

SEX DISCRIMINATION IN THE NINETIES, SEVENTIES STYLE:

CASE STUDIES IN THE PRESERVATION OF MALE

WORKPLACE NORMS

By

Michael Selmi*

I. INTRODUCTION

In 1973, Sears Roebuck was sued by the Equal Employment Opportunity Commission for discriminating against women by denying them positions in departments that paid commissions.¹ Nearly thirty years later, Wal-Mart, which for many Americans had replaced Sears as the quintessential shopping destination, was sued for assigning women to limited dead-end jobs without promotional possibilities.² In both cases, the companies defended the make-up of their workforce by claiming that the assignments were based on women's own preferences and that women generally lacked interest in management positions.³ In the last decade, lawsuits nearly identical to that filed against

* Professor of Law, George Washington University Law School. An earlier version of this paper was presented at the 2003 Law and Society Conference held in Pittsburgh, Pennsylvania, and I am grateful for the comments I received at that time, as well as for the excellent research assistance of Stacy Garrick, Terra Nevitt and Emily Bradford.

¹ See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Although the case was decided in the 1980s, it was originally filed in 1973. See *EEOC v. Sears*, 839 F.2d at 307. A substantial critical literature developed around the *Sears* case, much of which focused on the court's conclusion that women had "chosen" the non-commission paying jobs. See, e.g., Vicki Schultz, *Telling Stories About Women in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1799-1839 (1990); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813-45 (1989).

² See Reed Abelson, *6 Women Sue Wal-Mart, Charging Job and Promotion Bias*, N.Y. TIMES, June 20, 2001, at C1.

³ Compare *EEOC v. Sears*, 628 F. Supp. at 1305 ("Sears has proven, with many forms of evidence, that men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women in commission sales jobs in general at Sears, especially in the particular divisions with the lowest proportion of women selling on commission.") with Steven Greenhouse, *Wal-Mart Faces Lawsuit Over Sex Discrimination*, N.Y. TIMES, Feb. 16, 2003, at A22 (noting that a Wal-Mart official "said women's lack of interest in managerial jobs helped explain the lower percentage of women managers.").

Wal-Mart, and which challenge patterns like those at issue in the Sears case, have also been initiated against Home Depot and many of the major grocery chains around the country.⁴

In 1974, the brokerage firm Merrill Lynch was sued for sex discrimination for refusing to hire women as brokers.⁵ The case settled shortly thereafter with a pledge by the firm to hire more women for its broker positions.⁶ A quarter of a century later, Merrill Lynch was again sued for failing to hire women as brokers, and consigning the women it did hire to positions, primarily as sales associates, that typically did not lead to management level jobs.⁷ As discussed in more detail below, similar lawsuits have been filed in the last decade against many of the largest brokerage firms in the country.⁸

These cases, and many others, offer an important challenge to the reigning consensus regarding the persistence of sex discrimination in the workplace. Currently there is a widespread consensus, both in and outside of academia, that workplace discrimination against women has both receded and changed substantially over the last three decades. Virtually all significant discussions regarding discrimination now treat discrimination as subtle, often unconscious in nature, and relatively free of animus or

⁴ These cases are discussed in section II. I have previously written about the Home Depot case. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEXAS L. REV. 1249, 1281-89 (2003).

⁵ See Noelle Knox, *Wall Street Battles Sexual Bias Even as Brokerage Industry Fights Discrimination*, USA TODAY, Sept. 15, 2000, at 1B (discussing 1974 lawsuit).

⁶ *Id.*

⁷ See Stanley Ziemba, *Merrill Lynch Hit With Bias Suit*, CHI. TRIBUNE, Mar. 14, 1997, at B1. The Merrill Lynch case is discussed further in section II, *infra*. One thing that has changed is some of the methods. In 1974, prospective stockbrokers were asked, “Which quality in a woman do you consider most important?” The choices were beauty, intelligence, dependence, independence and affectionateness. Applicants were given two points for answering dependency or affectionateness, one point for beauty, and no points for intelligence or independence. See Knox, *supra* note 5, at 1B.

⁸ The cases filed against stock brokerage firms are discussed in section II *infra*.

what is often described as an intent to discriminate.⁹ The workplace barriers women continue to experience are now more commonly attributed to their family commitments.¹⁰

A series of cases that have arisen over the last decade casts doubt on this portrait of the workplace, and collectively suggest that discrimination remains a more powerful force in labor markets than is typically acknowledged. These lawsuits have targeted particular, and often entire, industries – securities, retail, restaurants and automobile – suggesting that these industries remain mired in sex stereotypes that see women as mothers who are marginal workers with their primary allegiance to be found outside of the labor market or as infiltrators who are infringing on the privilege and status male workers have obtained. Contrary to the emphasis on subtle discrimination, there is rarely anything subtle about the conduct in these cases; rather, all of the cases involve overt sex discrimination, and at least for these industries, provide substantial insight into the persistence of sex segregation and inequality for women.

By highlighting how these cases are inconsistent with the emphasis on subtle discrimination, I do not mean to suggest that the subtle discrimination hypothesis is wrong or even inaccurate; indeed, I have previously written about the importance and effect of subtle discrimination in the workplace and I firmly believe that much of the discrimination women face can be described as subtle, depending on how that term is

⁹ For discussions of the changing nature of sex discrimination and the ways in which such discrimination has become more subtle see VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 603-17 (2000); Barbara Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEMINISM 313, 318-23 (2002); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUMBIA L. REV. 458, 469-89 (2001).

¹⁰ For a sampling of the extensive literature see ANITA ILTA GARVEY, *WEAVING WORK AND MOTHERHOOD* (1999); JOAN WILLIAMS, *UNBENDING GENDER* (2000).

used.¹¹ Rather, what I mean to suggest is that there remains a significant amount of discrimination in the workplace that cannot accurately be described as subtle but which involves the active and conscious exclusion of women from the workplace, and that we must remain focused on the entrenched nature of institutional sex discrimination if we are to make further progress toward greater equality both in and outside of the workplace.

Although the class action cases are generally inconsistent with an emphasis on subtle discrimination, they are consistent with a theory of sexual harassment that has recently been developed by Professors Kathryn Abrams and Vicki Schultz.¹² Under the theories developed by these scholars, sexual harassment is less about sexual desire or dominance and more about preserving male norms within the workplace. As will be discussed in more detail shortly, this theory helps explain the underlying basis for these class action cases, even for those cases that do not involve formal claims of sexual harassment but are instead presented as classic cases of disparate treatment discrimination. Even in the twenty-first century, many male workers, particularly in certain industries that have traditionally been dominated by men, act in ways that are intended to preserve their places by excluding or marginalizing women.

This article will be divided in two distinct sections. In section II, I will discuss the set of cases that have arisen over the last decade in three areas: (1) securities industry; (2) grocery industry and (3) class action sexual harassment cases. In section III,

¹¹ For some of my contributions on the subject see Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1284-89 (1995) (discussing relationship between subtle discrimination and affirmative action); Michael Selmi, *Response to Professor Wax: Discrimination as Accident, Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (exploring meaning of subtle discrimination in the context of Professor Wax's argument). More recently I have cautioned against expansive definitions of subtle discrimination. See Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COL. HUMAN RTS. L. REV. 657 (2003) .

¹² See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

I will then offer some analysis of what these cases can tell us about the nature and persistence of discrimination, and in section IV I will add some reflections on what these cases mean for the way in which we think about sex discrimination in the future. I should also add that this article is primarily intended as what I call a “reminder” paper, with the reminder here being that intentional and overt discrimination remains a vital part of the labor market.

II. THE CLASS ACTION SEX DISCRIMINATION CASES.

During the last decade there has been a sharp rise in prominent class action cases alleging widespread patterns of discrimination.¹³ Many of the most prominent cases, including those filed against Texaco and Coca-Cola, have involved allegations of race discrimination,¹⁴ but there have also been a slew of cases challenging patterns of sex discrimination within a variety of industries. The first major case, which arose in the 1980s, involved a challenge to the job assignments of the State Farm Insurance agency, which had traditionally failed to hire women for positions as insurance agents. That case settled for more than \$150 million, and remains the largest settlement in a sex discrimination case against a private party.¹⁵ Perhaps prompted by the success of the State Farm case, similar cases have been filed challenging discriminatory assignment practices in the securities and grocery industries.¹⁶ At about the same time, a series of

¹³ See Selmi, *supra* note 4, at 1249 (discussing the rise in class action litigation).

¹⁴ See Henry Unger, *Coke to Settle Racial Suit with \$192.5 Million Deal*, ATLANTA J.-CONST., Nov. 17, 2000, at A1 (discussing Coca-Cola suit); Alison Frankel, *Tale of the Tapes*, AM. LAW., Mar. 1997, at 64 (providing a detailed analysis of the Texaco litigation). I discuss the Texaco litigation in Selmi, *supra* note 4, at 1268-80.

¹⁵ See Philip Hager, *State Farm to Pay Women \$157 Million for Job Bias*, L.A. TIMES, Apr. 29, 1992, at A1. The largest sex discrimination settlement, indeed the largest discrimination settlement of any kind, involved the settlement of a lawsuit against the United States Information Agency after nearly twenty-five years of litigation. See Bill Miller and David A. Vise, *U.S. Settles Job Bias Case: A Record \$508 Million is Due Women in USIA Dispute*, WASH. POST, Mar. 23, 2000, at A1.

¹⁶ Many of the grocery store cases were filed by the firm that handled the State Farm case. See Russell Mitchell, *The SWAT Team of Bias Litigation*, BUS. WK., Jan. 23, 1995, at 88. One of the original partners

class action sexual harassment cases have arisen that, as I will discuss in more detail shortly, are closely related to the exclusionary practices that have been challenged in the assignment cases. In this section, I will describe and detail the rise of class action litigation in the securities and grocery industries, as well as the sexual harassment class action cases.

1. *The Securities Industry.*

The securities industry has long been identified as an aggressive male-dominated industry, and indeed, the popular image is not far from the mark. On the trading floor and in Wall Street offices, macho behavior, including crude language and boorish conduct, is often the norm.¹⁷ At the same time, the industry is not just a place to move money but it is also a place where money can be made in droves, and women have long been seeking their place in the industry. Over the last decade, women have gradually infiltrated the securities industry, though they remain a substantial minority in all but the least desirable clerical positions. As of 1996, approximately 15% of the more than 100,000 brokers nationwide were women, and women held fewer than 8% of the positions at the level of Vice President or above.¹⁸ This modest infiltration of women, however, has not transformed the workplace, which remains deeply male and often deeply abusive.

Beginning in the mid-1990s, female brokers have initiated a slew of lawsuits alleging various forms of discrimination, including the failure to promote women, the

in the law firm is also involved in the case against Wal-Mart, which is being handled by a consortium of attorneys.

¹⁷ There is an extensive literature chronicling the behavior that prevails on Wall Street. See, e.g., FRANK PARTNOY, *F.I.A.S.C.O: THE INSIDE STORY OF A WALL STREET TRADER* (1998). For an earlier version detailing the world of investment banking see MICHAEL LEWIS, *LIAR'S POKER* (1989).

¹⁸ See Michael Siconolfi & Margaret A. Jacobs, *Wall Street Fails to Stem Rising Claims of Sex Harassment and Discrimination*, WALL ST. J., May 24, 1996, at C1.

failure to train or mentor women, pervasive sexual harassment, including quid pro quo harassment where male bosses were seeking sexual favors for employment prerequisites. Few of the major firms have been able to escape the allegations, and more lawsuits are likely forthcoming.¹⁹ What is equally clear, although all but one of the cases has settled, the allegations all appear to have been substantiated at least to some significant degree. Indeed, most of the firms did not deny the substance of the allegations; rather, their defenses, to the extent defenses were mounted, contended that the practices were not as pervasive as alleged.²⁰

Likely the best known of the cases was also the first to be filed against the firm that was then known as Smith, Barney, an old line firm that has since become part of the conglomerate Travelers, Inc. Initially filed in 1996, the case alleged that the company systematically discriminated against women in hiring, assignments, pay and promotions, as well as through pervasive sexual harassment.²¹ According to the allegations, only five percent of Smith Barney's brokers were women, and less than two percent of its branch managers were women. The company, on the other hand, claimed that women accounted for 13% of its brokers, and just over 2% of its branch managers.²² The lead plaintiff in the case, Pamela Martens, was a 50-year old women who had worked at the firm for ten years and who managed \$187 million for the company, but who was fired two days after

¹⁹ The cases are listed in Table One.

²⁰ As discussed below, most of the cases have settled without substantial litigation. Currently, a case filed against Morgan Stanley is being litigated, and that case may produce more detailed judicial determinations. As a result, most of the case descriptions are provided based on journalistic accounts, motions filed in the cases, and stories told by parties, rather than from published opinions.

²¹ See Sandra Tory & Jay Matthews, *Three Women Sue Smith Barney: Former, Current Employees Accuse Brokerage of Discrimination*, WASH. POST, May 21, 1996, at D3.

²² *Id.*; see also *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 250 (S.D.N.Y. 1998).

she complained about discriminatory behavior in her New Jersey office and retained an attorney to pursue her complaints.²³

More women joined the lawsuit shortly after it was filed and the case was eventually certified as a class action consisting of more than 20,000 past and former employees. Many of the allegations have now become commonplace in the securities cases. In particular, the plaintiffs alleged that they were systematically excluded from lucrative broker jobs and instead channeled into low-paying positions as sales assistants.²⁴ Those women who became brokers were typically denied the most important accounts, received little to no mentoring, and were subjected to gross and extensive harassment.²⁵ The case became best known for what was described as a “boom boom” room -- a room that was located in the basement of the Garden City, New York office where male brokers would go at the end of the day to drink from a garbage can and from which women were excluded.²⁶ At that same office, women were ordered to wear short skirts and strippers were a frequent accompaniment for the male brokers and some of their clients,²⁷ and one of the managers wore a gun strapped to his ankle while the branch manager occasionally brandished his own gun in the office.²⁸

As a legal matter, the case also became important as a challenge to the mandatory arbitration proceedings that had been instituted by the brokerage houses for all of their

²³ The case has been chronicled in a book by SUSAN ANTILLA, *TALES FROM THE BOOM, BOOM ROOM: WOMEN VS. WALL STREET* (2002).

²⁴ See Kristen Downey Grimsley, *26 Women Sue Smith Barney, Allege Bias*, WASH. POST., Nov. 6, 1996, at C11.

²⁵ See, e.g., Leah Spiro, *Smith Barney's Woman Problem*, BUS. WK., June 3, 1996, at 102.

²⁶ ANTILLA, *supra* note 23, at 59-60.

²⁷ See *Women Claimed Smith Barney Treated Them the Old Fashioned Way*, 7 WORLD ARB. & MEDIATION REP. 147 (1996).

²⁸ ANTILLA, *supra* note 23, at 62.

employees.²⁹ The class action allegations were seen as a way around the arbitration proceedings, and ultimately the case was settled in a manner that allowed members of the plaintiff class to avoid the mandatory proceedings in favor of a more neutral arbitration forum.³⁰ Under the settlement, more than 1900 women filed complaints, the vast majority of whom were former employees.³¹ Most of the claims were successfully settled for amounts that were not disclosed. However, under the arbitration system established pursuant to the settlement, one broker recently received an award of \$3.2 million, including \$1.5 million in punitive damages as a penalty for the company's tolerance of pervasive sexual harassment.³² In addition to the individual relief, the settlement required Smith Barney to spend \$15 million toward various diversity initiatives, including training.³³

²⁹ In the last decade, there has been a tremendous amount of litigation involving clauses that require employees to arbitrate claims against their employer, and these causes initially gained their popularity in the brokerage industry as an adjunct to arbitration clauses that clients signed to adjudicate claims against their brokers. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (permitting arbitration of age discrimination claim as part of a securities employment agreement); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1 (1st Cir. 1999). For a sampling of the literature see Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255 (1998); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 NYU L. REV. 1344 (1997); Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 S.CT. ECON. REV. 209 (2000); Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?* 53 DISP. RESOL. J. 40 (1998); Kahterine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

³⁰ See *Martens v. Smith Barney*, 1998 WL 1661385 (SDNY 1998) (final order and Judgment Approving Class Action Settlement and Dismissing Claims). In response to the legal developments, including the Smith Barney case, a number of other firms have adjusted their arbitration policies to make them more flexible. See Patrick McGeehan, *PaineWebber to Permit Suits on Harassment*, WALL ST. J., Dec. 4, 1998, at C1.

³¹ See Debra Baker, *Tangled Up in Ticker Tape*, ABA JOURNAL, Dec. 1999, at 44. Thirteen hundred of the claimants settled without going through the arbitration process. See Gary Weiss, *A Settlement That's Not Settled*, BUSINESS WEEK, Oct. 30, 2000, at 164. Another 38 members opted out of the settlement, including the lead plaintiff and a collateral proceeding began that was designed to challenge the terms of the agreement. See *Martens v. Thomann*, 273 F.3d 159 (2d Cir. 2001).

³² See Randall Smith, *Salomon is Told to Pay Broker \$3.2 Million*, WALL ST. J., Dec. 17, 2002, at C1. In contrast, the first woman to go through the arbitration system lost her claim and obtained no relief. See Robert Trigaux, *Up Against the Wall*, ST. PETERSBURG TIMES, Feb. 24, 2003, at 1E.

³³ See Patrick McGeehan, *Judge Approves Class-Action Settlement for Sex Harassment at Smith Barney*, WALL ST. J., July 27, 1998, at A4 (discussing settlement terms).

One year after the Smith Barney case was filed, a similar class action claim was initiated against Merrill Lynch, which at the time of the lawsuit was the nation's largest brokerage firm with more than 13,000 brokers.³⁴ As noted earlier, Merrill Lynch had actually been sued by the Equal Employment Opportunity Commission for discrimination against women twenty years earlier.³⁵ The 1974 case was settled with a pledge by Merrill Lynch to hire more women for a five-year period, but the company never met the targets that were established as part of that settlement and no one ever seemed to notice.³⁶ By the time the suit was filed in 1996, 5.8% of Merrill Lynch's brokers were women, about the same percentage that had existed in 1990.³⁷

Although the salacious harassment claims that had been a central part of the Smith Barney case were absent in the action against Merrill Lynch, the substance of the underlying claims was nearly identical. The class action alleged that women were systematically discriminated against in pay and promotions largely by the subjective way in which business was channeled to male brokers.³⁸ As was true of Smith Barney, and the other cases that were filed, the women also contended that they had been excluded from golf and strip club outings with clients, and that the company typically viewed its female employees as secondary earners.³⁹ For example, one of the lead plaintiffs, an experienced broker with an MBA, was asked during her interview how much money her

³⁴ See Ann Wozencraft, *Bias at the Bull: Merrill Lynch's Class Action Settlement Draws a Crowd*, N.Y. TIMES, Feb. 27, 1999, at C1.

³⁵ See note 5 *supra*.

³⁶ See Noelle Knox, *Wall Street Battles Sexual Bias Even as Brokerage Industry Fights Discrimination*, USA TODAY, Sept. 15, 2000, at 1B (noting that Merrill Lynch had agreed to a goal of having women constitute 16% of all new hires annually but that "[t]wenty years later, Merrill Lynch had not yet reached the target").

³⁷ See Ann Wozencraft, *Bias at the Bull: Merrill Lynch's Class Action Settlement Draws a Crowd*, N.Y. TIMES, Feb. 27, 1999, at C1.

³⁸ *Id.* ("Among [the plaintiffs'] chief concerns are how accounts from departing workers, walk-ins, leads and referrals are distributed."). See also *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1464 (N.D. Ill. 1997).

³⁹ See Susan E. Reed, *Taking the Bull By the Horns*, AMER. PROSPECT, Aug. 14, 2000, at 34-35.

husband made.⁴⁰ At a firm meeting of more than 100 female brokers, it was discovered that none of the women present had been chosen to participate in a new program aimed at generating new investor accounts.⁴¹ The lead plaintiff in the case, Marybeth Cremin, alleged that her supervisor made disparaging remarks about her status as a working mother, and told her that she would be more successful if she divorced her husband.⁴² When Cremin returned to work after a maternity leave, she was ordered to surrender all of her accounts and she was promptly fired.⁴³

One year after the case was filed, the parties settled on terms that were much like those adopted in the Smith Barney case, with the important exception that Merrill Lynch did not commit any funds to diversity efforts.⁴⁴ Of the 22,000 member class, it was determined that 2,700 individuals were eligible to file claims, and more than 900 (one of three) ultimately did.⁴⁵ The company settled most of the claims for amounts that reportedly ranged from \$20,000 to \$40,000.⁴⁶

⁴⁰ *Id.* at 35.

⁴¹ See Wozencraft, *supra* note –, at C1.

⁴² Cremin v. Merrill Lynch, 957 F. Supp. at 1464.

⁴³ *Id.*

⁴⁴ See Patrick McGeehan, *Merrill Lynch Settles Sex-Bias Lawsuit Creating a System to Resolve Complaints*, N.Y. TIMES., May 5, 1998, at C25.

⁴⁵ See Robert Manor, *Sex Bias Case Could Cost Broker Millions*, CHICAGO SUN-TIMES, Mar. 2, 1999, at 39.

⁴⁶ See *Merrill Lynch Offers to Settle With Women in Gender-Bias Cases*, WALL ST. J., Feb. 1, 2000, at C16.

Table One
Securities Class Action Defendants
1993-2002

American Express Financial Gruntal Corp. Lew Lieberman Merrill Lynch Morgan Stanley Olde Discount Smith Barney US Bancorp Piper Jaffrey
--

As indicated in Table One, other cases with similar allegations abound. Following on the heels of the Merrill Lynch settlement, two cases were filed against American Express and Morgan Stanley. The American Express case, which also included allegations of age discrimination, alleged systemic discrimination against women who applied for or attained the position of financial advisor.⁴⁷ Like the other cases, the plaintiffs also alleged discrimination in assignments, training and mentoring as a result of sex stereotyping, namely that women were not as aggressive as men.⁴⁸ The case settled for \$31 million and a series of proposed reforms, including new means of distributing accounts to its employees.⁴⁹ In contrast, rather than settling its case, Morgan Stanley is currently embroiled in class action litigation with private plaintiffs assisted by the Equal Employment Opportunity Commission, which has also filed a claim for sex discrimination against the company.⁵⁰ One of the lead plaintiffs in the Morgan Stanley

⁴⁷ See *Kosen v. American Express Financial Advisors*, Civil Action No. 01:02CV0082 (D.D.C. 2001), ¶ 1.

⁴⁸ *Id.* at ¶ 30.

⁴⁹ See David Phelps, *Judge Approves Amex Settlement in Sex, Age-Discrimination Lawsuit*, *Star Tribune*, June 18, 2002, at 3D; Jerry Markon & Jill Carroll, *Financial Firm Agrees to Settle Bias Lawsuit*, *WALL ST. J.*, Feb. 21, 2002, at A3.

⁵⁰ See Charles Gasparino & Gaston F. Ceron, *EEOC Joins Wall Street Sex-Bias Suit*, *WALL ST. J.*, Sept. 11, 2001, at C1.

case was a high-ranking woman with an annual salary that exceeded \$1 million a year and who was fired shortly after she complained about not being promoted to a managing partner position.⁵¹ Similar cases or claims of system-wide discrimination have also been filed against Olde Securities, US Bancorp, Lew Lieberman and Gruntal Co., and large individual cases that have the potential to expand to class actions have been filed against ING Barings, JP Morgan, and Kidder Peabody, the latter of which involved claims originally filed in 1993.⁵²

Although it is always difficult to draw definitive conclusions from settled cases, it is not too much to suggest that these cases, in both their volume and size, describe an industry that remains resistant to change and hostile to women. Equally clear, the lawsuits do not appear to have brought fundamental change. In 2001, only 15% of the brokers were women and women held 12.2% of the branch manager positions.⁵³ At Merrill Lynch, despite its recent lawsuit, women's representation among brokers has increased from 15 to 16%, or just one percent higher than the original goal from its 1974 lawsuit.⁵⁴

2. *The Grocery Industry.*

The grocery industry employs more than three million individuals, and remains one of the few large industries where employees can earn decent wages with substantial

⁵¹ See Patrick McGeehan, *Wall Street Highflier to Outcast: A Woman's Story*, NEW YORK TIMES, Feb. 10, 2002, at C1.

⁵² See Kate Kelly, *Floor Gover at Big Board Claims Sex Bias at ING Barings*, WALL ST. J., Jan. 11, 2001, at C1; Patrick McGeehan, *Duo Pursues Sex-Bias Cases on Wall Street*, WALL ST. J., May 14, 1997, at C1 (Olde Discount); Leon Nathans Spiro, *The Angry Voices at Kidder*, BUS. WK., Feb. 1, 1993, at 60; Benjamin Weiner, *Three Women Accuse Investment Concern of Sexual Harassment*, N.Y. TIMES, April 29, 1997, at B4 (Lex Lieberman); *Former Employee Files Lawsuit Charging J.P. Morgan Securities with Bias*, N.Y. TIMES, April 11, 2001, at C13; Thomas J. Mulligan, *EEOC Sues Brokerage in Gender Bias Cases*, L.A. TIMES, Sept. 11, 2001, at C1 (noting case was seeking class action status).

⁵³ See Securities Industry Association, Report on Diversity Strategy, Development and Demographics 12 (2001).

⁵⁴ See Reed, *supra* note 39, at 36 ("In 1996, when Cremin began her lawsuit, only 15% of the financial consultants at the firm were female . . . Today only 16 percent are female.")

promotional possibilities without possessing a college degree.⁵⁵ Promotions to managers have traditionally arisen internally, rather than from an external labor market, and historically both the meat and produce departments have been the most desirable positions because they are the most profitable departments and offer the greatest promotional opportunities. More recently, grocery stores have expanded their offerings and many now offer bakeries and delicatessans, although these departments, largely because they are new, are not typically part of the ladder to management. Not surprisingly, men dominate the meat and produce departments, while women tend to be concentrated in the bakery and delicatessen departments.

Publix is Florida's largest grocery store chain, and the largest privately owned supermarket chain in the United States with sales of more than \$10 billion in 1996.⁵⁶ The store has long been admired for its operations, and has consistently been included on lists of the "best places to work" in America and it is equally well known for its high customer service.⁵⁷ Publix, however, also has a history of hostility toward women, particularly in its management practices. In 1978, Publix printed and distributed brochures opposing the Equal Rights Amendment, and as late as 1994, its evaluation form for managers asked, "Family Status (does wife work?)."⁵⁸

⁵⁵ The data with respect to the grocery industry can be found at www.bls.gov/oes/2001/oes13_541.htm (last visited July 17, 2003). For a discussion of the promotional process see Stuart Silverstein, *In Supermarkets' Executive Department, A Lack of Variety Labor*, L.A. TIMES, May 2, 1999, at C1 (noting that "supermarket executive and upper-management jobs don't require the MBAs or other prestigious degrees that are important for career advancement elsewhere . . .").

⁵⁶ See Kristen Downey Grimsley, *Fla. Grocery Chain Settles Sex Bias Case*, WASH. POST, Jan. 25, 1997, at D1 ("The company, which is privately held and owned by its employees, had sales of more than \$10 billion in 1996.").

⁵⁷ See Scott Thurston, *Book Lists Delta Among Ten Best Places to Work*, ATLANTA J. CONSTITUTION, Jan. 23, 1993, at D1; Erica Beshears, *Survey Ranks Publix No. 1*, ST. PETERSBURG TIMES, July 22, 1997, at 1E; Kim Norris, *Publix Ranking Slides in Most Admired List*, ST. PETERSBURG TIMES, Feb. 15, 1997, at 1E.

⁵⁸ See Ann Hull, *A Woman's Place*, ST. PETERSBURG TIMES, Feb. 2, 1997, at 1A.

In 1992, the EEOC began investigating charges of gender and race discrimination at Publix stores, and three years later eight women filed suit against the grocery chain alleging that Publix discriminated against them on the basis of their sex.⁵⁹ The plaintiffs, represented by the premier employment discrimination firm Saperstein, Goldstein, Demchak and Baller and by two Tallahassee lawyers, obtained class certification for their suit in March of 1996, with the class consisting of more than 100,000 female management and non-management employees at Publix who had worked for the company since 1991.⁶⁰ The primary class allegation was that Publix had engaged in sex stereotyping by systematically channeling women into low-wage, dead-end jobs that would not lead to the higher paying, male-dominated management positions.⁶¹ The women claimed that they were kept in cashier and deli positions while men were placed in management-track stock and clerk positions.⁶² To build their case, the plaintiffs' lawyers relied primarily on statistical evidence – statistics that were compiled by representatives of the plaintiffs who walked into stores to observe the photographs Publix posted of its managers. The portraits provided a compelling picture of sex discrimination. A union representative who took part in the store visits explained, "My God, you'd go in the stores and you didn't need a clipboard to write down what you saw. It was all white guys on those pictures."⁶³

Ultimately, the plaintiffs compiled an impressive statistical case. Relying on EEOC and Census Bureau statistics, the plaintiffs' lawyers claimed that although women

⁵⁹ *Id.* In November, the EEOC sought permission to join the action, and by December, the number of named plaintiffs had increased to twelve. *Id.*

⁶⁰ 1996 U.S. Dist., LEXIS 3381 at *31, *32. The states were Florida, Georgia, South Carolina and Alabama.

⁶¹ Nicole Harris, *Revolt at the Deli Counter*, BUSINESS WEEK, April 1, 1996, at 32

⁶² *Id.*

⁶³ Hull, *supra* note 58, at 1A.

held forty percent of all supermarket management positions nationwide, women accounted for only twenty-one percent of Publix's management positions.⁶⁴ Moreover, the women who did make it into management for Publix tended to manage the delicatessen department, a position that was 90% female and was, not coincidentally, among the lowest paying of management positions, and one that traditionally did not lead to more substantial management positions.⁶⁵ Publix also required its store managers to have experience working as a stock person, and its meat managers to have worked as meat cutters, positions women had long been discouraged from seeking.⁶⁶ In 1994, only 3 of the 456 (0.6%) meat department managers were women, with 11 (2.4%) female produce managers; in contrast, 390 of the 433 (90%) deli managers were women.⁶⁷ This allegation followed a pattern established in other grocery store litigation where it was determined that women managers were concentrated in newer departments such as the bakery and delicatessen, whereas men dominated the traditional departments of meat and produce from which most promotions were made.⁶⁸ Plaintiffs also maintained that, as a result of sex stereotyping, full-time male employees earned on average 35% more than full-time female employees.⁶⁹

According to the plaintiffs, one primary reason for the segregated workforce was that the decision making process regarding promotions and entry-level placement was

⁶⁴ *Id.*

⁶⁵ *See id.* (chart detailing management positions, percent female, and maximum weekly pay. Store managers, 2% of whom are women, make a maximum weekly salary of \$820. Deli managers, 90% of whom are women, make a maximum weekly salary of \$600).

⁶⁶ *See Shores v. Publix Markets*, 1996 WL 407850 (N.D. Fla. Mar. 12, 1996).

⁶⁷ Hull, *supra* note 58, at 1A.

⁶⁸ As discussed in more detail shortly, there have been a large number of similar cases, though the only case with a published decision on liability remains the case against Lucky's Stores. *See Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992).

⁶⁹ *Id.*

largely subjective.⁷⁰ Job openings were not posted at Publix, rather managers subjectively determined who should apply for upper-level positions and passed the information along by what was described as a “tap on the shoulder” system.⁷¹ Managers were not provided with any written guidelines on promotions or initial placements but instead had total discretion to steer new workers into gender stereotyped positions. It was also alleged that managers exercised their discretion regarding who received what training in a similarly discriminatory manner.

Publix did not dispute the statistics but instead sought to explain the disparities as a product of women’s preferences. The company maintained that the discrepancy in hiring and promotion was due to the fact that male applicants were more likely to have prior experience in stock and clerk positions and that women chose dead-end jobs because those jobs often had better hours and did not require relocating.⁷² Company officials made similar statements during the course of the litigation seeking to link the store assignments to women’s interests in balancing their family and work commitments.⁷³

After a lengthy mediation, Publix settled the case in early 1997 for \$81.5 million dollars, one of the largest settlements of its kind.⁷⁴ The settlement also included a series of planned changes in their employment practices, including creating minimum

⁷⁰ 1996 U.S. Dist., LEXIS 3381 at *15, *16.

⁷¹ *Id.*

⁷² Harris, *supra* note 61, at 32.

⁷³ See Gregg Fields, *Publix Settles Discrimination Case*, MIAMI HERALD, May 30, 2001, at D1 (noting that the company had attributed differences in number of managers to “career choices that women themselves made, such as reducing hours after they had children.”); Kimberly Blanton, *In the Publix Eye: \$81.5 Million Settlement is a Showcase for EEOC’s Activism in High-Profile Class Action Suits*, BOSTON GLOBE, Feb. 16, 1997, at E1 (noting that company official had testified that “many female associates do not have an active interest in stocking shelves”).

⁷⁴ See Allen R. Myerson, *Supermarket Chain To Pay \$8Million To Settle a Bias Suit*, N.Y. TIMES, Jan. 25, 1997, at A1.

requirements for store-level jobs, and establishing a job candidate pool so that those interested in pursuing other positions could do so.⁷⁵ The company also agreed to fill store jobs with a number of women proportionate to those who apply, agreed to provide employees with new employment training and job advancement programs, but did not agree to post job openings.⁷⁶ One of the interesting sidenotes from the case is that the firm never seemed to suffer a loss of business from the lawsuit even though women constituted a majority of its shoppers.⁷⁷

Although the Publix case was the most recent of the large class action cases, it was typical of a series of lawsuits that have been filed against grocery chains around the country during the last decade. The largest of the cases, and the only one to have a published decision on liability,⁷⁸ involved a suit filed against the Western chain known as Lucky's, now owned by American Stores, which ultimately settled in the early 1990s for \$107 million.⁷⁹ A New York Times story summarized the allegations in the case in this way: "The women said they were channeled into dead-end jobs, either working the cash registers or in relatively new departments like bakeries and delicatessens, rather than in the main grocery and produce sections at the core of most supermarket operations, where

⁷⁵ *Id.*

⁷⁶ See Lisa Blackman, *Publix Pays Women \$81 million*, THE TAMPA TRIBUNE, Jan. 25, 1997, at 1. In 2000, a group of 10 women sought and were denied class certification for a new class action against Publix representing women who work in Publix food production plants and distribution centers. See *Dyer v. Publix Super Markets, Inc.*, 2000 U.S. Dist LEXIS 4455 (M.D. Fla. Mar. 22, 2000). The plaintiffs alleged that women were channeled into fruit and vegetable processing jobs, which were dead-end jobs, and discouraged from warehouse jobs and higher-paying mechanic, fork-lift operator and truck driver positions. *Id.* at 9-10.

⁷⁷ See Michael Sasso, *Discrimination Lawsuits Haven't Deterred Shoppers*, THE LEDGER, Jan. 21, 2001, at E1 ("[I]n the three months following the settlement . . . Publix's sales were actually up about 9 percent from the same three months in 1996. Meanwhile, profits were up 22 percent over the same quarter in 1996.").

⁷⁸ See *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992).

⁷⁹ See Benjamin A. Holden, *American Stores to Settle Sex-Bias Suit By Paying As Much as \$107.3 Million*, WALL ST. J., Dec. 17, 1993, at A2.

jobs are generally better paid and can lead to promotions.”⁸⁰ Like Publix, the case against Lucky’s was replete with comments from management regarding women’s lack of “drive,” their unwillingness to work long hours because of the child responsibilities and fears that the public might react negatively to women in management positions.⁸¹ In addition to the lawsuit against Lucky’s, similar lawsuits were filed against Safeway, Albertson’s and Save Mart, all of which were premised on similar assignment patterns and all of which settled relatively quickly.⁸²

The case against Lucky’s, and several other West Coast chains, began in the mid-1980s with suits originally initiated by the Equal Employment Opportunity Commission.⁸³ The allegations and defenses in those cases were identical to those made in the more recent cases. Upon the filing of the first lawsuits, one of the initial defendants stated that promotional opportunities required transferring from store to store, and women were not interested in relocating, the very same defense used in the Publix

⁸⁰ See Jane Gross, *Big Grocery Chain Reaches Landmark Sex-Bias Accord*, N.Y. TIMES, Dec. 17, 1993, at A1.

⁸¹ Stender, 803 F. Supp. at 332. For a comprehensive discussion of the Lucky’s case see Kara Swisher, *At the Checkout Counter, Winning Women’s Rights*, WASH. POST, June 12, 1994, at H1. For a discussion of the case and the Stender decision see Eric J. Wallach and Heidi Lichthardt, *Lucky Stores Has Lessons for Employers*, NATIONAL LAW J., Feb. 28, 1994, at S17.

⁸² See Margaret A. Jacobs, *Albertson’s Settles Bias Suit*, WALL ST. J., Nov. 23, 1993, at B12 (suit filed in 1992 settled for \$29.5 million); Arthur M. Louis, *Safeway Settles Sex Discrimination Suit*, S.F. CHRONICLE, April 2, 1994, at D1 (suit originally filed in 1991 settled for \$7.5 million); Arthur M. Louis, *Sex Bias Settles Roils Industry: Changes in National Supermarket Personnel Practices Expected*, S.F. CHRONICLE, Dec. 18, 1993, at D1 (noting that suit against Save Mart had settled for \$6.5 million).

⁸³ A set of lawsuits against four Washington state chains was filed in 1986. See Hal Taylor and Cathy Cohn, *Four Chains Sued for Sex Bias*, SUPERMARKET NEWS, Aug. 25, 1986, at 18 (noting that the EEOC had filed class action suits against Albertson’s, Fred Meyer, Safeway and Thrifty Stores). One of the charges that formed the basis for the Lucky’s case was filed in 1985. See Barbara Presley Noble, *Battling Sex Bias in a Store Chain*, N.Y. TIMES, Oct. 11, 1992, at C27. Although the allegations were slightly different, a lawsuit was filed in the 1970s alleging sex discrimination in promotions against the Dallas area Piggly Wiggly stores. See *Carter v. Shop Rite Foods, Inc.*, 470 F. Supp. 1150 (N.D. Tex. 1979).

case.⁸⁴ Women were also said to have “chosen” checker positions because of their “flexibility.”⁸⁵

Table Two
Grocery Store ClassAction Defendants
1990-2002

Albertson's Dominic's Ingles Markets Kash-n-Karry Kohl's Lucky Stores Publix Safeway Save Mart Winn Dixie
--

Despite the bevy of lawsuits, it is equally clear that the pattern of discrimination within the grocery industry remains today, some twenty years after the initial suits were filed. In the late 1990s, cases alleging sex discrimination along the same lines as those discussed above were filed against a Midwestern chain, Kohl's Markets, and a North Carolina-based chain, Ingles markets.⁸⁶ Like Publix, the Ingles case was premised on the “visual inspection” technique of reviewing photographs of the managers posted in the stores, which demonstrated that men occupied all of the management positions in the 39 stores that were surveyed.⁸⁷ Dominick's markets based in Chicago was sued in 1995 and subsequently settled their case for more than \$7 million, and in 1999, the Florida chain

⁸⁴ See Taylor and Cohn, *supra* note 83, at 18

⁸⁵ *Id.*

⁸⁶ See Tom Daykin, *Suit Against Kohl's Now Class Action*, MILWAUKEE JOURNAL SENTINEL, Mar. 19, 1999, at B3 (“The suit alleges Kohl's segregates bakery and produce jobs by sex, reserving the higher-paying produce jobs for male employees.”); Christine Blank, *Ingles Hit By Class-Action Sex-Bias Suit*, SUPERMARKET NEWS, Mar. 9, 1998, at 4 (“The suit . . . allege[s] that women were relegated to cashier, clerk, deli and baker positions, and are seldom promoted to management.”).

⁸⁷ See Blank, *supra* note 86, at 4 (“A visual survey of management pictures in 39 Ingles' stores showed that 100% of the manager, assistant manager and produce, meat and grocery manager positions were held by men, the plaintiffs' lawyers said.”). Ingles quickly settled the case for \$14 million. See Stuart Silverstein, *In Supermarkets' Executive Department, A Lack of Variety*, L.A. TIMES, May 2, 1999, at C1.

Winn-Dixie settled a race and sex discrimination claim for \$33 million the raised similar claims.⁸⁸

In addition to the grocery store cases, several other large retailers have been targeted for similar discriminatory practices. In 1996, Home Depot was hit with two class action cases that alleged that women were systematically assigned to cashier positions rather than working on the sales floor from which promotions were typically made.⁸⁹ Several years later, and on the eve of trial, Home Depot settled the cases for more than \$100 million.⁹⁰ More recently, Wal-Mart was the subject of what is likely to be the largest class action case of its kind when it was sued by a consortium of attorneys for sex-segregated assignments and promotions.⁹¹ The suit against Wal-Mart, the nation's largest retailer, and largest private employer in the country, alleges that Wal-Mart relies on sex-stereotyping for its assignments and promotions, largely due to its failure to post job openings and instead relying on subjective employment practices by its male-dominated management.⁹²

3. *Sexual Harassment Class Actions.*

Many of the securities and grocery store cases included allegations of sexual harassment; the Smith Barney case, in particular, gained much of its notoriety for its

⁸⁸ Robert Berner, *Winn-Dixie Settles A Bias Lawsuit for \$33 Million*, WALL ST. J., July 19, 1999, at B2. Another Florida grocery chain, Kash n' Karry, has recently been the subject of a pay discrimination lawsuit by its female employees. See William R. Levesque, *Female Workers Sue Plant City, Fla., Grocery Chain*, ST. PETERSBURG TIMES, Sept. 6, 2001, at C2.

⁸⁹ See Selmi, *supra* note 4, at 1281-87 (discussing Home Depot lawsuit and its aftermath).

⁹⁰ *Id.* at 1285.

⁹¹ See Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Lawyers Seek OK for Class-Action Suit*, S.F. CHRONICLE, April 29, 2003, at B1.

⁹² See Plaintiffs' Third Amended Complaint, *Dukes v. Wal-Mart Stores, Inc.*, No. c-01-2252 MJJ (N.D. Cal. 2002) (on-file with author). Although Wal-Mart's sales staff is 72% female, only one-third of its female sales staff reaches management positions, a level that matches its peers twenty-five years ago. See Michelle Coulin & Wendy Zellner, *Is Wal-Mart Hostile to Women?* BUS. WK., July 16, 2001, at 58.

infamous boom boom room and other allegations of harassment of female employees.⁹³

But the last decade has also seen the rise of class action sexual harassment cases, a cause of action that had previously not been recognized and one that remains controversial.⁹⁴

The best known of these cases involved the claims filed against the Japanese automobile manufacturer, Mitsubishi, stemming from the practices at its plant in the ironically named Normal, Illinois. The initial suit, filed on behalf of 29 women in 1994, alleged a pattern of harassment that included sexual abuse, lewd remarks and other forms of discrimination.⁹⁵ As many as 400 male employees at the 3800 worker plant were accused of taking part in the harassment. Several years later, the EEOC filed its first ever class action sexual harassment suit contending that as many as 400 of the 940 women who had worked at the plant had been subjected to a hostile working environment.⁹⁶

When built in the 1980s, the Mitsubishi plant offered a rare opportunity for high-paying jobs in what was an otherwise depressed economy. The jobs at the plant paid on average nearly \$50,000, with many skilled jobs paying as much as \$100,000 when overtime was factored in.⁹⁷ These were, without question, the best paying jobs for miles around. Most of the workers at the plant were represented by the United Auto Workers,

⁹³ See *supra* text accompanying notes 24-28.

⁹⁴ For a discussion of the rise of the class action sexual harassment claims see Melissa Hart, *Litigation Narratives: Why Jensen v. Ellereth Didn't Change Sexual Harassment Law, But Still Has a Story Worth Telling*, 18 BERKELEY WOMEN'S L.J. 282, 282-85 (2003) (book review). As Hart notes, the actual number of cases that have been filed is relatively small, though they have received considerable attention in the media and among attorneys. In addition to the cases listed in the text, a class action claim is currently pending against Combined Insurance Co. See Mark Skertic, *Sex Harassment Persists: Women Still Face Hostility in Workplace*, CHI. TRIBUNE, May 11, 2003, at C1.

⁹⁵ See Paul Jaskunas, *EEOC v. Mitsubishi*, THE AMERICAN LAWYER, July/August 1996, at 96 (discussing the initial lawsuit). For a discussion of the case with a particular focus on the role the unions played see Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1546-52, 1602-04 (1999).

⁹⁶ See Ellen Warren & Nancy Millman, *Abuse on the Line*, CHI. TRIBUNE MAGAZINE, Feb. 15, 1998, at C10 ("The EEOC has said about 400 of the 940 women at the plant were subjected to sexual harassment by at least 400 of the more than 3,000 men there.").

⁹⁷ See Frank Swoboda, *Hope and Hardship in Normal, Ill.: Once a Blue-Collar Savior, Mitsubishi Struggles Under Weight of Sluggish Sales*, WASH. POST, April 29, 1996, at A9.

although the union contract made various concessions to Mitsubishi's Japanese management and team concept, including the elimination of a standard clause that created a committee to resolve harassment claims.⁹⁸ As a result, the claims of sexual harassment at the plant were left to an indifferent management to address.

Both suits alleged a pervasive pattern of harassment that ran throughout the plant.

A journalistic account described the allegations in this way:

As early as 1992, female employees at Mitsubishi began to complain of sexual misbehavior on the factory floor. They reported obscene, crude sketches of genital organs and sex acts, and names of female workers scratched into unpainted car bodies moving along the assembly line. Women were called sluts, whores and bitches and subjected to groping, forced sex play and male flashing. Explicit sexual graffiti such as KILL THE SLUT MARY were scrawled on rest-area and bathroom walls. In a particularly egregious case, a worker put his air gun between a woman's legs and pulled the trigger. Declared a line supervisor: "I don't want any bitches on my line. Women don't belong in the plant."⁹⁹

Such behavior was so much the norm that when EEOC representatives visited the plant to conduct an investigation, no one had even bothered to remove the explicit sexual graffiti that lined the walls.¹⁰⁰ Unwanted sexual advances from co-workers and supervisors were

⁹⁸ It also appears that the union failed to exercise the power it had under the contract, and like management was largely indifferent to the harassing behavior at the plant. See Camille Colatosti, *Misrepresented Women Fight Harassment and the Union Boys' Club*, THE PROGRESSIVE, Aug. 1, 1996, at 36. One of the women represented by the EEOC stated that when she complained to her union representative, he responded by saying that he would help her if she first performed oral sex on him. See Ellen Warren and Nancy Millman, *Abuse on the Line*, CHI. TRIBUNE, Feb. 15, 1998, at C10; see also Crain, *supra*, note --, at 1548-52 (discussing the Union's response). For a discussion of the ways in which unions have often slighted women and their interests see Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992); Marion Crain, *Labor, Unions, & Hostile Work Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9 (1995).

⁹⁹ Leon Jaroff, *Assembly-Line Sexism? Charges of Abusing Women – And Angry Denials – Rock a Midwestern Mitsubishi Auto Plant*, TIME, May 6, 1996, at 56.

¹⁰⁰ See *id.* at 56 (noting that when the EEOC investigators arrived at the plant they were "astounded to find that the company seemed unconcerned. No one had even bothered to remove the widespread sexual graffiti.").

common, and strippers and prostitutes were hired to entertain at company parties when Japanese officials visited.¹⁰¹

After initially mounting an aggressive campaign to rebut the charges, Mitsubishi ultimately settled both claims for substantial sums. The private lawsuit was settled for \$9.5 million¹⁰² and shortly thereafter, the EEOC settled its lawsuit for \$34 million and the imposition of a three-year monitoring group that was empowered to recommend necessary changes in employment practices.¹⁰³ Under the EEOC's suit, which remains the largest award in a sexual harassment case to date, more than 300 women recovered sums ranging from \$25,000 to \$300,000 with an average of approximately \$100,000.¹⁰⁴ Despite these settlements, a lengthy report in the New York Times questioned how much the plant had really changed, suggesting that once the case was settled and removed from the public's eyes, there was little interest on the part of the company or the plaintiffs in pursuing substantial reform.¹⁰⁵

Although Mitsubishi is the largest and best known case, Ford Motors has struggled with similar allegations over the last few years, even though its struggles have rarely captured national attention. The initial allegations were focused on two plants outside of Chicago, and raised claims that were much like those directed at Mitsubishi – a gauntlet of harassment for Ford's female employees on the factory floor including unwanted sexual advances, groping, name calling and visible pornography.¹⁰⁶ Strippers

¹⁰¹ See Ellen Warren & Nancy Millman, *supra* note --, at 10 (discussing parties with strippers).

¹⁰² See Kristen Downey Grimsley, *Mitsubishi Settlement Said to Total \$9.5 Million: Company Still Faces Larger Suit Filed by EEOC*, WASH. POST, August 30, 1997, at F1.

¹⁰³ See Stephen Braun, *Mitsubishi To Pay \$34 Million in Sex Harassment Case*, June 12, 1998, at A1.

¹⁰⁴ See Jon Bigness, *Mitsubishi Settlement Checks on the Way*, CHI. TRIBUNE, June 26, 1999, at C1.

¹⁰⁵ See Reed Abelson, *Can Respect be Mandated? Maybe Not Here*, N.Y. TIMES, Sept. 10, 2000, at C1.

¹⁰⁶ See Joann Muller, *Ford: The High Cost of Harassment*, BUS. WK., Nov. 15, 1999, at 94.

and prostitutes also apparently made the rounds at the Ford plants.¹⁰⁷ Ford eventually settled four separate lawsuits – three involving allegations of harassment, and one for denying women entry-level jobs in seven of its assembly plants.¹⁰⁸ In addition to the claims against Mitsubishi and Ford, the EEOC also initiated, and later settled, class action sexual harassment claims against Astra Pharmaceuticals and Dial Corporation. The Astra claim settled quickly for \$10 million and led to the dismissal of its Chief Executive,¹⁰⁹ whereas the Dial case recently settled for the same amount but only on the eve of trial after four years of contentious litigation.¹¹⁰

The cases just mentioned represent the largest and latest of the class action sexual harassment claims but the first to attain class action status involved charges of pervasive harassment at a mining company in northern Minnesota. As was true with the Mitsubishi case, the mining jobs were the best jobs available in the rural area of Northern Minnesota where the mine was located. The case against Eveleth Mines began in 1984 when three female miners filed charges with the Equal Employment Opportunity Commission. The

¹⁰⁷ See *id.* (describing a “years-long” pattern of groping, name-calling, and parties with strippers and prostitutes).

¹⁰⁸ See *Sexual Harassment Suit is Settled by Ford Motor*, WALL ST. J., Feb. 14, 2002, at C14 (settling claim of three individuals); *Ford Agrees to Pay \$3.8 Million to Settle Discrimination Suit*, WALL ST. J., Feb. 22, 2000, at B16 (settlement with Department of Labor over hiring practices); *Ford Increases Amount in Sex Harassment Pact*, WALL ST. J., Nov. 20, 2000 (settling class claim initiated by EEOC for \$9 million in relief and \$10 million for training); Joann Muller, *Ford: The High Cost of Harassment*, BUS. WK., Nov. 15, 1999, at 94 (noting that the company had settled a private lawsuit for \$2 million).

¹⁰⁹ See Kenneth N. Gilpin, *Firm to Pay \$10 Million in Settlement of Sex Case*, N.Y. TIMES, Feb. 6, 1998 at A16. About 80 of the 120 female employees who were interviewed were eligible to file claims. See *id.* The company subsequently sued its former Chief Executive, and a jury ordered the defendant to pay more than a million dollars for breach of duties and fraud. See Bob Kievra, *Jury Rules Against Bildman: Ex-Astra President Ordered to pay \$1 M*, WORCESTER TELEGRAM & GAZETTE, Feb. 22, 2002, at A1. The CEO of Florsheim also resigned due to allegations of harassment. See Abraham McLaughlin, *CEOs Getting the Boot for Sexual Misconduct*, CHRISTIAN-SCIENCE MONITOR, July 2, 1999, at 1. It should be noted that in neither case were the allegations of harassment the sole reason for the termination, but in each instance the executives had committed other wrongs that also factored into the companies decision to terminate them.

¹¹⁰ See Sarah Ellison and Joann S. Lublin, *Dial to Pay \$10 Million to Settle a Sexual-Harassment Lawsuit*, WALL ST. J., April 30, 2003, at B4. On a smaller scale, the EEOC also filed and subsequently settled a class action sexual harassment case against Cheap Tickers, an on-line travel agent. See *Cheap Tickets Settles Harassment Suit*, L.A. TIMES, Aug. 8, 2003, at C9.

case was subsequently certified as a class action in 1991.¹¹¹ The case involved an all too familiar litany of harassment— groping, grabbing, stalking, pressure for sex, use of sexual language and pornography, men exposing themselves and masturbating on women’s clothes. One young boy testified that he watched his mother pack her lunch each day, including a knife, mace and rope to tie the door shut in her work area.¹¹²

Unlike the other cases, the Eveleth Mines case went to trial, and the testimony at the trial painted a picture of a workplace defiantly hostile to women. Testimony indicated that the personnel director would frequently comment that women belonged at home and pregnant, and that the union consciously decided to ignore the complaints so as to protect its male members.¹¹³ After the initial complaints were filed, a sign went up on a manager-controlled bulletin board that read, “Sexual harassment will not be reported, but it will be graded.”¹¹⁴ When the women employees asked for a portable bathroom near the mine, their request was refused as they were told that if they were to work like a man they would have to learn to “piss like a man.”¹¹⁵ Further testimony confirmed the plaintiffs’ allegations, and the plaintiffs ultimately prevailed in the lengthy trial.¹¹⁶

But the case did not end there. The damages phase was assigned to a retired judge who appeared hostile to the plaintiffs throughout the proceedings, and ultimately awarded paltry amounts to the individual plaintiffs. His decision, however, was reversed

¹¹¹ See *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991); Sandra Sugawara, *Class Action Sexual Harassment Suit Allowed: U.S. Court’s Ruling in Minnesota Case May Widen Use of Tactic*, WASH. POST, Dec. 18, 1991, at D1.

¹¹² Kristen Downey Grimsley, *A Hostile Workplace: Into an Abyss of Sex Harassment at Eveleth Mine*, WASH. POST, Oct. 27, 1996, at A1.

¹¹³ See *id.* (“Union officials testified that, when presented with the complaints, they didn’t take action because they thought it was important to protect the men’s jobs.”). See *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

¹¹⁴ See Grimsley, *supra* note 112, at A1.

¹¹⁵ John Tevlin, *The Eveleth Mines Case*, STAR TRIBUNE, Nov. 29, 1998, at 1A.

¹¹⁶ The case is chronicled in CLARA BINGHAM AND LAURA LEEDY GANSLER, *CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002).

by the Eighth Circuit Court of Appeals, which remanded the damages phase for a jury trial.¹¹⁷ Just before that trial was set to begin, the individual plaintiffs settled with the lead plaintiff receiving more than \$750,000, compared to the \$25,000 award the judge had ordered for her.¹¹⁸ Although ultimately victorious in the case, the lead plaintiff, Lois Jenson, went on permanent disability and has not worked since 1992.¹¹⁹

III. THE PERSISTENCE OF SEX DISCRIMINATION.

What do these, and other, cases tell us about the persistence of sex discrimination in the workplace? On the one hand, these cases may be seen as a random collection of thirty or so cases that offer little meaning in the context of the broader labor market. From this perspective, the cases might be seen as reflecting isolated incidents rather than entrenched patterns, which was precisely the defense raised in many of the cases.¹²⁰ To be sure, this is hardly a scientific or statistical survey, and yet, it would be a mistake to dismiss these cases as aberrational in nature. Indeed, a desire to dismiss the cases likely reflects the very societal perception regarding the persistence of discrimination that these cases directly challenge. In other words, these cases appear aberrational, or isolated, not because they are but because they fail to comport with our image of the changing nature of discrimination. As a society, we have plainly concluded, long ago, that cases of overt exclusion have all but vanished from the workplace.¹²¹ But

¹¹⁷ See *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).

¹¹⁸ BINGHAM & GANSLER, *supra* note 116, at 284.

¹¹⁹ See Tevlin, *supra* note 115, at 8A.

¹²⁰ For example, Smith Barney sought to defend its case by claiming that the problems alleged were concentrated at the Garden City office in suburban New York. See ANTILLA, *supra* note 23, at 142.

¹²¹ See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 340-50 (1997) (arguing that the Supreme Court's doctrine reflects a societal desire to "wish away" discrimination); see also Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2417 (2003) (book review) ("The simple truth is that once Bull Connor and Lester Maddox are gone, once angry parents are not screaming, 'Two, four, six, eight, we don't want to integrate' . . . it is hard to say precisely what discrimination means.").

as I discuss further below, our perceptions of discrimination may have changed far more than the reality of discrimination, and there is certainly strong reason to believe that intentional and overt discrimination remains a substantial barrier to workplace equality for women.

These cases are also important in that they provide some of the best available evidence regarding the persistence of discrimination. When it comes to understanding the persistence of gender inequality, both economics and sociology, where these issues are studied extensively, have turned to empirical analyses. Yet, it is extremely difficult to establish discrimination through empirical studies, which is, I think, one reason why discrimination tends to exist at the margins in theories premised on empirical analysis. Outside of controlled studies that seek to match pairs on all relevant factors other than sex, identifying discrimination through empirical studies often proves elusive. The match-paired studies, such as have recently been conducted with restaurants and orchestras,¹²² offer significant evidence of labor market discrimination, although even these studies are not without their critics.¹²³ These studies, however, are difficult to conduct and few in number. More commonly, an empirical study will seek to measure some other variable, such as the role of labor market experience in explaining gender

¹²² See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000); David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q. J. ECON. 915 (1996). The Goldin and Rouse study found that female musicians had a far greater likelihood of being hired if they auditioned behind a curtain, then when they were visible to the evaluators. Many major orchestras have moved to having musicians audition behind a blind curtain to avoid any distinguishing characteristics other than their music, and the Goldin and Rouse study took advantage of the data that existed both before and after these changes in practice. The Neumark study, on the other hand, was patterned on housing audit studies, and he had men and women with identical resumes apply for positions at restaurants in the Philadelphia area. This study found that male resumes led to approximately three times as many interviews and five times as many job offers at high priced restaurants. See *id.* at 933-36. These studies are discussed at length in Christine Jolls, *Is There a Glass Ceiling?* 25 HARV. WOMEN’S L.J. 1 (2002).

¹²³ For a discussion on the limits of testing audits, frequently used to document housing discrimination and more recently adapted in other areas see James J. Heckman, *Detecting Discrimination*, 12 J. OF ECON. PERSP. 101 (1998).

inequities, and treat discrimination as an “unexplained variable,” one that remains as a background possibility but that is solidly in the background nonetheless. For example, many studies have sought to explain the wage gap between men and women, and typically look to differences in experience or education to explain the observed pay disparities.¹²⁴ These studies uniformly fail fully to explain the disparities but it is rare that a researcher will identify discrimination as the cause of the unexplained portion of the wage gap, principally because the study was not set up to measure discrimination but was instead designed to measure the influence of tenure or education on labor market patterns.¹²⁵ As a result, empirical studies are generally not intended to measure discrimination, leaving case studies as some of the best available evidence of the discrimination that remains in the workplace.

This short discussion highlights another common and important problem with identifying discrimination. When it comes to discrimination, and this is true of both race and sex discrimination, in and out of court, our standards of proof are extremely high. Rather than establishing discrimination as the underlying cause by a preponderance of the evidence, we typically require a level of proof that eliminates all other potential causes. As a result, the cases discussed in this article provide as potent evidence of ongoing

¹²⁴ For a sampling of the rich literature see FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN, AND WORK* 134-43 (3d ed. 1998); Francine D. Blau & Lawrence M. Kahn, *Swimming Upstream: Trends in the Gender Wage Differential in the 1980s*, 15 J. LAB. ECON. 1 (1997); Linda Datcher Loury, *The Gender Earnings Gap Among College-Educated Workers*, 50 INDUS. & LABOR REL. REV. 580 (1997). I have discussed the literature and its limitations in Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 708, 714-30 (2000).

¹²⁵ Christine Jolls, who is sympathetic to identifying discrimination in these studies, comments, “The difficulty with the evidence here is that it is difficult to be sure that all non-sex differences – some of which may be subtle or difficult to observe – have been controlled for, and, unless all such differences have been controlled for, the residual cannot properly be attributed to sex.” Jolls, *supra* note 122, at 11 (footnote omitted). See also Van W. Kolpin & Larry D. Singell, Jr., *The Gender Composition & Scholarly Performance of Economics Departments: A Test for Employment Discrimination*, 49 INDUS. & LABOR REL. REV. 408 (1996) (finding that female economists had published more than their male counterparts even though they tended to be hired at lower ranked schools but avoiding the conclusion that discrimination explained the discrepancy because not all other explanations had been eliminated).

discrimination as we are likely to find, and they should not be discounted because of the lack of supporting empirical data.¹²⁶ In the end, the cases that percolate through the courts are often our best evidence of the persistence of discrimination.

A. *The Subtle Discrimination Hypothesis.*

As noted earlier, these cases tell a story that differs substantially from the consensual story regarding the nature of contemporary discrimination. The consensual story emphasizes how discrimination has become more subtle in nature, less overt, and often has to do with women's childcare commitments, or more commonly, with an employer's perceptions of a woman's childcare commitments.¹²⁷ In this story, there is also a blurring of lines as to what constitutes discrimination, particularly when the focus is on what is often defined as unconscious discrimination, or alternatively, on the balance many women seek to draw between their work and family obligations that may limit their labor market commitments. With respect to unconscious discrimination, the actor is generally thought to have no desire to discriminate and is generally thought to be

¹²⁶ Subjective interviews – asking those who are potential victims about their experiences – offer another possible means of identifying discrimination, and interviews with potential victims are frequently conducted. See, e.g., Janet Rosenberg et al., *Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers*, 7 GENDER & SOCIETY 415 (1993) (reporting results of survey of female lawyers' perception of discrimination); Patricia Yancey Martin et al., *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665 (2002) (study of perceptions of discrimination among Florida Bar members). However, these studies often fail to provide convincing information for the subject groups are small and frequently left on their own to define discrimination, or are provided a definition of discrimination, which may not comport with what a court would identify as discrimination. Subjective interviews can serve important purposes, but like all of the various methods, they have their limits.

¹²⁷ See, e.g., VIRGINIA VALIAN, *supra* note 9; JOAN WILLIAMS, *supra* note 10. Joan Waldfogel has published a series of studies documenting the disparity in pay between women with children and those without, and suggested that improving public policies designed to facilitate childrearing may go a long ways toward reducing the pay disparities. See Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?* 16 J. LAB. ECON. 505 (1998); Jane Waldfogel, *Understanding the "Family Gap" for Women With Children*, 12 J. ECON. PERSP. 137 (1998); Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPL. RTS. & EMLOY. POL'Y J. 273 (2001).

unaware of the way in which his acts adversely affect women.¹²⁸ The recent turn within law to focus on women's role as caretakers, and the ways in which society ought to give primacy to that role, suggests that many of the observed labor market inequities arise from women's dual roles as mothers and labor market participants.¹²⁹ This is certainly not a new issue and indeed the tension between women's roles as workers and mothers has long been embodied in our nation's social policy, which has tended towards protecting and defining women as mothers.¹³⁰

The cases discussed in this paper offer a different picture: there was nothing subtle about the discrimination in any of the cases, nor was the discrimination tied to women's childcare responsibilities. Instead the cases represent the kind of behavior that many had previously defined out of existence in today's labor market: overt acts of hostility and exclusion based on stereotypes regarding women's proper roles or abilities

¹²⁸ The two most influential and insightful articles on what is sometimes referred to as unconscious discrimination are Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) and Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For additional recent discussions see Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Defining the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).

¹²⁹ See WILLIAMS, *supra* note 10, at 65-77. The recent focus on caretaking develops an argument that has an antecedent in neoclassical economics, which has long sought to explain observed labor market inequalities based on women's roles in the home. For classic statements of this position see GARY S. BECKER, A TREATISE ON THE FAMILY 41-42 (1991) ("Wage rates are lower for women at least partly because they invest less than men in market human capital, while the productivity in household time is presumably greater for women partly because they invest more than men in household capital."); Solomon William Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 REV. ECON. & STAT. 60, 65-68 (1981) (arguing that women self-select into occupations that match their preferences). Although there are similarities between the neoclassical argument and the focus on caretaking, the differences are more profound. In particular, the caretaking literature seeks to identify ways to remedy the penalties women suffer, while the neoclassical position does not see the disparities as penalties in need of remedy but instead reflect differing interests and specialization.

¹³⁰ For an excellent historical overview of the gendered vision that has influenced social policy see ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2001). Kessler-Harris writes: "[T]he use of the family to justify and rationalize women's disadvantaged workforce position functions as a set of ideological and material blinders that limits women's access to the full range of economic life and shapes the nature of male as well as female experience." *Id.* at 12 (footnote omitted).

in the workplace. In both the securities and grocery industry cases, the employers based their policies on a presumption that women were less committed to the workplace and were less interested in pursuing career paths that would lead to power and influence but that would also seemingly require intense devotion. Importantly, these assumptions were not grounded in fact; no studies had been conducted by any of the companies to document women's interests nor did the companies provide any hard evidence that their assumptions were true. Rather, the company's assumptions were based on management's perceptions regarding women's interests.¹³¹ This was particularly true in the securities cases where many of the plaintiffs were women who had worked long and uninterrupted careers and were earning high incomes even while they were restricted in their opportunities.¹³² The experience of these women should have provided an important counterweight to the underlying stereotypes but their failure to do so sheds light on some of the other factors that contributed to the hostility so many of the women faced, including a desire by men to preserve their workplace advantages, an issue that will be discussed in more detail shortly.

The grocery store cases, as well as the cases against Home Depot and Wal-Mart, are more difficult to label, as neither case included allegations of harassment but instead they seem to be cases involving common stereotypes regarding women as mothers and men as breadwinners. All of the retail cases included allegations that the companies would ask women about their husband's jobs or salaries, and most also included claims

¹³¹ Occasionally, as in the Publix litigation, the company would survey some of its female employees as a means of providing evidence during the litigation. *See Shores v. Publix Super Markets*, No. 95-1162, CIV-T-28(E), 1996 Westlaw 407850, at *7 (M.D. Fla. 1996) (detailing study). But outside of the litigation, none of the companies had investigated the reason for their segregated workforces. *See, e.g., Stender v. Lucky Stores*, 803 F. Supp. at 292 (observing that Lucky's had never conducted a survey to gauge women's actual interests).

¹³² *See* text accompanying notes 23 and 52, *supra*.

that management justified paying men higher wages because of their family commitments.¹³³ Stereotyping also appeared to be at work in the particular assignments – for example, keeping women off the sales floor at Home Depot and out of the meat department in the grocery stores.

Despite the lack of apparent hostility towards women, these cases seem best classified as involving claims of overt rather than subtle discrimination. Certainly the claims regarding women’s husbands or their commitments were not subtle in nature, and there was nothing about the structure of the workplace that necessarily disadvantaged women. Retail hours can be flexible, and the various shifts that are designed around the lengthy hours the stores are open can likewise enable women to work when their children are at school or their husbands are at home. Indeed, the often obsessive focus on the need for flexible work conditions ignores the flexibility that higher wages and greater management responsibility can bring.¹³⁴ Instead of structural concerns, it was again the employers’ perceptions of women’s interests that likely caused the disparities – their perception that women would not be willing to move to different stores or to work at night, neither of which was substantiated to any degree in the cases.¹³⁵ In this respect, these cases resemble the famed case brought against Sears Roebuck, a case in which women were typically assigned to salaried rather than commission positions and one in

¹³³ See text accompanying note 40 *supra*; see also *More than 900 Women File Claims of Bias in Merrill Lynch Case*, WASH. POST, Mar. 2, 1999, at C2 (noting that “women were told they earned less than men because their husbands could support them.”); Reed, *supra* note 39, at 35 (Merrill Lynch broker Anne Marie Kearney claimed that in her interview she was asked how much money her husband made).

¹³⁴ As Barbara Reskin notes, “The higher pay and better benefits of male jobs are particularly attractive to women supporting families” Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. OF SOCIOLOGY, 241, 264 (1993).

¹³⁵ In the case against Lucky’s stores, the court listed the range of excuses the company raised, “women do not want to work late shifts, men don’t want to compete with women or have a woman as their boss . . . that women do not have the drive to get ahead.” Stender, 803 F. Supp. at 332. The court defined these excuses as discriminatory and based on stereotypes rather than any actual evidence. *Id.*

which the employer successfully defended the case by claiming that the assignments were the product of women's interests rather than discriminatory practices.¹³⁶

Although the cases discussed earlier are largely inconsistent with the subtle discrimination story, they are consistent with a story regarding segregation in the labor market that has been well documented. Much has been written regarding the segregated nature of the workforce, in particular about how segregation affects the gender wage gap, and while there is little consensus regarding how much of the gap can be attributed to sex segregation, few can doubt the extreme levels of segregation that continue to exist in the labor market.¹³⁷ Moreover, the progress that has been made since 1970 when women began to enter the workforce in less traditional occupations and today has been modest, and by almost any measure, far less than was expected thirty years ago when the civil rights laws began to be enforced.¹³⁸ For example, women accounted for 97.6% of all secretaries in 1970 and by 2000 the figure was 98.0%. In 2000, women still comprised 92.8% of registered nurses, 98.5% of Pre-K and kindergarten teachers, but only 3.8% of firefighters and 3.7% of airline pilots.¹³⁹ A recent report indicated that only 1 in five

¹³⁶ See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd* 839 F.2d 302 (7th Cir. 1988).

¹³⁷ An "index of segregation" has been developed to measure the level of occupational segregation that exists. The index measures the percentage of women who would have to change occupations in order to achieve an integrated workforce, and depending on the particular measure that is used, it is estimated that more than half of women would have to change jobs to achieve equal representation among occupations. See DAPHNE SPAIN & SUZANNE M. BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* 94 (1996); see also Francine D. Blau, *Trends in Well-Being of American Women, 1970-1995* 36 J. OF ECON. LIT. 112, 132 (1998) (finding that 53% of women would have had to switch jobs in 1990).

¹³⁸ See Reskin, *supra* note 134, at 245-48. For two recent discussions of the persistence of sex segregation see Stephanie Boraas & William M. Rodgers, *How Does Gender Play a Role in the Earnings Gap? An Update*, MONTHLY LABOR REVIEW, Mar. 2003, at 9; Phillip N. Cohen & Matt L. Huffman, *Occupational Segregation and the Devaluation of Women's Work Across U.S. Labor Markets*, 81 SOCIAL FORCES 881 (2003).

¹³⁹ These figures are drawn from ALICE ABEL KEMP, *WOMEN'S WORK: DEGRADED AND DEVALUED* (1994) and DEBRA BARBEZAT, *Occupational Segregation Around the World*, 177-98, in *WOMEN, FAMILY, AND WORK* (Karine S. Moe ed., 2003).

teachers are men, which marked a new forty-year low.¹⁴⁰ It would be easy to continue the list but the point has been widely recognized; what has been less recognized is the way in which contemporary discrimination preserves the occupational structure and just how difficult it can be for women who are entering traditionally male professions whether those professions are at the top of the pay scale (securities) or fall in the middle (miners) or tend towards the bottom (retail). In each instance, women continue to face substantial barriers to successful integration, and are clearly left with a different set of choices than their male counterparts.

B. *Preserving Male Norms.*

The cases discussed previously are also consistent with a theory of sexual harassment recently advanced by a number of feminist legal scholars. In an important article, Professor Kathryn Abrams has suggested that we should view sexual harassment as an attempt by men to preserve male norms in the workplace.¹⁴¹ Abrams defines sexual harassment “as a phenomenon that serves to preserve male control and entrench masculine norms in the workplace.”¹⁴² In this way, she argues, “[s]exual harassment feminizes women by throwing them off balance in the work environment and depriving them of opportunities the workplace could provide to chart new, more independent courses and to explore different conceptions of self.”¹⁴³ Under this perspective, sexual harassment is less about sexual desire, and more about preserving male norms that effectively exclude women from participation. Professor Vicki Schultz has advanced a

¹⁴⁰ See *Men in Teaching Fall to a 40-Year Low, Survey Finds*, N.Y. TIMES, Aug. 28, 2003, at A26 (“Two out of 10 teachers are men, the lowest figure in 40 years, a survey by the National Education Association has found.”).

¹⁴¹ See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

¹⁴² *Id.* at 1172.

¹⁴³ *Id.* at 1219.

similar theory, arguing that the judicial focus on sexual acts as the paramount form of sexual harassment obscures the many other ways in which male dominance is preserved.¹⁴⁴

The theories developed by Abrams and Schultz are typically contrasted with what is known as the social dominance theory, around which much of the doctrine relating to sexual harassment has been developed. Under this theory, sexual harassment in the workplace is about sexual desire and power, and it is typically defined with reference to sexual activity.¹⁴⁵ Workplace surveys that seek to measure the extent of sexual harassment almost always define harassment in precisely this way.¹⁴⁶

Although these theories are not necessarily incompatible and both approaches accurately describe behavior that occurs within the workplace, the theories that focus on preserving male norms better capture much of the behavior delineated in the cases discussed earlier. It is perhaps easiest to illustrate the relevance of sexual harassment

¹⁴⁴ See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). More recently, Professor Schultz has adopted somewhat of a different approach, contending that sexual harassment doctrine has driven sexuality out of the workplace in a way that is not necessarily advantageous for women. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003). In the more recent article, Professor Schultz emphasizes the importance of having an integrated workplace as a way of breaking down workplace barriers for women. See *id.* at 2151-52 (“Taken together, the studies suggest that more integrated, egalitarian employment settings give both women and men more power to resist stereotypes and, in so doing, to remake the culture of sexuality on their own terms.”) While I agree with the emphasis on integrated workplaces, I am less certain that the enforcement of sexual harassment laws have somehow put women at a disadvantage, particularly when compared to the realities of the workplace. Professor Schultz’s notion that we ought to have lots of different workplaces, and women ought to have lots of different choices for how much sexuality they have in the workplace, might be desirable in an ideal labor market, but given that our current situation is so far removed from the ideal one must choose among second or even third-best alternatives, and in that realm vigorous enforcement of the laws may be the best we can offer.

¹⁴⁵ This theory is generally associated with the work of Catherine MacKinnon, whose early work was influential in helping to shape sexual harassment doctrine in the courts. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 42 (1987) (describing her approach as the “dominance approach”); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (discussing sexual harassment as a possible cause of action under Title VII).

¹⁴⁶ In her recent exhaustive survey of existing sexual harassment policies, Vicki Schultz concluded, “It is clear that both those who conduct the surveys and those who respond to them define harassment in terms of sexual acts, language and materials.” Schultz, *The Sanitized Workplace*, *supra* note 144, at 2095 n.97. For one well-known example of such a survey see U.S. MERIT SYSTEMS PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 5 (1994).

theory by looking to the securities cases. These cases included very little overt sexual advances or behavior – men were not interested in their female counterparts as sexual objects but were instead intent on creating an environment that conveyed express hostility to women, making it clear through their actions that women were neither wanted nor would they necessarily be tolerated. The “boom boom” room was one manifestation of this exclusion. This was a place that was literally off-limits to women and where men could go for male-bonding rituals that perhaps offered the comfort of knowing that the workplace had not changed from the days when the professional staff was exclusively male.

The same was true in the grocery store cases where the job assignments made clear that women were seen as marginal employees, and that their primary fidelity should be to their families. While women were allowed to perform many of the necessary menial tasks, such as working the cash registers, they would not be accepted in the higher echelons of management because these were rungs preserved for men.¹⁴⁷ The grocery store cases rarely contained the sensational allegations of harassment or boorish behavior that was central to the securities cases, but the means of exclusion were designed to preserve male workplace norms, and equally important, they were designed to preserve gender norms outside of the workplace by emphasizing women’s commitments to their family over their commitments to work.

This latter point is important to emphasize given that we often focus on the ways in which harassing behavior is tied to preserving norms within the workplace, but it does

¹⁴⁷ See, e.g., CYNTHIA COCKBURN, *IN THE WAY OF WOMEN: MEN’S RESISTANCE TO SEX EQUALITY IN ORGANIZATIONS* (1991) (arguing that men resist gender integration so as to preserve their privileged positions within firms); Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, With Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1084-85 (1999) (arguing that men may want to expel women from the workplace to preserve their status, which can be challenged when women enter).

much more than that. By treating women as marginal employees, and by assuming that they will not want to relocate or work the long hours necessary to move forward, the workplace norms reach far beyond the workplace to help maintain stereotypes and gender roles in the home as well. In this way, the gender norms preserve men's status both in and outside the workplace.¹⁴⁸ The perpetuation of gendered parenting reaffirms these roles as women have found that, despite the pervasive rhetoric propounding equal parenting, they still perform the majority of work in the home, whether caring for children or the home itself.¹⁴⁹

We see the same interactions at work in the sexual harassment cases, none of which involved sexual overtures or advances as a central part of the claims. Although there was overtly sexual behavior in some of the cases, most of even the sexual behavior was too crude to be taken as anything other than an attempt to harass rather than to seduce. The behavior at issue in Mitsubishi, Eleveth Mines, Ford Motors and the other class action harassment cases, involved disciplining women's entry into male-dominated jobs as a way of preserving the norms that had previously existed. This was not behavior designed to have women act more like men, but it was instead intended to preserve a male space that excluded women regardless of how "male" their behavior may have been, or how willing women might have been to fit in.¹⁵⁰ Many of the women in the securities

¹⁴⁸ Christine Williams has written: "Men have historically used the occupational realm not only to serve economic advantages over women, but also to establish and affirm their essential difference from – and personal sense of superiority over – women." CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS 133 (1989).

¹⁴⁹ See Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects and Wages of Married Women*, 32 J. HUMAN RESOURCES 285, 289-90 (1997) (finding that in sample studied women averaged approximately three times as much housework a week as men). For a thorough discussion of studies on housework see Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 N.W. U. L. REV. 1, 8-10 (1996).

¹⁵⁰ Katherine Franke has argued that sexual harassment is often designed to create normalized sexual behavior so that men or women who step out of the traditional sex roles are most frequently the subject of harassment. See Katherine Franke, *What's Wrong With Sexual Harassment?* 49 STAN. L. REV. 691 (1997).

cases were aggressive, hard-working and high-earning, and yet they were still subjected to harassing and exclusionary behavior. As the Court of Appeals explained in its decision in the Eveleth Mines case, much of the workplace harassment was designed “to destroy the human psyche as well as the human spirit” of the plaintiffs.¹⁵¹

This desire to preserve male norms reflects two often unacknowledged social phenomena. For men, preserving male norms can be defined, at least in one sense, as rational behavior. Studies continually demonstrate that female-dominated jobs suffer a wage penalty, and that those positions dominated by men receive a substantial wage premium.¹⁵² Beyond the economic advantages, sociologists Susan Fiske and Peter Glick have observed that men may feel threatened by the introduction of women into male-dominated jobs because “jobs that are dominated by men are seen as requiring traits that distinguish men as superior to women.”¹⁵³ Breaking down these barriers may threaten

The class action cases offer little support for this theory, as the behavior was never aimed at disciplining men or women who were seen as atypical, other than perhaps women who were entering nontraditional professions. This, of course, does not mean that Franke’s theory would not describe sexual harassment targeted at individuals, but it does suggest that it may not account for systemic patterns of harassment.

¹⁵¹ *Jenson v. Eveleth Taconite Co.*, 130 F.3d at 1304.

¹⁵² A large number of studies have established a strong relationship between occupational segregation and the wage gap. See, e.g., Paula England et al., *The Effect of Sex Composition of Jobs on Starting Wages in an Organization: Findings from the NLSY*, 33 DEMOGRAPHY 511, 520 (1996) (“These findings add to the cumulating evidence that those who work in female-dominated jobs pay a wage penalty – that employers assign them lower wages than if the job had a larger proportion of men working in it.”); Judith Fields & Edward N. Wolff, *Interindustry Wage Differentials and the Gender Wage Gap*, 49 INDUS. & LABOR REL. RVW. 105, 116-18 (1995) (finding that women were concentrated in lower paying industries which explained between “31% to 38% of the overall gender wage gap”). There remains a significant gap in the college majors students choose, which may help explain some of the observed occupational segregation. See Sarah E. Turner & William G. Bowen, *Choice of Majors: The Changing (Unchanging) Gender Gap*, 52 INDUS. & LABOR REL. RVW. 289, 308 (1999) (noting that gender gap in majors had not decreased despite women’s changing employment patterns).

¹⁵³ Susan T. Fiske and Peter Glick, *Ambivalent and Stereotypes Cause Sexual Harassment: A Theory With Implications for Organizational Change*, 51 J. OF SOCIAL ISSUES 97, 105 (1995) (internal references omitted). See also Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOCIETY 527, 545 (1996) (“In doing gender, men and women engage in practices that promote male dominance and female subordination in most social contexts.”).

men's own sense of their selves, while likewise threatening their substantial occupational status and accompanying advantages independent of the earnings premium.¹⁵⁴

This perceived threat directly relates to another lurking explanation for why men may seek to preserve male norms in the workplace through practices of hostility and exclusion. Despite our professed allegiance to a world of sexual equality, there remains a deep social ambivalence regarding exactly what such a world would look like. Polls consistently demonstrate a curious nostalgia for returning to the sex roles characteristic of the 1950s where many women tended to stay home after marriage and certainly after having children. A 1996 poll by the Washington Post found that nearly forty percent of the respondents desired to return to traditional home life where the wife worked only inside the home.¹⁵⁵ Other polls have largely replicated these findings. For example, in a 2000 survey conducted by International Communications Research, 69% of 18 to 30 year olds and 80% of 45 to 60 year olds agreed with the statement: "It may be necessary for mothers to be working because the family needs the money, but it would be better if she could stay home and take care of the house and children."¹⁵⁶ A recent poll conducted by the nonprofit Public Agenda asked respondents to choose between creating public policies that would allow one family member to stay home and policies intended to

¹⁵⁴ The economist Claudia Goldin has defined this phenomenon as a pollution theory of discrimination where women are seen as "polluting" the occupation. See Claudia Goldin, *A Pollution Theory of Discrimination: Male and Female Differences in Occupations and Earnings*, National Bureau of Economic Research Working Paper 8985 (June 2002) (on file with author). See also Marianne LaFrance, *The Schemas and Schemes in Sex Discrimination*, 65 BROOKLYN LAW REV. 1063, 1069-70 (1999) ("[W]henever there is disadvantage, there is also advantage. Women are under-benefited because males are privileged.").

¹⁵⁵ See Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat*, WASH. POST, Mar. 22, 1998, at A1 ("4 in 10 of those surveyed said, it would be better to return to the gender roles of the 1950s").

¹⁵⁶ See Pamela Paul, *Meet the Parents*, 24 AMER. DEMOGRAPHICS 1 (Jan. 1, 2002). See also American Academy of Pediatrics, *FAMILY PEDIATRICS: REPORT OF THE TASK FORCE ON THE FAMILY*, June 1, 2003 ("In a recent public opinion survey 41% of women thought that a family in which the father worked and the mother stayed at home was best for raising children; only 17% said it was beneficial for children and society to have mothers work outside the home.").

provide more public child care as a way to help families balance their work and family obligations. Sixty-two percent of the respondents chose policies that would enable one parent to stay home.¹⁵⁷ In reviewing the literature on housework, Virginia Valian found that there was a consensus between men and women that “women should do most of the housework.”¹⁵⁸

This societal ambivalence has recently found its way into legal scholarship in the form of an emphasis on the importance of caretaking to women. Joan Williams, Martha Fineman and other feminist legal scholars have recently advocated creating more public policies that would facilitate women’s caretaking roles.¹⁵⁹ These policies might include public subsidies for caretaking, limits on hours worked and the creation of more flexible jobs that would presumably be more family friendly if not necessarily more career friendly. I, and others, have written critically of this trend, and I will not rehash those arguments here, other than to say that this turn towards caretaking represents a substantial rethinking of what exactly sex equality means.¹⁶⁰ My sense is that this rethinking is borne largely out of frustration with the limited progress that has been made towards equal parenting, and the ways in which women’s entry in the workplace has not necessarily resulted in more of a sharing of the work in the home.¹⁶¹ Nevertheless, it

¹⁵⁷ See Public Agenda Online, Survey Organization (2003) (poll was conducted in June 2000) (available at www.publicagenda.org/issues/major_proposals_detail2.cfm?issue_type=childcare, last visited July 31, 2003).

¹⁵⁸ VALIAN, *supra* note 9, at 40. Professor Valian noted that until their workload reaches 75%, most married women see their division of labor as fair. See *id.*

¹⁵⁹ See generally WILLIAMS, *supra* note 10; Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403 (2001) (arguing for a greater public emphasis on caretaking). For a treatment of the topic aimed at popular audience see ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001).

¹⁶⁰ See Michael Selmi, *Care Work and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT. L. REV. 1557 (2001); Naomi Cahn & Michael Selmi, *Caretaking and the Contradictions of Contemporary Policy*, MAINE L. REV. (forthcoming Winter 2002).

¹⁶¹ See, e.g., Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57 (2001). Naomi Cahn has recently argued that resistance to change may be attributable in part to women’s desire to preserve their

seems to reflect our societal ambivalence toward breaking down gender stereotypes in a way that might be transformative.¹⁶²

The societal view that it would be best for women to remain home with their children are plainly reflected in the class action cases. Every reported case included statements from management officials that women would be paid less than men because they did not have a family to support, and often these statements were accompanied by blanket declarations that women were not appropriate for management positions because of their family responsibilities.¹⁶³ The class action against the rental company, Rent-A-Center, provides an extreme example of such behavior. In that case, which subsequently settled for \$47 million, one regional director was quoted as saying, “I have never had one female store manager working for me and have never promoted a woman,” while another stated that “Women should be home taking care of their husbands and children, chained to the stove, not working in my store.”¹⁶⁴

own power, given that the realm of caretaking has been one of the areas where women have been able to dominate and obtain power. See Naomi R. Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2000).

¹⁶² Catherine Fisk has wonderfully captured this ambivalence in a recounting of the paths of her friends from college, all of whom went on to obtain professional degrees but half of whom have since left the labor market to stay home full-time. See Catherine Fisk, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America*, 51 BUFFALO L. REV. 409, 409-11 (2003) (book review). In an interesting history of women’s movement towards equality, Robert Jackson argues that feminists have had their greatest legislative successes when they have reinforced rather than challenged existing stereotypes. He writes: “Government responses to modern feminist agitation suggest that feminist efforts to affect national legislation succeeded only when they defined the issues narrowly, minimizing potential effects on gender roles. Feminists did influence legislation, such as laws that provided women equal access to credit, required schools receiving federal funds to give equivalent support to girls’ athletics, and required disability plans to cover pregnancy leaves. These successes seem to have occurred because none of these laws threatened to initiate significant changes in the status of women or the relations between the sexes.” ROBERT MAX JACKSON, *DESTINED FOR EQUALITY: THE INEVITABLE RISE OF WOMEN’S STATUS* 201 (1998).

¹⁶³ See text accompanying notes 70-71 *supra*.

¹⁶⁴ See *Wilfong v. Rent-A-Center*, 2001 U.S. Dist. LEXIS 22718 *29 (E.D. Missouri 2001); see also Kristin Downey Grimsley, *4,800 Women in Class to Sue Rent-A-Center: U.S. Judge Cites Allegations of Company-Wide Bias*, WASH. POST, Dec. 29, 2001, at E1. Among other practices challenged in *Rent-A-Center* was a requirement that all employees be able to lift 75 pounds, a requirement that had been increased from 50 pounds without any apparent justification. See Grimsley, *supra*. This is reminiscent of some of the obstacles that were literally placed in women’s paths when they sought positions in fire departments in the 1970s. See *Berkman v. City of New York*, 536 F.Supp. 177 (E.D.N.Y. 1982). In 1974,

In one respect, it is not all that difficult to understand why men might want to try to preserve workplace norms in which they both dominate and prosper, but it is more difficult to understand why employers would tolerate these efforts. Excluding women from the workplace has the potential to be economically inefficient insofar as the firm would be excluding productive employees for noneconomic reasons. Economic theory suggests that firms will eschew such behaviors, or that nondiscriminatory firms would provide a disciplining force for the market by hiring the excluded workers and thus lowering labor costs.¹⁶⁵ Yet, these cases make clear that inefficient exclusion and harassment frequently occur even in sophisticated workplaces, and it is a serious puzzle why this behavior persists, particularly at levels that approach industry-wide patterns of discrimination such as in the securities and grocery industries.

It is possible that the discriminatory practices discussed in this article are efficient in the sense that the firms gain more in productivity from their male employees than was lost by the exclusion or harassment of female employees. This might occur if the most productive male employees gravitate towards firms with a culture that permits male dominance. It may also be that these male employees are willing to forego salary in return for working in such a workplace culture, that these workers gain greater utility from a male-dominated environment than they might from higher salaries. In other words, male brokers would effectively agree to work for Smith Barney rather than one of

just after women began to apply to the fire department and just after Title VII became applicable to public employers, the City of New York modified its physical agility examination to require the scaling of an eight foot wall, which the vast majority of the female applicants were unable to do. The district court found the wall to be a “literal” barrier to women’s employment and also found that it was not job-related. *Id.* at 194.

¹⁶⁵ The standard reference for this argument is GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 153-60 (2d ed. 1971). The theory is considerably more complicated than stated above. For additional discussions see Selmi, *supra* note 4, at 1317-20; Stewart J. Schwab, *Employment Discrimination*, in 3 *ENCYCLOPEDIA OF LAW AND ECONOMICS* § 31 (2000).

its competitors precisely because male norms were preserved in one but not the other, or that in the grocery stores, men would only agree to begin their careers at the bottom of the firm ladder to the extent they would not have to compete, or conceivably work, with women.

For this to be the case, men would have to be substantially more productive than even the best female employees, and there is certainly no reason to assume, absent some proof, that this is the case. On the contrary, a number of published studies demonstrate that women are no less productive than their male counterparts.¹⁶⁶ There is, however, some support for the notion that homogenous work groups are more productive than heterogenous groups,¹⁶⁷ and it may be that management's tolerance for the practices can be defended in this manner. Yet, the evidence in support of the homogeneity thesis is limited and mixed, and there is little about the evidence that could be described as compelling.¹⁶⁸ Moreover, if true, this thesis could not defend the harassing behavior at issue in so many of the cases, but instead might be consistent with discriminatory assignments or promotions.

There is one other possibility that might justify the exclusionary practices based on an efficiency rationale. Some of the discriminatory behavior might be consistent with

¹⁶⁶ Although the studies are few in number, those that have sought to measure productivity differences between men and women have generally found no significant differences. See Harry J. Holzer, *The Determinants of Employee Productivity and Earnings*, 29 INDUS. REL. 403, 415 (1990) (finding that women had "comparable productivity" but "much lower wages" than men). A recent study of male and female veterinarians found that productivity differences could not explain wage differences. See David M. Smith, *Pay and Productivity Differences Between Male and Female Veterinarians*, 55 INDUS. & LABOR REL. REV. 493 (2002) (finding that 15% pay differential could not be explained by productivity factors).

¹⁶⁷ The evidence is collected and discussed extensively in Devon W. Carbado and Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (book review).

¹⁶⁸ A review of the existing literature concluded: "Diversity [in the workplace] thus appears to be a double-edged sword, increasing the opportunity for creativity as well as the likelihood that group members will be dissatisfied and fail to identify with the group." Francis J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. OF MGMT. REV. 402, 403 (1996).

customer desires or expectations, and in this way customer discrimination might help explain why the practices persist.¹⁶⁹ Customers might prefer men at the meat counter, men handling their financial matters or making their automobiles, but simply to state this proposition is to reveal its limits. A majority of shoppers are women, an increasing number of investors are likewise women, and it seems unlikely that they would have a strong preference for dealing exclusively with men, just as it seems quite unlikely that anyone would particularly care who assembled automobiles (or cut meat or handled the vegetables).¹⁷⁰ And as was true with the notion of women's preferences, no company has produced any data to support the notion that customer discrimination helps explain the discriminatory policies. Of course, this might be because customer discrimination has not been accepted as a legal justification for discriminatory policies,¹⁷¹ but it also seems that more likely assumed customer preferences, rather than actual preferences, underlie management acceptance. Indeed, it seems entirely implausible that these practices can be defended on an efficiency basis but instead they appear to indicate that employers are willing to forego profits in order to tolerate discriminatory practices despite their effects on the firm's profitability.

¹⁶⁹ See Stewart J. Schwab, *Employment Discrimination*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS, § 31, 568 (2000) ("Perhaps a more important explanation for long-run discrimination is that profit-maximizing employers in competitive markets will cater to the discriminatory tastes of employees or customers."). One recent study found a strong correlation between the race of customers and the race of employees, particularly with respect to African Americans, which the authors considered consistent with a theory of customer discrimination. See Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q. J. ECON. 835 (1998).

¹⁷⁰ For example, it is estimated that four in ten women shop at Wal-Mart in any given week. See Liz Featherstone, *Wal-Mart's Female Trouble*, NATION, Dec. 3, 2002, at 18.

¹⁷¹ The best known of these cases involved Southwest Airlines' attempt to only hire female flight attendants to cater to the interests of its male passengers. See *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981). A more recent variant involved a famous Miami Beach restaurant's attempt to hire only male waiters so as to create a European ambiance. See *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000).

Rather than focusing on these explanations, management's inability to root out inefficient practices likely stems from management's own perceptions and biases, perceptions and biases that often mirror those of their male employees. Certainly this seems true of all of the cases discussed in this article – the behavior described in the securities, grocery store and harassment cases all had lengthy pedigrees and originated during a time when the workplaces were exclusively male. Boorish behavior denigrating women was, for many, the norm, and not seen as something that required change but was rather part of the camaraderie of the workplace. In the grocery industry, the fact that management was comprised almost exclusively of men appeared normal, and was consistent with the gender schema that dominated the workplace. More than anything else, the explanations offered by management and others that women were not interested in the demands that came with management opportunities helped fit the reality to the perceptions rather than aligning the perceptions with reality.

In this way, the gendered nature of institutions becomes invisible because it is seen as the natural order of things. Joan Acker has written about the way in which gender infiltrates organizations and its processes, noting that “[m]anagers’ decisions often initiate gender divisions, and organizational practices maintain them.”¹⁷² She contends that gendered nature of institutions is obscured because the organization is theorized in gender-neutral terms.¹⁷³ She concludes, “Understanding how the appearance of gender

¹⁷² Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER AND SOCIETY 139, 146 (1990).

¹⁷³ See Joan Acker, *From Sex Roles to Gendered Institutions*, 21 CONTEMPORARY SOCIOLOGY 565 (1992).

neutrality is maintained in the face of overwhelming evidence of gendered structures is an important part of analyzing gendered institutions.”¹⁷⁴

Theories of social psychology also help us understand why sex-based discriminatory practices can persist even where they are demonstrably inefficient.¹⁷⁵ To the extent the discriminatory practices are left over from an era of exclusively male workplaces, management may not have seen any need to change what they had always done, and what had been perceived to work in the past. This fidelity to past practices, common to organizational structures, may have likewise enabled firms to discount the complaints that arose from the female employees.

Indeed, in an era of perceived hyperregulation of the workplace, where all firms now have sexual harassment policies and many enforce them vigorously,¹⁷⁶ one of the most puzzling aspects of the class action cases is why the complaints were consistently ignored. For example, in the Smith Barney case, the complaints of Pamela Martens fell upon deaf ears, even though a representative from the corporate office did make a token appearance to observe the office after the initial complaints.¹⁷⁷ The complaints that were raised would have been relatively easy to investigate, which was true of most the securities cases, and yet in none of the cases did the firms perform any substantial investigation before a lawsuit was filed.¹⁷⁸ In some instances, like the Smith Barney

¹⁷⁴ *Id.* at 568.

¹⁷⁵ For an insightful discussion of how social psychology can provide insights into organizational inequality see James N. Baron & Jeffrey Pfeffer, *The Social Psychology of Organizations and Inequality*, 57 SOCIAL PSYCHOLOGY Q. 190 (1994).

¹⁷⁶ See Schultz, *supra* note 144 (discussing and documenting the presence of harassment policies and no tolerance enforcement).

¹⁷⁷ See ANTILLA, *supra* note 23, at 116-17.

¹⁷⁸ In a case in which the plaintiff was awarded \$1.5 million in punitive damages under the arbitration procedure instituted by the Smith Barney settlement, the arbitration panel chastised the company for its “failure to undertake any meaningful investigations.” See Randall Smith, *Salomon is Told to Pay Broker \$3.2 Million*, WALL ST. J., Dec. 17, 2002, at C1. In the Eveleth Mines case, one of the plaintiffs who went

case, the company may have been trying to protect a powerful, and profitable, male manager but, even in that case, the strategy ultimately failed as once the lawsuit was filed, the manager at the center of the controversy quietly left the firm.¹⁷⁹

The grocery store cases, which began nearly thirty years ago, provide another perplexing example of corporate indifference to gender inequality within the firm. The lack of women in management positions – as well as the lack of women in positions that might lead to management – was plainly visible to anyone who bothered to look, as evidenced by the plaintiffs’ practice of collecting data by viewing photographs of managers hanging in stores.¹⁸⁰ Home Depot and Wal-Mart certainly must have known of their assignment patterns, and a walk through virtually any of their stores would have confirmed that women were working primarily at cash registers rather than on the sales floors or in management positions.¹⁸¹ The harassment uncovered by the EEOC in the Mitsubishi case was so pervasive that it could not have gone unnoticed by management level officials, and the same appears to be true for the other cases involving patterns of sexual harassment.

As noted, some of the managements’ tolerance for the behavior may reflect an implicit calculus of the value of the female employees when compared to the male employees. One notable example involved the difficulty of Pamela Martens finding new employment after she was fired by Smith Barney. Ms. Martens had a substantial

to complain to the superintendent noticed a picture of a vagina above his desk with the words, “Miners do it better in the bush.” See Jon Tevlin, *The Eveleth Mines Case*, STAR TRIBUNE, Nov. 29, 1998, at A8.

¹⁷⁹ See Spiro, *supra* note 25, at 102 (noting that the manager was placed on leave and retired shortly thereafter.)

¹⁸⁰ In the Lucky’s case, the court found that the company was aware of the underrepresentation of women in management positions since at least 1986. See Stender, 803 F. Supp. at 331.

¹⁸¹ Since I have begun this research, I have kept my own tallies when I visit stores such as Home Depot, where my cursory investigations suggest that not much has changed in the assignment patterns in the stores. The same is true in banks, where one is far more likely to find women as bank tellers rather than bank managers.

portfolio of business but firms were reluctant to hire her presumably because they viewed her as a trouble maker who might alienate male employees.¹⁸² Beyond this kind of rough calculus, another reason the firms tolerated such exclusionary practices, has to do with the stereotypes that undergird the very practices at issue. This is particularly true in these industries that are perpetuating past practices given that those practices will be seen as the norm, and because they are the norm, they will also be assumed to be efficient, given that efficiency is the underlying mantra of business practices. Without undertaking an effort to determine whether the practices are efficient, firms will persist with the practices they have always used. Management's stereotypes about women, however, will often preclude taking the step necessary to evaluate their practices. If the managers begin with the assumption that women are not "tough enough" to be brokers, will not be willing to move to take advantage of promotional opportunities, or if they assume that women want to work part-time and are likely to leave the workplace for extended periods to have and care for children, then there will be no reason to examine the existing practices, at least without some shocking event, or without perhaps a sense that they are falling behind competitors because of their practices.¹⁸³ This will be particularly true when there is some behavior that is congruent with management expectations. The social psychology literature explains that one of the reasons stereotypes are so resistant to change is the human tendency to emphasize stereotype consistent behavior while discounting behavior

¹⁸² Ms. Martens was turned down for employment by Paine Webber, Merrill Lynch and Dean Witter, and was ultimately hired by A.G. Edwards. *See* ANTILLA, *supra* note 23, at 133-35.

¹⁸³ In his recent book on the persistence of racial discrimination, Glenn Loury describes a similar process among individuals who fail to notice the need for change because their world view comports with an "inchoate sense of the natural order of things." GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 41 (2001).

that is inconsistent with our gender schemas.¹⁸⁴ This is no less true of senior management than it is of employees or mid-level managers.

The patterns of exclusion are even more difficult to change given that they are reinforced by the social ambivalence regarding the role of women in the labor market that was described above.¹⁸⁵ Although this ambivalence often lurks below the surface, the social signals are not hard to detect, and those signals likely impose a constraint on change, creating what Alice Kessler-Harris refers to as the “tenacity of the gendered imagination.”¹⁸⁶

IV. CONCLUDING REFLECTIONS

There remains a serious undercurrent of hostility to women in the workplace that is reflected in the class action cases that have arisen over the last decade and which involve overt acts of hostility towards women with an intent to preserve the male norms that have persisted despite our national pledges of gender equality. The persistence of these cases also help explain why we have not made more progress towards integrating the workplace, and why the labor market remains so deeply segregated by sex. This is not to suggest that all of the gender inequities we observe result from intentional acts of discrimination – it is important to note that no one theory of discrimination, no one theory of the workplace, can adequately explain what we observe. Rather than a single theory, we should look to many different theories and explanations to help us piece together the

¹⁸⁴ See generally Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 THE HANDBOOK ON SOCIAL PSYCHOLOGY 340 (Danil T. Gilbert et al. eds., 4th ed. 1998); see also Linda A. Jackson, et al., *The Effects of Stereotype Consistency and Consensus Information on Predictions of Performance*, 133 J. SOC. PSYCHOL. 293 (1993); John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 AM. PSYCHOL. 867 (1986).

¹⁸⁵ See text accompanying notes 155-58, *supra*.

¹⁸⁶ See KESSLER-HARRIS, *supra* note 130, at 291.

puzzle that gender inequality in the workplace remains.¹⁸⁷ Intentional discrimination remains a critical piece of the puzzle.

At the same time, it is important to acknowledge that women's experience in the workplace has not changed as much as is often stated or hoped. Moreover, this is not simply a result of institutional factors, of difficulties women may have in balancing their various commitments, or of their preferences, but the inequality is deeply grounded in gender stereotypes and assumptions about women's interests – gender stereotypes and assumptions that reflect views that we typically associate with a different era. One problem with the subtle discrimination literature is its tendency to remove the blame for persistent inequalities from the actors who are responsible for the actions that produce those inequalities, shifting the blame instead to amorphous institutions or the purported benign actions of well-intentioned individuals. Most of the behavior described in this article can only be seen as subtle if that term is used to encompass any behavior that is not accompanied by overt statements of hostility to women, but that would be a curious definition of subtle discrimination, particularly in the twenty-first century when such statements are thankfully quite rare – though as these cases indicate, certainly not non-existent. Although subtle forces play a strong role in perpetuating gender inequities,¹⁸⁸ intentional discrimination likewise plays an important role, and one that is too often ignored.

¹⁸⁷ In a related sense, Kathryn Abrams writes, “[F]eminists should argue that one size cannot fit all, theoretically speaking; it is crucial to see women’s inequality as the product of many intersecting motives, constructions, and modes of treatment.” Abrams, *supra* note 141, at 1217.

¹⁸⁸ For two helpful discussions of the ways subtle forces can lead to various inequities see VALIAN, *supra* note 9 and Sturm, *supra* note 9. Valian in particular emphasizes the way in which women are affected by what she defines as “cumulative disadvantage,” the cumulative effect of stereotypes, slights and assumptions.

This is the point at which I would traditionally be expected to offer policy prescriptions for eradicating the effects of discrimination from the workplace, perhaps by calling for greater enforcement of the law, or a change in the law, enhancing penalties, or more diversity training. But that is not the purpose of this paper. Instead, I have here sought to marshal evidence from existing cases as a way of demonstrating the persistence of intentional discrimination against women in the workplace at a level that far exceeds common perceptions. This level of discrimination is largely invisible because it is so common, and because it raises fundamental questions regarding our societal commitment to gender equality – a commitment that has always been more powerful rhetorically than in its implementation.

There is another reason for withholding policy prescriptions, which is that I am not at all certain that there is an easy fix or that some of the common policy suggestions would aid the quest for gender integration and equality. As I have noted elsewhere, I believe that the turn to caretaking represents a step backward rather than a step forward in the quest for greater gender equality because it enshrines caretaking as women's work, and in many instances also privileges care work over labor market work. I also do not think education or diversity training will likely move us forward, particularly since so much of both is litigation driven and as a result tends to offer businesses public relations more than it offers employees meaningful education.¹⁸⁹ This is not to suggest that training makes no difference – it is certainly the case that there are many employment practices committed employers can institute to decrease workplace barriers for women.

¹⁸⁹ There is little question that diversity training has become the cure of the day but there is a substantial question whether any of that training is beneficial. For a thorough review of the literature, and one that concludes that there is little documented support for the benefits of diversity training see Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001).

The comprehensive study and follow-up conducted by Johns Hopkins University when it discovered that female professors were consistently falling behind their male peers is one example of a successful course for change.¹⁹⁰ As the demographics of the workplace continue to evolve, more employers are likely to enact policies intended to retain and attract female employees. But the models of change remain the exception rather than the rule – a rule that seems far more represented in the class action cases discussed earlier. More than anything else, these cases serve as a reminder us of just how much remains to be done, how far we remain from our commitment to achieving our goal of gender equality in the workplace.

¹⁹⁰ See VALIAN, *supra* note 9, at 319-22.