

FROM LILY BART TO THE BOOM-BOOM ROOM: HOW WALL STREET’S SOCIAL AND CULTURAL RESPONSE TO WOMEN HAS SHAPED SECURITIES REGULATION

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INTRODUCTION

In Edith Wharton's 1905 novel *The House of Mirth*, protagonist Lily Bart learns in one brutal moment what happens to women who get tangled up with the stock market.¹ Though she is beautiful and wellborn, Lily is vulnerable when she seeks salvation in the stock market—she has no family to support her, no fortune of her own, no training in business matters, and no socially acceptable means of acquiring money save marriage.² But, after letting her last best chance for an advantageous union slip away and gambling away her meager savings playing cards, Lily finds herself in desperate straits.³ Unable to support her lifestyle, Lily asks Gus Trenor, the husband of a friend, for help investing her tiny income.⁴ When Trenor promises Lily that he can make money for her by speculating in securities, Lily agrees:

[B]efore [the conversation] was over he had tried, with some show of success, to prove to [Lily] that, if she would only trust him, he could make a handsome sum of money for her without endangering the small amount she possessed. She was too genuinely ignorant of the manipulations of the stock market to understand his technical explanations, or even perhaps to perceive that certain points in them were slurred; the haziness enveloping the transaction served as a veil for her embarrassment, and through the general blur her hopes dilated like lamps in a fog. She understood only that her modest investments were to be mysteriously multiplied without risk to herself; and the assurance that this miracle would take place within a short time, that there would be no tedious interval for suspense and reaction, relieved her of her lingering scruples.⁵

¹ See EDITH WHARTON, *THE HOUSE OF MIRTH* 114–121, 259–261 (Paul Negri & Joslyn T. Pine eds., Dover Pubs. 2002) (1905).

² See *id.* at 67–68; see also WAI CHEE DIMOCK, *DEBASING EXCHANGE: EDITH WHARTON'S THE HOUSE OF MIRTH* (1985), reprinted in EDITH WHARTON'S *THE HOUSE OF MIRTH: A CASEBOOK*, at 63, 63–66 (Carole J. Singley ed., 2003) (describing the way in which the language of the marketplace reproduces itself in “the commodification of social intercourse” and notions of currency or exchange); Judith Fetterley, “*The Temptation to Be a Beautiful Object*”: *Double Standard and Double Bind in the House of Mirth*, 5 *STUD. IN AM. FICTION* 199, 203–207 (1977) (discussing the paradox of Lily's relation to her environment in a world where men and women are valued differently in relation to money).

³ WHARTON, *supra* note 1, at 67–68 (Lily exclaims, “I *can't* make that kind of marriage; it's impossible. But neither can I go on living as all the women in my set do. I am almost entirely dependent on my aunt, and . . . she makes me no regular allowance, and lately I've lost money at cards, and I don't dare tell her about it. I have paid my card debts, of course, but there is hardly anything left for my other expenses, and if I go on with my present life I shall be in horrible difficulties. I have a tiny income of my own, but I'm afraid it's badly invested, for it seems to bring in less every year, and I am so ignorant of money matters that I don't know if my aunt's agent, who looks after it, is a good advisor.”).

⁴ *Id.* at 68.

⁵ *Id.*

When Trenor begins presenting Lily with money, she gladly accepts what she assumes are trading profits.⁶ One night, however, after luring Lily to his house under false pretenses, Trenor makes his true intentions known.⁷ After accusing Lily of leading him on, Trenor demands sexual favors, telling Lily that she must “pay up.”⁸ When Lily protests, and reminds Trenor that she “kn[ows] nothing of business,” Trenor says that his demands are “fair play” and reasonable “interest on one’s money.”⁹ Though Lily manages to extricate herself from the house without submitting to Trenor’s demands, her reputation is never the same after this encounter.¹⁰ Cast off by her social circle a short time later, Lily eventually leaves her last pennies to Trenor, takes an overdose of sleeping medication, and dies alone in a boarding house room.¹¹

One hundred years later, when senior Morgan Stanley executive Zoe Cruz sought her fortune in the stock market, she appeared to have none of Lily Bart’s limitations.¹² Ms. Cruz began her Wall Street career in 1982 at the storied Wall Street firm Morgan Stanley after graduating from Harvard College and Harvard Business School.¹³ Her first job was on the trading desk—a highly competitive and male-dominated environment where posters of pinup girls and strip club outings were not unheard of, then or now.¹⁴ After developing a reputation as a “tough and savvy trader,” Cruz spent the next twenty years working her way up through the ranks at Morgan Stanley, eventually becoming co-president of the firm and one of the most powerful and highly paid executives on Wall Street.¹⁵ At the apex of her tenure at Morgan Stanley, Cruz earned millions of dollars per year in compensation,

⁶ See *id.* at 69, 74.

⁷ *Id.* at 114–21. As Trenor explains:

That’s the trouble . . . you got reckless—thought you could turn me inside out, and chuck me in the gutter like an empty purse. But, by gad, that ain’t playing fair: that’s dodging the rules of the game. Of course I know now what you wanted—it wasn’t my beautiful eyes you were after—but I tell you what, Miss Lily, you’ve got to pay up for making me think so—

Id. at 118. Lily, confused, asks whether she owes him money, but Trenor laughs and responds, “Oh, I’m not asking for payment in kind. But there’s such a thing as fair play—and interest on one’s money—and hang me if I’ve had as much as a look from you.” *Id.* at 118.

⁸ *Id.* at 118.

⁹ *Id.*

¹⁰ See *id.* at 133–36.

¹¹ *Id.* at 257–63.

¹² See generally Joe Hagan, *Only the Men Survive: The Crash of Zoe Cruz*, N.Y. MAG., May 5, 2008, at 32 [hereinafter Hagan, *Only the Men*].

¹³ *Id.* at 34.

¹⁴ See *id.* at 34. For a more recent discussion of trading desk culture, see In the Matter of Fidelity Mgmt. & Research Co., Investment Advisers Act of 1940 Release No. 2713, Investment Company Act of 1940 Release No. 28185, File No. 3-12976 (Mar. 5, 2008).

¹⁵ See Hagan, *Only the Men*, *supra* note 12, at 33, 119. With respect to Ms. Cruz’s compensation, see Morgan Stanley, Definitive Proxy Statement (Schedule 14A), at 14–16 (Mar. 4, 2004); Morgan Stanley, Definitive Proxy Statement (Schedule 14A), at 25–29 (Feb. 23, 2007).

and billions in profits for Morgan Stanley through divisions under her control.¹⁶ By the spring of 2007, Cruz's boss and mentor John Mack openly signaled that she was his first choice to replace him as the head of the firm when he retired.¹⁷ If appointed, Cruz would have been the first—and only—woman to serve as chief executive officer of a major Wall Street firm.

In the end, however, just months after praising her market insights and her contributions to the Morgan Stanley's bottom line, Mack called Cruz to his office.¹⁸ With the subprime mortgage crisis unfolding, losses mounting, and his own job under pressure, Mack told Cruz that he had "lost confidence" in her and asked her to resign.¹⁹ After a ten minute meeting, Cruz left the building and never went back.²⁰

With her self-described "alpha" personality²¹ and her long tenure on Wall Street, one might expect Cruz to be treated like any other Wall Street executive forced out in the wake of the market crisis, with some arguing that she deserved to be fired for Morgan Stanley's losses, and others arguing that subordinates, bosses, and extraordinary economic conditions contributed to the firm's missteps.²² To a degree, this has happened.²³ But since Wall Street remains a male enclave, and Cruz had advanced higher than any other woman while exhibiting many of the same personal and professional attributes as her male peers, her termination triggered an intense debate about Wall Street's social and cultural response to women.²⁴ The terms of this debate pit

¹⁶ See Hagan, *Only the Men*, *supra* note 12, at 36–37; see also Landon Thomas, Jr., *Top Ranks of Women on Wall Street are Shrinking*, N.Y. TIMES, Dec. 1, 2007, at C1 [hereinafter Thomas, *Top Ranks*].

¹⁷ Hagan, *Only the Men*, *supra* note 12, at 119.

¹⁸ *Id.* at 34.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* According to Hagan:

[Cruz] wasn't oblivious to the fact that Wall Street, especially at the time, was dominated by men, but she was determined not to acknowledge it. She loved the game, and she was good at it—she didn't see what her gender had to do with it. And her competitive zeal would soon have her leapfrogging over men who had once been her bosses.

Id. Hagan notes that while Cruz "might not have been liked by everyone," she developed a reputation as a "tough and savvy trader with quick and unwavering views on market positions." *Id.*

²² *Id.* at 120; see also Thomas, *Top Ranks*, *supra* note 16.

²³ See, e.g., Hagan, *Only the Men*, *supra* note 12, at 34, 120; Landon Thomas, Jr., *Morgan Stanley Executive Ousted After Trading Loss*, N.Y. TIMES, Nov. 30, 2007, at C1.

²⁴ Hagan, *Only the Men*, *supra* note 12, at 34; see also Thomas, *Top Ranks*, *supra* note 16. It is worth noting that around the time that Zoe Cruz was terminated, two other senior women (Sallie Krawcheck, formerly of Citigroup, and Erin Callen, formerly of Lehman Brothers) were terminated, also triggering debate. See, e.g., Geraldine Fabrikant, *When Citi Lost Sallie*, N.Y. TIMES, Nov. 16, 2008, at BU1 (attributing Krawcheck's termination to corporate politics); Steve Fishman, *Burning Down His House*, N.Y. MAG, Nov. 30, 2008, available at <http://nymag.com/news/business/52603/> (discussing Callen's termination).

Cruz's "insider" credentials against images of women and the stock market that date back to the days of Lily Bart.

For example, despite Cruz's record of success, some of her Morgan Stanley colleagues reportedly were never convinced that she knew what she was doing.²⁵ When Cruz's former boss Vikram Pandit criticized her for not making as much money as competitors at other banks, and Cruz argued that she could improve the bottom line if Morgan Stanley were willing to take on more risk, Pandit allegedly said that he would be "more than happy for Zoe to take more risk . . . if [he] felt comfortable that she understood the risk she'd be taking."²⁶ At an annual dinner during which subordinates "roast" senior management, Cruz's division was reportedly described as being divided into the part "she gets" and the part "she doesn't get."²⁷ One mid-level executive reportedly interrupted a management meeting to ask whether Cruz was "high" because she was not, in his view, making sense.²⁸ As I discuss below, the belief that women lack market acumen and financial competence has been around for more than one hundred years.

Similarly, while Wall Street executives regularly earn praise for their passion, ambition, and aggression, Cruz's blend of these characteristics rubbed some of her former colleagues the wrong way.²⁹ Some complained that she was "overly-emotional" and manipulative.³⁰ Others criticized her

²⁵ Hagan, *Only the Men*, *supra* note 12, at 37; see also Randall Smith, Anita Raghavan & Ann Davis, *How Zoe Cruz Lost Her Job On Wall Street*, WALL ST. J., Dec. 1, 2007, at B1.

Among other criticisms leveled at Ms. Cruz: She didn't have a good handle on the risks the firm took in its mammoth bond division, a business she had grown up in and built over the years She also pushed some big organizational changes that some executives thought of as arbitrary and ill-informed.

Id. By contrast, some commentators have argued that firms like Bear Stearns, Merrill Lynch, and Lehman Brothers—all of which no longer exist as independent entities—failed because of hubris, greed, and compensation systems that encouraged and rewarded ill-advised risk-taking, not because the firm's executives were fundamentally incapable of understanding trading and risk. See, e.g., William D. Cohen, *A Tsunami of Excuses*, N.Y. TIMES, Mar. 12, 2009, at A29.

²⁶ See Hagan, *Only the Men*, *supra* note 12, at 37. Pandit currently serves as the chief executive officer of struggling Citigroup, Inc. See generally Joe Hagan, *The Most Powerful Man on Wall Street*, N.Y. MAG., Mar. 1, 2009 [hereinafter Hagan, *Powerful Man*] (describing Pandit's stormy tenure at the struggling financial giant).

²⁷ Hagan, *Only the Men*, *supra* note 12, at 37.

²⁸ *Id.*

²⁹ See *id.* at 35; see also Thomas, *Top Ranks*, *supra* note 16 (noting that while Cruz "tried to strike a balance between showing the emotion and fervor common to Wall Street's top traders—she, like others, would frequently snap a pencil when frustrated—and projecting the authority of a senior executive[,] her "impulsive behavior as well as her proclivity to play the occasional political card, rubbed others the wrong way").

³⁰ Hagan, *Only the Men*, *supra* note 12, at 37 (according to one former colleague, Cruz "wanted to compete with the guys, but she was not beyond crying when it was useful"); see also Smith et al., *supra* note 25 (noting that Cruz was criticized for having "frequently clashed" with a well-liked investment banker at Morgan Stanley).

management style and suggested that she was unable to cope with dissent.³¹ When she was fired, some reportedly were “almost gleeful” that the woman they had nick-named “Czarina,” “the Wicked Witch,” and the “Cruz Missile” finally was gone.³² Even supporters suggested that her hard-charging nature, while necessary, had come at a cost.³³ As one former colleague put it, “[f]or women to get to the top, they have to be so much more ruthless Whether it’s Martha Stewart or Donna Karan—the most bitchy people you’d ever want to meet in your life.”³⁴ As I discuss below, the notion that women are too emotional for Wall Street also has been around for at least one hundred years.

In this article, I argue that even though Lily Bart’s fictional ruin and Zoe Cruz’s rise and fall at Morgan Stanley are separated by more than one hundred years, “stories” like theirs are typical and reflect Wall Street’s fixed and surprisingly narrow social and cultural response to women who wish to trade securities or work for financial firms. In Wall Street lore, the movers and shakers of the securities markets are almost invariably men—they are the “masters of the universe,”³⁵ the “Big Swinging Dicks,”³⁶ the regulators, the decision-makers, and even the scoundrels thought to have shaped the markets and our system of securities regulation.³⁷ Women, by contrast, are

³¹ See Smith et al., *supra* note 25 (“Ms. Cruz was faulted internally for not having enough risk-management executives reviewing the subprime bets . . . Ms. Cruz didn’t encourage controversy and dissent, and by the time the risk-management group did highlight some problems and how the positions were working, it was too late.”); Hagan, *Only the Men*, *supra* note 12, at 120 (“When Hubler’s trading manager, Tony Tufariello, told Mack he had never liked Hubler’s mortgage positions, Mack asked why he hadn’t spoken up. ‘You cannot disagree with Zoe and continue to be successful at this firm,’ Tufariello said, according to someone briefed on the conversation.”).

³² Hagan, *Only the Men*, *supra* note 12, at 34.

³³ See *id.* at 120 (“[As] Mack interviewed the parties involved, it became clear that the blame was coalescing around Cruz.”).

³⁴ *Id.* at 35. For a discussion of whether Martha Stewart was targeted for prosecution because she was female and because she was thought not to conform to female social norms, see *MARTHA STEWART’S LEGAL TROUBLES* 9–22 (Joan MacLeod Heminway ed., 2007).

³⁵ The phrase “masters of the universe”—at least as it relates to Wall Street—appears in Tom Wolfe’s 1987 novel *The Bonfire of the Vanities* to describe Sherman McCoy. See TOM WOLFE, *THE BONFIRE OF THE VANITIES* 11 (1987) (McCoy is a rich white New York City bond trader—a self-described master of the universe—whose life is transformed when he and his mistress are involved in an apparent hit-and-run, in which a young black man is injured in the Bronx.). Wolfe later explained that he used the term “masters of the universe” to refer to the “ambitious young men (there were no women) who, starting with the 1980s, began racking up millions every year—millions!—in performance bonuses at investment banks” (most of which no longer exist). See Tom Wolfe, Op-Ed., *Greenwich Time*, N.Y. TIMES, Sept. 28, 2008, at WK12.

³⁶ Michael Lewis used the term “Big Swinging Dick” in his book *Liar’s Poker* to describe the aspirations of young, ambitious securities salespeople: “[i]f he could make millions of dollars come out of those phones, he became that most revered of all species: a Big Swinging Dick. . . . [E]veryone wanted to be a Big Swinging Dick, even the women. Big Swinging Dickettes.” MICHAEL LEWIS, *LIAR’S POKER* 46 (1989).

³⁷ See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 101–123,

portrayed as social and cultural outsiders in Wall Street narrative.³⁸ They are either omitted entirely, as if they are (and should remain) absent from securities markets, or they are relegated to the status of hapless victims or allegedly incompetent shrews. In either case, they are presumed to lack the skills and characteristics necessary to navigate Wall Street, as well as to risk the loss of fortune, virtue, and social standing when foolish enough to challenge the market's dark arts.

Drawing upon legislative history, administrative agency reports, and selected case law, I further argue that Wall Street's social and cultural response to women has become embedded in our system of securities regulation. Based on the legislative history of the federal securities laws, reports issued by the Securities and Exchange Commission, and case law, I argue that reform-minded legislators, courts, and regulators have used female victims of investment abuse—particularly “poor widows”—to establish standards for investor protection on Wall Street for almost one hundred years. In these matters, women serve as proxies for all vulnerable investors, and reformers use the financial abuse of women to generate outrage and sympathy for reform. Drawing upon employment discrimination litigation, I also show how financial institutions have used women's alleged emotionality and lack of financial competence to justify excluding women from employment in the securities industry and to rebut discrimination, harassment, and retaliation claims. Despite both doctrinal and other differences, these disparate bodies of law and commentary treat women as overly-emotional and unskilled outsiders who need to be protected against or excluded from Wall Street's prevailing social and cultural norms.

To understand how Wall Street's gender norms have shaped securities regulation, Parts I through IV of this paper survey images of women and the stock market from the past one hundred years in chronological fashion. Part I sets the stage for this inquiry by surveying pre-twentieth century accounts of women and securities trading. This section demonstrates that from the earliest days of securities trading, “polite society” thought women had no business buying or selling securities. Women who challenged this presumption were thought to risk financial and social ruin in the manner of Lily Bart. Part II analyzes accounts of female traders and securities industry workers from the turn of the century until just after World War II. This section shows that even as women's participation in the markets (and all of public life) increased, industry insiders continued to argue that women were ill-suited to the rough and tumble of the markets. Market commentators cited the grow-

156–212 (3d ed. 2003) (examining the origins, accomplishments, successes, and failings of the SEC in chapters entitled “Moley's Man” and “The Man Who Got Things Done”).

³⁸ See ROBERT E. WRIGHT & DAVID J. COWEN, FINANCIAL FOUNDING FATHERS: THE MEN WHO MADE AMERICA RICH (2006) (reflecting on the lives of early America's most important financiers—with no discussion of women); see also KEN FISHER, 100 MINDS THAT MADE THE MARKET 190–91, 263–65, 371–74 (2007) (listing three women as influential actors in the development of the securities market) [hereinafter FISHER, 100 MINDS].

ing presence and activities of female security holders as worrisome events. When legislators, courts, and regulators began to debate the direct federal regulation of the securities markets, they seized upon female victims of investment abuse to justify investor protection reforms. Part III focuses on the period from post-World War II through the 1960s. This section demonstrates that even as Wall Street began to recognize women's growing economic muscle and to market to female customers, industry insiders continued to depict women as uninformed and unskilled market outsiders. Court and regulators likewise continued to cite female victims of investment abuse when targeting sales practices abuses. Part IV examines images of women and the securities markets from the late 1960s to the present. Focusing on employment discrimination litigation, this section shows how Wall Street insiders have used women's perceived emotionality and lack of market acumen to limit access to employment and to rebut civil rights claims.

Having exposed links between Wall Street's social and cultural response to women and securities regulation, Part V of this paper argues that Wall Street's singular narrative for women has come at a cost, and one that we have yet fully to explore. As I discuss below, although securities regulation casts itself as a gender-neutral exercise, many of its norms, standards, and systems reflect gender-based assumptions about financial, speculative, and managerial competence. As scholars including Martha Minow have argued, importing assumptions about the competence (or lack thereof) of system participants into the law is a dangerous business, in part because it risks legitimizing and codifying discriminatory social, cultural, and legal norms.³⁹ If scandals like the Bernard Madoff Ponzi scheme and the collapse of venerable firms like Lehman Brothers and Bear Stearns tell us anything, it is that assumptions about competence built into our system of securities regulation merit a second look. With both history and current events as a guide, Section V asks whether a less traditionally gendered approach to securities regulation might help us develop a more effective and efficient system of regulating markets and trading. For example, Section V asks what would happen if we stopped defaulting to "master of the universe" stereotypes to express market acumen, and instead examined the skills and characteristics of successful investors and executives. Would we do a better job of identifying when someone who looks and acts the part is in fact incompetent or a fraudster? Would we be more skeptical when someone who does not look the part is deemed to lack the skills and characteristics necessary to serve as CEO of a Wall Street firm? Likewise, if we stopped using "poor widows" as a proxy for lack of sophistication, would we develop a more nuanced, less gender-specific list of characteristics of victims of investment abuse? Would this help us to identify potential victims of fraud, and would these investors

³⁹ See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (exploring costs associated with the use of stereotypical categories and labels in legal analysis).

have an easier time establishing liability when they are sold questionable securities? More broadly, Section V argues that it is time to develop a more nuanced list of the skills and characteristics associated with financial and managerial competence, and one less dependent upon century-old ideas about who is capable of identifying and managing market risks. Part V argues that unless we raise these sorts of questions and issues, and perform the empirical research necessary to address them, we will be left with stereotypes that have not held up well over time. As the current economic crisis and recent scandals demonstrate, we need a clear-eyed assessment, not an outdated and discriminatory assessment, of what works and what does not when it comes to trading securities and working on Wall Street.

PART I: THE PRE-TWENTIETH CENTURY PARADIGM: A FOOL AND HER
MONEY (AND VIRTUE) ARE SOON PARTED

*British Antecedents: Harlots and Wither'd Maids*⁴⁰

Though accounts of securities regulation in the United States often begin with Blue Sky laws or the Securities Act of 1933, the historical antecedents of our domestic securities regulation regime likely date back hundreds of years earlier to Great Britain.⁴¹ While a detailed survey of British attitudes toward female investors is beyond the scope of this article, the South Sea Bubble, an early stock market crash in England, offers a glimpse into early and (as it turns out) durable concerns about female securities trading and social norms.⁴² Established in 1711, the official purpose of the South Sea Company was to trade with Spanish South America.⁴³ Though the company engaged in some (limited) commercial activities—principally the slave trade—most of its income came from the British government in the form of interest on the company's holdings of Britain's national debt.⁴⁴ In 1720, the English government and the company agreed to a plan by which the company would issue millions of pounds of stock in exchange for government

⁴⁰ See *infra* note 50.

⁴¹ See generally STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860* (1998) (discussing regulation of the earliest securities markets in the United States and England, as well as widespread attitudes that informed the development and structure of early regulatory regimes in both countries).

⁴² See *id.* at 41–87 (discussing the South Sea Bubble). For a broad overview of the South Sea Company, see LARRY NEAL, *THE RISE OF FINANCIAL CAPITALISM: INTERNATIONAL CAPITAL MARKETS IN THE AGE OF REASON* 62–117 (1990); EDWARD CHANCELLOR, *DEVIL TAKE THE HINDMOST: A HISTORY OF FINANCIAL SPECULATION* 58–95 (1999); P.G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY OF THE DEVELOPMENT OF PUBLIC CREDIT 1688–1756* (1967). See generally JOHN CARSWELL, *THE SOUTH SEA BUBBLE* (1960); JOHN G. SPERLING, *THE SOUTH SEA COMPANY: AN HISTORICAL ESSAY AND BIBLIOGRAPHIC FINDING LIST* (1962).

⁴³ BANNER, *supra* note 41, at 42.

⁴⁴ See CARSWELL, *supra* note 42, at 45–49 (discussing the origins of the South Sea Company and its financial underpinnings).

debt.⁴⁵ Once the British parliament approved the plan in principle, the company's stock price began to rise, igniting widespread interest in stock speculation.⁴⁶ In September of 1720, when the price crashed, many investors were ruined.⁴⁷

As Stuart Banner and others have observed, “[o]f all the criticisms of the market generated by the South Sea Bubble, perhaps the most common concerned the market’s effect on the social structure of England” including the “disruption of traditional gender roles.”⁴⁸ Women’s expanded investment activity during the bubble was a surprise to good society and was “sati-rized[] in verses that suggest some discomfort with the independence that securities trading could bring.”⁴⁹ In songs, letters, and other popular culture forums, female South Sea speculators were described as mad speculators, “harlots,” and “wither’d maids.”⁵⁰ When markets crashed in 1720, these same women were described as social outcasts, having sacrificed fortune and feminine virtue to the corrupting lure of the markets.⁵¹

⁴⁵ BANNER, *supra* note 41, at 43.

⁴⁶ *Id.*

⁴⁷ *Id.* at 44.

⁴⁸ *Id.* at 65, 69; see also Catherine Ingrassia, *The Pleasure of Business and the Business of Pleasure: Gender, Credit and the South Sea Bubble*, in 24 *STUD. IN EIGHTEENTH-CENTURY CULTURE* 191, 192 (Carla H. Hay & Syndy M. Conger eds., 1995).

⁴⁹ BANNER, *supra* note 41, at 70. Peter Earle has emphasized “the enormous importance of women, particularly widows, in the [eighteenth century] London investment markets.” PETER EARLE, *THE MAKING OF THE ENGLISH MIDDLE CLASS: BUSINESS, SOCIETY AND FAMILY LIFE IN LONDON, 1660–1730*, 173 (Methuen London 1989). Carswell suggests that women of this era held stock in part because it was a “form of property which a married woman could properly retain as a personal estate” under then-applicable restraints on female ownership of property. CARSWELL, *supra* note 42, at 8. Carswell estimates that by 1685, “20 per cent. of the holders of India and Africa bonds (what we should call preference stock) were women; and between 1675 and 1691 the number of women holding the ordinary shares of the East India Company doubled.” *Id.* Dickson likewise estimates that between the 1690s and 1753, women held on average twenty percent of the stock holdings in annuities and funds, including those issued by the East India and South Sea Company. DICKSON, *supra* note 42, at 267.

⁵⁰ BANNER, *supra* note 41, at 70–71. As Catherine Ingrassia explains, texts from this era:

Repeatedly locate women symbolically and materially at the center of the cultural disruption [arising from speculation and paper credit], as they warn of speculative investment’s feminizing influence on culture as a whole. . . . The discourse surrounding the South Sea Bubble uses gendered characterizations to express cultural anxiety about the development of paper credit, the increasing participation of women in speculative investment, and the perceived feminization of culture.

CATHERINE INGRASSIA, *AUTHORSHIP, COMMERCE AND GENDER IN EARLY EIGHTEENTH-CENTURY ENGLAND: A CULTURE OF PAPER CREDIT* 20 (1998).

⁵¹ BANNER, *supra* note 41, at 69–72. A series of South Sea trading cards available through the Kress Collection at the Harvard Business School Library offer examples of this phenomenon. At least nine of the cards satirize female market participants with rhymes, including the Six of Diamonds: “A certain Lady when the Stocks run high, Put on Rich Robes, To Charm Her Lover’s Eye; But South Sea falling, Pawn’d her fine Brocades, And now appears like other homely Jades.” Similarly, the King of Spades purports to show the fate that awaits women foolish enough to speculate in South Sea securities: “A Lady, prompted by an Am’rous youth, Ventur’d her Dow’r and lost it in the

Early National United States: Where Are Women's Stories?

Like their British counterparts, scholars of the early national United States also have uncovered evidence of women buying and selling securities (or at least recommending transactions to others) as early as the 1700s.⁵² While some women of this era participated in financial transactions as agents for fathers, brothers, or husbands, others appear to have engaged in transactions for their own accounts.⁵³ Despite these early examples of female investment activity, however, detailed accounts of female market participants from this era are rare, and women generally are not included in discussions of the “founding fathers” of our modern financial system.⁵⁴

There are several likely reasons for this exclusion, some specific to women and some not. Certainly the realities of colonial and frontier life and the rigors of westward expansion meant that for many years, survival (and not securities trading) was the focus of everyday life. Moreover, until at least the mid-1700s, if not later, most economic enterprises were agricultural, small scale, family-based operations: as a result, there simply was not an abundance of corporate securities to buy or sell during the early days of the Republic, or public markets on which to trade them.⁵⁵ In addition to

South; My Dear, quoth he, ‘tis time I should forsake you, Since South Sea has your Gold, may South Sea take you.” South Sea Bubble Playing Cards (Carrington Bowles 1721) (on file with Baker Business Historical Collections-Kress Collection), available at <http://www.library.hbs.edu/hc/ssb/recreationandarts/cards.html>. See also Ingrassia, *supra* note 48, at 192; Ingrassia, *supra* note 50, at 17–39. These attitudes appear to have lingered. See Viscount Erleigh, *THE SOUTH SEA BUBBLE* 11 (Putnam 1933) (In describing the South Sea Bubble over two hundred years later, Gerald Rufus Isaacs, better known as Viscount Erleigh, observed that “[s]tatesmen forgot their Politics, Lawyers the Bar, Marchants their Traffic, Physicians their Patients, Tradesmen their Shops, Debtors of Quality their Creditors, Divines the Pulpit and even the Women themselves their Pride and Vanity.”).

⁵² See, e.g., Woody Holton, *Abigail Adams, Bond Speculator*, LXIV WM. & MARY Q., 821 (2007). Holton argues that Abigail Adams was interested in speculating in government-issued securities in part because “she had been succeeding at it since the summer of 1777, when she purchased her first £100 (Massachusetts) federal Loan Office certificate.” *Id.* at 823. Holton reports that Adams had earned a twenty-four percent rate of return on this investment on her initial investment every year. *Id.* at 824.

⁵³ See Robert E. Wright, *Women and Finance in the Early National U.S.*, 42 UNIV. OF VA., ESSAYS IN HISTORY (2000) (discussing women’s transactions in government-issued securities in the section entitled, “Women’s Involvement in Early National Financial Markets and Institutions”).

⁵⁴ See, e.g., Fisher, 100 MINDS, *supra* note 38, at 190–91, 263–65, 371–74; Wright & Cowen, *supra* note 38 (listing no women).

⁵⁵ See Banner, *supra* note 41, at 127–28.

Until the second half of the eighteenth century, there was little possibility to own American securities. No colonial government borrowed money by issuing bonds; because wealth tended to be so illiquid, government was financed primarily by issuing unbacked paper currency to pay for government expenses, currency which was taken back in for taxes. Very few business enterprises raised capital by issuing stock. . . . When one adds the handful of American enterprises chartered by the English government and the unchartered joint-stock companies in existence despite the extension of the (English) Bubble Act to the colonies, the likelihood of

these factors, women suffered from a number of other impediments that may have depressed their investment activity. Until the mid-1800s, legal restrictions on women's right to own property—including so-called coverture or *feme covert* systems—made it difficult (if not impossible) for married women to own, inherit, or bequeath property of any kind, including securities, thus making it difficult for women to acquire, accumulate, or trade property in their own names.⁵⁶ Notions of femininity and gentility also may have depressed female investment activity (or at least reports of female investment activity) during this era, since a woman's ideal role by the beginning of the nineteenth century was fixed firmly in the domestic realm, where she was encouraged to be dependent, to nurture her family, and to remain removed from the rough and tumble of public life.⁵⁷ As *The House of Mirth*

owning shares in an American enterprise before the late eighteenth century was still minimal.

Id. Though states and later the national government began to issue debt securities beginning in the mid-1700s, *id.* at 129–30, corporate issues did not dominate domestic markets until the first half of the nineteenth century, *id.* at 190. See generally Carl Parker, *Governmental Regulation of Speculation*, 38 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, at 126 (1911) (discussing changes in the industrial organization of businesses and government regulation of speculation).

⁵⁶ Carole Shammas, *Re-assessing the Married Women's Property Acts*, 6 J. OF WOMEN'S HIST. 9, 9 (1994) [hereinafter, Shammas, *Married Women's Property Acts*] (under common law systems of coverture, "a woman's personalty (all property except land and improvements) went to her husband when she married, and her realty came under his control."); see also Carole Shammas, *Early American Women and Control over Capital*, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION 134, 137–141, 150–51 (Ronald Hoffman and Peter J. Albert eds., 1989) (discussing the impact of the coverture system on early American women's ability to own, inherit, and bequeath property and its impact upon women's wealth). As numerous scholars have demonstrated, coverture was just one of many legal impediments that limited women's ability to participate in economic, social, and political life over the years. See, e.g., MICHAEL J. PHILLIPS, THE DILEMMAS OF INDIVIDUALISM: STATUS, LIBERTY, AND AMERICAN CONSTITUTIONAL LAW 20–30. As Martha Minow argues, "infants, married women, slaves, servants, apprentices, the very poor, and the mentally deficient" were all groups "excepted from liberal individualism" long after legal relationships began to transition from status-based to more individualized contract-based models. MINOW, *supra* note 39, at 124.

⁵⁷ See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499–1501 (1983). The notion that women are (and should remain) delicate, timid, dependent upon the protection of men, and far removed from civil and economic society is, of course, nothing new in American law. In 1873, for example, when the Supreme Court rejected Myra Bradwell's claim that Illinois could not constitutionally bar women from the practice of law, Justice Joseph Bradley cited presumed differences between men and women as grounds for his ruling:

Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Bradwell v. Illinois, 83 U.S. 130, 141 (1872).

suggests, speculating in securities was not something that wellborn women were encouraged to do.⁵⁸

By the early- to mid-1800s, however, economic, legal, and social developments opened the door—albeit slightly—for expanded female investment activity. With the coming of the industrial revolution, the nation's economy began to transform from one dominated by agriculture and smaller-scale enterprises to one characterized by larger-scale, capital-intensive businesses.⁵⁹ These businesses needed to raise money from the public, and this meant that more stocks and bonds were offered and available for trading on newly organized and increasingly busy public securities markets.⁶⁰ According to Carole Shammas, the gradual transformation of the nation's economy had important consequences for women: “[t]he growth of personalty [during this period], much of it due to the issuance of corporate stocks and bonds, made the amending of *feme covert* status all the more pressing and contributed to the passage of the married women's property acts in the various states” between the 1840s and the 1880s.⁶¹ As Shammas further explains, once coverture systems were abolished, and “married women could retain their own personalty, stocks and bonds became a very attractive form of wealth for men to give to females because the management of it could be undertaken by others at a lesser cost than was the case with realty or business.”⁶² Along with the end of coverture, the rise of the so-called “new

⁵⁸ See *supra* notes 1–10 and accompanying text. As Banner notes, even apart from gender-related concerns, securities speculators have long been viewed with distrust. See BANNER, *supra* note 41, at 281.

The belief that the sellers of securities were more likely to be deceitful than the sellers of other kinds of property, and that the sale of securities accordingly needed to be more closely supervised by government than the sale of other things, was widely held as early as the 1690s, and had never disappeared.

Id. As George Robb notes, “[w]omen as victims of an unregulated economy was a longstanding cliché of Victorian newspapers, novels and plays in both England and America” George Robb, *Women and White Collar Crime: Debates on Gender, Fraud and the Corporate Economy in England and America, 1850–1930*, BRIT. J. CRIMINOLOGY 1058, 1063 (2006).

⁵⁹ See, e.g., Parker, *supra* note 55, at 126–27. For a discussion of the change from family to corporate capitalism toward the end of the eighteenth century and into the nineteenth century, see PETER DOBKIN HALL, *THE ORGANIZATION OF AMERICAN CULTURE, 1790–1900*, at 20–75, 94–124 (1982).

⁶⁰ Parker, *supra* note 55, at 127–28.

⁶¹ Shammas, *Married Women's Property Acts*, *supra* note 56, at 1, 25 (citing Marylyn Salmon, *Republican Sentiment, Economic Changes and the Property Rights of Women in American Law*, in *WOMEN IN THE AGE OF THE AMERICAN REVOLUTION* 447–75 (Ronald Hoffman & Peter J. Albert eds., 1989)).

⁶² Shammas, *Married Women's Property Acts*, *supra* note 56, at 25.

Between the 1840s and 1880s, most states passed a series of acts that went beyond debt protection and recognized the right of married women to manage, enjoy the profits, sell, and will personal and real property that they had owned prior to marriage or had been given or inherited from a third party during marriage. Later versions often added earnings from wage work or businesses to what could be considered women's separate property.

woman” during the latter half of the nineteenth and early twentieth centuries—i.e., women of the middle or upper classes who lived in towns and cities, were more likely to remain single longer, to attend high school or even college, to work for wages outside the home (at least until marriage), to have fewer children, and to become involved in institutions beyond the family—also laid the groundwork for women’s expanded investment activity.⁶³

Nevertheless, the notion that a woman’s place was in the home (not in the business world), and that her time was best spent pursuing domestic ideals (not financial gain) proved to be resilient. Viewed by Wall Street with a combination of bemusement and resentment, turn-of-the-century female stock traders were thought to participate in the markets at their peril, with the gallantry and protection of male advisors as their only hope.⁶⁴ For example, in his 1870 memoir, stock market insider William Worthington Fowler devoted an entire chapter to the subject of female securities speculators.⁶⁵ In Fowler’s view, women speculators were imprudent, vain, and avaricious creatures, enticed by “dream[s] of new equipages, jewels, and silks, won out of stocks or gold.”⁶⁶ He described female traders as silly, wasteful diletantes: “[o]n any bright day, when stocks are rising, a dozen or more showy

Id. at 11. In discussing the commercial revolution in England, Carswell notes:

A good share or bond, people were beginning to see, was an excellent substitute for land, and in some ways a more convenient way of securing a future for oneself or one’s family. This new form of property, with which the law had not yet got to grips, was readily saleable, it needed no husbandry and, above all, unlike land, which since the Revolution had been taxed at 4s. in the pound, its yield was not taxed. In the second place, for those who possessed landed estates already, the share provided a means of avoiding charges on the rent-roll for married daughters, and a form of property which a married woman could properly retain as a personal estate.

CARSWELL, *supra* note 42, at 8.

⁶³ The early 1900s were, of course, a time of tremendous economic, social, legal, and political change for American women. For a discussion of some of the complexities of this era, see MINOW, *supra* note 39, at 239–66; NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 117–118 (2006); NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE 220–52, 269–307 (2d ed. 1994); *see also* LINDA WAGER-MARTIN, THE HOUSE OF MIRTH: A NOVEL OF ADMONITION (1990), *reprinted in* EDITH WHARTON’S THE HOUSE OF MIRTH: A CASEBOOK 107–110 (Carol J. Singley ed., 2003).

⁶⁴ *See, e.g.*, WILLIAM WORTHINGTON FOWLER, TEN YEARS IN WALL STREET; OR, REVELATIONS OF INSIDE LIFE AND EXPERIENCE ON ’CHANGE, 449–50 (1870). In a British account of young female speculators, Charles Dickens described:

One does not associate youth and beauty with the sweet simplicity of three per cents . . . but here they are, nevertheless, and giving the asthmatic old annuitant the go-by in the race for the Bank counters. Lady Lackpenny was a little surprised when her pretty housemaid asked for a morning’s leave to go and ‘draw her dividends,’ but she acceded with gracious alacrity. And the governess element is well represented, pale faces growing paler and more faded year by year, but brightening up the reflection of the pink dividend warrant.

Charles Dickens, *Dividend Day*, 10 ALL THE YEAR ROUND 462, 462 (1893).

⁶⁵ FOWLER, *supra* note 64, at 449–58.

⁶⁶ *Id.* at 450.

carriages may be seen drawn up in front of the offices of prominent brokerage houses," waiting upon speculative ladies, "dowagers with large bank accounts, for which they, perhaps, thank their departed husbands, or fathers, or uncles, and which they are now using as margins in stock-speculation, almost always for a rise, for it seems to them an incomprehensible thing that any money can be made by a fall in stocks."⁶⁷ Though "daring," Fowler was convinced female speculators were profoundly ill-informed and unskilled:

[These women] encounter risks that would appall the stoutest Wall Street veteran, and rush boldly into places, where even a Vanderbilt would fear to tread. The female character is, in many respects, suited to a life of speculation. Speculation is founded on hope, and women are generally remarkably prone to hope. Speculation requires patience and fortitude, which are, or should be, both womanly virtues. Speculation derives its food from excitement, and women often feed on excitement. Speculation comes from fancy, and women are much given to fancy.⁶⁸

For Fowler, these irrational creatures avoided ruin only through the gallantry of male brokers,⁶⁹ and were best off staying far away from the stock exchange:

It is well, however, that women rarely come in person into the stock-market to look after their interests. One can easily imagine the effect produced by several hundred women interested in stocks, being present at a panic and giving way with feminine impulsiveness to the feelings of the hour. We might then expect some new and strange appearances in these disasters. A bevy of dames dissolved in tears, with hair disheveled, and giving way to hysterics, or screaming like "Pythoness possessed," and slaughtering stocks as eagerly as the veteran stock-butchers.⁷⁰

Even when faced with a "strong-minded" woman, Fowler was not convinced that female investment activity was a good thing. Fowler described one such woman—a "Miss M"—as having the "face . . . of a goshawk" and suggested that her interest in the markets had made her harsh and unfeminine.⁷¹

Fowler's concerns were not unique. In 1902, the *New York Times* published an article entitled *Excluding Women From Brokers' Offices: Movement Started in Wall Street to Put an End to Female Speculating—Reasons Why Brokers Object to Business of This Kind—Instances of Woman's Lack*

⁶⁷ *Id.*

⁶⁸ *Id.* at 449.

⁶⁹ *Id.* at 456.

⁷⁰ *Id.* at 457.

⁷¹ *Id.* at 452–53.

of *Business Knowledge—Why They Are “Bad Losers.”*⁷² The article described a “movement” among brokers to “exclude women from their business houses and to deny them the privilege of speculating in stocks.”⁷³ Citing brokers’ longstanding view that women were “undesirable patrons,” the article reprinted a copy of a letter sent by a well-known firm to its female customers barring them from the firm’s offices.⁷⁴ The letter stated that some of the firm’s “best customers consider it undignified for women to frequent brokers’ offices”⁷⁵ For that reason, the firm requested that its female customers “kindly communicate with us only by letter or telephone” in the future.⁷⁶ The firm hastened to assure recipients of the letter that it had used “no discrimination” and that “[e]very woman who has an account or who has done business with us will receive similar notice by the same mail.”⁷⁷

In explaining why firms were seeking to exclude women, the article quoted several “well-known, reputable” brokers who believed that women simply were not suited to securities trading.⁷⁸ One broker reportedly commented that a woman was “a nuisance anywhere outside of her own home” and “particularly in a broker’s office.”⁷⁹ The broker explained that, “[t]he average woman knows little about brokerage. Business instinct is not innate in the woman, ordinarily speaking, and, worse than that, she can’t learn.”⁸⁰ While many of the quoted brokers acknowledged that some women made money speculating in securities, all suggested that the “ordinary” woman was much more likely to fall prey to unscrupulous brokers or to lose money trying to speculate on her own.⁸¹

In a 1906 article entitled *The Confessions of a Stockbroker*, a self-professed “very well known Wall Street Stockbroker” writing anonymously expressed similar views on the supposed ineptitude of women investors.⁸² According to the article, the broker said that while his firm had some female customers who insisted on speculating, “[w]e do not like women customers, and execute orders for them only when we cannot, for one reason or another, refuse them, as they are usually very bad speculators and troublesome as clients.”⁸³

⁷² *Excluding Women from Brokers’ Offices: Movement Started in Wall Street to Put an End to Female Speculating—Reasons Why Brokers Object to Business of this Kind—Instances of Woman’s Lack of Business Knowledge—Why They Are “Bad Losers,”* N.Y. TIMES, July 13, 1902, at 21.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *The Confessions of a Stockbroker*, LXI THE INDEPENDENT 1465, 1469 (1906) (published anonymously).

⁸³ *Id.*

Like Worthington before him, the broker Henry Clews also devoted a chapter to female speculators in his 1915 memoir, *Fifty Years on Wall Street*.⁸⁴ Following in the footsteps of his industry brethren, Clews was convinced that women lacked the ability and temperament necessary to trade securities:

[T]hey do not seem to have the mental qualities required to take in the varied points of the situation upon which success in speculation depends. They are, by nature, parasites as speculators, and, when thrown upon their own resources, are comparatively helpless. Although they are able, through craft and subtlety, to rule the male sex to a large extent, yet, when obligated to go alone, they are like a ship at sea in a heavy gale without compass, anchor or rudder. They have no ballast apart from men, and are liable to perish when adversity arises.⁸⁵

Clews advised women to marry a wealthy man, as “[i]t is probably only in the matrimonial line that women can become successful speculators.”⁸⁶

Even those who did not dismiss the idea of female traders outright around the turn of the century urged women to rely upon trusted male advisors to avoid exploitation. One financial advice book from this era warned that many a woman, though left in comfortable circumstances, had been “reduced to poverty and want” because she was unable to “protect herself against that army of sharks and rascals . . . to which a defenceless [sic] woman of means presents a golden opportunity.”⁸⁷ Women were counseled to avoid risky investments in favor of government securities, established railroads, and the like, while the “Jasons go forth and do battle for the Golden Fleece.”⁸⁸

Against this backdrop of intense skepticism about their financial and speculative competence, it is not surprising that Wall Street’s first female-owned brokerage firm was, in the end, dismissed as an affront to Wall Street’s social and cultural norms.⁸⁹ In early 1870, with the support and backing of a member of the Vanderbilt family, the colorful, controversial,

⁸⁴ HENRY CLEWS, *FIFTY YEARS IN WALL STREET* 437–46 (Arno Press 1973) (1915).

⁸⁵ *Id.* at 437.

⁸⁶ *Id.* at 444.

⁸⁷ JOHN HOWARD CROMWELL, *THE AMERICAN BUSINESS WOMAN: A GUIDE FOR THE INVESTMENT, PRESERVATION AND ACCUMULATION OF PROPERTY* v–vi (1910).

⁸⁸ Arthur Field, *A Woman’s Romance in Wall Street*, *DEMOREST’S FAM. MAG.*, Jan. 1894, at 151, 158.

⁸⁹ For a discussion of Woodhull, Claflin & Co., see, for example, BARBARA GOLD-SMITH, *OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL* 191–94 (1998); DANA L. THOMAS, *THE PLUNGERS AND THE PEACOCKS: AN UPDATE OF THE CLASSIC HISTORY OF THE STOCK MARKET* 86–115 (Morrow 1989) (1967) [hereinafter THOMAS, *PLUNGERS AND PEACOCKS*]; MARY GABRIEL, *NOTORIOUS VICTORIA: THE LIFE OF VICTORIA WOODHULL UNCENSORED*, 1–4, 42–53 (1998); *Woodhull, Victoria Claflin*, *XX DICTIONARY OF AMERICAN BIOGRAPHY* 493–94 (Dumas Malone ed., 1936).

and much-studied Victoria Claflin Woodhull and her sister Tennessee Claflin opened Woodhull, Claflin & Co., furnishing their offices in the manner of a “ladies’ drawing room,” complete with comfortable furniture, a piano, and religious-themed artwork.⁹⁰ Initially, the press was supportive (or at least interested in the “flashy novelty” of “two beautiful women who made good copy and courted publicity”), hailing the sisters as “The Queens of Finance” and “The Bewitching Brokers.”⁹¹ Wall Street took part in the spectacle: when Woodhull, Claflin & Co. moved to larger quarters on Broad Street in New York shortly after the firm opened, so many people crowded into the street the police were called in to keep order.⁹² Before too long, however, the tide of public opinion turned against the sisters: Victoria’s advocacy of women’s suffrage and her decision to run for president under the banner of the Equal Rights Party, coupled with allegations of multiple marriages and her support of “free love,” eventually galvanized critics against her.⁹³ When Woodhull, Claflin & Co. closed its doors, many concluded that the firm’s demise was, in the words of William Fowler, “evidence [of] how unsuited to woman’s nature is such a field of enterprise”:⁹⁴

[N]ow we ask, could or would or should a woman be a broker?
 Could, or would, or should she line her delicate throat with bell
 metal, put triple brass upon her face, change her tender heart into
 stone, crush out her human sympathies with the unfortunate and

⁹⁰ GOLDSMITH, *supra* note 89, at 191–92.

[Woodhull, Claflin & Co.] differed from other Wall Street firms in that there was a spacious private back office, completely cut off from the front offices by a richly carved walnut partition topped with ornamental glass. This office, accessible by a rear entrance, was restricted to women. Society women and heiresses, small-business owners, writers, teachers, and housewives who had saved modest amounts hidden from allowances supplied by their husbands flocked to the rear entrance.

Id. at 191.

⁹¹ *See id.* at 192. *See also* THOMAS, PLUNGERS AND PEACOCKS, *supra* note 89, at 95–96; GABRIEL, *supra* note 88, at 1–4, 42–53. The sisters, who became active in a number of causes (including suffrage) seem to have delighted in tweaking gender norms: they wore masculine clothing, attempted to dine alone in restaurants, and launched a weekly newspaper to publicize their views on all manner of economic and social issues. GOLDSMITH, *supra* note 89, at 191–95; *see also* THOMAS, PLUNGERS AND PEACOCKS, *supra* note 89, at 98–101.

⁹² *See* GOLDSMITH, *supra* note 89, at 191.

⁹³ *See id.* at 324–36. *See* THOMAS, PLUNGERS AND PEACOCKS, *supra* note 89, at 101–05 (describing the sisters’ arrest on obscenity charges after they printed an article alleging that the well-known preacher Henry Ward Beecher was having an affair with a young unmarried congregant). Cartoonist Thomas Nast eventually depicted Victoria Woodhull as “Mrs. Satan” in the magazine *Harper’s Weekly*. GOLDSMITH, *supra* note 89, at 328. In the cartoon, Woodhull appeared to have bat-like wings and a set of horns sprouting through her hair; she held a sign that read “Be Saved by Free Love,” as she looked back toward a man holding a bottle of whiskey and a bedraggled woman with two children; the caption said, “Get thee behind me, Mrs. Satan.” *Id.* at 328–29; *see also* THOMAS, PLUNGERS & PEACOCKS, *supra* note 89, at 99–101.

⁹⁴ FOWLER, *supra* note 64, at 456; GOLDSMITH, *supra* note 89, at 192–94, 324.

the distressed, and see men reduced from affluence to beggary, and profit by it as a broker?⁹⁵

PART II: TURN OF THE CENTURY TO WORLD WAR II: "NEW WOMEN"
 BEGIN BUYING AND SELLING SECURITIES, BUT THEY ARE NOT
 WELCOME ON WALL STREET

Women Become More Visible as Shareholders and Speculators

Despite the fact that they were by no means welcome on Wall Street, women nevertheless appear to have become more active, or at least more visible, as market participants after the turn of the century.⁹⁶ The popular press began to report on the expanding ranks of female shareholders around the start of World War I.⁹⁷ In 1914, for example, the journal *Current Opinion* commented that, "[s]lowly but surely woman is coming into ownership of a substantial portion of the stock of the great railroad and industrial corporations."⁹⁸ Another report from 1914 noted that women's names were rapidly increasing on the books of large industrial corporations, and, by way of example, claimed that women comprised forty-eight percent of the shareholders of the Pennsylvania Railroad Company.⁹⁹ By 1927, an article entitled *Women Now Investing Millions; Housewives Big Stock Buyers* reported that women were investing millions in large industrial corporations and "cash[ing] more dividend checks" in certain corporations than their male peers.¹⁰⁰ That same year, an article in the magazine *The Independent* proclaimed, "[w]omen own more stock in America's leading corporations than men" and cited statistics which reflected that women shareholders outnumbered men by as much as fifteen percent at nine out of the ten largest corporations whose shares were listed on the New York Stock Exchange ("NYSE").¹⁰¹

Reports of women openly buying and selling securities began to appear in the press with some regularity by the 1920s. By this time, industry insid-

⁹⁵ FOWLER, *supra* note 64, at 458.

⁹⁶ In addition to the economic, legal, and social developments cited above, the sale of Liberty Bonds during World War I made share ownership more common and socially acceptable for many Americans, including women. See R.H. PORTEOUS, *WOMEN! HELP AMERICA'S SONS WIN THE WAR* (1917) (referring to a poster advertising U.S. bonds for the Second Liberty Loan). The bonds were marketed broadly (including to women) as part of the war effort. See REPORT OF CAPITAL ISSUES COMMITTEE, H.R. DOC. NO. 65-1485, at 1, 3-4 (3d Sess. 1918).

⁹⁷ See, e.g., *Woman's Ownership of Corporations*, LVI CURRENT OPINION 304, 304, 306 (1914).

⁹⁸ *Id.* at 304.

⁹⁹ *Women Shareholders in Corporations*, THE LITERARY DIG., Feb. 14, 1914, at 348.

¹⁰⁰ *Women Now Investing Millions; Housewives Big Stock Buyers*, N.Y. TIMES, Feb. 16, 1927, at 29.

¹⁰¹ *The Sexes in Industry*, THE INDEP., Sept. 3, 1927, at 221.

ers acknowledged that women were customers of brokerage firms,¹⁰² with some firms reportedly going so far as to establish special rooms designed to resemble parlors, which they staffed with female clerks to accommodate female brokerage business.¹⁰³ Though one woman's bid to purchase a seat on the NYSE in 1927 was unsuccessful,¹⁰⁴ there are reports from this era that comment favorably on the existence and on the trading and investment skills of both female brokers and female customers.¹⁰⁵ For the first time, articles discussing career women attending to finances and housewives using dividends to augment family income began to appear alongside the traditional tales of female speculative excess.¹⁰⁶

Female Shareholders: A Threat To Good Corporate Governance?

While the presence and economic muscle of these women could not be denied, the prospect of women buying, selling, and owning securities continued to make people nervous. Some commentators from the early 1900s worried that the growing ranks of female shareholders would dilute shareholder power over corporate governance. For example, in a 1914 series of essays later compiled under the title *Other People's Money*, Louis Brandeis argued that the "dependence, both of corporations and of investors, upon the banker has grown in recent years, since women and others who do not participate in the management, have become the owners of so large a part of the stocks and bonds of our great corporations."¹⁰⁷ Brandeis also opined,

¹⁰² See *Women as Investors*, THE GOLDEN BOOK MAG., July 1929, at 110, 110–12 (noting women's increasing wealth and participation in the stock market). Contemporaneous accounts estimated that women comprised between twenty and thirty-five percent of brokerage customers in the late twenties. See Eunice Fuller Barnard, *Ladies of the Ticker*, 227 THE N. AM. REV. 405, 406–07 (1929).

¹⁰³ See, e.g., *Wall Street Bids for the Woman Speculator*, THE LITERARY DIG., NOV. 17, 1928, at 86; Barnard, *supra* note 102, at 405.

¹⁰⁴ See *Woman Seeks a Seat on Stock Exchange; Would Upset Male-Membership Tradition*, N.Y. TIMES, Jan. 14, 1927, at 1. In fact, the NYSE did not admit its first female member until 1967. See *infra* note 302 and accompanying text.

¹⁰⁵ See *infra* note 302 ("Many women now hold partnerships in Stock Exchange firms. . . . The number of women traders has been growing for several years. A great many are known to have made fortunes in the stock market. All the commission houses have women customers, some notably successful in their market operations."). See, e.g., *Working Girls Buying Wall St. Securities: Young Woman Doing an Extensive Business Among Them Joins Brokerage House Staff*, N.Y. TIMES, Jan. 5, 1928, at 39; see also Merrill Lynch & Co., Company History Timeline, http://www.ml.com/index.asp?id=7695_8134_8296_14044 (reporting that Merrill Lynch hired Annie Grimes as its operations manager in 1919, "launching the career of Wall Street's first bond saleswoman").

¹⁰⁶ See, e.g., Helen L.S., *The Business Woman's Investments: How One Business Woman Learned to Invest for Profit*, XXXVI THE MAG. OF WALL ST. 1199, 1199 (1925) (describing a stenographer's efforts to begin saving and investing); *The Sexes in Industry*, *supra* note 101; see also *Women Now Investing Millions*; *Housewives Big Stock Buyers*, *supra* note 100; *Women as Investors*, *supra* note 102.

¹⁰⁷ Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 52 (Melvin I. Urofsky, ed., Bedford Books of St. Martin's Press 1995) (1914).

The investment banker stands toward a large part of his customers in a position of trust, which should be fully recognized. The small investors, particularly the women, who are holding an ever-increasing proportion of our corporate securities, commonly buy on the recommendation of their bankers. The small investors do not, and in most cases cannot, ascertain for themselves the facts on which to base a proper judgment as to the soundness of securities offered. And even if these investors were furnished with the facts, they lack the business experience essential to forming a proper judgment.¹⁰⁸

Others worried about what might happen if women began to exercise governance rights. For example, a 1927 article from *The Independent* “commend[ed] a further study” to assess the implications of changing patterns of share ownership.¹⁰⁹ Noting that “[w]omen are much more sentimental than men,” the article questioned whether women “might effect some interesting changes in the relationship of capital and labor” were they to become “conscious” of their “control of American industry.”¹¹⁰ In dramatic fashion, the author noted that “[t]he hand that rocks the cradle now indorses a majority of dividend checks. What might happen if it also marked most of the ballots at annual stockholders’ meetings? Nobody knows.”¹¹¹

Still others expressed the view that women, as a group, were ill-prepared to direct corporate activity, whether they were interested in governance or not.¹¹² In his 1927 book *Main Street and Wall Street*, Harvard Professor William Ripley expressed surprise at the number of female shareholders of a particular major U.S. corporation, and opined that this “multitude” of women did not have the innate ability or training to exercise governance rights:

For a surprisingly large number of great corporations more than half of the shareholders are women—in American Telephone for 1926, 200,000 of the 366,000 were on the distaff side. Such a

¹⁰⁸ *Id.* at 138. It is worth noting that Brandeis represented the state of Oregon in the seminal case *Muller v. Oregon*, 208 U.S. 412 (1909), in which the Supreme Court upheld Oregon’s law regulating the number of hours that women could work per day in certain industrial jobs. Brandeis submitted a voluminous brief in this case detailing statutes, facts, and figures highlighting the supposed dangers to women’s health, safety, and morals posed by industrial work. *Id.* at 8–10. According to an inspector cited in Brandeis’ brief, “[t]he reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home—are all so important and so far reaching that the need for education need hardly be discussed.” Appellate Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (S. Ct. Jan. 31, 1908).

¹⁰⁹ *The Sexes in Industry*, *supra* note 101.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* 129 (Little, Brown & Co. 1929) (1926).

multitude are ill-fitted by training—begging the moot point of sex—to govern directly, less so than in politics.¹¹³

Female Speculators: A Sign of the Apocalypse?

The reaction to female securities speculators during the early 1900s was even more negative, reflecting Wall Street's long-held belief that women lacked speculative competence. As a 1920 letter to the editor reflects, some industry insiders used women's alleged lack of speculative competence as a basis for refusing all women as customers: in describing "the kinds of people who fall for the commodities speculating game," the article's author asserted that speculation was a "disease" that "women develop . . . in spite of the fact that [the Chicago] Board of Trade members refuse to handle their accounts, and they are therefore compelled to deal with other houses."¹¹⁴ Although the author knew of "places where ten or a dozen calls from women come in over the telephone every hour in the day," he opined that women were "poor gamblers [because] [t]hey are excitable—and they squeal hard when they lose. So most firms decline their orders."¹¹⁵ The Federal Trade Commission's ("FTC") 1926 Report on the Grain Trade reflects similar sentiments on the part of the industry.¹¹⁶ The study analyzed the occupation of futures trading customers of certain wire houses by (among other things) comparing the distribution of occupations of nearly five-thousand futures traders with the distribution of occupations of males gainfully employed in the United States according to the 1920 census.¹¹⁷ The FTC commented that "[m]ales only, rather than both sexes, are taken to represent the distribution of occupations in the population, chiefly because women rarely speculate on the grain exchanges (and their business is not sought by the commission houses)."¹¹⁸

Around the same time, elected officials began openly to worry about the social consequences of female securities speculators and to use their concerns to argue for limits on speculative activity. For example, when introducing the Futures Trading Act of 1921, a bill for the regulation of commodity exchanges, Senator Arthur Capper of Kansas spoke of both the perceived social costs of female speculative activity and the need to protect women from their own unsound trading practices.¹¹⁹ Citing the example of a widow in Topeka, Kansas who sued to recover \$35,000 lost in grain specula-

¹¹³ *Id.*

¹¹⁴ Paul S. Warden, Letter to the Editor, *Kiss Your Money Good-by—If you start to gamble in the grain market*, AM. MAG., Oct. 1920, at 54, 55.

¹¹⁵ *Id.*

¹¹⁶ See FED. TRADE COMM'N, REPORT ON THE GRAIN TRADE: EFFECTS OF FUTURE TRADING, VOL. VII, at 196 (June 25, 1926).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 61 CONG. REC. 5, 4763 (1921).

tion, Senator Capper quoted an industry insider as saying that the “country would be shocked if it knew how many women were ‘playing the market.’”¹²⁰ As justification for his proposed bill, Senator Capper declared, “I do not want my bread any cheaper if my gain comes from the widow who has gambled away her life insurance money, or from the farmer who has gambled away the savings of a lifetime, or from the bank clerk who has gambled himself into the penitentiary.”¹²¹

Writing years later, leading scholars seized upon the presence of female speculators in the 1920s securities markets as a sign of the country’s descent into a damaging speculative mania. For example, in his seminal 1954 work *The Great Crash: 1929*, Harvard University Professor John Kenneth Galbraith opined that in the years leading up to the crash, Americans “display[ed] an inordinate desire to get rich quickly with a minimum of physical effort,” leading to a “world of speculative make-believe”¹²² and a “type of intercourse which proceeds not from knowledge, or even from lack of knowledge, but from failure to know what isn’t known.”¹²³ For Galbraith, this “failure to visualize the extent of one’s innocence was especially true of women investors, who by now were entering the market in increasing numbers.”¹²⁴ Galbraith suggested that female traders of this era viewed securities as little more than pretty symbols on a tape, untethered to actual economic enterprise:

To the typical female plunger the association of Steel was not with a corporation, and certainly not with mines, ships, railroads, blast furnaces, and open hearths. Rather, it was with symbols on a tape and lines on a chart and a price that went up. She spoke of Steel with the familiarity of an old friend, when in fact she knew nothing of it whatever. Nor would anyone tell her that she did not know that she did not know. We are a polite and cautious people, and we avoid unpleasantness. Moreover, such advice, so far from accomplishing any result, would only have inspired a feeling of contempt for anyone who lacked the courage and the initiative and the sophistication to see how easily one could become rich. Surely her right to be rich was as good as anyone’s.¹²⁵

For Galbraith, female speculators were compelling evidence of a pre-Crash society that was “totally preoccupied with making money.”¹²⁶ Further, in

¹²⁰ *Id.*

¹²¹ *Id.* Senator Capper blamed trading on the grain exchanges for a range of social ills, including embezzlement, suicide, and speculation by industry outsiders, including women. *Id.*

¹²² JOHN KENNETH GALBRAITH, *THE GREAT CRASH: 1929* 8 (Houghton Mifflin Harcourt Publ’g Co. 2009) (1954).

¹²³ *Id.* at 80.

¹²⁴ *Id.*

¹²⁵ *Id.* at 81.

¹²⁶ *Id.*

Galbraith's view, society's failure to challenge female speculators' child-like belief in the possibility of profits reflected the degree to which the lure of speculation had become "central to the culture" in the years before the 1929 Crash.¹²⁷

In his 1965 book *Populists, Plungers, and Progressives: A Social History of Stock and Commodity Speculation, 1890-1936*, Cedric Cowing also commented on the presence of female speculators in pre-Crash markets. According to Cowing, "[t]his irrepressible horde of female investors reached sizeable proportions by 1927[,]" and "[b]y 1928 speculation had fanned out to include more than upper-middle-class widows, housewives, and career women."¹²⁸ Cowing described these female speculators as childlike gamblers who "repeated their menfolk's catchwords of prosperity with none of the qualifications or uncertainties, as children repeat the opinions of their parents without the rationale."¹²⁹

In her analysis of events leading up to the 1929 Crash and the Great Depression, Jeanette Nichols expresses similar concerns about female investment activity during the Roaring Twenties:

Wide distribution of stock ownership must ultimately mean wide sharing of disastrous deflation, but during the period of "benevolent anarchy" all but the poorest groups were caught by the net. Women, reportedly the more conservative sex, blindly believed the men's assurances of a perpetual boom; their rise in economic power gave their faith importance, as percentages of insurance paid to them, estates inherited and individual wealth held by them increased greatly. They long had been the chief buyers of goods; now they comprised the majority of stockholders in certain corporations, without directing policy. Like the men, they had become used to colossal figures, were eager to make money for themselves and sceptical [sic] of social control.¹³⁰

¹²⁷ *Id.* at 83. Though Galbraith challenged the "popular folklore" which "ha[d] Americans rushing like lemmings to participate in the market" during the 1920s, and noted that actual participation may not have expanded to the degree commonly assumed, he argued that what was striking about the 1920s was the degree to which the stock market had become central to culture. *Id.*

¹²⁸ CEDRIC B. COWING, *POPULISTS, PLUNGERS, AND PROGRESSIVES: A SOCIAL HISTORY OF STOCK AND COMMODITY SPECULATION, 1890-1936*, at 122-23 (1965). Cowing writes persuasively about efforts to limit or prevent women from speculating in securities. He comments, "[n]othing was done to exclude those allegedly incompetent by occupation. There was one important segment of society, however, against whom the arguments and data for restriction were cited persistently and with some effect: women." *Id.* at 119.

¹²⁹ *Id.* at 122.

¹³⁰ JEANETTE P. NICHOLS, *TWENTIETH CENTURY UNITED STATES: A HISTORY* 291 (1943).

The Crash: Won't These Women Finally Leave?

When the Roaring Twenties finally gave way to the 1929 Crash some suggested (perhaps hopefully) that ladies' trading rooms—and female traders generally—might finally be a thing of the past.¹³¹ For these market insiders, the 1929 Crash offered further proof that women were fundamentally ill-suited to the markets, and more trouble than they were worth as customers:

I'm not saying there are not some women, many perhaps, who are just as good as the best men at dealing in stocks. . . . But most women are more trouble than they are worth. They call up on the phone all day . . . and ply the broker personally with a thousand and one petty questions in return for a commission that perhaps wouldn't buy his commutation ticket; and the less their holdings the more fuss they make. Then, too, being worse gamblers than men . . . they lose their heads and get beyond their depth. . . . Too many women don't know how to lose.¹³²

Even those who felt women should remain in the markets in the 1930s emphasized the importance of having trusted male advisors. In a chapter from his 1930 book *Common Stocks and the Average Man* entitled, "Should Women Buy Common Stocks?" author George Frederick acknowledged that women, like men, were wage earners, tax payers, securities owners, and the beneficiaries of inherited wealth—in other words, too wealthy and too much a part of the economic life of the country to be excluded from the securities markets.¹³³ But while Frederick thought women had "the cash and reserves necessary to invest their money on a *standard* basis [i.e., stocks and bonds] instead of on a fenced-off nursery basis [i.e., highly conservative bonds only], as if they were children[,]"¹³⁴ he did not think that women were capable of making investment decisions on their own:

Quite obviously, however, women are somewhat less competent to use their own judgment in investment than men. Very few women should attempt to make their own investment analyses. It is not unfair to say that they have not the same coolness of judgment, as a rule, as men.¹³⁵

¹³¹ Frances Drewry McMullen, *Women and Ticker Tape: A Year After the Crash*, THE WOMAN'S J., NOV. 1930, at 20 (quoting an "experienced Wall Streeter" who opined, "[y]ou'll find all the [ladies' departments at brokerage houses] all shut up. . . . That was just part of the boom.")

¹³² *Id.* at 21.

¹³³ J. GEORGE FREDERICK, COMMON STOCKS AND THE AVERAGE MAN 285–86 (1929).

¹³⁴ *Id.* at 286.

¹³⁵ *Id.* at 289.

Instead, Frederick urged women “to seek the advice of the progressive but well-recommended, investment banker” to avoid falling into harm’s way.¹³⁶

*The New Deal: Women Are Either Absent or Described as
Instruments of Fraud and Victims of Abuse*

As these sources suggest, Wall Street, and public opinion generally, initially focused on speculation by investors presumed to lack speculative competence, including women, as a root cause of the nation’s financial crisis.¹³⁷ Over time, however, some began to question whether Wall Street had played a role in bringing the nation’s financial system to its knees.¹³⁸ In particular, while liberals acknowledged that speculation by retail investors had contributed to the nation’s financial difficulties during the late 1920s and early 1930s, they questioned whether unscrupulous market insiders had led the nation to ruin by unloading worthless issues on an uninformed and unsuspecting public.¹³⁹ As Joel Seligman, Donald Ritchie, and others have documented, reformers fomented these sorts of questions and then tapped into the public dismay with Wall Street’s pre-Crash machinations to galvanize support for direct federal regulation of the securities markets and the securities industry.¹⁴⁰ While the bulk of this story is beyond the scope of this paper, what is notable is the degree to which women, to the extent they appear at all in the legislative history of early federal securities legislation, appear as variations on the clueless victim role—unwitting tools of their husband’s or father’s misconduct, vulnerable victims of scheming salesmen, or woefully uninformed market outsiders in need of protection from their own stupidity.¹⁴¹

The Pecora hearings offer an example of this treatment of female market participants.¹⁴² In 1933, when Ferdinand Pecora was appointed as the

¹³⁶ *Id.*

¹³⁷ See generally Donald A. Ritchie, *The Pecora Wall Street Exposé, 1934*, in CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974, VOL. 4, at 2555 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

¹³⁸ *Id.* at 2555–57.

¹³⁹ See, e.g., *id.*

¹⁴⁰ For detailed accounts of this period, see, for example, SELIGMAN, *supra* note 37, at 1–38; Ritchie, *supra* note 137, at 2555–78.

¹⁴¹ See *infra* notes 142–49 and accompanying text.

¹⁴² See *Stock Exchange Practices: Hearings on S. Res. 84 Before the S. Comm. on Banking and Currency*, 72nd Cong. (1932–1933) (regarding “a resolution to investigate practices of stock exchanges with respect to the buying and selling and the borrowing and lending of listed securities”); *Stock Exchange Practices: Hearings on S. Res. 56 and S. Res. 97 Before the S. Comm. on Banking and Currency*, 73rd Cong. (1933–1934) (regarding “resolutions to investigate the matter of banking operations and practices, transactions relating to any sale, exchange, purchase, acquisition, borrowing, lending, financing, issuing, distributing, or other disposition of, or dealing in, securities or credit . . . with a view to recommending necessary legislation”). These hearings, commonly known as the Pecora Commission Hearings, set the stage for the Banking Act of 1933, the Securities Act of 1933, and the Securities Exchange Act of 1934.

fourth and final general counsel of the United States Senate Committee on Banking and Currency charged with investigating the causes of the financial crisis, he sought to expose Wall Street's malfeasance as a means of generating support for the regulation of Wall Street.¹⁴³ Equipped with subpoena power and a crusader's mindset, and armed with the support of newly-inaugurated President Franklin Delano Roosevelt, Pecora called the most important figures of the financial community—"men whose names were household words but whose personalities were frequently shrouded in deep aristocratic mystery"—to testify on subjects ranging from personal income taxes to manipulative trading pools.¹⁴⁴ Notably, Pecora's witnesses were all men, and women as independent market participants were all but absent from Pecora's account.¹⁴⁵

Pecora did, however, take notice when Wall Street insiders used family members to obtain unfair advantage, and it is in this context that women appear in the transcripts of the Pecora Hearings and in his report to Congress.¹⁴⁶ For example, one of Pecora's most notorious findings was that a number of Wall Street titans—including J.P. Morgan—had paid little or no federal income tax in 1931 and 1932.¹⁴⁷ Pecora reported that financiers avoided tax liabilities by transferring under-performing securities to relatives (typically wives) at year-end in order to generate tax losses, only to re-acquire the stocks after the expiration of the minimum period proscribed by law.¹⁴⁸ Pecora also found that Wall Street insiders—most notably Alfred H.

¹⁴³ See, e.g., Ritchie, *supra* note 137, at 2556–57, 2561–78; SELIGMAN, *supra* note 37, at 20–38 (describing the stock exchange hearings, Pecora's role in the investigation, and public reaction).

¹⁴⁴ FERDINAND PECORA, *WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS* 3 (1939) [hereinafter *PECORA, UNDER OATH*]; see also SELIGMAN, *supra* note 37, at 20–38; Ritchie, *supra* note 137, at 2561–76.

¹⁴⁵ See, e.g., PECORA, *UNDER OATH*, *supra* note 144, at 3–4. Pecora's only non-financier witness—a man named Edgar D. Brown of Pottsville, PA—testified that he had entrusted his finances to a representative of a leading bank, only to be left penniless and in broken health. *Stock Exchange Practices: Hearings on S. Res. 84 and S. Res. 239 Before the S. Comm. on Banking and Currency*, pt. 6, 72nd Cong. 2179–81 (1932–1933); PECORA, *UNDER OATH*, *supra* note 144, at 84–89.

¹⁴⁶ See *infra* notes 147–149 and accompanying text.

¹⁴⁷ See *COMM. ON BANKING & CURRENCY, SECURITIES EXCHANGE PRACTICES: REPORT PURSUANT TO S. RES. 84 AND S. RES. 56 AND S. RES. 97, S. REP. NO. 73-1455*, at 279–81 (2d Sess. 1934) [hereinafter *PECORA REPORT*], at 321; PECORA, *UNDER OATH*, *supra* note 144, at 190.

¹⁴⁸ See *PECORA REPORT*, *supra* note 147, at 322–29. Pecora also explains this practice in his book, *WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGER*:

The problem, therefore, was how to sell your stock at a loss, but keep it too. . . . They merely 'sold' the stock to members of their own family—their own wives or daughters for instance—instead of in the open market. Once the necessary interval had elapsed, nothing was easier than to have the wife or daughter transfer the stock right back again. Without any risk, everything was then just as it had been in the beginning—except that, for tax purposes, the husband or father had somehow suffered a great [tax] loss which he could deduct from his taxable income.

PECORA, *UNDER OATH*, *supra* note 144, at 193–94.

Wiggin, then-president of Chase National Bank—had formed family corporations with wives and children as stockholders in order to manipulate the prices of securities or avoid taxes.¹⁴⁹ (As recent press coverage of the Madoff situation reflects, putting assets in the wife's name remains en vogue.)¹⁵⁰

Like Pecora, liberals in Congress also focused on greed and corruption in the banking and financial industries when debating legislation that would, eventually, become the Securities Act of 1933 and the Securities Exchange Act of 1934.¹⁵¹ Whereas Pecora focused almost exclusively on Wall Street malfeasance to generate support for direct federal regulation, members of Congress invoked the specter of penniless investors—particularly widows (and orphans) stripped of their savings—to justify regulating trading, the markets, and Wall Street.¹⁵² For example, Representative Chapman of Kentucky invoked images of mothers, widows, and orphans to defend the 1933 Act's potential imposition of criminal penalties against stock market miscreants:

Not long ago our country was shocked to read that a mother had been sent to jail for selling a pint of beer to obtain the means with which to purchase bread for her starving children. Recently I read of a hungry boy being sentenced to the penitentiary for stealing chickens. The counterfeiter of currency is sentenced to a felon's cell, but the salesman of worthless stocks and bonds in interstate commerce has continued to operate upon an innocent public free of punishment, because no such law as this has been placed upon the Federal statute books.

Many a man in an intemperate moment commits a crime of violence. Many a man in sudden heat and passion snuffs out the life of a fellow being. But there are no extenuating circumstances when shrewd and crafty men, skilled in the tricks of a crooked game, sit around a table and deliberately and premeditatedly plan, and ruthlessly execute the plan, by devising cunning schemes and

¹⁴⁹ PECORA REPORT, *supra* note 147, at 327–28. Pecora also described the practice of price manipulation through pool operations that included the wives of prominent specialists. *Id.* at 47 (“Among those brought into the pool through M.J. Meehan & Co. were Mrs. M.J. Meehan, wife of M.J. Meehan, and Mrs. David Carnoff, wife of the president of Radio Corporation of America.”); see also COUNSEL FOR COMM. ON BANKING & CURRENCY, 72ND CONG., STOCK EXCHANGE PRACTICES 9 (1933) (Letter to the Comm. on Banking & Currency), reprinted in 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (J.S. Ellenberger & Ellen P. Mahar comps., 2001).

¹⁵⁰ See Susan Antilla, *Enriching Wife Made Sense to Ponzi Guy*, BLOOMBERG.COM, Mar. 10, 2009, http://www.bloomberg.com/apps/news?pid=20601039&sid=aTOI3oqaPF IU&refer=columnist_antilla.

¹⁵¹ 77 CONG. REC. 937, 937 (1933) (Message from the President) reprinted in 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (J.S. Ellenberger & Ellen P. Mahar comps., 2001).

¹⁵² See *infra* notes 153–158 and accompanying text.

resorting to every conceivable trick of financial legerdemain, to loot an unwary public of millions of dollars earned by the sweat of the brow

What a blessing such a law as this would have been during the past decade. We believe it would have saved tens of thousands of people from the losses incident to a wild orgy of speculation. . . . If there had been such a law, thousands of widows and orphans would not today be saddened and crushed as the result of having invested their money in worthless securities and having had their earnings filched from them by unconscionable promoters.¹⁵³

Others voiced similar sentiments.¹⁵⁴

During debates on what would become the 1934 Act, Judge William Clark of the United States District Court of the District of New Jersey also referred to widows and orphans and claimed to speak for “victims of stock-exchange speculation,” when advocating for reform of speculative trading practices.¹⁵⁵ While Representative Chapman focused on the need to protect widows and orphans from rapacious stock promoters, Judge Clark cited the need to protect widows and orphans from the consequences of their own bad decisions in taking on certain speculative risks:

The stock exchange is a very important institution in our economy and should be governed according to sound principles of political economy. One of these principles is undoubtedly that it should be a place where stocks can be bought and sold. Another is that it not be a place where people are tempted to indulge in unreasonable risks. Clearly, if everyone could purchase stocks for the asking and without the humiliating necessity of putting up some cash, the number of transactions would increase and multiply and the widow and orphan could sell or buy every split second

We must, it seems to me, arrive at a social balance between these conflicting values. The widows and orphans can afford to wait a few hours to get their money for their securities in order that

¹⁵³ 77 CONG. REC. 2910, 2933 (1933) (statement of Rep. Chapman) *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (J.S. Ellenberger & Ellen P. Mahar comps., 2001).

¹⁵⁴ *See, e.g.*, 78 CONG. REC. 8086, 8108 (1934). For example, Representative Rankin remarked:

Where, then, were those Republican leaders who are now criticizing this bill and proclaiming so loudly their desire to regulate the stock exchanges by some other method Where were they when these financial buccaneers were unloading on to the American people . . . Central and South American bonds, selling them to the widows and orphans and to the aged and infirm—bonds that are now scarcely worth the paper they are written on?”

Id.

¹⁵⁵ *Stock Exchange Practices: Hearings on S. Res. 56 and S. Res. 97 Before the S. Banking & Currency Comm.*, 73rd Cong. 6927 (1934) (statement of Judge Clark).

others of their fellow human beings may not be widowed or orphaned (for dishonor is a worse form of death) or forced into poverty because their loved ones have succumbed to the temptation of unreasonable risk.¹⁵⁶

Notably, Judge Clark seems to have been aware of, and somewhat cynical about, the tendency to use the widows and orphans to generate sympathy for securities regulation. He notes “how curious it is that tears for the widow and orphan appear wherever a utility or stock exchange goes on the operating table.”¹⁵⁷

Nevertheless, shortly after Judge’s Clark’s testimony, Representative Adolph J. Sabath of Illinois invoked the plight of widows and orphans when testifying in favor of limits on short selling:

When I started to advocate the elimination of short selling, I had this in mind, gentlemen: I saw the danger before us, and I figured that if [short sellers] unnecessarily destroy the market value of the securities, it will bring about destruction to the banks that held these securities as collateral; that it would bring about the destruction of every insurance company in the United States, and that it would bring destruction to thousands upon thousands of estates, and bring ruin to the widows and orphans.¹⁵⁸

Politics aside, the limited statistics that are available from this era raise questions about whether the widow/orphan storyline captured all women’s stock market experiences. In his study, “The Classification and Financial Experience of the Customers of a Typical New York Stock Exchange Firm from 1933 to 1938,” Paul Francis Wendt found that 278 of the 1000 accounts sampled, or almost thirty percent, from the firm’s credit department files were listed in the names of women.¹⁵⁹ Of these 278 accounts, 102 were in the names of women described as being “widows, housewives, spinsters”

¹⁵⁶ *Id.* at 6929. Interestingly, during the ’34 Act debates, when discussing proposed legislation which defined “controlled” persons (for purposes of imputing liability) as including those controlled by stock ownership or agency, as well as spouses, parents, or children residing in the home of the alleged violator, Sen. Hamilton Keane noted that, at least as to wives, “the provision is a departure from the principle of the married women’s separate property acts and the whole course of legislation in favor of equal rights for women, which has been the distinguishing mark for the last quarter century.” *Id.* at 7022.

¹⁵⁷ *Id.* at 6929.

¹⁵⁸ *Stock Exchange Regulation: Hearings on H.R. 7852 and H.R. 8720 Before The H. Interstate & Foreign Commerce Comm.*, 73rd Cong. 830 (1934) (statement of Rep. Sabath). Though banking regulation is not the focus of this paper, references to women in the legislative history of the Glass-Steagall Act are also of the widow/orphan variety. 75 CONG. REC. 9908, 9912 (1932) (remarks of Sen. Bulkley) reprinted in H. RODGIN COHEN & MARTIN E. LOWRY, *THE GLASS-STEAGALL ACT: BANKS AND THE SECURITIES BUSINESS* 250 (1985).

¹⁵⁹ PAUL FRANCIS WENDT, *THE CLASSIFICATION AND FINANCIAL EXPERIENCE OF THE CUSTOMERS OF A TYPICAL NEW YORK STOCK EXCHANGE FIRM FROM 1933 TO 1938*, at 46–51 (1941).

with the remaining 176 distributed among the other occupations listed.¹⁶⁰ Though it is impossible to know whether and to what extent these women made their own investment decisions, contemporaneous reports in the press suggest that at least some women of this era remained interested in buying and selling securities, despite economic challenges and continued concerns about their financial and speculative competence.¹⁶¹

Regulators and Courts Begin to Cite Female Victims of Investment Abuse To Justify Investor Protection Initiatives

Whatever the investment competence of the women tracked in the Wendt study or cited in contemporaneous press reports, the notion that women were disproportionately likely to fall prey to Wall Street miscreants did not disappear during the early days of direct federal regulation of the securities markets. To the contrary, following the enactment into law of the Securities Exchange Act of 1934, a new voice raised concerns about female investors—namely, the Securities and Exchange Commission.¹⁶² Whereas industry insiders used stories of women losing their life savings to justify excluding women from full participation in the markets, the staff of the newly-established Securities and Exchange Commission drew upon stories of female victims of investment abuse to generate support for investor protection reforms.¹⁶³

The Commission's approach to installment investment plans, also known as periodic payment plans or thrift plans, offers an example of this approach.¹⁶⁴ Though the origins of installment plans dated back to Britain,¹⁶⁵ the domestic industry appears to have been jump-started by people like well-known financier and politico John Jakob Raskob.¹⁶⁶ For example, in a 1929 interview in *Ladies Home Journal* entitled "Everybody Ought to be Rich," Raskob advocates the formation of equity securities corporations so that investors of limited means could invest a small amount of capital on a regular basis in a company that would in turn invest in equity securities selected by

¹⁶⁰ *Id.* at 50.

¹⁶¹ McMullen, *supra* note 131, at 20–21.

¹⁶² The Securities and Exchange Commission was established pursuant to Section 4 of the Securities and Exchange Act of 1934, now codified at 15 U.S.C. § 78(d) (2008).

¹⁶³ See *infra* note 216 and accompanying text.

¹⁶⁴ See generally SEC. & EXCH. COMM'N, INVESTMENT TRUSTS AND INVESTMENT COMPANIES: REPORT PURSUANT TO SECTION 30 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1940) [hereinafter INVESTMENT TRUSTS REPORT].

¹⁶⁵ See GALBRAITH, *supra* note 122, at 51–54 (describing operation of investment trusts and investment companies in nineteenth century England and Scotland); see also Paul C. Cabot, *The Investment Trust*, THE ATLANTIC MONTHLY, Mar. 1929, at 401.

¹⁶⁶ See Samuel Crowther, *Everybody Ought To Be Rich: An Interview With John Jakob Raskob*, THE LADIES HOME J., Aug. 1929, at 9; INVESTMENT TRUSTS REPORT, *supra* note 164, at 6–7 (testimony of John L. Thomas, president of Financial Independence Founders, Inc.); GALBRAITH, *supra* note 122, at 57–58 (describing the sort of financial alchemy that Raskob peddled).

“men of outstanding character, reputation and integrity.”¹⁶⁷ John Kenneth Galbraith estimated that in the wake of this sort of promotion, total assets invested in installment investment plans grew eleven-fold between 1927 and 1929.¹⁶⁸

In 1940, the Securities and Exchange Commission issued a report that was highly critical of the installment investment plan industry (“the Installment Investment Plan Report”).¹⁶⁹ Like Pecora before them,¹⁷⁰ the authors of the Installment Investment Plan Report found that the plans offered during the 1920s and 1930s were rife with hidden fees and conflicts of interest and were marketed to vulnerable investors (including wage-earning men and women) using high-pressure sales tactics.¹⁷¹ To highlight the industry’s abusive sales practices, the Installment Investment Plan Report cited a brochure issued by one firm to its “salesmen” entitled “On Selling Women.”¹⁷² Noting that women owned fifty-four percent of the vested wealth of the country at that time—a statistic the brochure attributes to women’s longer life span and the increased likelihood that women might acquire wealth through inheritance and insurance—the brochure offered tips for salesmen to “consciously improve” their own “especial technique in dealing with the opposite sex.”¹⁷³ According to the brochure’s author, because women are “intuitive animals,” the best way to reach them is not through facts or arguments, but rather by developing a personal relationship:

Cold turkey rarely sells a woman. Always approach a woman through someone known to her, and whom she instinctively likes, admires, or envies. Bear in mind that woman is an intuitive animal. Her race, her heritage, her instinct have made her so.¹⁷⁴

The brochure then goes on to describe the best way to approach potential female customers:

The usual type of approach to your average businessman is not always advisable in the case of women. Tones must be softened, opening leads must be less abrupt, more personal, and rarely, if ever, interrogatory. It is always wise to lead your subject cautiously and keep uppermost the personal point of view. Great care must be taken that all statements made by you are literal, and it is well to remember that the average woman is not as well versed in business practices as is the average man. The “*you*” attitude is

¹⁶⁷ Crowther, *supra* note 166, at 9.

¹⁶⁸ GALBRAITH, *supra* note 122, at 55.

¹⁶⁹ See generally INVESTMENT TRUSTS REPORT, *supra* note 164.

¹⁷⁰ See PECORA REPORT, *supra* note 147, at 333–63.

¹⁷¹ INVESTMENT TRUSTS REPORT, *supra* note 164, at 143–84.

¹⁷² *Id.* at 152, 199–200.

¹⁷³ *Id.* at 199.

¹⁷⁴ *Id.* at 200.

even more vital with women than with men and the use of the hypothetical proposition is apt to be fatal.¹⁷⁵

The brochure concludes by noting that a strong closing is essential:

While you will encounter procrastination, the desire to consult the family or the friend of the family, the banker or lawyer, it is often possible to speed the closing by the use of direct, firm, quiet pressure. Leaving no question unanswered, but bringing a client again and again to the closing point will definitely accomplish your purpose. There is more truth than poetry in the saying that “A woman’s *no*, means *maybe*; and a woman’s *maybe*, means *YES*.”¹⁷⁶

For modern readers, the sort of suasion contemplated by this brochure speaks to Wall Street’s longstanding view that women are easily manipulated, emotional creatures who need to be guided and ultimately controlled by men who want to sell them stock. For Commission staff of the 1930s and 1940s, the brochure (along with the rest of the Investment Trust Report) helped to pave the way for the enactment into law of the Investment Advisors Act of 1940 and the Investment Company Act of 1940.¹⁷⁷

*The Hughes Case: Widows and the Shingle Theory of
Broker-Dealer Liability*

Just a few years after issuing the Installment Investment Plan Report, in the milestone case *Charles Hughes & Co. v. Securities & Exchange Commission*, Commission staff once again invoked images of female victims of

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See 15 U.S.C. § 80a-1 (2006). In broad terms, the Investment Advisors Act of 1940 provides for the regulation of so-called investment advisors, defined by the Act to include:

Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

15 U.S.C. § 80b-2(11) (2006). The Investment Company Act of 1940 generally provides for the federal regulation of investment companies, defined to include:

Any issuer which (A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; (B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or (C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

15 U.S.C. § 80a-1 (2006).

investment abuse to challenge disclosure and sales practices in the brokerage industry.¹⁷⁸ Charles Hughes & Co. was a New York City-based broker-dealer that specialized in selling over-the-counter securities to retail customers.¹⁷⁹ On February 16, 1942, the Commission instituted proceedings under Section 15(b) of the Securities Exchange Act of 1934 to determine whether to suspend or revoke the Hughes firm's broker-dealer registration.¹⁸⁰ The order reported that Commission staff had uncovered information tending to show that the firm had violated Section 17(a) of the Securities Act of 1933 and Section 15(c)(1) of the Securities Exchange Act of 1934, and rules promulgated thereunder, by targeting persons "who were for the most part uninformed as to securities matters," causing them "to repose trust and confidence" in the company, and "to purchase various securities at prices far in excess of prevailing market prices" without disclosing either the prevailing market prices or the firm's profits.¹⁸¹

As formulated by the Commission, the *Hughes* case involved two important issues of first impression. The first concerned securities dealers' du-

¹⁷⁸ *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 435 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944).

¹⁷⁹ *Id.*

¹⁸⁰ In the Matter of Charles Hughes & Co., Exchange Act Release No. 34,3154, 13 S.E.C. 676 (Feb. 16, 1942). At the time of the *Hughes* case, under Section 15(a)(1) of the 1934 Act, broker-dealers like Charles Hughes & Co. could not effect securities transactions unless registered with the Commission. Section 15(b) provided, in pertinent part, that the Commission could:

Revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer . . . (D) has willfully violated any provision of the Securities Act of 1933, as amended, or of this title, or of any rule or regulation thereunder

Securities Exchange Act of 1934, § 15, 48 Stat. 881, 895, as amended by 49 Stat. 1375, 1377-78 (1936) (codified at 15 U.S.C. § 78o (2006)).

¹⁸¹ In the Matter of Charles Hughes & Co., Exchange Act Release No. 34,3154 (Feb. 16, 1942). At the time of the *Hughes* case, Section 17(a) provided in pertinent part that:

It shall be unlawful for any person, in the sale of any securities . . . (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Exchange Act of 1933, § 17, 48 Stat. 74, 84-85 (1933) (codified at 15 U.S.C. § 77q (2000)). This provision of the 1933 Act remains unchanged. *See* 15 U.S.C. § 77q (2000). Section 15(c)(1) provided in pertinent part that it was unlawful for broker-dealer registrants "to effect transactions in, and to induce the purchase and sale of, securities, otherwise than on a national securities exchange, by means of deceptive, manipulative, and other fraudulent devices and contrivances" as defined by relevant rules. Securities Exchange Act of 1934, 48 Stat. 895 (1934), as amended by 49 Stat. 1377-78 (1936). This language is essentially unchanged in the current codification of the statute. *Compare* Securities Exchange Act of 1934, § 15, 48 Stat. 881, 895 (amended by 49 Stat. 1375, 1377-78 (1936)), *with* 15 U.S.C. 78o(c)(1)(A) (including specific language regarding securities-based swap agreements as well as specifying the requirement of membership to a national securities exchange).

ties of disclosure—namely, did the Hughes firm, in its capacity as a dealer, commit fraud when it sold securities to its retail customers at above-market prices, without disclosing its mark-up (i.e., profits) to its customers.¹⁸² The second issue involved the so-called shingle theory, a type of implied warranty doctrine which holds that a securities dealer operating at arm's length impliedly represents that he will deal fairly with the public when he hangs out his "shingle."¹⁸³ In the view of the *Hughes*-era Commission, when a dealer charged a price not reasonably related to market conditions, he breached this implied representation of fair dealing and violated anti-fraud laws. Although the Commission had articulated the shingle theory earlier in the 1939 case *In the Matter of Duker & Duker*,¹⁸⁴ and had repeated and refined it in a number of other administrative opinions,¹⁸⁵ the doctrine had not yet been tested in the federal courts at the time of the *Hughes* case.

Although the Commission's order instituting proceedings made no reference to the gender of the firm's alleged victims, gender figured prominently when the Commission commenced hearings some two months later.¹⁸⁶ For its case in chief, Commission staff called three fact witnesses, each of whom was a single woman or widow who professed little if any knowledge of the stock market.¹⁸⁷ The Commission's first witness, Stella Dunn Furbeck, began her testimony by explaining that she was a "housewife" with "no business or occupation" who knew "absolutely nothing" about securities (although she had inherited securities from her father) and had no one to

¹⁸² See *In the Matter of Charles Hughes & Co.*, Exchange Act Release No. 34,3154 (Feb. 16, 1942). In contrast to brokers (who buy and sell securities for the accounts of others as agents), dealers buy and sell securities for their own accounts. See Securities Exchange Act of 1934, § 3(a)(5)(A), 48 Stat 881, 882 (1934) (codified at 15 U.S.C. § 78c(a)(5)(A) (2006)). When acting as a broker, firms typically charge commissions on securities transactions. When acting as a dealer, however, profits come in the form of a so-called "mark-ups" and "mark-downs." Mark-ups are generally defined as the difference between the price a dealer charges when it sells a security from its own account to its customer, and the then-prevailing market price. See, e.g., *Press v. Chem. Inv. Servs. Corp.*, 166 F.3d 529, 533 n.2 (2d Cir. 1999) (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997)). A mark-down is the difference between the price charged to the customer for a security and the then-prevailing market price when the dealer buys the security from its customer. *Id.*

¹⁸³ *In the Matter of Charles Hughes & Co.*, 13 S.E.C. 676 (1943), *aff'd*, 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944). This aspect of the *Hughes* case appears to have been newsworthy. A 1943 article in the *New York Times* commented, "it was the first time such a case has been carried to an appellate court, directly challenging the principle applied by the SEC since 1939 that a dealer by the very nature of his business impliedly represents that he will deal fairly." *SEC Wins Court Fight On Price Mark-Ups, But Is Censored For Lack of Regulations*, N.Y. TIMES, Dec. 19, 1943.

¹⁸⁴ See *In the Matter of Duker & Duker*, 6 S.E.C. 386, 388–89 (1939) ("It is neither fair dealing, nor in accordance with such standards, to exploit trust and ignorance for profits far higher than might be realized from an informed customer.").

¹⁸⁵ See 10 SEC. & EXCH. COMM'N ANN. REP. 74 n.56 (1944).

¹⁸⁶ See Transcript of Record at 24–44, 53–65, 67–78, *In the Matter of Charles Hughes & Co.*, 13 S.E.C. 676 (1943) [hereinafter *Hughes Transcript*]; see also *Charles Hughes & Co. v. SEC*, 139 F.2d at 435.

¹⁸⁷ See *Hughes Transcript*, *supra* note 186, at 24–44, 53–65, 67–78.

advise her on financial matters.¹⁸⁸ The Commission's second witness, Anne K. Knebel, testified that she was a "housewife" who had taken charge of her "widow[ed]" mother's Charles Hughes & Co. brokerage account.¹⁸⁹ The Commission's third witness, Amelia Zinnel, described herself as a "housewife" and "widow" who had inherited securities from her husband but had never purchased securities on her own.¹⁹⁰ Each witness testified that she had reposed total trust and confidence in the Charles Hughes & Co. salesman with whom she dealt, and each claimed that the salesman had not disclosed the firm's profits when recommending securities transactions.¹⁹¹ In addition to these witnesses, Commission litigators also called a forensic accountant as an expert witness.¹⁹² Although the total number of customers or potential victims is unclear from the forensic accountant's testimony, he prepared a chart (which was subsequently made part of the record) that summarized selected transactions for certain customers, all but one of whom were clearly female.¹⁹³

The hearing appears to have been something of a circus. During the first day of testimony, the firm was not represented by counsel, and its representatives—Anna Hughes (the sister of Charles Hughes and the purported owner of the Hughes firm) and Charles Massie (Ms. Hughes' husband and the firm's trader and de facto general manager)—initially were not present.¹⁹⁴ Once Ms. Hughes and Mr. Massie appeared, Massie (and not Ms. Hughes) cross-examined the Commission's three fact witnesses.¹⁹⁵ In each case, Massie sought to convince the witnesses (and the hearing officers) that the securities at issue were high-quality, and that the witnesses would have been better off had they held onto the securities and never gotten involved with law enforcement in the first place.¹⁹⁶

A few weeks later, the attorneys subsequently retained by the firm petitioned to reopen the hearing on the ground that the firm had not been represented by counsel.¹⁹⁷ When the hearing resumed, counsel for the Hughes firm essentially ignored the securities and the sales practices at issue, and

¹⁸⁸ *Id.* at 44. Furbeck explained that although she had two older brothers, they lived out of town.

¹⁸⁹ *Id.* at 53, 63.

¹⁹⁰ *Id.* at 67–69.

¹⁹¹ *See id.* at 24–81.

¹⁹² *Id.* at 82.

¹⁹³ *Id.* at 100–03 (discussing Commission's Exhibit 48).

¹⁹⁴ *Id.* at 8, 25.

¹⁹⁵ *Id.* at 44–51, 65, 78–81.

¹⁹⁶ *See id.* at 46, 49–53, 65, 78. Massie appears to have had a checkered history in the securities business. In 1945, the *New York Times* reported that the SEC permitted the broker-dealer registration of Charles Massie to become effective on the condition that he deal under his own name and act exclusively as an agent. *Massie on SEC Registry: But Broker-Dealer Is Restricted to Own Name and Agency*, N.Y. TIMES, Jan. 17, 1945, at 28. Noting that Massie's wife had been the sole stockholder of Charles Hughes & Co., the *New York Times* reported that Massie had applied to the commission to do business under the name D.J. McMillen & Co., New York.

¹⁹⁷ Hughes Transcript, *supra* note 186, at 8.

focused instead on attacking the credibility of the Commission's fact witnesses, in part by trying to demonstrate that they were more knowledgeable and sophisticated about the markets than they had led the hearing officer to believe.¹⁹⁸ In Amelia Zinnel's case, the firm called representatives of other brokerage firms as witnesses to establish that she had traded securities and visited the financial district before dealing with the Hughes firm.¹⁹⁹

On July 19, 1943, the Commission issued an order revoking the Hughes firm's broker-dealer registration.²⁰⁰ As with its initial order, the Commission refrained from arguing that the Hughes firm had targeted unsophisticated female investors.²⁰¹ Instead, citing *Ducker*, the Commission held that the Hughes firm's mark-ups were:

So far in excess of what may be regarded as reasonable that they unquestionably do violence to this vital representation of fair dealing, and constitute a fraud on the customer, in the absence of disclosure to him of such information as will permit him to form an independent judgment upon whether or not he will complete the transaction.²⁰²

Noting that its findings did not rest solely on the "implied representation as to fair dealing which is made generally by every securities dealer,"²⁰³ the Commission criticized the Hughes firm for "induc[ing] an atmosphere of trust and confidence, of which the [firm] took gross advantage" by failing to disclose material facts regarding market prices.²⁰⁴ The Commission acknowledged that "[m]uch attention was directed, at the hearing, to the question whether the customers were informed and experienced in securities matters"; it concluded that although "[t]he evidence is such that we might well hold they were, for the most part, inexperienced . . . in our opinion this question is not controlling."²⁰⁵ Instead, the Commission held "[t]hat the respondent led particular customers to place special reliance upon it in this

¹⁹⁸ *See id.* at 112–53. Remarkably, although the Hughes firm sought to demonstrate that the Commission's female witnesses were more sophisticated than they had led the hearing officer to believe, its counsel intimated that Anna Hughes (the purported owner of the Hughes firm) knew little about the firm's operations. *See id.* at 129 ("Mr. Humphreys, does it make any difference to you if we have Mr. Massie here who is familiar with every aspect of this thing, instead of Miss Hughes? I think he knows more about the running of the firm, that is my private opinion, than Miss Hughes.").

¹⁹⁹ *Id.* at 154–57.

²⁰⁰ *In the Matter of Charles Hughes & Co., Inc.*, 13 S.E.C. 676, 682 (1943), *aff'd*, 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944).

²⁰¹ *See id.* at 677–81.

²⁰² *Id.* at 679.

²⁰³ *Id.* at 680.

²⁰⁴ *Id.* at 681–82.

²⁰⁵ *Id.* at 681. Interestingly, the Commission commented in a footnote that "one of the three customer-witnesses was unreliable in certain respects, and we base no findings on that witness' testimony." *Id.* at 680 n.6.

case only emphasizes its failure to meet the minimum standards of fair dealing, and makes the fraudulent nature of its activities more evident.”²⁰⁶

On December 10, 1943, following an appeal by the Hughes firm, the United States Court of Appeals for the Second Circuit affirmed the Commission’s order revoking registration.²⁰⁷ Whereas the Commission had sought to downplay issues of gender in its order, the Second Circuit directly criticized the Hughes firm for targeting women: the Court commented that the “[p]etitioner’s dealings which are here in question were carried out by various of its customers’ men. The customers were almost entirely single women or widows who knew little or nothing about securities or the devices of Wall Street.”²⁰⁸ The Court held that even if (as the firm claimed) it had simply sold securities to customers in a “simple vendor-purchaser transaction . . . it was still under a special duty, in view of its expert knowledge and proffered advice, not to take advantage of its customers’ ignorance of market conditions.”²⁰⁹ Having established a relationship of trust and confidence, and given the “untutored mind of the purchasers,” the firm could not, in the Second Circuit’s view, either misrepresent or fail to disclose excess mark-ups without running afoul of the securities laws.²¹⁰ To hold otherwise would, in the court’s view, frustrate the “essential objective of securities legislation” at issue—that is, “to protect those who do not know market conditions from the overreaching of those who do.”²¹¹

Picking up on the Second Circuit’s language, the press highlighted the Hughes firm’s abuse of female customers.²¹² In an article entitled *SEC Price Scrutiny Upheld*, for example, the *New York Times* quoted Judge Clark’s observation that the customers at issue “were almost entirely single women or widows who knew little or nothing about securities or the devices of Wall Street.”²¹³ At least one academic journal likewise commented on the Hughes firm’s abuse of female customers.²¹⁴ As the note writer explained:

The dealer’s methods of operation were as follows: Prospects, usually single women or widows with little knowledge of financial transactions, were called to the ’phone or visited in their homes. They were told of a “wonderful stock”, a “marvelous buy”, one that was “beyond the usual.” High pressured salesmanship gradually broke down any resistance, instilled trust and confidence.²¹⁵

²⁰⁶ *Id.* at 681.

²⁰⁷ *Charles Hughes & Co. v. SEC*, 139 F.2d at 438.

²⁰⁸ *Id.* at 435.

²⁰⁹ *Id.* at 437.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See, e.g., SEC Price Scrutiny Upheld By Court*, N.Y. TIMES, Dec. 11, 1943, at 20.

²¹³ *Id.* (quoting *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 435 (2d Cir. 1943)).

²¹⁴ *Recent Decisions*, 18 ST. JOHN’S L. REV. 120, 134 (1944).

²¹⁵ *Id.*

Following its success in *Hughes* and throughout the 1940s, Commission staff repeatedly invoked images of female victims of investment abuse to combat abusive sales practices, often in cases of first impression or cases highlighted in the agency's annual report to Congress.²¹⁶ In each of these cases, the Commission took pains to note the gender of the victims and used language suggesting that the financial abuse of (presumably defenseless) women was a particularly heinous offense. For example, the same year that the Commission considered the *Hughes* case, it cited the presence of female victims in a case of first impression involving oil royalties.²¹⁷ In what the SEC termed "[o]ne of the more significant proceedings involving revocation of registration as a broker and dealer," the Commission alleged that a broker named Lawrence R. Leebby (doing business as Lawrence R. Leebby & Co.), sold oil royalties to customers at prices as high as 150 percent over cost.²¹⁸ Noting that the "two principal customers were women who were not well versed in investment matters and who depended exclusively upon Leebby's advice in all their securities transactions and relied upon him to act in their best interests at all times," the Commission revoked the firm's registration.²¹⁹ Among other reasons for its ruling, the Commission found that Leebby had violated his fiduciary obligation to treat the customers fairly, and to refrain from exploiting his customers' inexperience and their reliance upon his integrity.²²⁰

Just a few years later, the Commission revoked the registration of another over-the-counter broker-dealer based on its transactions with "two old women" to whom the firm owed fiduciary duties—one of whom was "a spinster over 80 years of age, so infirm that she could not be questioned or called to testify in the proceeding," while the other "was over 90 years of age."²²¹ The Commission emphasized that the firm had exploited the trust and confidence of these customers by taking secret profits on trades executed between the women's accounts.²²² One year after that, the Commission revoked the registration of yet another firm, and expelled it from NASD registration, on the grounds that it had "churned" (or excessively traded for the purpose of generating profits for the respondent) the accounts of "three

²¹⁶ For the Commission, the *Hughes* case was a major victory for its fledgling attempts to regulate disclosure and sales practices in the over-the-counter brokerage industry, which had long been (and in certain respects still remains) the wild west of the securities markets. In its 1944 annual report, the Commission described the *Hughes* case as the "most significant" of its kind, noting that the case subjected the Commission's shingle theory to judicial review for the first time. 10 SEC. & EXCH. COMM'N ANN. REP. 500 (1944).

²¹⁷ In the Matter of Lawrence R. Leebby & Co., Exchange Act Release No. 34,345, 13 S.E.C. 499 (June 26, 1943), *discussed in* 9 SEC. & EXCH. COMM'N ANN. REP. 18–19 (1943).

²¹⁸ 9 SEC. & EXCH. COMM'N ANN. REP., *supra* note 216, at 18–19.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ In the Matter of Oxford Co., Inc., 21 S.E.C. 681, 682 (1946).

²²² *Id.* at 691–94.

woman customers, two of them elderly widows.”²²³ The Commission observed that “[t]hese women were uninformed concerning securities matters and relied completely on the guidance and advice” provided by one of the firm’s officers.²²⁴ Under such circumstances, the Commission held that the firm’s churning was a “particularly vicious and fraudulent course of conduct in violation of the anti-fraud provisions of the Securities Act and the Securities Exchange Act.”²²⁵

In a 1948 case involving what the SEC termed a “shocking abuse of the trust and confidence” and an “utter betrayal” of a “widow without business experience,” the Commission permitted a broker-dealer to withdraw from registration after finding that the firm’s principal had engaged in inequitable and self-interested transactions with a customer.²²⁶ The Commission found that at a time when the firm’s financial condition was perilous, the firm’s principal convinced a sixty-one-year-old widow to sell certain securities on the promise that “he would reinvest the proceeds of the sale in a security issue which would be of greater advantage to her.”²²⁷ Instead, when the proceeds from the sale became available, the principal transferred the money “to his personal account and recorded the transaction on the firm’s books as a personal loan.”²²⁸ Although the firm mailed the widow a promissory note, it was never paid.²²⁹ Later, when the principal’s partner withdrew from the firm because of its deteriorating financial condition, the principal induced the same widow to invest all of her securities in a new partnership, in exchange for which she was promised four percent interest on her investment, as well as twenty percent of the firm’s earnings.²³⁰ Six months later, the business collapsed.²³¹ In finding that respondents had breached duties owed to the widow, the Commission emphasized the widow’s “complete ignorance of financial matters, her unqualified dependence on [the principal] for investment advice, and his knowledge that she was willing to entrust him with the conduct of her financial affairs.”²³²

In yet another case from 1948, the Commission cited a broker-dealer’s sale of securities to customers whose confidence its principal had gained, at prices far in excess of market prices and the firm’s own cost, as grounds for revoking the registration of the one broker-dealer and denying the application for registration of another broker-dealer organized by same principal.²³³

²²³ In the Matter of Behel, Johnsen & Co., 26 S.E.C. 163, 165 (1947).

²²⁴ *Id.*

²²⁵ *Id.* at 168.

²²⁶ In the Matter of Hammill & Co., 28 S.E.C. 634, 636–41 (1948); 15 SEC. & EXCH. COMM’N ANN. REP. 55–56 (1949) (describing Hammill’s betrayal of Mrs. G).

²²⁷ *Hammill & Co.*, 28 S.E.C. at 636.

²²⁸ *Id.*

²²⁹ *Id.* at 639.

²³⁰ *Id.*

²³¹ *Id.* at 640.

²³² *Id.* at 637.

²³³ In the Matter of Herbert R. May and Russell H. Phinney, 27 S.E.C. 814, 821–31 (1948).

As examples of the misconduct at issue, the Commission cited transactions involving three women—two of whom were identified as widows—who had inherited their securities and who were inexperienced in securities matters.²³⁴

PART III: POST WORLD WAR II: MORE FEMALE SHAREHOLDERS, BUT IMAGES OF FEMALE VICTIMS PERSIST, AND WOMEN REMAIN UNWELCOME OUTSIDERS ON WALL STREET

Wall Street Marketing Targets Women, but Some Industry Insiders Remain Ambivalent

On one level, the 1950s should have witnessed a sea change for women interested in the stock market. Female shareholders were commonplace by the 1950s, and the nation's growing prosperity brought the possibility of investing in securities within reach for greater numbers of Americans. As early as 1952, in its study of the socioeconomic characteristics of shareholders entitled *Share Ownership in the United States*, the Brookings Institution felt compelled to evaluate "the belief that women own most of the nation's securities—or the nation's wealth."²³⁵ While the study's results were mixed in some respects—finding more female shareholders of record by some (but not all) measures, but also finding that men owned more shares worth a greater amount—the study confirmed that significant numbers of women owned significant numbers of shares in major U.S. corporations.²³⁶ Just a few years later, in its 1956 census of shareowners, the NYSE reported that "housewives and non-employed women . . . represent the largest single group of [share]owners—some 34.2 per cent."²³⁷ The Census described this as an almost 40 percent increase, and "one of the sharpest changes" compared to the prior (1952) census.²³⁸ The 1956 Census also reported that women constituted 51.6 percent of shareholders.²³⁹ Three years after that, in its 1959 census, the NYSE reported that women accounted for 52.5 percent of all adult shareholders, with women outnumbering men by an even greater margin—56.3 to 43.7 percent—among new shareholders.²⁴⁰ Press coverage from the 1950s also reflects women's expanding interest in the markets. A 1958 article in the *Saturday Evening Post* expressed the view that "wives" too could (and should) invest in the markets.²⁴¹ An article in the magazine

²³⁴ *Id.* at 824–30.

²³⁵ LEWIS H. KIMMEL, *SHARE OWNERSHIP IN THE UNITED STATES* 14 (1952).

²³⁶ *Id.* at 15–17.

²³⁷ N.Y. STOCK EXCH., *WHO OWNS AMERICAN BUSINESS? 1956 CENSUS OF SHAREOWNERS* 20 (1956).

²³⁸ *Id.* at 10.

²³⁹ *Id.*

²⁴⁰ N.Y. STOCK EXCH., *SHARE OWNERSHIP IN AMERICA* 9 (1959).

²⁴¹ Lindsay Morgenthaler, *We Wives Can Play the Market, Too*, *THE SATURDAY EVENING POST*, Jan. 18, 1958, at 38–39. The article bears the interesting subtitle, "If you don't

The Independent Woman likewise noted women's wealth and market interest.²⁴²

The idea of marketing to women (or at least acknowledging women's interest in the stock market) also took hold during the 1950s, with firms launching a range of advertising initiatives designed to convince Americans, including women, that share ownership was in their best financial interest.²⁴³ Some programs were firm and female specific, such as an investor education seminar offered by one large NYSE member firm under the snappy title "Dividends Are a Girl's Best Friend."²⁴⁴ Others were designed to be gender-neutral and industry-wide.²⁴⁵

Even in purportedly gender-neutral programs, however, Wall Street continued to portray women as uninformed stock market outsiders, who were best off consulting their husbands or male brokers before buying or selling securities. In the mid-1950s, for example, the NYSE launched a series of advertisements designed to educate Americans about NYSE and the benefits of share ownership.²⁴⁶ Material relating to the program was sent to member firms in advance, and firms were free to run the advertisements under their own names via "tie-in" programs.²⁴⁷ Many of the advertisements from the NYSE program reflect Wall Street's prevailing view that the stock market was a man's world. For example, in an advertisement from 1956 entitled, "Are You A Financial Giant To the Mrs.?" a wife asks her husband why he has not yet purchased stocks to supplement the family income.²⁴⁸ The husband—who is urged by the ad to "control his temper" when responding to his wife's "sassy questions"—explains what common stocks and dividends are, and promises to consult a broker from a NYSE member firm for advice.²⁴⁹ A companion radio commercial advised men that a NYSE member could help them "acquire quite a bit of stature, very easily" by providing expert advice about how to invest.²⁵⁰

think your wife should dabble in the stock market, consider the unusual financial adventures of these ladies."

²⁴² *Id.*; see also Helen Hulett Searl, *The Old Blue Teapot Loses Its Job*, 29 THE INDEP. WOMAN, Feb. 1950, at 38–39 (describing popularity of broker-dealer sponsored lectures and educational programs targeting female investors).

²⁴³ See, e.g., SEC. & EXCH. COMM'N, REPORT OF THE SPECIAL STUDY OF SECURITIES MARKETS, PT. 1, H.R. DOC. NO. 88-95, at 244–50 (1st Sess. 1963) [hereinafter SPECIAL STUDY].

²⁴⁴ *Id.* at 249. Citigroup resurrected this tag line in 2007 in a series of print advertisements launched to promote its Women & Co. program. See "Dividends are a Girl's Best Friend," advertisement for Citigroup (2007) (on file with Citigroup), available at <https://www.citibank.com/womenandco/pages/pdfs/wcadbf2007.pdf>.

²⁴⁵ See SPECIAL STUDY, *supra* note 243, at 244–50.

²⁴⁶ See *id.* at 246–47.

²⁴⁷ *Id.*

²⁴⁸ "Are you a financial giant to the Mrs.?", Advertisement for the New York Stock Exch. (Jan. 24, 1956) (on file with the New York Stock Exch. archives).

²⁴⁹ *Id.*

²⁵⁰ 1-Minute Radio Commercial, Advertisement for the New York Stock Exch. (on file with the New York Stock Exch. archives).

Another advertisement from 1956 entitled, “Are You Still Awake, John?” took a similar approach.²⁵¹ The ad, which depicts a married couple in their bedroom (in separate beds), is drafted in the form of a conversation between husband and wife.²⁵² The wife says things like “I want to know what a stock broker is,” “I don’t understand what they do on the New York Stock Exchange,” and “what *is* a share of stock?”²⁵³ The husband in the ad exasperatedly answers the questions and tells his wife to be quiet so that he can go to sleep.²⁵⁴ When the husband finally admits that he secretly purchased stock and planned to give his wife a dividend check for her birthday, the wife exclaims that he is “the most wonderful husband that a girl could ever have.”²⁵⁵

In still another series of ads from 1957, the NYSE linked stock market savvy to success on the marriage market. One ad depicted a married couple riding on a bike, with the husband in front pedaling (and smoking a cigar) and the wife in shorts sitting cross-legged on the back seat.²⁵⁶ The ad asked, “Does your wife have a husband who is going somewhere? (financially, we mean)?” Another ad, entitled, “What it takes to be a successful bridegroom today,” depicted a woman resting her head on the shoulder of a confident-looking man staring into the distance.²⁵⁷ The ad urged men to become financially savvy about the stock market in order to impress a potential bride and her parents.²⁵⁸ Another ad, “Congratulations, Mrs. Ives,” congratulated a satisfied-looking bride with an “enigmatic smile,” holding the arm of her husband, for making her “splendid catch” of a financially savvy husband with an investment plan.²⁵⁹

Even when Wall Street sought to market directly to women in a respectful and non-patronizing fashion, echoes of gender stereotypes remained.²⁶⁰ Toward the end of 1960, for example, NYSE personnel “propose[d] to run

²⁵¹ “Are you still awake, John?”, Advertisement for the New York Stock Exch. (Feb. 12, 1956) (on file with the New York Stock Exch. archives).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ “Does your wife have a husband who is going somewhere?,” Advertisement for the New York Stock Exch. (May, 12 1957) (on file with the New York Stock Exch. archives).

²⁵⁷ “What it takes to be a successful bridegroom today,” Advertisement for the New York Stock Exch. (Apr. 28, 1957) (on file with the New York Stock Exch. archives).

²⁵⁸ *Id.*

²⁵⁹ Advertisements that ran in the 1960s also described brokers as wise and ethical men. One NYSE ad entitled “The ‘seat’ that money alone can’t buy,” (scheduled to run in magazines like *Newsweek*, *U.S. News & World Report*, and *Time*) pictured a seat on the exchange and told potential customers that “[t]he man who can sit on this little pull-down seat . . . is important to you . . . Only this man, and 1,366 men like him, can represent you in transaction business on the floor of the Exchange.” “The ‘seat’ that money can’t buy,” Advertisement for the New York Stock Exch. (Sept. 1962) (on file with the New York Stock Exch. archives).

²⁶⁰ See Lawrence C. Ruddick, Presentation to the Board: NYSE Advertising Campaign for Spring 1961 (Nov. 17, 1960) (on file with the New York Stock Exch. archives).

for the first time a campaign directed especially to women in leading women's magazines," such as *Ladies' Home Journal*, *Good Housekeeping*, *McCall's*, and *Better Homes & Gardens*.²⁶¹ Marketing personnel based this proposal on NYSE research regarding families' investment decisions: in its investor surveys, the Exchange had found that "there are more women investors than men" and that "investing is usually a family decision—especially with new investors—and in many cases women influence their husband's investment decisions."²⁶² As the Exchange's president G. Keith Funston explained in an internal memorandum seeking funding for the program, while the "theme for the special women's program would be identical with that to be used in the regular advertising program . . . [i]t would place even greater emphasis on our usual four cautions, and the desirability of getting good advice from a member firm and registered representative."²⁶³ Consistent with this approach, the Exchange developed ads with taglines like "For women who wonder what a broker is like," "Who said investing is a man's world," "Why is a smart shopper like a good investor," "Help for women considering stocks," "Sound goals for women investors," and "How smart women figure out how much to invest."²⁶⁴ In general, these ads counseled women to work with a reputable broker to devise a conservative investment plan.²⁶⁵

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Memorandum from G. Keith Funston to NYSE Board of Governors (July 14, 1961) (on file with the New York Stock Exch. archives) (regarding Supplemental Appropriation for Newspaper and Magazine Advertising).

²⁶⁴ See SPECIAL STUDY, *supra* note 243, at 246–47; "Member Firm Tie-in Ads for Women: 6 suggested ads to feature your firm tieing [sic] in with New York Stock Exchange ads in women's magazines" Advertisements for the New York Stock Exch. (Sept.–Nov. 1962) (on file with the New York Stock Exch. archives); "How Smart women figure how much to invest," Advertisement for the New York Stock Exch. (June 1962) (on file with the New York Stock Exch. archives). Other taglines included "The broker vs. the tipster (Suggested reading for all women who are thinking of investing in stocks and bonds)," Advertisement for the New York Stock Exch. (Dec. 1962) (on file with the New York Stock Exch. archives); "The right way vs. the wrong way to invest in stocks and bonds," Advertisement for the New York Stock Exch. (Apr.–May 1962) (on file with the New York Stock Exch. archives); "Four key differences between reckless and careful women investors (Recognize anyone?)" Advertisement for the New York Stock Exch. (Apr. 1963) (on file with the New York Stock Exch. archives); and "Right vs. wrong: when women choose stocks and bonds," Advertisement for the New York Stock Exch. (Nov. 1962) (on file with the New York Stock Exch. archives); "The smart way to buy stocks & bonds," Advertisement for the New York Stock Exch. (Nov. 1961) (on file with the New York Stock Exch. archives).

²⁶⁵ See SPECIAL STUDY, *supra* note 243, at 246–47. Depictions of women in the NYSE cooperative advertising program appear to be typical of advertisements portraying women in this era. In their study of images of women in business-related advertisements, Stephenson, Stover, and Villamor reviewed 709 business-related ads in a total of 144 magazines over the period 1962–1992. Theresa Stephenson, William Stover & Mike Villamor, *Sell Me Some Prestige! The Portrayal of Women in Business-Related Ads*, 30 J. OF POPULAR CULTURE 255, 257 (Spring 1997). The authors divided their analysis by ten year periods, based on the years 1962, 1972, 1982, and 1992. *Id.* They found that the 1962 ads "perpetuate sex inequality in the workplace through the selection of images and use

Moreover, despite Wall Street's efforts to market itself to dividend-seeking housewives, female customers remained a source of discomfort for some in the industry. For example, in a 1956 *Fortune Magazine* article entitled *Woman As Investors*, industry insiders described the characteristics of female investors of that time.²⁶⁶ The article acknowledged that the number of women owning securities had risen to 4,455,000, an increase of 35.7 percent over the prior four years.²⁶⁷ The article reported that, with their growing financial sophistication, women were beginning to look beyond bank savings accounts and government securities to the stock market as a whole.²⁶⁸ That said, the article suggested that certain "common denominators"—all of which reflected longstanding views about women's competence and temperament—stood out with female customers: (i) they often left investment decisions to men, (ii) wealthier women took less personal interest in their investments, (iii) they were generally more conservative as investors than men, (iv) they "hate[d] to touch capital," (v) they were likely to become "emotionally attached to certain stocks," (vii) they expected more from their investments than men did, (viii) when they did take risks, they would go all-out, (ix) they were "highly susceptible to 'hot tips,'" (x) they would buy stocks from companies whose consumer products they liked (xi) they had little interest in how a company was managed, and (xii) they would "drive brokers crazy."²⁶⁹

Ten years later in a syndicated newspaper column, Gerald M. Loeb, one of the founding partners of E.F. Hutton, asked whether "women who speculate in Wall Street show any difference in attitude or capability from men."²⁷⁰ While acknowledging that "no scientific study has ever been made" and that "[t]here are exceptions to any statement," Loeb admitted

of copy." *Id.* at 258. While men were depicted as "leaders in the corporate world, providers of security, dependable, knowledgeable, and on the move," women were shown as "depend[ing] on male assistance to function in life." *Id.* The authors found that women were most often portrayed as "housewives, flight attendants, secretaries, service workers" and other "entry-level, low-paid employees, committed to their male bosses[.]" with "no desire even to understand the operations of the male-dominated business industry." *Id.* Although the seventies began with a "spurt of growth" in women's rights, the authors found that women actually lost prestige in ads from 1972. *Id.* at 259–60. Although ads featured more women, they were still portrayed as secretaries, clerical workers, telephone operators and housewives. *Id.* at 260. When women appeared in executive positions, it was always in the presence of men. *Id.* The authors found that women also were more likely to be depicted as sex objects in the 1972 ads and more likely to be ruled by their emotions. *Id.* at 260–61. Similar trends appear in ads from 1982 and 1992. *Id.* at 263–266. The authors found that advertising from this period still portrayed a "male hierarchy" in the office with women confined to lower-status roles. *Id.* at 266–69.

²⁶⁶ Katherine Hamill, *Women as Investors*, *FORTUNE*, Oct. 1956, at 148.

²⁶⁷ *Id.*

²⁶⁸ *Id.* According to one investment counselor quoted in the article, "[o]nce they see their first dividend check . . . most of the girls begin to see the light. Women are really getting interested now." *Id.*

²⁶⁹ *Id.* at 148–49.

²⁷⁰ Gerald M. Loeb, *Few Women Stockholders Are Simply Business-Like*, *THE PHOENIX GAZETTE*, Nov. 14, 1966.

(in Henry Higgins fashion) that when it came to female investors, he wondered, “[w]hy can’t a woman be more like a man?”²⁷¹ In Loeb’s view it was “fortunate” that “most women have men do their investing for them” because women “generally [are] not as capable as men when it comes to investment, primarily because their interests lie elsewhere. There is a very limited number who devote a major part of their time to stock market problems, and a few of these are very astute.”²⁷² Loeb also opined that women tended to worry more than men “[p]erhaps . . . because they are both anxious to get the utmost profit and reluctant to take a loss.”²⁷³ “Where women need not watch over their own affairs,” Loeb felt it was “to their advantage to have a male member of the family or the family lawyer do it for them.”²⁷⁴ “The difficulty for women,” in Loeb’s view, “[was] to keep interference at the minimum.”²⁷⁵

With respect to share ownership, some questioned whether women were owners “in any real sense,” at least when they held shares jointly with their husbands.²⁷⁶ In his 1963 study of trends in the distribution of stock ownership, for example, Edwin Burk Cox addressed which family member’s socioeconomic characteristics to consider when dealing with securities jointly owned by husbands and wives.²⁷⁷ Reasoning that women often are legal owners “only because their husbands chose to register the stock that way,” Cox questioned whether it might be more appropriate to use the husband’s characteristics in his analysis, even if as a formal matter the wife possessed the right to receive dividends, vote, and sell the stock:

[S]ince joint holdings are generally those of husbands and wives, perhaps only the characteristics of the husband should be used in allocating the holding to a category on the theory that he is the

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* “Self-help” books from this era, including those written by women, reflect similar views. In her book *How Women Can Make Money in the Stock Market*, for example, one-time film actress Colleen Moore describes the lessons in finance that she learned from her husband, then a partner at Merrill Lynch. COLLEEN MOORE, *HOW WOMEN CAN MAKE MONEY IN THE STOCK MARKET* (1969). Moore argued that because women have a “lower tolerance for technicalities” than men do, they should “limit” themselves “to a smaller area of activity than a man would operate in” and should invest in securities rather than attempt active trading. *Id.* at 6–7. See also HERTA HESS LEVY, *WHAT EVERY WOMAN SHOULD KNOW ABOUT INVESTING HER MONEY* 11–12 (1968) (“There is the rare woman who is both thoroughly feminine and thoroughly knowledgeable in financial matters. This woman has complete regard and respect for her financial counselors, yet makes her own decisions on the use of her money—based, of course, on sound advice and information.”).

²⁷⁶ EDWIN BURK COX, *TRENDS IN THE DISTRIBUTION OF STOCK OWNERSHIP* 12–13 (1963) (Cox suggested that in cases of joint ownership of stocks—for example, by husbands and wives—it cannot be assumed that both parties share the allocation of risks and rewards.).

²⁷⁷ *Id.*

head of the household. Women are often the legal owners of stock only because their husbands chose to register the stock that way. It would be misleading to infer that in any real sense such women are stockholders. It will be seen that, for the purposes of analysis, the accepted notion of a stockholder is unsatisfactory.²⁷⁸

When confronted with real live female shareholder activists, 1950s commentators reacted with dismay and worried that “American business was beginning to take on some of the more frightening characteristics of a matriarchy.”²⁷⁹ In an article entitled *Women of Steel Give the Top Brass a Hard Time*, with the subheading “They turn a stockholders’ meeting into a gripe session on pensions, public relations and fat salaries,” *Life Magazine* cited the presence of activist female stockholders at a 1950 U.S. Steel stockholders’ meeting as a surprising and worrisome development.²⁸⁰ The article reported with some consternation that of the 350 stockholders present at the U.S. Steel annual meeting, over half were women.²⁸¹ According to the article, the most “articulate” of these women—a “professional gadfly” who owned fifteen shares and headed an organization “dedicated to getting more power for female stockholders”—made a splash by attacking the company’s public relations policies and “question[ing] the wisdom” of paying high salaries to senior officers.²⁸² The article accused two men “in cahoots with” this woman of asking “nasty” questions about executive compensation, and complained that the women and their male co-conspirator had turned the stockholders’ meeting into a “gripe session.”²⁸³

The 1950s/1960s: The Poor Widow Stereotype Endures

At the Securities and Exchange Commission, staff continued to invoke images of female victims of investment abuse to argue for investor protection reforms during the 1950s and into the early 1960s. In 1956, for example, when discussing efforts to limit “boiler rooms” (firms in which high-pressure salespeople use banks of telephones to call so-called “sucker lists” of vulnerable investors), the Commission explained that “[t]he tragedy from the standpoint of the public interest is that the widow, the wage earner, the person of small income is often the victim of the ‘boiler room’ salesman.”²⁸⁴

²⁷⁸ *Id.*

²⁷⁹ *Women of Steel Give the Top Brass a Hard Time: They turn a stockholders’ meeting into a gripe session on pensions, public relations and fat salaries*, *LIFE*, Mar. 13, 1950, at 46.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 46–47. The “Gadfly”—Ms. Wilma Soss—was the president and founder of the Federation of Women Shareholders in American Business, Inc., “an organization formed to get the ladies more of a say in the numerous companies in which they own[ed] stock.” Geoffrey T. Hellman, *The Talk of the Town*, *New Yorker*, June 25, 1949, at 17.

²⁸³ *Women of Steel Give the Top Brass a Hard Time*, *supra* note 279, at 46–47.

²⁸⁴ 22 SEC. & EXCH. COMM’N ANN. REP. 4 (1956).

Likewise, in a case from 1952, the Commission cited a broker-dealer's churning of a "joint account of an elderly widow and her daughter, neither of whom had any financial or business background," when affirming sanctions against a brokerage firm.²⁸⁵

Some ten years later, in its massive Special Study of the Securities Markets, Commission staff once again turned to female victims of investment abuse to generate support for reform.²⁸⁶ On September 5, 1961, pursuant to Public Law 87-196, Section 19 of the Securities Exchange Act of 1934 was amended so as to authorize and direct the Securities and Exchange Commission "to make a study and investigation of the adequacy, for the protection of investors, of the rules of national securities exchanges and national securities associations, including the rules for the expulsion, suspension or disciplining of a member for conduct inconsistent with the just and equitable principles of trade."²⁸⁷ Pursuant to this mandate, researchers for the Commission studied virtually every aspect of the securities markets and the securities industry, releasing a comprehensive report in 1963 addressing everything from the qualifications, responsibilities, and practices of persons and entities involved in the securities industry to the regulatory regime governing primary and secondary distributions of securities to the public ("the Special Study").²⁸⁸ As was true of *Hughes* era staff, the drafters of the Special Study sought to identify practices and problems common to retail investors generally, not retail investors of a particular gender.²⁸⁹ As in the *Hughes* case, however, the Special Study reflects a gender-segregated view of the securities markets and the securities industry in which people who sell securities are almost exclusively "salesmen," and women, to the extent they are mentioned at all, appear as vulnerable victims of sales practices abuses.²⁹⁰

²⁸⁵ *In the Matter of R. H. Johnson & Co.*, 33 S.E.C. 180, 182 (1952). Interestingly, although the Commission acknowledged that the office at issue had serviced between 2000 and 4000 accounts and that the NASD had made "no investigation . . . to determine whether excessive trading occurred in accounts other than the one involved in these proceedings," it held that the sanction of revoking the firm's brokerage license was neither excessive nor oppressive. *Id.* at 182, 182 n.3.

²⁸⁶ See SPECIAL STUDY, *supra* note 243 at 269–75.

²⁸⁷ Pub. L. No. 87-196 (September 5, 1961), 15 U.S.C. § 78s(d) (1964); see also SPECIAL STUDY, *supra* note 243. Section 19 of the Securities Exchange Act was subsequently amended. Pub. L. No. 94-29 (June 4, 1975) (codified at 15 U.S.C. § 78s(d) (2000)).

²⁸⁸ See SPECIAL STUDY, *supra* note 243, at III–VIII; see also SELIGMAN, *supra* note 37, at 295–308 (discussing the Special Study of Securities Markets).

²⁸⁹ See SPECIAL STUDY, *supra* note 243, at III–IV; see also SELIGMAN, *supra* note 37, at 295–308.

²⁹⁰ Though the Special Study acknowledges that some women worked—or at least desired to work—in the brokerage industry, female securities industry workers are absent from the Special Study's commentary and debate. See SPECIAL STUDY, *supra* note 243, at 19 (describing the "salesmen of the broker-dealer community"). For example, in a section discussing the words "profession" and "professional" as understood by those in the industry, the Special Study quotes an executive of one large firm who "described a 'professional' within the securities industry as 'a dedicated man, a well-trained man, a man of highest intellect, a man of highest caliber, morally—then the man who puts the cus-

For example, the Special Study found that “[o]n the basis of filed complaints it would appear that the trusting widow, who is taken advantage of by her securities salesman, is no mere figment of fiction, nor a figure of a by-gone era.”²⁹¹ As proof of the continuing viability of the widow as an at-risk market participant, the Special Study cites the experiences of three female investors who claimed that they bought or sold unsuitable securities based on recommendations from salesmen at large and reputable firms.²⁹² The first “lady investor” cited in this section of the Special Study claimed she followed the recommendation of a salesman in purchasing illiquid and speculative shares of an obscure company:

Customers are equally disillusioned by salesmen’s recommending of highly speculative securities when they have not been made aware of the risks involved, do not intend and can ill afford to speculate, and do not expect the firm for which the salesman works to recommend such securities. One such lady investor wrote that she had hoped to provide for her retirement years by investing in securities. In following the recommendation of a salesman with “an old reliable firm” in purchasing 200 shares of an obscure company not known to her, she relied on her trust in the firm and its salesman. When she later learned that the issue was unseasoned and speculative, she attempted to dispose of it, only to learn that a market for it no longer existed.²⁹³

The second investor, described as a widow with two school-age children, also claimed that her salesman caused her to purchase unsuitable securities:

tomers’ interest first.” *Id.* at 241. The Special Study reports that “[b]roker-dealer firms can be divided into a relatively small number of large organizations employing a majority of all salesmen in the industry and a large number of small units employing a few salesmen.” *Id.* at 16. One year later, in a report discussing the different types of firms involved in the distribution of mutual funds, Dennis J. Lehr and Meyer Eisenberg describe a sole proprietorship operated by a woman named Mary Louise Brown as an example of the smallest institution in the mutual fund distribution process. DENNIS J. LEHR & MEYER EISENBERG, *MUTUAL FUND RETAILING: ASPECTS OF MARKET STRUCTURE AND DEALER OPERATIONS* 27–28 (1964). Lehr and Eisenberg report that Brown received notoriety in the business when she published an article in the *Investment Dealers Digest* describing afternoon tea parties which she held for local residents as a means of publicizing mutual funds. *Id.* at 27. According to Lehr and Eisenberg, Brown’s “clientele are primarily women and her sales approach [which urged American women to fall in love with American industry] is highly emotional.” *Id.*

²⁹¹ SPECIAL STUDY, *supra* note 243, at 270. The Securities and Exchange Commission and the federal courts were not the only ones concerned about “poor widows” and unscrupulous stock brokers during the 1960s. In the 1962 case *Blackburn v. Dean Witter*, the California Court of Appeals affirmed the entry of judgment for the plaintiff in a case involving the alleged financial abuse of “an elderly widow [of a dairy farmer] who depended largely for her livelihood on her investments” and who was “not versed in business nor business transactions.” *Blackburn v. Dean Witter*, 201 Cal. App.2d 518, 523 (Cal. App. 5th Dis. 1962).

²⁹² SPECIAL STUDY, *supra* note 243, at 269–72.

²⁹³ *Id.* at 269–70.

One widow with two sons in school reported telling her salesman in a very large firm that investments were her only source of income, and that she could not afford to speculate. When she opened her account, most of her capital was invested in a balanced mutual fund. The salesman did not recommend speculations to her, but he did recommend that she sell the mutual fund and purchase a substantial amount of a security which paid no dividends. She reported that when, after 3 months, she asked about dividends on one of her stocks, the salesman told her “there wasn’t any, that it was a growth stock, and that I had no business in the stock market.” Investigation of her account showed examples of unusual activity in a period of less than 3 months, also based on his recommendations.²⁹⁴

The Special Study found that “[s]imilarly inappropriate but even more expensive advice was complained of by another widow, who followed and immediately regretted a sell recommendation of a salesman of the same large firm.”²⁹⁵

The Special Study also highlighted the experience of a female investor when discussing the problem of high-pressure sales tactics:

In one instance a secretary with little prior experience in securities responded to a major retail broker’s newspaper advertisement by returning a coupon offering information on securities. She shortly began to receive telephone calls from a salesman for the firm who urged her to sell the stock she owned and buy shares of another company. Despite her initial rejection of his advice the salesman pressed on. In one call he told her that he had purchased 100 shares himself, that he would purchase additional shares, if he had the money, and that the price of the stock would go higher. A few days later he telephoned her at her employer’s office and advised her to buy the stock immediately “as it was beginning to move.” Despite another refusal the salesman called again within minutes “because it was about to move.” At this point the harassed lady, busy at her job, consented to the purchase.²⁹⁶

In still another case, the Special Study referred to the experiences of “Mrs. Blank”—a divorced woman who had entrusted a family friend to make investment decisions for her—to highlight the problems of excessive trading and lax supervision in the retail brokerage industry.²⁹⁷ According to Joel Seligman, while there are “substantial questions” about the Special Study, including questions about the decision to conduct only twelve days of public

²⁹⁴ *Id.* at 270.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 271.

²⁹⁷ *Id.* at 272–73.

hearings, it was “the single most influential document published in the history of the SEC.”²⁹⁸ By documenting conflicts of interest, self-dealing, and other forms of exploitive behavior involving financial firms, the Special Study highlighted the limits of self-regulation in the financial industry and laid the groundwork for a range of regulatory reforms implemented over the next fifteen years, including reforms relating to the entry requirements for industry personnel, sales practices, commission rates, and disciplinary proceedings.²⁹⁹

PART IV: LATE 1960S–PRESENT: GIVE US YOUR MONEY, BUT
DON’T TRY TO WORK HERE

*Change Begins to Come to Wall Street, but Old Habits and
Attitudes Remain*

By the mid-1960s, movements for social change in the United States began—finally—to be felt on Wall Street.³⁰⁰ In 1965, Julia Walsh and Phyllis Peterson became the first female members of the American Stock Exchange.³⁰¹ In 1967, Muriel Siebert became the first woman to purchase a seat on the NYSE.³⁰² In 1968, Merrill Lynch (then the largest retail brokerage firm in the country) picked Mary Wrenn as its first female vice president.³⁰³ As an article from *Ms. Magazine* reported, “[t]he venerable NYSE even put its imprimatur on the new climate when, in December 1970, it allowed women back on the exchange floor as pages [for the first time since World War II]—this time hopefully for good.”³⁰⁴

As was the case almost one hundred years earlier when women first began to appear on Wall Street,³⁰⁵ these developments do not seem to have inspired Wall Street to re-examine its long-standing hostility toward female market participants. Instead, female Wall Street pioneers report that blatant discrimination and resistance were the norm.³⁰⁶ Women report that they were dissuaded from seeking jobs on Wall Street, paid less than their male peers when they could get hired, excluded and ejected from business meet-

²⁹⁸ SELIGMAN, *supra* note 37, at 299.

²⁹⁹ *See id.* at 295–308.

³⁰⁰ *See generally* MACLEAN, *supra* note 63 (describing reform movements involving African Americans, women, and other traditionally disenfranchised groups).

³⁰¹ *See* SUE HEINEMANN, *TIMELINES OF AMERICAN WOMEN’S HISTORY* 130 (1996).

³⁰² *See* MURIEL SIEBERT WITH AIMEE LEE BALL, *CHANGING THE RULES: ADVENTURES OF A WALL STREET MAVERICK* 36–37 (2002).

³⁰³ Lisa Cronin Wohl, *What’s So Rare as a Woman on Wall St.?*, *MS. MAG.*, June 1973, at 83.

³⁰⁴ *Id.* at 82–83.

³⁰⁵ *See supra* notes 64–95 and accompanying text.

³⁰⁶ *See generally* SUE HERERA, *WOMEN OF THE STREET: MAKING IT ON WALL STREET—THE WORLD’S TOUGHEST BUSINESS* (1997) (discussing the personal challenges and successes of fourteen women in the investment industry).

ings, and subjected to constant questioning about why they did not want to have children and stay at home.³⁰⁷ When women did succeed, some assumed that they had traded sexual favors for market access.³⁰⁸

Faced with this sort of behavior, women began to use civil rights legislation to challenge barriers to entry on Wall Street as early as the 1970s. As this body of litigation demonstrates, not only were assumptions about female market participants firmly embedded in the industry, they also informed how judges, arbitrators, and other system participants understood and interpreted claims of discrimination and harassment. Certainly, some women were successful in challenging blatant examples of embedded gender norms. In 1972, for example, Helen O'Bannon, a thirty-three-year-old woman who had graduated from Wellesley College with honors and received a Master's Degree in Economics from Stanford University, sat for Merrill Lynch's admission examination for its broker trainee program.³⁰⁹ At the time she applied to Merrill Lynch, O'Bannon's resume already included jobs at the House Banking and Currency Committee, the Treasury Department, the Comptroller of the Currency, and as an economics instructor at Robert Morris College.³¹⁰ While taking the exam, however, Ms. O'Bannon encountered questions like, "[w]hen you fight with your wife, which of you usually wins?" and "[w]hen you meet a woman, what interests you the most about her?"³¹¹ (The correct answer to that question was "dependency" or "affectionateness," which each received two points. "Beauty" received one point, while "intelligence"—O'Bannon's choice—and "independence" received no points.)³¹² When Ms. O'Bannon was rejected from the training program (a fact conveyed to her in a letter addressed to "Mr. O'Bannon") she sued for sex discrimination and won, reportedly costing the firm upward of four million dollars in damages, with the bulk of the award going toward future recruiting efforts and providing restitution to women who had been denied positions.³¹³

³⁰⁷ See, e.g., ANNE B. FISHER, WALL STREET WOMEN 9 (1989); HERERA, *supra* note 306, at 1–4, 8–9 (1997).

³⁰⁸ See SIEBERT, *supra* note 302, at 43.

³⁰⁹ SUSAN ANTILLA, TALES FROM THE BOOM-BOOM ROOM 6–7, 295 n.1 (2002), citing Helen B. O'Bannon v. Merrill Lynch, Pierce, Fenner & Smith Inc., Case No. YP13-017, Charge No. TP 12-0502 (Decision of the U.S. Equal Emp. Opportunity Comm'n, Pittsburgh, PA, Jan. 11, 1974); see also Class Action Complaint, Helen B. O'Bannon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Civ. Action No. 73-0905 (W.D. Pa. Oct. 24, 1973).

³¹⁰ ANTILLA, *supra* note 309, at 6–7, 295 n.1; see also Wilma Slaight, *Person of the Week: Helen O'Bannon* (May 7, 2001), <http://www.wellesley.edu/Anniversary/obannon.html>.

³¹¹ Slaight, *supra* note 310.

³¹² ANTILLA, *supra* note 309, at 6–7.

³¹³ See Slaight, *supra* note 310. According to press coverage, Ms. O'Bannon accepted only \$10,000 of this amount. See Gene Epstein, *Low Ceiling: How Women Are Held Back by Sexism at Work and Child-Rearing Duties at Home* (Dec. 1, 1997), <http://www.calbaptist.edu/dskubik/women.htm>; see also Consent Decree in Full Settlement of Civil Action, Helen B. O'Bannon and Equal Opportunity Employment Commission v.

More often, however, female employees of Wall Street firms who challenged alleged harassment and discriminatory conduct encountered mixed results.³¹⁴ In 1992, for example, Susan Jaskowski filed suit against Rodman & Renshaw and certain of its employees for discrimination.³¹⁵ Jaskowski alleged that after beginning in the firm's mail room and working her way up to the position of Vice President, Director of Human Resources, male co-workers reacted negatively when she became pregnant.³¹⁶ One executive vice president allegedly commented on the enlargement of pregnant women's breasts and remarked that he wanted to work with young, attractive females.³¹⁷ Another executive vice president allegedly told Jaskowski that she "should have stayed at [her] desk rather than out getting pregnant."³¹⁸ When Jaskowski went on maternity leave, her male replacement received a salary that was forty percent higher than Jaskowski's.³¹⁹ When she returned from leave, she was offered a clerk position that paid less than half the salary she had earned in her former position and, later on, a human resources position that again paid less than her former salary.³²⁰ The district court held that Jaskowski's claim for intentional infliction of emotional distress against the firm was preempted by the Illinois Workers' Compensation Act to the extent the claims were based on a respondeat superior theory of liability.³²¹ With respect to the conduct that was not preempted—namely, the decision to replace Jaskowski and offer her a lower-paid position upon her return from maternity leave—the district court held that while "we certainly to [sic] not condone conduct such as that alleged here, we cannot say that it amounts to behavior beyond all possible bounds of decency and which a reasonable person could not be expected to endure."³²²

Merrill Lynch, Pierce, Fenner & Smith, Inc., Civ. Action. No. 73-0905 (W.D. Pa. July 12, 1976).

³¹⁴ For another early example of this type of litigation, see *Utley v. Goldman, Sachs & Co. et al.*, 883 F. 2d 184, 184–85 (1st Cir. 1989). In 1987, Kristine Utley, then the only female sales associate in the money market department at the Boston Office of Goldman Sachs, charged that the work environment was "hostile, intimidating, and sexist." Verified Complaint at 3, *Utley v. Goldman Sachs & Co. et al.*, 883 F. 2d 184 (Mass. Dist. Ct. 1989) (No. 88-0794). As support for her allegations, Ms. Utley attached memos announcing the arrival of new female employees that contained pictures of nude pinups and gave examples of printed joke sheets containing gems like "Why Is Beer Better than a Woman?" *Id.*

³¹⁵ See *Jaskowski v. Rodman & Renshaw, Inc.*, 813 F. Supp. 1359, 1359 (N.D. Ill. 1993).

³¹⁶ *Id.* at 1361.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 1362.

³²² *Id.* at 1363.

Even into the 1990s, women who challenged alleged sexual harassment and discriminatory conduct continued to experience mixed results.³²³ One of the most notorious of these cases from this era involved the so-called “Boom-Boom Room” at the Garden City, New Jersey office of Smith Barney, Inc.³²⁴ On May 20, 1996, Pamela Martens and several other current and former employees of Smith Barney filed a class action complaint in the Southern District of New York against the firm, its chief executive officer, the former head of Smith Barney’s Garden City, New Jersey office, the NYSE, and the National Association of Securities Dealers.³²⁵ The complaint alleged that Smith Barney had engaged in a pattern and practice of sexual harassment, discrimination, and retaliation against its female employees.³²⁶ The long list of allegedly discriminatory conduct contains several allegations that call to mind the link between sex and money (and sex and market access) described almost one hundred years earlier in *The House of Mirth*: the complaint alleged, for example, that Smith Barney personnel took into account female employees’ refusal of, or submission to, unwelcome sexual conduct when making employment-related decisions, and that female Smith Barney employees were expected to tolerate sexual harassment as the price of being fortunate enough to work at the firm.³²⁷

Many of the *Martens* plaintiffs’ allegations concerned Nicholas Cuneo, who was the head of the firm’s Garden City, New Jersey office during the relevant period.³²⁸ According to the complaint, Cuneo created a supremely hostile work environment for women.³²⁹ He allegedly told one female broker that “there must be a lot of pressure on her to spread her legs,” called another a “jewish [sic] bitch” who “should be hit by a bus” and referred to attractive women as “slits and tits.”³³⁰ He also allegedly constructed a room in the firm’s basement—the “Boom-Boom Room”—which he decorated in fraternity house style and used for all-male drinking parties.³³¹ When Martens complained about such antics, Smith Barney allegedly told her that she “sounded like a hysterical woman” and that she “should leave Smith Barney.”³³² Following Cuneo’s lead, other male brokers at the Garden City office allegedly harassed and discriminated against their female coworkers.³³³ One woman reported a coworker wrote “[her name] gives good head” on

³²³ See ANTILLA, *supra* note 309; see also Michael Siconolfi & Margaret A. Jacobs, *Wall Street Fails to Stem Rising Claims of Harassment and Discrimination*, WALL ST. J., May 24, 1996, at C1 (providing a discussion of cases filed during this era).

³²⁴ See ANTILLA, *supra* note 309, at 17–25.

³²⁵ Complaint at 1, *Martens v. Smith Barney, Inc.*, 194 F.R.D. 113, (S.D.N.Y. 2000) (No. 96 Civ. 3779).

³²⁶ *Id.* at 3–5.

³²⁷ *Id.* at 4.

³²⁸ *Id.* at 2.

³²⁹ See *id.* at 7–19.

³³⁰ *Id.* at 9.

³³¹ *Id.* at 10.

³³² *Id.* at 13.

³³³ *Id.* at 10.

the blackboard in the trainee's board room.³³⁴ Another woman who applied for a compliance-officer position was told that she would not like the job or be able to perform it because she would have to travel, which would cause "family problems," and because she would not be able to "lock horns" with managers.³³⁵ As the manager explained, what the firm really wanted was "some guy with brass balls."³³⁶ Some men allegedly referred to their female coworkers as "cunts," "bitches," and "stupid."³³⁷

The *Martens* complaint also challenged securities industry rules that required brokers, as a condition of their employment, to agree to mandatory arbitration of all employment-related disputes in industry-sponsored arbitration forums rather than in court.³³⁸ Among other criticisms, the *Martens* plaintiffs alleged that industry-sponsored arbitration systems did not provide for the selection of truly neutral arbitrators and instead permitted panels to be staffed largely by older white males, who were likely to be more hostile to discrimination claims brought by women than demographically representative panels.³³⁹ Based on these and other similar concerns, the complaint alleged that mandatory arbitration violated Title VII of the Civil Rights Act and deprived the *Martens* plaintiffs of due process of law.³⁴⁰

³³⁴ *Id.*

³³⁵ *Id.* at 15.

³³⁶ *Id.*

³³⁷ *Id.* at 10.

³³⁸ *Id.* at 20–23.

³³⁹ *Id.* at 21–22.

³⁴⁰ *Id.* at 21–23. Notably, the *Martens* plaintiffs' challenge to the mandatory arbitration of their civil rights claims came after the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, the Supreme Court held for the first time that a statutory civil rights claim could be subjected to compulsory arbitration. *Id.* at 26. Interstate/Johnson Lane Corp. ("Interstate") hired Robert Gilmer in 1981 as a Manager of Financial Services. *Id.* at 23. The terms of his employment required Gilmer to register with various stock exchanges, including the NYSE. *Id.* At that time, relevant registration forms (in particular, Form U-4) contained a clause requiring Gilmer to submit any dispute with his employer to arbitration. *Id.* In 1987, when Gilmer was 62, Interstate terminated his employment. *Id.* After filing an age discrimination claim with the Equal Employment Opportunity Commission, Gilmer filed suit in federal district court alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). *Id.* at 23–24. Interstate moved to compel arbitration on the grounds that the arbitration provision of Gilmer's NYSE registration application required Gilmer to arbitrate (and thus precluded him from proceeding in federal court). *Id.* at 23–24. Interstate also cited the Federal Arbitration Act and the strong federal policy favoring arbitration that it embodied as grounds for its claim that Gilmer should be required to arbitrate his dispute. *Id.* at 24–25. Granting certiorari to resolve a split among the circuits, the Supreme Court held that Gilmer's age discrimination claim was subject to mandatory arbitration. *Id.* at 24, 35. In so holding, the Court rejected Gilmer's claims that compulsory arbitration would undermine the purpose and statutory scheme of the ADEA. *Id.* at 27–29. In the wake of *Gilmer*, courts have held that arbitration agreements in employment contracts can be enforced, even if that means that statutory discrimination claims are subject to compulsory arbitration. *See, e.g.,* *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 109 (S.D.N.Y. 1995) (holding as "well-settled" that federal statutory claims, including discrimination claims, may be subject to arbitration).

Just one month after Martens and her co-plaintiffs filed suit, Marybeth Cremin and seven other women filed a class action lawsuit against the brokerage firm Merrill Lynch.³⁴¹ In their amended complaint, the *Cremin* plaintiffs alleged that they too had been the victims of sexual harassment, discrimination, and retaliation.³⁴² As an example of the defendants' misconduct, Cremin alleged that when she became pregnant, her supervisor pressured her to transfer her book of business—\$60 to \$75 million in assets under management—to other brokers at the firm.³⁴³ As inducement, Cremin's supervisor allegedly promised her a substantial lump sum payment, a permanent part-time position, and other benefits.³⁴⁴ Instead of complying with this agreement, Cremin alleged that her supervisor fired her once her clients were transferred.³⁴⁵ Another plaintiff, Nancy Thomas, alleged repeated instances of sexual harassment and discrimination, including receiving packages with sexual paraphernalia from a male colleague.³⁴⁶ As with *Martens*, the *Cremin* complaint also alleged that the industry's practice of requiring women to arbitrate their claims before the NYSE or the NASD constituted unlawful discrimination.³⁴⁷

Then, in 1998, Allison Schieffelin, a successful bond trader, filed a charge of discrimination against Morgan Stanley with the Equal Employment Opportunity Commission ("EEOC") alleging that she had been discriminated against based on her gender with respect to her compensation, promotion, and the terms, conditions, and privileges of employment.³⁴⁸ After she was fired in October 2000, Ms. Schieffelin filed a second charge of discrimination and retaliatory discharge.³⁴⁹ After investigating the charges, the EEOC issued letters of determination finding that Morgan Stanley had discriminated against Ms. Schieffelin and other professional women in Morgan Stanley's Institutional Equity Division ("IED"), and that the firm had retaliated against Ms. Schieffelin when it terminated her employment.³⁵⁰ On September 10, 2001, the EEOC filed suit in federal court, alleging a pattern and practice of discrimination against professional women in Morgan Stanley's IED and alleging discrimination and retaliation against Ms. Schieffelin.³⁵¹ Shortly thereafter, Ms. Schieffelin filed an intervenor's complaint alleging employment discrimination. On October 15, 2001, the Court

³⁴¹ *Cremin v. Merrill Lynch, Inc.*, 957 F. Supp 1460 (N.D. Ill. 1997).

³⁴² Complaint at 2–25, *Cremin v. Merrill Lynch, Inc.*, 957 F. Supp 1460 (N.D. Ill. 1997) [hereinafter, *Cremin Complaint*].

³⁴³ *Cremin Complaint*, *supra* note 342, at 5–6.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 6.

³⁴⁶ *Id.* at 9.

³⁴⁷ *Id.* at 27–28.

³⁴⁸ Complaint of Plaintiff-Intervenor Allison Schieffelin at 4–5, *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451 (S.D.N.Y. 2004) (No. 01 CV 8421).

³⁴⁹ *Id.* at 5–6.

³⁵⁰ *See id.*

³⁵¹ Complaint, *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451 (S.D.N.Y. 2004) (No. 01 CV 8421).

granted Ms. Schieffelin's motion to intervene, and, in that capacity, she filed a complaint alleging employment discrimination and equal rights violations.³⁵²

Like the *Martens* and *Cremin* plaintiffs before her, Schieffelin's complaint recites a litany of overt and subtle ways in which Ms. Schieffelin's supervisors allegedly treated her differently from her male counterparts.³⁵³ For example, whereas male colleagues were praised for being aggressive and competitive, Schieffelin claimed that she was criticized for being "snippy" and "too emotional."³⁵⁴ When she was passed over for a promotion, Schieffelin's supervisor allegedly told her that she "shouldn't be so focused on Morgan Stanley," and she should instead direct her energy toward "the important things in life" like "having a family" and "full personal life."³⁵⁵ Schieffelin also alleged that she was excluded from sporting events, retreats, and social events (including strip club outings) that her male counterparts attended with clients.³⁵⁶ And, she alleged that when she complained and informed Morgan Stanley of her intent to file charges with the EEOC, Morgan Stanley initiated a campaign of retaliation that included filing an arbitration proceeding with the NYSE seeking a declaratory judgment that it had not discriminated against her, taking away job-related responsibilities, diminishing the quality of services provided to Schieffelin and her clients by the firm's traders, otherwise demeaning her, and diminishing her stature within the firm and with clients.³⁵⁷

In the end, despite their explosive allegations of systemic discrimination in both employment conditions and in the industry's arbitration system, the *Martens*, *Schieffelin*, and *Cremin* cases did not go to trial in federal court. In the *Martens* case, Judge Constance Baker Mottley approved a settlement in July of 1998 after years of procedural wrangling, in-fighting, falling-outs, and other twists and turns detailed in Susan Antilla's book *Tales From The Boom-Boom Room: Women v. Wall Street*.³⁵⁸ The settlement established a mediation procedure through which a substantial number of plaintiffs negotiated and settled their disputes with Smith Barney.³⁵⁹ All of the claims against individuals—including Cuneo—were dismissed and Cuneo and his cohorts were never deposed.³⁶⁰ Though class-wide information is not available, some who submitted to mediation reportedly were dis-

³⁵² See Complaint of Plaintiff-Intervenor, EEOC v. Morgan Stanley & Co., 324 F. Supp.2d 451 (S.D.N.Y. 2004) (No. 01 Civ. 8421); see also Amended Complaint, EEOC v. Morgan Stanley & Co., 324 F. Supp. 2d 451 (S.D.N.Y. 2004) (No. 01 CV 8421).

³⁵³ Complaint of Plaintiff-Intervenor Allison Schieffelin, *supra* note 348.

³⁵⁴ *Id.* at 11.

³⁵⁵ *Id.* at 12.

³⁵⁶ *Id.* at 13–15.

³⁵⁷ *Id.* at 18–23.

³⁵⁸ See *Martens v. Smith Barney, Inc.*, No 96 Civ. 3779 (CBM), 1998 WL 1661385 (S.D.N.Y. July 28, 1998); ANTILLA, *supra* note 309, at 222–42.

³⁵⁹ See ANTILLA, *supra* note 309, at 236, 238, 242.

³⁶⁰ *Id.* at 242.

appointed with the process.³⁶¹ The few *Martens* plaintiffs whose claims ended up in arbitration faced stiff opposition and did not always fare well. On January 11, 2002, for example, a three person panel of NASD arbitrators issued a decision awarding one former Smith Barney broker zero dollars for her claims.³⁶² This award came after a grueling hearing in which the broker was described as “sick” and asked repeatedly about her supposedly fragile emotional state.³⁶³ Though *Martens* herself, along with a few others, challenged the terms of the settlement and fought mandatory arbitration of their claims, their efforts to reform the settlement agreement and obtain a jury trial ultimately were rebuffed.³⁶⁴

The *Cremin* case also settled after much legal maneuvering.³⁶⁵ On September 2, 1998, Judge Ruben Castillo approved a settlement agreement, which, like the Smith Barney/*Martens* deal,³⁶⁶ did not set aside a large monetary fund.³⁶⁷ Instead, eligible claimants agreed, as part of the settlement stipulation, to pursue their claims before “neutral” arbitrators and mediators in

³⁶¹ *See id.* at 259, 274.

³⁶² *Id.* at 282–84, 289.

³⁶³ *Id.* at 282–84. Unfortunately, this broker was not the only woman to face the “nuts or sluts defense” in response to harassment and discrimination claims. In employment discrimination litigation, “nuts and sluts” refers to the defense tactic of portraying women who bring harassment and employment discrimination claims as too unstable to be believed or too promiscuous to be harassed. *See generally* SUSAN ESTRICH, *SEX AND POWER* 179, 185 (2000) (referencing the “nuts and sluts defense”); Hillary Jo Baker, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 *HASTINGS WOMEN’S L.J.* 83, 95–100 (2009) (describing the “nuts and sluts” litigation strategy); Kent D. Streseman, *Headshrinkers, Mannmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examination in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 *CORNELL L. REV.* 1268 (1994–1995) (describing compelled mental examinations of women labeled “nuts and sluts”). Antilla reports that when two female employees of a major Wall Street brokerage firm complained that a male coworker had tried to force himself on them physically, the employees had to wait three years for a hearing. “A week before the hearing, the firm . . . forced the two women to undergo examinations by a psychiatrist of the brokerage firm’s choosing.” ANTILLA, *supra* note 309, at 150–51. One of the women was subjected to an interrogation that included “questions about her sex life, the opening of her gynecological records, and queries about her menstrual periods, her marital counseling, and her divorce. The psychiatrist even had copies of her therapy records.” *Id.* at 151. The other employee also reported that she was grilled with questions relating to her sexual experiences and her childhood. *Id.* According to Antilla, this woman finally broke down when the psychiatrist asked her to recite in reverse order the names of the U.S. Presidents. *Id.* For a discussion of the psychology behind “nuts or sluts” tactics, see for example, Lynn Hecht Schafran, *Sexual Harassment Cases in the Courts, or Therapy Goes to War: Supporting a Sexual Harassment Victim During Litigation*, in *SEXUAL HARASSMENT IN THE WORKPLACE AND ACADEMIA: PSYCHIATRIC ISSUES* 133, 139 (Clinical Practice Series No. 38, Diane K. Shrier ed., 1996).

³⁶⁴ ANTILLA, *supra* note 309, at 275–76, 291.

³⁶⁵ *See Cremin v. Merrill Lynch, Inc.*, 328 F. Supp. at 866 (noting that in 1998, the parties entered into a settlement, pursuant to which aggrieved plaintiffs could pursue their claims before neutral mediators and arbitrators).

³⁶⁶ *See* ANTILLA, *supra* note 309, at 217–42.

³⁶⁷ *Id.* at 244–245. *See also Cremin v. Merrill Lynch, Inc.*, 328 F. Supp. 2d 865, 866 (N.D. Ill. 2004); *Martens v. Smith Barney, Inc.*, No 96 Civ. 3779 (CBM), 1998 WL 1661385 (S.D.N.Y. July 9, 2003).

what came to be called a “[c]laims [r]esolution [p]rocess.”³⁶⁸ As in the *Martens* case, those few who proceeded to arbitration faced stiff opposition and encountered mixed results. One woman, Hydie Sumner, received an award of \$2.2 million from an arbitration panel but engaged in years of litigation with Merrill Lynch over her efforts to be reinstated.³⁶⁹ During Nancy Thomas’ arbitration, Merrill Lynch allegedly sought to portray her as a lovesick mope whose broken engagement some seventeen years earlier had rendered her unfit to work on Wall Street.³⁷⁰ Ms. Thomas eventually received an award of \$420,000: \$320,000 for discrimination and \$100,000 for emotional distress.³⁷¹ The arbitrators found against Thomas, however, on her claim of constructive discharge.³⁷²

In Allison K. Schieffelin’s case, shortly before the EEOC’s trial was scheduled to begin, Morgan Stanley agreed to pay \$54 million to settle the EEOC’s case without admitting or denying wrongdoing: \$40 million to a pool to be allocated among women in the class pursuant to a claims process, \$2 million to fund diversity programs at Morgan Stanley, and (grudgingly) \$12 million to Ms. Schieffelin.³⁷³

PART V: DO LINKS BETWEEN HISTORICAL IMAGES OF WOMEN AND LAW MATTER?

Things Change, but Remain the Same

In the wake of cases like *Martens*, *Cremin*, and *Sheffelin*, firms did make some changes: some hired diversity officers, enhanced training, and revised hiring, review, and retention policies with an eye toward increasing the number of women and people of color in the work force.³⁷⁴ Likewise, in

³⁶⁸ See *Cremin v. Merrill Lynch, Inc.*, 328 F. Supp. 2d at 866–67.

³⁶⁹ See John Churchill, *Merrill and Hydie Sumner, Still Can’t Work It Out*, REGISTERED REP., Aug. 24, 2006, <http://registeredrep.com/news/sumner-merrill-saga>.

³⁷⁰ See Susan Antilla, *Merrill Sees Sex Case as Soap Opera, Not Bias*, BLOOMBERG.COM, Oct. 27, 2006, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=AHBbeM3hPKdA>.

³⁷¹ Susan Antilla, *Merrill Sex Case Yields Tough Battle, Puny Win*, BLOOMBERG.COM, Oct. 27, 2006, <http://www.bloomberg.com/apps/news?pid=20601039&sid=AEjEefBVGewM&refer=home>.

³⁷² *Id.*

³⁷³ See Patrick McGeehan, *Morgan Stanley Settles Bias Suit with \$54 Million*, N.Y. TIMES, July 13, 2004, at A1 (“Donald Kempf, Morgan Stanley’s chief legal officer, made it clear that the company did not think she should get any of the money. It was the commission’s decision to give \$12 million to Ms. Schieffelin. ‘We had zero input,’ Mr. Kempf said, standing in the courtroom long after the judge, the jury and the crowd had dispersed.”). Hydie Sumner, a female stockbroker at Merrill Lynch and one of 2800 women who brought a class action suit against Merrill Lynch for sex discrimination, received her award of \$2.2 million from an arbitration panel. Patrick McGeehan, *Merrill Lynch Firm is Told It Must Pay in Sexual Bias Case*, N.Y. TIMES, April 21, 2004, at A1.

³⁷⁴ See ANTILLA, *supra* note 309, at 184, 213–14, 223, 251 (describing diversity initiatives at Smith Barney in the wake of the *Martens* case).

response to criticisms of the industry's system of compulsory arbitration of employment disputes,³⁷⁵ the sponsoring self-regulatory organizations amended applicable forms and rules to exempt statutory discrimination claims from mandatory arbitration, but provided that parties may agree to arbitrate disputes if they wish.³⁷⁶ In recent years, some women even have

³⁷⁵ In March 1994, following a request for research by Representative Edward Markey (D. Mass.), the United States General Accounting Office ("GAO") examined how registered representatives of securities firms fare when discrimination claims are arbitrated. See U.S. GEN. ACCOUNTING OFFICE, *EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 1* (1994), available at <http://archive.gao.gov/t2pbat4/151196.pdf>. The GAO found, among other things, that arbitration panels were overwhelmingly comprised of white males around sixty years of age (approximately eighty-nine percent of arbitrators were men and ninety-eight percent were white according to a survey of NYSE panel members in 1992) and that arbitrators were not trained in discrimination law. *Id.* at 8, 12.

³⁷⁶ As a result of the merger of member regulatory functions of the NASD and the NYSE into what is now known as the Financial Industry Regulatory Authority ("FINRA"), the vast majority of securities industry arbitrations now take place in FINRA's arbitration forum. For an explanation of how FINRA was formed, see About FINRA, <http://www.finra.org/AboutFINRA/index.htm> (last visited Nov. 18, 2009). See also Fourteenth Report, Securities Industry Conference on Arbitration 44–51 (2009) (containing statistics reflecting case activity in various self-regulatory organization arbitration forums). Under applicable FINRA rules, statutory discrimination claims are exempted from mandatory arbitration. In particular, the FINRA Code of Arbitration Procedure for Industry Disputes now provides that "[a] claim alleging employment discrimination, including sexual harassment, in violation of a statute, is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose." FINRA Code of Arbitration Procedure for Industry Disputes Rule 13201. The Code further provides that if the parties agree to arbitrate employment discrimination claims under this rule, a number of provisions unique to discrimination claims apply, including the requirement that:

A single arbitrator or chairperson of a three-arbitrator panel in a case involving a statutory discrimination claim must have the following qualifications: (A) law degree (Juris Doctor or equivalent); (B) membership in the Bar of any jurisdiction; (C) substantial familiarity with employment law; and (D) ten or more years of legal experience, of which at least five years must be in either: law practice; law school teaching; government enforcement of equal employment opportunity statutes; experience as a judge, arbitrator, or mediator; or experience as an equal employment opportunity officer or in-house counsel of a corporation.

FINRA Code of Arbitration Procedure for Industry Disputes Rule 13802 (2007). It is unclear whether these amendments have provided any meaningful protection to potential claimants since an employer may, by its own corporate policy, require employees to consent to mandatory arbitration rather than rely on NASD regulations. See, e.g., Paul Rose, *Developing a Market for Employment Discrimination Claims in the Securities Industry*, 48 UCLA L. REV. 399, 413–14 (2000). Moreover, in the years since *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), researchers have questioned whether panels have, in fact, complied with rules designed to ensure compliance with statutory standards. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *supra* note 375, at 2 (noting FINRA/NASD awards in cases involving alleged gender discrimination and related claims suggest that claimants do not often prevail, and even when they are granted damages, they obtain only partial victories); Case Comment, *An Empirical Study of Sexual Harassment/Discrimination Claims in the post-Gilmer Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review To Ensure Compliance With Statutory Standards?*, 32 SUFFOLK U. L. REV. 369, 407–13 (1998) (reporting on an empirical study and arguing that current standards do not require arbitrators to issue the sort of reasoned,

succeeded in obtaining favorable judgments against financial firms in cases involving discrimination and sexual harassment claims.³⁷⁷

And yet, despite these developments, there is evidence that women and men remain on different footing when it comes to the securities markets and working on Wall Street. In terms of investors and customers, images of vulnerable women falling prey to sharp practices on Wall Street remain part of the common parlance of the media,³⁷⁸ and advocates continue to observe that financial institutions target women when marketing and selling certain kinds of abusive products.³⁷⁹ In terms of employment in the financial industry, while the “master of the universe” stereotype has taken a hit in the wake of the economic crisis,³⁸⁰ one does not get the sense that Wall Street is interested in developing a less traditionally masculine image of what it takes to be a successful salesperson, trader, or executive. To the contrary, both statistical and anecdotal evidence suggests that women’s career arcs at financial firms continue to lag behind those of their male counterparts.³⁸¹ Women remain statistically far less likely to hold sales, trading, or executive positions at financial firms.³⁸² Pay disparity remains a persistent problem on

written rewards that would enable courts to adequately review arbitrators’ findings of fact or conclusions of law).

³⁷⁷ See, e.g., Transcript of Record at 1798–99, *Zubulake v. UBS Warburg LLC*, 2005 WL 6180416 (S.D.N.Y. Apr. 6, 2005) (No. 02 Civ. 1243SAS); Transcript of Record at 1820, *Zubulake v. UBS Warburg LLC*, 2005 WL 6180420 (S.D.N.Y. Apr. 6, 2005) (No. 02 Civ. 1243SAS).

³⁷⁸ See, e.g., Mary Kane, *She’s 85, a Widow—And About To Become Another Foreclosure Statistic*, WASH. INDEP., June 4, 2009, available at <http://washingtonindependent.com/45606/shes-85-a-widow-and-about-to-become-another-foreclosure-statistic>; Timothy Noah, *GOP, RIP?*, SLATE, Sept. 30, 2008, <http://www.slate.com/id/2201245/>.

³⁷⁹ In its study of consumer mortgages, for example, the Consumer Federation of America (“CFA”) found that women are more likely to receive subprime mortgages than men, and patterns of subprime gender disparity exist for home purchase, refinance, and home improvement lending. CONSUMER FED’N OF AM., *WOMEN ARE PRIME TARGETS FOR SUBPRIME MORTGAGES: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET* 3–4 (2006), available at <http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf>. The CFA also found that women with the highest incomes have the highest disparities relative to men with similar incomes as compared to women at lower income levels, and that this gap is especially pronounced for women of color. *Id.* This means, for example, that African American women and Latinas with the highest incomes have much higher rates of subprime lending than white men with similar incomes. *Id.*

³⁸⁰ For an article discussing the current state of the “masters of the universe,” see for example Hagan, *Powerful Man*, *supra* note 26.

³⁸¹ See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM’N, *JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY* (2009), <http://www.eeoc.gov/stats/jobpat/jobpat.html> [hereinafter *JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY*] (demonstrating that the job patterns of women and minorities reveal that women are much less likely than their male counterparts to hold executive and sales positions in brokerage firms and financial services firms and are much more likely to hold clerical and other “non-producing” positions); U.S. EQUAL EMP. OPPORTUNITY COMM’N, *DIVERSITY IN THE FINANCE INDUSTRY* (2006), available at <http://www.eeoc.gov/stats/reports/finance/index.html>.

³⁸² See *JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY*, *supra* note 381.

Wall Street.³⁸³ Even those women who “look” most like their male counterparts from the perspective of educational background, training, experience, and personal characteristics face questions about their competence and character.³⁸⁴ And women continue to report that they experience discrimination while working for Wall Street firms.³⁸⁵

In terms of the law, unstated gender norms embedded in our regime of securities regulation have remained largely unexamined. Because disputes between stockbrokers and their customers are almost always subject to

³⁸³ See LOUISE MARIE ROTH, *SELLING WOMEN SHORT: GENDER AND MONEY ON WALL STREET* 179–95 (2006) (describing a persistent, large, and unexplained gender gap in pay on Wall Street that continued unabated during the bull market of the 1990s). Roth argues that “[w]hat is astonishing is the degree of inequality between men and women who were similar in their background and work related characteristics, who worked in similar positions in similar organizations, and who experienced the same market conditions in the formative years of their careers.” *Id.* at 8–9. The notion that it is appropriate and acceptable to pay women less for their work is both longstanding and pervasive. As Judith Lorber points out in *Paradoxes of Gender*, the earliest factory workers in both the United States and England were white unmarried daughters and younger sons—those who were less valuable as farm workers. JUDITH LORBER, *PARADOXES OF GENDER* 201 (1994). In New England, when female workers at Lowell textile mills organized strikes to protest low wages (among other things), the strikes were not successful in part because “the gender ideology that women were primarily wives and mothers was used to justify their low pay.” *Id.* at 202; see also MACLEAN, *supra* note 63, at 117–54.

³⁸⁴ See, e.g., *supra* notes 12–24 and accompanying text. In order to explain why women may not be welcome in male-dominated work environments, some scholars have pointed to the phenomenon of “homosociality,” which Judith Lorber describes in *Paradoxes of Gender*, as “the bonding of men of the same race, religion, and social-class background.” LORBER, *supra* note 383, at 231. Lorber argues that this “band of brothers” phenomenon can exert a powerful influence over workplace dynamics. *Id.* She notes that “[p]arallel to the formal organization of a large, modern workplace, which is structured as a task-related, bureaucratic hierarchy, is the informal organization, which is based on trust, loyalty, and reciprocal favors. Because the unspoken rules are often as significant to the way business is conducted as the written rules, colleagues want to work with people who know what goes without saying.” *Id.* at 230 (internal citations omitted). Lorber quotes an earlier work by the sociologist Everett C. Hughes to describe how this phenomenon operates:

In order that men [sic] may communicate freely and confidentially, they must be able to take a good deal of each other’s sentiments for granted. They must feel easy about their silences as well as about their utterances. These factors conspire to make colleagues, with a large body of unspoken understandings, uncomfortable in the presence of what they consider odd kinds of fellows.

Id. (quoting EVERETT C. HUGHES, *THE SOCIOLOGICAL EYE* 146 (1971)). In discussing pay disparity on Wall Street, Louise Marie Roth questions whether deeply-rooted gender norms and ideologies, coupled with homophily, may contribute to keeping women and persons of color in lower-status, lower-paying jobs while giving a boost to white male workers at the same time. ROTH, *supra* note 383, at 71–99.

³⁸⁵ For example, in March 2009, *Forbes Magazine* published a cover article entitled *Terminated: Why the Women of Wall Street are Disappearing* citing charges filed by several former employees of Citigroup with the Equal Employment Opportunity Commission which allege that women were passed over for positions and ultimately fired—in disproportionate numbers—from public finance positions when the firm encountered economic difficulties. Anita Raghavan, *Terminated: Why The Women of Wall Street Are Disappearing*, *FORBES*, Mar. 16, 2009 at 72.

mandatory arbitration,³⁸⁶ debates about whether an investor or customer is sophisticated or unsophisticated, reasonable or reckless, and diligent or dilatory generally occur in private. Scholars have questioned whether the arbitrators who decide these cases understand or “apply the law” in a consistent and systematic manner—since the law itself may not be clear—and whether the use of non-public arbitration forums has hindered the development of the law governing broker-dealer disputes.³⁸⁷ Likewise, although some courts and scholars have expressed concerns about the arbitration of civil rights claims and the composition and operation of arbitration panels in employment cases,³⁸⁸ harassment and discrimination claims continue to be resolved via nonpublic alternative dispute resolution including arbitration and settlement.³⁸⁹ A review of NASD/FINRA arbitration awards reveals that claimants continue to have difficulty winning discrimination cases outright.³⁹⁰ Moreover, arbitration awards typically do not describe challenged conduct in detail, and the grounds for vacating awards are extremely limited. Thus,

³⁸⁶ See generally *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1978) (holding that pre-dispute arbitration agreements are enforceable).

³⁸⁷ See generally Barbara Black & Jill Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 *CARDOZO L. REV.* 991, 1005–18, 1030–35 (2002).

³⁸⁸ In 1997, for example, one federal district court judge commented that arbitration was not an adequate forum for a plaintiff’s age and gender discrimination claims due to a “structural bias in the system.” *Rosenberg v. Merrill Lynch, Inc.*, 995 F. Supp. 190, 207 (D. Mass. 1998). The Court of Appeals rejected this contention, but refused to enforce an arbitration clause on other grounds. *Rosenberg v. Merrill Lynch, Inc.*, 170 F.3d 1, 4 (1st Cir. 1999). See generally Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 *U. PA. J. LAB. & EMP. L.* 685 (2004) (arguing the Supreme Court’s interpretation of the FAA has had the effect of privatizing justice by substituting privately constructed arbitration agreements for the public court system).

³⁸⁹ A review of FINRA/NASD awards in cases involving alleged gender discrimination and related claims shows that while claimants who allege discrimination, harassment, or retaliation do prevail on occasion, panels more often reject such claims, either in whole or in part. See, e.g., *Sommer v. Edward D. Jones & Co., LP*, FINRA Arb. Docket No. 06-048, 2008 WL 1030986 (Mar. 25, 2008) (Ellner & Emirhanian, Arbs.) (denying relief on harassment claim but finding in favor of female claimant on retaliation and constructive discharge claims); *Appel v. A.G. Edwards & Sons, Inc.*, FINRA Arb. Docket No. 05-01209, 2007 WL 4288020 (Nov. 19, 2007) (Dolan, Kershner & Elliott, Arbs.) (denying claimant’s sex discrimination claim); *Payne v. A.G. Edwards, NASD Arb. Docket No.05-01524*, 2007 WL 674255 (Feb. 22, 2007) (Elliott & Stall, Arbs.) (denying relief on gender discrimination claim, but finding in favor of female claimant on wrongful termination claim); *Simmons v. RBC Dain Rauscher, Inc.*, NASD Arb. Docket No. 04-05104, 2005 WL 1384745 (May 26, 2005) (Tatone & Volz, Arbs.); *Shankle v. UMB Bank, NASD Arb. Docket No.01-01054*, 2002 WL 1722362 (July 1, 2002) (Balk, Arb.) (denying gender discrimination claim, but awarding damages for other unrelated claims); *Katz v. Painwebber, Inc.* NASD Arb. Docket No. 98-00641, 2000 WL 567864 (Mar. 14, 2000) (Katsoris, Bishop & Madan, Arbs.) (denying claims for sex discrimination in employment and retaliation but ordering respondent to amend Form U-5); *LaPrade v. Kidder, Peabody & Co., Inc.*, NASD Arb. Docket No. 93-04030, 1999 WL 1146902 (Oct. 8, 1999) (Boyce, Malloy & Shinagel, Arbs.) (rejecting claims for statutory discrimination but ordering respondent to modify language respecting claimants’ departure from firm on Form U-5).

³⁹⁰ See *supra* note 389.

allegedly discriminatory conduct often remains insulated from both public scrutiny and meaningful judicial review.³⁹¹

The Cost of “Bounded” Vocabulary

What does it mean for securities regulation going forward if, as this article posits, gender-based norms are both entrenched and largely unexamined in our regulatory regime? Reviewing Sections I through V of this paper, a skeptical reader might argue that references to unsophisticated female investors in the historical record are simply descriptive—i.e., the vestigial remains of earlier eras when women were far less likely to be educated about the stock market or to work on Wall Street. Such a reader might also question whether references to vulnerable female investors do any real harm if, as seems to be the case, women remain targets of Wall Street misconduct,³⁹² and regulators have used stories of female victims of investment abuse to support investor protection reforms.³⁹³ While the “no harm, no foul” argument is harder, perhaps impossible, to make in the context of employment discrimination litigation, one can imagine that there are women who have not achieved desired career milestones for reasons other than entrenched gender-based discrimination.

In her book, *Making All the Difference: Inclusion, Exclusion, and American Law*, however, Martha Minow notes the tendency of the law to use stereotypes, categories, and other unstated norms to assign rights and obligations, finding it both endemic and pernicious.³⁹⁴ As Minow explains, when law adopts a “bounded vocabulary” which distinguishes between in groups (whose characteristics and values are presumed to be “normal”) and out groups (whose characteristics and values are presumed to be “abnormal”), system participants are reduced to characters with assumed traits and abilities instead of individuals with diverse experiences, abilities, and goals.³⁹⁵

[W]hen we respond to persons’ traits rather than their conduct, we may treat a given trait as a justification for excluding something we think is “different.” We feel no need for further justification: we attribute the consequences to the differences we see. We neg-

³⁹¹ See generally *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 522 U.S. 576 (2008) (describing narrow grounds for vacatur authorized by the Federal Arbitration Act).

³⁹² See, e.g., CONSUMER FED’N OF AM., *supra* note 379.

³⁹³ See *supra* note 178–234 and accompanying text.

³⁹⁴ See MINOW, *supra* note 39, at 4–15. Minow views the use of status based labels and categories as an outgrowth of what she calls the “dilemma of difference”—the challenge of determining “when . . . treating people differently emphasize[s] their differences and stigmatize[s] or hinder[s] them on that basis” and “when . . . treating people the same become[s] insensitive to their difference[s] and [is] likely to stigmatize or hinder them on that basis[.]” *Id.* at 20.

³⁹⁵ See *id.* at 9.

lect the other traits that may be shared. And we neglect how each of us, too, may be “different.”³⁹⁶

Minow makes the further point that when legal reasoning purports to be “neutral” while still using categories and labels that legitimize stigma, it risks codifying and even exacerbating discriminatory systems and norms.³⁹⁷

With respect to bodies of law other than securities regulation, scholars have challenged the use of status-based labels that ignore or stigmatize system participants. Feminist scholars from various schools of thought, for example, have challenged the pretense of neutrality in legal standards and methods of reasoning, thereby exposing the gendered underpinnings of standards and systems which take the experiences and perceptions of privileged white men as “normal,” and which treat women as abnormal, deviant, or confusing.³⁹⁸ Critical race theorists have lodged powerful criticisms against the design and operation of standards and systems that ignore or stigmatize the diverse experiences and perspectives of persons of color.³⁹⁹ Scholars

³⁹⁶ *Id.* at 3–4.

³⁹⁷ *See id.* at 9.

³⁹⁸ The list of relevant feminist scholarship is long and varied. Mary Jo Frug’s discussion of *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988) offers one useful example. *See* MARY JO FRUG, *POSTMODERN LEGAL FEMINISM* 12–18 (1992). In the *Sears* case, the EEOC claimed that Sears had discriminated against women by failing to hire and promote women in commission sales positions on the same basis as men. *Sears*, 628 F. Supp. at 1278. During the trial, Sears argued that the low number of women in commission sales positions was a function of the personality traits required to perform the job: according to Sears, the ideal commission sales worker should be aggressive, outgoing and good with people, highly motivated, and already informed about their products. *Id.* at 1290. Sears argued that women were less likely to have certain of these traits. *Id.* at 1312. To explain why this was so, Sears called historian Rosalind Rosenberg to testify through evidence drawn from social history that women traditionally have subordinated paid labor to domestic activities, and as a result, were less likely to choose commission sales work. FRUG, *supra*, at 13–14. In rebuttal, the EEOC called historian Alice Kessler-Harris to testify that women had taken on “non-traditional” paid labor when employers allowed them to do so. *Id.* at 13. After a lengthy investigation and trial, the district court dismissed the claims against Sears. *Sears*, 628 F. Supp. at 1276. A divided panel for the Seventh Circuit Court Appeals affirmed the lower court’s ruling. *Sears*, 839 F.2d at 360. As Frug points out, both experts:

Masculinized the traits needed to work in commission sales. That is, they interpreted Sears’ description of the ideal commission sales worker by reference to a particular masculine stereotype. In addition, the historians’ descriptions of women in the paid labor force suggested two opposing feminine stereotypes, neither of which fit the stereotypically male model of sales worker.

FRUG, *supra*, at 13. Frug argues that:

If the historians had relied on a less stereotypically male image of the successful commission sales worker in drawing conclusions about the relationship between the social history of women workers and women’s general aptitude for commission sales, Sears’ explanation for the lack of women in commission sales might have seemed less convincing.

Id.

³⁹⁹ *See generally* MINOW, *supra* note 39.

from these and other disciplines have challenged the notion that norms, standards, and systems exist in some abstract and entirely theoretical domain that is entirely "neutral" for all as to both application and design.⁴⁰⁰ Scholars also have recognized that when we expose unstated status-based norms, the conversation changes: new issues become part of the debate and we gain a new and more nuanced understanding of what existing norms and systems have and have not been able to accomplish.⁴⁰¹

Securities regulation is ripe for just this sort of analysis. Securities regulation casts itself as a gender-neutral exercise. It is awash with supposedly gender-neutral standards like "reasonable,"⁴⁰² "sophisticated," and "unsophisticated."⁴⁰³ Rights and obligations are set based upon purported gender-neutral roles, such as "customer," "trader," "broker," and "dealer." And, while courts and regulators have on occasion considered the experiences of

⁴⁰⁰ Law is, of course, one of many disciplines in which scholars have sought to expose and analyze gender norms embedded in supposedly gender-neutral systems and standards. Though any list of this work also is both too long and too varied to include here, I include several citations by way of example. In her analysis of corporate structure, Rosabeth Moss Kanter has argued that gender comes into play in large organizations through organizational roles that "carry characteristic images of the kinds of people that should occupy them." ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 250 (1977). The bioethicist Susan Wolfe has explored ways in which the women's movement's critique of medicine and healthcare lead to greater attention to issues such as incest, rape, domestic violence, breast cancer, and to the "special effects in women of cardiac illnesses and other conditions that affect both women and men." Susan M. Wolf, *Introduction: Gender and Feminism in Bioethics*, in *FEMINISM AND BIOETHICS: BEYOND REPRODUCTION* 13 (Susan M. Wolf ed., 1996). Wolfe argues that a feminist bioethics would analyze the practices of excluding women and women's health problems from research, and examine the different impact of therapies on male and female patients, among other issues. See *id.* at 23–24. Feminist historians have, of course, helped to change what "counts" as history and what gets studied. See, e.g., Linda Gordon, Persis Hunt, Elizabeth Pleck, Rochelle Goldberg Ruthchild & Marcia Scott, *Historical Phallics: Sexism in American Historical Writing*, in *LIBERATING WOMEN'S HISTORY: THEORETICAL AND CRITICAL ESSAYS* 55, 55 (Berenice A. Carroll ed., 1976).

⁴⁰¹ See MINOW, *supra* note 39, at 3–11, 49–78, 371–72.

⁴⁰² For example, in *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988), the Court held that a fact is material under Rule 10b-5 "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision, or if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (Quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Section 11 of the Securities Act of 1933 provides that certain defendants (including corporate directors) may avoid liability if they can prove as to non-"expertized" portions of a registration statement that they "after reasonable investigation, [have] reasonable ground to believe and did believe" there were no misstatements or omissions of material facts in such portions of the registration statement. 15 U.S.C. § 77k (1998). As to "expertized" portions of the registration statement (such as audited financial statements), a non-issuer defendant avoids liability with respect to "expertized" portions of a registration statement if he can prove that he had "had no reasonable ground to believe and did not believe" that such portions of the registration statement contained misstatements or omissions of material facts. *Id.*

⁴⁰³ E.g., *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981) (reviewing education, experience, and other indicia of investor sophistication in assessing duties owed by broker to customer).

certain market participants (e.g., widows) in formulating and interpreting rules, resulting norms and systems are thought to apply to all market participants without regard to gender. And yet, there is an increasingly large body of evidence, which suggests that gender-based stereotypes have made our system of securities less effective than it might otherwise be. Consider the Bernard Madoff Ponzi scheme, for example. To most of the world—except for whistle-blower Henry Markopolos and his associates,⁴⁰⁴ apparently—Bernard Madoff looked like a “master of the universe.”⁴⁰⁵ Madoff founded his firm, Bernard L. Madoff Investment Securities LLC in 1960 and was a prominent member of the securities industry for many years.⁴⁰⁶ He served as vice chairman of the NASD, a member of its board of governors, and chairman of its New York region.⁴⁰⁷ He was also a member of NASDAQ Stock Market’s board of governors and its executive committee and served as chairman of its trading committee.⁴⁰⁸ He had a glittering list of clients, though not all were famous,⁴⁰⁹ and was well known in philanthropic circles.⁴¹⁰

In the end, however, Madoff operated a Ponzi scheme of epic proportions.⁴¹¹ And while there are many reasons why the scheme went undetected for so long, part of the problem seems to have been that people assumed that Madoff was skilled and ethical, perhaps because he looked the part.⁴¹² Many of Madoff’s investors certainly were taken in.⁴¹³ Regulators at the Securities and Exchange Commission appear to have given him the benefit of the doubt as well,⁴¹⁴ even though the Commission had inspection powers over certain of his operations and despite the fact that a private citizen attempted to alert the Commission to red flags for almost ten years.⁴¹⁵ In this regard,

⁴⁰⁴ Cf. *Assessing the Madoff Ponzi Scheme and Regulatory Failures, Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises*, 111th Cong. (2009) (statement of Harry Markopolos, Chartered Financial Analyst and Certified Fraud Examiner).

⁴⁰⁵ See, e.g., Julie Creswell & Landon Thomas Jr., *The Talented Mr. Madoff*, N.Y. TIMES, Jan. 24, 2009, at BU1.

⁴⁰⁶ See Complaint at 1, 4, SEC v. Madoff, 08-CIV-10791 (S.D.N.Y. 2008), available at <http://www.sec.gov/litigation/complaints/2008/comp-madoff121108.pdf>.

⁴⁰⁷ See, e.g., Press Release of Sec. & Exch. Comm’n, *SEC Charges Bernard L. Madoff for Multi-Billion Dollar Ponzi Scheme* (Dec. 11, 2008), <http://www.sec.gov/news/press/2008/2008-293.htm> (describing Madoff’s positions in and relationship with the securities industry).

⁴⁰⁸ *Id.*

⁴⁰⁹ See, e.g., Dionne Searcey & Amir Efrati, *Madoff Clients Exposed*, WALL ST. J., Feb. 6, 2009, at A1.

⁴¹⁰ See Creswell & Thomas Jr., *supra* note 405.

⁴¹¹ See, e.g., Searcey & Efrati, *supra* note 411 (discussing “an eclectic list purporting to name thousands of people who lost money in Mr. Madoff’s alleged \$50 billion Ponzi scheme”).

⁴¹² See Creswell & Thomas Jr., *supra* note 405.

⁴¹³ See *id.*; Searcey & Efrati, *supra* note 411.

⁴¹⁴ See Creswell & Thomas Jr., *supra* note 405.

⁴¹⁵ See *Assessing the Madoff Ponzi Scheme Before the H. Comm. on Financial Services*, 111th Cong. (2009) (statement of Harry Markopolos, Chartered Financial Analyst

the Office of the Inspector General recently concluded that investigators at the Securities and Exchange Commission were cowed by Madoff's reputation and status, something Madoff himself appears to have bragged about in tape-recorded telephone conversations.⁴¹⁶ Even Madoff has argued that he strayed into criminal behavior because his self-image was that of a successful trader and money manager: he simply could not admit, even to himself, that he had failed.⁴¹⁷ In this regard, during his sentencing hearing, Madoff said that his difficulties began when he tried to bail out some bad investments for some clients with money from other clients:

I believed when I started this problem, this crime, that it would be something I would be able to work my way out of, but that became impossible. As hard as I tried, the deeper I dug myself into a hole. I made a terrible mistake, but it wasn't the kind of mistake that I had made time and time again, which is a trading mistake. In my business, when you make a trading error, you're expected to make a trading error, it's accepted. My error was much more serious. I made an error of judgment. I refused to accept the fact, could not accept the fact, that for once in my life I failed. I couldn't admit that failure and that was a tragic mistake.⁴¹⁸

Though Madoff may have avoided detection for some time no matter what, given his knowledge of and ability to manipulate reporting requirements, I cannot help but wonder what would have happened had we considered Madoff's conduct, and just not defaulted to a presumption of competence merely because Madoff "looked the part." Would investors have been more cautious and would they have raised questions earlier? Would coworkers, not all of whom have been exposed as co-conspirators, have been more likely to identify and report red flags? Would regulators have taken a harder look at his business and asked harder questions of his firm's supervisors?⁴¹⁹ And, would we have been less comfortable deferring

and Certified Fraud Examiner), http://www.house.gov/apps/list/hearing/financialsvcs_dem/markopolos020409.pdf.

⁴¹⁶ U.S. SEC. & EXCH. COMM'N OFF. OF INVESTIGATIONS, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME, at 50 (Aug. 31, 2009) (One SEC examiner suggested that "because of Bernard Madoff's reputation at the time as a large broker-dealer, there may not have been any thought to look into Madoff's operation any further."). The Report also notes that SEC staff told SEC examiners that Madoff was a "powerful and well-connected individual," and that he attempted to "impress and intimidate" SEC examiners through bluster, name-dropping, and other devices. *Id.* at 135, 181. One of Madoff's former secretaries is reported to have said that SEC examiners who met with Madoff were "in awe" of him. *Id.* at 181. *See also Congress to Investigate Madoff Failure as Tape Is Released*, N.Y. TIMES DEALBOOK (Sept. 10, 2009), <http://dealbook.blogs.nytimes.com/2009/09/10/congress-to-probe-secs-madoff-failure-as-tape-is-released/>.

⁴¹⁷ *Bernard L. Madoff's Statement to the Court*, N.Y. TIMES, June 30, 2009, at B4.

⁴¹⁸ *Id.*

⁴¹⁹ *See, e.g.*, FINRA Conduct Rule 3010 (requiring FINRA member firms to "establish and maintain a system to supervise the activities of each registered representative,

to the SEC's program of inspection and examination of regulated entities, and other policies and procedures designed to detect and prevent securities law violations at firms like Madoff's, if we understood that assumptions grounded in gender stereotypes risked obscuring securities fraud?

Conversely, when faced with a trader, salesperson, or executive who does not "look the part," I cannot help but wonder whether a less traditionally gendered approach might cause us to be more skeptical of claims that an industry professional is not competent. For example, if we develop standards for measuring trading competence that are less traditionally gendered than those currently used on Wall Street,⁴²⁰ would we change how we interpret criticisms of people like Zoe Cruz? (In this regard, it will be interesting to see Wall Street's reaction to Cruz's recently publicized decision to launch a hedge fund.)⁴²¹ Would we also take a harder look at supposedly expert traders, who, at least during the current economic crisis, appear to have taken on substantial and little-understood risks? From an employment law perspective, would judges, arbitrators, and mediators change how they respond to allegations of harassment, discrimination, and retaliation? Would we revisit whether such claims ought to be consigned to arbitration more often than not?

Questions about whether an investor is "sophisticated" or "unsophisticated" or "reasonable" or "unreasonable" also merit review. Thinking again of the *Madoff* case, which involved any number of high profile and successful victims, both male and female, I wonder what would happen if we decoupled investor sophistication from the widow, orphan, or dilettante stereotype? Would this make it easier for us to identify behaviors and characteristics of sophisticated and unsophisticated investors, regardless of their gender? Would we revise our understanding of what it means for an investor to be "reasonable" or "diligent" in the face of fraud? Would it alter our understanding of when an investment is suitable, and whether an investor has knowingly or unknowingly taken on too much risk?

Having analyzed the historical underpinnings of Wall Street's social and cultural response to women as a first step in examining the impact of unstated underpinnings of our system of securities regulation, this paper proposes additional empirical research into these sorts of questions to deconstruct—and reconstruct—the set of skills and characteristics necessary

registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules.").

⁴²⁰ See, e.g., FRUG, *supra* note 398, at 14–15 (suggesting that stereotypes of women undertaking "traditional men's work" can lead to essentialist depictions of women and create a "false simplicity" of the problem).

⁴²¹ See Aaron Lucchetti & Jenny Strasberg, 'Cruz Missile' Returns With a Hedge Fund, WALL ST. J., October 9, 2009, available at <http://online.wsj.com/article/SB125504628364874829.html>. It also will be interesting to see the reaction to Bank of America's decision to put Sallie Krawcheck in charge of global wealth and investment management operations. See Dan Fitzpatrick, *BofA Shakes Up Senior Ranks*, WALL ST. J., Aug. 4, 2009, available at <http://online.wsj.com/article/SB124931847274201985.html>.

to trade securities successfully or to work at financial firms so that relevant norms and standards are grounded in a clear-eyed understanding of what works and what does not, rather than in gender-based stereotypes. Indeed, some commentators have found that female individual investors are generally not the capricious speculators of Wall Street lore. As Joan Heminway points out in her article *Female Investors and Securities Fraud: Is the Reasonable Investor A Woman?*, behavioral finance experts, who have analyzed the characteristics of female retail investors, have found that empirical research has disaffirmed certain long-held assumptions about the characteristics of female investors.⁴²² These researchers found that women are (i) more likely to seek investment advice, (ii) less likely to be optimistic about the markets or overconfident about financial decision-making, and more likely to perceive themselves as lacking investment competence, (iii) less likely to trade frequently, and (iv) more likely to perform better, more consistently, or persistently stronger in investments that they make for their own accounts as compared to investments that men make for their own accounts.⁴²³ Heminway argues that traditional constructs of the “reasonable investor” that ignore these realities do not serve men or women very well.⁴²⁴ In terms of investment abuse, a 2006 study found that senior victims of financial fraud were more likely than not to be male, be married, have higher levels of education attainment, and have higher levels of income—in other words, the opposite of the “poor widow” profile.⁴²⁵

Of course, there is always the risk that attention to gender will further entrench the use of gender and gender-based stereotypes in legal analysis.⁴²⁶ Dividing the world up according to gender also risks lumping all women together, as if there were one “women’s point of view,” when, in reality, issues of class, race, and sexual orientation (along with many other characteristics) may have a profound impact upon experience, perspectives, and

⁴²² See Joan Macleod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291, 310–17 (2009). Professor Langevoort has questioned the risk-taking behavior of so-called sophisticated investors. See Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 699 (1996). In the wake of the current financial crisis, the psychology of overconfidence in the world of finance is once again a subject of review. See, e.g., Malcolm Gladwell, *Cocksure: Banks, Battles, and the Psychology of Overconfidence*, NEW YORKER, July 27, 2009, at 24.

⁴²³ See Heminway, *supra* note 422, at 310–17.

⁴²⁴ *Id.* at 322–36.

⁴²⁵ See CONSUMER FRAUD RESEARCH GROUP, INVESTOR FRAUD STUDY FINAL REPORT 6, 20 (May 12, 2006), <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118422.pdf>.

⁴²⁶ As Minow and many others have pointed out, claiming to speak about “women’s experience” or from a women’s point of view risks engaging in just the sort of simplification and stereotyping that feminist scholarship seeks to challenge. Moreover, issues of race, sexual orientation, class, religion, ethnicity, pregnancy status, and others all contribute to markedly different experiences, perspectives, and goals. MINOW, *supra* note 39, at 230–32.

goals.⁴²⁷ In the end, however, I think these risks ought to be dealt with explicitly, and not used as a basis for ignoring gender as a category of analysis. Gender has served as a proxy for acumen and temperament for too long to remain unexamined in securities law.

⁴²⁷ See, e.g., Kimberlé W. Crenshaw, *A Black Feminist Critique of Antidiscrimination Law*, in *PHILOSOPHICAL PROBLEMS IN THE LAW* 339 (David M. Adams, ed.) (4th ed. 2005); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 *HARV. WOMEN'S L.J.* 115 (1989); Audre Lorde, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 117–23 (1984); Bell Hooks, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); see also Maclean, *supra* note 63, at 117–54 (discussing development of law concerning gender-based employment discrimination, and noting key role played by the black freedom movement's fight for jobs and justice).

