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Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms

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SEX DISCRIMINATION IN THE NINETIES, SEVENTIES STYLE:
CASE STUDIES IN THE PRESERVATION OF MALE WORKPLACE
NORMS

BY
MICHAEL SELMI*

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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

* Visiting Professor of Law, Harvard Law School, 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. I also received generous and helpful comments from Naomi Cahn, Marion Crain, Anne-Marie Harris, Christine Jolls, Gillian Lester, Wendy Parker and Joan Williams, and two anonymous referees.

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 has 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

later, Wal-Mart, which for many Americans had replaced Sears as their shopping destination of choice, was sued for assigning women to limited dead-end jobs that did not offer promotional possibilities.² In both cases, the companies defended the make-up of their workforce by claiming that their workplace assignments were based on women's own preferences and that many women who worked for the companies lacked interest in management positions.³ In the last decade, lawsuits nearly identical to those filed against Wal-Mart and Sears have been initiated against Home Depot and most 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 as sales associates, positions that typically did not lead to management level jobs.⁷ As discussed in more detail below, during the last decade similar lawsuits have been filed against most of the major brokerage firms in the country.⁸

These cases, and many others like them, offer an important challenge to the reigning view 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

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").

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 of discrimination. 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*.

receded and changed substantially over the last three decades.⁹ The workplace barriers women now face are more commonly attributed to their family commitments, rather than to employer or even societal discrimination.¹⁰ Recent popular accounts sound a similar theme, emphasizing how observed labor market disparities are the product of choices women make between their work and family obligations.¹¹ To the extent that discrimination is still seen as problematic, such discrimination is generally identified as subtle, often unconscious in nature, and relatively free of what is often described as an intent to discriminate.¹²

Yet, the class action employment discrimination cases that have arisen over the last decade cast doubt on this portrait of the workplace, and collectively suggest that discrimination remains a more powerful force in the labor market than is typically acknowledged. These lawsuits have targeted particular, and often entire, industries, including securities, retail, restaurants and automobile manufacturing. Contrary to the contemporary emphasis on subtle discrimination, there is rarely anything subtle about the conduct at issue in these cases; rather, all of the cases involve overt sex discrimination, and, at least within these industries, provide substantial insight into the persistence of sex segregation and workplace 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

9. This issue is discussed in more detail in section III.A. See also sources cited *infra*, notes 10, 12. Barbara Reskin, one of the country's leading sociologists studying workplace discrimination, has recently moved away from emphasizing intentional discrimination towards emphasizing the way in which subtle often unconscious factors perpetuate inequality. See Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 326 (2000) (noting that "I and others suspect that most employment discrimination originates in the cognitive processes . . .").

10. For a sampling of the extensive literature see ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004); ANITA ILTA GARVEY, WEAVING WORK AND MOTHERHOOD (1999); JOAN WILLIAMS, UNBENDING GENDER (2000).

11. See, e.g., Lisa Belkin, *The Opt-Out Revolution*, N. Y. TIMES, Oct. 26, 2003, Magazine, at 42 (profiling women who have left prestigious jobs to stay home with their children).

12. 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 COLUM. L. REV. 458, 469-89 (2001). An excellent symposium recently published in this Journal provides a comprehensive review of the literature on stereotyping. See in particular the articles by Joan Williams, Martin Malin and Marc Poirier in Symposium, *Litigating the Glass Ceiling & the Maternal Wall: Using Stereotyping & Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMPLOYEE RTS. & EMP. POL'Y J. (2003).

in the workplace and I firmly believe that much of the discrimination women encounter can be described as subtle, depending on how that term is used.¹³ What I mean to suggest instead, is that there remains a significant amount of discrimination in the workplace that is not properly labeled as subtle but which involves the active and conscious exclusion of women from the workplace, and if we are to make further progress toward greater equality both in and outside of the workplace we must remain focused on the entrenched nature of institutional sex discrimination.

Although the class action cases are generally inconsistent with the theories steeped in subtle discrimination, they are consistent with a theory of sexual harassment that has recently been advanced by Professors Kathryn Abrams and Vicki Schultz.¹⁴ 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, their theories help explain the underlying basis for the class action cases, and this is true even for those cases that do not involve formal claims of sexual harassment but are instead presented as classic cases of disparate treatment discrimination.

This article will be divided into three 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, I will then offer some analysis of what these cases can tell us about the nature and persistence of discrimination, and the many ways in which our narratives of gender mask the reality of discrimination. 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" piece, with the reminder here being that intentional and overt discrimination against women 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 class action cases

13. 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 COLUM. HUM. RTS. L. REV. 657 (2003).

14. 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).

alleging widespread patterns of employment discrimination.¹⁵ Many of the most prominent cases have involved allegations of race discrimination, including those filed against Texaco and Coca-Cola,¹⁶ but there have also been a slew of cases challenging patterns of sex discrimination within a diverse array of industries. The first major case, arose in the 1980s and involved a challenge to the job assignments of the State Farm Insurance Company which had traditionally failed to hire women for positions as insurance agents.¹⁷ That case settled for more than \$150 million, and remains the largest settlement in a sex discrimination case involving a private party.¹⁸ Perhaps prompted by the success of the State Farm case, similar cases were filed challenging discriminatory assignment practices in the securities and grocery industries.¹⁹ At about the same time as these cases were developing, a series of class action sexual harassment cases arose that have much in common with the exclusionary practices that were challenged in the assignment cases.²⁰ In this section, I will describe the rise of class action litigation in the securities and grocery industries, as well as in the sexual harassment class action cases.

A. *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.²¹ At the

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

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

17. Sales of insurance policies was a field traditionally reserved for men. See Robin Leidner, *Serving Hamburgers and Selling Insurance: Gender, Work, and Identity in Interactive Service Jobs*, 5 GENDER & SOC'Y 154, 161-63 (1991) (discussing the gendered nature of jobs within insurance industry).

18. 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 a lawsuit against the United States Information Agency after nearly twenty-five years of litigation. See Bill Miller & 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.

19. 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 in the law firm is also involved in the case against Wal-Mart, which is being handled by a consortium of attorneys. See Steve Salter, *The New Big (Legal) Thing?*, FAST CO., April 2003, at 112 (discussing Brad Seligman and the other attorneys representing plaintiffs).

20. See text accompanying notes 101-28, *infra*.

21. 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

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 sought their place in the industry. Over the last decade, women have gradually infiltrated the securities profession, though they remain a substantial minority in all but the least desirable clerical positions. As of 1996 when many of the cases were filed, approximately 15 percent of the more than 100,000 brokers nationwide were women, and women held fewer than 10 percent of the senior management positions.²² By 2003, the figures were nearly the same: approximately 16 percent of the brokers and 12 percent of the branch managers were women.²³ This modest infiltration of women, however, had not transformed the workplace, which remains deeply male and often deeply abusive.

Beginning in the mid-1990s, female brokers initiated lawsuits alleging various forms of discrimination, including the failure to promote, train or mentor women, the failure to assign women to lucrative accounts, and pervasive sexual harassment, including quid pro quo harassment where male bosses were seeking sexual favors for employment prerequisites. Few of the major securities firms have been able to escape the allegations, and more lawsuits are likely forthcoming.²⁴ Although all of the cases have settled, it is equally clear that 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.²⁵

Likely the best known of the cases was also the first to be filed, a case involving the firm that was then known as Smith, Barney, an old line firm that has since become part of the financial conglomerate Travelers, Inc. Initially filed in 1996, the case alleged that Smith Barney had

version detailing the world of investment banking see MICHAEL LEWIS, *LIAR'S POKER* (1989).

22. 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. Peter Truell, *Success and Sharp Elbows: One Woman's Path to Lofty Heights on Wall Street*. N.Y. TIMES, July 2, 1996, at D1 ("Fewer than 10 percent of the partners and managing directors at Wall Street's leading firms are women.")

23. See Patrick McGeehan, *What Merrill's Women Want: A Mother, a Daughter and New Salvos in a Bias Case*, N.Y. TIMES, Aug. 22, 2004, at C1, C4 ("In the entire industry in 2003, about 16 percent of brokers and 12 percent of branch managers were women, according to a survey conducted by the Securities Industry Association."). The Report of the Securities Industry Association entitled 2003 Report on Diversity Strategy, Development & Demographics, Key Findings, is available at <<http://www.sia.com/hrdiversity/pdf/SurveyHighlights.pdf>> (last viewed Apr. 18, 2005), and the relevant charts are at pp. 15-16 of the report.

24. The cases are listed in Table One.

25. As discussed below, most of the cases have settled without substantial litigation. As a result, most of the case descriptions are based on journalistic accounts, motions filed in the cases, and stories told by parties, rather than from published opinions.

systematically discriminated against women in hiring, assignments, pay and promotions, as well as through pervasive sexual harassment in some of the firm's branch offices.²⁶ According to the allegations, only 5 percent of Smith Barney's brokers were women, and less than 2 percent of its branch managers were women. The company, on the other hand, claimed that women accounted for 13 percent of its brokers, but conceded that women were just over 2 percent of its branch managers.²⁷ The lead plaintiff in the case, Pamela Martens, was a fifty-year-old woman who had worked at the firm for ten years and who managed \$187 million for the company, but who was fired two days after she complained about discriminatory behavior in her suburban New York office and retained an attorney to pursue her complaints.²⁸

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.²⁹ 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.³⁰ 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.³¹ The case became best known for what was described as a "boom boom" room – a room 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 located below a toilet hanging from the ceiling and from which women were excluded.³² 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;³³ one of the managers wore a gun strapped to his ankle, while the branch manager occasionally brandished his own gun in the office.³⁴

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

27. *Id.*; see Derrick Z. Jackson, *Shutting Down the Wall Street "Frat House."* BOSTON GLOBE, Nov. 21, 1997, at A31; see also *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 250 (S.D.N.Y. 1998).

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

29. *Id.* at 241.

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

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

32. ANTILLA, *supra* note 28, at 5-16.

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

34. ANTILLA, *supra* note 28, at 62.

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 employees.³⁵ 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 arbitration proceedings in favor of a more neutral arbitration forum.³⁶ Under the settlement, more than 1900 women filed complaints, the vast majority of whom were former employees.³⁷ 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 an award of \$1.5 million in punitive damages as a penalty for the company's tolerance of pervasive sexual harassment.³⁸ In addition to the individual relief, the settlement required Smith Barney to spend \$15 million toward various diversity initiatives, including training.³⁹

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.⁴⁰

35. In the last decade, there has been a tremendous amount of litigation involving clauses that require employees to arbitrate claims against their employers, and these clauses initially gained their popularity in the brokerage industry as an adjunct to arbitration agreements, 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.C.T. ECON. REV. 209 (2000); Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?* 53 DISP. RESOL. J. 40 (1998); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

36. 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.

37. Gary Weiss, *A Settlement That's Not Settled*, BUS. WK., Oct. 30, 2000, at 164; see Debra Baker, *Tangled Up in Ticker Tape*, ABA J., Dec. 1999, at 44. Thirteen hundred of the claimants settled without going through the arbitration process. Weiss, *supra*, at 164. Another thirty-eight 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).

38. 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.

39. 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).

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

As noted earlier, Merrill Lynch had actually been sued by the Equal Employment Opportunity Commission for discrimination against women twenty years earlier.⁴¹ 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 their targets, and no one ever seemed to notice, and certainly no one seemed to care.⁴² By the time the suit was filed in 1996, only 15.8 percent of Merrill Lynch's brokers were women, about the same percentage that had existed in 1990, and not significantly more than had existed in the 1970s.⁴³

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.⁴⁴ As was true of Smith Barney, and the other cases alleging discrimination in the securities industry, 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.⁴⁵ For example, one of the lead plaintiffs, an experienced broker with an MBA, was asked during her interview how much money her husband made.⁴⁶ At a firm meeting attended by 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.⁴⁷ 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.⁴⁸ When Cremin returned to work after a maternity leave, she was ordered to surrender all of her accounts and was promptly fired.⁴⁹

41. *See supra*, note 5.

42. *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 percent of all new hires annually but that "[t]wenty years later, Merrill Lynch had not yet reached the target").

43. *See* Wozencraft, *supra* note 40.

44. *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).

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

46. *Id.* at 35.

47. *See* Wozencraft, *supra* note 40, at C1.

48. *Cremin*, 957 F. Supp. at 1464.

49. *Id.*

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.⁵⁰ Of the 22,000 member class, 2700 individuals were ultimately eligible to file claims, and more than 900 ultimately did.⁵¹ The company settled most of the claims for amounts that reportedly ranged from \$20,000 to \$40,000.⁵²

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

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

52. 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 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.⁵³ Like the other cases, the plaintiffs also alleged discrimination in assignments, training and mentoring as a result of sex stereotyping, namely that women were seen as not being as aggressive as men.⁵⁴ The case settled for \$31 million along with a series of proposed reforms, including new means of distributing accounts to its employees.⁵⁵

Morgan Stanley became the latest securities firm to settle its case, agreeing to provide \$54 million to the plaintiff class, including \$12 million for the woman, Alison Shieffelin, who initiated the complaints. Ms. Shieffelin had been a successful convertible bond salesperson with Morgan Stanley with an annual salary that exceeded \$1 million but who was fired shortly after she complained about not being promoted to a managing partner position.⁵⁶ Similar cases or claims of system-wide discrimination have also been filed against Olde Securities, US Bancorp, Lew Lieberman

53. See *Kosen v. American Express Financial Advisors*, Civil Action No. 01:02CV0082 (D.D.C. 2001), ¶ 1 (a copy of the complaint is on file with the author).

54. *Id.* at ¶ 30.

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

56. See Patrick McGeehan, *Wall Street Highflier to Outcast: A Woman's Story*, N.Y. TIMES, Feb. 10, 2002, at C1.

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 involve claims originally filed in 1993.⁵⁷

Although it is always difficult to draw 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. A survey of securities firms conducted in 2003 indicated that only 16 percent of the brokers were women, and 13 percent of the branch manager positions were held by women.⁵⁸ In contrast, 87 percent of the retail assistants were women.⁵⁹ At Merrill Lynch, despite its recent lawsuit, women's representation among brokers has increased from 15 to 16 percent, or just one percent higher than the original goal from its 1974 lawsuit.⁶⁰

B. 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 promotional possibilities without possessing a college degree.⁶¹ Promotions to grocery store manager positions 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 tend to offer the greatest promotional opportunities as well.⁶² More

57. See *Former Employee Files Lawsuit Charging J.P. Morgan Securities with Bias*, N.Y. TIMES, April 11, 2001, at C13; 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; 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); 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.

58. See SECURITIES INDUSTRY ASSOCIATION, REPORT ON DIVERSITY STRATEGY, DEVELOPMENT AND DEMOGRAPHICS 16 (2003). The survey participants included many of the largest securities firms, including many of those who had settled discrimination claims. See *id.* at 25.

59. See *id.* at 17.

60. See Reed, *supra* note 45, 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.")

61. The data with respect to the grocery industry can be found at <http://www.bls.gov/oco/cg/content/cgs024.stm> (last visited May 3, 2005). 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 . . .").

62. See Leslie Beyer, *Fresh Trends for Profit*, GROCERY HEADQUARTERS, Feb. 1998, at 35 (noting that produce "can be the most profitable department in the store"). For a discussion of the job

recently, grocery stores have expanded their offerings to include bakeries and delicatessens, although these departments, largely because they are new, are not typically part of the ladder to management positions. 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 1996.⁶³ 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.⁶⁴ Less well known is Publix's 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?)." ⁶⁵

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.⁶⁶ The plaintiffs were represented by the premier employment discrimination firm Saperstein, Goldstein, Demchak and Baller and 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 who had worked for the company since 1991.⁶⁷ 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.⁶⁸ The women claimed that they were kept in cashier and deli positions while men were placed in management-track stock and clerk positions.⁶⁹ To build their case, the plaintiffs' lawyers relied primarily on

structure within the grocery industry see KATHERINE L. HUGHES, *SUPERMARKET EMPLOYMENT: GOOD JOBS AT GOOD WAGES?*, (Inst. on Educ. & Econ., Working Paper No. 11, Apr. 1999) (on file with the author).

63. 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.").

64. See 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.

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

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

67. *Melodee Shores v. Publix Super Markets*, 1996 U.S. Dist. LEXIS 3381 at *31, *32 (M.D. Fla. Mar. 12, 1996). The states were Florida, Georgia, South Carolina and Alabama.

68. Nicole Harris, *Revolt at the Deli Counter*, BUS. WK., Apr. 1, 1996, at 32.

69. *Id.*

statistical evidence – statistics that were compiled primarily by having representatives of the plaintiffs walk into stores to observe the photographs Publix posted of its managers. The portraits provided a compelling picture of sex discrimination. One 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.”⁷⁰

Ultimately, the plaintiffs compiled an impressive statistical case. Relying on EEOC and Census Bureau statistics, the plaintiffs’ lawyers claimed that although women held 40 percent of all supermarket management positions nationwide, women accounted for only 21 percent of Publix’s management positions.⁷¹ Moreover, the women who did make it into management for Publix tended to manage the delicatessen department, a position that was 90 percent female. Not coincidentally, the deli department managers were among the lowest paid management positions and traditionally had not led to higher-level managerial positions.⁷² Publix also required its store managers to have experience working as stock people, and its meat managers to have worked as meat cutters, positions women had long been discouraged from seeking.⁷³ In 1994, only three of the 456 (0.6 percent) meat department managers were women, with eleven (2.4 percent) female produce managers; in contrast, 390 of the 433 (90 percent) deli managers were women.⁷⁴ Plaintiffs also maintained that full-time male employees earned on average 35 percent more than full-time female employees.⁷⁵

According to the plaintiffs, one primary reason for the segregated workforce was that the decision-making process regarding entry-level placement and promotions was largely subjective.⁷⁶ Job openings were not posted at Publix. Instead, 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.⁷⁷ Managers were not provided with any written guidelines but instead had total discretion to steer new workers into gender-stereotyped positions. It was also alleged

70. Hull, *supra* note 66, at 1A.

71. *Id.*

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

73. *See Shores*, 1996 U.S. Dist. LEXIS 3381.

74. Hull, *supra* note 65, at 1A.

75. *Id.*

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

77. *Id.*

that managers exercised their discretion regarding who received training in a similarly discriminatory manner.

Publix did not dispute the underlying statistics but instead sought to explain the disparities as a product of women's preferences. Male applicants, the company asserted, were more likely to have prior experience in stock and clerk positions and the company also claimed that women chose the jobs that they held because those jobs often had better hours and did not require relocating.⁷⁸ During the course of the litigation, company officials made similar statements seeking to link the store assignments to women's interests in balancing their family and work commitments.⁷⁹

After a lengthy mediation, Publix settled the case in early 1997 for \$81.5 million dollars, one of the largest settlements of its kind.⁸⁰ The settlement also included a series of planned changes in their employment practices, including minimum requirements for store-level jobs, and establishing a job candidate pool so that those interested in pursuing other positions could do so.⁸¹ The company also agreed to fill store jobs with a number of women proportionate to those who apply and to provide employees with new employment training and job advancement programs, but did not agree to post job openings.⁸² One of the interesting side notes to the case is that the company never seemed to suffer a loss of business from the lawsuit even though women constituted a majority of its shoppers.⁸³

Although the Publix case was the most recent of the large class action

78. Harris, *supra* note 68, at 32.

79. See 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"); 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.").

80. See Allen R. Myerson, *Supermarket Chain To Pay \$81 Million To Settle a Bias Suit*, N.Y. TIMES, Jan. 25, 1997, at A1.

81. *Id.*

82. See Lisa Blackman, *Publix Pays Women \$81 million*, THE TAMPA TRIBUNE, Jan. 25, 1997, at 1. In 2000, a group of ten 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. 21, 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.

83. 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. Mean while, profits were up 22 percent over the same quarter in 1996.").

grocery store cases, it was typical of a series of lawsuits that were filed against major grocery store chains during the last decade. The largest of the cases, and the only one to have a published decision on liability,⁸⁴ involved a suit against the western chain then known as Lucky's, now owned by American Stores. After the district court issued a strong decision for the plaintiffs on liability, the case settled in the early 1990s for \$107 million.⁸⁵ 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 jobs are generally better paid and can lead to promotions."⁸⁶ 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 their child responsibilities and fears that the public might react negatively to women in management positions.⁸⁷ As indicated in Table Two, similar lawsuits were filed against Safeway, Albertson's and Save Mart, all of which were based on the same assignment patterns at issue in Lucky's and Publix and all of which settled relatively quickly.⁸⁸

Although most of the grocery store cases were resolved in the 1990s, the case against Lucky's, and several other West Coast chains, were initiated by the Equal Employment Opportunity Commission in the mid-1980s.⁸⁹ At around the same time as these cases were filed, an industry journal featured a story on the absence of women in management,

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

85. 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.

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

87. *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; Eric J. Wallach & Heidi Lichthardt, *Lucky Stores Has Lessons for Employers*, NAT'L LAW J., Feb. 28, 1994, at S17.

88. 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).

89. A set of lawsuits against four Washington state chains were filed in 1986. See Hal Taylor & 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).

suggesting that companies were well aware of the problem, or at least aware that men disproportionately held the top positions by the mid-1980s.⁹⁰ Not surprisingly, the allegations and defenses raised in those cases were identical to those made in the more recent cases. For example, 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 case.⁹¹ Women were also said to have “chosen” checker positions because of the “flexibility,”⁹² just as was alleged in Lucky’s and Publix.

90. See David Merrefield, *Few Women Go Far in Industry Hierarchy*, SUPERMARKET NEWS, Nov. 26, 1984, at 1 (discussing the absence of women in management). It should be noted that the article did not attribute the dearth of women to discrimination, but instead quoted leaders in the industry as suggesting that discrimination did not cause the disparities.

91. See Taylor & Cohn, *supra* note 89, at 18

92. *Id.*

Table Two
Grocery Store Class Action Defendants
1990-2002

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

Despite the bevy of lawsuits, it is equally clear that the pattern of discrimination within the grocery industry remains entrenched 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 Kohl's Markets, a Midwestern chain, as well as a North Carolina-based chain, Ingles markets.⁹³ 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 thirty-nine stores that were surveyed.⁹⁴ Dominick's markets, based in Chicago, was also sued in 1995 and subsequently settled its case for more than \$7 million, and in 1999, the Florida chain Winn-Dixie settled a race and sex discrimination claim for

93. See 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."); Tom Daykin, *Suit Against Kohl's Now Class Action*, MILWAUKEE J. 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."). Class action suits were also filed against two smaller chains, Houston-based Randalls and Alabama-based Delchamps. Both of these cases involved allegations of race and gender discrimination. See Elliot Zweibach, *Taking Action: Litigation in the Supermarket Industry*, SUPERMARKET NEWS, Dec. 29, 1997, at 13 (noting that Delchamps agreed to pay \$4.8 million to settle five lawsuits while Randalls paid \$2.5 million to settle a case filed by the EEOC).

94. See Blank, *supra* note 93, 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.

\$33 million that raised claims virtually identical to those in the other grocery store cases.⁹⁵

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 allowed to work on the sales floor, from which promotions were typically made.⁹⁶ Several years later, and on the eve of trial, Home Depot settled the cases for more than \$100 million.⁹⁷ More recently, Wal-Mart was the subject of what is likely to become the largest class action case of its kind, when it was sued by a consortium of attorneys for sex-segregated assignments and promotions.⁹⁸ The suit against Wal-Mart, the nation's largest retailer, and the largest private employer in the country, alleges that the company relies on sex-stereotyping for its assignments and promotions, largely due to its failure to post job openings and the subjective employment practices implemented by its male-dominated management.⁹⁹ A lawsuit with similar allegations has recently been filed against Costco, a company, unlike Wal-Mart, that is known for its well-paying entry-level jobs.¹⁰⁰

C. 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

95. 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.

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

97. *Id.* at 1285.

98. See Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Lawyers Seek OK for Class-Action Suit*, S.F. CHRONICLE, Apr. 29, 2003, at B1. At the time this article was published, the District Court had certified a class against Wal-Mart but that ruling was on appeal in the Ninth Circuit. See *Dukes v. Wal-Mart*, 222 F.R.D. 189 (N.D. Cal. 2004) (certifying class); Ann Zimmerman, *Court Will Review Class Certification in Wal-Mart Suit*, WALL ST. J., Aug. 16, 2004, at B2 (reporting that Ninth Circuit had accepted interlocutory appeal).

99. 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 percent female, only one-third of its management positions are held by women, a level that matches its peers of twenty-five years earlier. See Michelle Coulin & Wendy Zellner, *Is Wal-Mart Hostile to Women?* BUS. WK., July 16, 2001, at 58.

100. See Abigail Goldman, *Costco Manager Files Sex-Bias Suit*, L.A. TIMES, Aug. 18, 2004, at C1. The lawsuit alleges that the company does not post job openings but instead promotes individuals based on a "tap on the shoulder" system, just as was alleged in the grocery store cases. According to the article, "Although women make up almost half of Costco's workforce, one in six managers is a woman, all of Costco's operations vice presidents are men and only two of 30 executive and senior officers are women . . ." *Id.*

notoriety for its infamous boom boom room and other allegations of harassment by its female employees.¹⁰¹ 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.¹⁰²

The best known of these cases involved the claims filed against the Japanese automobile manufacturer, Mitsubishi, stemming from the practices at its plant located in the ironically named Normal, Illinois. The initial suit, filed in 1994 on behalf of twenty-nine women, alleged a pattern of harassment that included sexual abuse, lewd remarks and other forms of discrimination.¹⁰³ 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 nearly half of the 940 women who had worked at the plant had been subjected to a hostile working environment.¹⁰⁴

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 an average salary of nearly \$50,000, with many skilled jobs paying as much as \$100,000 when overtime was factored in.¹⁰⁵ 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. Importantly, the union contract made various concessions to Mitsubishi's Japanese management practices, including the elimination of a standard clause that created a committee to resolve harassment claims.¹⁰⁶ As a result, the claims of sexual harassment at the plant were left

101. See *supra* text accompanying notes 32-34.

102. 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.

103. 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).

104. See Ellen Warren & Nancy Millman, *Abuse on the Line*, CHI. TRIBUNE, Feb. 15, 1998, at (Magazine) 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.")

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

106. 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.

to an indifferent management to address.

Both of the lawsuits alleged a pervasive pattern of harassment that ran throughout the plant. A journalistic account described the allegations:

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."¹⁰⁷

Such behavior was so much the norm at the plant that when EEOC representatives came to conduct an investigation, no one even bothered to remove the explicit sexual graffiti that lined the walls.¹⁰⁸ Unwanted sexual advances from co-workers and supervisors were common, and strippers and prostitutes were hired to entertain at company parties when Japanese officials visited.¹⁰⁹

After initially mounting an aggressive campaign to rebut the charges, Mitsubishi ultimately settled both cases for substantial sums. The private lawsuit was settled for \$9.5 million¹¹⁰ and shortly thereafter, the EEOC lawsuit was settled for \$34 million along with the creation of a monitoring group that would be in place for three years and that was empowered to recommend necessary changes in employment practices.¹¹¹ 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 award of approximately \$100,000.¹¹² Despite these settlements, a lengthy report in the *New York Times* questioned how

See Ellen Warren & Nancy Millman, *Abuse on the Line*, CHI. TRIBUNE, Feb. 15, 1998, at C10; see also Crain & Matheny, *supra*, note 103, 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).

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

108. 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.").

109. See Warren & Millman, *supra* note 106, at 10 (discussing parties with strippers).

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

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

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

much the plant had 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 significant reform.¹¹³

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.¹¹⁴ Strippers and prostitutes also apparently made the rounds at the Ford plants.¹¹⁵ 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.¹¹⁶ In addition to the claims against Mitsubishi and Ford Motors, 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,¹¹⁷ whereas the Dial case settled for the same amount on the eve of trial after four years of contentious litigation.¹¹⁸ The Chicago

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

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

115. See *id.* (describing a "years-long" pattern of groping, name-calling, and parties with strippers and prostitutes). For those wondering what strippers do for a day job, these cases provide at least a partial answer.

116. See *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, at B12 (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); *Sexual Harassment Suit is Settled by Ford Motor*, WALL ST. J., Feb. 14, 2002, at C14 (settling claim of three individuals).

117. See Kenneth N. Gilpin, *Firm to Pay \$10 Million in Settlement of Sex Case*, N.Y. TIMES, Feb. 6, 1998 at A16. About eighty 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*, THE 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; rather, in each instance the executives had committed other wrongs that also factored into the companies' decisions to terminate them.

118. See Sarah Ellison & Joann S. Lublin, *Dial to Pay \$10 Million to Settle a Sexual-Harassment Lawsuit*, WALL ST. J., Apr. 30, 2003, at B4. For a discussion of the Dial case and the allegations see David Hechler, *A White Buffalo: Dial Sex Harassment Trial Set for April 28*, NAT'L LAW J., Mar. 31, 2003, at A1. On a smaller scale, the EEOC also filed and subsequently settled a class action sexual harassment case against Cheap Tickets, an on-line travel agent. See *Cheap Tickets Settles Harassment Suit*, L.A. TIMES, Aug. 8, 2003, at C9.

Office of the EEOC has recently filed a class action harassment suit on behalf of more than 100 women against International Profit Associates (IPA), a consulting firm in Buffalo Grove, Illinois, with allegations much like those at issue in Dial and Mitsubishi.¹¹⁹

Table Three
Class Action Sexual Harassment
Cases, 1991-2003

Astra
Cheap Tickets
Combined Ins.
Dial Corp.
Eveleth Mines
Ford Motors
IPA
Mitsubishi
Rent-A-Center

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 available jobs 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 EEOC, and the case was subsequently certified as a class action in 1991.¹²⁰ 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 – a lunch that included a knife, mace and rope to tie the door shut in her work area.¹²¹

Unlike the other cases, the Eveleth Mines case went to trial, and the

119. See Sara Burnett, *Details Emerge in Sexual Harassment Case*, CHI. DAILY HERALD, Jan. 10, 2004 at 1 (describing allegations).

120. 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.

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

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.¹²² 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."¹²³ When the women employees asked for a portable bathroom near the mine, their request was refused, and instead they were told that if they were to work like a man they would have to learn to "piss like a man."¹²⁴ Further testimony confirmed the plaintiffs' allegations, and the plaintiffs ultimately prevailed in the lengthy trial.¹²⁵

But the case did not end there. The damages phase of the trial was assigned to a retired judge who appeared dismissive of the plaintiffs throughout the proceedings, and ultimately awarded paltry amounts to the individual plaintiffs. His decision, however, was reversed by the Eighth Circuit Court of Appeals, which remanded the damages phase for a jury trial.¹²⁶ 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 the judge had awarded her.¹²⁷ Although ultimately victorious in the case, the lead plaintiff, Lois Jenson, went on permanent disability and has not worked since 1992.¹²⁸

III. THE PERSISTENCE OF SEX DISCRIMINATION

What do these cases tell us about the persistence of sex discrimination in the workplace? On the one hand, these cases may be taken as powerful evidence of sex discrimination in the workplace. On the other hand, the cases may be seen as a random collection that offers little meaning in the context of the broader labor market. From this perspective, the cases might reflect isolated incidents rather than entrenched patterns, which was, in fact, the defense raised in many of the cases.¹²⁹ To be sure, this is hardly a

122. *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).

123. *See Grimsley, supra* note 121, at A1.

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

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

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

127. BINGHAM & GANSLER, *supra* note 125, at 284.

128. *See Tevlin, supra* note 124, at 8A.

129. For example, Smith Barney sought to defend its case by claiming that the problems alleged

scientific or statistical survey, but at the same time it would be a mistake to dismiss these cases as aberrational in nature. Indeed, a desire to treat the cases as isolated incidents likely reflects the very societal perception regarding the persistence of discrimination that these cases directly challenge. In other words, these cases appear aberrational not because they are but because they fail to comport with our image of the changed nature of discrimination. As a society, we have plainly concluded, long ago, that cases of overt exclusion have all but vanished from the workplace.¹³⁰ But as I discuss further below, our perceptions of discrimination may have changed more than its reality, and there is certainly strong reason to believe that intentional and overt discrimination remains a substantial barrier to workplace equality for women.

The cases discussed in this article 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.¹³¹ Yet, it is extremely difficult to establish the existence of discrimination through empirical studies, which is, I think, one reason why discrimination tends to exist at the margins in theories premised on empirical inquiries.¹³² Outside of controlled studies that seek to match pairs of individuals on all relevant factors other than sex, identifying discrimination through empirical studies often proves elusive because the studies are unable to eliminate all possible explanations. The match-paired studies, such as have recently been conducted with restaurants and orchestras,¹³³ offer significant evidence of

were concentrated at the Garden City office in suburban New York. See ANTILLA, *supra* note 28, at 142.

130. 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.").

131. For a collection of the works of an economist who has studied extensively the persistence of sex discrimination in various industries see DAVID NEUMARK, *SEX DIFFERENCES IN LABOR MARKETS* (2004).

132. For a discussion of the difficulty of drawing inferences of discrimination from academic studies see John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 69 Q. J. ECON. 49, 49-51 (2004).

133. 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 instead of being 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

discrimination, although even these studies are not without their critics.¹³⁴ Matched-pair studies, however, are difficult to conduct and few in number. More commonly, empirical studies of labor markets are typically designed to measure some other variable, such as the role of work experience in explaining gender inequity, and in these studies discrimination is treated as a possible “unexplained variable,” one that remains as a background possibility but 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.¹³⁵ These studies uniformly fail fully to explain the disparities in pay but it is rare that a researcher will be able to identify discrimination as the cause of the unexplained portion of the wage gap, primarily 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.¹³⁶ As a result, most empirical studies are not intended to measure discrimination, leaving case studies as some of the best available evidence of the discrimination that permeates the workplace.

This short discussion highlights another common and important problem with identifying employment discrimination. When it comes to discrimination, our standards of proof are extremely high, one might say too high. Rather than establishing discrimination as the underlying cause

in practice. The Neumark study, on the other hand, was patterned on housing audit studies, and he had men and women with identical résumés apply for positions at restaurants in the Philadelphia area. This study found that male résumés 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).

134. 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. ECON. PERSP. 101 (1998).

135. 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. & LAB. 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).

136. Christine Jolls, who is sympathetic to identifying discrimination in these studies, comments, “[t]he 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 133, 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. & Lab. 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).

by a preponderance of the evidence, we typically require a level of proof that eliminates all other potential causes. This is true not just in courts but in the social science studies noted above, and also, I think in society more generally. As a result, the cases discussed in this article provide about as potent evidence of ongoing discrimination as we are likely to find.¹³⁷ That said, the real significance of these cases is not in documenting the extent of discrimination but rather in explaining the nature of contemporary discrimination. In particular, these cases help us understand how discrimination is perpetuated, and the many ways in which women continue to be disadvantaged in the workplace.

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 less common. With respect to unconscious or subtle discrimination, the actor is generally thought to have no desire (or conscious desire) to discriminate and is likewise generally thought to be unaware of the way in which his acts adversely affect women.¹³⁸

Within the new framework, not only has the nature of discrimination changed, but the inequalities women face in the workplace are frequently attributed to women's childcare commitments, and the way in which those

137. 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 & SOC'Y 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 because 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.

138. 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 TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Marc Poirier, *Gender Stereotypes at Work*, 65 BROOKLYN L. REV. 1073 (1999); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (suggesting that employers should not be held responsible for unconscious discrimination because they cannot be expected to control unconscious impulses).

commitments run up against the demands of the workplace.¹³⁹ In this story, there is a blurring of lines as to what constitutes discrimination, as neutral institutional structures such as demanding work hours or inefficient employment practices that rely on outdated modes of operation are seen as the source of persistent inequalities.¹⁴⁰ As is true with the focus on unconscious discrimination, the literature emphasizing the role of institutional factors tends to shift the blame away from employers and towards structural aspects of the workplace that have not kept up with the changing demographics.

There is also a third dimension to the current understanding of the way in which gender operates in the workplace. Increasingly, legal scholars and the popular press emphasize how women's role as caretakers limit their workplace opportunities, causing women to either depart from the workplace to focus on childrearing or to seek positions that would better enable them to balance their competing demands in and outside of work.¹⁴¹ 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, likewise suggests that many of the observed labor market inequities arise from women's dual roles as mothers and labor market participants rather than from conscious discrimination.¹⁴² This is certainly not a new issue, and indeed the tension

139. See, e.g., VALIAN, *supra* note 12; WILLIAMS, *supra* note 10. Jane 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 way 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 EMPLOYEE RTS. & EMP. POL'Y J. 273 (2001).

140. Professor Susan Sturm, for example, has written about the way certain company policies or practices can disadvantage women without any particular intent to do so. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). For a related approach see Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2003).

141. See sources cited *supra*, notes 11, 140.

142. 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 a 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 remedying but instead sees the disparities as reflecting different interests and specializations.

between women's roles as workers and mothers has long been embodied in our nation's social policy, which has typically sought to protect and define women as mothers rather than workers.¹⁴³

All of the above factors converge to create a picture that downplays, at least rhetorically, the importance of discrimination in the workplace, and when discrimination becomes a background factor rather than an issue in the forefront, our societal will to address workplace issues recedes as well. If women are "choosing" to opt out of the labor market to care for children, or if women caring for children are unable to meet the demands required by the workplace, then the question of equality in the workplace becomes a matter of social policy or vision rather than the responsibility of employers. While it might be desirable, even profitable, for employers to alter their employment practices to accommodate women's childrearing, there is no legal mandate requiring them to do so, and employers are left to determine whether such practices will, in fact, be profitable. This emphasis allows employers off the hook much too easily.¹⁴⁴

The cases discussed in this paper offer a decidedly different portrait from what has emerged as the current view towards gender in the workplace. Indeed, there was nothing subtle about the discrimination in any of the class action cases, nor was the discrimination tied to women's childcare responsibilities. Instead the cases represent the kind of behavior that many had swept into the margins in today's labor market: overt acts of hostility and exclusion based on stereotypes regarding women's proper roles or abilities 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 therefore less interested in pursuing career paths that would lead to power and influence because those paths would require intense devotion and long hours.

143. 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).

144. Professor Alstott's recent work is representative. In discussing the relation between influence of childrearing on mothers' employment, she writes: "Study after study confirms that mothers in every income class compromise their working lives in order to provide their children with continuity of care. Mothers work less, earn less, and achieve less than men and than childless women. Job interruptions take their toll on mothers' earning power. Even when mothers stay in the race and accumulate the same credentials as their childless counterparts, they still earn less." ALSTOTT, *supra* note 10, at 7. In her description, there is no role – or no apparent role – for discrimination, and she makes the same assessment when she discusses the motherhood gap, which she specifically distinguishes from discrimination without discussing whether employers might, for various reasons such as their stereotypical views, discriminate more and differently against women with children. *See id.* at 24.

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 to support their assumptions. Rather, the company's assumptions were based on management's perceptions regarding women's interests.¹⁴⁵ 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.¹⁴⁶ The experience of these women should have provided an important counterweight to the underlying stereotypes, but their failure to do so sheds light on the other factors that have 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.¹⁴⁷

The grocery store cases, as well as the cases against Home Depot and Wal-Mart, are more difficult to label, as these cases did not include allegations of harassment but instead are 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 husbands' jobs or salaries, and most included claims that management justified paying men higher wages because of their family commitments.¹⁴⁸ 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, presumably because these jobs were associated with male tasks. Butchers (who are rare in grocery stores today) have traditionally been men, and men have likewise dominated the construction trades, which has some resonance for the home improvement stores.

Despite the lack of apparent hostility towards women, these cases are best classified as claims of overt rather than subtle discrimination.

145. 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, Inc.*, No. 95-1162-CIV-T-28(E), 1996 Westlaw 407850, at *7 (M.D. Fla. Mar. 12, 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, Inc.*, 803 F. Supp. 259, 292 (N.D. Cal. 1992) (observing that Lucky's had never conducted a survey to gauge women's actual interests).

146. *See supra*, text accompanying notes 28, 57. One of the plaintiffs in the Smith Barney case was earning \$820,000 per year. *See Susan Antilla, "Boom-Boom" Investigation: Arbitrators to Visit Trading Floor in Smith Barney Discrimination Case*, NEWSDAY, July 18, 2003, at A51.

147. *See infra*, text accompanying notes 162-76.

148. *See supra*, text accompanying notes 70-72; *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 45, at 35 (Merrill Lynch broker Anne Marie Kearney claimed that in her interview she was asked how much money her husband made).

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.¹⁴⁹ Instead of actual structural concerns or barriers, it was again the employers' perceptions of women's interests that 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 in any of the cases.¹⁵⁰

In this respect, these cases resemble the famed case against Sears Roebuck many years earlier. In that case, a class of women represented by the EEOC challenged the company's assignment practices, which typically relegated women to salaried positions rather than the more lucrative commission-based jobs.¹⁵¹ As is well known, Sears successfully defended its practices by claiming that the assignments were the product of women's interests rather than discrimination, and that same defense recurs today in virtually all of the major class action litigation involving claims of sex discrimination.¹⁵²

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. 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 doubt the extreme levels of segregation that continue to exist in the labor market.¹⁵³

149. 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. SOC. 241, 264 (1993).

150. 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.*

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

152. See *id.*

153. 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

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.¹⁵⁴ For example, women accounted for 97.6 percent of all secretaries in 1970 and by 2000 the figure was 98.0 percent. In 2000, women still comprised 92.8 percent of registered nurses, 98.5 percent of Pre-K and kindergarten teachers, but only 3.8 percent of firefighters and 3.7 percent of airline pilots.¹⁵⁵ A recent report indicated that only one in five teachers are men, a figure that marked a new forty-year low.¹⁵⁶ It would be easy to continue this list of segregated occupations 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), fall somewhere in the middle (miners) or tend towards the bottom (retail). In each instance, women continue to face substantial barriers to success, and are left with a different set of choices than their male counterparts.

Inevitably, the issue of gender segregation raises the question of whether the observed patterns might be the result of women's choices of how they want to structure their work lives.¹⁵⁷ While this is a difficult and contentious issue, the cases discussed earlier provide two strong refutations to the notion that the observed labor market patterns are the product of unfettered choice. First, in many of the cases women had sought nontraditional occupations; indeed, this is true for virtually all of the cases, to the extent nontraditional is defined as a position traditionally held by

Francine D. Blau, *Trends in Well-Being of American Women, 1970-1995*, 36 J. ECON. LIT. 112, 132 (1998) (finding that 53 percent of women would have had to switch jobs in 1990).

154. See Reskin, *supra* note 149, 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 LAB. REV., 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 SOC. FORCES 881 (2003). For a review of the literature, particularly as it relates to law, see Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee Agency*, 55 ME. L. REV. 241 (2003).

155. These figures are drawn from ALICE ABEL KEMP, *WOMEN'S WORK: DEGRADED AND DEVALUED* (1994) and Debra Barbezat, *Occupational Segregation Around the World, in WOMEN, FAMILY, AND WORK* 177 (Karine S. Moe ed., 2003). For additional, and consistent, figures see Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 293 tbl. 3 (2000) (providing a list of sixty-nine occupations that were more than 95 percent male).

156. 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.").

157. This issue seems to have regained currency with recent popular press reports. See Belkin, *supra* note 11.

men. Yet, in these cases, there was strong resistance to women's presence, and in many cases women were literally chased out of their chosen occupation. This leads to the second important critique of the choice argument, which is that women's choices are so often conditioned by what is perceived as available. Again, this is hardly a new issue¹⁵⁸ but it is one that bears repeating, particularly in light of the diminished importance the role of discrimination is assigned for today's labor market disparities.

These cases also highlight how we create legitimating narratives of gender that conceal the many ways in which gender operates. As Robin Ely and Debra Meyerson have explained, we use gender narratives to help us "make sense of what goes on around" us, and through "the process of retelling, these narratives and the particular assumptions, preferences, and interests upon which they are based, become taken for granted . . ." ¹⁵⁹ Our narratives thus help us "naturalize" the way things are, so that we attribute identifiable patterns of segregation to women's interests because that is consistent with our normative vision, or because we assume that childcare responsibilities will limit women's devotion to the workplace and we are not surprised when we find few women in management positions. As the dissenting judge in the *Sears* case noted, we tend to take an "extremely uncritical" view of the arguments that justify the observed inequality, and we likely do so as a way of maintaining our own narratives of gender.¹⁶⁰

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 workplace norms.¹⁶¹ Abrams defines sexual harassment "as a

158. The literature on the social construction of choices is vast. For a recent and helpful summary see KIMBERLY A. YURACKO, PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES 76-87 (2003). In her discussion, Professor Yuracko makes the important observation that emphasizing the way in which women's choices are socialized suggests that certain choices, such as choosing to stay out of the labor market to care for children, are inauthentic. *Id.* at 84-85. This observation highlights the often intractable nature of the question of women's choices, and reinforces the point made in the text, that the cases discussed in this paper involve women who did make choices that were resisted by employers and male employees.

159. Robin J. Ely & Debra E. Meyerson, *Theories of Gender: A New Approach to Organizational Analysis and Change*, 22 RES. IN ORG. BEHAV. 103, 129 (2000).

160. See *EEOC v. Sears*, 839 F.2d at 361 (Cudahy, J., concurring in part and dissenting in part) ("The adoption by the district court and by the majority of *Sears*' analysis . . . strikes me as extremely uncritical.").

161. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV.

phenomenon that serves to preserve male control and entrench masculine norms in the workplace.”¹⁶² 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.”¹⁶³ Under this perspective, sexual harassment is less about sexual desire, and more about preserving male norms that exclude women from participation. Professor Vicki Schultz has advanced a 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.¹⁶⁴

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 arisen. Under this theory which is most closely associated with the work of Catherine MacKinnon, sexual harassment in the workplace is about sexual desire and power, and it is typically defined with reference to sexual activity.¹⁶⁵ Workplace surveys that seek to measure the extent of sexual harassment almost always define harassment in precisely this way.¹⁶⁶

1169 (1998). The idea that men act to preserve their privileges in the workplace has a lengthy pedigree in the literature, and was particularly prominent at one time among scholars working in a Marxist tradition. See Barbara F. Reskin, *Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work*, 2 GENDER & SOC'Y 58, 60 (1988) (discussing the literature).

162. Abrams, *supra* note 161, at 1172.

163. *Id.* at 1219.

164. 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 the need for 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.

165. 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).

166. 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 164, 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

Although these theories are not necessarily incompatible and both accurately describe behavior that occurs within the workplace, the theories that focus on preserving male norms better explain much of the behavior delineated in the class action cases. It is perhaps easiest to illustrate the relevance of sexual harassment theory by looking to the securities cases. These cases included very little overt sexual advances or behavior – men were not generally interested in their female counterparts as sexual targets but were instead intent on creating an environment that conveyed express hostility to women, making it clear that women were neither wanted in the workplace nor would they necessarily be tolerated. The “boom boom” room was one explicit manifestation of this exclusion.¹⁶⁷ This was a place that was literally off-limits to women and where men could go for male-bonding rituals that helped maintain the impression that the workplace had not changed from the days when the professional staff was exclusively male. The egregious harassment that occurred in both Mitsubishi and Dial can also be seen as attempts at disciplining women who sought to infiltrate previously all-male workplaces.

A similar phenomenon was at issue 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 were not accepted in the higher echelons of management because these were rungs preserved for men.¹⁶⁸ The grocery store cases rarely contained the sensational allegations of harassment or outrageous behavior that was central to the securities cases, but the means of exclusion were designed to preserve male workplace norms. Equally important, these practices were also 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 given that we often focus on the ways in which harassing behavior is tied to preserving norms within the workplace, while losing sight of the effect harassment has outside of the workplace. 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,

CHALLENGES 5 (1994).

167. *See supra*, text accompanying notes 32-34.

168. *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).

workplace norms 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.¹⁶⁹

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 that 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, Eleventh 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 behavior that was 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.¹⁷⁰ Many of the women in the securities 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 Eleventh Mines case, much of the workplace harassment was designed "to destroy the human psyche as well as the human spirit" of the plaintiffs.¹⁷¹

The desire to preserve male norms reflects two often unacknowledged social conditions. For men, preserving workplace norms can be a form of rational behavior. Studies continually demonstrate that female-dominated jobs suffer a wage penalty, and, in contrast, positions dominated by men receive a substantial wage premium.¹⁷² Integrating traditionally male jobs

169. 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). The perpetuation of gendered parenting reaffirms these roles. Over the last several decades, women have found that, despite the pervasive rhetoric supporting equal parenting, they still perform the majority of work in the home, whether caring for children or for the home itself. See Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects and Wages of Married Women*, 32 J. HUM. 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 NW. U. L. REV. 1, 8-10 (1996).

170. Katherine Franke has argued that sexual harassment is often designed to create normalized sexual behavior so that men or women who step out of 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). 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.

171. *Jenson v. Eleventh Taconite Co.*, 130 F.3d 1287, 1304 (8th Cir. 1997).

172. A large number of studies have established a strong relationship between occupational

may result in economic losses for men.¹⁷³ 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.”¹⁷⁴ Breaking down gender barriers in the workplace may threaten men’s own sense of their selves, while likewise threatening their substantial occupational status even independent of the earnings premium they receive.¹⁷⁵

This perceived threat directly relates to another lurking explanation for why men may seek to preserve workplace norms through practices of hostility and exclusion. Despite the allegiance to a world of sexual equality our society frequently professes, there remains a deep social ambivalence regarding exactly what such a world would look like. As Professor Scott Coltrane recently observed, “Despite uneven progress in women’s professional advancement, the basic assumption that family caregiving is the exclusive responsibility of women remains.”¹⁷⁶ Polls consistently

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. & LAB. REL. REV. 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. & LAB. REL. REV. 289, 308 (1999) (noting that gender gap in majors had not decreased despite women’s changing employment patterns).

173. There is, of course, a way in which this economic advantage is illusory for those men who are married, or even for men who have daughters. Whatever male advantage was lost by equalizing pay would presumably be transferred to women, and it is even possible that the gain for women would be higher than the loss for men. See Reskin, *supra* note 161, at 74. But looking at men as a group, rather than as part of a family unit, there is plainly an economic advantage to be preserved.

174. Susan T. Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory With Implications for Organizational Change*, 51 J. SOC. 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 & SOC’Y 527, 545 (1996) (“In doing gender, men and women engage in practices that promote male dominance and female subordination in most social contexts.”).

175. 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 (Nat’l Bureau Econ. Res., Working Paper 8985 June 2002) (on file with author); see also Marianne LaFrance, *The Schemas and Schemes in Sex Discrimination*, 65 BROOK. L. REV. 1063, 1069 (1999) (“[W]hen there is disadvantage, there is also advantage. Women are under-benefited because males are privileged.”).

176. Scott Coltrane, *Elite Careers and Family Commitment: It’s (Still) about Gender*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 215 (2004). Professor Coltrane adds, “In 1960, there were more than twice as many breadwinner-father/homemaker-mother families as dual earner families, but in 2000, there were more than twice as many dual-earner families as breadwinner-father/homemaker-mother families.” *Id.* at 217.

demonstrate a curious nostalgia for returning to the sex roles characteristic of the 1950s where many women stayed 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.¹⁷⁷ Other polls have largely replicated these findings. A 2000 survey conducted by the firm International Communications Research reported that 69 percent of eighteen- to thirty-year-olds and 80 percent of forty-five- to sixty-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."¹⁷⁸ A recent poll by the nonprofit group Public Agenda asked respondents to choose between creating public policies that would allow one family member to stay home and policies intended to provide more public child care as a way to help families balance their work and family obligations. Seventy percent of the respondents chose policies that would enable one parent to stay home.¹⁷⁹ In reviewing the literature on housework, Virginia Valian likewise found that there was a consensus between men and women that "women should do most of the housework."¹⁸⁰

The societal view that it would be best for women to remain home

177. 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").

178. See Pamela Paul, *Meet the Parents*, 24 AM. DEMOGRAPHICS 1 (Jan. 1, 2002); see also American Academy of Pediatrics, *Family Pediatrics: Report of the Task Force on the Family*, 111 PEDIATRICS 1541, 1553 (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.").

179. See Public Agenda, *Necessary Compromises: How Parents and Children's Advocates View Child Care Today* (2000), summary available at <<http://www.publicagenda.org/specials/childcare/childcare.htm>> (last visited May 5, 2005).

180. VALIAN, *supra* note 12, at 40. Professor Valian noted that until their workload reaches 75 percent, most married women see their division of labor as fair. See *id.* Catherine Fisk has wonderfully captured our societal 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 BUFF. 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).

with their children is 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.¹⁸¹ The class action lawsuit filed against the 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."¹⁸² Although these statements may not be typical, they are indicative of a lingering bias that can severely restrict women's opportunities.

C. Why Do Employers Allow the Discriminatory Behavior to Persist?

As noted previously, it is not all that difficult to understand why men, although certainly not all men, might want to preserve workplace norms in which they both dominate and prosper, but it is more difficult to understand why employers would tolerate such efforts. Excluding women from the workplace, or treating them hostilely, has the potential to be economically inefficient insofar as the firm would be basing its employment decisions on irrelevant non-economic factors. Economic theory suggests that firms will eschew such behavior, or alternatively that nondiscriminatory firms would provide a disciplining force for the market by hiring the excluded workers and thus lowering their own labor costs.¹⁸³ Yet, the class action cases make clear that inefficient exclusion and harassment frequently occur even in sophisticated workplaces, and it remains a serious puzzle why such

181. See *supra* text accompanying notes 46, 66, 88.

182. See *Wilfong v. Rent-A-Center*, 2001 U.S. Dist. LEXIS 22718, at *10 (E.D. Mo. Dec. 27, 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 seventy-five pounds. 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), *aff'd*, 705 F.2d 584 (2d Cir. 1983). In 1974, 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.

183. 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).

behavior persists, particularly at levels that indicate industry-wide patterns of discrimination such as in the securities and grocery industries.

One possibility is 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 is lost by the exclusion or harassment of female employees. A firm's productivity may be enhanced if the most productive male employees gravitate towards those firms with a culture that permits male dominance. Male employees may also be willing to forego salary in return for working in a culture that reflects male dominance. In other words, these workers would gain greater utility from a male-dominated environment than they might from higher salaries. From this perspective, male brokers would effectively agree to work for Smith Barney rather than one of its competitors precisely because male norms were preserved in one but not the other workplace. In grocery stores, men might agree to begin their careers at the bottom of the firm ladder only if they would not have to compete, or conceivably work, with women.

For discriminatory practices to enhance productivity in this way, men would have to be substantially more productive than even the best female employees. Otherwise, there would be no efficiency gain assuming women were available at adequate levels to fill the positions. There is certainly no reason to assume men are significantly more productive than women in these fields. On the contrary, a number of published studies demonstrate that women are no less productive than their male counterparts.¹⁸⁴ There is, however, some support for the notion that homogenous work groups are more productive than heterogeneous groups, and it may be that management's tolerance for practices that are hostile to women can be defended along these lines.¹⁸⁵ That said, 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.¹⁸⁶ Nor is there any reason

184. 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. & LAB. REL. REV.* 493, 497-98 (2002) (finding that 15 percent pay differential could not be explained by productivity factors).

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

186. 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*

to believe the gains from homogeneity would outweigh the costs of excluding, or limiting the opportunities of women.¹⁸⁷ Moreover, the argument that homogenous workforces are more productive seems entirely inconsistent with the emphasis private employers place on having a diverse workforce, as evident in the significant support employers expressed for affirmative action in the recent case involving the University of Michigan.¹⁸⁸ Finally, even if true, the homogeneity thesis could not defend the harassing behavior at issue in so many of the cases discussed here because in most instances the employer was seeking, at least nominally, a heterogeneous workforce. Rather, the thesis might be consistent with the discriminatory assignment or promotion practices that are also present in many of the cases, particularly in the grocery industry.

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 customer desires or expectations, and in this way, customer discrimination might help explain why the practices persist.¹⁸⁹ Customers might prefer men at the meat counter, or to have 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 (or know) who assembled automobiles, cut meat or handled the vegetables.¹⁹⁰ In this way, looking to customer preferences to explain the persistence of discriminatory practices is much like relying on women's preferences to explain the observed disparities. In both instances, the explanations are likely consistent with employers' stereotypes but are

Groups, 21 ACAD. MGMT. REV. 402, 403 (1996).

187. When an employer excludes a group of potential employees, and the supply of substitutes is not unlimited, that employer will have to pay a higher wage to attract sufficient quality employees. Even assuming there is a productivity advantage to homogenous work groups, an exclusionary policy would only make economic sense to the extent the productivity increase exceeds the necessary wage increase. As noted in the text, there is no evidence to substantiate this claim and it would be wrong to assume as much.

188. See Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 368-70 (2003) (discussing amicus briefs filed by businesses in support of the University's affirmative action plan).

189. See Schwab, *supra* note 183, at 568 ("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).

190. 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.

not supported by any empirical data. 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 practices,¹⁹¹ but it seems just as likely that assumed customer preferences, rather than actual preferences, underlie management's acceptance of the exclusionary practices. For example, there seems to be little question that Home Depot assumed that its shoppers would prefer to have men on its sales floors, but the company's perception did not appear to be based on anything other than its own perceptions or beliefs about shopper preferences. Nor is there any evidence that the company's recent change in policies as a result of the settlements in several class action lawsuits has had any adverse effect on its business.¹⁹²

What this suggests is that, rather than identifying customer preferences or an efficiency rationale to explain the discriminatory workplace practices, employers appear willing to forego profits in order to tolerate discriminatory practices despite their effects on the firm's profitability. Management's inability to root out inefficient practices stems from its own perceptions and biases, perceptions and biases that frequently 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 originating at a time when the workplaces were almost exclusively male. Boorish locker-room style behavior denigrating women was, for many, the norm, and it was not seen as something that required change but was instead 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 their perceptions rather than aligning the perceptions with reality.

In this way, the gendered nature of institutions becomes invisible

191. 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, Co.* 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).

192. A recent news report indicated that the home improvement stores are beginning to market more extensively to women as surveys indicate that women are doing more home improvement projects. *See Fara Warner, Yes, Women Spend (And Saw and Sand)*, N.Y. TIMES, Feb. 29, 2004, at C1 (discussing marketing efforts of Home Depot and Lowe's).

because it is seen as the natural order of things. Joan Acker has written extensively 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.”¹⁹³ She contends that the gendered nature of institutions is obscured because the organization is theorized in gender-neutral terms.¹⁹⁴ She concludes, “Understanding how the appearance of gender neutrality is maintained in the face of overwhelming evidence of gendered structures is an important part of analyzing gendered institutions.”¹⁹⁵

Theories of social psychology also help us understand why sex-based discriminatory practices can persist even where they are demonstrably inefficient.¹⁹⁶ 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, which is 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,¹⁹⁷ one of the more 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 made a token appearance to observe the office after the initial complaints.¹⁹⁸ The complaints that were raised would have been relatively easy to investigate, which was true of most of the securities cases, and yet in none of the cases did the firms perform any substantial investigation before a lawsuit was filed.¹⁹⁹ In some instances, such as with Smith Barney, the company may

193. Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139, 146 (1990). For a recent discussion and critique of the literature on gendered organizations see Dana M. Britton, *The Epistemology of the Gendered Organization*, 14 GENDER & SOC’Y 418 (2000).

194. See Joan Acker, *From Sex Roles to Gendered Institutions*, 21 CONTEMP. SOC. 565 (1992).

195. *Id.* at 568.

196. 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 SOC. PSYCHOL. Q. 190 (1994).

197. See Schultz, *The Sanitized Workplace*, *supra* note 164 (discussing and documenting the presence of harassment policies and no-tolerance enforcement).

198. See ANTILLA, *supra* note 28, at 116-17.

199. 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

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.²⁰⁰

The grocery store cases, which began nearly thirty years ago, provide another perplexing example of corporate indifference to gender inequality. 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. After all, in some of the cases the plaintiffs built their case by looking at the photographs of managers hanging in stores.²⁰¹ Home Depot and Wal-Mart certainly must have known the reality of their assignment practices, 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 and were absent from management positions.²⁰² 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.

Managements' tolerance for the behavior may reflect an implicit calculus of the value of the female employees compared to their male employees. One notable example of this kind of calculus involved the difficulty Pamela Martens encountered in finding new employment after she was fired by Smith Barney. Ms. Martens had a substantial portfolio of business, one that ordinarily would have attracted instant employment offers, but firms were reluctant to hire her, presumably because they viewed her as a trouble-maker who might alienate male employees.²⁰³

Beyond this kind of rough calculus, another reason the firms tolerated exclusionary practices, has to do with the stereotypes that undergird the very practices at issue and the way those stereotypes can hinder effective action. If the managers begin with the assumption that women are not

the plaintiffs who went 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.

200. See Spiro, *supra* note 31, at 102 (noting that the manager was placed on leave and retired shortly thereafter.)

201. In the Lucky's case, the court found that the company was aware of the underrepresentation of women in management positions as early as 1986. See *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 331 (N.D. Cal. 1992).

202. 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, and it is still difficult to find a woman working in the produce aisles.

203. 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 28, at 133-35.

“tough enough” to be brokers, or that they will not be willing to relocate 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.²⁰⁴ 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 that is inconsistent with our gender schemas.²⁰⁵ 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 described above.²⁰⁶ 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.”²⁰⁷

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 male workplace norms that have persisted despite our national pledges of gender equality. 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 – no single theory of discrimination, no one theory of the workplace, can adequately explain what we observe. Rather than

204. 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).

205. See generally Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 *THE HANDBOOK ON SOCIAL PSYCHOLOGY* 340 (Daniel 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 (1980).

206. See *supra*, text accompanying notes 177-80.

207. See KESSLER-HARRIS, *supra* note 143, at 291.

relying on a unitary theory, we should look to many different theories and explanations to help us piece together the puzzle that gender inequality in the workplace remains.²⁰⁸ The premise of this essay is that intentional discrimination remains a critical piece of the puzzle.

Women's experience in the workplace has plainly not changed as much as is often stated or hoped. Equally clear, this is not simply a result of institutional factors, of difficulties women may have in balancing their various commitments, or of their own preferences. Instead, 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 an earlier 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 described as subtle if that term is used to encompass any behavior that is not accompanied by overt statements of hostility to women. This would, however, 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,²⁰⁹ intentional discrimination likewise plays an important role, and one that is too often ignored.

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, such as 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 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

208. 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 161, at 1217.

209. For two helpful discussions of the ways subtle forces can lead to various inequities see VALIAN, *supra* note 12 and Sturm, *supra* note 12. 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.

than in its implementation.

There is another reason for withholding policy prescriptions: I am not at all certain that there is an easy fix or that some of the common policy suggestions would advance the cause of workplace integration or equality. As I have noted elsewhere, I believe the recent focus on caretaking represents a step backward rather than a step forward in the quest for gender equality because it enshrines caretaking as women's work, and frequently privileges care work over labor market work.²¹⁰ I also do not think education or diversity training will likely move us forward, particularly since so much of both are litigation driven and, as a result, primarily offer businesses public relations cover more than they offer meaningful education for employees.²¹¹ 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. The comprehensive study and follow-up conducted by Johns Hopkins University when it discovered that its female professors were consistently falling behind their male peers is one example of a successful course for change.²¹² Replacing subjective employment practices with more a formal process has also been demonstrated to reduce gender inequities.²¹³

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. If one looks at the securities or grocery industry, if one walks into a Home Depot or a Wal-Mart, if one looks at an auto assembly line, or tries to find a female firefighter or police officer, it will become clear that we remain far from our commitment of gender equality in the workplace. More than anything else, the cases discussed in this article

210. See Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289 (2003); Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557 (2001).

211. There is little question that diversity training has become the preferred 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).

212. See VALIAN, *supra* note 12, at 319-22.

213. See Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210 (2000) (finding that decreasing subjectivity through more formal processes can be critical to decreasing discrimination in large organizations).

serve as a reminder of just how much remains to be done.