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An Economic, Psychological, and Linguistic Explanation of (Some Reasons) Why Women Don't Get a Fair Shake

Claire A. Hill[†]

Introduction

Fair Shake describes workplace dynamics that deeply disadvantage women.¹ My (wildly optimistic) aim here is to explain how those dynamics might arise and persist consistent with orthodox economic theory, and to suggest how orthodox economic theory might better accommodate dynamics of this sort. My more realistic aim is to open the door to such an inquiry

In the world depicted in *Fair Shake*, companies are surviving, and sometimes thriving, even though they are not properly rewarding skilled and talented female employees: such employees may quit or may even be fired. Under orthodox theory, these companies should be outcompeted by companies that do reward female employees' skill and talent.² Having been outcompeted, such companies should fail. Yet, while some do, many do not. And even those that do eventually fail are able to continue their problematic (that is, not merit-based) practices for quite a while.

There are several ways to resolve this puzzle. Perhaps the authors' assessment that the women have skill and talent, and were not properly rewarded for other reasons, is wrong. But that seems unlikely: the authors' case studies are very well documented, as is their broader evidence for this proposition, that women's prospects in the workplace are not always merit based.³

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1. NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, *FAIR SHAKE: WOMEN AND THE FIGHT TO BUILD A JUST ECONOMY* (2024).

2. *See generally* GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2010) (analyzing and trying to explain what might account for discrimination in employment given that employers must pay to discriminate.)

3. Of course, non-merit-based treatment is not confined to women. There are many reasons independent of gender why an employer might not recognize or reward merit.

Perhaps the worldview that markets work well enough that firms making bad personnel decisions should be outcompeted is wrong. But how could that be?

I argue here that markets do work well enough, but that “well enough” does not mean that only the fit(test) survive. It’s not as though there is pure competition among the competitor firms that leaves only the (fittest) victor surviving. As philosopher Daniel Milo explains, pure competition is *artificial* selection, where two or more stylized competitors are sent into “battle,” what we see in the world is actually the far more unwieldy *natural* selection.⁴ There are multiple types of competition on multiple dimensions, with no discrete beginning or end time to the particular competition. *What survives only needs to be good enough to do so.*⁵ And among the entities that survived, how do we know which qualities account for those entities’ success? The selection metaphor, again founded on a simple phenomenon, obscures the extent to which the assessment here is complicated and contingent—perhaps some mixture of luck and skill.

Critically, nobody knows who is going to win, or at least not lose, the competition.⁶ Business actors (including managers and investors) have to decide who to bet on before the winner is known. How do they do that? One appealing strategy is by hypothesizing what well-regarded others might do or copying what they do.⁷ Knowing that business actors will be looking for very quick demonstrations of good results, would-be competitors make decisions with a view towards short-term results, even if a regard for the longer term would counsel a different course.⁸

4. DANIEL MILO, GOOD ENOUGH: THE TOLERANCE FOR MEDIOCRITY IN NATURE AND SOCIETY 12 (2019).

5. *Id.* at 6 (“Human society is not ruthlessly competitive, and neither is nature. Both are tolerant of excess, inertia, error, mediocrity, and failed experiment. Where great successes occur in society and in nature, luck can be far more important than talent.”).

6. Note that even the broad applicability of the competition metaphor is coded male. That competition that yields a victor, as opposed to mutual cooperation that can make both sides better off, is an oft-discussed distinction between male and female conversational styles and indeed, modes of interacting. *See generally* DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND: MEN AND WOMEN IN CONVERSATION 42 (1990) (discussing differences among males and females as to competition, cooperation, and their respective interests in and ways of establishing status and connecting with one another).

7. Claire A. Hill & Alessio M. Paces, *The Neglected Role of Justification under Uncertainty in Corporate Governance and Finance*, 3 ANNALS CORP. GOVERNANCE 276, 303–08 (2018). *See also* Claire A. Hill, *Justification Norms under Uncertainty: A Preliminary Inquiry*, 17 CONN. INS. L.J. 27, 33–38 (2010).

8. Hill & Paces, *supra* note 7, at 276.

More broadly, business actors have to make decisions as to what is apt to work, and assessments as to what is working and what is not working. While orthodox theory characterizes the process as one of “seeking information,” the real-world process is far from straightforward, and different people can and do come to different conclusions.⁹ And necessarily so—not only do we live in a world of incomplete information, we live in a world of uncertainty, in which we might not know “complete” information, except perhaps in retrospect.¹⁰

I. On Prototypes and Proxies

What influences people’s decisions and assessments could of course not be feasibly be addressed in anything shorter than a multi-volume treatise. Here, I discuss some aspects of the inquiry, first in general, and then, in the context of gender: the role of prototypes¹¹ and proxies.¹² While not in common parlance, the terms are nevertheless in common currency—they are well understood and pervasive. As explained further below, prototypes are the typical examples of a category. (Think of a sunset. Or a cat.) Proxies are indirect indications of a fact: making erudite-sounding references to obscure historical facts is an indication, or proxy, of being learned or perhaps wise.

9. See Claire A. Hill, *Repetition, Ritual, and Reputation: How Do Market Participants Deal With (Some Types of) Incomplete Information?*, WISC. L. REV. 515 (2020).

10. See generally JOHN KAY & MERVYN KING, *RADICAL UNCERTAINTY: DECISION-MAKING BEYOND THE NUMBERS* (2022) (arguing that we live in a of uncertainty, in which possible and associated probabilities are not known, and discussing the implications thereof).

11. There is extensive literature distinguishing between prototypes and exemplars, and between different theories of prototypes. See generally *Prototype Theory*, SCIENCE DIRECT, <https://www.sciencedirect.com/topics/social-sciences/prototype-theory> [<https://perma.cc/W6GB-QH88>] (summarizing prototype theories); *Concepts*, STAN. ENCYC. PHIL. <https://plato.stanford.edu/entries/concepts/> [<https://perma.cc/4BE5-F4AX>] (summarizing philosophy of concepts). These distinctions are irrelevant for my purposes; I use a rough and intuitive sense of the term. See generally STEVEN WINTER, *A CLEARING IN THE FOREST: LAW, LIFE AND MIND* (2001) (describing prototypes as the category applies in the legal context).

12. For the use of the term “proxy” in this sense, see, e.g., Akshay R. Rao, *The Quality of Price as a Quality Cue*, 42 J. MKTG. RSCH. 401, 401 (2005) (“In the economics-oriented literature and in the emerging empirical tradition in marketing and consumer behavior, it was becoming increasingly apparent that consumers frequently used price as a proxy for product quality.”) (citations omitted). Note that the related term usually used in the economics literature is “signal.” See Spence, *infra* note 20.

Prototypes and proxies are commonly considered in discussions of gender. But the discussions often characterize gender prototypes and proxies as inaccurate and bad, rather than taking seriously their inevitability and what follows from that. Below I introduce prototypes and proxies in general and consider gender-related prototypes and proxies.

People organize their worldviews using prototypes. Experiences (and people, and most other things) are not singular—a person is an x, sharing x-ness with other x's. A singer shares an inclination and ability to sing with other singers. A skyscraper shares the attributes of a skyscraper—a tall building that “scrapes the sky”—with other skyscrapers. “Singer” and “skyscraper” can be viewed as categories.¹³ Categories have prototypes, or examples that are typical of the category, examples that immediately come to mind. A singing dog or bird is probably not a prototypical singer, nor is, in a classic example, the Pope or a four-year-old boy a prototypical bachelor. The prototypical bachelor in conversations about these examples was sometimes George Clooney, before his marriage to Amal Clooney.¹⁴

Think of Santa Claus. I would wager that you have a mental image of a portly jocular bearded older man with white hair dressed in a red outfit with white trim saying “Ho, Ho, Ho.” Santa Claus is no outlier in this respect. Supplying prototypical people is actually the business model of “Central Casting,” an agency that provides background actors for movies and television. The agency opened in 1925 and is still in existence.¹⁵ The phrase “out of Central Casting,” first used in 1953 in an article about an eighty-three-year-old man who had enrolled at UCLA,¹⁶ has come to be used figuratively, albeit perhaps not by generations after Gen X, to describe a person well summoned up by the applicable prototype. Indeed, the man in the

13. See Roland Fryer & Matthew O. Jackson, *A Categorical Model of Cognition and Biased Decision Making*, 8 B.E.J. THEORETICAL ECON. 1 (2008) (discussing the history, importance, and inevitability of “categorization”).

14. See Nichola Murphy, *George Clooney's Friends' Initial Reaction to Wife Amal Before Venice Wedding*, HELLO! MAG. (Aug. 7, 2023), <https://www.hellomagazine.com/brides/499566/george-clooney-friends-initial-reaction-to-wife-amal-before-venice-wedding> [https://perma.cc/YP6H-FTSR] (describing George Clooney as the paradigmatic bachelor); see also GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* (1987) (discussing the bachelor example). See generally WINTER, *supra* note 11 (describing categorization and prototypes in the legal context).

15. *What Does Straight Out of Central Casting Mean?*, CENT. CASTING (Apr. 2, 2020), <https://www.centralcasting.com/what-does-straight-out-of-central-casting-mean/> [https://perma.cc/JM4T-7CPM].

16. *Id.*

1953 article was described as “having ‘a formidable shock of white hair and a magnificent goatee’” and looking “as if he had just walked out of Central Casting with the role of a witty, kindly old prospector in the latest western movie.”¹⁷

A more recent example concerns the ouster of Disney CEO Bob Chapek, and his replacement with his immediate predecessor in the job, Bob Iger: “Bob Iger’s shoes were impossible to fill,” said Jeffrey Cole, director of USC’s Center for the Digital Future. “Chapek wasn’t as diplomatic or elegant or smooth as Iger He just wasn’t Central Casting’s idea of the CEO who would follow Bob Iger.”¹⁸

As noted above, prototypes aren’t just about physical appearances. A surly profane and drunken (but plump, white-bearded, and suitably attired) Santa Claus wouldn’t be considered a real Santa Claus, as countless movies make clear. And note that it was Chapek’s lack of diplomacy and “smooth[ness]” as much as his lack of “elega[nce]” that made him seem like the wrong man for the job.¹⁹ Note too that the real or figurative Central Casting might have far more than one idea as to who could succeed Iger—there isn’t just one prototypical CEO. Santa Claus is pretty close to having only one prototype, but a category may have many prototypes. Consider the category of “chef:” it is easy to conjure up several different prototypes.

A proxy is an indirect conveyance of information that complements or substitutes for direct conveyance.²⁰ This does not

17. *Id.*

18. Meg James, *Behind the Stunning Exit of Disney CEO Bob Chapek*, L.A. TIMES (Nov. 21, 2022), <https://www.latimes.com/entertainment-arts/business/story/2022-11-21/bob-chapek-disney-ouster-bog-iger> [<https://perma.cc/G9M2-ZWTE>]. Donald Trump is also known to make use of the phrase “central casting.” See Michael Collins & John Fritze, *Donald Trump, a Former TV Star, Often Sees Those Around Him as ‘Central Casting’*, USA TODAY (Feb. 25, 2021), <https://www.usatoday.com/story/news/politics/2019/02/25/donald-trump-often-uses-central-casting-describe-those-around-him/2981978002/> [<https://perma.cc/J5VK-44YC>].

19. James, *supra* note 18.

20. For my purposes, the terms are largely synonymous. See generally *Signaling Theory*, SCIENCEDIRECT, <https://www.sciencedirect.com/topics/economics-econometrics-and-finance/signaling-theory> [<https://perma.cc/P4YG-98AX>] (summarizing signaling). The most-discussed type of signaling is Spence signaling. See Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973), known as the seminal paper on Spence signaling. I use the term proxy because signaling has come to be associated with Spence signaling, which is a particular subtype of signaling not relevant to my use of the term here. Spence signaling involves resolving the problem of asymmetric information by the information possessor’s use of a costly device to convince the information seeker. For instance, a rich person spends money

imply that there is (or is not) a *conveyor*. Rather, a proxy is something the conveyee (decision-maker, actor, etc.) takes as information for a particular proposition, whether purposively conveyed to that end or not.

We can't help but use proxies to figure out what is true or what we should do—much of what we want to know can't be directly conveyed. We take a person's ostentatious spending, or casual references to exotic travel or consumption of luxury goods, as evidence that the person is rich. We take a person's rudeness to his subordinates and to waitstaff as evidence that the person is generally unkind. We take a job applicant's extensive preparation for an interview as evidence that the applicant is capable of and motivated to be prepared in other contexts.

Proxies are related to “signals,” a term from economics.²¹ In the standard economics use of “signaling,” the focus is on purposiveness—for instance, a person is spending ostentatiously to convince people that they are rich. Saying they are rich would be dismissed as self-serving, so they “signal” that they are rich by doing something that costs them far more if they are not rich (spending a great deal) than if they are.²² But, as the other examples suggest, there is a more general phenomenon at issue, of people trying to determine the presence of a characteristic or a state of affairs using suggestive, but far from definitive, evidence.

Again, we use proxies constantly—doing otherwise would be unthinkable, given the extent to which we need to act and make decisions based on incomplete information. What “authority” should we rely on as to what is true about the world? What food should we eat or not eat? Should we bring an umbrella and raincoat? Consider the process by which we make inferences that we use to guide us. Obviously, proxies are not perfect—you might conclude that food that didn't smell spoiled was safe to eat and later find out you were

ostentatiously to show they have enough that they can afford to do so. Or a person spends years getting a college degree to convince a prospective employer that the person is willing to make that investment. By contrast, the kind of proxy/signal at issue here is not necessarily one used purposively by the information possessor. The focus of my account is the proxy's use by the information seeker as an input in her assessment and decision. See generally Hill, *supra* note 7; Claire A. Hill, *Making Sense of Fallacies*, in *HIDDEN FALLACIES IN CORPORATE LAW AND FINANCIAL REGULATION* (Alexandra Andhov, Claire A. Hill & Saule T. Omarova, eds., 2025) (arguing that economics and law and economics far more often depict the process by which information is conveyed as Spence signaling than is warranted). I also avoid the term “signal” because it has been co-opted by semiotics into a term that has strayed far from its intuitive roots.

21. See, e.g., Spence, *supra* note 20.

22. This is an example of Spence signaling. *Id.*

wrong. Moreover, proxies are very sensitive to context. A sea of umbrella wearing, raincoat-clad people outside might be filming a movie rather than protecting themselves from the rain. An American lawyer who was thought to be effective in the United States because he was very assertive might, in another country, be thought to be boorish and difficult. This example raises another important aspect of proxies and prototypes: the extent to which the ultimate categories at issue are coarser or finer. Degrees of aggressiveness might be important to someone in the United States, whereas, in a country where lawyers were less adversarial, there might be a coarser prototype, and there might not be proxies for differing degrees of adversariness. This will prove very important when we turn expressly to the concept of gender.²³

Finally, of course, there are significant changes over time.²⁴

An interesting example is Sam Bankman-Fried (SBF). People are always looking for “the hot new thing”—notably, for this purpose, the genius who is capable of generating hot new business ideas. Genius doesn’t come pre-labeled as such: thus, we need a proxy. For a time, the ways SBF presented himself served in combination as proxies, and the overall persona became a prototype. But given his downfall, a hoodie-wearing, disheveled, and inattentive persona may no longer serve as a proxy for or prototype of genius, as described in a bit more detail below.

Not for Bankman-Fried the physical cage of a suit and tie. Instead, the T-shirt, cargo shorts and sneakers, often worn with white running socks scrunched down at the ankle. And not just any T-shirt and cargo shorts, but what could seem like the baggiest, most stretched out, most slept in, most consciously unflattering T-shirts and shorts; the most unkempt bed-head.²⁵

23. See Vallay Varro, *We've Got to Stop Lumping All Asian-Americans Together*, ED POST (Jan. 27, 2017), <https://www.edpost.com/stories/weve-got-to-stop-lumping-all-asian-americans-together?form=MG0AV3> [<https://perma.cc/656G-WMMV>] (discussing the concept of model minority, akin to a prototype).

24. See Daphne van der Pas, Loes Aldering & Angela L. Bos, *Looks Like a Leader: Measuring Evolution in Gendered Politician Stereotypes*, 46 POL. BEHAV. 1653 (2024).

25. Vanessa Friedman, *Hey, Silicon Valley, Maybe It's Time to Dress Up, Not Down*, N.Y. TIMES (Dec. 13, 2022) <https://www.nytimes.com/2022/12/13/style/sam-bankman-fried-style.html> [<https://perma.cc/DHA6-B974>]; see also Calder McHugh, *Did Sam Bankman-Fried Just End the Era of the Boy Genius?*, POLITICO (Feb. 10, 2023), <https://www.politico.com/news/magazine/2023/02/10/sam-bankman-fried-crypto-image-00081637> [<https://perma.cc/B8NG-BXTJ>] (“SBF . . . donned a regular uniform of sneakers, long white socks, shorts that went below his knees and a long T-shirt that sometimes seemed barely laundered. He let his hair grow in every direction. This dishevelment seemed curated to advertise his youth and irreverence.”).

Famously, SBF would play video games during meetings where he was seeking investors' funds,²⁶ as though he was so brilliant and so nonchalant about getting money that he couldn't and wouldn't devote his full attention to persuading them that he was worth investing in.

Clearly, dirty clothes, messy hair, and not paying attention in a business meeting is not in any direct way an indication of genius generally or worthwhile business ideas in particular. Yet for a time, it came to be so. There is no straightforwardly reliable test—like, for instance, a very difficult math test—that could pick out the kind of genius being sought, someone who had big money-winning ideas. So, this proxy was used instead and came to constitute a prototype.²⁷ An investor and marketing professor gave this description of the prototype and its underlying rationale: “It’s the ultimate billionaire white boy tech flex: [SBF is saying that he is] so above convention. [He is] so special [that he is] not subject to the same rules and propriety as everyone else.”²⁸

Subsequent to SBF’s fall from fortune and grace, the prototype he instantiated may have run its course. Articles recounting his fall have had titles such as *Hey Silicon Valley, Maybe It’s Time to Dress Up, Not Down: Sam Bankman-Fried’s Choices May Signal an End to the Schlubby Mystique*,²⁹ and *Wait, When Did the Schlubs of Silicon Valley Learn to Dress?: Tech Moguls Trade Hoodies for Conventional Style Amid Fresh Scrutiny of the Industry; Dressing Down ‘Is So Played Out.’*³⁰ The search for the hot new thing will continue, but it may look rather different than it did in SBF’s heyday.

As the foregoing makes clear, prototypes and proxies are often closely linked. Consider the reasons why Sam Waterston, who played District Attorney Jack McCoy on television for many years, was used as a spokesperson for a brokerage house advertising to get investors to entrust it with money: “At the end of the day, [the

26. Brittney Nguyen, *Sam Bankman-Fried Was Once Caught Playing the Video Game ‘League of Legends’ During a Pitch Meeting for FTX*, BUS. INSIDER (Nov. 10, 2022), <https://www.businessinsider.com/ftx-sam-bankman-fried-league-of-legends-investor-pitch-meeting-2022-11> [<https://perma.cc/Z84J-RZM2>].

27. See, e.g., Emily Peck, *Sam Bankman-Fried’s “Underdressed Genius” Look*, AXIOS (Nov. 28, 2022), <https://www.axios.com/2022/11/28/sam-bankman-frieds-genius-look> [<https://perma.cc/HC57-W7HN>].

28. Friedman, *supra* note 25.

29. *Id.*

30. Jacob Gallagher, *Wait, When Did the Schlubs of Silicon Valley Learn to Dress?*, WALL ST. J. (Mar. 25, 2024), <https://www.wsj.com/style/fashion/silicon-valley-tech-schlubs-fashion-897909ad> [<https://perma.cc/UJG5-NF46>].

advertising agency responsible for the advertising, together with the client] decided he is a valuable, credible spokesman for the idea of independence. In his role on 'Law & Order,' he is the voice of critical, independent thinking."³¹

McCoy was depicted as someone with unimpeachable integrity—he would never lie or cheat, nor would he proceed without what he deemed sufficient knowledge. He also didn't hesitate to take an unpopular position when he thought doing so was warranted by the facts and circumstances.

Jack McCoy is thus a (not *the*) prototypical trustworthy authoritative person. His taking unpopular stances at times is a proxy for an ability and willingness to think critically and be independent. Of course, the person appearing in the advertisement is not McCoy, but instead, the actor who played him, Sam Waterston. There is more to say, beyond our scope, as to why potential investors would imbue Waterston with McCoy's characteristics. At the least, they might think that Waterston would not have thought it worthwhile to have risked his reputation—and continuing prospects of playing McCoy—to get even a generous sum of money if he thought the firm was sketchy. Indeed, note that none of the foregoing suggests that prototypes or proxies are necessarily inaccurate, a topic to which I will return. Moreover, prototypes and proxies can also be starting points. After all, we have to start somewhere. Sometimes, though, prototypes and proxies start off accurate but become inaccurate: they are "sticky," not departed from notwithstanding evidence to the contrary.

How is this relevant to *Fair Shake*? In the orthodox economic picture, a) there's a "fact" as to who has talent and skill, b) determining that "fact" involves a process that will often be tractable and worthwhile, and c) failing at that determination should mean non-survival on grounds of unfitness. But the reality is far more complex. Even if we had a full list of what characteristics a desirable employee would have, we would still need to make the determination of whether someone had them—notably, including proxies for those characteristics, and prototypes, of what someone with those characteristics would be (look) like.

31. Stuart Elliot, *Actor Gets an Encore as Broker's Spokesman*, N.Y. TIMES (Apr. 19, 2006), <https://www.nytimes.com/2006/04/19/business/actor-gets-an-encore-as-brokers-spokesman.html> [<https://perma.cc/9TR4-6VEE>].

II. Some Examples Involving Gender

I now turn to some specifics expressly pertaining to women at work, particularly as regards women in more senior roles. These are intended to demonstrate how proxies and prototypes complicate an assessment of women's talents and skills.

A familiar example concerns leadership. Leaders need first and foremost to be competent and authoritative.³² Men more readily fit the prototype of competence and authority than women do. Not being seen as authoritative is of course importantly self-reinforcing. A woman's being viewed as warm may complicate her ability to be viewed as authoritative. By contrast, her being viewed as cold may be punished. There is a classic double bind—a woman, in an attempt to have her authority recognized, is viewed as cold, something that, again, will be held against her given the deviation from the female prototype. By contrast, men, “starting out” from a presumption of being authoritative, can be warm—or not—without cost.³³ A familiar trope is that women are too emotional to be leaders; thus, a woman being visibly affected by bad news might be taken as confirming that belief. By contrast, a man can afford to be visibly affected in that manner without undermining his appearance as an effective leader.³⁴

Discussing workplace interactions between men and women, linguist Deborah Tannen says:

Conversational rituals common among men often involve using opposition such as banter, joking, teasing, and playful put-downs, and expending effort to avoid the one-down position in the interaction. Conversational rituals common among women are often ways of maintaining an appearance of equality, taking into account the effect of the exchange on the other person, and expending effort to downplay the speakers' authority so they can get the job done without flexing their muscles in an obvious

32. See Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), <https://hbr.org/2013/08/why-do-so-many-incompetent-men> [<https://perma.cc/7TNL-UUDJ>]; Anne M. Koenig, Alice H. Eagly, Abigail A. Mitchell & Tiina Ristikari, *Are Leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms*, 137 PSYCH. BULL. 616 (2011); see also Charles A. O'Reilly III, Bernadette Doerr, David F. Caldwell & Jennifer A. Chatman, *Narcissistic CEOs and Executive Compensation*, 25 LEADERSHIP Q. 218, 220 (2013) (“This evidence, that narcissists are no more competent and, over the long term, are less likable than non-narcissists, raises the paradoxical question, why do they so often emerge as leaders?”).

33. See Susan T. Fiske, *Stereotype Content: Warmth and Competence Endure*, 27 CURRENT DIRECTIONS PSYCH. SCI. 67 (2018).

34. See, e.g., Susan Milligan, *Women Candidates Still Tagged as Too 'Emotional' to Hold Office*, US NEWS (April 16, 2019), <https://www.usnews.com/news/politics/articles/2019-04-16/women-candidates-still-tagged-as-too-emotional-to-hold-office> [<https://perma.cc/NJ94-BJBM>].

way. When everyone present is familiar with these conventions, they work well. But when ways of speaking are not recognized as conventions, they are taken literally, with negative results on both sides. Men whose oppositional strategies are interpreted literally may be seen as hostile when they are not, and their efforts to ensure that they avoid appearing one-down may be taken as arrogance. When women use conversational strategies designed to avoid appearing boastful and to take the other person's feelings into account, they may be seen as less confident and competent than they really are.³⁵

The problem is that arrogance may not be perceived as un-leader-like in a man, but deficits in confidence and competence in a woman surely will be.³⁶

Continuing in the vein of language, there has been research on typically gendered speaking patterns. One study on "uptalk," raised intonation at the end of a phrase more often associated with women, finds that: "over and above firm, CEO, analyst, and call attributes, equity analysts downgrade recommendations and the share price of a firm drops when incoming female CEOs (but not male CEOs) use high levels of uptalk."³⁷ Another paper by some of the same authors found that:

Female executives respond to the presence of more female executives on the call with more uptalk. By contrast, the incidence of uptalk by men decreases with the fraction of female executives present on the call. Uptalk by women increases when the firm's financial constraints are greater and decreases when analysts' recent and/or next recommendations are higher, but uptalk by male executives does not exhibit similar effects. These results are consistent with findings in the sociolinguistics literature that uptalk is a female-typed behavior which signals a lack of confidence.³⁸

When discussing women and language, one of course must mention Elizabeth Holmes, who supposedly learned to speak in a lower pitched voice in order to sound more male.³⁹ She also

35. DEBORAH TANNEN, *TALKING FROM 9 TO 5: WOMEN AND MEN AT WORK* 13 (2013) (ebook).

36. See Elliot, *supra* note 31.

37. Aharon Cohen Mohliver, Anantha Divakaruni & Laura Fritsch, *Equity Analysts Downgrade Stock Recommendations When Female CEOs Use Uptalk* 10 (SSRN Working Paper No. 4634085, 2024).

38. Anantha Divakaruni, Laura Fritsch, Howard Jones & Alan D. Morrison, *Market Reactions to Gendered Speech Patterns* 2 (SSRN Working Paper No. 4501479, 2023).

39. Danielle Cohen, *Elizabeth Holmes Has Changed Her Voice Again*, THE CUT (May 8, 2023), <https://www.thecut.com/2023/05/elizabeth-holmes-voice-new-york-times-interview.html> [<https://perma.cc/E7S8-746U>].

regularly dressed in a black turtleneck, supposedly to emulate Steve Jobs.⁴⁰ Interestingly, evidence generally supports the idea that those with lower-pitched voices seem more leaderlike, whether the leader is male or female.⁴¹ It seems likely, though, that the reason is a prototype of leader that is male, something unfortunate but not historically inaccurate.

On the broader topic of gendered prototypes, consider the following example, discussed in a 2014 magazine article (albeit describing research only published in 2021):

Here's an old riddle . . . [A] father and son are in a horrible car crash that kills the dad. The son is rushed to the hospital; just as he's about to go under the knife, the surgeon says, "I can't operate—that boy is my son!" . . .

If you guessed that the surgeon is the boy's gay, second father, you get a point for enlightenment, at least outside the Bible Belt. But did you also guess the surgeon could be the boy's *mother*? If not, you're part of a surprising majority.

In research conducted by [several scholars] even young people and self-described feminists tended to overlook the possibility that the surgeon in the riddle was a she . . .

In both groups, only a small minority of subjects . . . came up with the mom's-the-surgeon answer. Curiously, life experiences that might suggest the mom answer "had no association with how one performed on the riddle[.]"⁴²

This "riddle" is quite old, from a time when very few women were doctors, much less surgeons. In the 1960s, women comprised less than 5% of physicians, with a much smaller number being surgeons.⁴³ More recently, in 2022, 38% of active American

40. Kate Storey, *Why the Black Turtleneck Was So Important to Elizabeth Holmes's Image*, ESQUIRE (Mar. 18, 2019), <https://www.esquire.com/style/mens-fashion/a26836670/elizabeth-holmes-steve-jobs-black-turtleneck> [<https://perma.cc/FZR5-QER7>].

41. Midam Kim, *Think Leader, Think Deep Voice? CEO Voice Pitch and Gender*, ACAD. MGMT. PROC. (2022). That being said, pitch may matter less in appraising women leaders. *Id.*; see also Casey A. Klofstad, Rindy C. Anderson, Stephen Nowicki, *Perceptions of Competence, Strength, and Age Influence Voters to Select Leaders with Lower-Pitched Voices*, 10 PLOS ONE 2 (2015) ("[P]reference for leaders with lower-pitched voices correlates with the perception that speakers with lower voices are stronger, more competent, and older."). The findings are not unambiguous or completely clear, but they don't need to be for the points I am making.

42. Rich Barlow, *BU Research: A Riddle Reveals Depth of Gender Bias*, BOS. UNIV. (Jan. 16, 2014), <https://www.bu.edu/articles/2014/bu-research-riddle-reveals-the-depth-of-gender-bias> [<https://perma.cc/N6KB-G36U>]; see also Deborah Belle, Ashley B. Tartarilla, Mikaela Wapman, Marisa Schlieber & Andrea E. Mercurio, "I Can't Operate, That Boy Is My Son!": Gender Schemas and a Classic Riddle, 85 SEX ROLES 1 (2021) (describing the riddle research).

43. Deborah A. Wirtzfeld, *The History of Women in Surgery*, 52 CANADIAN J. SURGERY 317, 319 (2009).

physicians were women; female surgeons represent a greater, but still small, proportion of surgeons, ranging from 24% to 6% depending on the surgical specialty.⁴⁴ Still, I would argue that the “riddle’s” continuing vitality is astonishing, and pernicious.

One way to articulate the point is by reference to the concept of “stereotype.” Stereotypes may, and indeed, sometimes do, have some basis in reality. The concept of stereotype is closely related to that of prototype, but “stereotype” is generally negatively charged. It is used to mean making an oversimplified and overgeneralized (and sometimes incorrect) attribution of particular proclivities, aptitudes, or circumstances to someone who comes within a particular (gender, race, immigration status, religion, or other) category, and often for negative purposes. Even if the attribution has some validity for the group as a whole, it is often perniciously and incorrectly used for particular people within the group regardless of whether the attribution is accurate as to them.⁴⁵

III. What Follows?

Thus far, I’ve argued that we necessarily use proxies and prototypes to make decisions, including, for this purpose, as to who to hire, promote, give particular responsibilities to, discipline, or fire, and that those proxies and prototypes are flawed, reflecting history that may have changed or not have been accurate to begin with, or having other shortcomings. This is not to say that there is a perfect (or even better) alternative or that these uses of proxies and prototypes are purposive or intentionally malevolent. Indeed, the examples above suggest that use of proxies and prototypes is often unconscious; a part of people’s assumptions of what is true.

44. Patrick Boyle, Michael Dill, Rosalie Kelly & Zakia Nouri, *Women are Changing the Face of Medicine in America*, AAMC (May 28, 2024), <https://www.aamc.org/news/women-are-changing-face-medicine-america?form=MG0AV3> [<https://perma.cc/J654-B9LS>]; Laura J. Linscheid, Emma B. Holiday, Awad Ahmed, Jeremy S. Somerson, Summer Hanson, Reshma Jagsi & Curtiland Deville Jr., *Women in Academic Surgery over the Last Four Decades*, 15 PLOS ONE (2020), <https://journals.plos.org/plosone/article?id=10.1371%2Fjournal.pone.0243308&form=MG0AV3> [<https://perma.cc/PHL4-WRLN>].

45. The over-attribution isn’t just descriptively false. It can also be pernicious, as the text suggests. Fryer and Jackson provide a fascinating example. Fryer, *supra* note 13, at 2. A majority-race employer may have “coarser”—that is, broader, with fewer distinctions—categories for minorities. *Id.* at 5. Because “minorities will not be as finely sorted based on their investments in human capital[,]” they will have “less of an incentive to invest in human capital, which then further reinforces the coarse sorting.” *Id.* at 2.

Surely, it would be difficult to expressly defend an association between low pitch and leadership abilities. Yet we can all envision feeling more (or less) confident in someone's leadership abilities based importantly on an impression of (low-voiced) gravitas. Believing that others also make this assumption adds a recursive dimension in which leadership may be more successful because the leader, seeming more leaderlike, is more readily obeyed. Another example, with higher-pitched voices being sex-specific proxies, discussed above, is the following finding about "uptalk," a raised intonation at the end of a phrase more often associated with women:

[A]nalysts make lower recommendations in response to uptalk by female executives; in particular, more unexpected female executive uptalk increases the likelihood of analyst sell recommendations and decreases the likelihood of buy recommendations. Unexpected uptalk by male executives has no such effects . . . [But] analysts' lower recommendations are a rational response to unexpected female executive uptalk in that they correctly forecast the drop in earnings signaled by it. [Indeed], the analysts who downgrade earnings forecasts in response to uptalk are underreacting. This indicates that female uptalk is a signal of worse-than-expected performance in the next quarter, and that analysts respond to that signal.⁴⁶

Here, the uptalk by a woman did map onto a rational assessment of an imminent decline in share price. Clearly, this proxy is contingent, and relates to broader cultural and linguistic, yet non-sticky, norms, an association borne of history rather than a substantive assessment. Insofar as uptalk is a "tell" for women, training not to use such "tells" should be easy and effective.

Thus far, I have argued that proxies and prototypes regarding gender are used more than is warranted. Sometimes, the proxies and prototypes were truer historically than they are now. Sometimes they were never true. (Sometimes, of course, they are true.) From an orthodox economics perspective, proxies and prototypes that are used more than is warranted should not persist—again, companies that "got it right" about who the best employees were would render those that didn't extinct. But, as I initially argued, competition doesn't work nearly that effectively. It eliminates the unfit, but there is plenty of room for the "good enough." The market does not suffice to give women their due. Women lose out. And so would business, it might seem, insofar as it is hobbled in this manner. The *Fair Shake* authors have many suggestions for how the situation can be improved.

46. See Divakaruni et al., *supra* note 38, at 3–4.

The passage of time is proving helpful. Proxies for what is sought in a high-level employee, and prototypes of women, are changing. One article, appraising the situation as to women in politics, finds this, which suggests some, albeit measured, progress:

The evolution of the women politician stereotype is encouraging: the traits that people associate with women politicians are more positive than ten years ago and more congruent to desirable traits for politicians. However, the findings also underscore the continuing masculinity of the political domain, by the strong overlap between the stereotype of men politicians and politicians in general.⁴⁷

We can hope that greater awareness of the dynamics discussed here will be helpful, especially insofar as the decision-makers' motivations are unconscious or benign. Consider my example above concerning gravitas. Consider as well the strong forces encouraging people to make non-risky—that is to say, traditional—decisions in the employment realm. If there are bad results—say, the company does badly—a person asked to justify a non-traditional decision (such as hiring a woman for a job theretofore always held by a man) may face a steeper hurdle.⁴⁸ As “tradition” erodes, that hurdle should flatten.

But there are, the authors convincingly argue, malign forces at play as to why women are not getting a fair shake: a highly-successful business model that a) relies on attributes that men may have more than women do; b) can be utilized only if men get and keep certain levels of power within the business; and c) is either illegal or in some meaningful sense should be. The authors marshal considerable evidence in the book in support of this view. The view necessarily requires that certain characteristics are more often found in men, and certain other characteristics are more often found in women, something that is overwhelmingly supported in the literature and intuitively.

IV. What Follows

It seems, then, that women lose and society loses if women don't get a fair shake. But might a certain kind of business win? The malign business story could solve the puzzle with which I began this paper: women are losing out because the skills they have, while good for business models that are also good for the society, are not the ones that are needed to carry out “bad” (illegal or unethical)

47. van der Pas, *supra* note 24, at 1653.

48. See Hill, *supra* note 8.

business models, models that are even better for the business, but at the society's expense. The market is working after all—it's law that is falling short. I take the authors of *Fair Shake* to be making precisely this point.

I end on an optimistic note. The problematic business models rely on not being known, recognized, or treated as being what they are. The models co-exist with, and rely to some extent on, the dynamics I describe, to legitimate what they are doing, making it seem "fair" and appropriate. Law is doing better at ferreting them out and dealing with them and can do better still. Moreover, not all instantiations of the dynamic are pretextual—far from it. Indeed, many are benign. We can guardedly hope that with better law, and increasing awareness that proxies and prototypes of business aptitudes may need more careful scrutiny, women will get more of a fair shake.