example, in the years after the scandal, Wells Fargo, like other companies, has used stock buybacks<sup>166</sup> and changes in its loss reserves to boost share price.<sup>167</sup> These more prosaic actions also benefit top executives (and short-term shareholders) in ways that may or may not necessarily be good for the longer-term interests of the corporation.<sup>168</sup>

Taken together, these actions have two immediate effects on women relevant to this article. First, they demonstrate that women, like Carrie Tolstedt, are fully capable of being involved in implementing and benefitting from such schemes. Second, as this article will explain below, implementing the Wells Fargo cross-selling system disadvantaged women in less direct ways.

## B. The Wells Fargo Culture And The Lack of Accountability

Wells Fargo became the “king of cross-sell”<sup>169</sup> and prompted the fake account scandal through a culture that prized bottom line results without accountability for anything else. Its sales metrics were a dominant feature of the corporate culture and had a series of important ancillary effects on the banks’ operations. Those metrics influenced everything from senior executives’ stock options whose value increased when Wells Fargo met or exceeded its cross-sell goals<sup>170</sup> to the threat of dismissal held over the heads of low-level employees when they did not meet their production quotas.<sup>171</sup> Wells Fargo employees were judged by how they measured up relative to these goals, and they were ranked against one another with their incentive compensation and promotional opportunities dependent on their performance, creating intense pressure to meet

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166. Reuters, *Wells Fargo Announces \$18 Billion Buyback Plan, Doubles Dividend*, YAHOO! FINANCE (June 28, 2021), <https://finance.yahoo.com/news/wells-fargo-announces-18-bl-214231137.html> [<https://perma.cc/F7TY-RWMN>]. For a discussion of the problems with stock buybacks, see Jerry Useem, *The Stock Buyback Swindle*, ATLANTIC (July 26, 2019), <https://www.theatlantic.com/magazine/archive/2019/08/the-stock-buyback-swindle/592774/> [<https://perma.cc/Z7PE-Q4U8>].

167. Ciara Linnane, *Wells Fargo Earnings Boosted by Release of \$1.6 Billion in Loan Loss Reserves*, MARKETWATCH (Apr. 14, 2021), <https://www.marketwatch.com/story/wells-fargo-earnings-boosted-by-release-of-16-billion-in-loan-loss-reserves-2021-04-14> [<https://perma.cc/A7WG-UQ6E>].

168. See generally, e.g., William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can Be Regained*, 36 SEATTLE U. L. REV. 857 (2013) (discussing how “financialization” in the form of efforts to maximize short term share price increases undercut investment).

169. *OCC Notice*, *supra* note 3o ¶ 60, at 16.

170. See discussion *supra* at Sec. II.A.

171. “Bankers in branches who hit sales targets could earn bonuses of \$500 to \$2,000 per quarter, while district managers could get \$10,000 to \$20,000 a year, according to six Wells Fargo employees. Bonuses made a big difference in the paychecks of branch employees, whose base salaries often were about \$30,000 a year.” Glazer, *supra* note 17.

sales quotas.<sup>172</sup> In valorizing these metrics, Wells Fargo imposed little accountability for how the metrics were accomplished.<sup>173</sup>

When John Stumpf testified before Congress, he emphasized *in Wells Fargo's defense* that the bank cared about “results, not process.”<sup>174</sup> The lack of attention to process was deeply embedded in the bank's institutional culture. An investigative report by the Independent Directors of the Board of Wells Fargo & Company<sup>175</sup> observed that the corporate structure was decentralized.<sup>176</sup> CEO Stumpf had a long relationship with Carrie Tolstedt, the head of Community Banking and he “left her on her own to run her department.”<sup>177</sup> Department heads like Tolstedt were told to “run it like you own it.”<sup>178</sup> Practically, this meant that the department heads were granted broad authority, not just to determine business lines but to structure staff and control functions such as risk management; they could “shake off questions from superiors, subordinates or lateral colleagues.”<sup>179</sup> The fact that Tolstedt had a demonstrated record of success in meeting sales metrics increased the deference accorded her.<sup>180</sup>

Tolstedt, in turn, oversaw an operation designed to increase cross-sell metrics, no questions asked.<sup>181</sup> Described as the “most powerful woman in banking,”<sup>182</sup> she understood that sales metrics were what Wells Fargo rewarded, and she pushed her far-flung divisions to increase those sales.<sup>183</sup> She bragged that when an underling suggested a 4% increase, she insisted the increase had to be in the double digits – every year.<sup>184</sup> Tolstedt took the position that “[a] whole bunch of management gurus say you need BHAGs – bold, hairy, audacious

172. *Ind. Dirs. Rep.*, *supra* note 13, at 20.

173. And, indeed, one of the criticisms of high-pressure evaluation systems is that it undermines managerial accountability. *See Psychology of Enron*, *supra* note 78, at 37; *see also* Nelson, *supra* note 21, at 930–31 (discussing the role of middle management in orchestrating frauds that benefit upper management.)

174. Susan M. Ochs, *The Leadership Blind Spots at Wells Fargo*, HARV. BUS. REV. (Oct. 6, 2016), <https://hbr.org/2016/10/the-leadership-blind-spots-at-wells-fargo> [<https://perma.cc/DAU9-97K8>].

175. *See Ind. Dirs. Rep.*, *supra* note 13 (identifying Wells Fargo's self-identified sales culture, improper sales models, and decentralized corporate structure as leading to an atmosphere that prompted “low quality sales” and “unethical behavior”).

176. *Id.* at 4.

177. Cowley & Kingson, *supra* note 128.

178. *Ind. Dirs. Rep.*, *supra* note 13, at 19; *see also* GEERT HOFSTEDÉ, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIOR, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* 397–400 (2d ed. 2001) (observing that organizations with a closed systems may be more susceptible to having silos or other spheres in which centralized influence is limited.).

179. Cowley & Kingson, *supra* note 128; *see also Ind. Dirs. Rep.*, *supra* note 13, at 19.

180. *Ind. Dirs. Rep.*, *supra* note 13, at 19 (observing that “while Wells Fargo's decentralized model naturally afforded Tolstedt significant independence in that position, her record of success and strong financial performance enabled Tolstedt to maintain and enhance her authority.”).

181. *See OCC Notice*, *supra* note 30 ¶ 6, at 4 (“The Bank tolerated pervasive sales practices misconduct as an acceptable side effect of the Community Bank's profitable sales model, and declined to implement effective controls to catch systemic misconduct.”).

182. *Tayan*, *supra* note 139.

183. *OCC Notice*, *supra* note 30, at 16.

184. *Id.*

goals.” According to these gurus, it is effective “to give troops a goal that looks unattainable and flog them heavily. And according to that line of thought, you will do better chasing a BHAG than you will a reasonable objective.”<sup>185</sup> She accordingly set goals she knew were unattainable. Within the bank, they were referred to “as 50/50 plans, meaning that there was an expectation that only half the regions would be able to meet them.”<sup>186</sup> The regions were nonetheless compared to each other in terms of how well they performed.<sup>187</sup>

The result created unrelenting pressure on the Community Bank as a whole, increasing legitimate sales.<sup>188</sup> Employees faced with impossible demands, however, also discovered that unauthorized accounts were an effective way to deal with that pressure within a culture that did not inquire too closely into how they made their numbers.<sup>189</sup> The OCC Notice alleges that the “Bank had better tools and systems to detect employees who did not meet unreasonable sales goals than it did to catch employees who engaged in sales practices misconduct.”<sup>190</sup> Indeed, while misconduct was pervasive, “the Bank intentionally designed and maintained controls to catch only the most egregious instances of the illegal conduct.”<sup>191</sup> The OCC concluded, “In short, Bank senior executives favored profits and other market rewards over taking action to stop the systemic issuance of unauthorized products and services to customers.”<sup>192</sup>

Wells Fargo, of course, had mechanisms for ferreting out such misconduct, including human resources departments that deal with employee dismissals and turnover. Yet, “there was no coordinated effort by HR, either within the Community Bank or in Corporate HR, to track, analyze or report on sales practice issues.”<sup>193</sup> This allowed Wells Fargo to treat the individual allegations of misconduct that surfaced as isolated incidents.<sup>194</sup> Over the years, Wells Fargo fired thousands of low-level employees when reports of fraudulent practices surfaced without taking action to stem the misconduct.<sup>195</sup>

The result allowed the practices associated with unauthorized accounts and the sale of unneeded or inappropriate products to persist. It also allowed a vari-

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185. *Id.* ¶ 82, at 20.

186. *Ind. Dirs. Rep.*, *supra* note 13, at 10.

187. *Id.* at 20.

188. *OCC Notice*, *supra* note 30 ¶ 6, at 4 (“The Community Bank’s business model was highly profitable because it resulted in a greater number of legitimate sales than would have been possible without the unreasonable sales goals and sales pressure.”).

189. *Ind. Dirs. Rep.*, *supra* note 13, at 38 (describing influence of sales pressure as a motive for opening unauthorized accounts).

190. *OCC Notice*, *supra* note 30 ¶ 6, at 4.

191. *Id.*

192. *Id.*

193. *Ind. Dirs. Rep.*, *supra* note 13, at 12.

194. *Id.*

195. After the scandal broke, Wells Fargo announced that it had fired 5,300 low-level employees for misconduct related to the scandal, but relatively few senior executives. See Rick Rothacker, *Thousands of Low-Level Workers Lost Jobs in Wells Fargo Scandal. What About the Execs?*, THE STATE (Apr. 12, 2017), <https://www.thestate.com/news/business/article144119779.html>.

ety of other practices to arise that management did not track or address. As the next section shows, these practices magnified the impact on women.

### C. The Consequences For Women

What took place at Wells Fargo had dramatic consequences for all its employees, increasing stress, turnover, and discomfort with customer treatment. The OCC described employees as caught in a vise:

The Community Bank's business model . . . presented a stark dilemma to employees every day for 14 years: they could engage in sales practices misconduct—much of which was illegal—to meet their goals, or they could struggle to meet their goals and face adverse consequences, including losing their jobs.<sup>196</sup>

Even before the scandal surfaced, Wells Fargo had turnover rates of 30%, much higher than for most banks.<sup>197</sup> Wells Fargo has not released the gender breakdown of the employees who left. Still, the high-pressure corporate culture had consequences for women that were distinct from and greater in effect than those for men. These consequences followed from the institutional culture associated with unrelenting pressure as a deliberate tactic, the lack of accountability for managerial behavior, and the toleration of illegal and unethical behavior. They illustrate practices that persist in less extreme corporate environments.

#### 1. Family Responsibilities

High pressure sales positions treat jobs as the first priority; family obligations are not allowed to become a reason for failing to meet goals.<sup>198</sup> Wells Fargo encouraged a competitive environment that compared employees to each other in terms of how well they met sales metrics.<sup>199</sup> While long hours were not an end in themselves, employees were encouraged to do whatever it took to meet the metrics.<sup>200</sup> Moreover, discrimination suits against Wells Fargo suggest that the company did not enforce worker protections. In 2010, for example, Wells Fargo fired Yesenia Guitron after she complained about the fake accounts. Guitron alleged that, despite the fact that she was a single mother, the

196. *OCC Notice*, *supra* note 30 ¶ 7, at 4.

197. *Ind. Dirs. Rep.*, *supra* note 13, at 27 (reporting the 30% rate and noting that Wells Fargo compared itself to other retail operations, which typically have high turnover rates, rather than other banks).

198. *See* Berdahl et al., *supra* note 10, at 435 (observing that masculinity contests become more intense when managers need to repeatedly prove themselves and that the contest often take the form of the willingness to work long hours).

199. *Ind. Dirs. Rep.*, *supra* note 13, at 20.

200. Doreen McCallister, *Wells Fargo CEO Discusses Secret-Accounts Scandal in Senate Hearing*, NPR (Sept. 20, 2016), <http://www.npr.org/sections/thetwo-way/2016/09/20/494680201/wells-fargo-ceo-to-address-accounts-scandal-before-senate-panel> [https://perma.cc/373E-D22J] (“Managers often tell employees to do whatever it takes to reach their quotas. Employees who do not reach their quotas are often required to work hours beyond their typical work schedule without being compensated for that extra work time, and/or are threatened with termination.”); Chris Arnold, *Former Wells Fargo Employees Discuss Toxic Work Culture, Even at HQ*, NPR (Oct. 4, 2016), <https://www.npr.org/2016/10/04/496508361/former-wells-fargo-employees-describe-toxic-sales-culture-even-at-hq> [https://perma.cc/GDT7-CALP].

bank scheduled required meetings in the mornings before the bank opened and required her to take calls from customers during the evening.<sup>201</sup> It also refused her requests for legally mandated family leave, and penalized her when she was even a few minutes late because of childcare responsibilities.<sup>202</sup> Home Mortgage Consultant Raena Krestovnikov, who filed suit for sex discrimination in 2020, alleged that her superiors routinely required her to work more than eight hours a day and 40 hours per week—hours that entitled her to overtime pay at one and half times her regular hourly rate.<sup>203</sup> Yet, her supervisors encouraged her not to report the extra hours; she learned that if she did report them, *her managers* could get into trouble.<sup>204</sup> Employees with family responsibilities were thus on their own in juggling work with other responsibilities, even when family leave and wage and hour legislation existed to protect them.<sup>205</sup> Employees who were dependent on the jobs, with limited ability to switch employers, felt stuck.<sup>206</sup>

## 2. Toxic Management

Wells Fargo during this period became a symbol of a toxic managerial culture. One former employee described the pressure to sell as so disturbingly intense that the employees “were all miserable, and it was just soul crushing to walk in every day.”<sup>207</sup> The OCC complaint asserted that:

Community Bank management intimidated and badgered employees to meet unattainable sales goals year after year, including by monitoring employees daily or hourly and reporting their sales performance to their managers, subjecting employees to hazing-like abuse, and threatening to terminate and actually terminating employees for failure to meet the goals.<sup>208</sup>

Managers were subject to pressure similar to the employees. The OCC complaint described, for example, how Community Bank officials had multiple daily calls with management to discuss sales performance.<sup>209</sup> They, too, were

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201. Complaint & Demand for Jury Trial ¶ 30, at 55–58, *Guitron v. Wells Fargo Bank*, No. CV103461, 2010 WL 3300829 (N.D. Cal. Aug. 6, 2010), <https://bloximages.chicago2.vip.townnews.com/napavalleyregister.com/content/tncms/assets/v3/editorial/c/43/c43ba2c7-53a8-56ae-a545-9eb55c95a36c/57f6def8b8a58.pdf.pdf> [<https://perma.cc/DR2Q-HPQZ>].

202. *Id.*

203. Complaint ¶ 99, at 30, *Krestovnikov v. Wells Fargo Bank*, No. 2:20-CV-08252, 2020 WL 5549144 (C.D. Cal. Sept. 9, 2020).

204. *Id.*

205. For a description of how enforcement of such legislation has been weakened generally, see Catherine Ruetschlin & Sean McElwee, *How Walmart and Home Depot Are Buying Huge Political Influence*, AM. PROSPECT (Dec. 3, 2014), <http://prospect.org/article/how-walmart-and-home-depot-are-buying-huge-political-influence> [<https://perma.cc/7CUJ-WB7J>].

206. One employee, for example, explained that “she was afraid to lose her job, especially because this started back when the economy was still in bad shape. You were stuck and it was the feeling that no other employer is going to want you because we will ruin you.” Arnold, *supra* note 200.

207. *Id.*

208. *OCC Notice*, *supra* note 30 ¶ 5, at 4.

209. *Id.* ¶ 82, at 20.

compared to each other, subject to ridicule in front of their peers, and threatened with termination.<sup>210</sup>

In this environment, there is little indication that upper management scrutinized the behavior of managers who led in cross-selling when they tolerated unauthorized accounts – or other forms of misconduct.<sup>211</sup> Former Wells Fargo employees report retaliation against those who questioned the sales practices or other management activities.<sup>212</sup> An investigation by Shearman and Sterling could not establish a pattern of retaliation, but many of the individual suits brought against Wells Fargo alleged retaliation,<sup>213</sup> and, once the scandal broke, at least one employee received a multi-million dollar award.<sup>214</sup> Of course, one reason for the failure to establish a *pattern* of retaliation is that Wells Fargo did not collect or analyze dismissals and resignations in ways that would provide insights into the motivations of the employees who left or were not promoted.<sup>215</sup>

Upper management simply accepted high turnover as the norm for sales operations, and it treated dismissals for cause as evidence that the bank had addressed individual instances of misconduct.<sup>216</sup> It thus did not inquire (or collect data) on either the unauthorized accounts or what might have been patterns of managerial abuse involving other issues.<sup>217</sup>

Studies of other institutions have found that these patterns – the emphasis on high pressure tactics, managerial autonomy, and reductionist metrics – tend to produce abusive managers who play favorites, increasing the risk of in-group favoritism.<sup>218</sup> Given that the majority of managers were male, there is every rea-

210. *Id.*

211. See *OCC Rep.*, *supra* note 13, at 7 (observing that Wells Fargo “did not have an effective business process to ensure whistleblower cases were properly researched, analyzed (both individually and systemically), and resolved.”).

212. See Matt Egan, *Wells Fargo’s Whistleblower Problem Worsens*, CNN BUS. (Apr. 6, 2017), <http://money.cnn.com/2017/04/06/investing/wells-fargo-whistleblower-retaliation-osha/index.html> [<https://perma.cc/EA2K-VAL2>] (providing the example of the wrongful termination of Claudia Ponce de Leon, a Wells Fargo general manager, who warned her bosses about the creation of fake bank accounts, called the “EthicsLine,” and was subsequently fired because “she drank too much”); Matt Egan, *More Wells Fargo Whistleblowers Allege Retaliation for Whistleblowing*, CNN BUS. (Nov. 7, 2017), <https://money.cnn.com/2017/11/06/investing/wells-fargo-retaliation-whistleblower/index.html> [<https://perma.cc/AM9D-AUL4>].

213. See, e.g., Complaint & Demand for Jury Trial, *supra* note 201; Complaint, *supra* note 203.

214. Julia Horowitz, *Feds Order Wells Fargo to Rehire Whistleblower Who Reported Fraud*, CNN BUS. (Apr. 3, 2017), <https://money.cnn.com/2017/04/03/news/companies/wells-fargo-whistleblower/index.html?iid=EL> [<https://perma.cc/UV9E-KTCS>].

215. *Ind. Dirs. Rep.*, *supra* note 13, at 6–7, 12, 27 (describing how the bank treated established cases of misconduct as individual issues resolved by the termination of the employee involved; then noting acceptance of and lack of inquiry into high turnover rates).

216. *Id.*

217. *Id.* at 6–7, 12 (describing failure to inquire into patterns or causes of turnover and misconduct). In addition, given the high turnover, the managers were often inexperienced, further weakening their ability to resist the practices. *Ind. Dirs. Rep.*, *supra* note 13, at 28.

218. See discussion *supra* at Sec. I. Indeed, employees complained in 2010 that the Wells Fargo practices “guarantees high turnover, a managerial staff of bullying taskmasters, [and] bankers who are really financial molesters [and] cheaters . . .” *OCC Notice*, *supra* note 30 ¶ 39, at 11.

son to believe that these factors disproportionately affected women; the data to make that case, however, has emerged only in the study of dismissals described in the next section.

### 3. The Double Bind

The Wells Fargo anecdotal accounts involve abusive male and female managers, male and female employees who participated in misconduct,<sup>219</sup> male and female whistleblowers, and the termination of male and female employees, both for misconduct and in retaliation for whistleblowing.<sup>220</sup> The one arena where a detailed empirical examination of gender differences exists is with respect to termination for misconduct, and this study indicates that Wells Fargo's gender disparities were the worst in the industry.<sup>221</sup> While 41% of men committing misconduct were fired or resigned after they were accused of wrong-doing, 69% of women were fired or resigned – a higher gender firing gap than for any other entity.<sup>222</sup> This finding suggests that the double bind that existed for all workers – push the envelope on unethical practices or risk failing to meet your production quotas – had particularly negative consequences for women.<sup>223</sup>

The authors of this study noticed that of the 44 firms studied, Wells Fargo Advisors, an arm of Wells Fargo providing brokerage services, had the highest rate of female workers leaving during the period between 2005 and 2015.<sup>224</sup> Second was A.G. Edwards, also a division of Wells Fargo.<sup>225</sup> The researchers looked more closely and concluded that terminations were a major factor in the gender disparities.<sup>226</sup>

The *Intercept* followed up with more recent data, replicating that academic study. It found that in 2019, 42% of the men with records of misconduct left the

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219. The gender breakdown of those fired for opening unauthorized accounts has not been released. But those fired were overwhelmingly low-level employees. See Rothacker, *supra* note 196.

220. See, e.g., Arnold, *supra* note 200 (interviewing both male and female former employees); *OCC Notice*, *supra* note 30 (detailing wrongdoing by male and female executives). Indeed, one employee explained how everyone at Wells Fargo faced a double bind, reporting that “Wells Fargo is playing a shell game – they are rewarding employees for fake accounts and will terminate them if they find out this is the case. . . . The termination ax is suspended over our head one way or another; meet unreasonable goals or you will be terminated, cheat to meet the unreasonable goals and you will be terminated when caught.” *OCC Notice*, *supra* note 30 ¶ 40, at 11–12.

221. The study is possible because of the mandated reporting of misconduct involving financial advisors. See Egan et al., *supra* note 24 (describing available information).

222. Susan Antilla, *When Brokers Act Badly at Wells Fargo, Women Take the Fall*, THE INTERCEPT (July 1, 2019), <https://theintercept.com/2019/07/01/wells-fargo-brokers-gender-bias/> [<https://perma.cc/LJ83-CCR2>].

223. In addition, at the senior level, four of the five executives Wells Fargo fired directly because of the fraudulent accounts scandal were women. Jen Wiczner, *How Wells Fargo's Carrie Tolsted Went from Fortune Most Powerful Woman to Villain*, YAHOO! NEWS (Apr. 10, 2017), <https://www.yahoo.com/news/wells-fargo-apos-carrie-tolstedt-225240189.html> [<https://perma.cc/3S3Z-973K>].

224. Matt Egan, *Women Financial Advisers at Wells Fargo 27% More Likely to Lose Their Job: Study*, CNN BUS. (Mar. 16, 2017), <https://money.cnn.com/2017/03/16/investing/wells-fargo-gender-gap-bank/index.html> [<https://perma.cc/XCK4-PHZP>].

225. *Id.*

226. *Id.*

company compared to 72% of the women.<sup>227</sup> It also found that “75 percent of women who had negative disclosures resulting in a termination or resignation did not find work in the industry again, compared to 59 percent of the men.”<sup>228</sup>

Yet, of the 25 employees that caused the bank the largest dollar losses in the 2005-2015 period, 24 were men.<sup>229</sup> And in 2019, more than half of the men found to have committed misconduct – in comparison with only a quarter of the women – ended up with third party settlements against them, again suggesting that the conduct they committed was more serious.<sup>230</sup> In addition, the male brokers who faced settlements had average settlement amounts of more than double those against the women.<sup>231</sup> Accordingly, the study established that the men committed worse misconduct, yet were treated more leniently.

What produces the disparities? According to Egan and his co-authors, their “evidence suggests that the gap arises because of in-group tolerance by managers, who are more forgiving of missteps among members of their own gender/ethnic group.”<sup>232</sup> The term “in-group tolerance” describes the statistical conclusion of their study; the authors did not interview those involved in the decision-making.<sup>233</sup> Their conclusion could therefore include three possible, related explanations:

The first is traditional sexism; high stakes competitive cultures produce more misogynist managers and more politicized decision-making than other workplaces.<sup>234</sup> Male managers may protect workers they identify with (i.e., aggressive, competitive men) while more seriously punishing women, either because they are an outgroup<sup>235</sup> or because the women engaged in misconduct are acting against gender stereotypes.<sup>236</sup>

The second involves opportunistic retaliation. In an environment where misconduct is rife, managers may feel compelled to take action against some employees to show that they are cracking down and they may also fear the po-

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227. See Egan et al., *supra* note 91 (describing study methodology, which involved examining statistical records).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Egan et al., *supra* note 24; Egan et al., *supra* note 96; Glazer, *supra* note 95.

233. *Id.*

234. See Berdahl, et al., *supra* note 10, 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 . . .”); *Psychology of Enron*, *supra* note 100, at 37 (explaining how internal competition contributes to more politicized decision-making).

235. See, e.g., Complaint, *Terrazas v. Wells Fargo Bank*, No. 04-275 (D. Ariz. Nov. 21, 2017) (alleging that plaintiff was fired because her district had an unusually large number of fraudulent accounts while men who had similar records were not fired).

236. See, e.g., Berdahl, et al, *supra* note 10, 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 masculinity contests).

tential whistleblowers in their ranks.<sup>237</sup> Raena Krestovnikov alleges, for example, that she was fired for misconduct because she complained about sex discrimination in the award of office benefits.<sup>238</sup> The misconduct for which she was fired was relatively minor; she alleged that men in the office had committed far worse infractions without being fired, and that her termination was a pretext cloaking the retaliatory reasons for her dismissal.<sup>239</sup>

The third is managers seeking to protect their star performers. John Stumpf, for example, protected Carrie Tolstedt long after allegations of unauthorized accounts surfaced because she had been so successful in producing the cross-sell metrics that Stumpf (and Wells Fargo) valued.<sup>240</sup> Lower-level managers may protect the employees who most help them meet their sales metrics while letting go less valued employees to give the appearance that, in fact, they were clamping down on misconduct.<sup>241</sup>

Whatever the reasons for the gender disparities, the result in corporate environments like Wells Fargo is that women have to walk more of a tightrope than the men to succeed.<sup>242</sup> Practically, it was almost impossible to thrive in the Community Bank without in some way being complicit in a system where employees felt that they could only meet sales quotas by engaging in illegal or unethical activities.<sup>243</sup> Yet, women who engaged in such misconduct were at greater risk than the men that such activities would end their careers.<sup>244</sup>

237. A former Well Fargo HR specialist admitted that the bank tracked down whistleblowers and often fired them for minor infractions. Matt Egan, *I Called the Wells Fargo Ethics Line and Was Fired*, CNN BUS. (Sept. 21, 2016), <https://money.cnn.com/2016/09/21/investing/wells-fargo-fired-workers-retaliation-fake-accounts/index.html> [<https://perma.cc/4C9P-FQGP>]. Other companies, feeling pressure to show they were cracking down on employee misconduct, would choose managers they wanted to fire for other reasons rather than those committing the worst abuses. See Carbone & Black, *supra* note 14, at 453 nn.62–63 (describing Walmart’s practice of firing managers who failed to keep labor costs low); see also Julia Menasce Horowitz, *Views on Leadership Traits and Competencies and How They Interact with Gender*, PEW RES. CTR. (Sept. 20, 2018), <https://www.pewresearch.org/social-trends/2018/09/20/2-views-on-leadership-traits-and-competencies-and-how-they-intersect-with-gender/> [<https://perma.cc/A4UP-VY8G>] (finding that to the extent the public perceives a difference between men and women, women are more likely to be seen as honest and ethical, a disadvantage in some corporate contexts).

238. Complaint, *supra* note 203 ¶¶ 18, 22, at 7–8.

239. *Id.*; see also *Guitron v. Wells Fargo Bank*, No. 13-16023 (N.D. Cal. July 6, 2012), *aff’d*, 619 F. App’x 590 (9th Cir. 2015) (involving an early whistleblower who was fired when she complained about fraudulent accounts because she failed to meet her sales quotas and was “insubordinate” to her manager).

240. *Ind. Dirs. Rep.*, *supra* note 13, at 10 (describing how Stumpf was slow to recognize complaints about Tolstedt because the he had known her for years and admired her performance).

241. See NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION* 58 (2009) (describing such practices as Walmart’s).

242. See BRANSON, *supra* note 87, at 68 (noting that women starting to climb the corporate ladder are actually “walking a tightrope” because they must be sufficiently aggressive to excel, but not overly aggressive because they will be perceived as pushy).

243. *Ind. Dirs. Rep.*, *supra* note 13, at 28 (observing that sale performance is what mattered in employee evaluation and promotion).

244. Egan, et al., *supra* note 24.

#### 4. Discrimination

Beyond the Egan study, the only comprehensive data on Wells Fargo's diversity metrics is what Wells Fargo has chosen to provide.<sup>245</sup> Since the scandal, the company has issued annual diversity reports that show it in a favorable light, including data indicating that a majority of its employees are female, and that once appropriate controls are introduced, the wage gap between male and female employees who hold the same jobs in the same regions is negligible.<sup>246</sup> These statistics, however, do not consider promotions, dismissals, or turnover rates,<sup>247</sup> while approximately 57% of Wells Fargo employees are women, for example, women constitute only 27% of upper management.<sup>248</sup> Nor do the given statistics address whether women and minorities are concentrated in low paying positions – or whether incentive pay awards are comparable.<sup>249</sup> Accordingly, there has been no comprehensive public review of how the factors discussed in this article affect workforce composition and compensation.<sup>250</sup>

The best evidence of gender disparities has tended to come from class action sex discrimination cases or from studies based on mandated reporting.<sup>251</sup> The Supreme Court, however, has made such actions more difficult to bring and the many actions that result in settlements typically produce only a limited public record.<sup>252</sup> Wells Fargo, for example, has faced a number of allegations of dis-

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245. See *Press Release: Wells Fargo Is 3rd Top U.S. Bank Closing Gender Pay Gap in Response to Stockholder Pressure*, ARJUNA CAPITAL (Feb. 1, 2018), <http://www.arjuna-capital.com/archive/news/press-release-wells-fargo-3rd-top-u-s-bank-closing-gender-pay-gap-response-shareholder-pressure?rq=gender%20pay%20wells%20fargo> [<https://perma.cc/68J8-4GK3>] (releasing some data in response to shareholder pressure based on gender pay equity concerns); Egan, et al., *supra* note 24 (relying on data about misconduct-based terminations from an external source).

246. *Learning from the Past, Transforming the Future, Business Standards Report*, WELLS FARGO 25 (Dec. 31, 2018) [hereinafter *Bus. Standards Rep.*], <https://www08.wellsfargomedia.com/assets/pdf/about/corporate/business-standards-report.pdf> [<https://perma.cc/LKN7-QHAQ>] (showing that once job position, tenure, geography, etc. were taken into account, women earned 99 cents on the dollar compared to men).

247. *Id.*

248. See Arjuna Capital, *Gender Pay Equity Statement* (Mar. 23, 2017), [http://arjuna-capital.com/wp-content/uploads/2017/03/WFC-Shareholder-Proposal\\_Gender-Pay-Equity-3-23-17.pdf](http://arjuna-capital.com/wp-content/uploads/2017/03/WFC-Shareholder-Proposal_Gender-Pay-Equity-3-23-17.pdf) [<https://perma.cc/Q8Y8-P6HB>].

249. *Bus. Standards Rep.*, *supra* note 246, at 25 (“For 2018, we expanded our analysis to include certain of our global locations and other elements of pay, including base pay, discretionary cash incentives, and long-term incentive awards. After accounting for factors such as role, tenure, and geography, the most recent results of our analysis show that female team members at Wells Fargo earn more than 99 cents for every \$1 earned by their male peers.”). This statement, however, gives no indication of its methodology.

250. Egan, et al., *supra* note 24. The study indicates that examination of termination rates is also unusual and constitutes an overlooked area of gender discrimination. *Id.*

251. See, e.g., Brad Seligman, *Patriarchy at the Checkout Counter*, 14 NEW LAB. F. 40 (2005) (describing how the lawyers in the Walmart class action reviewed 1.3 million documents and interviewed hundreds of women).

252. See *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 142–43 (N.D. Cal. 2004), *aff'd sub nom Dukes v. Wal-Mart*, 474 F.3d 1214 (9th Cir. 2007), *opinion withdrawn and superseded on denial of reh'g*, 509 F.3d 1168 (9th Cir. 2007), *on reh'g en banc sub nom Dukes v. Wal-Mart Stores*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011) (reversing the trial court's eighty-four page opinion describing the statistical disparities in Walmart's promotion patterns and narrowing

crimination, retaliation for protected activity, and wrongful termination, without producing a comprehensive analysis of the bank's practices or implementing substantial changes.

The EEOC brought the farthest-reaching case against Wells Fargo, alleging race and sex discrimination in hiring entry level employees in its on-line banking centers.<sup>253</sup> It settled the case in 2020 for \$7.8 million dollars.<sup>254</sup> As part of the settlement, Wells Fargo agreed to hire 580 of the applicants who were the subjects of the EEOC action, as tellers, personal bankers, customer sales and service representatives, and administrative support professionals.<sup>255</sup> The settlement, which primarily addressed racial discrimination, only involved low-level hiring in a limited part of Wells Fargo's operations.<sup>256</sup>

In 2018, Wells Fargo also conducted an internal investigation into allegations that women in its Wealth Management Division had been marginalized. Jay Welker, president of Wells Fargo's private bank and head of the wealth-management division since 2003, had made remarks suggesting that women should be home taking care of children.<sup>257</sup> Twelve of the forty-five regional managing directors were women who felt that qualified women had been rejected for top jobs that went to men.<sup>258</sup> When the women questioned the decisions, they said that they "felt ignored."<sup>259</sup> Wells Fargo's internal investigation found no indications of sex discrimination, but Welker's retirement was announced at the conclusion of the investigation and the women did not file suit.<sup>260</sup>

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the basis for class certification in discrimination cases). Mandatory arbitration clauses and nondisclosure agreements have also helped shroud workplace practices. *See, e.g., NELP Welcomes Federal Legislation to Stop Forced Arbitration*, NELP (Feb. 28, 2019), <https://www.nelp.org/news-releases/nelp-welcomes-federal-legislation-stop-forced-arbitration/> [<https://perma.cc/8W5C-G5F4>].

253. Lisa Nagele-Piazza, *Wells Fargo Agrees to Settle Race and Sex Bias Claims for \$7.8 Million*, SHRM (Aug. 28, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wells-fargo-agrees-to-settle-race-and-sex-bias-claims.aspx> [<https://perma.cc/34AG-GLE9>]; *Wells Fargo Agrees to Pay \$7.8 Million in Back Wages After U.S. Department of Labor Alleges Hiring Discrimination*, DOL (Aug. 24, 2020), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20200824> [<https://perma.cc/GMF2-XZDG>] (The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) "alleged that the San Francisco-based banking giant discriminated against 34,193 Black applicants for banking, customer service and administrative roles and 308 female applicants for administrative support jobs.").

254. *Id.*

255. *Id.*

256. *Id.* (noting the settlement also primarily addressed claims based on race rather than gender).

257. Emily Glazer, *At Wells Fargo, Discontent Simmers Among Female Executives*, WALL ST. J. (Aug. 31, 2018), <https://www.wsj.com/articles/at-wells-fargo-discontent-simmers-among-female-executives-1535707801> (last accessed Jan. 9, 2022).

258. *Id.*

259. *Id.*

260. Glazer, *supra* note 232. Earlier, the wealth management division had been accused of engaging in unethical practices, caused by the same high-pressure environment that had characterized the Community Bank. 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://www.wsj.com/articles/whistleblowers-detail-wells-fargo-wealth-management-woes-1532707096?mod=article_inline) (last accessed Jan. 9, 2022).

In addition, any number of individual women, including at least one of the women fired for failing to address fraudulent accounts in the division she managed, have sued for sex discrimination, but none of the actions have produced reported opinions or published findings.<sup>261</sup>

Taken together, these actions suggest that discrimination suits have not been a significant vehicle for addressing women's roles at Wells Fargo. The only case to address systemwide issues involved hiring, and then it alleged more pervasive issues of racial than gender bias.<sup>262</sup> The factors that disproportionately affect women, in contrast, are deeply embedded in the bank's high-pressure sales culture. To the extent that the culture disproportionately affects women, the larger issue is the legitimacy of the culture itself. As the *Guitron* case demonstrates,<sup>263</sup> it is difficult to address factors such as irregular hours or retaliatory harassment if impossible sales quotas and the excesses they produce are treated as legitimate.

### 5. Pathways Into The Corporate Suite

Any analysis of the role of gender in Wells Fargo's culture has to acknowledge the central role Carrie Tolstedt played. Tolstedt oversaw the Community Bank where Wells Fargo's worst excesses occurred.<sup>264</sup> She personally pressed her employees to increase cross-sell metrics and insulated the results from review.<sup>265</sup> Tolstedt demonstrates that it is certainly possible for women to be complicit in corporate wrong-doing, and that simply adding women to upper management ranks does not eliminate either that wrongdoing or the forces that skew gender outcomes.<sup>266</sup> Her rise in the corporate ranks, however, also illustrates several patterns that persist more generally and that narrow women's opportunities for advancement.

At Wells Fargo, the most telling comparison is not between Carrie Tolstedt and John Stumpf, the CEO to whom she reported. Instead, it is the comparison of Tolstedt and Stumpf with Richard M. Kovacevich, the Wells Fargo CEO who proceeded Stumpf and put in place the corporate culture that led to the scandal.<sup>267</sup> Kovacevich represents the trajectory of the modern, driven CEO, who takes over an organization from the outside, and recreates it to dramatically in-

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261. See, e.g., *Terrazas v. Wells Fargo Bank*, No. 04-275 (D. Ariz. Dec. 18, 2018) (ending with a stipulated dismissal with prejudice).

262. Nagele-Piazza, *supra* note 253 (indicating that the case focused on more pervasive issues of racial discrimination than sex discrimination and that the remedy involved simply hiring a few hundred additional workers minority or female workers at a time of widespread layoffs).

263. *Guitron v. Wells Fargo Bank*, *supra* note 239 (upholding whistleblower dismissal on the grounds that she failed to meet the sales quotas she had complained were impossible to meet without unethical practices).

264. *OCC Notice*, *supra* note 30 ¶¶ 14–15, at 6–7.

265. *Id.* ¶¶ 39–40, 42, 48, at 11–13.

266. Cahn et al., *supra* note 8.

267. Mclean, *supra* note 40.

crease its earnings and share price.<sup>268</sup> Stumpf and Tolstedt, in contrast, worked their way up through the ranks, internalizing and implementing the corporate culture Kovacevich created.<sup>269</sup> The contrast between them illustrates the different possible routes into the corporate suite.

Kovacevich, like Tolstedt and Stump, came from a modest background. His father worked in a sawmill 20 miles outside of Tacoma, Washington.<sup>270</sup> The comparisons, however, largely stop there. Kovacevich, a star pitcher, turned down an offer from the New York Yankees to accept a scholarship to Stanford.<sup>271</sup> A shoulder injury derailed any professional ambitions, but Kovacevich graduated with a degree in industrial engineering, and eventually an M.B.A. from Stanford Business School.<sup>272</sup> He started his career at General Mills, in Minneapolis, Minnesota, then moved after two years to Cincinnati, Ohio, to become general manager of General Mills' toy division.<sup>273</sup> After a few years, he took over a small photography business in New York started by former General Mills executives.<sup>274</sup> Three years later, Citibank recruited him for its consumer division and within two years, he was in charge of the bank's branch system in New York City.<sup>275</sup> When another man was promoted ahead of him for a position Kovacevich wanted, he moved back to Minneapolis and joined Norwest, then a small regional bank.<sup>276</sup> He quickly advanced, becoming chief operating officer and then president, within a few years of joining the company.<sup>277</sup> Kovacevich's repeated moves gave him valuable experience, and he knew how to make an immediate impression, gaining rapid promotions.<sup>278</sup> With each step, he sought the ability to impose his personal stamp on the organization he headed and when he hit roadblocks or saw new opportunities, he switched jobs, cities, and companies.<sup>279</sup>

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268. See *Kovacevich, Dick*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/books/culture-magazines/kovacevich-dick> [<https://perma.cc/T9EK-UUMT>] (describing Kovacevich's role in the growth of Norwest and its acquisition of Wells Fargo) (last visited Oct. 20, 2021).

269. *Id.* (quoting a former Wells Fargo employee that "what Dick Kovacevich implemented was John Stumpf's downfall.").

270. *Richard Kovacevich*, WIKIWAND, [https://www.wikiwand.com/en/Richard\\_Kovacevich](https://www.wikiwand.com/en/Richard_Kovacevich) [<https://perma.cc/XKG3-BJZS>] (last visited Oct. 20, 2021).

271. *Richard M. Kovacevich 1943-*, REFERENCE FOR BUS., <https://www.referenceforbusiness.com/biography/F-L/Kovacevich-Richard-M-1943.html#ixzz70YIi8PC6> [<https://perma.cc/JA34-99ZA>] (describing offer from the Yankees) (last visited Oct. 20, 2021).

272. *Kovacevich, Dick*, *supra* note 268.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. Kovacevich has been described "inspiring employees, sometimes resorting to theatrical antics to fire up team spirit." *Id.*

279. *Id.* (emphasizing that initially Kovacevich did not want to be a banker because he "preferred a less hierarchical business, where he would have more responsibility for key decisions.").

As the head of Norwest, Kovacevich emphasized two things:

First, cross-selling became central to his business model. He explained in an interview in 1998 that he saw bankers as “salespeople” “whose job was to ‘cross-sell,’ which meant getting ‘customers’—not ‘clients,’ but ‘customers’—to buy as many products as possible.”<sup>280</sup> A former Norwest executive commented, “It was a religion. It very much was the culture.”<sup>281</sup> Signs of “gaming” or rigging the numbers underlying the cross-sell metrics appeared while Kovacevich was CEO.<sup>282</sup> There was no follow-up effort to root out the misconduct.<sup>283</sup>

Second, Kovacevich spearheaded Norwest’s continual expansion into new products (consumer finance, insurance, and mortgages), new branches (1400 new branches in the early nineties), and growth through mergers, including Norwest’s 1998 acquisition of the smaller, but better known, Wells Fargo.<sup>284</sup> The banking industry journal *American Banker* chose Kovacevich as its banker of the year for 2003.<sup>285</sup> He stepped down as CEO in 2007 but stayed on as Chairman of the Board for an additional period to oversee Wells Fargo’s acquisition of Wachovia and its emergence as the third largest bank in the United States.<sup>286</sup>

While Kovacevich has been hailed as “a larger-than-life CEO,”<sup>287</sup> Stumpf and Tolstedt were closer to the midcentury model of the “organization man.”<sup>288</sup> They worked their way up through the ranks, absorbing and administering the

280. Mclean, *supra* note 140.

281. *Id.* By 2003, Wells Fargo averaged four products per customer, double the industry average. Richard M. Kovacevich 1943–, *supra* note 271.

282. *Id.* “Gaming” was defined in the Wells Fargo Code of Ethics as “the manipulation and/or misrepresentation of sales or referrals . . . in an attempt to receive compensation or to meet sales goals.” See Rucker, *supra* note 159.

One of Kovacevich’s corporate slogans was to see “people as a competitive advantage,” which was supposed to mean Wells Fargo venerated its everyday employees as trusted advisors to the customer. And yet in the early 2000s, Wells Fargo was losing 20% of all customers yearly while the bank’s entire workforce churned every three years, Kovacevich noted in an executive meeting in 2002. *Id.*

283. Alex Morrell, *Without Fraud, the Math Didn’t Work”: Wells Fargo’s Cuthroat Culture Was Reportedly Simmering for Decades*, YAHOO! FINANCE (May 31, 2017), <https://finance.yahoo.com/news/without-fraud-math-didn-t-162534702.html> [https://perma.cc/E29K-KVGR] (observing that “[a]lmost 15 years before the scandal became front-page news, in 2002, Wells Fargo’s internal investigations unit had noticed an uptick in what they called ‘sales integrity’ cases. ‘Whether real or perceived, team members . . . feel they cannot make sales goals without gaming the system,’ an investigator wrote in a report dated August 2004. ‘The incentive to cheat is based on the fear of losing their jobs.’ The report recommended that Wells consider reducing or eliminating sales goals, as several peer banks had done, and warned that the issue could lead to ‘loss of business and . . . diminished reputation in the community.’ There was no follow-up.”); see also *Ind. Dirs. Rep.*, *supra* note 13, at 80 (indicating that there were low level reports of sales quality issues in 2002).

284. Kovacevich, Dick, *supra* note 268.

285. *Id.*

286. Greg Farrell, *Kovacevich Steps Down at Wells Fargo*, FIN. TIMES (Sept. 22, 2009), <https://www.ft.com/content/e0308b18-a7cd-11de-b0ee-00144feabdc0> (last accessed, Jan. 9, 2022) (Kovacevich stayed on as Chairman of the Board for an additional 18 months to oversee an additional merger with Wachovia). For a discussion of the role of personality types in mergers and acquisition, see Afra Afsharipour, *Bias, Identity and M&A*, 2020 WIS. L. REV. 471, 476 (indicating that management studies and behavioral corporate finance suggest that public company acquisitions are “plagued by behavioral biases—such as hubris and ego gratification—on the part of management.”).

287. Mclean, *supra* note 140.

288. WHYTE, *supra* note 7.

corporate ethos Kovacevich created.<sup>289</sup> Stumpf grew up as one of eleven children on a dairy farm in Minnesota.<sup>290</sup> He shared a room with his brothers until he married.<sup>291</sup> He was an indifferent high school student, who eventually earned a B.A. from St. Cloud University. His first job in banking was as a “repo man,” repossessing the assets of those who failed to pay their debts. Six years later, in 1982, he joined Norwest, and stayed with the company through his retirement in 2016, thirty-four years later. Forbes describes him as rising “in lockstep—he ran various regions” until Dick Kovacevich called him to San Francisco and put him in charge of community banking.<sup>292</sup> Stumpf endorsed Kovacevich’s cross-sell model as his own.<sup>293</sup> A financial blog commented that the “result of Dick Kovacevich’s approach to build the plumbing in Wells Fargo is that he enabled troopers like John Stumpf to come up from the ranks to feel like the organization belongs to them.”<sup>294</sup>

Carrie Tolstedt also grew up in the Midwest and also came up through the ranks at Wells Fargo. Like Stumpf, she prospered at Wells Fargo only because she absorbed the corporate ethos. Her father owned a bakery in the small town of Kimball, Nebraska.<sup>295</sup> She left to attend the University of Nebraska.<sup>296</sup> She went to work for Norwest in 1986, while she was still in her twenties, and stayed there until she was forced out as a result of the fraudulent accounts scandal,<sup>297</sup> rising to become head of community banking in 2007, after Stumpf became CEO.<sup>298</sup> She was known at Wells Fargo as “a tireless worker, spending nights and weekends on the job and poring over even small details.”<sup>299</sup> The Independent Directors of the Board of Wells Fargo & Company Report described her as someone who ran a “tight ship” with everything “buttoned down.”<sup>300</sup> It also faulted her for maintaining “an ‘inner circle’ of staff that supported her, rein-

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289. Mclean, *supra* note 140.

290. Aimee Picchi, *5 Things to Know About Wells Fargo CEO John Stumpf*, CBS (Sept. 14, 2016), <https://www.cbsnews.com/news/5-things-to-know-about-wells-fargo-ceo-john-stumpf/> [https://perma.cc/CV5P-YFWN].

291. Halah Touryalai, *Wells Fargo: The Bank that Works*, FORBES (Jan 25, 2012), <https://www.forbes.com/sites/halahtouryalai/2012/01/25/wells-fargo-the-bank-that-works/?sh=d6aea76718e9> [https://perma.cc/ZDK7-6SD5].

292. *Id.*

293. Mclean, *supra* note 140.

294. Emmanuel Daniel, *Dick Kovacevich Came to Asia*, EMMANUEL DANIEL (July 18, 2012), <https://www.emmanueldaniel.com/dick-kovacevich-came-to-asia/> [https://perma.cc/XB2K-ZNSZ].

295. *The Hard Fall of Wells Fargo’s Carrie Tolstedt*, CBS (Apr. 11, 2017), <https://www.cbsnews.com/news/the-hard-fall-of-wells-fargos-carrie-tolstedt/> [https://perma.cc/JQH7-VGUX] [hereinafter *Hard Fall*].

296. *Id.*

297. *Id.* (indicating that she started at Northwest in 1986); see also *List: Most Powerful Women 2014*, FORTUNE, <https://fortune.com/most-powerful-women/2014/carrie-tolstedt/> [https://perma.cc/5L8R-GD3F] (listing her age as 54 in 2014). The *Wall Street Journal*, however, stated that she had been with the bank 27 years in 2016. *Id.*

298. *Ind. Dirs. Rep.*, *supra* note 13, at 46.

299. *List: Most Powerful Women 2014*, *supra* note 297.

300. *Ind. Dirs. Rep.*, *supra* note 13, at 46.

forced her views, and protected her.”<sup>301</sup> Emily Glazer of the *Wall Street Journal* reported that Tolstedt’s obsession with day-to-day operations and failure to delegate is one of the reasons she was not considered CEO material at Wells Fargo.<sup>302</sup> The strengths that allowed her to rise through the ranks as a woman – her ability to get the job done without challenging those above her – limited her ability to be seen as a potential CEO in line to succeed Stumpf had not both their careers been derailed by the scandal.

What these career pathways illustrate is the evolution of gendered pathways for advancement. Kovacevich represents the new breed of executives, who master the corporate tournament, reaching for new opportunities and switching jobs when they reach roadblocks. Their goals involve a mix of self-promotion and the opportunity to shift institutions toward new models that will boost profitability and establish their mark on an industry.<sup>303</sup> Wells Fargo, ironically, was a corporate culture that hired more from within, valuing those who internalized the companies’ culture values – the “troopers” who seek to perpetuate business models identified with the company.<sup>304</sup> The problem is that those who buy into institutional values have nowhere to go when those values prove bankrupt.

#### D. Wells Fargo’s Morality Tale

Wells Fargo illustrates the modern state of gender equity in large financial firms. On the one hand, women are now included in the company and even sometimes hold prominent roles. On the other hand, the nature of Wells Fargo’s corporate culture intensified factors associated with women’s disadvantages in corporate America. Prominent among them are the roller coaster nature of advancement. A *Forbes* cover in 2012 hailed Wells Fargo as “the bank that worked.”<sup>305</sup> The article concluded that “Stumpf has at once made Wells exceedingly profitable—for 2011 the bank’s net income jumped 28% to \$15.9 billion, on \$81 billion in revenue—and extremely safe.”<sup>306</sup> The following year, the *Los Angeles Times* broke the scandal on the unauthorized accounts, with the scandal ultimately tarnishing Wells Fargo’s corporate image and leading to billions in fines.<sup>307</sup> In such an environment, top executives were in the same posi-

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301. *Id.*

302. *List: Most Powerful Women 2014*, *supra* note 297.

303. For a critique of this leadership style, see Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable Cons*, HARV. BUS. REV. (Jan. 2004), <https://hbr.org/2004/01/narcissistic-leaders-the-incredible-pros-the-inevitable-cons> [<https://perma.cc/XB6T-8AZ6>].

304. See Mark W. Sheffert, *Wells Fargo Fiasco Resulted from Leadership Culture the Company Apparently Plans to Keep*, STAR TRIB. (Oct. 18, 2016), <https://www.startribune.com/wells-fargo-fiasco-resulted-from-leadership-culture-the-company-apparently-plans-to-keep/397520671/> [<https://perma.cc/RD3A-6335>] (describing Wells Fargo’s insular culture).

305. Touryalai, *supra* note 291.

306. *Id.*

307. See, e.g., E. Scott Reckard, *Wells Fargo Fires Workers Accused of Cheating on Sales Goals*, L.A. TIMES (Oct. 3, 2013), <http://articles.latimes.com/2013/oct/03/business/la-fi-mo-wells-fargo-workers-fired-20131003> (last accessed Jan. 9, 2022) (discussing Wells Fargo’s issues with sales pressures).

tion as many lower level employees: it was impossible to advance within the company without being complicit in unethical practices, but when the scandal broke, their careers might be over.<sup>308</sup>

Within this environment, what should be made of Carrie Tolstedt? Some commentators have argued that she was treated more harshly than Stumpf because she was a woman;<sup>309</sup> he was allowed to resign while the Wells Fargo Board retroactively fired her. In addition, he reached early settlements that left her as the senior official contesting the results.<sup>310</sup> She continues to battle SEC and OCC actions that leave her with greater exposure than Stumpf's settlements.<sup>311</sup> While the Board treated Tolstedt more harshly than it treated Stumpf, Stumpf's loyalty to Tolstedt was remarkable. His only hope when the scandal broke was to quickly clean house, and that would have meant firing Tolstedt. Instead, he rejected such advice in December 2015<sup>312</sup> and praised her at her retirement in September 2017, which occurred shortly before his own retirement in October 2016. He criticized her performance only after he stepped down, as part of the settlements he engineered to extricate himself from the ongoing investigations of Wells Fargo's misdeeds.<sup>313</sup> The Wells Fargo Board faulted him for moving too slowly to address the scandal and Tolstedt's role in it.<sup>314</sup>

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308. See *OCC Notice*, *supra* note 30 ¶ 7, at 4 (describing dilemmas Wells Fargo employees faced); see also Carbone & Black, *supra* note 14, Sec. II.B (using the term "plausible deniability" to describe incentive systems that encourage illegal or unethical practices while allowing senior executives to deny knowledge of the activities).

309. Tolstedt retired in 2016, after the scandal broke, at age 56. The Wells Fargo Board, however, retroactively fired her and clawed back \$47.3 million in compensation that she had received, in addition to the \$19 million that they had clawed back earlier. Wilford Frost & Dawn Giel, *Wells Fargo Board Slams Former CEO Stumpf and Tolstedt, Claws Back \$75 Million*, CNBC (Apr. 10, 2017), <https://www.cnbc.com/2017/04/10/wells-fargo-board-slams-stumpf-and-tolstedt-claws-back-millions.html> [<https://perma.cc/588L-2LUP>]. In contrast, Stumpf was allowed to retire. And while he faced an additional \$28 million in compensation clawbacks together with the \$41 million he originally had to forego, that was "far less in relative compensation" than Tolstedt's clawbacks. Victoria Medvec, *What Wells Fargo's Fake Accounts Scandal Says About How Women in Leadership Are Punished*, FORTUNE (Apr. 18, 2017), <https://fortune.com/2017/04/18/wells-fargo-former-ceo-john-stumpf-clawbacks-carrie-tolstedt/> [<https://perma.cc/53VJ-L8DE>].

310. *Id.*

311. Dave Michaels & Ben Eisen, *Wells Fargo Ex-CEO Settles SEC Claims, Former Consumer-Unit Head Faces Fraud Case*, WALL ST. J. (Nov. 13, 2020), <https://www.wsj.com/articles/wells-fargo-ex-ceo-settles-sec-claims-former-community-bank-head-faces-fraud-case-11605280547> (last accessed Jan. 9, 2022).

312. Stumpf continued to work closely with Tolstedt and to resist calls to fire her as the scandal unfolded. See Frost & Giel, *supra* note 308 (demonstrating his defense of Tolstedt in mid-2015; then indicating that the Chair of the Risk Management Committee advised Stumpf to fire Tolstedt in December 2015).

313. Marcy Gordon, *Wells Fargo CEO Faces Lawmakers, Apologizes Again*, PBS NEWS HOUR (Sept. 29, 2016), <https://www.pbs.org/newshour/economy/wells-fargo-ceo-lawmakers-defense> [<https://perma.cc/WJ7H-B9ZH>]. In the press release issued upon on Tolstedt's retirement, Stumpf called her a "principled" banker and a "dear friend." Stumpf had earlier testified to Congress that he never considered firing Tolstedt. *Hard Fall*, *supra* note 295.

314. *Ind. Dirs. Rep.*, *supra* note 13, at 10 (concluding that upper management was slow to react); see also Sheffert, *supra* note 304 (noting that at the time of the Senate hearings, Stumpf admitted that three years after news of the scandal appeared in the press, no senior executives had been fired).

Stumpf's treatment of Tolstedt contrasts with the treatment of many women during the financial crisis.<sup>315</sup> The CEOs of Morgan Stanley and Bank of America both deflected criticism of their handling of the crisis by firing the top women under them, individuals who at the time were among the highest ranking women in banking.<sup>316</sup> In those cases, the women were less culpable for what had happened than Tolstedt, but culpability was not the issue.<sup>317</sup> Instead, the CEOs saw an opportunity to buy time for themselves by casting the blame on someone else.<sup>318</sup> At lower levels within Wells Fargo, the same thing happened. Prominent women were terminated while similarly culpable men were not, either because the women had attracted negative publicity or because their terminations helped protect others.<sup>319</sup> The issue was not whether they bore some responsibility for the results; often executives like Morgan Stanley's Zoe Cruz did.<sup>320</sup> Instead, it was that given the narrow pathways women have had into the C-Suite, they had less ability to protect themselves.<sup>321</sup> Wells Fargo at least replaced Carrie Tolstedt with another woman, Mary Mack.<sup>322</sup> The overall representation of women in finance fell with the dot.com and financial crisis busts and with the mortgage-backed securities bubble.<sup>323</sup> Boom-bust cycles have not been good for women.

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315. See Ciaran Walker, *The Role of the Regulator in Supervising Culture in Financial Services Firms*, in WHITE COLLAR CRIME IN IR.: L. & POL'Y 103–05 (Joe McGrath ed. 2018) (discussing individual accountability; then explaining role of firm cultures in tolerating misconduct).

316. See Joe Hagan, *Only the Men Survive: The Crash of Zoe Cruz*, N.Y. MAG. 32 (May 5, 2008), <http://nymag.com/news/business/46476/> (last accessed Jan. 9, 2022) (describing how the head of Morgan Stanley engineered Cruz's dismissal to protect himself). Cruz, 52, had been at Morgan Stanley for 25 years. *Id.*; see also Louise Story & Eric Dash, *Bank of America Ousts Head of Risk Oversight*, N.Y. TIMES (June 5, 2009), <https://www.nytimes.com/2009/06/05/business/05risk.html> [<https://perma.cc/E7DM-N5WF>] (describing resignation of Amy Brinkley at Bank of America to help CEO Ken Lewis "hold on to his job"). Brinkley, 56, had spent 31 years, the bulk of her career, at Bank of America. *Id.*; Amy Woods Brinkley, MYNEXTSEASON, <https://mynextseason.com/team/amy-woods-brinkley/> [<https://perma.cc/T95A-WHED>].

317. Hagan, *id.* (describing Cruz's efforts to limit the bank's exposure to mortgage backed securities as warning signs appeared).

318. *Id.*

319. See, e.g., Terrazas v. Wells Fargo Bank, No. 04-275 (alleging that plaintiff was fired after a negative article in the Wall Street Journal while men who had similar or worse records were not fired).

320. See Hagan, *supra* note 316, at 120 ("[As] Mack interviewed the parties involved, it became clear that the blame was coalescing around Cruz."); Story & Dash, *supra* note 316 (describing Brinkley's resignation as a response to federal pressure to improve risk management at a time when she was the bank's chief risk officer).

321. See Hagan, *supra* note 316, at 34 (describing how some of the men were gleeful that Cruz was gone); see also Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street's Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J. L. & GENDER 175, 177–80 (2010) (describing Cruz's firing and the narrow pathways available to women in finance).

322. Kevin Wack, *Wells Fargo Consumer Chief May Testify of 'Fear' Her Predecessor Inspired*, AM. BANKER (Aug. 17, 2020), <https://www.americanbanker.com/news/wells-fargo-consumer-chief-may-testify-of-fear-her-predecessor-inspired> [<https://perma.cc/GK7X-K5B9>].

323. See William Alden, *Wall Street's Young Bankers Are Still Mostly White and Male*, Report Says, N.Y. TIMES (Sept. 30, 2014), <https://dealbook.nytimes.com/2014/09/30/wall-streets-young-bankers-are-still-mostly-white-and-male/> [<https://perma.cc/65S4-DL7V>]; T. Clifton Green et al., *Gender and Job*

The stories of the small number of top women in banking are inevitably anecdotal. The most telling accounts lie in the statistics. At lower levels than Tolsted's, Wells Fargo's women bore a disproportionate burden in its fake accounts scandal.<sup>324</sup> We know that, however, only because of the independent reports keeping track of misconduct charges and dismissals.<sup>325</sup> With respect to Wells Fargo's record in awarding commissions, incentive pay, and the benefits that enhance career prospects, there is no comprehensive data, only identification of the factors that drive gender disparities – factors that multiply in a high pressure environment without accountability for anything other than bottom line results.

#### IV

#### CONCLUSION: THE IMPLICATIONS FOR BOARD DIVERSITY

What are the implications of the Wells Fargo example for board diversity? The immediate answer would seem to be very little. In the shareholders' derivative action brought against the Wells Fargo Board for its failure to detect and address the unauthorized accounts scandal, seven of the sixteen defendants were women.<sup>326</sup> Critics have faulted the "pliant board" that never inquired closely into the company's operation;<sup>327</sup> the Board was critical of the information Wells Fargo executives provided, but did not follow up on its own until late in the scandal.<sup>328</sup> Having seven women on a sixteen member board did not transform board practices, nor did it operate to address the misconduct. Simply having a critical mass of women on Wells Fargo's Board neither strengthened Wells Fargo compliance practices nor its anti-discrimination efforts. And while Wells Fargo did have women like Carrie Tolstedt in upper management, it did not have female successors to Richard Kovacevich, that is, leaders who remade the institution to reflect their personal vision or values. Tolstedt, for better and definitely for worse, was selected and promoted to the degree she implemented Kovacevich's model, not her own.

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*Performance: Evidence from Wall Street* (Nat'l Bureau of Econ. Rsch., Working Paper No. 12897, 2007), available at <https://www.nber.org/papers/w12897>. On enrollment, see ASS'N TO ADVANCE COLLEGIATE SCHS. OF BUS., BUS. SCH. DATA TRENDS AND 2012 LIST OF ACCREDITED SCHS. 17 (2012), available at <https://studylib.net/doc/10813401/business-school-data-trends-and-2012-list-of-accredited-s>.

324. Egan, et al., *supra* note 24.

325. *Id.*

326. *S'holder Complaint*, *supra* note 15 ¶¶ 55, 76–91, at 12, 22–25 (listing defendants: John G. Stumpf, John D. Baker II, Elaine L. Chao, John S. Chen, Lloyd H. Dean, Elizabeth A. Duke, Susan E. Engel, Enrique Hernandez, Donald M. James, Cynthia H. Milligan, Enrique Peña, James H. Quigley, Judith M. Runstad, Steven W. Sanger, Susan G. Swenson, and Suzanne M. Vautrinot).

327. Sheffert, *supra* note 304.

328. See Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2205 (2019) (describing the board's role and noting that board members were "highly critical" of the initial management presentation yet relied on management to deal with the issue).

A more effective model would combine diversity and corporate reform objectives. The current system allows those who “seize the day” to enrich themselves, their boards, and short-term shareholders by producing immediate results. The appearance of success in turn reduces scrutiny, and the evisceration of effective third-party oversight makes suborning internal controls less risky.<sup>329</sup> This, in turn, increases the pressure to select for the Richard Kovacevichs who project confidence and the ability to transform institutions. It also contributes to the creation of pressured workplaces where “traits such as over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception” are advantages,<sup>330</sup> advantages linked to stereotypically male attributes.<sup>331</sup> The goal of diversity efforts ought to be to strive for something more than an equal right to profit from corporate misconduct. Such efforts ought, instead, to be more aware of the subtle interactions between the celebration of internal competition and the exacerbation of gender stereotypes tied to ambition, overconfidence, and amorality. Such efforts may benefit from the following lessons from the Wells Fargo scandal.

First, adding women and “stirring” does not in itself transform corporate practices. The social science literature has reviewed the various claims that diverse boards improve corporate performance and reduce the incidences of various types of fraud, earnings management, and accounting irregularities.<sup>332</sup> The most rigorous studies indicate the effects – when they happen – do not come from the presence of women per se, but rather that the presence of women and improved performance may both reflect other factors such as greater transparency or the inclusion of women board members more committed to diverse stakeholders.<sup>333</sup> The Wells Fargo example underscores the conclusion that board composition may not matter if board members are not willing to look behind management representations and play a more active oversight role.<sup>334</sup> Instead, more diverse boards may matter only if the diversity occurs together with greater pressure for board engagement – or perhaps the threat of greater board liability.<sup>335</sup>

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329. See 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) (observing that if the CEO produces strong initial returns, that “creates greater autonomy by both enhancing his bargaining position over time and increasing the cognitive commitment of the board to him.”).

330. *Id.* at 288.

331. CHAMORRO-PREMUZIC, *supra* note 105 (arguing that these traits lead to the greater selection of male leaders).

332. See Douglas J. Cumming et al., *Gender Diversity and Securities Fraud*, 58 ACAD. MGMT J. 34 (Feb. 9, 2015), available at <https://ssrn.com/abstract=2562399> (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud, and 742 non-fraudulent companies for a control group).

333. For a review of this literature, see Cahn et al., *supra* note 8.

334. Gadinis & Miazd, *supra* note 328, at 2207 (commenting on the historic difficulty of establishing board liability).

335. *Id.* (suggesting that the growth in compliance efforts also increases the likelihood of board liability because compliance reports establish board knowledge of corporate red flags); John Armour et

Second, greater board diversity may contribute to building networks that promote diversity more generally. Diverse board members may lobby for more management diversity;<sup>336</sup> they may also encourage pathways that allow women to move more easily from company to company. When Wells Fargo finally brought in an outside CEO, Charles Scharf, at least seven of the senior African-American women at Wells Fargo left, believing that their path to further advancement would be blocked.<sup>337</sup> Media accounts emphasized that Scharf tended to hire executives with whom he had worked previously – he installed his own team at Wells Fargo – and those executives were white males.<sup>338</sup> A number of the women who left went to companies with more diverse senior management. Diverse boards expand the networks that increase the movement across companies; they can also inspire women within the company to believe that pathways to advancement are open to them.<sup>339</sup>

Third, board diversity is easier to accomplish than management diversity. Kovacevich saw banking in a negative light early in his career because it was too hierarchical; he preferred to be in a position where he would have more authority to make key decisions.<sup>340</sup> What he probably saw was that, as a regulated industry, banking had too many rules. He achieved his Wells Fargo successes at the beginning of a deregulatory era. Still, most corporate hierarchies are pyramids. As one rises closer to the top, there are fewer positions available. Choosing one candidate for a top position is at the expense of others who, often, as the Wells Fargo example demonstrates, leave as a result. Boards in contrast are more horizontal, and board members are not necessarily competing with each other for advancement. Moreover, boards have the power to engineer greater turnover through term limits or other means that ensure a steady flow of new members.<sup>341</sup> Board diversity is therefore an easy substitute for upper management diversity, but the greatest changes come from management reform.

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al., *Board Compliance*, 104 MINN. L. REV. 1191, 1193–94 (2020) (describing board passivity at Wells Fargo and elsewhere).

336. For example, Hillary Clinton on the Walmart board.

337. Austin Weinstein, “*We Need to Do More*”: *Seven High-Ranking Black Women Leave Wells Fargo*, CHARLOTTE OBSERVER (Sept. 30, 2020), <https://account.charlotteobserver.com/paywall/registration?resume=246012155>.

338. *Id.*

339. See, e.g., Sandeep Gopalan & Katherine Watson, *An Agency Theoretical Approach to Corporate Board Diversity*, 52 SAN DIEGO L. REV. 1, 20 (2015) (arguing that “board diversity may operate as a separation signal—our company is different because we care about social justice issues—or an identification signal—our company is part of the group that cares about social justice issues.”); Celia Huber & Sara O’Rourke, *How to Accelerate Gender Diversity on Boards*, MCKINSEY & CO. (Jan. 16, 2017), <https://www.mckinsey.com/featured-insights/leadership/how-to-accelerate-gender-diversity-on-boards> [<https://perma.cc/C2SG-W33F>] (observing that women board members become role models for women executives).

340. Kovacevich, *Dick*, *supra* note 268.

341. See Darren Rosenblum & Yaron Nili, *Board Diversity By Term Limits?*, 71 ALA. L. REV. 211, 216–17 (2019) (arguing for use of term limits to speed the increase in diversity).

Fourth, boards can nonetheless be avenues for corporate reform.<sup>342</sup> Board liability is a powerful weapon.<sup>343</sup> And bringing in new, truly independent board members can be a way of increasing scrutiny or prioritizing new developments or greater attention to stakeholders such as customers or employees.<sup>344</sup> One of the more powerful tools a board has is the ability to inquire into the dark shadows that cloak or minimize corporate wrongdoing.<sup>345</sup> The Wells Fargo scandal would never have occurred if the extent of the problem had been visible or if it had been closely monitored when the warning signs first appeared.<sup>346</sup> The fact that women tend to be disproportionately penalized in corporate scandals means women have more to lose when they become complicit in corporate misconduct.

More diverse boards can thus be instruments to facilitate closer examination of the practices that link gender disparities and corporate malfeasance – but only where there is a will to look and acknowledge the results of greater board activism. Otherwise, the new board members will be in the position of Carrie Tolstedt – or Elaine Chao, who left the Wells Fargo Board just as the scandal was breaking to become Secretary of Commerce.<sup>347</sup> Neither had the will to confront what appeared to be one of the most successful banks in the United States. Had they done so, they could have accomplished reform only by questioning the very foundation of the company in which they were embedded. Systematic reform, in contrast, requires changing the dynamic that allows the few to profit handsomely at the expense of everyone else.

At the core of these challenges is the ability to profit by breaking the rules and getting away with it.<sup>348</sup> The ability to profit by defying legal or ethical re-

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342. The topic of corporate reform is, of course, immense. The point here is simply that the issue of gender diversity should be of thought of together with ESG principles rather than separate from them. For a more extensive discussion of the connections, see Cahn, et al., *supra* note 12.

343. See Leo E. Strine et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1887-88 (2021) (observing corporate boards are legally required to be reasonably informed concerning the corporation's operation and business performance, and is in compliance with law).

344. For an analysis on when more independent directors are most likely to have a positive impact on board vigilance, see Yuval Feldman et al., *Corporate Law for Good People*, 115 NW. L. REV. 1125, 1154 (2021) (arguing that “independent directors have the potential to improve corporate governance if measures are taken to address the subtle conflicts of interest that undermine their performance.”).

345. See Cahn, et al., *supra* note 12 (arguing that much of the apparent correlation between greater board diversity and business performance comes from more active boards and particularly board audit committees).

346. See *Shaev v. Baker*, No. 16-CV-05541-JST, 2017 WL 1735573, at \*9–15 (N.D. Cal. May 4, 2017) (examining allegations stemming from the failure to investigate Wells Fargo's account fraud scandal).

347. Lizzy Price, *As Ethics Probes Build, Will Elaine Chao Answer for Wells Fargo Fraud Scandal?*, MORNING CONSULT (Sept. 6, 2019), <https://morningconsult.com/opinions/as-ethics-probes-build-will-elaine-chao-answer-for-wells-fargo-fraud-scandal/> [https://perma.cc/WUV8-UCV3].

348. See generally *The Triple Bind*, *supra* note 8 (arguing that regimes that allow rule-breaking with impunity disadvantage women).

strains resets the terms of the marketplace for everyone else.<sup>349</sup> As this article has demonstrated, women may find that, like Carrie Tolstedt, they cannot advance without engaging in misconduct, but that they also are significantly less likely than the men around them to get away with it.<sup>350</sup> That makes women important allies in the movement for corporate reform; sustaining greater diversity and promoting corporations as “law abiding citizens”<sup>351</sup> are inextricably linked.

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349. George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECONS. 488 (1970) (arguing that the ability of used car dealers to disguise the quality of their products created a “Gresham’s dynamic” or a race to the bottom in which honest companies find that they cannot compete with ethically compromised ones).

350. See *The Triple Bind*, *supra* note 8 (arguing that in fact women face a triple bind in that they are also more likely to be driven out of such marketplaces).

351. Strine et al., *supra* note 343, at 1922.