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The Law Has Perpetuated Gender Inequality in the Technology Field

LENA GHAMRAWI*

INTRODUCTION

Women have historically been excluded from almost all aspects of public life.¹ The separate spheres ideology² that dominated the public view of women's roles was reinforced when the Supreme Court issued *Bradwell v. Illinois* in 1873.³ The Supreme Court ultimately expressed that women could not enter the legal profession because their primary duty was to be an obedient wife.⁴ This pervasive sentiment continued to dominate American culture until women began to utilize the court system in the 1970's to demand a change in the status quo.⁵ Now nearly forty-five years later, women are still fighting for inclusion in the workplace in a plethora of areas, including the technology field.⁶ Women currently only comprise 30 percent (30%) of the technology work force, as compared to the 59 percent (59%) of the U.S. labor force, and 51 percent (51%) of the U.S. population.⁷ Are there cultural, biological, or even legal explanations that account for this disparity?

This paper examines how the law has played an imperative role in the exclusion of women in technology and created gender inequality in the technology sector's workforce. Part I assesses the importance of the relationship between young girls studying Science, Technology, Engineering, and Math ("STEM")⁸ subjects and how that correlates to

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1. Wendy W. Williams, *The Equality Crisis: Some Reflection on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1983).

2. Doctrine of Separate Spheres Law and Legal Definition, USLEGAL.COM, <https://definitions.uslegal.com/d/doctrine-of-separate-spheres/> (The Doctrine of Separate Spheres is an early 19th century common law principle that defined gender roles. Women were limited to the domestic sphere in the home and men had control of the public sphere, where they would work and financially support the family.) (last visited Aug. 30, 2017).

3. Williams, *supra* note 1, at 178.

4. Williams, *supra* note 1, at 178.

5. Williams, *supra* note 1, at 175.

6. See Roger Cheng, *Women in tech: The numbers don't add up*, CNET, (May 6, 2016, 6:01 AM), <http://www.cnet.com/news/women-in-tech-the-numbers-dont-add-up/> (explaining that the percentage of women in the tech industry is much lower than the national U.S. labor force).

7. *Id.*

8. *Science, Technology, Engineering and Math: Education for Global Leadership*, U.S.

women working in the technology field today. Part II dissects various employment discrimination cases and experiences highlighting the unique type of discrimination women face in this field. Part III provides suggestions and actions lawyers and policymakers can take to make a positive impact in the technology sector.⁹ In addition to the case law and articles that were used in this research, this paper also explores the personal experiences of four women in the technology field, who are at varying stages of careers, in order to illustrate the effects of systematic gender inequality.

I. STEM AND ITS RELATIONSHIP TO WOMEN IN TECHNOLOGY

A. EXPOSURE TO STEM IS NECESSARY DURING YOUTH

The need to foster an environment where women are included in STEM careers is crucial and became a primary point of interest under the Obama Administration.¹⁰ According to President Obama, “One of the things that I really strongly believe in is that we need to have more girls interested in math, science, and engineering. We’ve got half the population that is way underrepresented in those fields and that means that we’ve got a whole bunch of talent . . . not being encouraged the way they need to.”¹¹ The Obama Administration aimed to tackle this issue by increasing young girls’ engagement in STEM by “encouraging mentoring to support women throughout their academic and professional experiences, and supporting efforts to retain women in the STEM workforce.”¹²

The Obama Administration recognized that the shift in gender equality in STEM must start at an early age.¹³ According to the American Association of University Women, barriers to girls entering STEM fields begin during their primary education.¹⁴ School climates play a significant role in whether young girls decide to pursue STEM studies.¹⁵ Stereotypes about girls not possessing adequate technical skills, gender biases, and hostile teachers can make all the difference

DEP’T OF EDUC., <https://www.ed.gov/stem> (last visited Aug. 30, 2017).

9. In addition to the case law and articles referenced, this paper also explores the personal experiences of four women in the technology field to help illustrate the effects of systematic gender inequality.

10. *See Women in STEM*, OFF. OF SCI. & TECH. POL’Y, <https://web.archive.org/web/20170120023643/https://www.whitehouse.gov/administration/eop/ostp/women> (last visited Aug. 30, 2017).

11. *Id.*

12. *Id.*

13. *See generally id.*

14. *AAUW Issues: Science, Technology, Engineering, and Mathematics (STEM) Education*, AAUW.ORG, <http://www.aauw.org/what-we-do/public-policy/aauw-issues/stem-education/> (last visited Aug. 30, 2017).

15. *Id.*

during a girl's formative years.¹⁶

Elizabeth Engele, founder of MakerGirl,¹⁷ an organization whose mission statement is to “inspire girls to be active in STEM,” discussed the importance of young girls being exposed to STEM.¹⁸ Ms. Engele started this organization as part of her social entrepreneurship class at the University of Illinois at Urbana-Champaign after being frustrated by female classmates who were not “using their full potential.”¹⁹ Ms. Engele's goal is to create a program that empowers young girls to tackle problems by using their creative and analytical skills. Today, MakerGirl has served over 500 young girls through use of their mobile and interactive 3-D printing workshops, Google Glass presentations, and coding sessions.²⁰ Ms. Engele requests that participants be between seven and ten years old as this developmental age is “where girls start saying ‘no’ to trying new things.”²¹

Gender stereotypes are also reinforced at home.²² According to Saadia Muzaffar, founder of TechGirls Canada,²³ the way that parents encourage and celebrate their children's accomplishments can have a lasting impact.²⁴ For example, if a boy and girl both build the same project, the boy is often told that he should be an engineer and the girl is told that she is crafty.²⁵ Another way that parents send subtle messages reinforcing gender bias is when they seek technological help from males instead of female figures.²⁶ Girls need positive affirmation at home so that they can grow up and become engineers and scientists.²⁷ In order to dethrone the idea that STEM skills are more inherent in males, parents must actively support and provide STEM opportunities to their daughters, while deconstructing any implicit biases they may hold themselves.²⁸

B. WOMEN STUDYING STEM FIELDS IN COLLEGE

Researchers have emphasized that girls exposed to STEM disciplines during their primary education must be encouraged to

16. *Id.*

17. MAKERGIRL, <http://makergirl.us/> (last visited Aug. 30, 2017).

18. Interview with Elizabeth Engele, Co-Founder & Executive Director, MakerGirl, in San Francisco, Cal. (May 1, 2016).

19. *Id.*

20. *Id.*

21. *Id.*

22. Kate Rae, *Why girls need STEM and why STEM needs girls*, TODAY'S PARENT (Oct. 3, 2016), <http://www.todayparent.com/kids/why-girls-need-stem/>.

23. TECHGIRLS CANADA, <http://www.techgirls.ca/> (last visited Aug. 30, 2017).

24. *See* Rae, *supra* note 22.

25. *See* Rae, *supra* note 22.

26. Lynda R. Wiest, Ph.D., *Strategies for Parents to Support Daughters in STEM*, UNIV. OF NEV., RENO: NORTHERN NEV. GIRLS MATH & TECH. PROGRAM RESOURCES (July 2014), <http://www.unr.edu/girls-math-camp/resources/parents/tips>.

27. *See* Rae, *supra* note 22.

28. *See* Wiest, *supra* note 26.

major in these fields during college.²⁹ Evidence indicates that many students who initially choose majors in STEM subjects ultimately switch and graduate with a non-STEM degree – a direct reflection of a pipeline system failing.³⁰

Sherina Malkani, a sophomore at the University of California, San Diego, is majoring in bioengineering/biotechnology and wants to eventually work in the pharmaceutical sector of bioengineering for drug companies (i.e. discovering and developing pharmaceutical drugs).³¹ When asked why she chose to study these subjects, she said that she grew up “tinkering with things.”³² She attributes her aptitude in science to her parents since they essentially gave her no other option but to study and be involved in STEM activities.³³ According to Ms. Malkani, male students dominate 70 percent (70%) of her bioengineering classes, and she only knows of one tenured female professor in her department.³⁴ When asked about women studying STEM at the college level, Ms. Malkani adamantly recommends that high school seniors cannot hesitate or second-guess themselves because they need to enroll in the prerequisite classes as soon as they start their college career.³⁵ Due to the competitive nature and volume of coursework, students majoring in STEM subjects should start during their first semester or else they will quickly fall behind.³⁶ In support of this sentiment, Ms. Malkani notes that it is “near impossible to start off studying humanities and then switch to STEM without adding another two or three years of college.”³⁷

To conclude, early engagement is vital, and if young women choose to major in STEM subjects, there needs to be continual support to protect them from any hostile college STEM department environments they may face.³⁸

29. See generally Laurie T. O'Brien et al., *Ethnic Variation in Gender-STEM Stereotypes and STEM Participation: An Intersectional Approach*, 21 AM. PSYCHOL. ASS'N. CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. J. 169 (2015), <https://www.apa.org/pubs/journals/releases/cdp-a0037944.pdf> (discussing the implications of an intersectional approach for understanding the relationship between gender and STEM participation within an American university context).

30. *Id.* at 178.

31. Interview with Sherina Malkani, Research Assistant, The Mali Lab at UC-San Diego, in San Jose, Cal. (Mar. 25, 2016).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Christopher Drew, *Why Science Majors Change Their Minds (It's Just So Darn Hard)*, N.Y. TIMES (Nov. 4, 2011), <http://www.nytimes.com/2011/11/06/education/edlife/why-science-majors-change-their-mind-its-just-so-darn-hard.html> (explaining that the freshman year courses in Engineering are extremely difficult and abstract; thus, leading to high attrition rates).

37. Interview with Sherina Malkani, *supra* note 31.

38. See AAUW.ORG, *supra* note 14.

II. EMPLOYMENT DISCRIMINATION CASES AND EXPERIENCES

A. ELLEN PAO AGAINST KLEINER PERKINS

One of the largest gender discrimination cases in the technology field took Silicon Valley by storm when Ellen Pao brought suit against her former employer, venture capital giant, Kleiner Perkins Caufield & Byers, LLC (“Kleiner Perkins”).³⁹ Her case shed light on the lack of diversity within the technology sector, especially at a prominent time when Silicon Valley’s gender imbalance gained national attention.⁴⁰ Ellen Pao, who holds an undergraduate degree in Electrical Engineering from Princeton, and a J.D. and M.B.A. from Harvard, began her job as chief of staff for a senior partner at Kleiner Perkins in 2005.⁴¹ Kleiner Perkins creates funds to raise capital for emerging companies, focusing on digital technology and biotechnology sectors.⁴² Ellen Pao filed suit against her former employer in 2012, right before she was dismissed from the firm.⁴³

The case was filed in the San Francisco Superior Court under the California Fair Employment and Housing Act of 1959 (FEHA)⁴⁴ with the main causes of actions being employment discrimination based on gender, workplace retaliation, and failure to take reasonable steps to prevent gender discrimination.⁴⁵

During the February 2015 trial, Ms. Pao focused her arguments on the two salient forms of discrimination patterns and practices the defendant exhibited.⁴⁶ Her first allegation was that women were not advancing as quickly as men in the company.⁴⁷ Pao alleged that “she, and other women, received less compensation, [Kleiner Perkins] failed to promote her and other women to senior partner, and that male partners were promoted to senior partner despite inappropriate behavior.”⁴⁸ Her second allegation was that as an effect of women being denied higher positions within the firm, women were allocated

39. Pao v. Kleiner Perkins Caufield & Byers LLC, No. CGC-12-520719, 2013 WL 3224589 (Cal. App. 1st Dist. 2013).

40. David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html>.

41. *Id.*; see also Ellen Pao, LINKEDIN, <https://www.linkedin.com/in/ekpao/> (last visited Sept. 14, 2017).

42. Pao v. Kleiner Perkins Caufield & Byers LLC, No. CGC-12-520719, 2013 WL 3224589 (Cal. App. 1st Dist. 2013).

43. *Id.* at *3.

44. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT OF 1959 (FEHA), CAL. GOV. CODE §12900 (2017).

45. Pao v. Kleiner Perkins Caufield & Byers LLC, No. CGC-12-520719, 2013 WL 3224589, at *1 (Cal. App. 1st Dist. 2013).

46. *Id.* at *7.

47. *Id.* at *3.

48. *Id.*

smaller carried interest percentages from the investment funds.⁴⁹ The managing partners, primarily men, determined the amount of carried interest an employee would receive.⁵⁰ Other facts that were revealed during the trial include the fact that Ms. Pao was not invited on a ski trip and was constantly subject to demeaning statements by men about women at the office.⁵¹ Kleiner Perkins argued that their firm was committed to the promotion of women and that Ellen Pao was fired because she was a “chronic complainer who twisted the facts and wasn’t a team player.”⁵²

After a twenty-four day trial, the jury found for Kleiner Perkins on all accounts.⁵³ When asked by the media about the verdict, the jurors asserted that they focused on the facts and the negative performance reviews that Ms. Pao received during her time at the firm.⁵⁴ The jurors believed that the evidence suggested that “Ms. Pao’s own performance held . . . her back.”⁵⁵ One juror, Steve Sammut, said that hearing testimony of Ms. Pao’s former colleagues regarding her negative attitude and poor work-product highly influenced his decision.⁵⁶

Although Ellen Pao ultimately lost her individual battle, her lawsuit drew national media attention and has moved the conversation forward regarding gender discrimination in the technology world.⁵⁷ Critics are becoming increasingly hyper-aware of the small percentage of women in executive positions, especially at venture capital firms.⁵⁸ “According to research from Babson College, the percentage of female venture capitalists is 6 percent [6%], down from 10 percent [10%] at the peak of the dot-com boom in 1999.”⁵⁹ Ellen Pao continues to champion for gender inclusion and has indicated that although the law silenced her, she will not remain quiet anymore.⁶⁰

49. *Id.*

50. *Id.*

51. See Hari Sreenivasan, *How women in tech see Ellen Pao’s gender discrimination case*, PBS NEWSHOUR (Mar. 27, 2015, 6:40 PM), <http://www.pbs.org/newshour/bb/women-tech-see-ellen-paos-gender-discrimination-case/>.

52. *Id.*

53. David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html>.

54. *Id.*

55. *Id.*

56. *Id.* (explaining that Ms. Pao’s reviews at Kleiner Perkins deteriorated over time).

57. See Sreenivasan, *supra* note 51.

58. See Streitfeld, *supra* note 53.

59. See Streitfeld, *supra* note 53.

60. See Nick Statt, *Ellen Pao drops lawsuit against Kleiner Perkins, will not appeal*, THE VERGE (Sept. 10, 2015, 2:18 PM), <http://www.theverge.com/2015/9/10/9302777/ellen-pao--drops-lawsuit-kleiner-perkins>.

B. SUBSEQUENT GENDER DISCRIMINATION CASES IN THE TECHNOLOGY FIELD

1. Huang v. Twitter, Inc.

Four days after Ellen Pao's case came to an end, Tina Huang, a former Twitter engineer and one of Twitter's original employees, filed a class-action gender discrimination suit against Twitter at the San Francisco Superior Court.⁶¹ Ms. Huang, similarly to Ms. Pao, brought suit under California FEHA⁶² alleging that Twitter engaged in sex discrimination and retaliation.⁶³ Ms. Huang claimed that she was denied promotions, despite excellent reviews, because she was a woman.⁶⁴ Her complaint stated that "men dominated senior positions in the software-engineering group where she worked."⁶⁵

Twitter denied the allegations and announced that women account for about 10 percent (10%) of their technical staff and 21 percent (21%) of their leadership.⁶⁶ Twitter subsequently announced that they pledge to raise those statistics to 16 percent (16%) and 25 percent (25%), respectively.⁶⁷ Twitter's statistics have illustrated that the highest paying jobs are held by overwhelmingly Caucasian and Asian men.⁶⁸ According to Ms. Huang's complaint, "[t]he company's promotion system creates a glass ceiling for women that can not be explained or justified by any reasonable business purpose, because Twitter has no meaningful promotion process for these jobs."⁶⁹ Ms. Huang complained to Twitter's CEO, Dick Costolo, and was then put on leave.⁷⁰ She resigned in 2014 after she felt that she had no other choice for the sake of her career.⁷¹ While the outcome of the case was not publicized, the last action on the case's docket is dated June 17, 2015. It appears that the parties held a joint case management

61. Class Action Complaint for Damages, Huang v. Twitter, Inc., No. CGC-15-544813, 2015 WL 1262889 (Cal. Super. Mar. 19, 2015).

62. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT OF 1959 (FEHA), CAL. GOV. CODE §12900 (2017).

63. Class Action Complaint for Damages, Huang v. Twitter, Inc., No. CGC-15-544813, 2015 WL 1262889, at *2 (Cal. Super. Mar. 19, 2015).

64. Joel Rosenblatt, *Twitter's Gender-Bias Lawsuit Gets Swept Up in the Tech Talent Wars*, BLOOMBERG TECHNOLOGY (Feb. 9, 2016, 9:01 PM), <http://www.bloomberg.com/news/articles/2016-02-10/at-twitter-a-gender-bias-claim-gets-swept-up-in-the-talent-wars>.

65. *Id.*

66. *Id.*

67. *Id.*

68. See Robert Hennelly, *Does Twitter's reset on race and gender go far enough?*, CBS NEWS MONEYWATCH (Sept. 1, 2015, 5:45 AM), <http://www.cbsnews.com/news/does-twitters-reset-on-race-and-gender-go-far-enough/>.

69. *Id.*

70. Rob Price, *Twitter is the latest Silicon Valley company to be sued over gender discrimination allegations*, BUSINESS INSIDER (Mar. 23, 2015, 6:23 AM), <http://www.businessinsider.com/ex-twitter-employee-tina-huang-sues-over-gender-discrimination-in-promotions-2015-3?r=UK&IR=T>.

71. *Id.*

conference and it is highly possible that the case was settled.⁷²

2. *Hong v. Facebook, Inc.*

Another major lawsuit immediately preceding Ellen Pao's case against Kleiner Perkins involved a former product manager and partner in finance at Facebook, Chia Hong.⁷³ Hong claimed that she was discriminated, harassed, and retaliated against because of her sex and race.⁷⁴ Similar to the former cases, Hong recounted many instances where she was belittled, ignored, or subjected to performing remedial and secondary tasks, such as organizing parties and serving drinks to her male superiors.⁷⁵ Ms. Hong alleged that she was once told that the reason she was not integrated into the team at Facebook was "because she looks and talks differently than other team members."⁷⁶ Chia Hong was fired in October 2013, claiming that her termination was motivated by implicit biases.⁷⁷ After being fired, her position was replaced by a "less qualified, less experienced Indian male."⁷⁸ The case was settled in October 2015 for an undisclosed amount.⁷⁹

C. IDENTIFYING GENDER DISCRIMINATION

Three out of the four women interviewed said that they had experienced gender discrimination during their careers. Ms. Malkani, the college sophomore, vividly recalled the time that she walked into the extracurricular rocket club on campus and realized she was the only girl among fifty (50) male students.⁸⁰ Although she felt intimidated, she decided to stay because she was passionate about rocket science.⁸¹ After realizing that none of the men took her seriously at the meeting and were condescending, she never returned.⁸² When asked whether she had found anybody else who had experienced this kind of systemic exclusivity, Ms. Malkani revealed that most female students do not talk

72. *Huang v. Twitter, Inc. Et Al: Joint Case Management Conference Statement*, PLAINSITE.ORG, <https://www.plainsite.org/dockets/2n5u5knc/superior-court-of-california-county-of-san-francisco/tina-huang-v-twitter-inc-et-al/> (last visited Sept. 14, 2017).

73. See Complaint for Damages, *Hong v. Facebook Inc. et al.*, No. CIV532943, 2015 WL 1262142 (Cal. Super. Mar. 12, 2015).

74. Colleen Taylor, *Facebook Sued By Former Staffer Alleging Sex Discrimination, Harassment, Other Charges*, TECHCRUNCH (Mar. 18, 2015), <http://techcrunch.com/2015/03/18/facebook-sued-by-former-staffer-alleging-sex-discrimination-harassment-other-charges/>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Hong v. Facebook, Inc.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hong_v._Facebook,_Inc. (last edited Aug. 31, 2017, 4:36 PM).

80. Interview with Sherina Malkani, Research Assistant, The Mali Lab at UC-San Diego, in San Jose, Cal. (Mar. 25, 2016).

81. *Id.*

82. *Id.*

about this issue with each other.⁸³ She explained that they attempt to ignore it because of the social stigma that follows if they speak out, especially at such a liberal institution.⁸⁴ Ms. Malkani further elaborated that her physics Teaching Assistant never acknowledged her existence; instead he spoke directly to her male counterpart and only communicated with her when he wanted her to collect the lab equipment.⁸⁵

Elizabeth Engele also experienced very similar discrimination at LinkedIn.⁸⁶ Ms. Engele claimed that there was still an “old boys club” environment at the company.⁸⁷ “My boss has to validate everything I say with my male counterpart. If I make a suggestion at a meeting it’s not taken seriously, but if a guy says the same thing then my boss will seriously consider it.”⁸⁸ In addition, Ms. Engele was hyper-cognizant of the way that she acted around her superiors.⁸⁹ She noticed that the men at work seemed more comfortable around their managers, but she constantly felt self-conscious.⁹⁰ According to Margaret Montoya, the feeling of being “on stage” is when one is acutely aware of his or her every gesture, appearance, body language, and tone.⁹¹ Her research suggests that many marginalized groups experience this effect; it is similar to wearing a mask that covers your true self at the detriment of assimilating.⁹²

Professor Kimia Kaul,⁹³ founder of her own start-up and former employee at IBM, Sony, and CompuServe, has experienced pervasive sexism during her twelve years in the technology industry.⁹⁴ Ms. Kaul articulated that gender-based discrimination was entrenched in the technology world’s culture.⁹⁵ When asked whether a glass ceiling existed in the technology sector, Ms. Kaul answered in the affirmative,⁹⁶ “Yes, it’s getting better, but only slightly.” As a founder of her own company, Ms. Kaul recalled the numerous times that investors would make comments like, “[i]f I knew you were this beautiful I would have

83. *Id.*

84. *Id.*

85. *Id.*

86. Interview with Elizabeth Engele, Co-Founder & Executive Director, MakerGirl, in San Francisco, Cal. (May 1, 2016).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Margaret E. Montoya, *Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 197 (1994).

92. *Id.* at 196.

93. Name has been changed at the request of the interviewee.

94. Interview with Kimia Kaul, Professor and Start-up Founder (May 6, 2016) (She earned her PhD in information Science Studies. Kimia has requested to keep her identity protected, so the university where she taught and the name of her start-up will not be disclosed.)

95. *Id.*

96. *Id.*

made a meeting sooner” or “[h]ey Jack, there’s this pretty woman that wants us to invest in her idea.”⁹⁷ Ms. Kaul has even begun collecting anecdotes of other womens’ struggles in the profession because she is an adamant believer that not enough is being done to address this issue.⁹⁸

Similar to the other women interviewed, Ms. Kaul is frustrated when she attends meetings and potential investors only speak to her male subordinate.⁹⁹ “Men are in a position of privilege, so my male employee does not even notice that the investors never once acknowledged me even though ironically it’s my company,” she stated in a jaded tone.¹⁰⁰ When asked which company had the worst policies around gender equality, she quickly responded Sony.¹⁰¹ Ms. Kaul said that the glass ceiling was blatant at Sony; if you were not a white, male engineer, you were not going to be in a position of influence.¹⁰² Ms. Kaul often felt “tokenized” as the only women in her department or at a meeting.¹⁰³

Martha Fineman has studied the effects that tokenism has had on the feminist movement.¹⁰⁴ Fineman argues that tokenism, as representation, is faulty because it reduces the capacity of others to view the tokenized person as a sovereign individual.¹⁰⁵ People will assume that all women have a shared experience and will apply the speaker’s characteristics to all women.¹⁰⁶ Fineman recommends focusing on the message, not the messenger.¹⁰⁷

Despite the bleak (and realistic) outlook that Ms. Kaul had on the industry, our conversation ended on a positive note. Ms. Kaul said that she has learned how to modify her personality in various scenarios and that being the only woman in the room enables her to have more power than people expect.¹⁰⁸ Female founders, as she expressed, constantly have to prove themselves, but that leads them to do a better job promoting their startups to investors.¹⁰⁹

When asked, each interviewee would never make a formal complaint to their managers regarding the discrimination that they experienced. They all shared the same underlying apprehension: their

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See generally MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES*, 34–54 (1995).

105. See *id.* at 45.

106. *Id.* at 46.

107. *Id.* at 45.

108. Interview with Kimia Kaul, Professor and Start-up Founder (May 6, 2016).

109. *Id.*

careers would be tarnished and fighting their employers would be difficult. Usually discrimination is so subtle and nuanced that proving intent is too burdensome of a task.¹¹⁰ Two of the interviewees also noted that they do not fully know the law, legal system, or their legal rights. This lack of accessibility to the legal system and knowledge has deterred many women from bringing suits.

D. THE DIFFICULTY OF PROVING GENDER DISCRIMINATION CASES

Despite the multitude of gender discrimination cases being brought by female plaintiffs in Silicon Valley, the vast majority do not prevail. How is the law affecting these women's chances of success? While most American employers know that gender discrimination in employment violates Title VII of the Civil Rights of 1964,¹¹¹ many fail to address the issue when it surfaces.¹¹²

If plaintiffs have direct evidence of discrimination based on a protected characteristic, they can use that evidence to demonstrate that their employers' adverse actions were motivated by a discriminatory intent.¹¹³ However, proving actual intent is extremely difficult and this is the stage in the litigation process where the plaintiff usually fails.¹¹⁴ Plaintiffs can attempt to prove actual intent through circumstantial evidence and build a *prima facie* case.¹¹⁵ If the plaintiff is able to prove intent through direct or circumstantial evidence, then the burden of proof shifts to the defendant to convey that his or her actions were not motivated by a discriminatory purpose.¹¹⁶ The burden then shifts back to the plaintiff to prove that the defendant's reasons are simply pretexts for the discrimination patterns and practices,¹¹⁷ meaning that the employer's stated reason is false and only intended to mask the true motives.¹¹⁸ Proving intent is a high bar to overcome, which is why these cases become fact-intensive.¹¹⁹

110. See Sharon Bell, *Is this the end of gender wars?*, THE CONVERSATION (July 3, 2013, 12:47 AM), <http://theconversation.com/is-this-the-end-of-the-gender-wars-15719>.

111. TITLE VII OF THE CIVIL RIGHTS OF 1964, 42 U.S.C. §2000e (2017).

112. Caroline Fredrickson, *Why Is It Still So Hard For Women To Prove Workplace Discrimination, Even When It's Painfully Obvious?*, ALTERNET (May 21, 2015, 3:10 PM), <http://www.alternet.org/books/why-it-still-so-hard-women-prove-workplace-discrimination-even-when-its-painfully-obvious>.

113. *Burden of Proof Under the Employment Non-Discrimination Act*, THE LEADERSHIP CONFERENCE (July 1, 2001), <https://web.archive.org/web/20170216191831/http://www.civilrights.org/lgbt/enda/burden-of-proof.html>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *How do I prove sex discrimination?*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-i-prove-sex-discrimination.html> (last visited Sept. 14, 2017).

119. *Id.*

III. LIMITED FUNDING FOR FEMALE ENTREPRENEURS

A. FACTORS AFFECTING VENTURE CAPITALISTS' DECISIONS TO FUND WOMEN

Not only are women being excluded from promotions and fair treatment within the workplace, women who begin their own entrepreneurial endeavors also encounter blatant gender discrimination.¹²⁰ Women-led startups struggle with receiving the funding needed to sustain their ideas.¹²¹ Although the venture capital community is starting to become more aware of the disparity in funding for female-driven startups, there has not been much action to remedy this reality. Approximately thirty-eight percent (38%) of new businesses created in America are owned and operated by women; however, they only receive between two (2%) and six percent (6%) of the available venture capital funds.¹²² What accounts for this inequality?

Many factors play a role when a venture capitalist invests in a new idea, company, or person. Female-founded companies tend to be smaller and typically focused on lower-growth industries, such as retail, food, and cosmetics.¹²³ Starting a technology company is not always a viable option for women who do not have STEM backgrounds, as discussed in earlier sections.¹²⁴ According to the Wharton School of Business at the University of Pennsylvania, evidence suggests that women are less likely than men to even reach out to venture capitalists, based on gender-specific characteristics, such as male hubris and female humility, which already places them at a disadvantage.¹²⁵ A Kauffman Foundation Survey revealed that out of three hundred fifty (350) female technology founders, eighty percent (80%) used their own personal savings as the main resource when funding their venture.¹²⁶

However, even though part of the problem lies with women not asking, implicit biases also play a major factor when deciding to seek funding from venture capitalists.¹²⁷ Laura Huang, a management professor at the Wharton School of Business, explains that “in the context of entrepreneurship, there is so little objective data to go on in the early stages of a venture [that it] makes it easier [for VCs] to be influenced, whether implicitly or explicitly, and make judgments based

120. See *Why VCs Aren't Funding Women-led Startups*, KNOWLEDGE@WHARTON: TECHNOLOGY (May 24, 2016), <http://knowledge.wharton.upenn.edu/article/vcs-arent-funding-women-led-startups/>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

on personal attributes like gender.”¹²⁸ Because the majority of venture capitalists are white men, it is easier for them to form connections with other white men.¹²⁹ Bonnie Crater, CEO of Full Circle CRM, has personally dealt with these adversities, usually being the only woman in the room.¹³⁰ Crater says, “It’s human nature;” investors tend to fund people with similar qualities as themselves, such as “guys who graduated from Stanford are funding young guys graduating from Stanford.”¹³¹ The professional and personal networks of these venture capitalists vastly differ from womens’ networks, making it an access problem for women.¹³² By not having the same resources, networks, and access as men, it is more difficult for women to find thought leaders, who are willing and excited to sponsor, develop, market, and mentor them.¹³³

Another factor that influences mens’ decisions to refrain from funding female-backed startups is that men second-guess womens’ commitments to their venture.¹³⁴ Saikat Chaudhuri, Executive Director of Wharton’s Mack Institute for Innovation Management, believes that due to the extremely demanding nature of the startup world, venture capitalists question whether women will put their work before families.¹³⁵ This lack of confidence is founded on the double standards that society has designed for women. Chaudhuri claims that “despite growing numbers of men who report work/life balance as a concern, they often don’t face the same scrutiny in the community.”¹³⁶

In 2014, Patricia Greene, a professor of entrepreneurial studies at Babson College, conducted an extensive study on venture capital for women and her findings were groundbreaking.¹³⁷ Not only did her research confirm the reasons aforementioned, she found that eighty-five percent (85%) of all venture capital firms have no women on their executive team and a shocking less than three percent (2.7%) of these firms had a woman CEO.¹³⁸ Patricia Greene’s key findings included businesses with female entrepreneurs actually performed as well, or

128. *Id.*

129. *Id.*

130. Tom Kaneshige, *Why Venture Capitalists Don’t Fund Women-Led Startups*, CIO.COM (Feb. 12, 2015, 10:45 AM), <http://www.cio.com/article/2882826/venture-capital/why-venture-capitalists-dont-fund-women-led-startups.html>.

131. *Id.*

132. *Why VCs Aren’t Funding Women-led Startups*, KNOWLEDGE@WHARTON: TECHNOLOGY (May 24, 2016), <http://knowledge.wharton.upenn.edu/article/vcs-arent-funding-women-led-startups/>.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. See Candida G. Brush et al., *Women Entrepreneurs 2014: Bridging the Gender Gap in Venture Capital*, ARTHUR M. BLANK CENTER FOR ENTREPRENEURSHIP AT BABSON COLLEGE 1 (2014), <http://www.babson.edu/Academics/centers/blank-center/global-research/diana/Documents/diana-project-executive-summary-2014.pdf>.

138. *Id.* at 14.

even better, as those led by men, contrary to the skeptical sentiment held by venture capitalists.¹³⁹ Greene asserts that businesses with at least one female on their executive team had higher valuations during all rounds of funding and that venture capital firms with female partners were three times as likely to invest in companies led by women.¹⁴⁰ Finally, her last major discovery was that there had been a decline in the number of female thought leaders in the venture capital community.¹⁴¹ Her research highlighted how unjust the opportunities are for women in this field and how much progress remains.

B. WAYS TO IMPROVE THE IMBALANCE

While the landscape for female founders seems unwelcoming, remedies are available. According to Greene, the biggest hurdle is to change the social perceptions that are so deeply ingrained in the male-dominated venture capital world.¹⁴² One way to achieve this result is to showcase and underscore the success of female-founded startups whose potential for growth exceed the competition.¹⁴³ Another way to combat gender disparity is to actively recruit and promote women to decision-making roles and create more equal representation.¹⁴⁴ The last recommendation from Greene's study is to continue highlighting the gender disparity in order to increase venture capitalists' awareness of their own biases.¹⁴⁵ While many male venture capitalists do not deliberately choose men over women, they will not be more cognizant of their actions until it is made clear to them.¹⁴⁶

An example of a venture capitalist firm taking corrective measures to ensure that women receive the funding they deserve is BBG Ventures. BBG Ventures is currently funded by AOL, growing from AOL's "Built by Girls" initiative.¹⁴⁷ BBG Ventures has taken a public stance stating that "[w]e believe the greatest untapped opportunity for venture capital lies in backing women who are using technology to address common life-challenges and transform daily habits. Women are the dominant users of the fastest-growing mobile and social platforms, and they make or influence 85% of consumer purchases."¹⁴⁸ The firm's approach is effective because they use hard data and

139. *See id.* at 20.

140. *Id.* at 10–11.

141. *See id.* at 11, 18 (The total number of female partners in venture capital firms dropped from 10% to 6% since 1999.).

142. *See id.* at 22.

143. *Id.*

144. *See id.* at 19.

145. *See id.* at 23.

146. *See Kaneshige, supra* note 130 (explaining that most venture capital managing partners making decisions are men, who unknowingly tend to choose people that look like themselves).

147. *About Us*, BBG VENTURES, <http://www.bbgventures.com/about/> (last visited Oct. 9, 2017).

148. *Id.*

economics to prove that investing in women is a tactful and profitable business decision.¹⁴⁹ BBG Ventures is undoubtedly paving the way for other venture capital firms.¹⁵⁰ By demonstrating that investing in women is not as risky as perceived, BBG Ventures has inspired more women to seek funding when they otherwise would not.¹⁵¹

IV. RECOMMENDATIONS FOR LEGAL REFORM

A. MANDATE PAID MATERNITY LEAVE

This section examines the possible ways that the legal field can help create reform in the technology field. The primary way that the law can enhance womens' positions is to ensure generous maternity leave and prioritize job security for women.

Currently, under the federal Family and Medical Leave Act (FMLA),¹⁵² employees are entitled up to twelve (12) weeks of unpaid leave within a twelve month period.¹⁵³ California has adopted its own version of FMLA called the California Family Rights Act¹⁵⁴ (CFRA), which provides unpaid leave.¹⁵⁵ In 2002, California became the first state to provide income replacement for people who wish to bond with their newborn under the Paid Family Leave program.¹⁵⁶

On April 6, 2016 San Francisco passed the Paid Parental Leave Ordinance (PPLO).¹⁵⁷ This ordinance is the nation's most generous paid family leave law yet: employers are now required to offer six weeks of paid leave for new parents.¹⁵⁸ The ordinance took effect in January 2017, applying to both parents and all employees, regardless of their status as part-time or full-time.¹⁵⁹ Funding will be mostly covered by employers; however, concerns about affordability exist.¹⁶⁰

149. *Id.*

150. See Moran Bar, *Built by Girls: Why AOL's new VC fund will only invest in women*, GEEKTIME.COM (June 16, 2015), <http://www.geektime.com/2015/06/16/built-by-girls-why-aols-new-vc-fund-will-only-invest-in-women/>.

151. See *id.* (describing the success of BBG's Breakfast Club and encouragement to women entrepreneurs).

152. 29 U.S.C. §2601 (2017).

153. *Family and Medical Leave Act*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/fmla/> (last visited Oct. 9, 2017).

154. CAL. FAM. RTS. ACT OF 1993, CAL. GOV. CODE §§ 12945.1 TO 12495.2 (2011).

155. See *California Family Leave Laws: Know Your Rights!*, CALIFORNIA WORKER AND FAMILY COALITION 3 (2013), <https://www.sccgov.org/sites/owp/Documents/SCC%20Know%20Your%20Rights.pdf>.

156. *Id.* at 2, 9-11.

157. SAN FRANCISCO, CA. POLICE CODE art. 33H (2016), <https://sfgov.org/olse/sites/default/files/Document/31%20FINAL%20PPLO%20Rules%2012%2023%2016v2.pdf>

158. Madison Park, *San Francisco passes nation's most generous family leave law*, USA TODAY, <https://www.usatoday.com/story/news/2016/04/05/san-francisco-passes-nations-most-generous-family-leave-law/82670058/> (last updated Apr. 6, 2016, 12:02 AM).

159. *Id.*

160. See *id.*

A few employers have begun to inquire about pregnant employees' legal rights, leading some to believe that this ordinance might inadvertently harm employees.¹⁶¹

According to San Francisco's Supervisor, Scott Weiner, "[o]ur country's parental leave policies are woefully behind the rest of the world, and today San Francisco has taken the lead in pushing for better family leave policies for our workers."¹⁶² This ordinance is a step in the right direction, but the laws around paid family leave in the rest of the state and country trail far behind.¹⁶³ America is the only western, industrialized nation that continues to fall behind in terms of supporting working mothers because paid maternal leave is not guaranteed.¹⁶⁴ America's gender equality laws pale in comparison to other developed nations. Hungary, Finland, Sweden, Japan, and Germany all offer over one year of paid maternity leave.¹⁶⁵

Data from three hundred thousand (300,000) students in forty (40) countries revealed that in more "equal" countries, not only are women seen as being capable of achieving success in STEM fields, but they also have access to lengthy government-mandated paid family leave and high-quality child day care.¹⁶⁶ Such government benefits make it more possible for women to pursue demanding careers without being pushed away by cultural and social stereotypes.¹⁶⁷ This sentiment must come from the citizens at a grassroots level, as well as local and state representatives.¹⁶⁸ It is imperative that the government requires employers to provide adequate paid time off without ramifications encouraging more women to prosper in the workforce. These policies must be equally applicable and offered to men and women to create the most effective impact.

B. CHANGE THE EQUAL PROTECTION STANDARD OF REVIEW

Another option is for courts to heighten the level of scrutiny used in gender discrimination cases. Currently, the intermediate scrutiny standard applies to gender discrimination cases.¹⁶⁹ The government must demonstrate that there is an important (or exceedingly

161. *See generally id.*

162. Park, *supra* note 158.

163. *See* Nadja Popovich, *The US is still the only developed country that doesn't guarantee paid maternal leave*, THE GUARDIAN (Dec. 3, 2014, 8:46 AM), <http://www.theguardian.com/us-news/2014/dec/03/sp-america-only-developed-country-paid-maternity-leave>.

164. *See id.*

165. *See id.*

166. Maia Szalavitz, *How Cultural Stereotypes Lure Women Away From Careers in Science*, TIME (March 25, 2013), <http://healthland.time.com/2013/03/25/how-cultural-stereotypes-lure-women-away-from-careers-in-science/>.

167. *See id.*

168. *See id.* (explaining that women are attracted to fields that provide more support).

169. *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

persuasive) government interest at stake and that the law is substantially related to those interests.¹⁷⁰ Unfortunately, this standard can be difficult to overcome for plaintiffs bringing suit.¹⁷¹ As Justice Ruth Bader Ginsburg states “such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.”¹⁷² Yet, these classifications continue to undermine a woman’s ability to bring a successful equal protection claim. In addition, plaintiffs in these cases, like Ellen Pao, have trouble proving the intent of discrimination because it is usually subtle and nuanced.

C. ENSURE EQUAL PAY FOR EQUAL WORK

Another possibility for combating inequality in the technology sector is to ensure that women and men are compensated equally. In January 2016, California passed amendments to the Fair Pay Act¹⁷³ “to address the disparity in earnings between men and women.”¹⁷⁴ William Gould, former Chairman of the National Labor Relations Board, claims that these new amendments are “[the] most ambitious law we’ve seen of its kind. . . . It is more beneficial to female workers.”¹⁷⁵ The primary impetus of this bill was to lower the bar for plaintiffs bringing claims under the Fair Pay Act,¹⁷⁶ and to increase employee awareness of the pay equity law.¹⁷⁷ The new Fair Pay Act¹⁷⁸ will change the landscape for lawsuits brought by employees because it imposes a new affirmative burden of proof on employers to justify pay discrepancies.¹⁷⁹ Other states should follow California’s lead and inflict the same burden on employers to ensure that women are being paid the same for performing “substantially similar work.”¹⁸⁰ The Act also prohibits employers from retaliating against employees who discuss their salaries with other employees.¹⁸¹ By allowing open dialogue,

170. *Id.*

171. *Id.* at 220 (Rehnquist, J., dissenting) (explaining that gender classification issues place a heavier burden of judicial review).

172. *U.S. v. Virginia*, 518 U.S. 515, 534 (1996).

173. FAIR PAY ACT, CAL. LAB. CODE §1197.5 (West 2017).

174. Ed Silverstein, *California employers need to comply with new Fair Pay Act*, INSIDE COUNSEL (Jan. 6, 2016), <http://www.insidecounsel.com/2016/01/06/california-employers-need-to-comply-with-new-fair->

175. *Id.*

176. CAL. LAB. CODE §1197.5 (West 2017).

177. *See* Silverstein, *supra* note 174.

178. CAL. LAB. CODE §1197.5 (West 2017).

179. Silverstein, *supra* note 174.

180. Lisa M. Bowman & Sarah R. Nichols, *Twice in Two Years: California Expands the Fair Pay Act for the Second Consecutive Year*, OGLETREE DEAKINS (Dec. 6, 2016),

<https://ogletree.com/shared-content/content/blog/2016/december/california-expands-the-fair-pay-act-for-the-second-consecutive-year>.

181. Dan Eaton, *Two changes to the California equal pay law coming in 2017 that all employees need to know*, THE SAN DIEGO UNION-TRIBUNE (Dec. 12, 2016, 3:20 PM), <http://www.sandiegouniontribune.com/pomerado-news/business/sd-fi-eaton-20161212->

women may feel more empowered to address wage discrepancies with their supervisors.

CONCLUSION

The path towards achieving greater gender equality in the technology industry begins at an early age.¹⁸² Society, parents, and schools need to emphasize STEM skills during a young girl's formative years, support her through higher education, and provide opportunities for advancement and leadership development within technology companies.¹⁸³ The law should play a larger role in ensuring that women have access to companies by aggressively enforcing Title VII,¹⁸⁴ heightening the standard of scrutiny from intermediate to strict, providing substantial paid leave policies for parents, and ensuring job security if women leave to start a family. The private sector and employers need to continue awareness of possible implicit gender biases during employee hiring and promotion, making women more represented in STEM fields.¹⁸⁵ Finally, venture capital firms should encourage women to be leaders and entrepreneurs by confidently providing financial support to turn their ideas into reality.¹⁸⁶ If society, the government, and employers can implement these policies, women in the technology industry could finally be awarded similar opportunities as men, ultimately allowing them to succeed with greater ease.

story.html.

182. See generally AAUW.ORG, *supra* note 14.

183. See AAUW.ORG, *supra* note 14.

184. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e et seq.

185. See generally AAUW.ORG, *supra* note 14.

186. See generally Brush et al., *supra* note 137.