

Minnesota Journal of Law & Inequality

Volume 43
Issue 3 *Special Issue 2025*

Article 2

May 2025

Interview of Naomi Cahn, June Carbone & Nancy Levit

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Recommended Citation

Naomi Cahn, June Carbone, Nancy Levit, Claire Hill & Matthew T. Bodie, *Interview of Naomi Cahn, June Carbone & Nancy Levit*, 43 L. & INEQUALITY 5 (2025).

Available at: <https://scholarship.law.umn.edu/lawineq/vol43/iss3/2>

Minnesota Journal of Law & Inequality is published by the
University of Minnesota Libraries Publishing.



Interview of Naomi Cahn, June Carbone, and Nancy Levit, Moderated by Claire Hill and Matthew Bodie

This conversation occurred at the start of the conference on “Women at Work” on Thursday, October 24, 2024, from 1:45 to 2:45 p.m. The conference, sponsored by the University of Minnesota Law School, was inspired by the new book, Fair Shake: Women & The Fight to Build a Just Economy, by Naomi Cahn, June Carbone, and Nancy Levit. The co-authors were interviewed by two members of the University of Minnesota School of Law faculty, Claire Hill and Matt Bodie. What follows is the conversation, edited for clarity. Questions to the panelists are in italics, while their responses are in regular type.

Claire: I’ll start with a few questions. What motivated you to write the book? How does the book fit in with what I will, I believe uncontroversially, characterize as a remarkable body of scholarship? What are you thinking about now, and where do you think your interests in this area will take you?

Nancy: We have known each other for decades and have been writing together over the years. Our scholarship has centered on inequalities in the family, the workplace, and the market.¹ We talk quite a bit among the three of us about gender, sex discrimination, and the gender-based wage gap. In fact, we had originally named the book “Shafted.” Simon and Schuster said, “That’s too phallic.” We said, “Duh.” So . . . “Fair Shake” it is.²

When we started our research more than seven years ago, we were hopeful that women were closing the gender-based wage gap. However, we dived into the data more deeply and realized that the apparent gains were not really gains for women, but the result of

1. See, e.g., NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER (2nd ed. 2016); Naomi Cahn, June Carbone & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. U. L. REV. 1105 (2019); Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425 (2018); June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963 (2017).

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

blue-collar men losing ground from about the 1990s onward.³ Even though women are the more educated sex in terms of bachelor's degrees (earning more than men since 1982), master's degrees (earning more than men since 1987), and doctorate degrees (earning more than men since 2006),⁴ wage gaps have not only persisted, but widened for women with more advanced degrees.⁵ A number of studies, one in particular by Goldman Sachs in 2019, show that if present trends continue, the gender-based wage gap will not be closed for another one hundred years.⁶

We noticed an interesting parallel trend: the skyrocketing of CEO salaries. Back in the 1950s, the comparison rate for CEO to average-worker salaries was about 20 to 1. As of September 2024, the Economic Policy Institute reported that this comparative ratio is now a whopping 290 to 1.⁷ Evidence suggests that the dramatic increase in CEO salaries is connected to the widening gender pay gap for more educated women. These trends are not unrelated. The gender-based wage gap and the slow advancement of women in the highest levels of different professions⁸ relate to the structure of

3. See, e.g., James Anthony, *Blue Collar Job Blues—Are We Losing Our Blue Collar Workers*, FINANCES ONLINE (Nov. 12, 2024), <https://financesonline.com/blue-collar-blues-are-we-losing-our-blue-collar-workers/> [https://perma.cc/UN22-68LJ]; Abe Unger, *What's Happening to the Blue Collar Male and Why Does It Matter*, CENTRE FOR MALE PSYCHOLOGY (Oct. 5, 2021), <https://www.centreforalepsychology.com/male-psychology-magazine-listings/whats-happened-to-the-blue-collar-male-and-why-does-it-matter> [https://perma.cc/925B-UFUZ].

4. *Women in the Workforce: United States*, CATALYST (Aug. 29, 2022), <https://www.catalyst.org/insights/2022/women-in-the-workforce-united-states> [https://perma.cc/UZB5-34LP].

5. Elise Gould & Katharine deCourcy, *Gender Wage Gap Widens Even as Low-Wage Workers See Strong Gains*, ECON. POL'Y INST. (Mar. 29, 2023), <https://www.epi.org/blog/gender-wage-gap-widens-even-as-low-wage-workers-see-strong-gains-women-are-paid-roughly-22-less-than-men-on-average/> [https://perma.cc/3BH6-FM3Z].

6. Amanda Hindlian, Sandra Lawson, Sonya Banerjee & Hui Shan, *Closing the Gender Gaps 2.0: Fresh Data Show More Work to Do*, GOLDMAN SACHS (Oct. 23, 2019), https://www.goldmansachs.com/pdfs/insights/pages/gender-pay-gap-2_0-f/report.pdf [https://perma.cc/F3F3-AGFW].

7. Josh Bivens, Elise Gould & Jori Kandra, *CEO Pay Declined in 2023*, ECON. POL'Y INST. (Sept. 19, 2024), <https://www.epi.org/publication/ceo-pay-in-2023/> [https://perma.cc/U4K4-CCAX].

8. See, e.g., Alice A. Tolbert Coombs & Roderick K. King, *Workplace Discrimination: Experiences of Practicing Physicians*, 97 J. NAT'L MED. ASS'N. 467, 470 (2005) (reporting survey responses regarding female physicians and gender discrimination in "the form of career advancement obstacles and disrespectful or punitive actions."); Shruti Rana, *Promoting Women's Advancement in the Judiciary in the Midst of Backlash: A Comparative Analysis of Representation and Jurisprudence in Key Domestic and International Fora*, 127 DICK. L. REV. 693 (2023); Meredith Somers, *Women Are Less Likely than Men to Be Promoted*, MASS. INST. TECH. SLOAN SCH. MGMT. (Apr. 12, 2022), <https://mitsloan.mit.edu/ideas-made-to>

workplaces and various practices in the new economy that promote the exorbitant increase in CEO pay.

This is the heart of the book: the new economy celebrates those who can break the rules and get away with it. Companies have embraced a “winner-take-all” (WTA) tournament in which the corporate executives prize certain qualities among their managers and promote fierce competition among managers who are then rewarded for delivering what the CEOs want. These CEOs are using the companies as essentially extraction devices for their own wealth. Take the situation of the richest person in the world. In April of 2024 Tesla’s board of directors sought approval for a \$47 billion compensation package for CEO Elon Musk.⁹ Within less than two weeks, and on a much quieter scale, Tesla announced it needed to terminate about 14,000 workers (roughly 10% of its global workforce).¹⁰ One month later, Tesla announced a recall of more than one hundred thousand vehicles because of product safety concerns—these were quality issues Musk admitted he ignored in his efforts to beat production expectations.¹¹ When the Delaware Chancery Court ruled that the board of directors breached its fiduciary obligations by approving this compensation plan because Musk essentially controlled the board, Musk shifted Tesla’s home state to Texas.¹²

The winner-take-all economy that we describe in *Fair Shake* is significantly gendered. In WTA workplaces, managers use

matter/women-are-less-likely-men-to-be-promoted-heres-one-reason-why
[https://perma.cc/BSM5-ZT5K].

9. Jack Ewing, *Tesla Seeks to Revive Musk’s \$47 Billion Pay Deal After Judge Says No*, N.Y. TIMES (Apr. 17, 2024), <https://www.nytimes.com/2024/04/17/business/tesla-elon-musk-pay.html> [https://perma.cc/DV3R-ZT6T].

10. *Tesla Announces It’s Laying Off More Than 10% of Its Global Workforce*, NPR (Apr. 16, 2024), <https://www.npr.org/2024/04/16/1244991217/tesla-announces-it-s-laying-off-more-than-10-of-its-global-workforce> [https://perma.cc/5ZLX-TAXH].

11. Jeremy Tanner, *Tesla Recalls 125K Vehicles from Four Models over Safety Issues*, KGET (May 31, 2024), <https://www.kget.com/news/business/product-recalls/tesla-recalls-125k-vehicles-from-four-models-over-safety-issue/> [https://perma.cc/85QV-HNBN]; see Chris Isidore, *Elon Musk Admits Tesla Has Quality Problems*, CNN (Feb. 3, 2021), <https://www.cnn.com/2021/02/03/business/elon-musk-tesla-quality-problems/index.html> [https://perma.cc/AK5N-4AEQ].

12. See *Tornetta v. Musk*, 310 A.3d 430, 497 (Del. Ch. 2024); Natasha Solo-Lyons, *Your Evening Briefing: Elon Musk Officially Shifts Tesla’s Incorporation to Texas After Vote*, BLOOMBERG LAW (June 14, 2024), <https://www.bloomberg.com/news/newsletters/2024-06-14/bloomberg-evening-briefing-elon-musk-moves-tesla-incorporation-to-texas> [https://perma.cc/ZM4A-QE6G].

competition to pit people against each other in order to achieve whatever short term ends the managers want and they care very little for employees who are harmed in the process.¹³ Managers play favorites: “they identify with the workers who have the same traits they see in themselves, and they ‘exclude or harass historically disadvantaged groups,’ including men who are not traditionally masculine or who won’t play the same games.”¹⁴ In these WTA workplaces, women are excluded, marginalized, and often harassed.

Practices in the winner-take-all corporate sphere are those that are linked to bullying, hostility, and sexist climates that increase gender disparities at work.¹⁵

Naomi: I will say that as disappointed as we were that we could not call the book “Shafted,” another reason for calling it “Fair Shake,” was to start—end—on something of a more hopeful note by saying that there is a reconstructive project. There is a lot of doom and gloom, but it’s not all doom and gloom. So, at the end of the book, we do have proposals for structural changes, ranging from changing the marginal tax rate to promoting community. And, in interviews and podcasts, we have also developed suggestions for what individuals can do in their own workplaces, including the importance of mentoring.¹⁶

I also want to go back a little bit to the origin story. We approached this book from different, but overlapping, perspectives: Nancy teaches employment discrimination, Nancy and June co-authored a wonderful piece in the *Minnesota Law Review* that helps set the stage for some of what became the book,¹⁷ and then, as Nancy generously said, June and I have written numerous articles

13. Jack Welch, *‘Rank-and-Yank’? That’s Not How It’s Done*, WALL ST. J. (Nov. 14, 2013), <https://www.wsj.com/articles/8216rankandyank8217-that8217s-not-how-it8217s-done-1384473281> [<https://perma.cc/DD8Y-QT67>] (bragging that his management system, dubbed “rank and yank,” could get employees to do whatever management wanted); see also Richard Bernstein, *Books of the Times; Winning the Business Game with a Few Basic Principles*, N.Y. TIMES (Sept. 14, 2001), <http://www.nytimes.com/2001/09/14/books/books-of-the-times-winning-the-business-game-with-a-few-basic-principles.html> [<https://perma.cc/7P63-UAXG>] (describing Welch’s emphasis on cost-cutting at the expense of workers).

14. CAHN ET AL., *supra* note 2, at 78.

15. Jennifer L. Berdahl Peter Glick & Marianne Cooper, *How Masculinity Contests Undermine Organizations, and What to Do About It*, HARV. BUS. REV. (Nov. 2, 2018), <https://hbr.org/2018/11/how-masculinity-contests-undermine-organizations-and-what-to-do-about-it> [<https://perma.cc/7QJB-VC6R>].

16. See, e.g., Emma Goldberg, *They Say It’s a Woman’s World Now. The Workplace Tells a Different Story*, N.Y. TIMES (July 19, 2024), <https://www.nytimes.com/2024/07/19/books/review/women-workplace-business-books.html> [<https://perma.cc/9R9T-9KXM>].

17. Carbone & Levit, *The Death of the Firm*, *supra* note 1.

and books that bring together the family, gender, and the economy.¹⁸ So, the book brings together our overlapping and differing areas of expertise. The combination of the three of us builds on each of our individual strengths. I think we've come to that realization through working on the book, related articles, and publicity for the book. We started it at a time when Hillary Clinton was running for President, just to give you a little bit more of an idea of the gestation of the book. We thought, "Oh, gee! If Hillary becomes President, maybe what we're writing will just be a wonderful history, and everything will have changed."

That—obviously—is not what happened. To put where we are in perspective, the book looks at the origins of the progress narrative. There was, indeed, a trajectory of decreases to the gender pay gap, and the enactment in the early 1960s of the Equal Pay Act, and Title VII of the Civil Rights Act appear to have made a difference. Our question was, why did progress stall?¹⁹ What had changed? Women have always been expected to be caretakers, and that hasn't changed. Notwithstanding that, there was an upward improvement over the course of several decades, but the rate of changing became much slower, beginning in 1990.²⁰ So, something beyond expectations for women's roles had changed, and it was answering that question of what changed that really got us moving forward eight years ago as we started writing this book.

Matthew: In terms of the relationship between what you're talking about and the job market, the standard non-malevolent explanation for differential employment outcomes is that women have to take a break for caregiving at home, and women choose

18. See, e.g., Cahn & Carbone, *supra* note 1; Naomi Cahn & June Carbone, *It's Still About the Economy: A Response to "The Republican Marriage Advantage"*, IFS BLOG (Dec. 3, 2024), <https://ifstudies.org/blog/its-still-about-the-economy-a-response-to-the-republican-marriage-advantage-> [<https://perma.cc/W3N5-UVHW>]; Naomi Cahn & June Carbone, *Supporting Families in a Post Dobbs World: Politics and the Winner Take All Economy*, 101 N.C. L. REV. 1549 (2023); June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185 (2013); Naomi Cahn & June Carbone, *Which Ties Bind: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. L. REV. 1011 (2003).

19. See, e.g., Paula England, Andrew Levine & Emma Mishel, *The Gender Revolution Is Stalling—What Would Invigorate It?*, BROOKINGS INST. (2020), <https://www.brookings.edu/articles/the-gender-revolution-is-stalling-what-would-reinvigorate-it> [<https://perma.cc/H85E-JWM3>]; Martha J. Bailey, Thomas E. Helgerman & Bryan A. Stuart, *How the 1963 Equal Pay Act and 1964 Civil Rights Act Shaped the Gender Gap in Pay*, NAT'L BUREAU OF ECON. RESEARCH (Dec. 2023), <https://www.nber.org/papers/w31332> [<https://perma.cc/FBY6-P9VQ>].

20. England et al., *supra* note 19.

different industries or types of jobs on their own. You all break that apart and say, that's not what's going on here. I'm just wondering to what extent you have identified the unfair job outcomes feeding into or fed by cultural patterns, some of which we're seeing in this election just in the last few weeks, especially as to the role of men in society and the role of masculinity in society?

June: One of the things that surprised us was that we expected to see lots of different kinds of stories working to women's disadvantage, childcare, the low-wage workforce at Walmart, finance (which has always been notorious), and we expected that there would be a number of different factors contributing to the outcomes. But we found every chapter was the same story. We started digging down, for example, on the story of a woman, Lauren Martinez, who had been a manager in a dental office when Covid hit.²¹ She had a newborn, and her older child was taking care of the newborn. The older child got Covid, and Martinez ended up being fired, arguably in violation of the Covid protections that Congress had passed.²² We thought, "This is going to be a different story. It's a dental office, so maybe it was a story of decentralization, a limited number of workers, a dentist who felt squeezed by the pandemic." But no, the story is one about private equity. Aspen Dental, a private equity firm, dominates the dental management industry nationally, and the decision to fire Martinez was not made in Florida, where the dental office was located, but in Aspen's human resources office in New York. Monthly profits were the key driver in Aspen's calculations. We were stunned. We got off the phone with Martinez, and one of our collaborators looked at us and said, "Did you see that coming?" It's the same story in every other chapter.

So, what is that story? I think Silicon Valley in the 90s with the dot-com bubble captures it quite nicely. We used to have tech innovation with federal oversight, with many of the initial innovations funded by the Defense Department.²³ The government would finance universities like Stanford, and phone call toll rates funded Bell Labs, AT&T's private research arm. By the 90s, the source of the funding had shifted from public sources to venture capital, with the 90s boom, touching off an intense competition to

21. CAHN ET AL., *supra* note 2, at 142–58.

22. See *Martinez v. Aspen Dental Mgmt., Inc.*, No. 2:20-CV-545-JES-MRM, 2022 WL 523559, at *9 (M.D. Fla. Feb. 22, 2022) (alleging violation of the Emergency Family and Medical Leave Act).

23. NATIONAL RESEARCH COUNCIL, MAXIMIZING U.S. INTERESTS IN SCIENCE AND TECHNOLOGY RELATIONS WITH JAPAN 48 (1997) (describing the role of defense spending in the early growth of science and technology in the United States).

fund the next hot product. All the incentives were to grow quickly and massively. My husband and I were living in Silicon Valley at the time, and you could get a sense of the boom when you went into expensive restaurants in San Francisco or Palo Alto, and you couldn't get a table. You could sense the excitement. You could see young engineers moving to California because they wanted to be a part of the tech boom. Looking at the shift in culture, the first shift is the difference in selection: venture capitalists, unlike university research labs, select for confidence, dominance, narcissism, and drive.²⁴

Venture capitalists, who expect most of the start-ups they fund to fail, are looking for something that scales up very quickly. This gives you a platform that allows you to dominate a whole new sector of industry that may not have existed before. Mark Zuckerberg, the founder of Facebook, described the environment as “move fast and break things,”²⁵ capturing the idea that the successful will displace existing industries. Uber is the poster child for this mindset. After all, it outflanked the taxi companies, in part by flouting the laws that apply to taxi companies.²⁶ Uber also had a competitive advantage, in part, because it could operate more cheaply by treating its drivers as independent contractors. Growing quickly (and having a great app) made it possible to recruit a loyal customer base that opposed taxi company efforts to fight back. Venture capital firms, in selecting start-up founders, look for individuals like Uber CEO Travis Kalanick, whose biggest strength was described as the fact that he would “run through a wall to accomplish his goals.”²⁷ It turns out that when you select for those qualities, you're

24. Hayden Field, *98 Percent of VC Funding Goes to Men. Can Women Entrepreneurs Change a Sexist System?*, ENTREPRENEUR (Oct. 23, 2018), <https://www.entrepreneur.com/article/315992> [<https://perma.cc/LZ39-4C9Q>]; see also CAHN ET AL., *supra* note 2, at ch. 4, ch. 6.

25. See, e.g., Enrique Dans, *When Companies Move Fast, They Do More than Break Things*, MEDIUM (Nov. 8, 2023), <https://medium.com/enrique-dans/when-companies-move-fast-they-do-more-than-break-things-770740e248c2> [<https://perma.cc/T5NC-PNFF>].

26. Edward Ongweso, Jr. & Jason Koebler, *Uber Became Big by Ignoring Laws (and It Plans to Keep Doing That)*, VICE NEWS, (Sept. 11, 2019) <https://www.vice.com/en/article/8xwxyv/uber-became-big-by-ignoring-laws-and-it-plans-to-keep-doing-that> [<https://perma.cc/EE4Q-TJFT>].

27. Eric Siu, *10 Lessons Startups Can Learn from Uber's Growth*, SINGLE GRAINBLOG, (Sept. 26, 2022), <https://www.singlegrain.com/blog-posts/business/10-lessons-startups-can-learn-ubers-growth> [<https://perma.cc/2RK3-224R>]; Mike Isaac, *How Uber Got Lost*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/business/how-uber-got-lost.html> [<https://perma.cc/E5JQ-5278>].

also selecting for people who feel entitled to pay themselves handsomely, have wild parties, and open beer kegs on the floor of many Silicon Valley startups, and you're selecting for a personality type that doesn't treat women well.²⁸

Naomi: Also, in terms of seeing the same story in every sector of the economy, we start the book with the story of Betty Dukes, a Walmart greeter.²⁹ One of the things, as June said, in anticipation of your question about what surprised us, was that we were seeing patterns in the case of the dental company worker. But beginning the book with Betty Dukes, showed how foundational these 'masculinity contest cultures' are and the pervasiveness of this new corporate culture and mindset.

Claire: I want to return to the subject of lawbreaking. You say, reasonably, that Uber is in the business of breaking laws, and of course, so is Airbnb.³⁰ But so are some other companies that many people of a certain demographic might regard more sympathetically. Marijuana companies are also in the business of breaking the law, as are companies trying to ship abortion pills. I have two questions about this, one more consistent with your book, and one more of a detour. The first one is: is there some sort of interesting historical-cyclical perspective in which law-breaking sometimes becomes the next frontier? Certainly, in finance, there are booms and busts. After a boom, where investors are trying to do the best they can—high returns, but high risk, AKA, “flight to yield”—there's a bust. After the bust comes the “flight to quality,” where everyone is cautious and investors are happy with more certain, but lower, returns. At a certain point, investors' memories start to fade, and they again look for higher returns, accepting higher risk. That's followed by another bust, and so it continues.³¹ Would you say that the situation you describe with lawbreaking is similar? That there's a cycle where people flee to yield-risky law-breaking strategies, but then flee to quality, a more conservative follow-the-law perspective, followed by . . . ? If so, where are we in the cycle? The other question is: would you make a distinction between different types of law-breaking – for instance, between, as some might characterize it, law-breaking

28. See Berdhal et al., *supra* note 15.

29. CAHN ET AL., *supra* note 2, at 21–41.

30. See generally Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017) (describing businesses where contesting and changing regulation is part of their business plan).

31. See Claire A. Hill, *Why Didn't Subprime Investors Demand a (Much Larger) Lemons Premium?*, 74 L. & CONTEMP. PROBS. 47, 62 (2011).

intended to do an end-run around consumer-protective regulation and law-breaking to get around outdated or unjust laws?

Nancy: I'll take the easy question. We have seen this from a historical perspective, and it relates to the next article that the three of us are writing on the gender of law. I'm sure everyone in the room is familiar with the history of robber barons and industrialists, who broke as many laws as they could. Then there was a cycle back to regulation with FDR saying that it was not right and the development in the 1950s of the "organization man" (whom we really think was a woman!). The organization man, although he wore gray flannel suits and probably had a wife at home and the only women in the firm were in the secretarial pool, had an extraordinary amount of loyalty and was committed to the corporation and cared for the people around him.³²

We've seen this movement from competition to cooperation with periods of rampant individualism and lawlessness and then restraining and returning to the rule of law, which is, of course, one of the things that we advocate. We've seen the cycles throughout history. Where are we in the cycle? Read your morning newspaper.

June: There's a quote from Frédéric Bastiat, a French economist and member of the French National Assembly, who said, "When plunder becomes a way of life for a group of men in a society, over the course of time they create for themselves a legal system that authorizes it and a moral code that glorifies it."³³ What Bastiat described is not just a few pushing the boundaries of what they can get away with, or the type of business cycle that produces booms and busts, with course corrections along the way. Instead, it involves a wholesale change that defines an era. All of the companies we looked at were judged by how well their share prices performed on the stock markets, and most of the "winners" ultimately defeated what are supposed to be the guardrails in place to prevent what they did. For Walmart, the ultimate victory was crushing unionization efforts, a victory that came when George W. Bush brought an end to the enforcement efforts that the NLRB had brought against the company;³⁴ the defeat of unionization made Walmart's domination of the retail industry—and its ability to treat

32. CAHN ET AL., *supra* note 2, at 45-47.

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

34. NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS* 136-37 (2009).

wages and hours fines as simply the cost of doing business—possible. In most of the other chapters, financialization has encouraged an emphasis on producing the numbers Wall Street rewards, whether the production numbers at Tesla, met by ignoring product quality concerns, or earnings management at GE. Many of these practices are illegal, but the Supreme Court has made it systematically harder to prosecute white collar crimes and while many of the companies do pay fines, the total dollar amounts are small in comparison with the size of the gains to the company from the practices. The odds of accountability for the executives who engineered these practices is small. And this in turn changes the measure of what constitutes success. I like to describe it this way: George Romney and Mitt Romney, father and son, both owned major companies, and both were governors of important States. They both ran for President, bragging about their accomplishments as businessmen. For George, the father, the accomplishment was the health of his company, American Motors. For Mitt, no one much cared about his private equity fund, Bain Capital; his status came from the size of his personal fortune, much of it in the Cayman Islands to escape tax liability. Troy Paredes has written a piece summarizing the psychological research, concluding that your worth depends on the size of your bonus. Corporate boards, in turn, think, “If we’re that good, we have to pay our CEO more than other companies.”

So, you have a shift in what confers prestige from the health of the institution to the individual who outshines others, with the result that individual wealth confers prestige in and of itself. That’s a shift. It’s a shift that happened in the Gilded Age and is happening now. The last time it ended in two world wars and the Great Depression.

Naomi: I’ll try to answer the hard question. I think that when we’re talking about your example of abortion pills, there’s also a question between breaking the law versus testing the law. So, it’s about seeing how far you can go with what is legal. For example, the wage theft that Walmart engaged in was clearly illegal.³⁵ Shipping abortion pills is not illegal—yet.³⁶ Tax strategies to

35. See PHILIP MATTERA, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS’ WAGES 8 (2018), https://goodjobsfirst.org/wp-content/uploads/docs/pdfs/wagetheft_report_revised.pdf [<https://perma.cc/G5PC-FMY6>] (“The employer that has paid far and away the most in wage theft penalties is Walmart, with more than \$1.4 billion in fines and settlements since 2000.”).

36. Naomi Cahn & Sonia Suter, *Supreme Court Unanimously Concludes That Anti-Abortion Groups Have No Standing to Challenge Access to Mifepristone – But the Drug Likely Faces More Court Challenges*, THE CONVERSATION (June 13, 2024),

minimize the estate and gift taxes are not illegal, and creative lawyers have developed the strategies that test the applicable regulations.³⁷ In the book, we see instances where breaking the law, in fact, leads to much greater inequality and anti-unionization, which is against the collective good. So, a lot of what we focus on, and this gets into the reconstructive project, is what about the collective good?

Claire: I'm going to briefly respond, and then I'm going to turn it over to Matt. I do want to take the other side of what you're saying with respect to breaking the law, and I say this as someone who's very much a moderate. I think that one can defend even the law-breaking that can be seen as an end-run around consumer-protective regulation. Not all such law-breaking, of course, but some of it—even, to some extent, Uber and Airbnb. Consumer-protective regulation can be cumbersome, inartful, and excessive; some end-runs might serve the greater good. I think that it's very hard, as a principled matter, to distinguish between when the law completely gets it right and when it really doesn't, and when we're in a more complicated place. And I think reasonable people can disagree about the value of "pushing the envelope." Uber is certainly a complicated case on many fronts: there are many different constituencies—some are better off, some are worse off. In sum, I'd divide the universe into three buckets: 1) Law-breaking that is just wrong and bad, like wage theft, such that nobody could defend it; 2) law-breaking that some could defend on grounds that the law is unjust or otherwise bad; and 3) The complicated middle ground, where it depends in particular cases about who's benefiting, who's being hurt, ancillary effects and precedents set, and, perhaps, the respective parties' motives.

June: The reason I want to respond to this question is that my long story about the difference between Mitt Romney and George Romney captures it. We're describing a system, a system-level

<https://theconversation.com/supreme-court-unanimously-concludes-that-anti-abortion-groups-have-no-standing-to-challenge-access-to-mifepristone-but-the-drug-likely-faces-more-court-challenges-232453> [<https://perma.cc/2BGX-VMS2>]; Naomi Cahn & Sonia Suter, *Medication Abortion Could Get Harder to Obtain—Or Easier: There's a New Wave of Post-Dobbs Lawsuits on Abortion Pills*, THE CONVERSATION (Feb. 9, 2023), <https://theconversation.com/medication-abortion-could-get-harder-to-obtain-or-easier-theres-a-new-wave-of-post-dobbs-lawsuits-on-abortion-pills-198978> [<https://perma.cc/DNH6-8F82>].

37. See, e.g., Jesse Drucker, *How One of the World's Richest Men Is Avoiding \$8 Billion in Taxes*, N.Y. TIMES (Dec. 5, 2024), <https://www.nytimes.com/2024/12/05/business/nvidia-jensen-huang-estate-taxes.html> [<https://perma.cc/JED8-KFZU>].

change, and a system-level change from identifying success with the strength of institutions to a system of personalized power in which what counts is the results, however they are achieved. When you do that, some results are good. I admire Musk's supercharging the electric vehicle industry, even if some of the means he used to produce results violated the securities and anti-discrimination laws.³⁸ I think Walmart is an extraordinarily successful company that, when it hired women in the Arkansas Hills in the 60s, produced win-win results (the women valued the jobs even at the low pay Walmart offered and even when the company failed to pay the wages mandated by federal wage and hour protections). It is possible to say all that. But when you then look at the dynamic of a society that says you can break the rules and get away with it, it then becomes possible to become a billionaire who, whether or not it is possible to buy the Presidential election, can definitely buy every election in Arkansas. When you get to that point, you skew society, and you destabilize society for a number of reasons.

Part of the change we describe in the book is how that creates a system that selects for narcissists, it turned out that narcissistic CEOs were not worse. What they did was produce more big wins and more big losses.³⁹ As a society, when you concentrate wealth in the hands of a few winners who are then excused for all their flaws, you skew everything else.⁴⁰

Nancy: I agree with Claire that there are many different buckets and that nuances are hugely important. One of the structures we put in the book was the idea of a triple bind. First, if women don't compete on the same terms as men, they lose because they're just not in the game. The second leg of the triple bind was that when women do try to compete on the same terms as men, they are punished more harshly for their sharp elbows and ethical misdeeds.⁴¹ When scandals need scapegoats, women are very convenient ones. We looked at the work of Mark Egan; he wrote a wonderful article that many of you may have read, entitled "When

38. SEC, *Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge* (Sept. 29, 2018) <https://www.sec.gov/news/press-release/2018-226> [<https://perma.cc/J5FA-UZSS>].

39. See 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) (describing how narcissistic leaders produce more big gains and more big losses, averaging out to about the same performance).

40. 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, 288 (2004) (describing the psychology associated with breaking the rules).

41. CAHN ET AL., *supra* note 2, at 14-15.

Harry Fired Sally.”⁴² It has a great article title, but not quite at the level of “When Mother Jones Meets Gordon Gecko,”⁴³ but still, it’s up there. His thesis was that women who commit misconduct in finance are more likely to be fired and less likely to be rehired than men. He looked at the Wells Fargo circumstance and said that when there were examinations and investigations into the opening of excess accounts, women suffered 55% of employment separations, and when men committed the same conduct, 46% experienced employment separations.⁴⁴ So, it’s not just good behavior, bad behavior. It’s what happens along gender dimensions when there is bad behavior, and that’s one of the things we address in the book.

Naomi: Our book is not about breaking the law. As both June and Nancy have said, it’s about a system. I have taught a course on estate planning with a partner at a law firm. At the end of our course, our students turn to us and say, “Do you mean everything that we learned this semester is legal?” This is how wealthy people are able to retain their wealth. They hire estate planners to use the existing law.⁴⁵ So, the book is not about breaking the law; it’s about what happens with this winner-take-all mentality that we identify.

Matthew: It’s just such a fascinating book, and there’s so much to ask. The possibility of a Freudian analysis is one thing I’m curious about. This is another somewhat far-out example, but I’m thinking about how the Vikings of yore were stereotypically known for pillaging and lawlessness, and now the Scandinavian societies are some of the most Democratic Socialist countries in the world and very communitarian. How do you go about transitioning from a system where we find ourselves locked into this winner-take-all system? How do you transition out? One of the things you talk about is fighting back. How can people fight back?

42. Mark Egan, Gregor Matvos & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct*, (Nat’l Bureau of Econ. Rsch., Working Paper 23242, 2021), https://www.nber.org/system/files/working_papers/w23242/w23242.pdf [<https://perma.cc/AB72-HFKA>].

43. Matthew T. Bodie, *Mother Jones Meets Gordon Gekko: The Complicated Relationship Between Labor and Private Equity*, 79 U. COLO. L. REV. 1317 (2008).

44. Egan et al., *supra* note 42; *see also id.* at 16 (“Relative to male advisers’, the decline in reemployment opportunities following misconduct is 30% larger for female advisers.”).

45. Andrew Ross Sorkin, *Tax the Rich? Here’s How to Do It (Sensibly)*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/business/dealbook/taxes-wealthy.html> [<https://perma.cc/VW47-SDR3>] (noting the estate tax system has “loopholes that allow wealthy Americans to blatantly (and legally) skirt taxes”).

June: Well, I want to talk about Scandinavia, having spent three months in Sweden. What I was struck by was the friends we got to meet there were all saying how Sweden is busy becoming a capitalist society with greater inequality and greater hostility toward immigrants. But when we looked at it, it looked a lot like the United States in the 1950s. We are sometimes warned about nostalgia, but I think is worth looking at the 50s, and what produced it. Here's my answer. People talk about the Greatest Generation's shaping events of the Depression and World War II. I think the shaping events of the Depression and World War II were threefold. First, Congress enacted marginal tax rates, on average, for the entire period from 1940 into the 60s when Kennedy began to lower them.⁴⁶ Second, the New Deal decision to make unions the base of the Democratic party, locking in a shift in the balance of power in the country. Third, the two world wars and the Great Depression had weakened the power of wealthy capitalists to prime the system on their own behalf, allowing a more egalitarian society to emerge, characterized by much lower levels of income inequality. A large part of the answer with respect to Scandinavia is that it, too, for a longer period than in the United States, also had relatively high marginal tax rates, higher levels of social services than in the United States, and a relatively egalitarian society. In Scandinavia, like the United States, those factors have begun to break down, producing greater inequality.

While economists certainly disagree about taxing the rich,⁴⁷ an important consequence of high marginal tax rates is that the competition for status becomes channeled into institutions. The bragging rights in the fifties were: "My company is bigger than your company," "My company is more prestigious than your company because it has Bell Labs." There's no point in saying, "My bonus is bigger than your bonus," because if it's taxed at an 80% marginal rate, the size of the individual bonus becomes less important. So, what happened was the channeling of competition into different arenas that were less destructive.

Of course, the United States also emerged from World War II as the only major country in the world whose industrial base had not been destroyed. Companies within the United States enjoyed cartel-like profits and the ten largest companies in the United

46. Marc Linder, *Eisenhower-Era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 TUL. L. REV. 905, 923 (1996).

47. See Paul Krugman, *The Economics of Soaking the Rich*, N.Y. TIMES (Jan. 5, 2019), <https://www.nytimes.com/2019/01/05/opinion/alexandria-ocasio-cortez-tax-policy-dance.html> [https://perma.cc/66KT-LSBX].

States in 1960 were the same as the ten largest companies in 1910, producing a great deal of economic stability.⁴⁸ That's not true today. So, if you think of it as a system, then you say that equality produces greater quality because we are all in it together. Inequality produces people who rewrite the tax code to make sure they keep it all. We've gotten rid of the rule against perpetuities and trusts. Why? Because the new generation of oligarchs wants to control their wealth. It is legal. That's Bastiat.

Naomi: We had many long discussions and potential disagreements while writing the book. One of the long discussions was about what we mean when we hearken back to the 50s, and the organization man, because the organization man was a white man. Women who worked, could essentially serve as secretaries or housekeepers.⁴⁹ And then there's the Black racial wealth and income gap.⁵⁰ So, when we say, "Bring back the 50s," what we're talking about is bringing back some (but certainly not all) of the *values* identified with the organization man. Those values today are actually, perhaps ironically, identified with women. To get back to your question, part of the reconstructive project is valuing community, unions, loyalty, stability, and equality rather than *per se* going back to the 50s.

June: I was radicalized by this project. We started off writing a book about how women are losing here, there, and everywhere. We sometimes referred to the summary as a report card on women. Our initial draft looked at Title VII cases, the persistence of what

48. For a description of the importance of institutions in the fifties compared with today, see Carbone & Levit, *The Death of the Firm*, *supra* note 1.

49. U.S. DEPT' LAB. WOMEN'S BUREAU, WOMEN'S BUREAU BULLETIN 253, CHANGES IN WOMEN'S OCCUPATIONS 1940-1950, (1954), https://fraser.stlouisfed.org/files/docs/publications/women/b0253_dolwb_1954.pdf [<https://perma.cc/6SBK-EE7U>]; Cecilia A. Conrad, *Racial Trends on Labor Market Access and Wages: Women*, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES: VOLUME II 128 (Nat'l Acads. of Scis., Eng'g, & Med. ed.) (2001), <https://nap.nationalacademies.org/read/9719/chapter/7#127> [<https://perma.cc/9G6X-82L8>] ("Before 1960, a White woman without a college degree could find employment as a secretary, a sales clerk, or as a blue-collar operative. A Black woman, particularly in the South, had one option—domestic service. In 1960, more than 33 percent of all Black women worked as domestic servants ('private household workers'); only 3.2 percent of White women held these jobs . . .").

50. See, e.g., Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men Since 1940*, 133 Q. J. ECON. 1459, 1472 fig. 3, 1473 fig. 4 (2018); Stephanie Bornstein, *Confronting the Racial Pay Gap*, 75 VAND. L. REV. 1401, 1460 (2022); Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, 139 Q. J. ECON. 693 (2024) (the racial wealth gap was 7:1 in the 1950s).

seemed to be sex discrimination, and studies of implicit bias. But at some point, that perspective stopped making sense. If you go the era in the 60s when Congress passed the anti-discrimination laws, there was relative economic equality among white men. The question was, how do women gain a foothold? How do racial minorities win a seat at the table? Equality was the benchmark because the goal was to acquire the benefits white men had. If I were to give my law review version of the book, it would talk about how almost all of the law of Title VII is about measuring equality, that is, about measuring whether those who had been excluded had gained access to formerly white male workplaces.

The point of radicalization for me came in realizing that in today's world, there is no equality between white men or anyone else. You're talking about hierarchy and radical inequality, even among the well-off. Women have lost ground in a variety of ways, but, in relative terms, they are not the biggest losers in the new economy – that honor belongs to men without college degrees who no longer have access to the well-paying unionized jobs.⁵¹ Instead, when you're talking about radical inequality and asking how women are doing, we came to the conclusion in our book that women are the canaries in the coal mine; they are inside the workplace today rather than outside of it and their well-being is a measure of how well-run, fair, and transparent an organization is. We concluded the goal of the fight for women's equality in the workplace should not be: "How can we make sure that when Carrie Tolstedt commits fraud at Wells Fargo she can get away with it to the same degree as the men sitting next to her?" Once you start thinking in terms of a radically unequal society, the question shifts from equality to abuse of power. The symbol of that is #MeToo, not Betty Dukes' loss on employment discrimination in front of the Supreme Court in a five to four vote.⁵²

Nancy: We often get asked, "What should women do? Should women lean in? Should women lean out?" And our answer is, "Change the system, not the women." And I'd really like to get audience participation at this point on what can be done to move away from a system with high stakes bonus systems, et cetera. What can be done to move away from companies that pit employees

51. See June Carbone & Clare Huntington, *Fatherhood, Family Law, and the Crisis of Boys and Men*, 124 COLUM. L. REV. 2153, 2171–73 (2024) (describing relative declines in male earning and employment and reporting that the median wage of men without a college degree nearly fell in half after the late 70s, and the racial wage gap between white men and Black men increased).

52. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

against each other? We just danced in some of the areas. For example, we looked at shareholder derivative litigation and said, “Hey, can you sue the board instead of using Title VII, which has damage caps that haven’t changed in more than three decades?”

What do you think can be done to move from a winner-take-all system in a winner-take-all economy to a system that provides opportunities for equality, cares about employees, and cares about the well-being of the family? In other words, it goes back to some of the values that we’re talking about from the 50s.

Claire: Let me yet again offer a slightly contrarian perspective: might the trajectory be one-way, and inexorable? Many big law firms had “lockstep” compensation, where people were compensated based on seniority. At a certain point, some firms, and then most firms, and then almost all firms, moved to “eat what you kill,” lawyers being compensated based on the business they had brought to the firm. The latter system allows for enormous disparities in lawyer pay.⁵³ Maybe there will be a move back towards more collective compensation schemes—that is, maybe the phenomenon is cyclical—although the trajectory I am aware of is one way: from more collective (lockstep) to less collective (eat what you kill). Investment banks, too, have followed a similar trajectory, from more collective to less collective. Investment banks used to be organized as general partnerships, with each partner liable for the partnership’s obligations, a collective-type structure. They are now corporations— and far less collective in this respect.⁵⁴

Q (Avner Ben-Ner): As I was reading the book, I found myself in complete agreement with just about every sentence. On the other hand, two things bothered me. Your historical analysis, as in another recent book that I loved (David Leonardt’s Ours Was the Shining Future⁵⁵), projects the sense the past was much better than it probably was. Things were not as rosy as implied by the discussion

53. See generally Jacob Dougherty, Note, *Can LockStep Find Its Footing Again? Why the Lockstep Compensation Model Creates a Culture for Providing Better Legal Services*, 84 PITT. L. REV. 313 (2022); Milton C. Regan, Jr. & Lisa H. Rohrer, *Money and Meaning: The Moral Economy of Law Firm Compensation*, 10 U. ST. THOMAS L.J. 74 (2012); FINANCIAL TIMES, ‘Lockstep’ Falls Out of Step with Modern Law Firms, (Dec. 16, 2021) <https://www.ft.com/content/5bb897b9-ec87-4018-8705-589fe8ce569d> (last visited Mar. 24, 2025).

54. See generally CLAIRE A. HILL & RICHARD W. PAINTER, *BETTER BANKERS, BETTER BANKS PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT* (2015).

55. DAVID LEONARDT, *OURS WAS THE SHINING FUTURE: THE STORY OF THE AMERICAN DREAM* (2023).

of the present for large swaths of the population. As you know full well, unions were good for some workers but not others, and those who enjoyed wage increases in 1950s, for example, had lower standards of living, worse workplace safety, and harsher bosses than workers do today. Women's job opportunities were poor, and only a narrow slice enjoyed the suburban plenty enabled by the companies for which their "organization men" husbands worked. To say nothing of Blacks. So that's one thing that bothered me.

The other thing is, why have the changes faithfully described in the book taken place? The book seems to attribute them to changes in values, community, collectivity, and culture. I'm in complete agreement with all that. But what drives all this? Is it technology? Is it technology that allows greater mobility, faster movement of goods, rapid communications, and other changes in the economy that facilitated the rise of the phenomenon of winner-take-all? Is it that competition within organizations becoming harsher while product markets became dominated by monopolies, and oligopolies and powerful companies came to have a lot of power in labor markets?

Despite the trends that you describe in the book, there is also the other trend that if we sat here 20 or 50 years ago, there would not have been this many women, certainly not in front of the room. So there have been a lot of changes that kind of contradict that. Although I'm not disputing the statistics about wage disparities and relevant trends, there's no question that along with all these changes have been other kinds of changes. So, my biggest question that your stimulating book raises for me is, what drives all this?

June: Let's look at the three things that created the environment for change in 1980 as Jack Welch became the CEO of General Electric and ushered in what I think really is the starting point of this shift. First, when the U.S. emerged from World War II as the only industrial economy that the war hadn't decimated, it enjoyed something like a monopoly position. By the time you get to the 80s, global competition began to challenge U.S. dominance and fed the perception that American companies were bureaucratic and uncompetitive. Secondly, the combination of globalization and technological change also increased the importance of being able to respond quickly, companies that could respond nimbly could quickly boost earnings, something that became more important with the shift to shareholder value and executive compensation tied to stock options.

The third, and in my opinion, the underestimated component, is the Arab oil embargo and stagflation. That created not only a

recession, as the Federal Reserve finally dealt with it, but a sense of discontent that increased the openness to deregulation and the shift to shareholder primacy as a theory of corporate governance.⁵⁶

So, I think there are large components of the shift in corporate governance that would have happened anyway, such as automation and globalization. But when you then trace why CEO salaries skyrocketed, you find two things. There is a legal change, a legal change in how one expenses stock options.⁵⁷ And there is the change in mindset that makes share price the principal measure of success. Reinforcing this focus is also the role of activist investors, such as hedge funds, who buy up significant shares in a company they see as underperforming, acquire seats on the board, and pressure management to make changes that boost shareholder value.⁵⁸

You also find something else that drives me insane. I ask economists all the time, how do we measure this? Is it good? Is it bad? Have we increased productivity? Are there measures that allow us to analyze the corporate structure? The overwhelming answer I get is we have no idea how to measure productivity, so we don't study it. So that goes to the question, what's the flip side? I would note that it is the question I play with. I think the key to the Industrial Age is that the shop floor became the focal point for the New Deal and the Great Society, that is, large capitalist industrialists needed a large stable labor force. Henry Ford introduced the male family wage in 1914 because he had a 370% turnover the year before.⁵⁹ Unionization, in subsequent decades, then becomes an important factor in worker reforms and in the foundation of the Democratic party. Where are we now? We've eliminated the shop floor. There is no focal point for the counter organization.

Naomi: I think there was also a change in politics. One of the things we talk about in the book is the efforts of corporations. The Powell Memo⁶⁰ is an example of that in terms of spurring

56. See Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169 (2013).

57. Carbone & Levit, *Death of the Firm*, *supra* note 1, at 1000 (describing change in the tax treatment of stock options).

58. *Id.* at 966 (describing role of activist investors).

59. Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L. REV. 1, 15–16 (2021).

60. Lewis F. Powell, Jr., *The Memo in THE POWELL MEMORANDUM: ATTACK ON AMERICAN FREE ENTERPRISE SYSTEM* (Powell Archives ed., 1971), <https://scholarlycommons.law.wlu.edu/powellmemo/1/> [<https://perma.cc/2837-WKUQ>]; see Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their*

corporations to press their agenda politically, and we've seen that quite visibly in the Citizens United case and its repercussions.⁶¹ But this is an intermingling of business and politics even more, and the model that we critique in the book—and elsewhere.⁶² As we have noted, politicians “have found that the corporate playbook works in the political arena the same way that it does in the business sphere.”⁶³

Q: Your analysis pertains, as you presented it so far, exclusively to the private sector. Yet a lot of American workers are in the public sector. To what extent are the issues of inequality the same? And are the causes at all parallel?

June: We have many versions of the book, and in the initial draft, we talked a lot about the rise of public sector unions. The final version has a section on public school teachers, who have been under wholesale assault. I think one of the keys to the modern era, and to lawlessness in particular, is the radical shifting of power between the public sector and the private sector, with the public sector losing. The public sector, however, has been an important source of support for women and for Black women, in particular. I started working at the Justice Department in 1978. There was a picture on the wall of a whole group of white men and one white woman in a mini skirt. By the time I left five years later, the office was about 50% women and 25% non-white. The best of the men left to join law firms when their wives got pregnant, and the best of the women went to law firms and came back because it was a whole lot easier to raise kids in the public sector.

Naomi: We also have a chapter in the book on teachers as an example of public employees, and we see some of the same dynamics there. On the other hand, Rachel Rebouché, the Dean at Temple University, and co-authors have done wonderful articles analyzing

Right to Speak in 1970s Boston, 36 L. & HIST. REV. 943, 954 (2018) (“[Powell] called on business executives to enlist their own institutions—business corporations—to respond using ‘guerrilla warfare’ against the regulatory state.”).

61. *Citizens United v. FEC*, 558 U.S. 310 (2010); see, e.g., Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 28 (2017); Jedediah Purdy, *That We Are Underlings: The Real Problems in Disciplining Political Spending and the First Amendment*, 30 CONST. COMMENT. 391 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134.

62. See June Carbone, Nancy Levit & Naom Cahn, *Trump's Business Strategy and His Authoritarianism Are Linked - And Women Are the Antidote*, THE HILL (Mar. 20, 2024), <https://thehill.com/opinion/finance/4543027-trumps-business-strategy-and-his-authoritarianism-are-linked-and-women-are-the-antidote/> [https://perma.cc/P9TR-VVBE].

63. *Id.*

the gender composition of patent attorneys in public and private practice.⁶⁴

Afra Afsharipour: It's a paper that studies women's and men's relative participation in appellate patent litigation. They find a significant difference in the opportunity to argue patent cases between government lawyers versus lawyers from private sector law firms, with much less disparity in women presenting oral arguments in patent cases when they represent the government. The authors have also conducted other studies of inequality in patent litigation.⁶⁵

Q: My question is about political scientists and institutions. If Tony Blair and Bill Clinton had never existed, and the Democrats hadn't abandoned the working class, what would be different? and not necessarily among the 0.01%, but a little further down?

June: Public universities, like the University of Minnesota, would be better funded; *we* might be better off. The changes we are describing emphasize the impact of the changes in corporate governance on women, but they take place in the context of a broader set of changes that may be as profound as the industrial revolution. By 2019, even conservatives like Florida Senator Marco Rubio were criticizing "quarterly capitalism," which is really what we're describing in the book, that is, a myopic focus on quarterly earnings, and how that skewed decision-making in large companies and on Wall Street.⁶⁶ What we don't have is a new paradigm for governance.

So, think of Marx in the nineteenth century as synthesizing the critique of capitalism and providing a vocabulary for the opposition focused on the exploitation and the alienation of factory

64. Paul R. Gugliuzza & Rachel Rebouché, *Gender Inequality in Patent Litigation*, 100 N.C. L. REV. 1683 (2022) [hereinafter Gugliuzza & Rebouché, *Gender Inequality in Patent Litigation*]; see Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion in U.S. Corporate Law*, 90 U. CHI. L. REV. 1819, 1882 (2023) (discussing the study). For further analysis, see Paul R. Gugliuzza, Rachel Rebouché, & Jordana R. Goodman, *Inequality on Appeal: The Intersection of Race and Gender in Patent Litigation*, 58 U.C. DAVIS L. REV. (forthcoming 2024) [hereinafter Gugliuzza et al., *Inequality on Appeal*], <https://ssrn.com/abstract=4614338> [https://perma.cc/HFU4-3LQJ], or <http://dx.doi.org/10.2139/ssrn.4614338>.

65. See Gugliuzza et al., *Gender Inequality in Patent Litigation*, *supra* note 64; Gugliuzza et al., *Inequality on Appeal*, *supra* note 64.

66. MIAMI HERALD, *Rubio Sounds Alarm on U.S. Business Investing: 'The Stock Market is Not the Economy'*, TAMPA BAY TIMES (June 20, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/06/20/rubio-sounds-alarm-on-us-business-investing-the-stock-market-is-not-the-economy/> [https://perma.cc/AQW6-LB6H].

workers, and the solution was to rebuild the factory work. That became the agenda, starting with the Progressive era and continuing until Reagan's fight against the Air Traffic Controllers symbolizing the end of union power. What's the agenda today? There's none. There is an agenda that talks about lawless capitalists, but there's not an agenda to rebuild an economy that works for everybody, and I think that's the problem. Once you got rid of all the workers from the factory floor, you lost the focal point for the counter organization. So #MeToo is more inspiring than most workplace-related activities because there's a focal point.

Claire: Matt had talked previously about Scandinavian countries. I spent a semester interviewing various people in various Scandinavian and other northern European countries. In my interviews, I asked my interview subjects how they felt about high marginal tax rates and government generally—that is, whether they felt that the government would have good use for their money and otherwise trusted the government. Someone I talked to at some length in the Netherlands said to me: “I don't understand your country. We judge ourselves by how we treat the least of us.” But about ten minutes later, he was complaining that some Bulgarians, having entered the Netherlands as visitors, could, after five years of living in the Netherlands, get full privileges (presumably including welfare-type benefits). I asked how he could reconcile his two statements. He basically said that “the least of us” did not include (non-Dutch) like the Bulgarians.

I had conversations with people in Scandinavian countries, and especially in Sweden, noting increasing hostility to minorities. One strain of comments was to the effect that being egalitarian—having an egalitarian ethos and practices—is easier when a country is homogeneous. You're hypothesizing a United States in which people are okay with equality even though we are not a homogeneous country. My question, then, is: to what extent does significant heterogeneity on many dimensions complicate attempts to get towards moral equality? And what do we do about it?

June: We need to take a longer view of the process of change. When you look at the New Deal, one of the things you find is that Roosevelt knew he could not take on discrimination in the South and, indeed, some New Deal programs increased segregation. But Roosevelt was not indifferent to racial equality either, and he did things that laid a foundation for greater racial equality in later decades. The most important of these things were to create a legal foundation for unionization, and then during World War II, he acted to strengthen the roles of unions in the defense industry and to ban

discrimination by executive order in federal agencies, employers, and unions as part of the defense mobilization effort.⁶⁷ Fast forward to the present and one of the things we found in researching the book is that union representation is perhaps the single most important factor in reducing racial and gender disparities. Unions, though they have been under assault for the last half century, are no longer the bastion of white males. Unionized women earn 94% of the pay men receive, a substantially smaller wage gap than elsewhere in the economy, and Black and Latina women, in particular, do substantially better in unionized workplaces.⁶⁸

Naomi: I'm going to do a shout-out to our piece that came out today in a journal called *The Persistent*, which is about gender and voting.⁶⁹ To build on this last question, one of the things that we emphasize is the need for a community mentality rather than one based on "heads, I win, tails, you lose," which also gets at how we function in a society where people can trust each other. That doesn't at all mean we are against any form of competition.

Nancy: One of the questions that was posed before today was, do we feel optimistic? There are probably three different views. If we divorce ourselves from the roller coaster of the news these days, I'm actually quite optimistic about the long-term future. There's a phrase by a Unitarian minister to which Dr. Martin Luther King Jr. later gave voice: "the arc of the moral universe is long, but it bends toward justice."⁷⁰ I'm hopeful for the long term. This younger generation grew up with rights and never had to fight for them. They are learning to fight for rights. While the national political outcome is dark for people who believe in individual rights, there have been recent and unexpected bright spots on the state level. As just one example, voters in very red Kansas blocked a proposed constitutional amendment that would have unraveled protections for abortion that the Kansas Supreme Court held were supported

67. Exec. Order No. 8802, 6 Fed. Reg. 3109 (Jun. 27, 1941), <https://www.archives.gov/milestone-documents/executive-order-8802> [<https://perma.cc/E9XF-PWP5>].

68. See Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST. (Apr. 3, 2017), <https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap/> [<https://perma.cc/8V3A-7HX7>].

69. Naomi Cahn, June Carbone & Nancy Levit, *What's Really Fueling U.S. Voters?*, THE PERSISTENT (Oct. 24, 2024), <https://www.thepersistent.com/us-election-workplace-gender-harris-trump/> [<https://perma.cc/62KF-BDQY>].

70. Martin Luther King, Jr., Speech at the Washington National Cathedral: Remaining Awake Through a Great Revolution (Mar. 31, 1968), <https://www.seemeonline.com/history/mlk-jr-awake.htm> [<https://perma.cc/S7YM-6EL3>].

by the Kansas Constitution.⁷¹ In 2023, with abortion rights issues headed to the state supreme court, Wisconsin voters elected a liberal justice and flipped control of the Wisconsin Supreme Court to a liberal majority.⁷² These little flares of optimism may embody collective and progressive action on the state level. If federalists truly do believe in states' rights, that is where the ground game needs to occur. Also, the #MeToo movement was not a little flare: there were nineteen million tweets after actor Alyssa Milano tweeted the phrase in 2017, and the country witnessed extra-legal action (that did not depend on lawsuits), community cooperation, and turning the power of celebrated individuals against them to bring them down. I am hopeful about the future of the fight for rights—although if the *Dobbs* case, other decisions of the Roberts Court, and the outcome of the 2024 election are at all indicative, it will likely be a many-year battle that begins with some significant retrenchment.

June: One of the reasons I went off on my long digression about the history of the 50s and the New Deal is that when people, and men in particular, feel they're losing status, income, or position in society, they become less willing to support things that help other people, even if they themselves would benefit. What we tried to capture in the corporate environments is that the CEO tactics that enhance personal power involve making everybody insecure, pitting people against each other, and handsomely rewarding the winners but only so long as they're with the program. The alternative strategy requires people to believe that we are all in this together, but that requires success in delivering benefits to increase an overall sense of societal well-being.

Nancy: I speak for all of us in saying that we're delighted to have this opportunity to share our work with you, and we look forward to your thoughts.

71. Sherman Smith & Lily O'Shea Becker, *Kansas Voters Defeat Abortion Amendment in Unexpected Landslide*, KANSAS REFLECTOR (Aug. 2, 2022), <https://kansasreflector.com/2022/08/02/kansas-voters-defeat-abortion-amendment-in-unexpected-landslide-1/> [https://perma.cc/TYH4-LKS7].

72. Alex Ebert, *Abortion Ads Help Drive Most Expensive Court Race in U.S. History*, BLOOMBERG L. (Mar. 24, 2023), <https://about.bgov.com/news/abortion-ads-help-drive-most-expensive-court-race-in-us-history/> [https://perma.cc/U994-2WEP].