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## Venture Bearding

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# Venture Bearding

Benjamin P. Edwards<sup>†\*</sup> & Ann C. McGinley<sup>\*\*</sup>

*“Venture bearding,” a term that we coin in this Article, describes processes of obscuring and covering socially stigmatized identities in business environments. This Article introduces distinctive identity performance strategies from the technology, startup, and venture capital context into the legal literature and discusses what their existence explains about business environments and capital formation. Venture bearding, as we use the term, describes behaviors that persons with contextually stigmatized identities adopt to access social status and capital. In some instances, women, who are stigmatized in this context, may employ men as front persons to conceal that the venture is an exclusively women-owned business. Venture bearding is a common, complex, and problematic strategy and is driven by stigma and bias in the business environment.*

*The Article focuses on how the current startup, technology, and venture capital landscape causes persons with stigmatized identities to strategically conceal facets of their female identities in favor of presenting masculinized identities to conduct business and raise capital. The Article charts a continuum of venture bearding practices ranging from techniques to downplay a founder’s identity to the actual employment of men for the purpose of deriving economic value from their identities.*

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*The existence of venture bearding raises critical capital allocation concerns. While venture bearding strategies may mitigate some capital allocation biases and benefit some entrepreneurs, employing these strategies risks reifying discriminatory norms. These norms increase the cost of capital and inhibit economic growth.*

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## INTRODUCTION

Predicting who will succeed is an imperfect art, but also, sometimes, a self-fulfilling prophecy. When venture capitalists say — and they do say — “We think it’s young white men, ideally Ivy League dropouts, who are the safest bets,” then invest only in young white men with Ivy League backgrounds, of course young white men with Ivy League backgrounds are the only ones who make money for them. They’re also the only ones who lose money for them.

—Ellen Pao

THIS IS HOW SEXISM WORKS IN SILICON VALLEY<sup>1</sup>

The cutoff in investors’ heads is 32 . . . . After 32, they start to be a little skeptical. . . . I can be tricked by anyone who looks like Mark Zuckerberg. There was a guy once who we funded who was terrible. I said: “How could he be bad? He looks like Zuckerberg!”

—Paul Graham

FOUNDER, Y COMBINATOR<sup>2</sup>

Penelope Gazin and Kate Dwyer faced a familiar problem.<sup>3</sup> Like many female founders, they discovered that developers, graphic designers, and other outsiders were often condescending and disrespectful in emails.<sup>4</sup>

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<sup>1</sup> Ellen Pao, *This Is How Sexism Works in Silicon Valley*, CUT (Aug. 21, 2017), <https://www.thecut.com/2017/08/ellen-pao-silicon-valley-sexism-reset-excerpt.html> [hereinafter *How Sexism Works*].

<sup>2</sup> Nathaniel Rich, *Silicon Valley’s Start-Up Machine*, N.Y. TIMES (May 2, 2013), <http://www.nytimes.com/2013/05/05/magazine/y-combinator-silicon-valleys-start-up-machine.html?pagewanted=all>. After public criticism of this statement, Paul Graham released a statement indicating that the quotation “was a joke.” Paul Graham, “*I Can Be Tricked by Anyone Who Looks Like Mark Zuckerberg*,” PAUL GRAHAM (Nov. 2014), <http://www.paulgraham.com/tricked.html> (“People will probably still repeat that quote, but now if someone does it will be proof that either (a) they didn’t do their research or (b) they have an ideological axe to grind.”). Regardless of whether the statement was intended as a joke at the time it was made, it resonates because of the widespread bias toward allocating capital to particular classes of founders. Ellen Pao confirms that investors place a great emphasis on finding young male venture capitalists’ projects in which to invest. See ELLEN K. PAO, RESET: MY FIGHT FOR INCLUSION AND LASTING CHANGE 66-82 (2017) [hereinafter RESET].

<sup>3</sup> John Paul Titlow, *These Women Entrepreneurs Created a Fake Male Cofounder to Dodge Startup Sexism*, FAST COMPANY (Aug. 29, 2017), <https://www.fastcompany.com/40456604/these-women-entrepreneurs-created-a-fake-male-cofounder-to-dodge-startup-sexism>.

<sup>4</sup> *Id.*

One developer even began an email with “okay girls.”<sup>5</sup> Another attempted to “stealthily delete everything” on their website when Gazin declined an invitation to go on a date with him.<sup>6</sup>

To sidestep the constant conflict and secure better treatment, Gazin and Dwyer presented their business with a masculine identity.<sup>7</sup> The two created an email account for a fictitious third cofounder named Keith Mann.<sup>8</sup> Developers treated Mr. Mann differently than they treated the female founders. Developers responded to the imaginary man’s messages more quickly and respectfully.<sup>9</sup> While they recognized the injustice in how they were treated, the female founders embraced the strategy, accepting that “this is clearly just part of this world that we’re in right now. We want this and want to make this happen.”<sup>10</sup>

For all founders, the size, shape, and frequency of the obstacles they face shifts with perceptions about their identities. Identity alters the economic landscape because venture capitalists, developers, and others may consciously and unconsciously modulate their behavior depending on the perceived identity of the founder.<sup>11</sup> In some instances, identity grants a person access to social or economic benefits.<sup>12</sup> In others, it acts as a friction, increasing transaction costs and making interactions more difficult.<sup>13</sup> Gazin and Dwyer opted to

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; see also Hannah-Rose Yee, *These Entrepreneurs Made Up a Fake Male Co-founder to Deal with Sexism*, N.Y. POST (Aug. 30, 2017, 3:38 PM), <http://nypost.com/2017/08/30/these-entrepreneurs-made-up-a-fake-male-co-founder-to-deal-with-sexism/>.

<sup>7</sup> Titlow, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (quoting Kate Dwyer).

<sup>11</sup> See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 48-52, 111-22 (2013) (explaining that implicit biases held by people as measured by the Implicit Association Test are related to behavior resulting from those biases in both the race and gender contexts); Judge Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 80, 81-86 (Justin D. Levinson & Robert J. Smith eds., 2012) (arguing that in deciding employment discrimination cases federal judges exercise implicit bias, which harms plaintiffs); Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This*, 35 JUSTICE SYS. J. 301, 306 (2014) (“[E]veryone is exposed to the societal stereotypes associated with different categories of people. It is through the lens of these stereotypes that we perceive, process, store, recall, and synthesize information about people.”).

<sup>12</sup> See Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1336 (2016) (“Each of these individuals is what I will call an *identity entrepreneur* — someone who leverages his or her identity as a means of deriving social or economic value.”).

<sup>13</sup> Cf. Claire Cain Miller, *Google Releases Employee Data, Illustrating Tech’s*

present outsiders with a masculine identity because it reduced transaction costs and allowed them to devote more time and attention to launching and growing their business.<sup>14</sup>

Research shows that uncorrected implicit biases pervade the business environment, tilting the investment decisions made by venture capitalists toward men.<sup>15</sup> Because venture capitalists are overwhelmingly white and male, they may be particularly vulnerable to implicit bias in favor of white male founders in evaluating investment opportunities.<sup>16</sup>

The digital passing strategy employed by Gazin and Dwyer exemplifies an instance of what we will call *venture bearding*. We use the term to describe the techniques used by women and others in technology and venture capital firms either to pass for an idealized masculine identity or to cover their otherwise stigmatized identities and deflect attention from their differences for the purpose of accessing social and economic resources.<sup>17</sup> In many instances *venture bearding* involves the sublimation of a woman's identity and role within a business and the elevation of a man's position. By shifting a masculine identity into the foreground, a woman may access social and economic resources that would otherwise be out of reach.

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*Diversity Challenge*, N.Y. TIMES (May 28, 2014, 6:42 PM), [https://bits.blogs.nytimes.com/2014/05/28/google-releases-employee-data-illustrating-techs-diversity-challenge?\\_r=0](https://bits.blogs.nytimes.com/2014/05/28/google-releases-employee-data-illustrating-techs-diversity-challenge?_r=0) (“[W]omen who try to start tech companies face exclusion by a venture capital network dominated by a chummy fraternity of men.”).

<sup>14</sup> See Titlow, *supra* note 3.

<sup>15</sup> For more details on these implicit preferences, see *infra* notes 132–56, and accompanying text.

<sup>16</sup> See Dan Lyons, *Jerks and the Start-Ups They Ruin*, N.Y. TIMES: OPINION (Apr. 1, 2017), [https://www.nytimes.com/2017/04/01/opinion/sunday/jerks-and-the-start-ups-they-ruin.html?\\_r=0](https://www.nytimes.com/2017/04/01/opinion/sunday/jerks-and-the-start-ups-they-ruin.html?_r=0) (stating that as of 2014, only “[six] percent” of “investing partners at venture capital companies were women”); Somini Sengupta, *If You're a Venture Capitalist, You're Most Likely a White Man*, N.Y. TIMES: BITS (Nov. 22, 2011, 10:42 AM), <https://bits.blogs.nytimes.com/2011/11/22/if-youre-a-venture-capitalist-youre-most-likely-a-white-man/> (reporting that “[eighty-seven] percent identified themselves as white, [nine] percent were Asian, [two] percent black or Latino, with the remaining [two] percent calling themselves ‘mixed race.’”).

<sup>17</sup> In discussing identities through the lens of commonly accepted categories, the analysis risks essentializing conceptions of whiteness, nonwhiteness, masculinity, and femininity. This degree of reduction puts the gradations between and inherent arbitrariness of identity categories to the side. In many instances, the lines between white and non-white blur. See, e.g., Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 33 (2013) (describing how “[George] Shishim became the first immigrant from the Arab World to be naturalized as an American and judicially ruled white by law”).

The term *venture bearding* evocatively encapsulates the presentation of masculinity. A beard symbolizes masculinity, and as facial hair increases, men and women rate bearded men as more masculine.<sup>18</sup> Men and women in some societies view bearded men as enjoying higher social status, and men see bearded men as more aggressive.<sup>19</sup> In the United States, in the mid-1990s there emerged a “craze” that experts say rivals the facial hair movement of the 1960s, a movement that continues today.<sup>20</sup> In colloquial usage, the term “beard” has referred to women who provide a cloak of heterosexuality for gay and bisexual men.<sup>21</sup> By their presence, these women seemingly confirm a man’s heterosexual masculinity. Actual beards (or their absence) have long been used to convey information about a person’s identity. Historically, Jews and others facing persecution shaved their beards to avoid stigma.<sup>22</sup> Others have grown beards to blend in and pass for locals in beard-wearing cultures.<sup>23</sup> Some grow beards to obscure their faces and true thoughts.<sup>24</sup> As a term, *venture bearding* aims to convey

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<sup>18</sup> See Barnaby J. Dixson & Robert C. Brooks, *The Role of Facial Hair in Women’s Perceptions of Men’s Attractiveness, Health, Masculinity and Parenting Abilities*, 34 *EVOLUTION & HUM. BEHAV.* 236, 240 (2013) (finding that ratings of masculinity rose with beardedness, and facial hair correlates with ideas of maturity, dominance, and aggression). See generally CHRISTOPHER OLDSTONE-MOORE, *OF BEARDS AND MEN: THE REVEALING HISTORY OF FACIAL HAIR* 1-4 (2015) (describing how beards have been associated with conceptions of masculinity).

<sup>19</sup> See, e.g., Barnaby J. Dixson & Paul L. Vasey, *Beards Augment Perceptions of Men’s Age, Social Status, and Aggressiveness, but Not Attractiveness*, 23 *BEHAV. ECOLOGY* 481, 486 (2012) (“[M]en and women from NZ and Samoa judged neutral faces with beards as having higher social status” and “[m]en also judged bearded faces posing angry facial expressions as more aggressive than clean-shaven faces.”).

<sup>20</sup> See ALLAN PETERKIN, *ONE THOUSAND BEARDS: A CULTURAL HISTORY OF FACIAL HAIR* 190-91 (2001) (describing the popularity of different types of beards from goatees to “snail trails”).

<sup>21</sup> See Marc A. Fajer, *A Better Analogy: “Jews,” “Homosexuals,” and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 *STAN. L. & POL’Y REV.* 37, 46 (2001) (“One shared symbol of self-censorship is the ‘beard.’ Jewish men shaved their beards to indicate that they were becoming modernized. Gay men brought ‘beards’ — women whom they seemed to be dating — to public functions to suggest that they were heterosexual.”).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., James Brooke, *Vigilance and Memory: Kandahar; Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right*, *N.Y. TIMES* (Sept. 12, 2002), <https://www.nytimes.com/2002/09/12/us/vigilance-memory-kandahar-pentagon-tells-troops-afghanistan-shape-up-dress-right.html> (“For several months, the Special Operations Forces soldiers whom the United States sent to Afghanistan have been growing beards and donning local garb in an effort to blend in with the local people and their surroundings.”).

<sup>24</sup> See Alex Williams, *What Your Beard Says About You*, *N.Y. TIMES* (July 27, 2011),

deflection, concealment, drag, and the projection of an idealized masculinity.<sup>25</sup>

*Venture bearding* may take many forms. In some instances, it occurs at the intersection of entity formation and identity negotiation. *Venture bearding* occurs when: (1) a woman substitutes a man in her place as the face of an entity to mitigate gender bias; or (2) a woman includes a man (a tactic we call *manclusion*) in economic activities because his masculine presence offers a passport to better treatment. *Venture bearding* also occurs through traditional identity performances where women seek to pass for men in electronically-mediated discourse, or otherwise take steps to deflect attention from their differences.

The literature contains rich discussions about how persons with stigmatized identities manage their identity presentation to assimilate, pass for white, or to cover stigmatized aspects of their identities.<sup>26</sup> This Article expands the academic literature by introducing distinctive identity performance strategies from the technology, startup, and venture capital context. It contributes to the legal literature by discussing what their existence signifies about the business environment and capital formation.<sup>27</sup>

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<http://www.nytimes.com/2011/07/28/fashion/what-your-beard-says-about-you-the-mirror.html> (“A beard is a mask as much as a fashion accessory, hiding the ‘you’ that everyone knows as you and replacing it with whatever they happen to associate with the phrase ‘guys with beards.’”).

<sup>25</sup> See Ridhi Tariyal, *To Succeed in Silicon Valley, You Still Have to Act Like a Man*, WASH. POST (July 24, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/07/24/to-succeed-in-silicon-valley-you-still-have-to-act-like-a-man/?utm\\_term=.bbb801e316a4](https://www.washingtonpost.com/news/posteverything/wp/2018/07/24/to-succeed-in-silicon-valley-you-still-have-to-act-like-a-man/?utm_term=.bbb801e316a4) (“When women pitch mostly male investors, we essentially do it in drag. We ‘code’ male. We may no longer wear the shoulder pads of the 1980s but that is because dress, vernacular and careful selection of cultural touchstones are the superficial accoutrements of a gendered performance. Women have advanced the art much further.”).

<sup>26</sup> In his oft-cited article, Kenji Yoshino drew from the sociological literature and distinguished between passing and covering. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (“Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed.”). See generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* 35-38 (2013) [hereinafter *ACTING WHITE?*] (discussing the “working identity” of blacks and the choices that black workers make as to how to present their identities in a way that is socially acceptable to those in predominantly white workplaces).

<sup>27</sup> A search for the terms “implicit bias” and “venture capital” within the same sentence returned no results in Westlaw’s secondary source database. Notably, the Article is also informed by our experiences as a man and a woman who researches and writes about men. In particular, men do not often write about gender issues. See Corey Rayburn, *Why Are You Taking Gender and the Law?: Deconstructing the Norms That Keep Men Out of the Law School’s “Pink Ghetto,”* 14 HASTINGS WOMEN’S L.J. 71, 74-75



Part I examines how gender bias distorts capital allocation. That Part reviews how pervasive gender bias increases capital costs for founders who do not conform to the idealized young, white, male Ivy League-dropout norm.<sup>28</sup> It examines how these identity-based preferences stigmatize many persons, especially women, who do not conform to the idealized norms.<sup>29</sup> It details how the business environment shifts along identity lines, making it substantially more difficult for many to raise capital.<sup>30</sup> For women, this often means that investors seek to negotiate sexual access to their bodies instead of, or alongside, a standard term sheet.<sup>31</sup> In contrast, young men often benefit from a social subsidy, favored by explicit and implicit preferences.<sup>32</sup>

Part II analyzes identity performance theory and applies it to the strategies many founders now employ to reduce their cost of capital and access economic and social resources. For individuals with stigmatized identities, forced assimilation toward an idealized masculine identity often occurs in three ways: conversion, passing, and covering.<sup>33</sup> In utilizing digital passing strategies, female founders may simply remove clear markers of their femininity in electronically mediated exchanges or operate from behind masculine handles and sobriquets. These mediated modes of interaction may allow them, for a

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(2003) (“For the most part, men are not teaching, writing about, or taking classes that address gender issues. The numbers are astonishing and if institutional arrangements remain the same there is little hope for change since the norms against male involvement are deeply imbedded in the educational environment.”).

<sup>28</sup> See Pao, *How Sexism Works*, *supra* note 1 (describing the preference for young, white men that have dropped out of an Ivy League institution).

<sup>29</sup> See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2226 n.8 (2013) [hereinafter *Racial Capitalism*] (“The intersection of race with other identity categories, such as gender, class, and sexual orientation, affects the degree of privilege that any individual white person in fact experiences . . .”).

<sup>30</sup> See, e.g., Jessica Guynn, *It’s Called the “Pao Effect” — Asian Women in Tech are Fighting Deep-Rooted Discrimination*, USA TODAY (Sept. 19, 2017, 2:21 PM ET), <https://www.usatoday.com/story/tech/news/2017/09/19/ellen-pao-asian-women-tech-glass-ceiling-bamboo-ceiling/665822001/> (describing how one founder “was approached by an investor at a pitch competition. It was only after the investor lured her on a business trip to New York that she realized the offer to help her raise money was a ruse to sleep with her”).

<sup>31</sup> See PAO, RESET, *supra* note 2, at 143 (“I’ve heard too many stories from women CEOs about their struggles to be treated fairly when asking VCs for funding. They get talked over, interrupted, ignored, leered at, and propositioned.”).

<sup>32</sup> See Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 371-72 (2004) [hereinafter *Masculinities at Work*] (explaining how men benefit from a “patriarchal dividend” allowing them greater access to resources simply because they are male).

<sup>33</sup> See Yoshino, *supra* note 26, at 772.

time, to pass as persons with idealized identities. As a term, *venture bearding* also aims to capture how a strong discriminatory animus now causes outgroup members to perform their identities in ways aimed at deflecting dominant group member attention from their difference.<sup>34</sup>

Part III examines legal avenues to address systemic discrimination and bias. Although existing anti-discrimination laws do not apply to situations outside of the traditional employer-employee relationship, the venture capital industry faces strong incentives to address significant distributive justice concerns as well as the inefficiencies of the current discriminatory environment.<sup>35</sup> Pervasive gender-discrimination in technology reduces the supply of technology workers by deterring entry into the field. It also inhibits capital formation, skews capital allocation, and may generate less useful innovation and lower returns than an environment that allocates capital more efficiently.

Although we focus on the American technology and venture capital context, persons with contextually stigmatized identities will undoubtedly adopt similar strategies in other business environments.

## I. GENDER BIAS AND CAPITAL ALLOCATION

To showcase how systemic bias affects capital allocation, this Part reviews how gender bias inhibits women seeking to raise capital. It shows that gender bias misallocates social resources, causing harm to all stakeholders and generating less useful development than would otherwise occur.

### A. Gender Bias Exists

When venture capitalists fund business development, they direct disproportionate amounts toward male entrepreneurs. In 2016, all-male firms raised \$58.2 billion in venture capital funding.<sup>36</sup> In contrast, all-female firms raised only \$1.46 billion.<sup>37</sup> Although these numbers do not reveal funding disparities per founder, other research has revealed the

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<sup>34</sup> See *id.* (defining covering).

<sup>35</sup> This is particularly true today given the #MeToo movement and the important repercussions it is having throughout many industries. See Stephanie Zacharek et al., *The Silence Breakers*, TIME (2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> (naming the #MeToo women as the magazine's Person of the Year).

<sup>36</sup> Valentina Zarya, *Venture Capital's Funding Gender Gap is Actually Getting Worse*, FORTUNE (Mar. 13, 2017), <http://fortune.com/2017/03/13/female-founders-venture-capital/>.

<sup>37</sup> *Id.*

stark contrast for individuals seeking capital: “Black-female-founded start-ups raised an average of \$36,000, while the white-male-led start-ups that *failed* raised an average of \$1.3 million.”<sup>38</sup>

Several factors may influence the persistent differentials.<sup>39</sup> The pipeline to technology firms plays some role. If fewer women seek funding or launch technology startups, that differential would affect relative funding levels. Now, only about eighteen percent of computer science degrees go to women.<sup>40</sup> This number peaked at thirty-seven in 1984. But women have been discouraged by universities and the industry from pursuing degrees in computer science, and their percentage has decreased significantly in the past thirty years.<sup>41</sup> While the pipeline is a problem, industry conditions also contribute to decisions about whether to take or leave jobs in the industry.<sup>42</sup> Female

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<sup>38</sup> Doree Shafrir, *How Ingrained is Sexism in Silicon Valley? Ask the Women Trying to Get Funding*, CUT (Apr. 27, 2017), <https://www.thecut.com/2017/04/women-entrepreneurs-talk-about-sexism-in-silicon-valley.html>.

<sup>39</sup> A variety of additional factors compound the ones detailed here. This is not an attempt at an exhaustive list. Rather, the factors highlighted establish that the business environment in startups, technology, and venture capital now segments along gender lines, with female entrepreneurs facing higher capital costs because of the stigmatization of their identities. Moreover, one group of theorists suggests that the divergence between male and female lending in venture capital occurs because uncertainty, which is great at the funding stage by venture capitalists, plays a role in emphasizing the manifestation of bias. See Sarah Thébaud & Amanda J. Sharkey, *Unequal Hard Times: The Influence of the Great Recession on Gender Bias in Entrepreneurial Financing*, 3 SOC. SCI. 1, 24 (2016).

<sup>40</sup> Liza Mundy, *Why Is Silicon Valley So Awful to Women?*, ATLANTIC (Apr. 2017), <https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788/> (“The percentage of female computer- and information-science majors peaked in 1984, at about 37 percent. It has declined, more or less steadily, ever since. Today it stands at 18 percent.”).

<sup>41</sup> See Emily Chang, *Women Once Ruled the Computer World. When Did Silicon Valley Become Brotopia?*, BLOOMBERG BUSINESSWEEK (Feb. 1, 2018, 1:00 AM PST), <https://www.bloomberg.com/news/features/2018-02-01/women-once-ruled-computers-when-did-the-valley-become-brotopia> [hereinafter *Women Once Ruled*].

<sup>42</sup> Women who know they will face constant discrimination in a particular field may decide to pursue other vocations. See CATHERINE HILL ET AL., AM. ASS'N OF UNIV. WOMEN, WHY SO FEW? WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS 24, 70 (2010), <https://www.aauw.org/files/2013/02/Why-So-Few-Women-in-Science-Technology-Engineering-and-Mathematics.pdf> (finding that in STEM careers, women’s sense of isolation, unsupportive work environments, extreme work schedules and unclear rules concerning advancement are major factors in women’s decisions to leave the organization); Isis H. Settles et al., *Derogation, Discrimination, and (Dis)Satisfaction With Jobs in Science: A Gendered Analysis*, 37 PSYCHOL. WOMEN Q. 179, 181, 185 (2012) (stating that perceptions of both men and women that the organization is sexist leads to lower job satisfaction and that even when perceptions are inaccurate, workers make decisions about involvement and

entrepreneurs receive significantly less venture capital in large part because of the rhetoric about gender stereotypes that accompanies funding decisions.<sup>43</sup> Consider the general hostility expressed by one former financial sector employee turned technology firm founder who characterized Silicon Valley's women as:

[S]oft and weak, cosseted and naïve despite their claims of worldliness, and generally full of shit. They have their self-regarding entitlement feminism, and ceaselessly vaunt their independence, but the reality is, come the epidemic plague or foreign invasion, they'd become precisely the sort of useless baggage you'd trade for a box of shotgun shells or a jerry can of diesel.<sup>44</sup>

This is not an isolated sentiment. Young men in high tech and engineering firms voice and demonstrate hostility towards their female colleagues.<sup>45</sup> This type of behavior also occurs in venture

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commitment and even leave organizations based on perceptions of sexism). Women are perceived as incompetent in STEM jobs, but if competent, they are often perceived to be unlikeable. Women who are competent must demonstrate themselves as more communal in order to be liked than men, but there is a double edge sword because if a woman tries to be too communal, she will be perceived to be incompetent. See HILL ET AL., *supra*, at 86.

<sup>43</sup> Malin Malmstrom et al., *Gender Stereotypes and Venture Support Decisions: How Government Venture Capitalists Socially Construct Entrepreneurs' Potential*, 41 *ENTREPRENEURSHIP THEORY & PRAC.* 833, 847 (2017) (finding that government venture capitalists used stereotypical language about both men and women when discussing whether to fund their projects: men were described as agentic, innovative, credible, trustworthy, very competent, experienced, and knowledgeable, whereas women were described as needing support, of questionable credibility, lacking in competence, and having questionable experience and knowledge).

<sup>44</sup> ANTONIO GARCÍA MARTÍNEZ, *CHAOS MONKEYS: OBSCENE FORTUNE AND RANDOM FAILURE IN SILICON VALLEY* 57 (2016).

<sup>45</sup> SYLVIA ANN HEWLETT ET AL., *THE ATHENA FACTOR: REVERSING THE BRAIN DRAIN IN SCIENCE, ENGINEERING, AND TECHNOLOGY* 7-11 (2008) [hereinafter *THE ATHENA FACTOR*] (detailing extremely hostile, predatory behavior toward women in Science, Education, and Technology ("SET") jobs, including isolation, sexually explicit taunts, attitudes that women are less competent, and "geek" culture refusal to acknowledge women in their presence or mistaking women for administrative assistants). In an updated study, the same authors found less hostile behavior, and a continuing rich pipeline of qualified women; women were discouraged, however, with twenty-seven percent believing their careers were stalled, thirty-two percent saying they were likely to quit within a year, and forty-six percent concluding that men in senior management saw men as "leadership material" more readily than women. See SYLVIA ANN HEWLETT ET AL., *CENTER FOR TALENT INNOVATION, ATHENA FACTOR 2.0: ACCELERATING FEMALE TALENT IN SCIENCE, ENGINEERING, AND TECHNOLOGY, EXECUTIVE SUMMARY 2* (2014), <http://www.talentinnovation.org/assets/Athena-2-ExecSummFINAL-CTI.pdf>.

firms.<sup>46</sup> One young woman at a leading technology firm states, “It reminds me of the antelope and lion footage you see in nature films. The culture is extremely predatory, and the women are the prey.”<sup>47</sup> In a study of engineering and technology firms, more than one quarter of the women studied complained that their male colleagues consider them to be less capable and “genetically disadvantaged.”<sup>48</sup>

However, the masculine dominance of technology firms was not inevitable. In fact, a recent book by Emily Chang demonstrates that women predominated among the first computer programmers and were drummed out of tech businesses because of the ill-conceived notion that the best programmers were anti-social.<sup>49</sup> Since those early days, women have received the message that they are not welcome through a failure of recruiting or mentoring or downright discrimination, and the move to hire male “nerds” as computer programmers.<sup>50</sup>

Moreover, the environments in tech, engineering, and venture firms are disproportionately masculine: they value extremely long work hours and offer little space between personal life and work life. Long work hours, complete dedication to pursuit of work, and the ability to work 24/7 are characteristics of workplaces that are identified as masculine, prestigious, upper middle class, and white.<sup>51</sup> In fact, workplaces with these qualities allow men to perform and enhance

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<sup>46</sup> See, e.g., PAO, RESET, *supra* note 2, at 121-45 (describing her treatment in the industry and her lawsuit for sex discrimination); Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html> (describing sexual harassment of women in the tech industry); *Silicon Valley's Sexism Problem*, ECONOMIST (Apr. 15, 2017), <https://www.economist.com/news/leaders/21720621-venture-capitalists-are-bright-clannish-and-almost-exclusively-male-silicon-valleys-sexism> (noting that tech in general and Silicon Valley in particular have a gender problem with women representing only twenty-one percent of American tech executives, sixty percent of women stating in one study that they had experienced unwanted sexual advances, and two-thirds feeling excluded from social and networking opportunities).

<sup>47</sup> See HEWLETT ET AL., THE ATHENA FACTOR, *supra* note 45, at 9.

<sup>48</sup> *Id.* at 10.

<sup>49</sup> See Chang, *Women Once Ruled*, *supra* note 41.

<sup>50</sup> See *id.*

<sup>51</sup> See Richard Collier, *Naming Men as Men in Corporate Legal Practice: Gender and the Idea of “Virtually 24/7 Commitment” in Law*, 83 FORDHAM L. REV. 2387, 2403-06 (2015) (describing the big corporate law firm and the contradiction of the masculine environment that feeds men’s sense of identity and the firms’ professed interest in wellbeing); Ann C. McGinley, *Masculine Law Firms*, 8 FLA. INT’L U. L. REV. 423, 430-32 (2013) (describing contemporary law firms that value hard work, no flexibility, and make it virtually impossible for men to spend much time with their children).

their masculinity in the eyes of their co-workers, supervisors, and clients. Perhaps more importantly, these environments allow men to feel that their work is important and that they are engaged in an elite enterprise.<sup>52</sup> Therefore, there is little incentive to accommodate the schedules of women, or men who are engaged in the “feminine” task of care giving. In fact, studies demonstrate that there is a gender stereotype bias against workers who take advantage of flexible work policies or caregiving leave.<sup>53</sup>

In essence, the importance of presence and visibility for long hours during workdays and on weekends creates pressure on workers with family responsibilities. Men tend to prove their masculinity through their relationships to work, and these environments reproduce themselves, but women often have greater family responsibilities.

Because women tend to bear a disproportionate share of familial responsibilities, their ability to make the career-maximizing decision at every opportunity is often limited.<sup>54</sup> Moreover, research demonstrates that women who are mothers benefit from more flexible schedules, which are difficult to find in these masculine workplaces.<sup>55</sup> Although this dynamic plays a role, other factors, including bias,

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<sup>52</sup> See, e.g., Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2271-72 (2010) (describing a new “hypercompetitive ideology” in law firms that sees working 24/7 as heroic, identifies particular firms as elite, and thus creates no incentive for firms to shorten work days or to refuse to deliver service to clients on-demand).

<sup>53</sup> See Stephanie Bornstein, *The Legal and Policy Implications of the “Flexibility Stigma,”* 69 *J. SOC. ISSUES* 389, 390-91 (2013).

<sup>54</sup> See Deborah L. Rhode, *Leadership in Law*, 69 *STAN. L. REV.* 1603, 1647 (2017) (reporting the view that “[b]ecause of their disproportionate family responsibilities, female attorneys are reportedly more likely to reduce their schedules, take time out of the workforce, and lack the credentials that could propel them into leadership positions”); see also McGinley, *Masculinities at Work*, *supra* note 32, at 363 (“While many women ‘choose’ to forego careers to spend time with their children, these ‘choices’ are often ordered by necessity, societal expectations, and lack of opportunities.”); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 *HARV. WOMEN’S L. J.* 77, 90-101 (2003) (discussing the relatively new area of family caregivers’ discrimination claims, which rely on a number of potential statutory violations, and describing the difficulty that mothers often have in workplaces where working very long hours is expected, as well as the stereotypes applied to mothers and how they affect their working conditions).

<sup>55</sup> See Ann C. McGinley, *Gender, Law, and Culture in the Legal Workplace: A Chilean Case Study*, 60 *ARIZ. L. REV.* 675, 744-46 (2018) [hereinafter *Gender, Law, and Culture*] (discussing the pleas for flexibility from mothers who are lawyers who were interviewed as part of an empirical study of gender and lawyers).

stereotypes, and workplace cultures also play a significant role, deterring and harming even those women without disproportionate family responsibilities.<sup>56</sup>

### 1. Pay Differentials

For a variety of reasons, the American business environment has long returned richer rewards to men, making it more difficult for women to accumulate the capital reserves to launch businesses. One recent review found that as of 2015 working women were typically paid only “80 percent of what men were paid, a gap of twenty percent.”<sup>57</sup> The gap grows significantly wider “for Hispanic and Latina women, who earned only 54 percent of what white men were paid in 2015.”<sup>58</sup> African-American women made only sixty-three percent of what white men were paid.<sup>59</sup> Although income increases with education levels, the gender pay gap remains and sometimes widens at higher levels of academic achievement.<sup>60</sup> Women are also underrepresented in the ranks of senior executives, holding only twenty-five percent of these positions as of 2015.<sup>61</sup> The pay gap reflects not only differential pay for women who have family responsibilities, but also a differential that cannot be explained by pregnancy, childcare, or other factors.

The pay gap remains for women in technology. Consider the income differential between men and women in software development, a traditionally male-dominated field.<sup>62</sup> As of 2015, the median male software developer earned \$1,751 a week.<sup>63</sup> The median female

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<sup>56</sup> See Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RES. ORGANIZATIONAL BEHAV. 113, 123-28 (2012); McGinley, *Gender, Law, and Culture*, *supra* note 55, at 738; JOAN C. WILLIAMS ET AL., THE CTR. FOR WORKLIFE LAW, CLIMATE CONTROL: GENDER AND RACIAL BIAS IN ENGINEERING? 4-10 (2016), <http://worklifelaw.org/publications/Climate-Control-Gender-And-Racial-Bias-In-Engineering.pdf> (last visited Jan. 26, 2018).

<sup>57</sup> AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 4 (2017), [https://cdn.ymaws.com/www.sidnet.org/resource/resmgr/DI\\_Tool\\_Kit/The\\_simple\\_truth\\_about\\_the\\_g.pdf](https://cdn.ymaws.com/www.sidnet.org/resource/resmgr/DI_Tool_Kit/The_simple_truth_about_the_g.pdf) [hereinafter THE SIMPLE TRUTH].

<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 14. (“At every level of academic achievement, women’s median earnings are less than men’s median earnings . . .”).

<sup>61</sup> See *id.* at 20.

<sup>62</sup> See *id.* at 18.

<sup>63</sup> See *id.*

software developer made only \$1,415 a week, eighty-one percent of the median male earning.<sup>64</sup>

Gender pay and status disparities may persist even in leading technology firms. An employee-led review found that Google pays its female employees less than their male colleagues “at most job levels within Google, and the pay disparity extends as women climb the corporate ladder.”<sup>65</sup> The review found that women across all job levels tended to receive lower annual compensation and lower bonuses.<sup>66</sup> Google issued a statement in response to the compiled salary data, saying that its own analysis indicated that its women make “99.7 cents for every dollar a man makes, accounting for factors like location, tenure, job role, level and performance.”<sup>67</sup> Nonetheless, Google’s own diversity report indicates that women comprise a little under a third of its employees and make up about a quarter of its leadership positions.<sup>68</sup> And, three female employees recently filed suit alleging pay discrimination.<sup>69</sup> Other tech companies also appear to pay women significantly less than their male employees.<sup>70</sup>

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<sup>64</sup> See *id.*

<sup>65</sup> Daisuke Wakabayashi, *At Google, Employee-Led Effort Finds Men Are Paid More than Women*, N.Y. TIMES (Sept. 8, 2017), [https://www.nytimes.com/2017/09/08/technology/google-salaries-gender-disparity.html?\\_r=0](https://www.nytimes.com/2017/09/08/technology/google-salaries-gender-disparity.html?_r=0).

<sup>66</sup> See *id.*

<sup>67</sup> *Id.* Google also pointed out that the spreadsheet “does not take into account a number of factors, like where employees are based, whether they are in higher-paying technical positions, and job performance.” *Id.* Technical positions receive a pay premium at similar job levels. See *id.*

<sup>68</sup> See DANIELLE BROWN, GOOGLE DIVERSITY ANNUAL REPORT 2018, at 21-22 (2018), [https://static.googleusercontent.com/media/diversity.google/en/static/pdf/Google\\_Diversity\\_annual\\_report\\_2018.pdf](https://static.googleusercontent.com/media/diversity.google/en/static/pdf/Google_Diversity_annual_report_2018.pdf).

<sup>69</sup> See Daisuke Wakabayashi, *Google Sued by 3 Female Ex-Employees Who Say It Pays Women Less than Men*, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/technology/google-gender-pay-lawsuit.html>.

<sup>70</sup> See *The Gender Pay Gap in Tech*, COMPARABLY (June 13, 2016), <https://www.comparably.com/blog/the-gender-pay-gap-in-tech/>; *The State of Wage Inequality in the Workplace*, HIRED, <https://hired.com/wage-inequality-report> (last visited Dec. 26, 2018); Elizabeth Weise, *Oracle Is Yet Another Tech Firm Hit with Suit for Allegedly Paying Women Less than Men*, USA TODAY (Sept. 29, 2017, 7:57 PM ET), <https://www.usatoday.com/story/tech/2017/09/29/oracle-yet-another-tech-firm-hit-suit-allegedly-paying-women-less-than-men/718471001/>. The Department of Labor also filed a complaint against Oracle for gender pay discrimination. See generally Complaint Charging Oracle Am., Inc., No. R00192699, (Dep’t of Labor Jan. 17, 2017), <https://www.dol.gov/sites/default/files/newsroom/newsreleases/OFCCP20170071.pdf>.



## 2. Explicit Preferences for Men

Female founders may face particular challenges in securing capital because of explicit preferences for men at two different junctures. A significant subset of the financial sector believes that investment decisions should be made by men and that wiser investments in the venture capital space will be in men.

### *a. Explicit Preferences for Men to Make Investment Decisions*

Much of the capital in venture capital comes from other parts of the financial sector. Preferences of hedge fund managers shape the flow of hedge fund capital to venture capital funds because hedge funds direct significant amounts of capital to venture capital firms.<sup>71</sup>

Venture capital funds may be overwhelmingly male dominated because male hedge fund managers may have more confidence in other male investors. For example, one leading hedge fund manager expressed concern about whether mothers would make smart investment decisions.<sup>72</sup> Paul Tudor Jones founded Tudor Investment Corporation, one of the world's largest and most profitable hedge funds.<sup>73</sup> At one talk, he claimed that motherhood interferes with investment prowess, saying that:

As soon as that baby's lips touch that girl's bosom, forget it. . . . Every single investment idea, every desire to understand what's going to make this go up or go down, is going to be overwhelmed by the most beautiful experience, which a man will never share, about a mode of connection between that mother and that baby.<sup>74</sup>

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<sup>71</sup> See Alexandra Stevenson, *Hedge Funds Are the New Venture Firms*, N.Y. TIMES (Apr. 6, 2016), <https://www.nytimes.com/2016/04/07/business/dealbook/hedge-funds-are-the-new-venture-firms.html> ("In Silicon Valley, hedge funds with billion-dollar reserves are becoming the new venture capitalists.").

<sup>72</sup> See ROTHSTEIN KASS INST., WOMEN IN ALTERNATIVE INVESTMENTS: A MARATHON, NOT A SPRINT 6 (2013), <http://txwsw.com/wp-content/uploads/RKWomeninAlternativeInvestments1.14F.pdf>.

<sup>73</sup> Cf. Rob Copeland, *Paul Tudor Jones' New Hedge Fund Pitch: Low, Low Prices*, WALL ST. J. (Feb. 27, 2017, 6:41 PM), <https://www.wsj.com/articles/paul-tudor-jones-new-hedge-fund-pitch-low-low-prices-1488214739> ("Paul Tudor Jones for years charged some of the highest fees in the hedge-fund industry. Now the billionaire is cutting them for the second time in eight months. . . . The former cotton trader rose to fame with a big score during 1987's stock-market crash.").

<sup>74</sup> William Alden, *When a Billionaire Speaks Off the Cuff on Motherhood*, N.Y. TIMES (May 24, 2013, 10:44 AM), <https://dealbook.nytimes.com/2013/05/24/when-a-billionaire-speaks-off-the-cuff/>. Jones was also pessimistic about the ability of male

Reactions to the comments were mixed. Despite the graphic depiction of breastfeeding and the use of the term “girl” for a female trader, one commentator characterized Jones remarks as directed at “a social, structural issue having to do with gender and expectation,” explaining that Jones really meant that women faced larger burdens than men.<sup>75</sup> Others characterized the comments as both “scientifically unsound” and as reflecting “what a lot of men on Wall Street actually think.”<sup>76</sup>

Many persons share the erroneous perception that men, on average, make better investors. One survey found that only nine percent of women surveyed believed that women make better investors than men.<sup>77</sup>

However, the data does not support this lack of confidence in women as investors. For retail investors, women tend to have higher savings rates and higher rates of return than male investors.<sup>78</sup> Women who manage hedge funds also tend to deliver equivalent or higher returns than their male competitors.<sup>79</sup> One performance review found that female hedge fund managers returned six percent over a six and a half year period, outperforming the S&P 500 (4.2%) and a broader hedge fund index (-1.1%) over the same period.<sup>80</sup>

Recent research indicates that female investor outperformance may occur because female investors react differently to stress when selecting shorter-term investments. One study found that male trading

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managers to earn solid returns while going through a divorce; *see id.*

<sup>75</sup> Linette Lopez, *I'm a Woman, And I Don't Think Paul Tudor Jones' Comments on Woman Traders Were Sexist*, BUS. INSIDER (May 23, 2013, 4:20 PM), <http://www.businessinsider.com/paul-tudor-jones-not-sexist-2013-5> (“His point is that women are expected to get married, expected to have children, and expected to keep a house . . . there will not be as many women who choose to live the grueling lifestyle of being a trader and a mother at the same time . . .”).

<sup>76</sup> Alden, *supra* note 74 (quoting Simone Foxman and Joanna Coles, respectively).

<sup>77</sup> *See* Fidelity Investments, *Who's the Better Investor: Men or Women?*, FIDELITY (May 18, 2017), <https://www.fidelity.com/about-fidelity/individual-investing/better-investor-men-or-women>.

<sup>78</sup> *See id.* (“[A] growing body of evidence, including an analysis of more than eight million clients from Fidelity, shows that women actually tend to outperform men when it comes to generating a return on their investments.”).

<sup>79</sup> *See, e.g.*, ROTHSTEIN KASS INST., *supra* note 72, at 2; *cf.* Rajesh K. Aggarwal & Nicole M. Boyson, *The Performance of Female Hedge Fund Managers*, 29 REV. FIN. ECON. 23, 25 (2016) (finding that women and men perform about the same as hedge fund managers but that only the best women survive possibly because “investors are unwilling (for whatever reason) to invest with female hedge fund managers”).

<sup>80</sup> *See* ROTHSTEIN KASS INST., *supra* note 72, at 2.

activity increased as male cortisol levels increased.<sup>81</sup> In contrast, female traders did not react as strongly to increasing cortisol levels.<sup>82</sup> Another study found that women make steadier investors, trading significantly less than men and earning higher returns.<sup>83</sup> Psychologists find that men tend to be overconfident about their actual prowess in financial areas.<sup>84</sup>

*b. Explicit Beliefs About Male Superiority*

Women also face additional challenges because of widespread beliefs that men are more biologically and socially suited to technology careers and leadership positions. In a widely-circulated memorandum, James Damore, then-engineer at Google, wrote about his concerns with diversity initiatives.<sup>85</sup> He stated that “the distribution of preferences and abilities of men and women differ in part due to biological causes and that these differences may explain why we don’t see equal representation of women in tech and leadership.”<sup>86</sup> His memorandum reported that he had received “many personal messages from fellow Googlers expressing their gratitude” for stating positions

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<sup>81</sup> See Carlos Cueva et al., *Cortisol and Testosterone Increase Financial Risk Taking and May Destabilize Markets*, NATURE (July 2, 2015), <https://www.nature.com/articles/srep11206> (“Cortisol was strongly associated with greater trading activity in men . . .”).

<sup>82</sup> See *id.* (“In contrast to the behavior of men in the experiment, women exhibited a borderline significant negative correlation between trading activity and cortisol . . .”).

<sup>83</sup> See Brad M. Barber & Terrance Odean, *Boys Will Be Boys: Gender, Overconfidence, and Common Stock Investment*, 116 Q.J. ECON. 261, 262 (2001) (“While both men and women reduce their net returns through trading, men do so by 0.94 percentage points more a year than do women.”).

<sup>84</sup> See *id.* (“Psychologists find that in areas such as finance men are more overconfident than women.”). But see Richard T. Bliss & Mark E. Potter, *Mutual Fund Managers: Does Gender Matter?*, 8 J. BUS. & ECON. 1 (2002) (finding no evidence that men are more overconfident or take more risks than women or that there is any performance difference between men and women). Other studies find differences based on biological substances. See, e.g., W. V. Harlow & Keith C. Brown, *Understanding and Assessing Financial Risk Tolerance: A Biological Perspective*, 46 FIN. ANALYSTS J. 50, 60 (1990) (finding an increase of MAO enzymes in women tend to be associated with risk-averse behavior); Amos Nadler et al., *The Bull of Wall Street: Experimental Analysis of Testosterone and Asset Trading*, 64 MGMT. SCI. 4032 (2018) (finding a difference between male and female risk-taking based on presence of increased testosterone, a male hormone).

<sup>85</sup> See generally James Damore, *Google’s Ideological Echo Chamber: How Bias Clouds Our Thinking About Diversity and Inclusion*, ASSETS (July 2017), <https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf>.

<sup>86</sup> *Id.*

“which they agree with but would never have the courage to say or defend.”<sup>87</sup>

The beliefs articulated by Damore may be widely shared within other technology firms, which are still dominated by men. Damore’s memorandum found substantial support at Google, and there is no good reason to believe that its employee population diverges significantly from that of the remainder of the industry. For example, Susan Fowler encountered these beliefs when she raised concerns about the lack of female engineers at Uber.<sup>88</sup> The female human resources representative responded “with a story about how sometimes certain people of certain genders and ethnic backgrounds were better suited for some jobs than others, so [Fowler] shouldn’t be surprised by the gender ratios in engineering.”<sup>89</sup> These stereotypical attitudes, if acted upon in workplaces to deny women jobs, promotions, or equal pay, would create liability under Title VII of the 1964 Civil Rights Act.<sup>90</sup>

These beliefs appear driven more by the existing gender composition and social status of professions than actual differences between abilities of the different sexes. The history of computing provides an illustrative example.<sup>91</sup> American women were programmers during World War II and at NASA after the war.<sup>92</sup> During World War II, British women primarily “assembled, trouble-shot and ran the British Colossus computers, which decrypted coded messages intercepted from the German army.”<sup>93</sup> This “technical work required significant skill, but it was perceived as less intellectual

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<sup>87</sup> *Id.*

<sup>88</sup> See Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>.

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-58 (1989) (declaring that adverse employment decisions caused by sex stereotyping is illegal).

<sup>91</sup> See Claire Cain Miller, *Tech’s Damaging Myth of the Loner Genius Nerd*, N.Y. TIMES, (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/upshot/techs-damaging-myth-of-the-loner-genius-nerd.html> [hereinafter *Tech’s Damaging Myth*] (“Computer programming was originally considered a woman’s job.”).

<sup>92</sup> See *id.* (explaining that American women “were programmers of the Eniac during World War II and at NASA”).

<sup>93</sup> Marie Hicks, *Memo to the Google Memo Writer: Women Were Foundational to the Field of Computing*, WASH. POST (Aug. 9, 2017), [https://www.washingtonpost.com/opinions/memo-to-the-google-memo-writer-women-were-foundational-to-the-field-of-computing/2017/08/09/76da1886-7d0e-11e7-a669-b400c5c7e1cc\\_story.html?utm\\_term=.8cae3f665171](https://www.washingtonpost.com/opinions/memo-to-the-google-memo-writer-women-were-foundational-to-the-field-of-computing/2017/08/09/76da1886-7d0e-11e7-a669-b400c5c7e1cc_story.html?utm_term=.8cae3f665171).

because women did it.”<sup>94</sup> As computing grew more important, women were systematically excluded through the 1950s because the tasks seemed to be “too important to leave to women.”<sup>95</sup>

Other professions experience declines in their pay and relative prestige as the gender balance of the profession shifts. Historically, a perception that an occupation had become a “woman’s profession” would diminish the occupation’s compensation and social prestige.<sup>96</sup> This happened for secretaries and teachers.<sup>97</sup> An influx of women drove men to “flee, and all of the prestige [drained] out of the job.”<sup>98</sup> This has been labeled as the “typewriter paradox: [women] master a machine or set of skills that opens up job opportunities for them, and then that job becomes immediately devalued.”<sup>99</sup>

This dynamic may already be occurring within different segments of engineering work. A distinction has emerged between front-end and back-end engineers.<sup>100</sup> More women work in the lower paid front-end engineering area, which focuses on the user interface.<sup>101</sup> In contrast, more men work in back-end engineering that concentrates on systems that function outside of the user’s view.<sup>102</sup> Persons who have done both front-end and back-end work do not see significant differences in the work’s difficulty.<sup>103</sup>

Beliefs about male superiority likely shape investing behavior. Beliefs that biology and socialization make men better suited for technology careers and leadership lead to allocating more capital to technology companies led by men. Ellen Pao revealed that venture capitalists will sometimes make these beliefs explicit and state that

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<sup>94</sup> *Id.* (“Who was performing the tasks, not the content of the work, defined its worth.”).

<sup>95</sup> *Id.*

<sup>96</sup> HANNA ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* 119 (2012).

<sup>97</sup> *See id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (crediting Columbia University labor historian Alice Kessler-Harris with coining the term).

<sup>100</sup> *See* Miller, *Tech’s Damaging Myth*, *supra* note 91 (“One example is the distinction between front-end engineers, who build the parts of a product that users interact with, and back-end engineers, who work on behind-the-scenes systems, like data storage or scaling.”).

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.* The women suing Google for pay discrimination alleged that Google concentrated men in the back-end and women in the front-end engineering jobs. *See* Wakabayashi, *supra* note 69.

they “think it’s young white men, ideally Ivy League dropouts, who are the safest bets.”<sup>104</sup>

### 3. Systemic Problems in Workplace Cultures

Women often encounter problems in male-dominated work environments.<sup>105</sup> In many ways, the current venture capital and Silicon Valley work environments resemble the misogynistic Wall Street cultures that were revealed in the 1980s.<sup>106</sup> Women in the technology sector and the venture capital industry often encounter sexual harassment and misogynistic social and workplace cultures proliferate.<sup>107</sup> These toxic masculine cultures make founding new ventures more difficult and also complicate women’s employment in the sector, reducing opportunities for women to acquire experience before launching a venture.<sup>108</sup> Sex segregation leads to discrimination and harassment based on sex.<sup>109</sup> And, work environments that are predominantly male tend to exhibit exaggerated forms of toxic masculinity. Men police the boundaries of the workplace in order to confirm their own masculinity to themselves and to the group, and

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<sup>104</sup> Pao, *How Sexism Works*, *supra* note 1 (quoting unnamed VCs); *see also* HEWLETT ET AL., *THE ATHENA FACTOR*, *supra* note 45, at 9-10.

<sup>105</sup> *See* McGinley, *Masculinities at Work*, *supra* note 32, at 409 (“[E]xperience shows that men in predominately male work environments often denigrate women and other males who do not conform to gender norms, using gender specific language that equates inferiority with being female or feminine.”).

<sup>106</sup> For detailed descriptions of sexual harassment in Wall Street firms in the 1980s, *see generally* SUSAN ANTILLA, *TALES FROM THE BOOM-BOOM ROOM: THE LANDMARK LEGAL BATTLES THAT EXPOSED WALL STREET’S SHOCKING CULTURE OF SEXUAL HARASSMENT* (2003).

<sup>107</sup> *See* PAO, *RESET*, *supra* note 2, at 182-83 (reporting how one female cofounder received “horrendously sexist, racist, and otherwise inappropriate comments”); Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, *N.Y. TIMES* (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html?hpw&rrref=technology&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well> (“[S]exual harassment in the tech start-up ecosystem goes beyond one firm and is pervasive and ingrained.”).

<sup>108</sup> *See* CATHERINE ASHCRAFT & SARAH BLITHE, *NAT’L CTR. FOR WOMEN IN TECH., WOMEN IN IT: THE FACTS 1*, 15 (2010), [http://www.ncwit.org/sites/default/files/legacy/pdf/NCWIT\\_TheFacts\\_rev2010.pdf](http://www.ncwit.org/sites/default/files/legacy/pdf/NCWIT_TheFacts_rev2010.pdf) (“[F]emale attrition is higher in technology than in science and in engineering, but across all three climates, it is considerably higher than men’s attrition.”).

<sup>109</sup> *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1756-61 (1998).

harass and discriminate against women interlopers in an attempt to force them out and establish the work as necessarily masculine.<sup>110</sup>

Consider the challenges Susan Fowler reported that she faced at Uber.<sup>111</sup> When she began her “first official day” with her new team, her manager told her that he “was trying to stay out of trouble at work . . . but he couldn’t help getting in trouble, because he was looking for women to have sex with.”<sup>112</sup> Although she reported the behavior to human resources immediately, nothing was done because human resources said it was his “first offense,” and he was perceived to be a “high performer.”<sup>113</sup> Fowler reported that her concerns were widely shared by other women working at Uber.<sup>114</sup>

In response to Fowler’s allegations, Uber launched internal investigations into its culture and alleged misconduct.<sup>115</sup> Concerns about Uber’s workplace environment emerged into public view.<sup>116</sup> Women reported that they had been groped at company retreats.<sup>117</sup> Leaked audio from internal meetings revealed female engineers calling for then-CEO Travis Kalanick to recognize “that there is a systemic problem here.”<sup>118</sup> Concerns about Kalanick emerged as well. One report revealed that in 2014 he had taken employees to sing karaoke at “an escort bar, where customers may pay for the company of women,

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<sup>110</sup> See ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* 53 (2016); Schultz, *supra* note 109, at 1762-71.

<sup>111</sup> See Fowler, *supra* note 88.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* (“I began to meet more women engineers in the company. As I got to know them, and heard their stories, I was surprised that some of them had stories similar to my own. Some of the women even had stories about reporting the exact same manager I had reported . . .”).

<sup>115</sup> See Todd C. Frankel, *Ex-Uber Engineer Whose Complaint Started Firm’s Internal Investigation Dismisses Findings as “Optics,”* WASH. POST (June 13, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/06/13/ex-uber-engineer-whose-complaint-started-firms-internal-investigation-dismisses-findings-as-optics/?utm\\_term=.37a7024eb92a](https://www.washingtonpost.com/news/the-switch/wp/2017/06/13/ex-uber-engineer-whose-complaint-started-firms-internal-investigation-dismisses-findings-as-optics/?utm_term=.37a7024eb92a) (“Fowler is widely credited with causing ride-hailing giant Uber to launch an internal investigation into its workplace culture after her personal blog post earlier this year detailed her experiences as an Uber engineer.”).

<sup>116</sup> See Mike Isaac, *Inside Uber’s Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), [https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html?\\_r=0](https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html?_r=0).

<sup>117</sup> See *id.* (“One Uber manager groped female co-workers’ breasts at a company retreat in Las Vegas.”).

<sup>118</sup> Priya Anand, *Uber Women to CEO Travis Kalanick: We Have A Systemic Problem*, BUZZFEED NEWS (Feb. 24, 2017, 1:39 PM ET), [https://www.buzzfeed.com/priya/uber-women-to-ceo-travis-kalanick-we-have-a-systemic-problem?utm\\_term=.yjEpwBLYzG#.ya7O3ybWan](https://www.buzzfeed.com/priya/uber-women-to-ceo-travis-kalanick-we-have-a-systemic-problem?utm_term=.yjEpwBLYzG#.ya7O3ybWan).

and some members of the party picked out dates for the evening.”<sup>119</sup> This behavior is not unusual in predominantly male fields, and female employees are forced to decide whether they will go along and try to become one of the boys.<sup>120</sup>

The internal investigations at Uber resulted in some actions, including firings<sup>121</sup> and a slew of recommendations that were unanimously adopted by Uber’s board of directors.<sup>122</sup> The report recommended reallocating the portfolio of “responsibilities that Mr. Kalanick has historically possessed” as well as steps to empower a “senior leader who is responsible for diversity and inclusion.”<sup>123</sup>

Uber’s attempts to minimize the reputational damage from the scandals misfired, seeming to confirm the hostile environment for women. After Uber’s lone female board member, Arianna Huffington, told the press that “this is not a systemic problem” at Uber,<sup>124</sup> another board member generated additional commentary with a sexist remark.<sup>125</sup> In a staff meeting organized for the purpose of discussing the company’s culture, Huffington told attendees that having “one woman on a board often leads to more women joining a board.”<sup>126</sup> Another board member responded that “[a]ctually, what it shows is that it’s much more likely to be more talking.”<sup>127</sup>

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<sup>119</sup> Mike Isaac, *Uber’s C.E.O. Plays with Fire*, N.Y. TIMES (Apr. 23, 2017), <https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html>.

<sup>120</sup> See, e.g., Meredith Lepore, *Going to Strip Clubs with My Male Coworkers is Part of My Career Strategy*, GRINDSTONE (Dec. 23, 2011), <https://web.archive.org/web/20140707104650/http://www.the grindstone.com/2011/12/23/career-management/going-to-strip-clubs-with-my-male-coworkers-is-part-of-my-career-strategy-300/> (noting that women who work with men in financing are faced with supporting or at least ignoring their colleagues’ violent and aggressive behavior in strip clubs as part of their work).

<sup>121</sup> Mike Isaac, *Uber Fires 20 Amid Investigation into Workplace Culture*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/technology/uber-fired.html> [hereinafter *Workplace Culture*].

<sup>122</sup> Mike Isaac, *Uber Embraces Major Reforms as Travis Kalanick, the C.E.O., Steps Away*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/technology/uber-travis-kalanick-holder-report.html>.

<sup>123</sup> *Holder Recommendations on Uber*, N.Y. TIMES: TECH. (June 13, 2017), <https://www.nytimes.com/interactive/2017/06/13/technology/document-The-Holder-Report-on-Uber.html>.

<sup>124</sup> Isaac, *Workplace Culture*, *supra* note 121.

<sup>125</sup> Mike Isaac & Susan Chira, *David Bonderman Resigns from Uber Board After Sexist Remark*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/technology/uber-sexual-harassment-huffington-bonderman.html>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (quoting David Bonderman). This misogynist response apparently reflects the “Bernie Bros.” mentality of Silicon Valley. See, e.g., Thrity Umrigar, *Bernie Bros*



Although Fowler and others brought attention to Uber's work environment, challenges persist throughout the technology space. At Social Finance ("SoFi"), a startup with a four billion valuation, CEO Mike Cagney "bragged about his sexual conquests and the size of his genitalia."<sup>128</sup> SoFi's chief financial officer would talk "openly about women's breasts and once offered female employees bonuses for losing weight."<sup>129</sup>

Survey data confirms that these cultures are common. One survey found that sixty percent of women in the tech industry had received unwanted sexual advances in the workplace.<sup>130</sup> Most of these unwanted sexual advances came from superiors, with many respondents reporting persistent advances from the same superiors.<sup>131</sup> These workplace dynamics make it difficult for women to remain in the industry.

#### 4. Implicit Bias

In addition to the other factors identified, implicit bias against female founders likely plays a significant role in raising the cost of raising capital for women. Unlike purposeful discrimination, implicit bias occurs as a product of automatic mental associations and processes.<sup>132</sup> A convincing body of social science research demonstrates that implicit expectations affect how persons absorb new information.<sup>133</sup> Stereotypes play a significant role in human cognition

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*Made Me Finally Recognize Misogyny in America*, HUFFPOST (May 5, 2016, 9:11 AM ET), [https://www.huffingtonpost.com/thrity-umrigar/bernie-bros-sexism\\_b\\_9847092.html](https://www.huffingtonpost.com/thrity-umrigar/bernie-bros-sexism_b_9847092.html) (describing recognition of sexism).

<sup>128</sup> Nathaniel Popper & Katie Benner, "It Was a Frat House": *Inside the Sex Scandal That Toppled SoFi's C.E.O.*, N.Y. TIMES: TECH. (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/technology/sofi-chief-executive-toxic-workplace.html>.

<sup>129</sup> *Id.* The same CFO also reportedly said that "women would be happier as homemakers" than working at technology firms. *Id.*

<sup>130</sup> ELEPHANT IN THE VALLEY, <https://www.elephantinthevalley.com> (last visited Dec. 20, 2018).

<sup>131</sup> *Id.*

<sup>132</sup> See Anthony G. Greenwald & Linda Hamilton Krieger, *Symposium on Behavioral Realism: Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006) ("This Article introduces implicit bias — an aspect of the new science of unconscious mental processes that has substantial bearing on discrimination law.").

<sup>133</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-92 (1995); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 484 (2005) ("Studies have demonstrated that, once people have developed stereotypic expectancies, they 'remember' stereotype-consistent behavior that did not actually occur; more-over, stereotype-

and tend to influence decisions — even for individuals who genuinely believe that they make decisions as impartial umpires on a case-by-case basis without stereotyping others.<sup>134</sup>

The largely white male venture capital population may be particularly vulnerable to implicit bias in decision-making for a variety of reasons.<sup>135</sup> A lack of awareness or concern about widespread discrimination may lead white male venture capitalists to underinvest in precautions to prevent their own implicit biases from skewing investment decisions.<sup>136</sup> When these biases affect capital allocation decisions, venture capitalists may not succeed at selecting the most profitable investment opportunities. One survey found that white male venture capitalists and founders were significantly less aware “of sexism and racism within the tech industry.”<sup>137</sup> They also reported significantly different experiences when seeking to raise capital, with most women reporting encountering sexism and only eight percent of men reporting any observation of sexism in the capital raising process.<sup>138</sup>

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inconsistent behavior that did occur is stored in a more diffuse manner and is thus less readily retrievable by the decision-maker.”).

<sup>134</sup> See Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 L. & SOC'Y REV. 731, 737 (2011) (“Within the discipline of psychology there has been extensive research establishing that stereotyping, as part of the normal unconscious cognitive processes of categorization, leads to inaccurate and unfair judgments of women and minorities . . .”); Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't) Healthism?*, 50 GA. L. REV. 833, 886-87 (2016) (“Because of the role of stereotyping in human cognition, it may be impossible for decisionmakers not to engage their negative perceptions related to health status. The result is that even individuals who sincerely believe that they are acting without bias may still be making decisions based on stereotypes.”).

<sup>135</sup> See Lyons, *supra* note 16 (stating that as of 2014, only “6 percent” of “investing partners at venture capital companies were women”); Sengupta, *supra* note 16 (reporting that “87 percent identified themselves as white, 9 percent were Asian, 2 percent black or Latino, with the remaining 2 percent calling themselves ‘mixed race’”).

<sup>136</sup> See Caroline Fairchild, *Investors and Startup Founders Think Tech's Diversity Problem Will Solve Itself*, LINKEDIN (Nov. 3, 2016), <https://www.linkedin.com/pulse/startup-founders-investors-think-techs-diversity-solve-fairchild> (“More than half of investors ranked founder commitment to a diverse team as the least of their concerns when considering to invest.”).

<sup>137</sup> *Id.* (“Nearly 80% of female investors have witnessed episodes of sexism in the industry (conscious or unconscious), whereas only 28% of male investors reported witnessing episodes of sexism in the industry.”).

<sup>138</sup> *Id.* (“A majority of female founders said they have witnessed sexism while trying to raise capital, compared to 80% of male founders.”).

Bias may manifest in different ways. One study found that venture capitalists ask different questions of male and female founders.<sup>139</sup> The venture capitalists “tended to ask men questions about the potential for gains and women about the potential for losses.”<sup>140</sup> The researchers found that the bias in question style extended to both male and female venture capitalists.<sup>141</sup>

Implicit biases may play a particularly large role in venture capital investments because early-stage firms often have short track records and do not provide much data for analysis. In this environment, research has found that investors key off of the limited available “hard data” and their “perceptions of the founding entrepreneur.”<sup>142</sup> Some early-stage investors rely almost entirely on intuition. One reported that he did not “care about the business plan . . . as much as I care about the entrepreneur. My most successful deals have come when I trust my gut feelings . . . when I trust only what my gut tells me about the entrepreneur, and filter everything else out.”<sup>143</sup> Research shows, however, that due to stereotypes and implicit biases, the “gut” may fail in determining which ventures deserve funding.<sup>144</sup>

Empirical research shows that investor’s guts have strong filters. These “gut” filters favor men, particularly attractive men.<sup>145</sup> One novel series of studies sought to shed light on whether “the gender imbalance is due to irrational investor behavior.”<sup>146</sup> In one study, the researchers presented participants with the same pitches, alternating whether a male or female voice read the pitch scripts.<sup>147</sup> Both male and female participants preferred pitches presented by male voices, with the male pitch winning 68.33% of the time.<sup>148</sup> When the researchers

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<sup>139</sup> Dana Kanze et al., *Male and Female Entrepreneurs Get Asked Different Questions by VCs — and It Affects How Much Funding They Get*, HARV. BUS. REV. (June 27, 2017), <https://hbr.org/2017/06/male-and-female-entrepreneurs-get-asked-different-questions-by-vcs-and-it-affects-how-much-funding-they-get>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Laura Huang & Jone L. Pearce, *Managing the Unknowable: The Effectiveness of Early-Stage Investor Gut Feel in Entrepreneurial Investment Decisions*, 60 ADMIN. SCI. Q. 634, 644 (2015).

<sup>143</sup> *Id.* at 645 (quoting an investor).

<sup>144</sup> See *supra* notes 139–42 and accompanying text.

<sup>145</sup> Alison Wood Brooks et al., *Investors Prefer Entrepreneurial Ventures Pitched by Attractive Men*, 111 PROC. NAT’L ACAD. SCI. 4427, 4427 (2014) [hereinafter *Investors Prefer*].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 4428–29.

<sup>148</sup> *Id.* at 4429.

added photos to the pitches, participants were “significantly more likely to invest after watching the high-attractiveness male’s pitch.”<sup>149</sup> Collectively, the researcher’s studies found “a profound and consistent gender gap in entrepreneur persuasiveness.”<sup>150</sup> Another study concludes that venture capital is influenced by tangible education and work history credentials, in tandem with cultural beliefs about gender. There are two distinct aspects of venture capitalists’ evaluations: evaluations of the venture and those of the entrepreneur. When evaluating the entrepreneur, venture capitalists valued the technical degree for women much more than for men, largely because in high-tech entrepreneurship cultures, hegemonic forms of masculinity are strongly associated with masculinity and technological prowess and power. Women who lacked documentation of technical expertise through an educational degree were deemed to be less compatible to assume leadership roles in technological companies than men with the same qualifications.<sup>151</sup> Interestingly, women with technical backgrounds and men with non-technical backgrounds appeared to have an advantage in leadership and sociability ratings over their same-gender counterparts.<sup>152</sup> Moreover, for women, the study found, a trusted social tie to the evaluator is more important to the evaluation than for male founders.<sup>153</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (“Both professional investors and nonprofessional evaluators preferred pitches presented by male entrepreneurs compared with pitches made by female entrepreneurs, even when the content of the pitch was the same.”). This study is consistent with numerous studies of hiring discrimination in which equal resumes are given men’s and women’s names or names of black applicants and white applicants. The studies consistently demonstrate a preference for the white male applicants. See, e.g., Sonia K. Kang et al, *Whitened Resumes: Race and Self-Presentation in the Labor Market*, 61 ADMIN. SCI. Q. 469, 491-92 (2016) (finding that black candidates who removed racial indicators from their resumes received more than a twofold increase in interviews for jobs); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WISC. L. REV. 1283, 1298-1301 (describing a study in which resumes with black-sounding names received 50% fewer interview offers); Alexander W. Watts, *Why Does John Get the STEM Job Rather Than Jennifer?*, CLAYMAN INST. FOR GENDER RES. (June 2, 2014), <https://gender.stanford.edu/news-publications/gender-news/why-does-john-get-stem-job-rather-jennifer> (describing research by Corinne Moss-Racusin who found that resumes with male names received more job offers and at a higher rate of pay than those with female names).

<sup>151</sup> See Justine E. Tinkler et al., *Gender and Venture Capital Decision-Making: The Effects of Technical Background and Social Capital on Entrepreneurial Evaluations*, 51 SOC. SCI. RES. 1, 11 (2015).

<sup>152</sup> *Id.* at 11-12.

<sup>153</sup> *Id.* at 12.

Anecdotal accounts of venture capital processes cohere with research findings that investors may misallocate capital toward attractive men and favor their guts over hard data. For example, Ellen Pao reported that if “the guy pitching was hyper-confident and used a lot of technical language, I saw my colleagues take the bait again and again.”<sup>154</sup> She recounts an instance where venture capitalists “were dead set on pouring more money into” a company led by “a charismatic Texan with just enough knowledge of tech to be convincing and more confidence than all our other CEOs combined.”<sup>155</sup> The venture capitalists made the investment without doing financial due diligence even though two chief financial officers had recently “quit after short stints on the job, one after just two weeks.”<sup>156</sup>

### B. Capital Allocation Problems

Systemic gender bias in the capital allocation process drives a host of problems. Bias in venture capital firms has an outsized impact because of the amount of capital allocated and the economic activity driven by venture capital firms. One study found that “public companies with venture capital backing employ four million people and account for one-fifth of the market capitalization and forty-four percent of the research and development spending of U.S. public companies.”<sup>157</sup>

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<sup>154</sup> PAO, RESET, *supra* note 2, at 80.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 81 (reporting Pao’s “educated guess was that they saw something they didn’t like in the books and bailed”). New research on court reform efforts in Chile explains a similar phenomenon. Researchers found that certain “gendered expertise” and “gendered competence” were perceived to exist, and, based on these perceptions, court reforms either succeeded or failed. The criminal court reforms that were identified as masculine and young, high-tech, and different from the “old gentlemen” lawyers were supported well and found success. In contrast, family court reform, that was characterized as less scientific and more connected to “feminine” studies such as psychology received much less legislative support, and it floundered. See María José Azócar Benavente, *Expertos en Derecho: Profesión Legal, Género y Reformas Judiciales en Chile*, 28 REV. DE DERECHO 9, 25-26 (2015) (Chile). These results are examples of implicit biases that favored men as lawyers (especially young, academic men) and masculine legal topics, such as criminal law, over women as lawyers and feminine topics such as family law. The criminal court reform was considered sober and scientific whereas the family court reform was looked upon as emotional and unscientific. See Maria Azocar & Myra Marx Ferree, *Gender, Lawyers and Professional Expertise*, AM. SOC. ASS’N: WORK IN PROGRESS (Dec. 23, 2015), <https://workinprogress.oowsection.org/2015/12/23/gender-lawyers-and-professional-expertise-2>.

<sup>157</sup> Will Gornall & Ilya A. Strebulaev, *The Economic Impact of Venture Capital:*

While the investing acumen of venture capitalists plays a role in the success of venture-backed companies, broader regulatory changes directing more of society's capital to venture capital firms also drive growth. In particular, venture capital firms received massive capital inflows after pension regulations changed.<sup>158</sup> As pension rules relaxed, capital inflows to venture capital firms increased from a relatively modest \$0.1 billion to "\$4.5 billion annually from 1982 to 1987."<sup>159</sup> The capital now gushing into the sector because of these changes allows venture capital firms to fund an increasing volume of companies, increasing the total number of successes.

### 1. Increased Capital Costs Underutilize Women's Talents

The cost of capital plays a critical role in business growth and formation. Lower capital costs allow founders to raise funds more easily and put more capital to work in their ventures.<sup>160</sup> Entrepreneurs without their own capital acquire capital in the markets by offering investors a slice of their venture's equity ownership or by committing to repay a loan.<sup>161</sup> As a general policy preference, policies and norms that lower capital costs and facilitate capital acquisition lead to increased economic growth.<sup>162</sup>

Importantly, the cost of capital to an early-stage entrepreneur depends not only on the amount of equity she must trade in exchange

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*Evidence from Public Companies 1* (Stanford Univ. Graduate Sch. of Bus. Research Paper No. 15-55, 2015).

<sup>158</sup> *Id.* at 5.

<sup>159</sup> *Id.*

<sup>160</sup> See Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 945 (1993) ("It is a safe generalization that no nation should increase the cost of raising capital except for compelling reasons. The lower the cost of capital to a nation's entrepreneurs, the more that will be purchased.").

<sup>161</sup> See Kurtis Urien & David Groshoff, *An Essay Inquiry: Will the Jobs Act's Transformative Regulatory Regime for Equity Offerings Cost Investment Bankers' Jobs?*, 1 TEX. A&M L. REV. 559, 564-67 (2014) (explaining how entrepreneurs can raise capital either through debt or equity).

<sup>162</sup> John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 308 (2007) ("[T]he public (including non-investors) benefits from a reduced cost of capital."); Michael Piwowar, Acting Chairman, Sec. & Exch. Comm'n, Remarks Before the 27th International Institute for Securities Market Growth and Development (Mar. 27, 2017), <https://www.sec.gov/news/speech/remarks-27th-international-institute-securities-market-growth-and-development> ("One of the most important factors in making capital markets work is the cost of capital. If we lower the cost of capital for business and entrepreneurs, this will lead directly to economic growth.").

for capital but also on the transaction costs associated with making the deal.<sup>163</sup> In the venture capital context, some relevant transaction costs for raising capital include the costs associated with: (1) preparing a pitch; (2) getting access to venture capitalists; (3) negotiating deal terms; and (4) continued negotiations with venture capitalists over governance, business strategy, and subsequent rounds of capital raising.<sup>164</sup>

The cost of capital affects all stakeholders. As transaction costs and the cost of capital increase, overall economic efficiency declines. This happens because transaction costs act as a friction in the deal-making and economic development engine.<sup>165</sup> High capital costs undercut real investment, leading to a reduction in job creation, innovation, and development.<sup>166</sup> In contrast, market developments that reduce transaction costs and the cost of capital drive economic growth.<sup>167</sup>

Pervasive gender bias means that female founders face higher and different capital costs than their male peers. In particular, women often report a deal-making environment where investors seek to acquire sexual access to their bodies while negotiating financing terms.<sup>168</sup> Advances may happen even with investors who publicly

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<sup>163</sup> Cf. Geoffrey Miller, *Ethics in Corporate Representation: From Club to Market: The Evolving Role of Business Lawyers*, 74 *FORDHAM L. REV.* 1105, 1109 (2005) (recognizing that behavior that increases transaction costs also increases the cost of capital).

<sup>164</sup> The term “transaction cost” has been used in different ways in the legal literature. David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 *ARIZ. L. REV.* 61, 84 (2005) (“In spite of the pervasiveness of the transaction cost minimization goal, scholars do not share an agreed-upon definition of transaction costs. Usually, definitions vary with the subject under analysis.”).

<sup>165</sup> See Stephen M. Bainbridge, *Must Salmon Love Meinhard? Agape and Partnership Fiduciary Duties*, 17 *GREEN BAG 2d* 257, 268-69 (2014) (“Just as friction reduces the efficiency of a machine, transaction costs are a dead weight loss making transacting less efficient.”).

<sup>166</sup> See Ziven Scott Birdwell, *The Key Elements for Developing a Securities Market to Drive Economic Growth: A Roadmap for Emerging Markets*, 39 *GA. J. INT’L & COMP. L.* 535, 547 (2011) (“If the cost of capital can be decreased, businesses have an incentive to increase real investment, resulting in more jobs, higher income, and greater economic growth.”).

<sup>167</sup> *Id.*

<sup>168</sup> Jessica Guynn & Jon Swartz, *Sexism and Silicon Valley: Women Can’t Raise Cash and Now We Have One More Reason Why*, *USA TODAY* (July 13, 2017, 6:40 AM ET), <https://www.usatoday.com/story/tech/news/2017/07/13/there-hasnt-been-female-mark-zuckerberg-heres-one-more-reason-why/469470001> (“Women have come forward to describe the sexual advances that come with negotiating financing, jobs and partnerships — and retaliation, such as an abrupt end to the business conversation if they rebuff a sexual come-on.”).

portray themselves as diversity allies. For example, when Melinda Epler met with a potential investor about funding for a startup accelerator focused on woman-led companies, he “moved his hand close to hers, let his knee brush against hers and advised her that male investors would find her attractive and she should say nothing when they spoke to her or touched her in inappropriate ways.”<sup>169</sup> The investor also cautioned her against speaking out about the constant advances because investors would blacklist her and frustrate her plans to raise capital.<sup>170</sup> Epler now “advises women and underrepresented minorities not to waste their time trying to raise money from venture capitalists.”<sup>171</sup>

## 2. Reduced Innovation and Diminished Economic Efficiency

Gender bias in venture capital investment processes may generate suboptimal returns for investors and society. This happens when the bias of the persons allocating capital skews the allocation of capital away from more productive uses and toward allocations preferred by the capital allocators.<sup>172</sup> This can happen in different ways. In the retail investment sector, financial incentives for financial advisers to recommend particular products creates a bias toward convincing investors to allocate capital to less profitable ventures that return more capital to intermediaries than to investors.<sup>173</sup> In the venture capital space, a bias against women as entrepreneurs may mean that profitable and social-welfare-enhancing innovations become less likely to be pursued.

Pervasive bias against women reduces the efficiency of capital allocation processes — causing capital to flow to suboptimal uses. This may cause underinvestment in businesses and technology serving markets that white male venture capitalists do not understand. For example, white male venture capitalists may not have much familiarity with breast pumps.<sup>174</sup> Their lack of experience with the product may make it more difficult for them to recognize its value.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181, 185 (2017) (“[C]onflicts of interest also affect the broader economy by distorting the ways in which capital flows to fund business opportunities.”).

<sup>173</sup> *Id.* at 192 (“If the equilibrium were different — rewarding more competition on the merits and the risks instead of efforts to bias financial advisors, these products would likely attract less capital, freeing it for more productive uses.”).

<sup>174</sup> Emily Chang & Ellen Huet, *A Smart Breast Pump: Mothers Love It. VCs Don't*,



This is not the only way in which male-dominated capital allocation processes may undervalue investment opportunities associated with female leaders. For example, the broader financial industry skews overwhelmingly male, though less so than the venture capital subsector.<sup>175</sup> Hedge funds, with only about two percent managed by women, share roughly similar gender ratios with venture capital funds.<sup>176</sup> Despite this, the women that do receive capital in the hedge fund space tend to outperform their male-led peers by significant margins.<sup>177</sup>

Venture capital firms that fail to correct for bias in their capital allocation processes miss profitable opportunities. Some evidence indicates that startups with female founders tend to outperform all-male teams. One venture capital firm recently released the results from ten years of investing data.<sup>178</sup> It found that firms “with a female founder performed 63% better than [its] investments with all-male founding teams.”<sup>179</sup>

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BLOOMBERG (Sept. 21, 2017, 12:09 PM PDT), <https://www.bloomberg.com/news/articles/2017-09-21/a-smart-breast-pump-mothers-love-it-vcs-don-t> [hereinafter *A Smart Breast Pump*] (“[G]etting venture funding can be even harder when your product isn’t one men use.”).

<sup>175</sup> See William Alden, *Wall Street’s Young Bankers Are Still Mostly White and Male, Report Says*, N.Y. TIMES: DEALBOOK (Sept. 30, 2014, 11:09 AM), [https://dealbook.nytimes.com/2014/09/30/wall-streets-young-bankers-are-still-mostly-white-and-male/?\\_r=0](https://dealbook.nytimes.com/2014/09/30/wall-streets-young-bankers-are-still-mostly-white-and-male/?_r=0) (“Wall Street’s gender diversity problem is not confined to the top executives. Even at the entry level, investment bank employees are overwhelmingly men.”).

<sup>176</sup> See Sam Polk, *How Wall Street Bro Talk Keeps Women Down*, N.Y. TIMES: OPINION (July 7, 2016), <https://www.nytimes.com/2016/07/10/opinion/sunday/how-wall-street-bro-talk-keeps-women-down.html> (“Only about 2 percent of hedge fund managers are women. During my years on Wall Street, I never saw a woman run a trading or sales desk, which is the first step toward executive management.”).

<sup>177</sup> See ROTHSTEIN KASS INST., *supra* note 72, at 2.

<sup>178</sup> FIRST ROUND: 10 YEAR PROJECT, <http://10years.firstround.com/> (last visited Sept. 25, 2017).

<sup>179</sup> *Id.*; see also JMG Consulting, LLC & Wyckoff Consulting, LLC, *Venture Capital, Social Capital and the Funding of Women-Led Businesses*, U.S. SMALL BUS. ADMIN. (Apr. 2013), <https://www.sba.gov/content/venture-capital-social-capital-and-funding-women-led-businesses> (finding that venture firms that invested in women-led businesses had more positive performances than firms that did not); Victor Lipman, *Startups with Female Founders Grow Faster*, FORBES (Apr. 19, 2017, 4:20 PM), <https://www.forbes.com/sites/victorlipman/2017/04/19/start-ups-with-female-founders-grow-faster/#cf6be14513ed>.

## II. A THEORY OF VENTURE BEARDING

The term *venture bearding* encapsulates the ways in which women now perform their identities in response to social and economic preferences for idealized white or Asian male identities in startups, technology, and venture capital firms. This Part relates *venture bearding* to identity performance theory. It details how persons with stigmatized identities convert, pass, and cover their identities to access social and economic benefits despite their subordinated status. It introduces *venture bearding* as an alternative form of identity performance at the intersection of entity formation and identity performance.

A. *The Frame: Identity Performance Theory*

Identity performance theory provides a frame for analyzing how gender discrimination in startup, technology, and venture capital firms forces women to assimilate in ways that reify discriminatory norms.<sup>180</sup> As explained above, stigma attaches to persons who differ from the idealized, masculine identity prized in the technology and venture capital context.<sup>181</sup> A range of scholars have catalogued how members of lower status groups will “undertake identity mobilizing strategies to join ‘higher status’ groups by negating characteristics associated with the ‘low status’ group.”<sup>182</sup> Social psychologist Erving Goffman broke identity-negating strategies into three categories: conversion, passing, and covering.<sup>183</sup> In his scholarship on antidiscrimination, Kenji Yoshino applied Goffman’s concepts to detail identity negation in the context of sexual orientation, race, and sex.<sup>184</sup> Conversion here refers to ways in which an individual alters her underlying identity to move out of the stigmatized group.<sup>185</sup> Passing refers to instances where “the underlying identity is not altered, but hidden.”<sup>186</sup> Covering captures

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<sup>180</sup> See Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 874-76 (2013) (describing identity performance theory).

<sup>181</sup> Tariyal, *supra* note 25 (“Many female entrepreneurs I know play up masculine traits, and why shouldn’t we? Research shows investors prefer entrepreneurial pitches presented by men rather than women, even when the content of the pitch is the same.”).

<sup>182</sup> Andrew Tae-Hyun Kim, *Immigrant Passing*, 105 KY. L.J. 95, 126-27 (2016) (presenting research).

<sup>183</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 9, 73, 102 (1963).

<sup>184</sup> See Yoshino, *supra* note 26, at 772.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

instances where a person downplays her underlying identity and minimizes its salience so as to make “it easy for others to disattend” the fact of her identity.<sup>187</sup>

### 1. Conversion

When persons experience strong stigma on account of particular characteristics, converting or changing that underlying characteristic may allow them to escape stigma.<sup>188</sup> Persons will literally alter their identities at great personal cost “to blend into the mainstream.”<sup>189</sup> Even though many now consider sexual orientation as an immutable characteristic,<sup>190</sup> homosexuals were (and to some extent are still) subjected to demands to convert to heterosexual orientations.<sup>191</sup>

Social, legal, and financial pressures from dominant identity paradigms have driven persons to attempt to convert many identity characteristics to more socially advantageous characteristics. Immigrants who converted their names to more “American” versions experienced greater economic prosperity than those who did not.<sup>192</sup> Health insurance fat taxes have mandated that people who are overweight convert their “fat bodies” into thin bodies to escape financial penalties.<sup>193</sup> Many persons have converted from one faith to another and gained access to and membership in new communities.<sup>194</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *See id.* at 774 (“When discriminatory animus against an identity is particularly strong, it may require conversion.”).

<sup>189</sup> Kim, *supra* note 182, at 127.

<sup>190</sup> *See, e.g.,* Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 843-44 (2017) (“Sexual orientation is immutable not because of its cause, but because it is both extremely difficult to alter and so central to a person’s identity that no one should be asked to change that part of themselves.”).

<sup>191</sup> *See generally* Yoshino, *supra* note 26, at 784-810 (detailing the history of attempts to convert homosexuals into heterosexuals).

<sup>192</sup> *See* Costanza Biavaschi et al., *The Economic Payoff of Name Americanization* 1, 25 (IZA Discussion Paper Series, Paper No. 7725, 2013), <http://ftp.iza.org/dp7725.pdf> (“We find, in fact, that immigrants who Americanized their names experienced higher occupation-based earnings growth than those who did not.”).

<sup>193</sup> *See* Rebecca L. Rausch, *Health Cover(Age)ing*, 90 NEB. L. REV. 920, 923 (2012) (“To escape the financial penalties, fat people must either follow a weight loss program, attempting to convert but probably failing, or state that their fatness is beyond their control, rendering them helpless and victimized.” (footnote omitted)).

<sup>194</sup> *See* Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 775 (2017) (In post-conversion a person “becomes, in theory at least, accepted as an equal member of the majority faith community. In other words, she has moved from outsider to member of the majority in-group and has fundamentally altered a hitherto

## 2. Passing

Passing strategies allow persons with disfavored identities to pass as members of the dominant social group by hiding the disfavored aspects of their identity.<sup>195</sup> Passing allows outgroup members to access the social and economic privilege they would be denied if their true identities were known.<sup>196</sup> For example, lesbians who do not reveal their orientation may access economic opportunities that would otherwise be foreclosed.<sup>197</sup>

Individuals have also used corporate entities to conceal their identities.<sup>198</sup> For example, before the Supreme Court ruled that covenants forbidding the sale of land to Black purchasers were unconstitutional,<sup>199</sup> Major Joseph B. Johnson, a former slave, used a corporate entity to buy land with a restrictive covenant.<sup>200</sup> Even though the “corporation [was] composed exclusively of negroes,”<sup>201</sup> a Virginia court declined to unsettle the purchase, instead treating the corporation as a distinct legal entity.<sup>202</sup>

A new dynamic, reverse passing, has also emerged.<sup>203</sup> The term describes “the process by which whites shed their white racial identity

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disadvantaged characteristic.”).

<sup>195</sup> See Yoshino, *supra* note 26, at 772 (“Passing occurs when a lesbian presents herself to the world as straight.”).

<sup>196</sup> See Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 289 (2017) [hereinafter *Reverse Passing*] (“Due to the tangible benefits associated with whiteness and the negative value associated with nonwhiteness, persons who are able to racially identity [sic] as white have every incentive to do so in most contexts.”).

<sup>197</sup> See, e.g., Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133, 136-37 (2005) (“I got a job in Salt Lake City at what was then the largest firm in the state. There was not one openly gay attorney . . . . If they had known I was a lesbian I would not have been hired. This is the way passing privilege works . . . .”).

<sup>198</sup> See Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2027 (2006) [hereinafter *Incorporating Race*] (“The corporation, as a corporate person, a persona ficta, itself constitutes another mask that allows persons to conceal and display their identities.”).

<sup>199</sup> See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (“We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.”).

<sup>200</sup> See Brooks, *Incorporating Race*, *supra* note 198, at 2024.

<sup>201</sup> *People’s Pleasure Park Co. v. Rohleder*, 61 S.E. 794, 795 (Va. 1908), *aff’d on reh’g*, 63 S.E. 981 (Va. 1909).

<sup>202</sup> *Id.* at 796.

<sup>203</sup> See Beydoun & Wilson, *Reverse Passing*, *supra* note 196, at 288-89.

in exchange for a nonwhite racial identity.”<sup>204</sup> This new dynamic may have emerged because of a shifting “valuation scheme within the racial hierarchy caused in part by modern affirmative action jurisprudence.”<sup>205</sup>

### 3. Covering

Covering occurs when a person with a stigmatized identity characteristic minimizes, downplays, and otherwise avoids drawing attention to that characteristic.<sup>206</sup> Yoshino explained that covering requires “that the individual modulate her conduct to make her difference easy for those around her to disattend her *known* stigmatized trait.”<sup>207</sup> People cover in many different ways and whether a behavior serves to pass or cover depends on what others already know.<sup>208</sup>

Khaled Beydoun has described ways in which American Muslims now cover to avoid stigmatization.<sup>209</sup> Immediately after the election of President Trump, some Muslim women stopped wearing headscarves to reduce the salience of their religious identities.<sup>210</sup> Beydoun explains that a “Muslim American male that chooses to shave his beard, for fear of being perceived as an extremist or profiled as a radical . . . capitulates to the negative stereotypes and stigmas the state ascribes to specific expressions of Muslim identity.”<sup>211</sup> Others may cover by going by Anglicized names.<sup>212</sup>

In *Acting White? Rethinking Race in “Post-Racial” America*, Devon Carbado and Mitu Gulati describe behavior of African American workers who perform their racial identities in less threatening ways in

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<sup>204</sup> *Id.* at 288. A famous example is of Rachel Dolezal, the former NAACP leader who passed for Black. See Mary Bowerman, *Rachel Dolezal, Former NAACP Leader Who Claimed to Be Black, Is on Food Stamps*, USA TODAY (Feb. 27, 2017, 8:24 AM ET), <https://www.usatoday.com/story/news/nation-now/2017/02/27/rachel-dolezal-former-naACP-leader-who-claimed-white-food-stamps/98469292/>.

<sup>205</sup> Beydoun & Wilson, *Reverse Passing*, *supra* note 196, at 289; see also Leong, *Racial Capitalism*, *supra* note 29, at 2153-54 (arguing that a system of racial capitalism allows white individuals and white institutions to derive social and economic value by association with nonwhite persons).

<sup>206</sup> Kim, *supra* note 182, at 131 (describing covering).

<sup>207</sup> Yoshino, *supra* note 26, at 837 (emphasis added).

<sup>208</sup> See *id.* at 842 (“The ways in which an individual can cover are so vertiginously plural that they are difficult to catalogue.”).

<sup>209</sup> See Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 1 (2018).

<sup>210</sup> *Id.* at 2-3.

<sup>211</sup> *Id.* at 14.

<sup>212</sup> See, e.g., *id.* at 55-57.

order to gain acceptance in majority-white workplaces.<sup>213</sup> According to Carbado and Gulati, although members of all races perform their identities in the workplace in order to gain the favor of employers, “race can increase the likelihood that one’s sense of self will be in conflict with criteria that an institution values, and, correspondingly, race can increase the pressure one feels to compromise one’s sense of identity.”<sup>214</sup> Racial minorities engage in six different strategies in order to conform to employer expectations, all of which create discomfort and conflict for the employee.<sup>215</sup> These strategies include: racial comfort, strategic passing, using prejudice, racial discomfort, selling out, and buying back.<sup>216</sup> These strategies come at a cost to the individual applicant or employee who has to perform more work than others in order to be successful at work, and must often sacrifice his or her true identity to comply.<sup>217</sup>

Women, too, face demands to engage in covering and other strategies to assure that others accept them in the tech and venture capital worlds. Yet they also often face contradictory demands to both downplay and amplify their femininity at the same time. Yoshino describes this dynamic as the requirement for women to both cover and to reverse cover — “to signal [their] outgroup status along other axes.”<sup>218</sup> The demands for women to both downplay their difference and accentuate their femininity forces women “to strike an Archimedean mean between the poles of being too masculine and being too feminine.”<sup>219</sup> It is a particularly difficult line to walk in the tech industry. As in other industries, female leaders must prove they are communal in order to soften their image as unlikeable, but if they are considered too communal, they run the risk of being seen as incompetent. In the tech industry, women explain that they must learn to act like men. They avoid and look down on other women, knowing that their professional success depends on withstanding aggressive male behavior.<sup>220</sup> But the women’s adoption of male styles is not always successful: it can backfire. Women who adopt men’s

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<sup>213</sup> See generally CARBADO & GULATI, *ACTING WHITE?*, *supra* note 26, at 1.

<sup>214</sup> *Id.* at 26.

<sup>215</sup> See *id.*

<sup>216</sup> *Id.* For an explanation of these strategies, see *id.* at 27-35; see also Ann C. McGinley, *Reconsidering Legal Regulation of Race, Sex, and Sexual Orientation*, 50 *TULSA L. REV.* 341, 343-44 (2015) (reviewing CARBADO & GULATI, *ACTING WHITE*, *supra* note 26).

<sup>217</sup> See CARBADO & GULATI, *ACTING WHITE?*, *supra* note 26, at 35-42.

<sup>218</sup> Yoshino, *supra* note 26, at 906.

<sup>219</sup> *Id.* at 910.

<sup>220</sup> See HEWLETT ET AL., *supra* note 45, at 11.

styles tend to attack other women as “petty” and “emotional,” thereby destroying the possibility of solidarity that could potentially be found in women’s networks. And, in the end, it is virtually impossible for a woman, even one who adopts a male persona, to join the “old boys’ club.”<sup>221</sup> Ellen Pao’s story of a woman who played the game but then ultimately was characterized as not a team player or too aggressive demonstrates what happens to a woman who is perceived to be too masculine.<sup>222</sup>

### B. *Venture Bearding as Identity Performance*

Shifting identity performance to avoid mistreatment and access social and economic benefits is not a new phenomenon.<sup>223</sup> There are many distinctive things that women and minorities “feel pressured to do because of negative assumptions about their identities.”<sup>224</sup> This Article draws on this identity performance frame to coin the process as *venture bearding*. With *venture bearding* strategies, women negotiate and perform not only their own identities but also the identities of startup firms in order to be successful in their businesses. These strategies, like those of racial minorities in majority-white workplaces, are, at a minimum, more work. They also deny the true identities of the women who employ them, behavior that takes a personal and psychological toll, and that harms the public because it does not challenge the stereotypes and assumptions that deny female venture capitalists equal treatment.<sup>225</sup>

The existence of these strategies testifies to the greater degree of opportunity afforded to masculine men. In practice, even ingenious *venture bearding* strategies highlight and reproduce the negative stereotypes ascribed to women’s identities. By yielding to pressures to perform their entities in particular ways, women leave discriminatory

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<sup>221</sup> *Id.*

<sup>222</sup> See, e.g., PAO, RESET, *supra* note 2, at 207-08.

<sup>223</sup> See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (“The basic concepts of signaling and identity performance are familiar to most . . . [Because] women and minorities are often likely to perceive themselves as subject to negative stereotypes, they are also likely to feel the need to do significant amounts of ‘extra’ identity work to counter those stereotypes.”).

<sup>224</sup> *Id.*

<sup>225</sup> See Tariyal, *supra* note 25 (“[T]here is a critical difference between code-switching as a form of expression and as a requirement for survival. Women like me exist in professional and personal ecosystems that devalue not only femaleness, but also any perceived ‘otherness.’ For us, the demand to perform is constant, and there is a tax — physical, mental and emotional — associated with maintaining the mask.”).

norms unchallenged. This is not to say that female entrepreneurs and employees act wrongfully when they cover or otherwise conform to the dominant paradigm, but rather that they may continue to harm themselves and others by confirming the belief that men are superior entrepreneurs. To blame women who engage in covering or passing is to blame the victim of the industry's discriminatory attitudes and behaviors.

The costs of resisting social pressures and unjust gender expectations may be too great to force onto the shoulders of individuals seeking access to economic and social resources.<sup>226</sup> Women must often consider the interests of other stakeholders when they decide how to perform their own identities and how to shape the identities of their ventures. For business leaders, this may include duties to existing investors, employees, and others who have a stake in the success of a business venture. It may also include family obligations.

### 1. Substitution

Identity performance theory predicts that the strength of discriminatory animus against an identity will drive the responses to it.<sup>227</sup> Particularly hostile environments will drive individuals to convert their underlying identity characteristics if they are able.<sup>228</sup> As animus diminishes, the diminished pressure may allow persons to pass or to cover their identities.<sup>229</sup>

As predicted by identity performance theory, some women attempt strategies approaching conversion to access capital. In at least one instance, a female founder strategically converted to a mixed-gender enterprise to increase her ability to access capital.<sup>230</sup> She substituted a man as the public face of the venture to facilitate her access to capital.

Speaking on the condition of anonymity, a female founder revealed that she had grown frustrated with pitching groups of all-male venture capitalists. She perceived that their biases led them to discount both her and her startup. She believed that if a man were pitching the exact

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<sup>226</sup> See McGinley, *Masculinities at Work*, *supra* note 32, at 375 (“Women and men who wish to survive at work must adapt to the hegemonic masculinity practiced at the workplace.”).

<sup>227</sup> Yoshino, *supra* note 26, at 774-75 (“When discriminatory animus against an identity is particularly strong, it may require conversion.”).

<sup>228</sup> See *id.* at 774.

<sup>229</sup> See *id.* at 774-75.

<sup>230</sup> Because revelation of the participants' identities would harm their careers, they have requested to remain anonymous.



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same opportunity, the venture capitalists would be significantly more likely to provide the funding she needed to grow the business.<sup>231</sup> Her comments revealed a firm conviction that discriminatory animus against her sex made raising capital more difficult.

For the purpose of evading discriminatory biases, she strategically converted the startup from an all-female-led firm to a mixed gender firm. She brought a man into the venture to facilitate capital acquisition, allowing the firm to present a masculine identity when pitching investors. Conversion in this context differed from others because the founder converted the identity of the startup instead of her own. By offering contingent equity to a man and putting a masculine identity in front of venture capitalists, she converted the identity of the startup in a meaningful sense.

But there are limits to this form of conversion. The founder described a desire to inhabit a male body as an avatar for purposes of interacting with venture capitalists. She remarked that she wanted to “use a bro like a puppet” and that it would be easier if she could “just put [her] hand up his ass to move his mouth.”

The use of a man as a venture beard resulted in some disjunction. On the substance, he lacked her mastery. He also lacked her drive and passion for the product. She could not control his presentation as she could her own. After he completed a number of unsuccessful pitches, she ultimately abandoned the strategy and fired him.

It may be impossible to know whether this incident represents an isolated case or a more widespread phenomenon. Although predicted by identity performance theory, the female entrepreneurs pursuing these conversion strategies (and the often bearded men in their employ) have little incentive to reveal themselves publicly.

## 2. *Manclusion*

*Venture bearding* also occurs when women elevate men from the background to the foreground to derive economic and social benefits from their male privilege. To describe the dynamic, we coin the term *manclusion*. *Manclusion* occurs when women elevate and include men in economic activities because the presence of the man causes other men to moderate their behavior and improves outcomes.<sup>232</sup>

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<sup>231</sup> Research does support this belief. One study found that both survey participants and experienced investors were more likely to fund ventures pitched by men. See Brooks et al., *Investors Prefer*, *supra* note 145, at 4429.

<sup>232</sup> See Tariyal, *supra* note 25 (“In one of my first meetings, a male investor avoided eye contact with me and addressed his questions to my male co-founder. My co-

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As a strategy, *manclusion* represents a different form of *venture bearding* than substitution. With *manclusion*, the woman does not abdicate her official position as the leader of an entity — she simply elevates and includes a man in economic and social interactions.

Consider the difficulties faced by Janica Alvarez, the CEO of startup Naya Health Inc., a company offering a popular line of smart breast pumps.<sup>233</sup> When she went to pitch investors on her own, they would ask her “how a mother of three stays in such good shape” or how she could manage the company and her kids at the same time.<sup>234</sup> In one meeting, “investors Googled the product and ended up on a porn site. They lingered on the page and started cracking jokes” about the pornography.<sup>235</sup>

To keep investor meetings on track, Alvarez adopted a *manclusion* strategy — she started “bringing her husband with her to pitch meetings.”<sup>236</sup> Once she inserted his masculine identity into the room, “investors never made disparaging comments or asked about the challenges of running a company as a parent.”<sup>237</sup> Her husband, a medical device engineer, said that without him investors treated “her like a little girl trying to play a man’s game.”<sup>238</sup>

*Manclusion* — the inclusion of a man to induce better behavior from other men — grants women access to a borrowed degree of male privilege. This *venture bearding* strategy works because our culture habituates men to extend respect to other men. Men may hesitate before showing disrespect to a woman associated with another man because they may see the woman as that man’s property. Because of the fear introduced by the presence of a potential enforcer, other men moderate their behavior.

*Manclusion* appears particularly distinctive because it is a unique strategy for women in male-dominated environments. Men entering female-dominated environments do not become imbued with a similar social cachet by pulling women of lower rank in their business hierarchy into meetings with outsiders.

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founder, without pause, would politely turn to me and repeat the question verbatim. This went on for multiple rounds as if we were caught in some surreal reenactment of an ‘Abbott and Costello’ skit.”).

<sup>233</sup> See Chang & Huet, *A Smart Breast Pump*, *supra* note 174.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (quoting Jeffrey Alvarez).

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Implementation of the strategy does not always require physical interactions. *Manclusion* may also operate effectively through email communications. It happens when women copy men from their organization on email exchanges so that their digital presence will induce better behavior from their outside correspondents.

*Manclusion* remains problematic for a variety of reasons. It bestows economic benefits, access, and inclusion upon men simply because of their existing male privilege. By definition, *manclusion* occurs only when the masculine identity is useful for mitigating gender bias from other men. It also fails to directly challenge other men on their behavior, leaving misogynistic norms in place. *Manclusion* also contributes to skewed gender ratios by ensuring the overrepresentation of men in leadership roles.

### 3. Digital Passing

Electronic communication now allows some female entrepreneurs to pass for male in a limited subset of interactions. Notably, Penelope Gazin and Kate Dwyer digitally passed as a fictitious male cofounder named “Keith Mann” when interacting with outside developers.<sup>239</sup> By electronically donning Mr. Mann’s masculine identity, Gazin and Dwyer gained access to privilege that they would not have been able to access under their own names.<sup>240</sup>

Other accounts show that presenting masculine identities in online interactions allows women to pass for men and evade discriminatory bias. For example, one man realized that “women do not get the same respect in the workplace” after inadvertently switching email signatures with a female colleague.<sup>241</sup> He reported that his female colleague had “the most productive week of her career” because she did not need to “convince clients to respect her.”<sup>242</sup>

Female founders have been urged to pass in other ways. One venture capitalist published a controversial op-ed in the Wall Street Journal putting the onus on women to conform to a genderless default, to pass and cover their identities online.<sup>243</sup> He argued that

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<sup>239</sup> See Titlow, *supra* note 3.

<sup>240</sup> See *id.*

<sup>241</sup> See Zlata Rodionova, *Gender Inequality: What Happened When a Man and Woman Switched Names at Work For a Week*, INDEP. (Mar. 10, 2017, 11:35 AM), <http://www.independent.co.uk/news/business/news/gender-inequality-man-woman-switch-names-week-martin-schneider-nicky-knacks-pay-gap-a7622201.html>.

<sup>242</sup> *Id.*

<sup>243</sup> See John Greathouse, *Why Women in Tech Might Consider Just Using Their Initials Online*, WALL ST. J. (Sept. 28, 2016, 10:00 AM), <https://blogs.wsj.com/experts/2016/>

adopting a “gender-neutral persona allows women to access opportunities that might otherwise be closed to them.”<sup>244</sup> His advice may be viewed as recommending passing to “make an initial connection with a potential employer or investor.”<sup>245</sup> After a wave of criticism,<sup>246</sup> he apologized for the “dreadful article.”<sup>247</sup> He recognized that his advice “told women to endure the gender bias problem rather than acting to fix the problem.”<sup>248</sup>

Freada Kapor, a technology investor and diversity advocate, pointed out the limited utility of the advice and rather obvious “holes in this strategy.”<sup>249</sup> She explained that if women adopted the strategy while men continued to use their names, the use of initials would create an obvious marker of difference.<sup>250</sup> The strategy also does little for persons with last names that suggest racial difference.<sup>251</sup>

Ultimately, these digital passing strategies offer only limited utility in real world interactions. They may be more likely to backfire than to generate any positive result. Like other *venture bearding* strategies, digital passing decreases women’s visibility and reinforces perceptions that the business world belongs to men.<sup>252</sup>

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09/28/why-women-in-tech-might-consider-just-using-their-initials-online/ (“[W]omen in today’s tech world should create an online presence that obscures their gender.”).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See, e.g., Ruth Graham, *Male Entrepreneur Advises Women to Disguise Their Gender If They Want Success*, SLATE (Sept. 29, 2016, 4:55 PM), [http://www.slate.com/blogs/xx\\_factor/2016/09/29/male\\_entrepreneur\\_john\\_greathouse\\_advises\\_women\\_to\\_disguise\\_their\\_lady\\_names.html](http://www.slate.com/blogs/xx_factor/2016/09/29/male_entrepreneur_john_greathouse_advises_women_to_disguise_their_lady_names.html) (“But Greathouse isn’t advising women to act with professional decorum. He’s advising them to act like faceless, nameless cyphers, thereby tricking people into assuming they’re men.”).

<sup>247</sup> John Greathouse (@johngreathouse), TWITTER (Sept. 29, 2016, 1:01 PM), <https://twitter.com/johngreathouse/status/781584645691289600>.

<sup>248</sup> *Id.*

<sup>249</sup> See Cale Guthrie Weissman, *Female Execs to Contribute VC: Thanks but the Damage (Continues to Be) Done*, FAST COMPANY (Sept. 30, 2016), <https://www.fastcompany.com/3064258/female-executives-the-op-ed-telling-them-to-hide-their-gender> (quoting Freada Kapor).

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> Cf. Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 217 (2002) (“[O]ften the first things we see about the person is whether a person is male and recognizably and appropriately masculine, or female . . . . We do not have the capacity to ignore sex and gender . . . unless it is rendered invisible because it is so ordinary.”).

#### 4. Covering Continues

Discriminatory animus in startups, technology companies, and venture capital firms now places extraordinary pressure on women to both cover and reverse cover at the same time.<sup>253</sup> The pressure to cover demands that women deflect attention from their difference while the simultaneous pressure to reverse cover encourages them to conform to expectations about behavior for women.<sup>254</sup> Kenji Yoshino explained that these demands mean that for women to succeed they must “have the correctly titrated balance of masculine and feminine traits. One must be ‘authoritative’ and ‘formidable,’ but remain an ‘appealing lady.’”<sup>255</sup>

Demands to reverse cover may apply with less force to women who self-identify as lesbian, gay, bisexual, transgender, or queer. In particular, gender-fluid white and Asian women may enjoy greater success with covering strategies than women with more contextually stigmatized identities.<sup>256</sup> One study detailed how these women experienced greater inclusion by presenting in ways that minimized their femininity.<sup>257</sup> One white, bisexual woman used a “gender-neutral style [that] positioned her as an ‘insider’ within a male-dominated team and company.”<sup>258</sup> This presentation insulated her “from the microaggressions and gender-based discrimination that women who were conventionally feminine reported.”<sup>259</sup> Other gender-fluid women achieved “acceptance, in part, by cultivating a style of communication and dress that made them virtually indistinguishable from their male peers.”<sup>260</sup>

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<sup>253</sup> For a broader description of covering and reverse covering, see text accompanying notes 206–19. For an intersectional analysis, see Gowri Ramachandran, *Intersectionality As “Catch 22”: Why Identity Performance Demands Are Neither Harmless nor Reasonable*, 69 ALA. L. REV. 299, 300 (2006) (arguing that “negotiating multiple identity performance demands simultaneously often places intersectionals in a uniquely restricted situation”).

<sup>254</sup> See Yoshino, *supra* note 26, at 910.

<sup>255</sup> *Id.*

<sup>256</sup> See Lauren Alfrey & France Winddance Twine, *Gender-Fluid Geek Girls: Negotiating Inequality Regimes in the Tech Industry*, 31 GENDER & SOC’Y 28, 28 (2016).

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* at 40.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* But see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (finding that the partnership discriminated against Ann Hopkins because she failed to conform to feminine gender stereotypes and was too aggressive in her treatment of staff and holding that it is illegal under Title VII to discriminate against a woman for her failure to live up to stereotypes of how a woman should act).

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Yet in many instances, these identity performance demands to cover and reverse cover may now create insurmountable barriers. Ellen Pao's autobiographical account of her experience as a venture capitalist reads as an extended case study in covering.<sup>261</sup> It captures how inconsistent demands to both minimize gender difference and perform a feminine identity place women in a catch-22. She describes the contradictory demands to both downplay her difference from the masculine norm and the maddening criticisms she faced for failing to conform to expectations about her identity:

We are either silenced or we are seen as buzzkills. We are either left out of the social network that leads to power — the strip clubs and the steak dinners and the all-male ski trips — and so we don't fit in, or our presence leads to changes in the way things are done, and that causes anger, which means we *still* don't fit in. If you talk, you talk too much. If you don't talk, you're too quiet. You don't own the room. If you want to protect your work, you're not a team player. Your elbows are too sharp. You're too aggressive. If you don't protect your work, you should be leaning in. If you don't negotiate, you're underpaid. If you do negotiate, you're complaining. If you want a promotion, you're overreaching. If you don't ask for a promotion, you get assigned all the unwanted tasks.<sup>262</sup>

The continuing pressure for outgroup entrepreneurs to both cover and reverse affects their ability to access capital and other economic benefits.

### III. LEGAL AND PRIVATE ORDERING RESPONSES

*Venture bearding* does not always allow founders to overcome bias and access capital. Even when it does, it still requires many founders to pay a relatively higher cost to access capital than founders with favored identities. If anything, *venture bearding* practices may reinforce discriminatory norms and increase the overall cost of capital for persons without idealized identities. This Part argues that because of the limited reach of anti-discrimination laws, stakeholders should consider options to promote equality and enhance economic growth.

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<sup>261</sup> PAO, RESET *supra* note 2, at 143.

<sup>262</sup> *Id.*

A. *The Limited Reach of Anti-Discrimination Law*

Traditional anti-discrimination law interventions may not succeed at reshaping the business environment.<sup>263</sup> The most basic reason for this failure is that Title VII law applies only to employers in an employment relationship with employees. Thus, a founder attempting to find investors will not have this relationship with those from whom she seeks investment. Moreover, even if there is an employer-employee relationship, Title VII often requires an employee to prove that she has been treated discriminatorily based on her sex by comparing her treatment with others who are not members of her protected class. If there is open and obvious discrimination against a woman as a woman, this requirement of proving a comparator is not necessary, but if the discriminatory treatment is subtle, most courts like to see a comparator who has been treated differently. Moreover, as in Ellen Pao's case, once a victim gets to the jury, proving discriminatory motive is not easy — the jury concluded that despite the terrible treatment she endured which seemed to result from her sex that she had not proved that she was a victim of sex discrimination. This result seems to be due to her failure to convince the jury that she was not an aggressive “bitch,” a stereotype in itself, who deserved what she got. Finally, although there are causes of action under Title VII that redress both intentional and non-intentional systemic discrimination, Title VII emphasizes individual bad actors who reach discriminatory results against other individuals, rather than systemic discrimination, and the Court has made it exceedingly difficult to prove systemic cases.<sup>264</sup>

B. *Private Law and Market Responses*

A close focus on venture capitalists and entrepreneurs risks missing other critical, and often passive, silent, stakeholders.<sup>265</sup> Venture capital

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<sup>263</sup> See Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 58 (2009) (“Antidiscrimination work seeks to punish and prevent discriminatory conduct, rather than shift underlying inequities in favor of broader balance. These efforts fail to rectify gender-based power disparities.”).

<sup>264</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (discussing both systemic disparate treatment and disparate impact cases under Title VII and in dicta limiting those causes of action).

<sup>265</sup> See Christopher Gulinello, *Venture Capital Funds, Organizational Law, and Passive Investors*, 70 ALB. L. REV. 303, 303 (2006) (“The current orthodox view is that investors in U.S. venture capital funds are passive. They delegate decision-making authority and other management responsibilities to the fund manager. Legal scholarship on the U.S. venture capital market, however, has offered surprisingly little

firms serve as intermediaries between institutional investors and entrepreneurs.<sup>266</sup> Because institutional investors provide venture capital firms with much of the capital venture capitalists use to strike deals with entrepreneurs, institutional investors enjoy some leverage to address bias in the capital allocation process.

Notably, the investors providing capital to venture capital funds have substantially different rights than the shareholders of publicly traded corporations. Because institutional investors possess limited rights under current agreements, institutional investors may seek to negotiate for governance covenants in future agreements.

### 1. Limited Options for Fiduciary Suits Under Existing Agreements

Venture capital firms generally owe specific contractual and fiduciary duties to their investors.<sup>267</sup> Most courts and theorists recognize that default fiduciary duties include duties of care, loyalty, and good faith.<sup>268</sup> In theory, institutional investors might consider suits against venture capitalists for breaches of these fiduciary duties if misconduct by venture capitalists causes damage to the venture capital fund.

In practice, however, suits against venture capital funds for breaches of fiduciary duty may be extraordinarily difficult. Most venture capital firms organize their funds as limited partnerships under Delaware law.<sup>269</sup> Delaware allows “drafters of Delaware limited partnerships to modify or eliminate fiduciary-based principles of governance, and

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analysis on why venture capital fund investors are passive.”).

<sup>266</sup> See Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1070 (2003) (“The typical transactional pattern in the U.S. venture capital market is for institutional investors — pension funds, banks, insurance companies, and endowments and foundations — to invest through intermediaries, venture capital limited partnerships usually called ‘venture capital funds,’ in which the investors are passive limited partners.”).

<sup>267</sup> Charles M. Yablon, *Innovation, the State and Private Enterprise: A Corporate Lawyer’s Perspective Reviewing the Entrepreneurial State: Debunking Public vs. Private Sector Myths*, by Mariana Mazzucato (Anthem Press Rev. Ed. 2014), 40 DEL. J. CORP. L. 1017, 1026 (2016) (book review).

<sup>268</sup> See, e.g., *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (describing the fiduciary duty “triad” as including duties of “good faith, loyalty or due care”).

<sup>269</sup> See David Rosenberg, *Venture Capital Limited Partnerships: A Study in Freedom of Contract*, 2002 COLUM. BUS. L. REV. 363, 370 (2002) (“Although systematic data are not yet available, evidence suggests that venture capital contracts are routinely organized under Delaware law . . .”).



displace them with contractual terms.”<sup>270</sup> Venture capital firms take full advantage of this freedom and typically create limited partnership agreements that waive default fiduciary duties.<sup>271</sup>

Without the protection of fiduciary duties, investors may struggle to use lawsuits to hold venture capitalists accountable for their misbehavior. If a limited partnership agreement waives duties of care and loyalty, an investor is unlikely to win a suit alleging that venture capitalists breached nonexistent duties. Given the limited options available to institutional investors under existing agreements, institutional investors must exert influence through other channels.

Initial and reinvestment periods provide institutional investors with significant bargaining leverage.<sup>272</sup> Most venture capital funds exist for approximate ten-year terms.<sup>273</sup> During this window of time, institutional investors may bargain for additional contractual covenants or fiduciary duties, giving them influence over future funding cycles. Institutional investors may focus their efforts at securing specific covenants from venture capital firms to advance equality and ensure that the venture capital fund invests in a gender-diverse portfolio.

## 2. A Private Ordering Mechanism: Governance Covenants

Governance covenants may provide a mechanism for private law to address invidious discrimination in the venture capital space.<sup>274</sup> Institutional investors expect venture capitalists to add value to early-stage companies beyond simply providing a mechanism to transfer

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<sup>270</sup> Dieckman v. Regency GP LP, 155 A.3d 358, 366 (Del. 2017) (describing “settled principles of law governing Delaware limited partnerships”).

<sup>271</sup> See Rosenberg, *supra* note 269, at 382 (“[T]he limited partnership agreement usually includes a waiver of all default duties under the applicable law of limited partnerships (usually Delaware).”).

<sup>272</sup> See D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 345 (2005) (“Exit is not merely optional for venture capitalists. Most venture capital funds have a fixed life, usually ten years with an option to extend for a period up to three years. Any venture capitalist who desires to remain in business, therefore, must successfully raise funds, invest them in portfolio companies, then exit the companies and return the proceeds to the fund investors, who in turn are expected to reinvest in a new fund formed by the same venture capitalist (assuming that the previous investment was successful).”).

<sup>273</sup> See *id.*

<sup>274</sup> We use the term “governance covenant” to denote an agreement for a venture capital firm to meet particularized governance standards itself or to invest only in firms that implement particularized governance mechanisms, such as the creation of a human resources department or the acceptance of codes of conduct.

large sums of institutional capital to early-stage businesses.<sup>275</sup> Both entrepreneurs and institutional investors prize venture capitalists who increase startup success rates by bringing their business knowledge and connections to bear.<sup>276</sup> In theory, this should result in improved governance and decision-making by companies with venture capital investment.

Institutional investors may now need to more actively focus on governance issues because venture capital firms have failed to mitigate governance risks. Recent, public, and value-destroying governance failures at venture-backed firms provide ample cause for institutional investors to pressure venture capital firms to improve governance and workplace cultures at their portfolio companies.<sup>277</sup> Institutional investors may also need to focus on governance provisions because many venture-backed firms remain private for longer periods and no longer implement standard governance reforms to prepare for an initial public offering.<sup>278</sup>

Even if institutional investors seek and obtain governance covenants, their efforts will only partially address the pervasive and systemic stigmas driving entrepreneurs to engage in *venture bearding* practices. Institutional investors have strong incentives to push for governance practices and policies that reduce material risks to their investments. To the extent that invidious bias persists in the capital formation space, entrepreneurs will still face pressure to perform their identities in ways calculated to increase access to capital.

### 3. Market Forces

Private market forces may also address bias-driven funding disparities. If current funding disparities are economically irrational, investors may achieve abnormally profitable returns by targeting investments toward founders with stigmatized identities.<sup>279</sup> Some

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<sup>275</sup> See Rosenberg, *supra* note 269, at 363-64.

<sup>276</sup> Cf. Jay B. Kesten & Murat C. Mungan, *Political Uncertainty and the Market for IPOs*, 41 J. CORP. L. 431, 436 (2015) (“VCs provide at least three non-financial benefits: managerial assistance, reputational capital, and intensive monitoring.”).

<sup>277</sup> Consider, for example, the sexual harassment scandals at Uber and Sofi. See *supra* Part I.A.3.

<sup>278</sup> See Renee M. Jones, *The Unicorn Governance Trap*, 166 U. PA. L. REV. ONLINE 165, 167 (2017) (“[T]here has been little academic discussion of the unique governance challenges posed by an increasing number of Unicorns without discernable plans to pursue the traditional exit strategy for a successful startup — an initial public offering (IPO).”).

<sup>279</sup> See Louis Anthony Steiner, *The Right Deed for the Wrong Reason: A Critical*

funds have already embraced this theory and begun to direct capital toward founders with stigmatized identities.<sup>280</sup> Consider Backstage Capital for an example.<sup>281</sup> Its founder, Arlan Hamilton, calls for funders to recognize how current bias creates an economic opportunity to invest at undervalued prices.<sup>282</sup> Other venture capitalists have also embraced this thesis.<sup>283</sup> These early bets may pay significant returns and a single, salient success may cause other funds to adopt similar strategies.

Some evidence now indicates that gender diversity improves financial performance at venture capital firms. One recent review found that “[d]iversity significantly improves financial performance on measures such as profitable investments at the individual portfolio-company level and overall fund returns.”<sup>284</sup> Researchers also found significant benefits for gender diversity, finding that venture capital “firms that increased their proportion of female partner hires by 10% saw, on average, a 1.5% spike in overall fund returns each year and had 9.7% more profitable exits (an impressive figure given that only 28.8% of all VC investments have a profitable exit).”<sup>285</sup> These figures

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*Examination of Regulation A+ and Its Rationales*, 22 FORDHAM J. CORP. & FIN. L. 155, 180 (2017) (“If this disparity in funding stems not from economically rational factors but rather from biases against women and minorities, we might expect market forces to remedy the problem, since those spurned businesses represent untapped opportunities and potential above-market returns.”).

<sup>280</sup> See *id.* (“[S]everal venture capital funds targeting female-founded companies have cropped up in recent years . . .”).

<sup>281</sup> See generally Clare O’Connor, *Inside Backstage Capital, the VC Betting on (Almost All) Black, LGBT, Hispanic, and Women Founders*, FORBES (Aug. 1, 2017, 1:08 PM), <https://www.forbes.com/sites/clareoconnor/2017/08/01/inside-backstage-capital-the-vc-betting-on-almost-all-black-lgbt-hispanic-and-women-founders/#230fc96e3833> (“In a sector where black women receive only 0.2% of all funding, Backstage Capital overwhelmingly — and intentionally — backs underrepresented founders.”).

<sup>282</sup> See Arlan Hamilton, *Dear White Venture Capitalists: If You’re Reading This, It’s (Almost!) Too Late*, MEDIUM (June 13, 2015), <https://medium.com/female-founders/dear-white-venture-capitalists-if-you-re-not-actively-searching-for-and-seeding-qualified-4f382f6fd4a7> (“Because of the blind spot investors have for this group of people right now, there’s an enormous opportunity to invest at undervalued prices. It won’t always be this way. Adjust your thinking NOW. Adapt NOW.”).

<sup>283</sup> See, e.g., ROSS BAIRD, THE INNOVATION BLIND SPOT: WHY WE BACK THE WRONG IDEAS AND WHAT TO DO ABOUT IT 28 (2017) (“Blind spots cause investors to miss not only companies but also entire markets of people. Too many investors stick to a narrow range of ideas shaped by their own echo chamber . . .”).

<sup>284</sup> Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, HARV. BUS. REV. (July 2018), <https://hbr.org/2018/07/the-other-diversity-dividend>.

<sup>285</sup> *Id.*

strongly suggest that capital allocators may achieve outperformance by shifting additional capital to more diverse venture capital firms.

### C. Public Intervention

Given the importance of venture capital processes to interstate commerce, a future Congress might also intervene and mandate gender equality on the governing boards of venture capital firms with assets above particular amounts.<sup>286</sup> Mandating gender parity might significantly reduce the need for entrepreneurs to engage in *venture bearding* behaviors to secure access to capital. It might also improve risk management by venture capital firms.<sup>287</sup> Congress might conclude that this type of public intervention would lower the cost of capital for approximately half of the population and significantly increase rates of economic growth.<sup>288</sup>

Public intervention might also be justified because the current market equilibrium that extracts *venture bearding* behavior from entrepreneurs also limits the ability of the private market to shift its norms. When women use *venture bearding* strategies to access capital, their presence within the market remains masked. Because women lack visibility in the space, the norms that require women to project idealized masculinized identities persist.

If the United States took a public intervention approach, it would not be the first nation to mandate some form of gender parity in corporate governance. For example, Norway implemented reforms in 2003 to require greater representation for women on corporate

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<sup>286</sup> At least one scholar has pointed out that disparities in venture capital processes might be addressed by the commerce power. See, e.g., Linda R. Crane, *From Gibbons to Lopez: Does the Commerce Clause Remain a Viable Tool for Eliminating the Vestiges of Slavery?*, 4 BARRY L. REV. 71, 89 (2003) (“We’re talking about . . . the lower rate at which Black-Americans have access to venture capital for starting businesses . . . all of which are clearly directly related to interstate commerce . . .”).

<sup>287</sup> See Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms’ Risk Oversight?*, 70 SMU L. REV. 327, 376 (2017) (“Studies reveal that heterogeneous groups may have greater success overcoming herd behavior, groupthink, and relational biases that impact senior executives and boards of directors’ risk management decisions.”).

<sup>288</sup> Moreover, increasing the number of women on the boards may help to eliminate sexual harassment that has become the focus of the #MeToo movement. See Nicole Raz, *Las Vegas Gaming Company Boards Below Average in Women Members*, LAS VEGAS REV. J. (Feb. 13, 2018, 7:56 PM), <https://www.reviewjournal.com/business/casinos-gaming/las-vegas-gaming-company-boards-below-average-in-women-members/> (last visited Feb. 13, 2018).

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boards.<sup>289</sup> The Norwegian Ministry of Children and Equality explained the legislation's importance, pointing out that it would "secure women's influence in decision making processes of great importance for the economy in the society," and that it "is important to make use of all the human resources in our country, not just half of it."<sup>290</sup>

Other nations have followed Norway's example and taken steps to address gender disparities in corporate governance. France acted in 2011 to require that each gender comprise at least forty percent of public company boards.<sup>291</sup> Germany soon followed.<sup>292</sup>

#### CONCLUSION

Widespread bias and stigmatization in the venture capital, startup, and technology sectors now cause many founders to adopt ingenious *venture bearding* strategies. Although these strategies now facilitate access to capital, their use both testifies to widespread bias and risks reinforcing discriminatory norms.

Importantly, the environment giving rise to *venture bearding* strategies imposes costs on society as well as founders. A high cost of capital for founders with stigmatized identities means that the entrepreneurs best situated to serve vast markets may struggle to access capital and many social welfare enhancing technologies may go undeveloped or face significant headwinds.<sup>293</sup> These results lead not only to undeveloped resources but also to the promotion of inequalities of non-favored groups, the very persons who have historically suffered from invidious discrimination. Individual female

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<sup>289</sup> See Rosenblum, *supra* note 263, at 62-63 (describing Norway's reforms).

<sup>290</sup> *Id.* at 66.

<sup>291</sup> See Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 889 (2015) ("In early 2011, France adopted a law that requires men and women each have at least forty percent representation on corporate boards.").

<sup>292</sup> See *id.* at 890.

<sup>293</sup> See, e.g., Tariyal, *supra* note 25.

In my own case, the technology I am developing — a "smart" tampon that tests the endometrial cells shed in menstrual fluid for disease — only complicates matters, partly because our potential funders are unaccustomed to talking about menstruation. Some of my mentors recommended I mask the technology itself: *Strip the deck of "menstrual blood" and call it a novel female substrate*, they suggested. *Don't say you're a "women's health" company. It signals a lack of scientific heft.* I understood them to mean: Try to look as little as possible like what you really are — a woman-led company utilizing female biology to advance health care for half the population.

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founders should not be left with the choice of *venture bearding* or losing capital. The markets combined with legal regulation should redress the vast inequities.