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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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Abstract

In Edith Wharton’s 1905 novel House of Mirth, Lily Bart learns in one brutal moment what happens to women who get tangled up with the stock market. Though she is beautiful and well-born, 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. When the husband of a friend (Gus Treanor) offers to help Lily by speculating in the stock market, Lily agrees. And when Treanor begins presenting Lily with money, she gladly accepts what she assumes are trading profits.

One night, however, after luring Lily to his house under false pretenses, Treanor makes his true intentions known. After accusing Lily of leading him on, Treanor demands sexual favors, telling Lily that she must “pay up.” Even though Lily manages to extricate herself from the house without submitting to Treanor’s demands, she is ruined by this encounter. Cast off by her social circle, Lily eventually leaves her last pennies to Treanor, takes an overdose of sleeping medication and dies alone in a boarding house room.

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. Ms. Cruz was a long-time Wall Street warrior. She began working on Wall Street in 1982 after graduating from Harvard College and Harvard Business School. After proving herself on the trading desk, she spent more than twenty years working her way up through management, eventually earning millions of dollars per year in compensation, and billions in profits for her employer. By 2007, she was the heir apparent for the CEO job.

Just months after praising Ms. Cruz’s market insights and her contributions to the Morgan Stanley’s bottom line, however, Ms. Cruz’s boss called her to his office. With the subprime mortgage crisis unfolding, losses mounting and his own job under pressure, Ms. Cruz’s boss said that he had “lost confidence” in her and asked her to resign. After a ten minute meeting, Ms. Cruz left the building and never went back. In the wake of termination, some former colleagues questioned whether the woman they had nicknamed “the Cruz Missile” had ever understood the markets, trading or how to manage financial risk.

In this article, I make three points about Wall Street’s social and cultural response to women. First, I argue that even though Lily Bart’s fictional ruin and Ms. Cruz’s rise and fall are separated by more 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 in the financial industry. Drawing upon industry narratives, reports in the popular press and selected academic commentary, I show that women have been social and cultural outsiders on Wall Street for more than one hundred years. Wall Street narratives express women’s outsider status in two ways: they either omit women from the ranks of market participants entirely, as if they are (and should remain) absent from the business of buying and selling securities, or they relegate women
to the status of hapless victims or allegedly incompetent shrews. In either case, women are presumed to lack the skills and characteristics necessary to navigate on Wall Street, and they are thought to face ruin and/or expulsion if foolish enough to venture into the markets alone.

Second, drawing upon selected case law, legislative history and administrative agency reports, I argue that Wall Street’s social and cultural response to women has become embedded in our system of securities regulation. Reform-minded legislators, courts and regulators have used stories of vulnerable women – particularly widows stripped of their lifesavings – to curb abusive sales practices on Wall Street. Wall Street firms have use women’s alleged emotionality and lack of financial competence to justify excluding women from employment, and to rebut sexual harassment, discrimination and retaliation claims.

Third, having exposed links between Wall Street’s image of women and legal norms, I argue that Wall Street’s singular narrative for women has come at a cost. Securities regulation purports to be a gender-neutral exercise. It uses supposedly gender-neutral standards like “reasonable,” “sophisticated” and “unsophisticated,” and it assigns rights and obligations based on purportedly gender-neutral roles like “broker” and “customer.” In reality, however, relevant standards and systems reflect unstated gender norms about who is sophisticated and skilled when it comes to the markets, and who is not. And because the law, with its tendency to use labels and stereotypes, has seized upon Wall Street’s image of women as incompetent outsiders, it has reinforced and in some cases legitimized Wall Street’s gender norms. As a result, instead of examining the skills and characteristics of individual market participants, we assume that some people are competent merely because they “look the part” (say, Bernard Madoff) and we are skeptical of those who do not (say, Zoe Cruz). We presume that some people are vulnerable and in need of protection (poor widows), but we are skeptical when people who do not fit this stereotype allege investment abuse. And, we assume that norms and systems impact all system participants equally, when in reality, they may reflect the experiences and perspectives of one or more dominant groups.

As a first step in understanding how Wall Street’s gender norms have affected securities regulation, this paper examines Wall Street’s social and cultural response to women over the past one hundred years, and traces links between Wall Street’s gender norms and case law, legislative history and administrative agency activity. Going forward, this paper urges scholars to ask hard questions about the gendered unpinning of securities law, so that our system of securities regulation can be as complex and nuanced as the women and men who work with or in the securities industry today.
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. Though she is beautiful and well-born, 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.¹ But, after letting her last best chance for an advantageous union slip away, and then gambling away her meager savings playing cards, Lily finds herself in desperate straits. Unable to support her lifestyle, Lily asks Gus Treanor, the husband of a friend, for help investing her tiny income.² When Treanor promises Lily that he can make money speculating in securities without putting her small income at risk, Lily agrees:

[B]efore it [the conversation] was over he had tried with some show of success, to prove to her [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.

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² As Lily explains, “I can’t make that kind of marriage; it’s impossible. But neither can I go on living like as all the women in my set do. I am almost entirely dependent on my aunt, and . . . she makes 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.” EDITH WHARTON, HOUSE OF MIRTH 67-68 (Paul Negri & Joslyn T. Pine eds., Dover Publins, Inc. (2002) (unabridged reproduction of work originally published in 1905 by MacMillan & Co., Limited, London).

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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.³

When Treanor begins presenting Lily with money, she gladly accepts what she assumes are trading profits. One night, however, after luring Lily to his house under false pretenses, Treanor makes his true intentions known. After accusing Lily of leading him on, Treanor demands sexual favors, telling Lily that she must “pay up.”⁴ When Lily protests, and reminds Treanor that she “knows nothing of business,” Treanor says that his demands are “fair play” and reasonable “interest on one’s money.”⁵ Though Lily manages to extricate herself from the house without submitting to Treanor’s demands, her reputation is never the same after this encounter. Cast off by her social circle, Lily leaves her last pennies to Treanor, takes an overdose of sleeping medication and dies alone in a boarding house room.

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.⁶

Ms. Cruz began her Wall Street career in 1982 at the storied Wall Street firm Morgan

³ Id. at 68.

⁴ As the husband explains, “[t]hat’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 -- . . . Pay up?” she faltered. “Do you mean that I owe you money?” He laughed again. “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.

⁵ Id. at 118.

⁶ See generally Joe Hagan, Only the Men Survive; The Crash of Zoe Cruz, N.Y. MAG., May 5, 2008.
Stanley after graduating from Harvard College and Harvard Business School. Her first job was on the trading desk – a highly-competitive and male-dominated environment where posters of pin up girls and strip club outings were not unheard of, then or now.\textsuperscript{7} After proving herself as a trader, Ms. Cruz spent more than twenty years working her way up through management, eventually becoming co-president of Morgan Stanley and one of the most powerful and highly-paid executives on Wall Street. At the apex of her career, Ms. Cruz earned millions of dollars per year in compensation, and billions in profits for Morgan Stanley through divisions under her control. By the spring of 2007, Ms. 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. If appointed, Ms. 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 Ms. Cruz’s market insights and her contributions to the Morgan Stanley’s bottom line, Mack called Ms. Cruz to his office. 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.\textsuperscript{8} After a ten minute meeting, Ms. Cruz left the building and never went back.\textsuperscript{9}

With her self-described “alpha” personality and her long tenure on Wall Street, one might expect Ms. Cruz to be treated like any other Wall Street executive forced out


\textsuperscript{8} Hagan, supra note 6, at 32, 35.

\textsuperscript{9} Id. at 34.
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.\textsuperscript{10} To a degree, this has happened.\textsuperscript{11} But since Wall Street remains a male enclave, and Ms. 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.\textsuperscript{12} The terms of this debate pit Ms. Cruz’s “insider” credentials against images of women and the stock market that date back to the days of Lily Bart.

For example, despite Ms. Cruz’s record of success, some of her colleagues reportedly were never convinced that Ms. Cruz knew what she was doing.\textsuperscript{13} When Ms. Cruz’s former boss Vikram Pandit criticized Cruz 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

\textsuperscript{10} Id. at 120. See also, Landon Thomas, Jr., \textit{Top Ranks of Women on Wall Street are Shrinking}, \textit{N.Y. TIMES}, Dec. 1, 2007.

\textsuperscript{11} See, e.g., Hagan at 34, 120; Landon Thomas, Jr., \textit{Morgan Stanley Executive Ousted After Trading Loss}, \textit{N.Y. TIMES}, Nov. 30, 2007; Thomas, supra note 10.

\textsuperscript{12} Id. at 34. See also Landon, supra note 10.

\textsuperscript{13} Id. at 37. See also Randall Smith, Anita Raghavan & Ann Davis, \textit{How Zoe Cruz Lost Her Job On Wall Street}, \textit{WALL ST. J.} (E. Ed.), Dec. 1, 2007, at B.1. (“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.”) By contrast, some commentators have argued that firms like Bear Stearns, Merrill Lynch, and Lehman Bros. -- all of which no longer exist as an independent entities -- failed because of hubris, greed, compensation systems that encouraged and rewarded ill-advised risk-taking and the like, and not because the firm’s executives were fundamentally incapable of understanding trading and risk. See, e.g., William D. Cohen, \textit{A Tsunami of Excuses}, \textit{N.Y. TIMES}, March 12, 2009, at A29.
“more than happy for Zoe to take more risk . . . if I felt comfortable that she understood
the risk she’d be taking.” At an annual dinner during which subordinates “roast” senior
management, Cruz’s division reportedly was described as being divided into the part “she
gets” and the part “she doesn’t.” One mid-level executive reportedly interrupted a
management meeting to ask whether Cruz was “high” because she was not, in his view,
making sense. As I discuss below, criticisms of this sort have been around for more
than one hundred years.

Similarly, while Wall Street executives regularly earn praise for their passion,
ambition and aggression, Ms. Cruz’s blend of these characteristics rubbed some of her
former colleagues the wrong way. Some complained that Ms. Cruz was “overly-
emotional” and manipulative, not a team player and unable to cope with dissent.
Some objected when Ms. Cruz corrected them in public. When she was fired, some
reportedly were “almost gleeful” that the woman they had nick-named “Czarin,” “the

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14 Pandit currently serves as the chief executive officer of struggling Citigroup, Inc. See Hagan, infra, note 212.
15 Hagan, supra note 6, at 37.
16 Id.
17 For example, according to one former colleague, Ms. Cruz “wanted to compete with the guys, but was not beyond crying when it was useful.” Id. at 37. See also, Smith et al, supra note 13, at B1 (noting Ms. Cruz was criticized for having “frequently clashed” with well-liked investment banker at Morgan Stanley).
18 Smith et al., supra note 13 (Ms. Cruz was faulted internally for not having enough risk-management executives reviewing subprime bets . . . Ms. Cruz did not 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.”).
19 Hagan, supra note 6, at 119-120; Smith et al., supra note 13, at B1.
Wicked Witch” and the “Cruz Missile” finally was gone. Even supporters suggested that her hard-charging nature, while necessary, had come at a cost. 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.” As I discuss below, criticisms of this sort also have been around for at least one hundred years.

In this article, I argue that even though Lily Bart’s fictional ruin and Ms. Cruz’s rise and fall are separated by more 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 and/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,” the “Big Swinging Dicks,” the judges, the regulators and

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20 Hagan, supra note 6, at 34.

21 Id. at 35.

22 The phrase “masters of the universe” -- at least as it relates to Wall Street -- appears memorably in Tom Wolfe’s 1987 novel The Bonfire of the Vanities to describe Sherman McCoy. See TOM WOLFE, THE BONFIRE OF THE VANITIES: A NOVEL (Farrar 1981)) A self-described master of the universe, McCoy is a rich white New York City bond trader who life is transformed when he and his mistress are involved in an apparent “hit and run” in the Bronx in which a young black man is injured. Wolfe recently said 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, September 28, 2008, §WK, at 12, available at http://www.nytimes.com/2008/09/28/opinion/28wolfe.html. Michael Lewis used the term “Big Swinging Dick” in his book Liar’s Poker to describe the aspirations of young, ambitious securities salespeople: “If 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 (Penguin Books 1990) (W.W. Norton & Co. 1989). See also JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (Aspen Publ’rs. 3d ed. 2003); KEN FISHER,
even the scoundrels though to have shaped the markets and our system of securities regulation. Women, by contrast, are portrayed as social and cultural. They are either omitted entirely from Wall Street narratives, 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 on Wall Street, and they are thought to risk financial and reputational ruin if foolish enough to venture into the markets alone.

With this context in mind, I also argue that Wall Street’s social and cultural response to women has become embedded in our system of securities regulation. Drawing upon selected case law, legislative history and administrative agency reports, I show how reform-minded legislators, courts and regulators have used stories of vulnerable female victims of investment abuse – particularly “poor widows” – to curb abusive sales practices on Wall Street for almost one hundred years. In these matters, reformers use the abuse of those presumed to be most vulnerable to generate outrage and sympathy for reform. Drawing upon employment discrimination cases, I also show how Wall Street firms use stereotypes about women as weapons of exclusion. In these matters, industry insiders use women’s alleged emotionality and lack of financial competence to justify excluding women from employment, and to rebut discrimination claims.

Finally, having exposed links between Wall Street’s social and cultural response to women and our regime of securities regulation, I argue that Wall Street’s singular

narrative for women has come at a cost, and one that we have yet fully to explore. When
surveying the history of Wall Street, one might question whether references to
unsophisticated female investors are 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. One
also might question whether references to vulnerable female investors do any harm,
especially when there is evidence that Wall Street miscreants have targeted
unsophisticated female investors for abuse.

The problem however, is that after one hundred years of hapless victims and
incompetent shrews, Wall Street’s narrative contemplates little else for women, even
when faced with Wall Street warriors like Zoe Cruz. And because the law, with its
tendency to use labels and categories, has seized hold of Wall Street’s image of women,
it has reinforced Wall Street’s gender norms. And as a result, instead of analyzing
conduct, standards and systems in a robust and nuanced fashion, we default to unstated
and discriminatory stereotypes, to the detriment of legal analysis. For example, instead
of considering the conduct, skills and characteristics of individual investors, we default to
the “poor widow” to explain why a certain investors are sophisticated or unsophisticated,
reasonable or reckless, and diligent or at fault for having failed to act. Stereotypes about
widows tell use little about the traits and characteristics of victims of investment abuse.
Similarly, instead of identifying the skills and characteristics of successful securities
traders, we default to “master of the universe” stereotypes to decide who is competent
and who is not. Such stereotypes tell us little about market acumen necessary to navigate
on Wall Street. Gender stereotypes also fail to explain why, in cases ranging from Bernie

23 See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND
AMERICAN LAW (Cornell Univ. Press 1990).
Madoff-like Ponzi schemes to financial accounting frauds like Enron, our assumptions about who is competent, how we regulate and supervise, and who we need to protect, sometimes go horribly wrong.

As a first step in understanding how unstated gender norms affect securities regulation, this paper surveys images of women in industry narratives, the popular press, academic commentary, case law, administrative agency reports, and legislative history 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. It demonstrates that from the early days of public securities markets, “polite society” thought women had no business buying or selling securities, and that 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 argued that women were ill-suited to the rough and tumble of the markets. Market commentators cited the growing presence of female shareowners and securities as worrisome events. Beginning in the 1920s, legislators, regulators and courts steeped in these sorts of images seized upon female victims of investment abuse to justify investor protection reforms. Part III focuses on the period from post World War II years through the 1970s. This section demonstrates that even as Wall Street began to recognize women’s growing economic muscle, and to market to female customers, it continued to conceive of women as uninformed outsiders. Despite challenges to gender stereotypes, court and regulators 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 1970s 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 discrimination claims.

Having exposed links between Wall Street’s social and cultural response to women and securities regulation, Part V argues that securities regulation is ripe for an examination of the effects of unstated gender norms. This section also calls upon scholars to consider what would happen if, instead of assuming standards and systems were somehow “neutral,” we decoupled the law of securities regulation from deeply-rooted and unexamined gender stereotypes. If we stopped defaulting to the “master of the universe” stereotype to express market acumen, for example, would we do a better job of identifying when someone who “looks the part” – say, Bernie Madoff – is in fact incompetent and a fraudster? Would we be more skeptical when someone who does not “look the part” -- say, Zoe Cruz – is told she lacks 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 investors who do not fit the “poor widow” stereotype have an easier time establishing liability when they are sold unsuitable or fraudulent securities? More broadly, would we re-asses norms that purport to be gender neutral – like “reasonable,” “sophisticated,” or “unsophisticated” investors, “reasonable” brokers, “suitable” recommendations, “reasonable” systems of supervision, and the like – but which in reality have gendered underpinnings? Similarly, would we re-think how we resolve sexual harassment and
discrimination claims in the securities industry? In my view, these sorts of questions – and the empirical research necessary to examine them – present themselves once we understand the long history of gender-segregated norms on Wall Street and in the securities laws. Such questions are necessary if, one hundred years after Lily Bart, we are to ensure that our regime of securities regulation is as nuanced as the women and men who work with or in the securities industry today.

Part I: The Victim Paradigm: A Fool and Her Money (and Virtue) Are Soon Parted

British Antecedents: Harlots and Wither’d Maids

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. While a detailed survey of British attitudes towards 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. Established in 1711, the official purpose of the South Sea Company was to trade with Spanish South America. Though the company engaged in some

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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. 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 debt. Once the British parliament approved the plan in principle, the company’s stock price began to rise, igniting wide-spread interest in stock speculation. In September of 1720, when the price crashed, many investors were ruined.

As Banner and others have observed, “of 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.”

Women’s expanded investment activity during the bubble was a surprise to good society and was “satirized[,] in verses that suggest some discomfort with the independence that securities trading could bring.” In songs, letters and other popular culture forums, female South Sea speculators were described as mad speculators, “harlots” and “wither’d

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26 Banner, supra note 25, at 65, 69. See also Catherine Ingrassia, The Pleasure of Business and the Business of Pleasure: Gender, Credit and the South Sea Bubble, 24 STUD. IN EIGHTEENTH-CENTURY CULTURE 191 (1995).

27 Banner, supra note 25, at 70. Peter Earl has emphasized “the enormous importance of women, particularly widows, in the [eighteenth century] London investment markets,” PETER EARL, THE MAKING OF THE ENGLISH MIDDLE CLASS: BUSINESS, SOCIETY AND FAMILY LIFE IN LONDON, 1660-1730 (Univ. of Cal. Press 1989). Carswell suggests that women of this era held stock in part because it was a “form of property which a married woman could we retain as a personal estate” under then-applicable restraints on female ownership of property. Carswell, supra note 28, at 11. Carswell estimates that by 1865, “20 percent of the holders of India and Africa bonds (what we should call preferred 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 28, at 267.
maids.” When markets crashed, these same women were described as social outcasts, having sacrificed fortune and feminine virtue to the market’s dark arts.

**Early National United States: Where Are Women’s Stories?**

In the early national United States, as in Britain, scholars have uncovered evidence of women buying and selling securities (or at least recommending transactions to others) as early as the 1700s. While some women of this era participated in financial transactions as agents for fathers, brothers or husbands, others appear to have engaged in

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28 Banner, supra note 25, 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 (Cambridge Univ. Press 2005).

29 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 South; My Dear, quoth he, ‘tis time I should forsake you, Since South Sea has your Gold, may South Sea take you.” See South Sea Bubble Playing Cards, BAKER BUSINESS HISTORICAL COLLECTIONS- KRESS COLLECTION, Printed for Carrington Bowles (1721), http://www.library.hbs.edu/hc/ssb/recreationandarts/cards.html. See also Ingrassia, supra note 29, at 192; Ingrassia, supra note 30, at 17-39. These attitudes appear to have lingered. See Viscount Erleigh, The South Sea Bubble 11 (Putnam 1993) quoted in JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929 80 n.16 (Houghton Mifflin Co. 1954) (in describing the South Sea Bubble, Gerald Rufus Isaacs (better known as Viscount Erleigh) observed that “[s]tatesmen forgot their politics, Lawyers the Bar, Marchents 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!”).

30 See, e.g., Woody Holton, Abigail Adams, Bond Speculator, 3d Series Vol. LXIV No. 4 WILLIAM AND MARY Q., 820 (October 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 24% rate of return on this investment on her initial investment every year. Id. at 824.
transactions for their own accounts. 31 Despite these early examples, however, detailed accounts of female investment activity from this era are rare. 32 There are many reasons for this. 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. Legal restrictions on women’s right to own property – including coverture – also may have depressed the number of female shareholders. 33 Notions of femininity and gentility also may have reduced female investment activity, since by the beginning of the nineteenth century, women’s ideal role 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. 34 Speculating in securities -- an


32 See, e.g., Fisher, supra note 22, at 190-91, 263-65, 371-74; Wright & Cowen, supra note 22.

33 Under systems of coverture, all of a woman’s personality (all property except land and improvements) went to her husband when she married. See Carole Shammas, Reassessing the Married Women’s Property Acts, 6 J. OF WOMEN’S HIST. 9, 9 (Spring 1994). As numerous scholars have demonstrated, women suffered from any number of legal impediments during (and long after) this period that limited their ability to participate in economic, social and political life. E.g., Michael J. Phillips, The Dilemmas of Individualism: Status, Liberty and American Constitutional Law, in 67 CONTRIBUTIONS IN AM. STUD., at 23-30 (Greenwood Press 1983). As Nell Minow argues, “[i]nfants, married women, slaves, servants, apprentices, the very poor and the mentally deficient” (among others) were “exempted from liberal individuals” long after legal relationships began to transition from status-based to more individualized contract-based models. See Minow, supra note 24, at 125-26.

34 See, e.g., Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497 (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 assumed differences between men and women as grounds for his ruling. See Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (“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
alluring but suspect enterprise under the best of circumstance -- was not something that
well-born “ladies” were encouraged to do. These constraints, coupled with the relative
scarcity of public markets and securities available for trading prior to industrialization,
may explain why early accounts of female investment activity are limited, and why no
women are identified as “founding fathers” of our modern financial system.

By the early-to-mid-1800s, however, economic and social developments opened
the door – slightly – or expanded female investment activity. As a practical matter,
industrialization had begun to transform the nation’s economy from one dominated by
agriculture and smaller-scale enterprise to one dominated by larger-scale, capital-
intensive businesses like railroads. 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. Around the same

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 function of
womanhood. The harmony, not to say identify, 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.”)

35 See, e.g., Banner, supra note 25, 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.” 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,

36 E.g., Wright & Cowen, supra note 22.

37 See, e.g., Carl Parker, Governmental Regulation of Speculation, in 38 Annals of the
American Academy of Political and Social Science, American Produce Exchange
Markets (No. 2) at 126-54 (Sept. 1911).
time, coverture began to give way to married women’s property acts and community property systems which made it possible for married women to own (and inherit) property in their own names. As Carole Shammus has observed, “growth of personalty, 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.”³⁸ “Once 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.”³⁹ The rise of the “new woman” during the latter half of the nineteenth century – 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.⁴⁰

That said, and while there are some positive (or at least not overtly hostile) accounts of women and the securities markets from this period,⁴¹ women were thought to

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³⁹ *Id.* at 25.


⁴¹ For example, in its 1851 obituary for the actress Edna Wallace Hopper, the New York Times reported that Ms. Hopper’s main interest after retiring from the stage was Wall Street, and that
to too emotional and too uninformed to navigate the markets alone. Viewed with a combination of ambivalence, bemusement and even resentment, these women participated in the markets at their peril in Wall Street’s view, with gallantry and protection of male advisors as their only hope. For example, in his 1870 memoir, stock market insider William Worthington Fowler devoted an entire chapter of his memoir to the subject of female securities speculators. In his view, female speculators were an affront to nature and good society, better suited to “embroidering golden bees and butterflies, on black velvet. . .” than the stock market. Fowler characterized these women as wasteful dilettantes: he commented that on any “bright day, when stocks are rising,” “showy carriages” bring “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.” Though

she was the only woman among thirty-five men to receive a desk in the boardroom at L.F. Rothschild & Co. The obituary further reported that Ms. Hopper “was at her desk at L.F. Rothschild & Co. on lower Broadway, to which she traveled daily by subway to handle her investments” the day before she became ill. See Edna Wallace Hopper, Actress With Perpetual Youth, Is Dead, N.Y. TIMES, 1851 (Publ’d by ProQuest Hist. Newspapers: N.Y. Times (1857 to Current File)), at 39.

42 For a British perspective, see CHARLES DICKENS, DIVIDEND DAY, in ALL THE YEAR ROUND 462, 462 (Nov. 11, 1893) (“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 to 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.”).

43 WILLIAM WORTHINGTON FOWLER, TEN YEARS IN WALL STREET; OR, REVELATIONS OF INSIDE LIFE AND EXPERIENCE ON ‘CHANGE, 449 (Worthington, Dustin & Co. 1870).

44 Id. at 450.

45 Id. at 450.
Fowler thought these women were “daring,” he was convinced they were profoundly ill-informed and unskilled:

They [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 any 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.  

Dependent upon the money of relatives and the “gallant[ry]” of brokers, these emotional creatures did not belong on the Exchange, in Fowler’s view:

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.

Even those women able to overcome their limitations were not welcome in Fowler’s world. Fowler described one such “strong-minded” investor – a “Miss M” – as having the “face . . . of a goshawk,” and suggested that her interest in the markets had made her harsh and unfeminine.

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46 Id. at 449.
47 Id. at 456
48 Id. at 457.
49 Fowler, supra note 45, at 449-50.
Fowler’s concerns were not unique. In 1902, the New York Times ran 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 of Business Knowledge – Why They Are ‘Bad Losers.’”

The article described a “movement” among brokers to “exclude women from the business and . . . deny them the privilege of speculating in stocks.” 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. The letter stated that some of the firm’s “best customers consider it undignified for women to frequent brokers’ offices. . . “ For that reason, the firm, “beg[ged] to ask” its female customer to “kindly communicate with us only by letter or telephone” in the future. The firm hastened to assure recipients of this letter that it had used “no discrimination” “[a][e]very woman who has an account or who has done business with us will receive similar notice by the same mail.”

In explaining why firms were seeking to exclude women, the article quoted several “well-known, reputable” brokers who explained women simply were not suited to trading securities. One such broker commented that a woman was “a nuisance anywhere outside of her own home” and “particularly in a broker’s office.”

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50 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.

51 Id.

52 Id.

53 Id.
explained that, “[t]he average women knows little about brokerage. Business instinct is not innate in the woman, ordinarily speaking, and, worse than that, she can’t learn.”

While many of the quoted brokers acknowledged some women made money speculating in securities, all suggested that the “ordinary” woman was much more likely to fall prey to unscrupulous brokers and/or lose money trying to speculate on their own.

In a 1906 article entitled “The Confessions of a Stockbroker,” a self-professed “very well known Wall Street Stockbroker” writing anonymously said that while his firm had some female customers (“who insist on speculating from time to time”), “[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.”

Likewise, in his memoir entitled Fifty Years on Wall Street, broker Henry Clews also devotes an entire chapter to female speculators, making it clear and made it clear that he thought Wall Street was “no place for women”:

[T]hey [women] 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.

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54 Id.
55 Id.
56 Id.
58 HENRY CLEWS, FIFTY YEARS IN WALL STREET ch. XLI at 437 (Irving Publ’g Co. 1908).
59 Id.
Instead, Clews advised women to marry a wealthy man, as “[i]t is probably only in the matrimonial line that women can become successful speculators.”

Even those who did not dismiss the idea of female traders outright urged women to rely upon trusted male advisors to avoid exploitation. One financial advice book from this era told women to steer clear of the “army of rascals to which a defenseless woman of means presents a golden opportunity.” More generally, women were counseled to avoid risky investments in favor of government securities, established railroads and the like -- “let the Jasons go forth and do battle for the Golden Fleece,” women were told.

Against this backdrop, it is perhaps 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. In 1870, with the support and backing of a member of the Vanderbilt family, the colorful, controversial and much-studied Victoria Claflin Woodhull and her sister Tennessee Claflin opened Woodhull, Claflin & Company on Broad Street, not far from the New York Stock Exchange, furnishing their offices in the manner of a ladies parlor, complete with comfortable furniture, a piano and religious-themed artwork. Initially, the press was supportive, hailing the sisters as "the Queens of Finance" and "the

60 Id. at 444.

61 JOHN HOWARD CROMWELL, THE AMERICAN BUSINESS WOMAN: A GUIDE FOR THE INVESTMENT, PRESERVATION AND ACCUMULATION OF PROPERTY at x (G.P. Putnam’s Sons (1900).

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

Bewitching Brokers.” Before too long, however, Victoria and her sister were depicted in newspaper cartoons as driving a chariot pulled by bulls and bears bearing the faces of male business rivals. 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,” galvanized her critics. When Woodhull, Claflin & Co. closed its doors in 1871, 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:”

Now 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 on her face, change her tender heart into stone, crush out her human sympathies with the unfortunate and the distressed, and see men reduced from affluence to beggary, and profit by it as a broker?

Part II: “New Women” Begin Buying and Selling Securities, But They Are Not Welcome On Wall Street.

What To Make of Female Shareholders?

Despite concerns about their temperaments and financial acumen, women became more active, or at least more visible, as market participants after the turn of the century.

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64 See, e.g., DANA L. TOMAS, THE PLUNGERS AND THE PEACOCKS (Putnam 1967); MARY GABRIEL, NOTORIOUS VICTORIA, THE LIFE OF VICTORIA WOODHULL UNCENSORED, 1-4, 42-53 (Algonquin Books 1998). During their brief time in business, the sisters published a weekly magazine designed to expose corruption in the business, among other things. In addition to opening the first female-run brokerage firm, Victoria Woodhull became the first woman to run for president of the United States. For a host of reasons, the Claflins were controversial figures. See e.g., Dumas Malone, Dictionary of American Biography, Vol. X, 493-94.

65 FOWLER, supra note 44, at 456; GOLDSMITH, supra note 64, at 192-94, 324.

66 FOWLER, supra note 44, at 456-58.

67 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. The bonds were marketed broadly, including to women, as
The press began to report on the expanding ranks of female shareowners around the start of World War I. 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.” 68 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 48% of the shareholders of the Pennsylvania railroad company. 69 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. 70 That same year, an article in the magazine *The Independent* proclaimed that, “[w]omen own more stock in American’s leading corporations than men” and cited statistics which reflected that women shareholders outnumbered men by up to 15% at nine out of the ten largest corporations whose shares were listed on the New York Stock Exchange. 71

**Female Traders Are Even Worse**

With respect to securities trading, reports of women openly buying and selling

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68 Woman’s Ownership of Corporations, LVI, No. 4 *CURRENT OPINION* 304, 304 (Apr. 1914).


securities began to appear in the popular press with some regularity by the 1920s. By this time, the press and industry insiders acknowledged that women were customers of brokerage firms, 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. Though a woman was unsuccessful in her bid to purchase a seat on the New York Stock Exchange in 1927, there are reports from his era that comment favorably on the existence and trading/investment skills of female brokers and female customers. For the first time, articles discussing career women attending to finances and housewives using dividends to augment family income began to appear alongside tales of female speculative excess.

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72 See, e.g., Women as Investors, THE GOLDEN BOOK MAG., July 1929, at 110-12 (noting women’s increasing wealth and participation in the stock market); Eunice Fuller Barnard, Ladies of the Ticker, THE N. AM. REV., Apr. 1929, 405. One contemporaneous account speculated that women comprised 20-35 percent of brokerage customers in the late twenties. See Barnard, supra, at 406.

73 See, e.g., Wall Street Bids for the Woman Speculator, THE LITERARY DIG., Nov. 17, 1928; Barnard, supra note 73.


75 See, e.g., id. (noting that “[m]any 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.”); Working Girls Buying Wall St. Securities: Young Woman Doing an Extensive Business Among Them Joins Brokerage House Staff, N.Y. TIMES, Jan. 5, 1928 (Publ’d by ProQuest Hist. Newspapers: The New York Times (1851-2005)), at 39. See also Merrill Lynch & Co., Company History Timeline, http://www.ml.com/index.asp?id=7695_8134_8296_14044 (Merrill Lynch & Co. reports that in 1919, it “hires Annie Grimes as its operations manager, launching the career of Wall Street’s first bond saleswoman.”).

76 See, e.g., Helen L.S., The Business Woman’s Investments: How One Business Woman Learned to Invest for Profit, THE MAG. OF WALL STREET, 1925, 1199 (describing a stenographer’s efforts to begin saving and investing); The Sexes in Industry, supra note 72. See
While the presence and economic muscle of these women could not be denied, the prospect of women buying, selling and owning securities made people nervous. Some worried that female shareowners would dilute shareholders’ corporate governance rights. In a 1914 series of essays later compiled under the title *Other People’s Money*, for example, 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.”77 Brandeis also opined that, “[t]he 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.”78 Just a few years later, Harvard Professor William Ripley likewise presumed that female shareholders were ill-suited to the demands of governance:

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

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78 Id. at 138.
366,000 were on the distaff side. Such a multitude are ill-fitted by training – begging the moot point of sex – to govern directly, less so than in politics.79

If Brandeis and Ripley presumed women were not interested in governance, others worried about what might happen if female shareowners decided to exercise governance rights. A 1927 article from *The Independent* “commend[ed] a further study” to assess women’s behavior as stockholders.80 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.”81 In dramatic fashion, the author(s) 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.”82

**Female Speculators: A Sign of the Apocalypse?**

The prospect of female speculators appears to have been a particular concern during this era. In a 1920 magazine article/letter to the editor discussing “the [k]inds of [p]eople who ‘[f]all for’ the [commodities] [s]peculating [g]ame,” the author opined that speculation was a “disease” that “[w]omen develop . . . in spite of the fact that [the Chicago] Board of Trade members refuse to handle their accounts, and they are therefore

79 *William Z. Ripley, Main Street and Wall Street* 129 (Little, Brown, and Co. 1929)(1926).

80 *The Sexes in Industry*, supra note 72.

81 Id.

82 Id.
compelled to deal with other houses.”\textsuperscript{83} 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.”\textsuperscript{84} The Federal Trade Commission cited similar sentiments in its 1926 Report on the Grain Trade. The study analyzed the occupation of futures trading customers of certain wire houses by (among other things) comparing the distribution of nearly 5,000 futures traders with the distribution of males gainfully employed in the United States according to the 1920 census.\textsuperscript{85} 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).”\textsuperscript{86}

Around the same time, elected officials began to worry openly about the social consequences of speculation by women. When introducing the Futures Trading Act of 1921 (a bill for the regulation of commodity exchanges), for example, 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. Citing the example of a widow in Topeka, Kansas who had sued to recover $35,000 lost in grain

\textsuperscript{83} Paul S. Warden, Letter to the Editor, \textit{Kiss Your Money Good-by. AM. MAG.}, Oct. 1920, 54, at 55.

\textsuperscript{84} Id.


\textsuperscript{86} Id.
speculation, Capper quoted an industry insider as saying that the “country would be shocked if it knew how many women were playing the market.” As justification for his proposed bill, Capper declared that he did not want his bread any cheaper if it came 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.”

Writing years later, leading scholars seized upon the presence of female speculators in pre-Crash 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” and “type of intercourse which proceeds not from knowledge, or even from lack of knowledge, but from failure to know what isn’t known.” 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.” Galbraith suggests that female

87 61 CONG. REC. 5, 4763 (1921).
88 Id. Capper blamed trading on the grain exchanges for a range of social ills, including embezzlement, suicide and speculation by industry outsiders, including women.
90 Id. at 75.
91 Id. at 75 (citing the article in the North American Review referenced in footnote __).
traders of this era viewed the securities as little more than a pretty symbols on a tape, untethered to actual economic enterprise:

To the typical female plunger the associate 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.

One of the uses of women is that their motivations, though often similar, are less elaborately disguised than those of men.\(^92\)

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]he irrepressible horde of female investors reached sizeable proportions by 1927” and by 1928 “speculation had fanned out to include more than upper-middle class widows, housewives, and career women.”\(^93\) Cowing described these female speculators as childlike gamblers who “repeated their menfolk’s catchwords of prosperity with none of

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\(^{92}\) *Id.* at 76.

\(^{93}\) CEDRIC B. COWING, *POPULISTS, PLUNGERS AND PROGRESSIVES: A SOCIAL HISTORY OF STOCK AND COMMODITY SPECULATION, 1890-1936* at 122-23 (Princeton Univ. Press 1965). Cowing writes persuasively about efforts to limit and/or prevent women from speculating in securities. Cowing comments that, “[t]here 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.
the qualifications or uncertainties, as children repeat the opinions of their parents without
the rationale.”94

In her 1943 analysis of events leading up to the 1929 Crash and the Great Depression, Professor Jeanette Nichols expresses similar concerns about female investment activity during the Roaring ’20s:

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; there 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 good; 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 skeptical (sic) of social control.95

The Crash: Won’t These Women Finally Leave?

When the Roaring 1920s 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.96 For these market insiders, the Crash offered proof that women remained sore losers when it came to the stock market, and that they were 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

94 Id. at 122.
96 Frances Drewry McMullin, Women and Ticker Tape: A Year After the Crash, THE WOMAN’S J. 20, 20 (1930) (reporting on, but questioning, assumptions about female investors) (quoting an “experienced Wall Streeter” as saying that all of the “ladies departments” at brokerage houses were “shut up . . . [t]hat was just part of the boom.”).
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.”

Even those who felt women should remain in the markets emphasized the importance of having trusted male advisors. For example, 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.

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 (emphasis original),” Frederick 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 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.”

97 Id. at 21.


99 Id. at 286.

100 Id. at 289.
Instead, Frederick urged women “to seek the advice of a progressive but well-recommended, investment banker” to avoid falling into harm’s way.\textsuperscript{101}

As for themselves, the limited statistics that are available suggest that women did not abandon the markets \textit{en masse} in the wake of the 1929 Crash. In his study entitled, “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 (or almost 30\%) accounts sampled from the firm’s credit department files were listed in the names of women.\textsuperscript{102} Of these 278 accounts, 102 were in the names of women described as being “widows, housewives, spinsters” with the remaining 176 distributed among the other occupations listed.\textsuperscript{103} Contemporaneous reports in the press likewise suggest that some women of this era remained in the markets to the extent possible post-crash, despite economic challenges and concerns about their financial and speculative competence.\textsuperscript{104}

\textbf{The New Deal: Women as Instruments of Fraud and Victims of Abuse.}

The 1929 Crash did, however, contribute to a turning point in the relationship between government, individual investors and Wall Street. In the wake of the 1929 Crash and ensuing financial crisis, Congress adopted a record number of resolutions calling for investigations into the stock market crash and ensuing financial crisis. As

\textsuperscript{101} Id.

\textsuperscript{102} 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 (Edwards Bros., Inc. 1941).

\textsuperscript{103} Id.

\textsuperscript{104} McMullin, supra note 98, at 20-21.
Joel Seligman and others have documented, liberal reformers fomented and then tapped into public dismay with Wall Street’s “money changers,” galvanizing support for direct federal regulation of the securities markets and the securities industry. While the bulk of this story is beyond the scope of this paper, what is notable here is the degree to which women, to the extent they appear at all in the legislative history of early federal securities legislation, are limited to variations on the victim role: (i) unwitting tools of their husband’s or father’s misconduct, (ii) vulnerable victims of scheming salesmen, or (iii) woefully uninformed market outsiders who needed to be protected from their own stupidity.

The so-called Pecora hearings offer an example of this approach. While liberals acknowledged that speculation by retail investors had contributed to the nation’s financial difficulties, they questioned whether unscrupulous market insiders had led the nation to ruin by unloading worthless issues on an uninformed and unsuspecting public. In 1933, when he was appointed as the fourth (and final) general counsel of the United States Senate Committee on Banking and Currency, Ferdinand Pecora explored this question. Equipped with subpoena power and a crusader’s mindset, and armed with the support of newly-inaugurated President Franklin Delano Roosevelt, Pecora called “[t]he Street’s mightiest and best-informed men” to testify on subjects ranging from personal


106 See, e.g., Ritchie, supra note 108.
income taxes to manipulative trading pools.\textsuperscript{107} Women as market participants are all but absent from Pecora’s account.

That said, Pecora did take notice when Wall Street insiders used family members to obtain unfair advantage, and it is in this context that women appear the transcripts of the Pecora Hearings and in Pecora’s report to Congress. 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.\textsuperscript{108} 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 them after the expiration of the minimum period proscribed by law.\textsuperscript{109} Pecora also found that Wall Street insiders – most notably Alfred H. Wiggin, the 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.\textsuperscript{110} (As recent press coverage of the Madoff situation reflects, putting assets in the wife’s name remains en vogue.)\textsuperscript{111}

\textsuperscript{107} \textsc{Ferdinand Pecora}, \textit{Wall Street Under Oath: The Story of Our Modern Money Changes} at x (Simon and Schuster 1939). The only non-financier witness – one 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. \textit{Id.} at 84-89.

\textsuperscript{108} \textsc{S. Rep. No.} 73-1455, at 321 (1934); \textsc{Pecora, supra} note 110, at 190.

\textsuperscript{109} \textsc{S. Rep. No.} 73-1455, at 322-29. \textit{See also} \textsc{Pecora, supra} note 110, at 193-94 (“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.”).

Consistent with Pecora’s blueprint, liberals in Congress 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. While both the President and members of Congress acknowledged the role of speculation in the nation’s financial difficulties, they argued that Wall Street had facilitated unsound trading practices by issuing and promoting worthless securities to investors who were ill-equipped to learn the truth. On a number of occasions, legislators invoked the specter of widows (and orphans) stripped of their savings to justify regulating the trading, the markets and Wall Street. For example, Representative Chapman of Kentucky invoked images of mothers, widows and orphans to defend the ’33 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 resorting to every conceivable trick of financial ledgerdemain, to look 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.¹¹³

Others voiced similar sentiments.¹¹⁴

During debates on what would become the ’34 Act, Judge William Clark of the United States District Court of the District of New Jersey likewise invoked widows and orphans, and claimed to speak for “victims of stock market speculation.”¹¹⁵ In Clark’s view, however, regulation was necessary to protect unsophisticated investors from the consequences of their own bad decisions:

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


¹¹⁴ E.g., 78 CONG. REC. 8086, 8108 (1934) (remarks of Rep. Rankin of Mississippi) (“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?”).

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 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.  

Interestingly, Judge Clarke seems to have been well-aware of politicians’ tendency to use the widow/orphan paradigm for political ends: 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.”

A short time later, Representative Adolph J. Sabath of Illinois invoked the specter of widows and orphans coming to ruin 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 they [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.

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116 Id. at 6929. Interestingly, with respect to Section 19 of certain proposed legislation, which set forth standards for “control person” liability for spouses, parents and/or children residing in the home of the alleged violator, Senator Hamilton Keane of New Jersey read into the record a letter from a New Jersey Company – New York Airbrake Co. – which argued 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.

117 Id. at 6929.

118 Stock Exchange Regulation: Hearings Before The H. Interstate and Foreign Commerce Comm., 73rd Cong. 830 (1934) (statement of Rep. Adolph J. Sabath). Short selling refers to selling a security that the seller does not own at the time of the sale. Though banking regulation is not the focus of this paper, references to women in the legislative history of the Glass-Steagall Act also are of the widow/orphan variety. 75 CONG. REC. 9908, 9912 (1932) (remarks of Sen. Bulkley) reprinted in
Regulators and Courts Begin to Cite The Specter of Female Victims of Investment Abuse To Justify Investor Protection Initiatives

Steeped in this sort of imagery, it is not surprising that when newly-appointed regulators at the newly-established Securities and Exchange Commission began to comment on market practices, they too drew upon images of vulnerable widows to expose investment abuse. The Commission’s approach to installment investment plans, also known as periodic payment plans and/or thrift plans, offers an example of this approach. Though the origins of installment plans dated back to Britain, the domestic industry appears to have been jump-started by people like well-known financier and politico John Jakob Raskob, who extolled the virtues of these plans in interviews and elsewhere. In a 1929 article from Ladies Home Journal entitled “Everybody Ought to be Rich,” Raskob advocated 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 “men of outstanding character, reputation and integrity.” Galbraith estimates that total invested assets invested in these sorts of plans grew eleven-fold from 1927 to 1929.


120 Raskob, supra note 120, at 9.

121 GALBRAITH, supra note 89, at 50.
In 1940, however, after studying the nature, origin and growth of these investment plans, the Commission issued a highly critical report (“the Installment Investment Plan Report”). Like Pecora, the Commission found that the plans were rife with hidden fees and conflicts of interest, and marketed to vulnerable investors (including wage-earning men and women) using high pressure sales tactics. To highlight the industry’s abusive sales practices, the report cited a brochure issued by one firm to its “salesmen” entitled “On Selling Women.” Noting that women owned 54% 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.” 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.

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122 SEC REP. PURSUANT TO §30 OF THE PUB. UTIL. HOLDING CO. ACT OF 1935, INVESTMENT TRUSTS AND INVESTMENT COMPANIES (1940). The securities purported to reflect the holder’s beneficial ownership of an interest in securities underlying the installment investment plan. Id. at 4.

123 S. REP. NO. 733-1455, at 333-62; INVESTMENT TRUSTS AND INVESTMENT COMPANIES at 143-84.

124 INVESTMENT TRUSTS AND INVESTMENT COMPANIES at 152, 199-200.

125 Id. at 199.

126 Id. at 200.
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 even more vital with women than with men and the use of the hypothetical proposition is apt to be fatal.\footnote{Id.}

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 women’s no, means maybe; and a woman’s maybe, means YES.”\footnote{Id.}

\textbf{The Hughes Case: Widows and the Shingle Theory of Broker-Dealer Liability.}

Just a few years later, in the milestone case \textit{Charles Hughes & Co. v. Securities & Exchange Commission}, 139 F.2d 434 (2d Cir. 1943), Commission staff once again invoked the specter of vulnerable female victims to challenge disclosure and sales practices in the brokerage industry.\footnote{Charles Hughes & Co. v. Sec. & Exch. Comm’n., 139 F.2d 434 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944).} Charles Hughes & Co. was a New York City-based broker-dealer that specialized in selling over-the-counter securities to retail customers. 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. 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 then causing them “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.

As formulated by the Commission, the Hughes case involved two important issues of first impression. The first concerned securities dealers’ duties of disclosure – i.e., 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. The second involved the so-called shingle theory, a type of implied

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130 In the Matter of Charles Hughes & Co., Inc., Exchange Act Release No. 34,3154 (Feb. 16, 1942). Under Section 15(a)(1) of the ’34 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 . . . “

131 Charles Hughes & Co., Release No. 34-3154, at 1. Section 17(a) provided in pertinent part that, “[i]t 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.” 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.

132 In contrast to a broker (a person who buys and sells securities for the accounts of others as agent), dealers buys and sells securities for their own accounts. See Section 3(a)(5)(A) of the Securities Exchange Act of 1934. When acting as a broker, firms typically charge commissions
warranty doctrine which holds that even a securities dealer operating at arm’s length impliedly represents that he will deal fairly with the public when he hangs out his “shingle.” 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 in the 1939 case Ducker v. Ducker, and had repeated and refined it in a number of other administrative opinions, 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. 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. The Commission’s

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. & Exch. Comm’n 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.

This aspect of the Hughes case appears to have been newsworthy. A 1943 article in the New York Times commented that, “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(Publ’d by ProQuest Hist. Newspapers: The New York Times (1851-2004)), at S5.

In the Matter of Ducker & Duker, 6 SEC 386, at 2 n.5 (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.”)

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 advise her on financial matters.\textsuperscript{136} The Commission’s second witness – Anne K. Knebel – likewise testified that she was a “housewife” who had taken charge of her “widow[ed]” mother’s Charles Hughes & Co. brokerage account.\textsuperscript{137} The Commission’s third witness – Amelia Zinzel – described herself as a “housewife” and “widow” who had inherited securities from her husband, but had never purchased securities on her own.\textsuperscript{138} Each witness testified that she had reposed total trust and confidence in the Charles Hughes & Co. salesmen with whom she dealt, and each claimed that the salesman had not disclosed the firm’s profits when recommending securities transactions.\textsuperscript{139} In addition to these witnesses, Commission litigators also called a forensic accountant as an expert witness.\textsuperscript{140} Although the total number of customers/ potential victims is unclear from the expert’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 was clearly a female.\textsuperscript{141}

\begin{footnotes}
\item[136] Transcript of Record at 25-30, Charles Hughes & Co., 139 F.2d 434. Furbeck explained that although she had two older brothers, they lived out of town.
\item[137] Transcript of Record, supra note 137, at 53, 63.
\item[138] Transcript of Record, supra note 137, at 67-69.
\item[139] Transcript of Record, supra note 137, at 24-103.
\item[140] Transcript of Record, supra note 137, at 82.
\item[141] Transcript of Record, supra note 137, at 100 (Commission’s Exhibit 48).
\end{footnotes}
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 brother of Charles Hughes and the purported owner of the firm) and Charles Massie (Ms. Hughes’ husband and the firm’s trader and de facto general manager) – initially were not present. Once Ms. Hughes and Mr. Massie appeared, Massie (and not Ms. Hughes) cross examined the Commission’s three fact witnesses. 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.\footnote{\textit{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. \textit{Massie on SEC Registry: But Broker-Dealer Is Restricted to Own Name and Agency}, N.Y. Times, Jan. 17, 1945 (Publ’d by ProQuest Hist. Newspapers: The New York Times (1851-2004)), at 28. Noting that Massie’s wife had been the sole stockholder of Charles Hughes & Co., the Times reported that Massie, had applied to the commission to do business under the name D.J. McMillen & Co., New York.}}

A few weeks later, counsel subsequently retained by the firm petitioned to reopen the hearing. When the hearing resumed, counsel for the Hughes firm (after disagreeing internally about whether they were ready to proceed) essentially ignored the securities and the sales practices at issue.\footnote{\textit{In the Matter of Charles Hughes & Co., Inc.}, Exchange Act Release No. 34,3248 (June 8, 1942).} Instead, counsel focused on demonstrating that the Commission’s fact witnesses were more knowledgeable and sophisticated then they had lead the hearing officer to believe.\footnote{Interestingly, counsel sought to expose the alleged sophistication of the Commission’s witnesses while, at the same time, suggesting that Anna Hughes, the firm’s purported owner, really knew nothing about the firm’s operations. At one point, after some back-and-forth on the potential exclusion of witnesses, counsel for the Hughes’ firm asked counsel for Commission if
representatives of other brokerage firms as witnesses to establish that the she had traded securities and visited the financial district before dealing with the Hughes firm. Having first sought to establish the witnesses’ lack of sophistication, Commission staff vacillated during the second day of the hearing, at times emphasizing the witnesses’ alleged lack of sophistication and at other times arguing that the witnesses’ sophistication (or lack thereof) had nothing to do with whether the firm had violated the securities laws.

On July 19, 1943, the Commission issued an order revoking the Hughes firm’s broker-dealer registration. As with its initial order, the Commission refrained from arguing that the Hughes firm had targeted unsophisticated female investors. 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.”

Noting that its findings did not rest solely on the “implied representation as to fair dealing which is made generally by every securities dealer,” the Commission criticized the Hughes firm for “induce[ing] certain customers to rely upon its advice in securities transactions”

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he minded with Massie remained. See Transcript of Record, supra note 137, 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.”).


146 Id. at 679.

147 Id. at 680.
and then failing to disclose what the Commission viewed as excessive mark-ups.\textsuperscript{148}

While 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,” the Commission held that although the “evidence is such that we might well hold they were, for the most part, inexperienced; but in our opinion this question is not controlling.”\textsuperscript{149} Instead, the Commission held, “[t]hat the respondent led particular customers to place special reliance upon it in this case only emphasizes its failure to meet the minimum standards of fair dealing, and makes the fraudulent nature of its activities more evident.”\textsuperscript{150}

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.\textsuperscript{151} 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 about 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.”\textsuperscript{152} The Court held that even if (as the firm claimed) it had simply sold securities

\begin{thebibliography}{9}

\bibitem{148} \textit{Id.} at 681, n.7.

\bibitem{149} \textit{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.” \textit{Id.} at 680, n.6.

\bibitem{150} \textit{Id.} at 681.

\bibitem{151} \textit{Charles Hughes & Co.}, 139 F.2d at 438.

\bibitem{152} \textit{Id.} at 435.

\end{thebibliography}
to customers in a “simple vendor-purchaser transaction . . . it was still under a special
duty, in view of its expert knowledge and proferred advice, not to take advantage of its
customers’ ignorance of market conditions.”

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. To hold otherwise would, in the court’s view frustrate the “essential objective of securities legislation” at issue – i.e., “to protect those who do not know market conditions from the overreaching of those who do.”

Picking up on the Second Circuit’s language, the press highlighted the Hughes firm’s abuse of female customers. 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.” Academic journals likewise commented on the Hughes firm’s abuse of female customers. As one note-writer explained, “[t]he 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

153 Id. at 437.

154 Id.

155 Id.

resistance, instilled trust and confidence.”

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) a “wild west” of the securities markets. From the perspective of the over-the-counter securities dealer community, the Hughes case represented a back-door attempt by the Commission to create new disclosure norms and to limit profits. Though the Commission took pains to argue that these were not its objectives, an article in the New York Times reported after the Second Circuit’s decision was released, “[t]here seems to be no doubt that the Securities and Exchange Commission scored a big victory last week in the United States Circuit Court of Appeals, which denied the appeal of Charles Hughes & Co., holding that the over-the-counter house ‘must be deemed to commit a fraud’ in making mark-ups of 16 to 40 per cent. The victory lies in the fact that the SEC no longer is under any strong compulsion to phrase a disclosure rule for deals in which the broker-dealer acts as a principal.”

Following its success in Hughes, 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. For

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158 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 Ann. Rep. 500 (1944).

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. In what the SEC termed “[o]ne of the more significant proceedings involving revocation of registration as a broker and dealer” and the first proceeding involving pricing practices in oil royalties, the Commission alleged that a broker named Lawrence R. Leeby (doing business as Lawrence A. Leeby & Co.), sold oil royalties to customers at prices as high as 150% over cost. Noting that the “two principal customers were women who were not well versed in investment matters and who depended exclusively upon Leeby’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. Among other reasons for its ruling, the Commission found that Leeby had violated his fiduciary obligation to treat the customers fairly, and to refrain from exploiting his customers’ inexperience and their reliance upon his integrity.

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.” The Commission emphasized that the firm had exploited the trust and confidence of these customers by taking secret profits on trades executed

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162 Id.

between the women’s accounts.\textsuperscript{164} 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 woman customers, two of them elderly widows.”\textsuperscript{165} 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.\textsuperscript{166} Under such circumstances, the Commission held that the firm’s churning was a “particularly vicious and fraudulent course of conduct in violation of the antifraud provisions.”\textsuperscript{167}

In a 1948 case involving what the SEC termed a “shocking abuse of the trust and confidence” and an “utter betrayal of the... confidence reposed” by 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 widowed customer.\textsuperscript{168} 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 invest the proceeds in a security which would be of greater advantage to her.\textsuperscript{169} Instead, when the

\textsuperscript{164} Id. at 691-94.

\textsuperscript{165} In the Matter of Behel, Johnsen & Co., 26 S.E.C. 163, at 165 (1947).

\textsuperscript{166} Id.

\textsuperscript{167} Id. at 168.

\textsuperscript{168} 15 SEC ANN. REP. 55-56 (1949); In the Matter of Hammill & Co., 28 S.E.C. 634, at 642 (1948).

\textsuperscript{169} 15 SEC ANN. REP. 55-56; Hammill & Co., 28 S.E.C. at 636.
proceeds from the sale became available, the principal transferred the money to his personal account and recorded the transaction as a personal loan.\textsuperscript{170} Although the firm mailed the widow a promissory note, it was never paid.\textsuperscript{171} 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 on the promise that she would receive four percent interest on her money and that her securities would be deposited with a bank, where they would be safe.\textsuperscript{172} Six months later, the business collapsed.\textsuperscript{173} 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.”\textsuperscript{174}

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.\textsuperscript{175} As examples of the misconduct at issue, the Commission

\\textsuperscript{170} 15 SEC ANN. REP. 56; Hammill & Co., 28 S.E.C. at 636.
\textsuperscript{171} 15 SEC ANN. REP. 56; Hammill & Co., 28 S.E.C. at 636.
\textsuperscript{172} 15 SEC ANN. REP. 56; Hammill & Co., 28 S.E.C. at 636-37.
\textsuperscript{173} 15 SEC ANN. REP. 56-55; Hammill & Co., 28 S.E.C. at 635.
\textsuperscript{174} Hammill & Co., 28 S.E.C. at 637.
\textsuperscript{175} In the Matter of Herbert R. May and Russell H. Phinney, 27 S.E.C. 814 (1948).
cited transactions involving three women -- two of whom were identified as widows -- who had inherited their securities and were inexperienced in securities matters.\(^{176}\)

**Part III: More Female Shareowners, But Images of Female Victim Persist, and Women Remain Unwelcome Outsiders On Wall Street.**

Notwithstanding these sorts of cases, and lingering concerns about their competence and emotional make-up, women seem to have emerged from World War II more (rather than less) likely to own securities. By 1952, in its study of the socio-economic characteristics of shareholders entitled “Share Ownership in the United States,” the Brookings Institution evaluated “the belief that women own most of the nation’s securities – or the nation’s wealth.”\(^{177}\) 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 a major U.S. corporations.\(^{178}\) Just a few years later, in its 1956 census of share owners, the New York Stock Exchange reported that “housewives and non-employed women . . . represent the largest single group of [share]owners – some 34.2 per cent.”\(^{179}\) The Census described this as an almost 40 percent increase, and “one of sharpest changes” compared to the prior (1952) census.\(^{180}\) The 1956 Census also reported that women constituted 51.6 per

\(^{176}\) *Id.* at 824-30.

\(^{177}\) *Lewis H. Kimmel, Share Ownership in the United States* 14 (George Banta Publ’g 1952).

\(^{178}\) *Id.*


\(^{180}\) *Id.* at 10.
cent of shareowners. Three years after that, in its 1959 census, the New York Stock Exchange reported that women accounted for 52.5 per cent of all adult shareowners, with women outnumbering men by an even greater margin – 56.3 to 43.7 per cent – among new shareholders. While it is impossible to know how many of these women managed their own affairs, press coverage from this era reflects women’s expanding interest in the markets. A 1958 article in the Saturday Evening Post expressed the view, for example, that “wives” too could (and should) invest in the markets. An article in the magazine The Independent Woman likewise noted women’s wealth and market interest.

Always ready to follow the money, Wall Street initiated a range of programs beginning in the 1950s designed to convince women (and men) that share ownership was in their best financial interest. Some programs were firm and female specific, such as an investor education seminar offered by one large New York Stock Exchange member firm under the snappy title “Dividends Are a Girl’s Best Friend.” Others were designed to

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181 Id.


183 Lindsay Morgenthaler, We Wives Can Play the Market, Too, THE SATURDAY EVENING POST vol. 230, Jan. 18, 1958, at 38-39. The article bears the interesting subtitle, “[i]f you don’t think your wife should dabble in the stock market, consider the unusual financial adventures of these ladies.”

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

be gender neutral and industry-wide. Even in these purportedly gender-neutral programs, however, Wall Street continued to portray women as uninformed stock market outsiders who were best off consulting their husbands (and male NYSE brokers) before buying or selling securities.

In the mid-1950s, for example, the New York Stock Exchange (NYSE) launched a series of advertisements designed to educate Americans about NYSE and the benefit of share ownership. 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. Many of the advertisements from this period 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. 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 consult a broker from a NYSE member firm for advice. A companion radio commercial advised men that a NYSE member could help them “acquire a bit of stature, very easily” by providing expert advice about how to invest.

Another advertisement from 1956 entitled “Are You Still Awake, John?” took a similar approach. The ad, which depicts a married couple in their bedroom (in true

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186 SPECIAL STUDY OF SECURITIES MARKETS, supra note 186, at 1.
187 Available at NYSE Archives, Are You a Financial Giant to the Mrs.?
188 Available at NYSE Archives, 1-Minute Radio Commercial.
189 Available at NYSE Archives, Are You Still Awake John?
Rob and Laura Petrie fashion, the couple are in separate beds), is drafted in the form of a
conversation between a wife, who says things like “I want to know what a stock broker
is,” “I don’t know understand what they do on the New York Stock Exchange,” and
“what is a share of stock” and a husband who exasperatedly answers the questions and
tells his wife to be quiet so that he can go to sleep. 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.”

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, and asked the question “Does Your Wife Have A Husband Who
Is Going Somewhere? (financially, we mean)?” Another entitled “What It Takes To
Be A Successful Bridegroom Today” depicted women resting her head on the shoulder of
a confident-looking man staring into the distance. The ad urged men to become
financially savvy about the stock market in order to impress a potential bride and her
parents. Still another entitled “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.

190 Available at NYSE Archives, Does Your Wife Have a Husband Who Is Going Somewhere?
191 Available at NYSE Archives, What It Takes To Be a Successful Bridegroom Today.
192 Ads that ran in the 1960s also described brokers as wise and ethical men. In an NYSE ad
entitled “The ‘seat’ that money alone can’t buy,” which was scheduled to run in magazines like
Newseek, U.S. News & World Report and Time in 1962 pictured a seat on the exchange and told
Even when Wall Street sought to market directly to women, it had a hard time transcending gender-based stereotypes about female investors. Towards the end of 1960, for example, NYSE personnel “proposed to run for the first time a campaign directed especially to women in leading women’s magazines” such as Ladies’ Home Journal, Good Housekeeping, McCalls and Better Homes & Gardens.\footnote{193} 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.”\footnote{194} As the Exchange’s president G. Keith Funston explained 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, however, "it would “place even greater emphasis on our usual four cautions, and the desirability of getting good advice from a member firm and registered representative.”\footnote{195} Consistent with this approach, the Exchange developed ads with taglines like “Who Said Investing Is A Man’s World,” “Why Is A Smart Shopper Like A Good Investor,” “Sound Goals For Women Investors,” “Help For Women Considering Stocks,” “The Broker vs. The

\footnote{193}{NYSE Memorandum “Advertising for Spring 1961 Presentation to the Board, Lawrence C. Ruddick dated November 17, 1960. (Available at NYSE Archives).}

\footnote{194}{Id.}

\footnote{195}{NYSE Memorandum from G. Keith Funston to NYSE Board of Governors dated July 14, 1961 regarding Supplemental Appropriation for Newspaper and Magazine Advertising. Available at NYSE Archives.}
Tipster (Suggested Reading For All Women Who Are Thinking of Investing In Stocks and Bonds), “The Right Way Vs. The Wrong Way To Invest In Stocks and Bonds,” “Four Key Differences Between Reckless and Careful Women Investors,” “Right vs. Wrong When Women Chose Stocks and Bonds” and “How Smart Women Figure Out How Much To Invest.” In the main, these ads counseled women to work with a reputable broker to devise a conservative investment plan.\textsuperscript{196}

But even as Wall Street tried to market itself to dividend-seeking housewives, female customers remained a source of discomfort for some in the industry. In an article from 1956 entitled “Woman As Investors,” for example, Fortune Magazine noted that the number of women owning securities had risen to 4,455,000, an increase of 35.7 percent over the prior four years.\textsuperscript{197} The article reports with their growing financial sophistication, women were beginning to look beyond bank savings accounts and

\textsuperscript{196} Depictions of women in the NYSE cooperative advertising program are typical of the era. In their study 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, \textit{Sell Me Some Prestige! The Portrayal of Women in Business-Related Ads}, 30 J. OF POPULAR CULTURE 255, 257 (Spring 1997). The authors found that the 1962 ads “perpetuate sex inequality in the workplace through the selection of images and use of copy.” \textit{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.” \textit{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.” \textit{Id.} Though the seventies began with a “spurt of growth” in women’s rights, the authors found that women lost prestige in ads from 1972. \textit{Id.} at 259-60. Though ads featured more women, they were still portrayed as secretaries, clerical workers, telephone operators and housewives. \textit{Id.} at 260. When women appeared in executive position in the reviewed ads, it was always in the presence of men. \textit{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 motions. \textit{Id.} at 260-61. These same trends appears in ads from 1982 and 1992. The authors found that advertising from this period still portrayed a “male hierarchy” in the office with women confined to lower-status roles. \textit{Id.} at 264-69.

government securities to the stock market as a whole. 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.” That said, the article reported that certain “common denominators” about female customers – all of which reflect longstanding views about women’s competence and temperament -- “stand out:”

(i) they “leave investment decisions to men,” (ii) “the richer the woman the less personal interest does she take in her investments”, (iii) they are “more conservative investors then men,” (iv) they “hate to touch capital”, (v) they are “likely to become emotionally attached to certain stocks”, (vii) the “expect a great deal more from their investments then men do”, (viii) “[w]hen they do gamble, they do it all-out”, (ix) they are “highly susceptible to ‘hot tips’”, (x) they “often buy stocks because they like the consumer products the company makes”, (xi) they have “practically no stockholder interest in how a company is managed”, and (xii) they “driver brokers crazy.”

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.” While acknowledging that “no scientific study has ever been made” and that “[t]here are exceptions to any statement,” Loeb admitted (in Henry Higgens fashion) that when it came to female

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198 Id.
199 Id.
200 Id.
201 Id. at 148-49.
investors, he wondered, ‘‘[w]hy can’t a woman be more like a man?’’ In Loeb’s view it was “fortunate” that “most women have men do their investing for them” because women were (in Loeb’s view) “generally 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 astute.” 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.” “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.” “The difficulty for women,” in Loeb’s view, “it to keep interference to a minimum.”

“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. Moore argued that because women have a “lower tolerance for technicalities” then men do, they should “limit” themselves “from the start to a smaller area of activity than a man would operate in” and invest in securities rather than attempt active trading.

203 Id.
204 Id.
205 Id.
206 COLLEEN MOORE, HOW WOMEN CAN MAKE MONEY IN THE STOCK MARKET (Doubleday & Co., Inc. 1969).
207 Id. at 6-7. See also HERTA HESS LEVY, WHAT EVERY WOMAN SHOULD KNOW ABOUT INVESTING HER MONEY 11-12 (Dartnell Press 1968) (“There is the rare woman who is both thoroughly feminine and thoroughly knowledgeable in financial matters -- . . . Any reasonably
And though passive female shareholders might be welcome, women who attempted to exercise governance rights were not any more welcome during the 1950s than they had been fifty or one hundred years earlier. Some continued to assume that women were not suited to or interested in governance. In his 1963 study of trends in the distribution to stock ownership, for example, Edwin Burk Cox addressed which family member’s socioeconomic characteristics to consider when dealing with jointly owned securities. Noting that the term “stockholder” traditionally is defined as the person who is “entitled to receive the dividends, cast the votes, and exercise the right to sell,” Cox questioned whether women were stockholders in any “real” sense:

[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 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.

When confronted with real, live female shareholder activists, commentators worried that “American business was beginning to take on some of the more frightening characteristics of a matriarchy.” In an article from 1950 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 intelligent woman can learn her way around the money world and at the same time preserve her feminine nature.”.


209 Id.

the presence of activist female stockholders at a U.S. Steel stockholders’ as a surprising and worrisome development. The article reported with some consternation that of the 350 stockholders present at a U.S. Steel annual meeting, over half were women. According to the article, the most “articulate” of these women -- a “professional gadfly” who owned 15 shares and headed an organization “dedicated to getting more power for female stockholders” – made a splash by “attacking” the company’s public relations policies, “questioned the wisdom” of paying high salaries to senior officers. The article accused two men “in cahoots with” this person of asking “nasty” questions about executive compensation.

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

Given these sorts of images, it is not surprising that the Securities Exchange Commission of the 1950s and 1960s continued to conceive of women as outsiders, and to invoke images of defenseless women in need of protection when criticizing sharp sales practices on Wall Street. In 1956, for example, when discussing its efforts to limit “boiler rooms,” or firms in which high-pressure salespeople use banks of telephones to call investors (known in the trade as “sucker lists”) in order to peddle securities of (at best) dubious quality, 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

211 Id. at 47. The “gadfly” – Ms. Wilma Soss – appears to have been 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 owned stock.” See Geoffrey T. Hellman, The Talk of the Town, “Pressure Group” THE NEW YORKER, June 25, 1949, at 15.

212 Women of Steel Give the Top Brass a Hard Time, supra note 211, at 46-47.
often the victim of the ‘boiler room’ salesmen.” 213 Likewise, in a case from 1952, the Commission cited a broker-dealer’s churning in a “joint account of an elderly widow and her daughter, neither of whom had any financial or business background” when affirming the expulsion of a broker-dealer from NASD membership. 214 While acknowledging 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,” the Commission held that the sanction or revocation was neither excessive nor oppressive. 215

In 1963, the Commission’s massive Special Study of the Securities Markets made repeated use of the women’s perceived vulnerability to expose investment abuse. On September 5, 1961, Section 19(d) of the Securities Exchange Act was enacted, authorizing and directing 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.” 216 Pursuant to this mandate, Commission staff studied virtually every aspect of the securities markets and the securities industry for two years, eventually releasing a comprehensive report in 1963 addressing everything from the qualifications, responsibilities and practices of persons and entities involved in securities

213 See 22 SEC ANN. REP. 4 (1956).


216 SPECIAL STUDY OF SECURITIES MARKETS, supra note 186, at 1.
industry to the regulatory regime governing primary and secondary distributions of securities to the public ("the Special Study"). As was true of the Hughes case some twenty years earlier, the drafters of the Special Study sought to identify practices and problems common to retail investors generally, not retail investors of a particular gender. 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. 217

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 bygone era.”218 By way of example, the Special Study cites the experiences of three female investors who claimed that they bought or sold unsuitable securities based on recommendations from salesmen.

217 For example, The Special Study reports, that broker-dealer firms could 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 unites employing a few salesmen. See id. at 16. Though the Special Study acknowledged 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 id. at 9 (referring to registered representative applications filed by people who listed their prior occupation as housewife, but referring exclusively to salesmen). One year later, in their report “Mutual Fund Retailing: Aspects of Market Structure and Dealer Operations, Dennis J. Lehr and Meyer Eisenberg of the Securities and Exchange discussed the different types of firms involved in the distribution of mutual funds. One such firm – a sole proprietorship operated by a woman named Mary Louise Brown – was presented as an example of the smallest institution in the mutual fund distribution process. Eisenberg and Lehr 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 means of publicizing mutual funds. According to Eisenberg and Lehr, Brown’s “clientele are primarily women and her sales approach [which urged American women to fall in love with American industry] is highly emotional.” DENNIS J. LEHR & MEYER EISENBERG, MUTUAL FUND RETAILING: ASPECTS OF MARKET STRUCTURE AND DEALER OPERATIONS 27 (June 1964), http://www.sechistorical.org/collection/papers/1960/1964_0601_Mutual_Fund_manual.pdf.

218 SPECIAL STUDY OF SECURITIES MARKETS, supra note 186, at 270.
at large, reputable firms. 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 salesmen. 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.”

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

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.

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.”

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219 Id. at 269-70.

220 Id. at 270.

221 Id.
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.222

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 decision for her – to highlight the problems of excessive trading and lax supervision in the retail brokerage industry.223

Part IV: 1970s – Present: Give Us Your Money, But Don’t Try To Work Here.

By the late 1960s/ early 1970s, women had achieved a number of “firsts” on Wall Street, much as they did in other areas of social, economic and political life. In 1965, for example, Julia Walsh and Phyllis Peterson because the first female members of the American Stock Exchange. In 1967, Muriel Siebert became the first women to purchase a seat on the New York Stock Exchange.224 In 1968, Merrill Lynch (then the largest

222 Id. at 271.

223 Id. at 272-73.

retail brokerage firm in the country) picked Mary Wren as its first female vice president. 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.”

For many of Wall Street’s female pioneers, however, blatant discrimination and resistance were the norm. 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 meetings and subjected to constant questioning about why they did not want to have children and stay at home.

When they did succeed, some assumed that they had traded sexual favors for market access.

As early as the 1970s, some women began to use civil rights legislation to challenge barriers to entry on Wall Street. In 1972, Helen O’Bannon, a 33-year old woman who had graduated from Wellesley College with honors after majoring in economics and received a master degree from Stanford University, sat for Merrill Lynch’s admission examination for its broker trainee program. 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, and the Comptroller of the Currency and

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225 Lisa Cronin Wohl, What’s So Rare As A Woman On Wall St.,? MS. MAG., June 1973, at 2.

226 E.g., SIEBERT, supra note 226; ANNE B. FISHER, WALL STREET WOMEN9 (Alfred A. Knopf 1990); SUE HERRERA, WOMEN OF WALL STREET: MAKING IT ON WALL STREET – THE WORLD’S TOUGHEST BUSINESS (John Wiley 1997).

227 As Muriel Siebert reports in Changing the Rules: Adventures of a Wall Street Maverick, the women that began working on Wall Street in the late 1960s and early 1970s faced blatant sexism and discrimination at almost every turn. Siebert further reports that female brokers were assumed to get business by “sleeping around.” SIEBERT, supra note 226, at 43.
as an economics instructor at Robert Morris College. 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? (The correct answer to that question was beauty. Intelligence received the lowest number of points.) When Ms. O’Bannon was rejected for the training program (a fact conveyed to her in a letter addressed to “Mr. O’Bannon”) she sued for sex discrimination and won, costing the firm upward of $4 million in damages. 228 As time went on, other female employees of Wall Street firms challenged harassment and discriminatory conduct as well.229


229 For example, in 1987, Kristine Utley, 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.” Utley v. Goldman, Sachs & Co., Civ. Action No. 99-0794-WF (D. Mass. 1988). As support for her allegations, Ms. Utley attached memos announcing the arrival of new female employees which contained pictures of nude pinups and gave examples of printed joke sheets containing gems like “Why Is Beer Better than a Woman?” Id. In 1992, Susan Jaskowski filed suit against Rodman & Renshaw and certain of its employee for discrimination. See Jaskowski v. Rodman & Renshaw, Inc., 813 F. Supp. 1359, No. 92 C 04161 (N.D. Ill. February 18, 1993). Jaskowski alleged that after beginning in the firm’s mailroom and working her way up to the position of Vice President, Human Resources, male co-workers reacted negatively when she became pregnant. 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. Another executive vice president allegedly told Jaskowski that she “should have stayed at [her] desk rather than going out getting pregnant.” When Jaskowski went out on maternity leave, her male replacement received a salary that was forty percent higher than Jaskowski. When she returned from leave, she was offered a clerk position that paid less than half the salary she had earned in former position and, later on, a human resources position that again paid less than her former salary. While the court permitted Jaskowski sex discrimination claim go forward under Title VII of the Civil Right Act of 1964, the district court dismissed Jaskowski’s sex discrimination claim under Title VII of the Civil Rights Act of 1991 on the grounds that the statute did not apply retroactively to conduct that occurred before November 21, 1991. The Court also held that Jaskowski’s claim for intentional infliction of emotional distress against the firm was preempted by the Illinois Workers Compensation Act,
It the 1990s, after the enactment of Title VII of the Civil Rights Act of 1991, the number of high profile sexual harassment, discrimination and retaliation cases began to increase, as did the firms’ efforts to rebut such challenges. One of the most notable cases involved the now-infamous “Boom Boom Room” at the Garden City, New Jersey office of Smith Barney. On May 20, 1996, Pamela Martens and several other current and former employees of the brokerage firm Smith Barney, Inc. filed a class action complaint in the Southern District of New York against Smith Barney, its chief executive officer, the former head of Smith Barney’s Garden City, New Jersey Office, the New York Stock Exchange and the National Association of Securities Dealers. The complaint alleged that Smith Barney had engaged in a pattern and practice of sexual harassment, discrimination and retaliation against its female employees.

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. According to the complaint, Cuneo created a supremely hostile work environment for women. He allegedly told one female broker that there must be pressure on her to “spread her legs,” called another a “Jewish bitch” who “should be hit by a bus” and referred to attractive women as “slits and tits.” He also allegedly constructed a room in the firm’s basement -- the “Boom Boom Room” -- which he decorated in fraternity house and style and used for all-male drinking parties. When Martens complained about such

to the extent the claims were based on a respondeat superior theory of liability. With respect to the decision to replace Jaskowski and offer her lower-paid position upon her return from maternity leave, the 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.” Id. at 1363.

antics, Cuneo and/or his cohorts allegedly told her that she “sounded like a hysterical women” and that she “should leave Smith Barney.”

Following Cuneo’s lead, other male brokers at the Garden City office allegedly harassed and discriminated against their female co-workers as well. One women reported a co-worker wrote “[her name] gives good head” on the blackboard in the broker trainee room. Another woman who applied for a compliance-related 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. As the manager explained, what the firm really wanted anyway was “some guy with brass balls.” Some men alleged referred to their female co-workers as “cunts” and “bitches” and “stupid.” Recalling the days of Lily Bart, the complaint further alleged that Smith Barney personnel took into account female employees’ refusal of or submission to unwelcome sexual conduct when making employment-related decisions.

In addition to its Smith Barney-specific allegations, the Martens complaint also challenged securities industry rules which 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. 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 more likely to be hostile to discrimination claims brought by women than demographically representative panels. Based on these and other similar concerns, the complaint alleged that mandatory arbitration violated Title VII of the Civil
Rights and deprived the Martens’ plaintiffs of due process of law.\textsuperscript{231}

Just one month after Martens and her co-plaintiffs filed suit, Marybeth Cremin and seven other women filed a class action lawsuit against MerrillL Lynch.\textsuperscript{232} In their amended complaint, which was filed after several months of legal wrangling, the Cremin plaintiffs alleged that they had been the victims of sexual harassment, discrimination and retaliation, among other claims.\textsuperscript{233} As an example of the defendants’ alleged 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. As inducement, Cremin’s supervisor allegedly promised her a substantial lump sum payment, a permanent part-time position and other benefits. Instead of complying with this agreement, however, Cremin alleged that her supervisor fired her once her clients were transferred. Another plaintiff – Nancy Thomas – alleged repeated instances of sexual harassment and discrimination, including receiving packages with sexual paraphernalia from a male colleague. As with Martens, the Cremin complaint also alleged that the industry’s practice of requiring females to arbitrate their claims before the NYSE or the NASD constituted unlawful discrimination.

Then, in 1998, Allison Schieffelin, a successful bond trader at Morgan Stanley, filed a charge of discrimination against Morgan Stanley & Co. with the Equal Opportunity Employment Commission alleging that she had discriminated against based

\textsuperscript{231} In 1991, a slim majority of the Supreme Court upheld the arbitrability of an age discrimination claims in a case involving the securities industry. See \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20 (1991).

\textsuperscript{232} \textit{Cremin et al. v. Merrill Lynch Pierce et al.}, 1:96-CV-03773 (N.D. Ill).

\textsuperscript{233} Marybeth Cremin et al v. Merrill Lynch Pierce Fenner & Smith, Inc. et al., No. 96 C 3773, 1997 WL 34658369 (N.D. Ill. February 27, 1997).
on her gender with respect to her compensation, promotion and the terms, conditions and privileges of employment. After she was fired in October 2000, Ms. Schieffelin filed a second charge of discrimination and retaliatory discharge. 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. 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. On October 15, 2001, the Court granted Ms. Scheiffelin’s motion to intervene and in that capacity, she filed a complaint alleging employment discrimination and equal rights violations. Ms. Schieffelin’s complaint recited a litany of overt and subtle ways in which Ms. Schieffelin’s supervisors allegedly treated her differently from her male counterparts.

For example, whereas male colleagues were praised for being aggressive and competitive, Ms. Schieffelin claimed that she was criticized for being “snippy” and “too emotional.” When she was passed over for a promotion, Ms. Schieffelin’s supervisor allegedly told her that she “shouldn’t be so focused on Morgan Stanley” and that she instead should direct her energy toward “the important things in life” like “having a family” and “full personal life.” Ms. 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. And, she alleged that when she complained and

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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 New York Stock Exchange seeking a declaratory judgment that it had not discriminated against her, taking away job-related responsibilities, diminishing the quality of services provided to Ms. Schieffelin and her clients by the firm’s traders and otherwise demeaning her and diminishing her stature within the firm and with clients.

In the final analysis, despite their explosive allegations of systemic bias in both employment practices and in the industry’s dispute resolution forum, the Martens, Schieffelin and Cremin claims did not receive full hearings in federal court. In the Martens case, 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*, a pre-trial settlement established a mediation procedure through which a substantial number of plaintiffs negotiated and settled their disputes with Smith Barney. All of the claims against individuals – including Cuneo – were dismissed and Cuneo and his cohorts were never deposed. Though class-wide information is not available, some who submitted to mediation reportedly were disappointed with the process.235 Those 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 $0 for her claims.”236 Though Martens herself (along with a few others)

235 Antilla, supra note 230 at 259, 274.

236 Antilla, supra note 230, at 278-89. Unfortunately, the Martens and Cremin plaintiffs were not the first (or only) women to face the “nuts or sluts defense” in response to harassment and discrimination claims, nor were they the only ones to find mandatory arbitration a less than
challenged the terms of the settlement and fought mandatory arbitration of their claims, their efforts to reform the settlement of the class action and obtain a jury trial ultimately were rebuffed.

The Cremin case also settled. In 1998, Judge Ruben Castillo approved a settlement agreement which, like the Smith Barney/Martens deal did not set aside a large monetary fund. Instead, claimants agreed, as part of the settlement, to pursue their claims before “neutral” arbitrators and mediators in what came to be called a claims resolution process.\footnote{237} 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 with years of wrangling with Merrill Lynch over her efforts to be reinstated.\footnote{238} 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

satisfying venue in which to pursue such claims. Antilla reports that when two female employees of a major Wall Street brokerage firm complained that a male co-worker 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 (which by then was known as Smith Barney) allegedly “forced the two women to undergo examinations by a psychiatrist of the brokerage firm’s choosing. Antilla, supra note 230, at 151 and n.32. 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 of “nuts or sluts” tactics, see, e.g., 38 at 239, Clinical Practice Series, SEXUAL HARASSMENT IN THE WORKPLACE AND ACADEMIA: PSYCHIATRIC ISSUES (Diane K. Schrier ed., Am. Psychiatric Press, Inc. 1996).

\footnote{237} See, e.g., Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 328 F. Supp. 2d 865, 866-867 (N.D. Ill. 2004). Unlike the Smith Barney settlement, however, Morgan Stanley agreed to exempt discrimination cases brought by employees from mandatory arbitration. This provision did not, of course, apply to the plaintiffs/claimants in the Cremin case.

Ms. Thomas eventually received an award of $420,000 -- $320,000 for discrimination and $100,000 for emotional distress. The arbitrators found against Thomas, however, on her claim of constructive discharge. In 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, $2.0 million to fund diversity programs at Morgan Stanley, and (grudgingly) $12 million to Ms. Schieffelin.

**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 Sheiffelin, some firms hired diversity officers, enhanced training, and revised hiring, review and retention policies with an eye towards increasing the number of women and people of color in the work force. And, once the industry’s system of mandatory arbitration of statutory discrimination claims came under scrutiny; sponsoring self-regulatory organizations

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239 See http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ahBbeM3hPKdA.


242 In March 1994, following a request for research by Representative Edward Markey (D. Mass.), the United States General Accounting Office to examine how registered representatives fare when discrimination claims are arbitrated. The GAO found (among other things) that arbitration panels were overwhelming comprised of white males around sixty years of age (some
amended applicable rules to exempt statutory discrimination claims from mandatory arbitration, unless the parties agree otherwise. In recent years, some women have even succeeded in obtaining favorable judgments/decisions against financial firms in cases involving discrimination and/or sexual harassment claims.

Despite these developments, however, there is substantial evidence that women and men remain on different footing when it comes to the securities markets and working Wall Street. In terms of investors/customers, images of vulnerable women falling prey to sharp practices on Wall Street remain part of the common parlance, and advocates

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243 It is unclear whether those amendments have addressed potential claimants’ concerns. As a result of the merger of member regulatory functions of the NASD and the NYSE, forming what is now known as FINRA (the Financial Industry Regulatory Authority), the vast majority of securities industry arbitrations now take place in FINRA’s arbitration forum. Under applicable FINRA rules, statutory discrimination claims are exempted from mandatory arbitration. Employees may, however, agree to arbitrate such claims either before or after the dispute arose. Since an employer may by policy require employees and potential employees to agree to arbitration, some have questioned whether these amendments offer meaningful protection to victims of discrimination. See, e.g., Paul Rose, “Developing a Market for Employment Discrimination Claims in the Securities Industry,” 48 U.C.L.A. Law Rev. 399, 413 (2000). Moreover, in the years since Gilmer, researchers have questioned whether panels have, in fact, complied with rules designed to ensure compliance with statutory standards. See, e.g., John D. Shea, “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 (1998).


continue to worry that financial firms target women.246 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, 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.247 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.248 Women remain statistically far less likely to hold

246 In its study of consumer mortgages, for example, the Consumer Federation of American found that women are more likely to receive subprime mortgages than men, and that patterns of subprime gender disparity exist for home purchase, refinance and home improvement lending. See “Women are Prime Targets For Subprime Mortgages: Women Are Disproportionately Targeted in High Cost Mortgage Market,” 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. 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.


248 In explaining why women may not be welcome in male dominated work environments, some scholars have pointed to the phenomena of “homophily” or “homosociality,” which Lorber describes as “the bonding of men of the same race, religion, and social economic background.” Lorber at 230. Lorber makes the point this “band of brothers” phenomena can exert a powerful influence over workplace dynamics. She notes that “[p]arallel to the formal organization of the 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 as significant to the way business is conducted as the written rules, colleagues want to work with people know what goes without saying.” Lorber quotes an earlier work by the sociologist Everett C. Hughes to describe how this phenomena operates: ‘[i]n 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.” Lorber at 230 (citing Hughes, Everett C., The Sociological Eye, Chicago: Aldine-Atherton (1971). In discussing the lack of pay disparity on Wall Street, Roth questions whether deeply rooted gender norms and ideologies, coupled with homophily, may contribute to keeping
sales, trading and/or executive positions at financial firms. Pay disparity remains a persistent problem on Wall Street.” Even those women who “look” most like their male counterparts from the perspective of educational background, training and experience and personal characteristics face questions about their competence and character. And, women continue to report that they experience discrimination while working for Wall Street firms.

in women and persons of color in lower status, lower paying jobs while at the same time giving a boost to white male workers. Roth, Selling Women Short, at 71-99.


In her book Selling Women Short: Gender and Money and Wall Street, Louise Marie Roth documents what she describes as a persistent, large and unexplained gender gap in pay on Wall Street that continued unabated during the bull market of the 1990s. See generally Marie Louise Roth, Selling Women Short: Gender and Money and Wall Street (Princeton University Press 2006). Roth argues that, “[w]hat is astonishing is the degree to which 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 a longstanding one. 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 – i.e., those less valuable as farm workers. 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 were primary wives and others was used to justify their low pay.” Judith Lorber, Paradoxes of Gender, Yale University Press (1994) at 202.

Around the time that Zoe Cruz was terminated, two other senior women (Sallie Krawcheck, formerly of Citi Group and Erin Callen, formerly of Lehman Bros.) also were terminated, triggering intense debate. See 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, November 30, 2008, available at http://nymag.com/news/business/52603/ (discussing Cullen’s termination).

On June 9, 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 Citi
In terms of the law, unstated gender norms in the law have remained largely unexamined. Because disputes between stock brokers and their customers are almost always subject to mandatory arbitration, debates about whether an investor/customer is sophisticated or unsophisticated, reasonable or reckless, and diligent or dilatory often occur in private, as do debates about whether an broker’s recommendation was suitable, and whether a firm’s system of supervision is reasonably designed to prevent securities law violations. As a result, scholars have questioned whether analysis of these sorts of standards has atrophied. In terms of employment discrimination claims, although some courts and scholars have expressed concerns about mandatory arbitration and the industry’s arbitration forum, cases continue to be resolved via non-public alternative dispute resolution means and/or through settlement. While mandatory arbitration may not be required in all cases, to the extent litigants agree to arbitrate disputes involving harassment and/or statutory discrimination claims, such agreements


See FINRA Conduct Rule 2310.

See FINRA Conduct Rule 3010.


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 favor of the industry.” Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 965 F. Supp. 190 (D. Mass.) The Court of Appeals rejected this contention, but refused to enforce an arbitration clause on other grounds. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1 (1st Cir. 1999). See also Clyde W. Summers, Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate, 6 U. PA. J. LAB. & EMP. L., 685 (2004).
will be enforced. For these and other reasons, including the social and professional cost of bringing harassment and discrimination claims, such grievances often are not subject to judicial review.

**The Cost of “Bounded” Vocabulary**

So, what does this mean for the law of securities regulation going forward? In her book *Making All The Difference, Inclusion and Exclusion and American Law*, Martha Minnow examines the law’s tendency to use unstated norms to assign rights and obligations, and finds it to be both endemic and pernicious.\(^{257}\) 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 (who are presumed to be “abnormal”), it reduces system participants to characters with assumed traits and abilities instead of individuals with diverse experiences, abilities and goals.\(^{258}\) And, “when we respond to persons’ traits rather than their conduct, we may treat a given trait as 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 neglect the other traits that may be shared. And we neglect how each of us, too, may be ‘different.’”\(^{259}\) Minow makes the point that when legal reasoning purports (or even

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\(^{257}\) Minow views the use of status-based labels and categories as an outgrowth what she calls the “dilemma of difference” – i.e., the challenge of determining “when . . . treating people differently emphasize[s] their differences and stigmatize[s] or hinder[s] them on that basis” and when “the treatment people the same become insensitive to their difference and [is] likely to stigmatize or hinder them on that basis[].” See Minow, *supra* note 24 at 20.

\(^{258}\) Id. at 9.

\(^{259}\) Id. at 3-4.
attempts) to be “neutral” while still using categories and labels that legitimize stigma, it may codify and even exacerbate discrimination.

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 standards and legal reasoning, and exposed 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. Critical race theorists also have lodged powerful criticisms against the design and operation of legal standards and systems which ignore and/or stigmatize the diverse experiences and perspectives of persons of color. These and other disciplines

260 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, 1288 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988) offers one example. See Mary Jo Frug, Postmodern Legal Feminism, Routledge at 12-29 (1992). In the Sears case, the EEOC claimed that Sears had discriminated against women by failing to hire and promote proportionate numbers of women in commission sales position. 638 F. Supp. at 1292-1301. 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, already informed about their products, and “leaders” traits which Sears argued women were less likely to have. Id. at 1305-15. 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. A divided panel for the Seventh Circuit Court Appeals affirmed the lower court’s ruling. As Frug points out, both experts “masculinized the traits needed to work in commission sales. That is, they interpreted Sears’ description of the deal commission sales worker by reference to a particular masculine stereotype. In addition, the historians’ description of women in the paid labor force suggested two opposing feminine stereotypes, neither of which fit the stereotypically male model of sales worker.” Id. 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 in commission sales, Sears’ explanation for the lack of women in commission sales might have seemed less convincing.” Id.
have challenged the notion that legal norms exist in some abstract and entirely theoretical domain that is entirely “neutral” as to all system participants.\textsuperscript{261} These disciplines also have recognized that when we expose unstated status-based norms, and consider the experiences and perspectives of all system participants and not just those considered normal, the conversation changes. New issues become part of the debate. We gain a better understanding of what the law has, and has not, been able to accomplish. And our perceptions of legal norms and systems become richer and more varied.\textsuperscript{262}

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,”\textsuperscript{263} “sophisticated” and “unsophisticated,” among many

\textsuperscript{261} 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 have included several citations by way of example. In her analysis of corporate structure, for example, Rosabeth Moss 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.” \textsc{Rosabeth Moss Kanter}, \textit{Men and Women of the Corporation} 250 (Basic Books, Inc. Pub’rs 1977). \textsc{See also}, Marleen O’Connor, \textit{Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego and Power}, 65 Md. L. Rev. 465 2006. 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 difference in women of cardiac illnesses and other conditions that affect both women and men. Susan Wolfe, ed., \textit{Feminism and Bioethics. Beyond Reproduction} Oxford University Press (1996) at 13. 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. \textit{Id.} at 23-24. Feminist historians have, of course, helped to change what “counts” as history and what gets studied. \textsc{See e.g.}, Linda Gordon, Persis Hunt, Elizabeth Peck, Rochelle Goldberg Rothchild, and Maria Scott, \textit{Historical Phallacies: Sexism in American Historical Writing}, in \textit{Liberating Women’s History: Theoretical and Critical Essays}, ed. Berenice A. Carroll (Urbana: University of Illinois Press, 1976).

\textsuperscript{262} \textsc{See Minow supra} note 24, at 19-79.

\textsuperscript{263} For example, in \textit{Basic Incorporated 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
Rights and obligations are set based upon purported gender-neutral roles, including “customer” and “broker,” among others. And, while courts and regulators may consider the experiences of certain groups (e.g., widows) in formulating and interpreting rules and standards, resulting norms and systems are thought to apply to all system participants without regard to gender. The industry certainly has argued that its sins against women are largely a thing of past.

Given the persistence of Wall Street’s gender norms, and their ongoing importance to the law of securities regulation, however, this paper concludes with a call for research and analysis in the cost of unstated gender norms upon our legal analysis. In particular, this paper asks readers to consider whether norms and systems would change if we managed to decouple them from Wall Street’s prevailing image of women.

Consider the Madoff case, for example. To all the world (except for whistle-blower Henry Markopolous, apparently), Bernard Madoff looked like a master of the universe. Madoff founded his firm (Bernard L. Madoff Investment Securities LLC) in 1960 and was a prominent member of the securities industry for many years. He served as vice chairman of the NASD, a member of its board of governors, and chairman of its New York region. He was also a member of NASDAQ Stock Market’s board of governors and

reasonable investor as having reasonably altered the ‘total mix’ of information made available.” (quoting TSC Industries, Inc. Northway, Inc., 426 U.S. 438 (1976)).

264 For example, 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. As to "expertized" portions of the registration statement (such as audited financial statements), a non-issuer defendant avoids with respect to “expertised” 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.
its executive committee and served as chairman of its trading committee.\textsuperscript{265} He had a glittering list of clients, and was well-regarded for both his business acumen and his service to the philanthropic community.

In the end, however, Madoff operated a Ponzi scheme of epic proportions. 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. Madoff’s investors certainly were taken in – many entrusted him with their life savings. Regulators at the Securities and Exchange Commission appear to have given him a free pass as well, even though the Commission had inspection powers over certain of his operations and despite the fact a private citizen attempted to alert the Commission to red flags for almost ten years.\textsuperscript{266} Even Madoff has argued that he strayed into criminal behavior because he could not admit that he had failed as a money manager. 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. As Madoff explained, “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.”

Though Madoff likely would 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. Would investors have been more cautious? Would they have raised questions earlier? Would co-workers, many of whom were experienced and licensed industry insiders, 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? Should we re-think legal standards which require firms and to establish and maintain systems of supervisory control reasonably designed to prevent and detect violations of the securities laws?

Conversely, when faced with a trader, salesperson or executive who does not “look the part,” should we be more skeptical of claims that the person is incompetent? Should we develop standards for measuring competence that are less traditionally “masculinized” than those currently used on Wall Street? Would this change how we interpret criticisms of people like Zoe Cruz? Would it change how we view the “nuts and sluts” defense in harassment, discrimination and retaliation cases? Would it affect our

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268 See, e.g., FINRA Conduct Rule 2310 (the “suitability rule), which requires FINRA member firms to “establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules.”

269 See, e.g., Frug, supra note __, at 15.
how courts respond to settlement agreements, or how arbitrators and mediators respond when faced with allegations of harassment, discrimination and retaliation? Should we question whether such claims ought to be dealt with in arbitration or other non-public forums where decisions are almost completely insulated from judicial review?

Questions about whether an investor is “sophisticated” or “unsophisticated” or “reasonable” or “unreasonable” also merit review. As discussed above, for more than one hundred years, Wall Street has used female status (the widow, most notably) as a proxy for unsophisticated and vulnerable investors. 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/dilettante stereotype? Would it be easier for us to identify behaviors and characteristics of sophisticated and unsophisticated investors, regardless of their gender? Would we revise our understanding what 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?

In the final analysis, this sort of research and analysis is necessary if we are to decouple securities law from unstated gendered stereotypes, and develop a narrative for Wall Street and securities regulation that includes (or at least acknowledges) the perspectives and experiences vast number of women who have traded securities and worked at financial institutions over the years. Empirical research must be part of this effort, as any attempt to deconstruct (and reconstruct) skills and characteristics necessary to perform well when trading securities or working at financial firms ought to be
grounded in an understanding of what works, and what does not. In this regard, I note that interesting research is underway. As Joan Heminway points out in her recent thought-provoking article “Female Investors and Securities Fraud: Is the Reasonable Investor A Woman?,” behavioral finance experts and other commentators have found that female individual investors are not necessarily the capricious speculators of Wall Street lore. Instead, they are (i) more likely to seek investment advice, (ii) less likely to be optimistic about the markets or over-confident about financial decision-making, and more likely to perceive themselves as lacking investment competence, (v) less likely to trade frequently, and (vi) 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. Heninway argues that traditional constructs of the “reasonable investor” do not serve men or women very well. In terms of investment abuse, a 2006 study found that senior victims of financial fraud were more likely than not to be male, married, to have higher levels of education attainment and to have higher levels of income – in other words, the opposite of the “poor widow” profile.

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. 272 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 goals.273 In the end, however, I think these risks ought to be dealt with explicitly, not used as a basis for ignoring gender as a category. Gender has served as a proxy for characteristics relating to trading securities and working on Wall Street for too long in the law to remain latent and unexamined in the securities laws.

272 As Minow and many others have pointed out, claims to the speak about the “women’s experience” or from a women’s point risk engaging in just the sort of simplification and stereotyping that feminist scholarship seeks to challenge. Moreover, issues of race, sexual orientation, class, religion, ethnicity, marital status, pregnancy status (and many others) all contribute to markedly different experiences, perspectives and goals. Minow, supra note 24, at 230 – 39.