2002

Is There a Glass Ceiling?

Christine Jolls
Yale Law School

IS THERE A GLASS CEILING?

CHRISTINE JOLLS*

In the spring of 2001, I was asked by the Federalist Society at Harvard Law School to debate Diana Furchtgott-Roth, chief of staff of the Council of Economic Advisers in the George W. Bush Administration, on the question of whether there is a "glass ceiling" for women in the labor market. I was to argue in favor of the glass ceiling's existence, and she was to take the opposing view. As those who attended know, the discussion ranged broadly over widely varying terrain, including some questions that should be silly but apparently aren't—most memorably, whether it is "mommy track" behavior to give one's nanny or babysitter a cell phone number at which one can be reached while at work when one is away from one's desk—to serious academic disputes over the underlying explanations for women's present labor market position. This Essay, on the occasion of the twenty-fifth anniversary of the *Harvard Women's Law Journal*, attempts to summarize some of my views on the current state of the glass ceiling debate.

An important threshold question concerns the definition of the "glass ceiling." Former Senator Robert Dole once remarked that "there are probably as many definitions of the glass ceiling as there are individuals affected by it."[1] But I like the formulation he offered, and I shall adopt it here. The glass ceiling issue, according to Dole, ultimately "boils down to eliminating artificial barriers in the workplace which have served to block the advancement of qualified women."[2] In other words, if barriers exist that "block the advancement of qualified women," then I shall say that a glass ceiling is present.

I.

"Yes," I replied, unhesitatingly, when Ms. Furchtgott-Roth asked whether I provided my children's caregiver with a cell phone number at which I could be reached during work hours. (My husband, vice-president of marketing at a large corporation, does the same.) "If, for ex-

---

* Professor of Law, Harvard Law School. Ph.D. (Economics), Massachusetts Institute of Technology, 1995; J.D., Harvard Law School, 1993; B.A., Stanford University, 1989. Thanks to Martha Minow and Cass Sunstein for extremely helpful comments, and to the *Harvard Women's Law Journal* for inviting me to publish a written version of the oral remarks that form the basis of this Essay.

[1] 137 CONG. REC. 28,859 (1991).

[2] *Id.*

ample, one of our children were to need emergency stitches during the work day and I happened to be out of my office for an extended period, I would want to be reachable so that I would know what was happening and be able to be present, and my husband feels the same way." I then asked the same question of Ms. Furchtgott-Roth (whose economic position would surely allow access to a cell phone for use in emergencies): "Doesn't your children's caregiver have a cell phone number at which to reach one or both parents at work?" "No," she replied. "I simply hire a competent caregiver to begin with." (This is either an exact quote or a very close paraphrase.) In Ms. Furchtgott-Roth's view, "serious" business people cannot be interrupted with "home matters" during their work hours.

This exchange was surprising to me on many levels. Part of the surprise came from the way in which the exchange placed me in the entirely new position of "perceived mommy tracker." I also chuckled in thinking about how various Bush Administration officials would react if they had been there to witness the exchange. But what was most surprising—and disturbing—was the way in which the exchange demonstrated a vision of the "appropriate worker" as one who was *wholly* unencumbered by life outside of work. Even the tiny likelihood of an emergency phone call from a child's caregiver, in Ms. Furchtgott-Roth's view, would radically disrupt the worker's effectiveness and render him or her not "serious" enough to hold down an important job.

The implications of such a vision for the glass ceiling debate, defined as above, are rather obvious. From the empirically uncontroversial notion that in today's world many women (not to mention men) are not prepared to check *all* of their outside concerns at the office door, it is but a quick leap to the conclusion, advanced by Ms. Furchtgott-Roth, that women's current underrepresentation in high level jobs has everything to do with women's "choices" and nothing whatsoever to do with glass ceilings—understood, as stated above, as barriers that block women's advancement despite their objective qualifications.

What is so striking about Ms. Furchtgott-Roth's picture is the way in which the mere fact of parenthood (or, more to the point, motherhood), with even its most minimal incidents, is enough to derail the worker's chances of holding down a "serious" job. In Ms. Furchtgott-Roth's world, even the employee who works full-time and has extremely reliable childcare is not qualified for "serious" jobs if he or she so much as gives a child's caregiver an emergency phone number. Almost every mother—and, indeed, almost every reasonably involved parent—is likely to be on the "mommy track" in this vision.

My own view of the glass ceiling issue is quite different. I believe—and my belief is supported by the broad range of empirical evidence I describe below—that an important part of the explanation for women's present labor market position is the continued existence of unlawful em-

ployment discrimination against women. Because many people seem unaware of the strength of the evidence of modern day sex discrimination in labor markets, I will describe this evidence in some detail below. Given the evidence, it simply cannot seriously be argued, in my view, that women's labor market position is solely or largely a consequence of their own "choices" rather than of the existence of glass ceilings in many sectors of the economy. Without even getting into the complex topic of women's "choices" and how we should regard these—an important subject on which I touch briefly in Part IV below—we should all be able to agree, given the strength of the evidence, that unlawful sex discrimination plays an important role in determining women's failure to attain the same level of job success as their male counterparts.

II.

Let's talk about the evidence of unlawful sex discrimination in modern day labor markets, as that evidence is at the heart of my argument here. The studies described below focus on a range of industries, and all were published in top economics journals. They all reach the same conclusion—that sex discrimination in modern day labor markets is alive and well despite the laws that prohibit it.

The orchestra study. The most prominent recent study of sex discrimination in labor markets is the study published in 2000 in the *American Economic Review*, authored by Claudia Goldin of the Harvard University economics department and Cecelia Rouse of the Princeton University economics department.[3] Goldin and Rouse consider a wonderful experiment: the effect of the move to blind auditions for the major American symphony orchestras, most of which now choose their players by having them audition behind a screen so that sex and other identifying characteristics of the musicians are not apparent.[4] In many cases orchestras even take the step of rolling out carpets to "muffle footsteps that could betray the sex of the candidate."[5]

Goldin and Rouse find that introduction of blind auditions substantially increased the likelihood that a female candidate would advance out of the preliminary round in an orchestra's selection process.[6] The move to blind auditions also had a substantial effect on the ultimate likelihood that a female candidate would be selected for an orchestra position.[7] Goldin and Rouse conclude that "the switch to blind auditions can explain about one-third of the increase in the proportion female among new

---

[3] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

[4] *Id.* at 716, 721–22.

[5] *Id.* at 721.

[6] *Id.* at 716.

[7] *Id.*

hires" within the major symphony orchestras.[8] Although Goldin and Rouse's modest sample size means that some estimated coefficients do not pass standard tests of statistical significance, the overall weight of the evidence they present—which stems from a significant range of sources and is studied a wide variety of ways—points convincingly to a substantial effect on the sex composition of new orchestra hires of changing from non-blind to blind audition procedures.[9]

Goldin and Rouse's careful study tells a story of discrimination that seems very difficult to refute. To take just one example from their work, when the very same female and male candidates were compared across blind and non-blind auditions, the female candidates were substantially more likely to succeed relative to male candidates in blind auditions as compared to non-blind auditions.[10] In preliminary rounds with no semifinals, for instance, 28.6% of female musicians were advanced in blind auditions, compared to only 20.2% of male musicians, whereas 19.3% of female musicians were advanced in non-blind auditions, compared to 22.5% of male musicians.[11] In other words, the very same female musicians were more likely than male musicians to advance in blind auditions and less likely than those very same male musicians to advance in non-blind auditions. It is hard to see what, other than discrimination, could be driving this effect; the focus on the successes of the very same musicians across blind and non-blind settings controls directly for underlying musician quality. In terms of timing, the auditions studied occurred from the late 1950s to 1995; 175 of the 254 auditions upon which the authors' conclusions are based are from 1980 or later, and 73 are from the 1990s.[12]

The labor market discrimination suggested by Goldin and Rouse's findings could perhaps be rational (in the sense of maximizing orchestras' returns or profits); it is possible, for instance, that existing players might have better morale, and thus play better as a group, if they were with "like" (male) individuals, and it is also possible that long-time patrons of a traditionally male orchestra such as the Vienna Philharmonic might be unsupportive of hiring female musicians. In such circumstances, the orchestras' behavior would be rational, but nonetheless it would clearly be unlawful.[13]

Reluctance to hire female musicians might also be rational for orchestras if, as a player for the Vienna Philharmonic once contended, female musicians would often take leave time because of pregnancy or

---

[8] *Id.*
[9] *Id.* at 737–38.
[10] *Id.* at 726–27, 730.
[11] *Id.* at 727.
[12] *Id.* at 724–25.
[13] *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 686–87 (2001).

have shorter tenures than their male counterparts, so that these musicians would typically impose greater costs on orchestras than the average male musician.[14] However, Goldin and Rouse's data show that in the period studied male and female musicians took statistically indistinguishable numbers of medical and other leaves and did not appear to differ in their tenures, at least in the direction posited by the account here.[15] Thus, cost differentials of this sort cannot explain the treatment the female musicians received.

Therefore, the Goldin and Rouse results provide strong evidence of the persistence of substantial unlawful sex discrimination. Whether the glass ceiling effects they uncovered for female musicians resulted from discriminatory attitudes of fellow musicians, from discriminatory attitudes of orchestra patrons, from inaccurate stereotypes about women's leave-taking and tenure, or from some other cause, it is hard in light of Goldin and Rouse's findings to deny the existence of unlawful sex-based treatment of women as recently as the last decade.

The restaurant study. A second leading study of sex discrimination in modern day labor markets is David Neumark's restaurant audit study, published in 1996 in the *Quarterly Journal of Economics*.[16] The audit methodology involves the use of "testers"—individuals who are selected to appear identical to one another except for the trait to be studied, generally sex or race. This methodology has a long pedigree in the housing and employment contexts, which have been examined by the Urban Institute and other researchers.[17]

The first step in Neumark's approach was to vary the sex of the names on a set of fictional resumes and then examine the odds of applicants' receiving interviews for waitstaff jobs at sixty-five Philadelphia restaurants.[18] The study took place in the spring of 1994.[19] Neumark's methodology is tightly tethered to the question of unlawful sex discrimination because at the point at which the employer's decision to interview is made, the *only* information in its possession is the resume, and thus there is simply no plausible explanation other than unlawful discrimination for different interview frequencies in response to male versus female resumes; this is so because each resume used in the study was sometimes

---

[14] Goldin & Rouse, *supra* note 3, at 737 & n.55.

[15] *Id.* at 737.

[16] David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q. J. ECON. 915 (1996).

[17] *See* Harry Cross, *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers*, URB. INST. REP. 90-4 (1990); Margery Austin Turner, Michael Fix & Raymond J. Struyk, *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring*, URB. INST. REP. 91-9 (1991); Genevieve M. Kenney & Douglas A. Wissoker, *An Analysis of the Correlates of Discrimination Facing Young Hispanic Job-Seekers*, 84 AM. ECON. REV. 674 (1994); John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881 (1986).

[18] Neumark, *supra* note 16, at 917, 920–23.

[19] *Id.* at 923.

associated with a male name and sometimes with a female name, so that on average the set of male resumes and the set of female resumes were identical.[20] Neumark's inquiry into restaurant hiring comes against the backdrop of a significant gap between the earnings of full-time waitresses and full-time waiters, with the former earning about seventy-five cents for every dollar earned by the latter.[21]

Neumark's results are striking. Resumes with male names led to interviews in sixty-one percent of cases at high-price restaurants (where pay is higher than at middle- and low-price restaurants), whereas female resumes led to interviews in only twenty-six percent of cases at such restaurants.[22] Clearly, high-price restaurants exhibited a strong preference for waiters over waitresses with on-average-identical resumes. Other findings reported by Neumark suggest that at least part of the reason for this strong preference may lie in customer attitudes; "the proportion male among the waitstaff is significantly positive related to the proportion male among the clientele."[23] However, the customer preference data was gathered in a somewhat less rigorous manner than that underlying the study's main results,[24] and so more study would be useful before reading a definitive conclusion. Still, the findings certainly suggest that customer discrimination may play a role, and thus that, as in the orchestra study, the observed sex differentials in the labor market cannot be attributed solely to factors such as differential leave-taking behavior or tenure with an employer. In light of Neumark's striking results, it is difficult to dispute that glass ceiling effects provide at least part of the explanation for the differing representations of waiters and waitresses at high-price restaurants in Philadelphia.[25]

After establishing that male resumes are far more likely than (on-average-identical) female resumes to lead to interviews, Neumark goes on to examine the likelihood that male and female candidates ultimately receive job offers. He finds, not surprisingly, that male candidates are far more likely than female candidates ultimately to receive job offers at high-price restaurants; males received offers in forty-eight percent of cases, whereas females received offers in only nine percent of cases.[26] These results are in principle more open to question than the interview

---

[20] *Id.* at 920–21.

[21] *Id.* at 915–16.

[22] *Id.* at 925, 931–32. *See also id.* at 930 (reporting multivariate regression results suggesting the same conclusion).

[23] *Id.* at 919, 933–36.

[24] For a description of how the data on customer attitudes was gathered, see *id.* at 933.

[25] In the twelve high-price restaurants visited by researchers in conjunction with the Neumark study, the approximate proportion of males among the restaurants' waitstaffs was 0.72. *Id.* at 933–34. By comparison, the proportion of males among the waitstaffs at the nine low-price restaurants visited for the study was 0.39. *Id.*

[26] *Id.* at 925. *See also id.* at 930 (reporting multivariate regression results suggesting the same conclusion).

results, for different success rates could reflect the behavior or demeanor of candidates during interviews; indeed, sometimes it is even suggested that individuals interested in participating in discrimination studies may also be individuals who (consciously or otherwise) end up behaving in ways that lend support to the discrimination theory in which they believe. However, the similarity between the interview disparities (which cannot be attributed to candidates' behavior) and the offer disparities supports the idea that discrimination may be driving the offer disparities. Thus, as Neumark observes, while "one of the main purposes of studying [interview frequencies] is to attempt to eliminate the effects of personality differences or experimenter effects that are correlated with sex," the fact that the "results for interviews . . . are very similar to those for job offers" means that personality differences and experimenter effects probably do not "drive the job offer results."[27]

Thus, the Neumark study, like the Goldin and Rouse study, provides strong and, to my knowledge, unchallenged evidence of unlawful sex discrimination in modern day labor markets. Ms. Furchtgott-Roth's only response to these studies during our debate was the (to be perfectly blunt) utter non sequitur that factors other than sex can explain *some* of the observed differences between male and female job successes in modern day labor markets. Well, of course they can in some instances (more on this shortly); but the precise point of the Goldin/Rouse and Neumark findings is that even *after* exhaustively controlling for factors other than sex (which, everyone agrees, may differ), a significant sex differential remains. *That* is what establishes the sex discrimination.

What is the cause of the sex discrimination revealed by the Goldin/Rouse and Neumark studies? This discrimination need not reflect strong dislike or disdain for female employees; instead, modern day sex discrimination may well reflect more subtle causes (although it also may not, as some of the eyebrow-raising cases discussed in Part III below reveal). Decision makers may, for instance, find certain behavior acceptable in male employees but not in female employees, so that a broader set of traits may be viewed as "consistent with the proper functioning of the business" in the case of male employees than in the case of female employees. As just one illustration of this idea, when George Seltzer's book *Music Matters* (cited by Goldin and Rouse) reports the "popular myth" that female musicians are "more likely to demand special attention or treatment,"[28] one wonders whether female musicians actually did demand more special treatment in the experience of the persons adhering to this view or whether, instead, the demands these women made were simply

---

[27] *Id.* at 925.

[28] GEORGE SELTZER, MUSIC MATTERS: THE PERFORMER AND THE AMERICAN FEDERATION OF MUSICIANS 213–14 (1989); Goldin & Rouse, *supra* note 3, at 719.

more memorable or noteworthy against a background set of expectations about appropriate behavior of male versus female musicians.

One of the best, most sensitive expressions of the complex processes underlying much modern day sex discrimination may be the one that came out of a Massachusetts Institute of Technology report written in 1999. As reported in a front-page *New York Times* article on the events in question:

> In an extraordinary admission, top officials at the Massachusetts Institute of Technology, the most prestigious science and engineering university in the country, have issued a report acknowledging that female professors here suffer from pervasive, if unintentional, discrimination.
>
> "I have always believed that contemporary gender discrimination within universities is part reality and part perception," the university's president, Charles M. Vest, said in comments to be published in the faculty newsletter within days and already posted on the World Wide Web. "True, but I now understand that reality is by far the greater part of the balance."
>
> Dr. Vest's comments introduced a report about discrimination against women in the School of Science, one of M.I.T.'s five schools.[29]

The report, by a committee of male and female tenured School of Science faculty members, contains a section entitled "How did inequities come about? 'Gender Discrimination' in 1999." This section of the report reads as follows (in pertinent part):

> How . . . might we explain what happened to the senior women faculty in Science? While the reasons for discrimination are complex, a critical part of the explanation lies in our collective ignorance. We must accept that what happened to the tenured women faculty in the School of Science *is* what discrimination is. . . . [W]e, including for a long time the women faculty themselves, were slow to recognize and understand this for several reasons. First, *it did not look like what we thought discrimination looked like.* Most of us thought that the Civil Rights laws and Affirmative Action had solved gender 'discrimination.' But gender discrimination turns out to take many forms and many of these are not simple to recognize. Women faculty who lived the experience came to see the pattern of difference in how their

[29] Carey Goldberg, *M.I.T. Acknowledges Bias Against Female Professors*, N.Y. TIMES, Mar. 23, 1999, at A1.

> male and female colleagues were treated and gradually they realized that this was discrimination . . . .
>
> The tenured women faculty . . . made a discovery. They identified the forms that gender "discrimination" takes in this post-Civil-Rights era. They found that discrimination consists of a pattern of powerful but unrecognized assumptions and attitudes that work systematically against women faculty even in light of obvious good will. Like many discoveries, at first it is startling and unexpected. Once you "get it," it seems almost obvious.[30]

Wage evidence. Alongside the empirical studies of discrimination described above, a second way to approach the question of how women and men are being treated in labor markets as an empirical matter is to ask—as researchers have done in an enormous number of studies—how well the substantial gap that exists between male and female *pay* can be explained by factors such as the individual's experience, background, education, and the type of employer at which the individual is employed, so that the gap might be said to reflect one or more of these other factors rather than sex discrimination.[31] In the absence of controls for such other factors, the raw ratio of female to male wages is presently approximately 0.7 to 1, not all that much different from the Old Testament ratio of 0.6 to 1: "[A] male from twenty years . . . to sixty years old . . . shall be [valued at] fifty shekels of silver, after the shekel of the sanctuary. [I]f it is a female, [she] shall be [valued at] thirty shekels."[32]

Of course, even if the male-female wage gap could be attributed (as we will see it cannot) solely to factors such as experience, background, education, and employer type, such a conclusion would not imply an absence of unlawful sex discrimination, as the Neumark study described above makes clear. In that study, it might well have been the case that the substantial pay gap between waiters and waitresses in Philadelphia could be fully explained by the different types of restaurants at which they tended to work, but the very fact that women were underrepresented at the high-paying, high-price restaurants was *itself*, the study convincingly demonstrated, a consequence at least in part of unlawful sex discrimination. Another example of the same point is that while the gap in the pay of male and female top executives is, according to a recent study by Marianne Bertrand and Kevin Hallock, less than five percent after con-

---

[30] *A Study on the Status of Women Faculty in Science at MIT*, MIT FAC. NEWSL., Mar. 1999, at 11–12 (on file with author).

[31] *See, e.g.*, GEORGE J. BORJAS, LABOR ECONOMICS 348 (1996) (discussing studies); Robert G. Wood, Mary E. Corcoran & Paul N. Courant, *Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries*, 11 J. LAB. ECON. 417 (1993) (study of male and female lawyers' pay).

[32] BORJAS, *supra* note 31, at 346; *Leviticus* 27:3–4.

trolling for the size of the employer and various other factors, "[t]his obviously does not imply the absence of discrimination" because the very fact that female top executives are more common at small than large firms could itself reflect discrimination.[33] If, though, the wage gap in many sectors *cannot* be explained by factors such as experience, background, education, and employer type, then the wage gap provides further suggestive evidence of sex discrimination.

In fact, as Bertrand and Hallock note, most studies in this area have "indeed identified an unexplained gender gap that cannot be attributed to observable differences between men and women."[34] George Borjas's labor economics text describes two of the leading studies, each finding that various factors can explain about two-thirds of the male-female gap, leaving about one-third unexplained.[35]

It is important not to make too much of these wage gap findings. The difficulty with the evidence here is that it is difficult to be sure that all non-sex differences—some of which may be subtle or difficult to observe—have been controlled for, and, unless all such differences have been controlled for, the residual cannot properly be attributed to sex.[36] The control problem is precisely the reason that the audit methodology, as well the orchestra audition experiment exploited by Goldin and Rouse, leads to more definitive conclusions than the wage evidence. As Neumark explains, "The purpose of an audit study is to provide much more direct evidence on discrimination than is provided by other empirical methods . . . . Unobservable differences between men and women are eliminated . . . by matching their characteristics."[37]

A final point about the wage gap is important to note here. In addition to the general gap between male and female workers, there may be an additional gap between the wages of women with children and those without, as Ms. Furchtgott-Roth emphasized in our debate.[38] Jane Waldfogel calls this gap the "family gap."[39] The existence of such a gap of course does not negate the idea of substantial unlawful sex discrimination in modern day labor markets (contrary to Ms. Furchtgott-Roth's repeated suggestion during the debate, again apparently predicated on the non sequitur that the existence of *some* non-sex differences between men and

---

[33] Marianne Bertrand & Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS. & LAB. REL. REV. 3, 17–18 (2001).

[34] *Id.* at 3–4.

[35] BORJAS, *supra* note 31, at 348.

[36] Bertrand & Hallock, *supra* note 33, at 3–4; Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSP., Fall 2000, at 75, 82–83.

[37] Neumark, *supra* note 16, at 917.

[38] *See generally* DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA 14–15 (1999); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP., Winter 1998, at 137, 143–48.

[39] Waldfogel, *supra* note 38, at 137.

women (here differential caretaking burdens on mothers versus fathers) somehow negates the possibility of other, sex-based differences). It is of course perfectly obvious that the market may well punish women simply for being women (the unlawful sex discrimination uncovered by the Goldin/Rouse and Neumark studies and suggested by the wage evidence described above) and in addition may impose an extra punishment on women who have children, based either upon "true" differences between them and other women or upon inaccurate or unfair stereotypes about the effects of having children.

III.

As a contextual accompaniment to the general economics evidence of sex discrimination described just above, the next portion of the discussion describes some "on the ground" litigated employment discrimination cases that provide a flavor of the real world events that lie behind the statistics. *Bredesen v. Detroit Federation of Musicians*,[40] decided in September of 2001, involved sex discrimination by an orchestra; *EEOC v. Joe's Stone Crab, Inc.*,[41] decided in August of 2000, involved sex discrimination by a restaurant; and *Madison v. IBP, Inc.*,[42] decided in June of 2001, involved sex discrimination by a leading American manufacturing firm of the sort whose pay practices feature significantly in the empirical studies of the wage gap. Each of these litigated cases provides a concrete and textured picture of sex discrimination in modern day labor markets; they are in this sense the lawyer's counterpart to the general economics evidence discussed above.

Bredesen v. Detroit Federation of Musicians. This case involved discrimination against an orchestra "house contractor" (whose duties are described just below) employed by the Detroit Opera House.[43] The case was brought against the Detroit Federation of Musicians, a union representing individuals employed by the Opera House, rather than against the Opera House itself because the Federation (hereinafter referred to as the "Union") negotiated Ms. Bredesen's terms of employment and because these terms were reflected in a collective bargaining agreement between the Union and the Opera House rather than in an employment contract to which Bredesen herself was a signatory.[44] The Union also represented individuals employed at the Fisher and Fox Theatres in Detroit, the Masonic Temple, and the Detroit Symphony Orchestra (the relevance of which will become clear just below).[45]

---

[40] 165 F.Supp.2d 647 (E.D. Mich. 2001).
[41] 220 F.3d 1263 (11th Cir. 2000), *on remand*, 136 F.Supp.2d 1311 (S.D. Fla. 2001).
[42] 257 F.3d 780 (8th Cir. 2001).
[43] *Bredesen*, 165 F.Supp.2d. at 648.
[44] *See id.* at 648–51.
[45] *Id.* at 648–49 & n.1.

A "house contractor" is responsible for hiring needed musicians for performances, ensuring that musicians understand performance schedules and all other relevant information, enforcing dress codes, ensuring the presence of all required players despite sickness or other reasons for absence, and serving generally as the musicians' liaison to the conductor and the theatre.[46] While the house contractor for the Detroit Opera House was female (Bredesen), the house contractor position was held by a man at both the Fisher and Fox Theatres and the Masonic Temple.[47] (The Detroit Symphony did not utilize a house contractor.)[48] When Bredesen was initially offered the house contractor position at the Opera House, "[s]he became the only woman to hold that position in any major Detroit area venue, union or non-union, and the first woman in the Union's history to hold that position."[49]

Upon being offered the position, Bredesen asked the Union president to negotiate a "double scale" salary for her as house contractor.[50] He declined, stating that "all of the house contractors were paid the same rate for such work, that this uniform rate was a single side-musician's scale, and that the house contractor rate of pay was required by the Union to be uniform at all venues so that they would not compete with another."[51] In fact, however, it turned out that "all of the other Detroit area venues were paying their house contractors—all males—double the regular side-musician's scale."[52] Thus, the plaintiff was being paid less than all of the other house contractors, all of whom were men. Indeed, "[e]ven the Macomb Center, a very small union venue, has always paid its house contractor double scale."[53]

In addition to her central claim of wage discrimination, Bredesen contended that union officials tried to bully her into allowing them to dictate her musician hiring decisions.[54] "When she proceeded to make her own decisions without their input, [the Union president] become infuriated with her, threatened to 'take away her job,' and told her that 'he was going to get [her]' [and] said 'it's time the boys sit down and teach you a lesson and teach you the way it has to be done,'" according to Bredesen's testimony.[55]

None of this texture emerges from an economics study of sex discrimination by symphony orchestras, and for this reason employment discrimination cases provide a useful complement to the broader statisti-

---

[46] *Id.* at 649.
[47] *Id.*
[48] *Id.* at 649 n.1.
[49] *Id.* at 649.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 650.
[53] *Id.*
[54] *Id.* at 651.
[55] *Id.*

cal studies summarized in Part II above. Bredesen's case gives a sense of what goes on behind the scenes and the sorts of norms and cultural background that may lie behind the statistical findings.

EEOC v. Joe's Stone Crab, Inc. A recent case from the restaurant context is one brought by the Equal Employment Opportunity Commission (EEOC) against Joe's Stone Crab, a "Miami Beach landmark" seafood restaurant.[56] Joe's is, by the court's description, a classic high-price restaurant of the sort examined in the Neumark study from above. Its "distinctive menu" has traditionally been served by "tuxedo-clad men," and the restaurant has "maintained an 'Old World' European tradition, in which the highest level of food service is performed by men, in order to create an ambience of 'fine dining' for its customers."[57] The waitstaff at Joe's enjoys a "generous salary and benefits package."[58]

Consistent with Neumark's findings, prior to the EEOC's discrimination charge Joe's food service staff was "almost exclusively male."[59] "Indeed, one striking exception proves the rule. Dotty Malone worked as a food server at Joe's for seventeen years, and for most of this time she was the lone female on a serving staff that ranged between twenty-four and thirty-two."[60] In the five years preceding the EEOC's discrimination charge in 1991, Joe's hired 108 male servers and no female servers.[61] Ms. Furchtgott-Roth's claim during our debate that, contrary to my contention, Joe's has for long employed a large number of women—an allegation she claimed was based on personally visiting Joe's and talking to the owners—is simply impossible to reconcile with the unambiguous judicial findings quoted here.

The expert witness hired by Joe's in the course of the litigation provides a fascinating window on the attitudes that lie behind sex discrimination in the restaurant industry.

> [I]n all of the grade three restaurants in Europe, there is an impression that service at that high level is the environment of men, and that it ought to be that way. And I think that that attitude a few decades ago came and was felt a little bit here in this country .... Those [European] opinions and those sensibilities, I think were in fact carried here by restaurateurs who hoped to create something serious. If you wanted to create a serious restaurant that would become known in the community, that would

---

[56] EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1268 (11th Cir. 2000), *on remand*, 136 F.Supp.2d 1311 (S.D. Fla. 2001) (finding that restaurant had engaged in intentional sex discrimination).

[57] *Joe's Stone Crab, Inc.*, 220 F.3d at 1269–70.

[58] *Id.* at 1268.

[59] *Id.* at 1269.

[60] *Id.*

[61] *Id.* at 1271.

become one of the community's great restaurants, you did what they did in Europe, you modeled yourself after them.[62]

As the discussion just below (of *Madison v. IBP, Inc.*) makes clear, the idea that women are simply not suited for certain positions—positions that happen to pay better than the positions they will otherwise be occupying—is certainly not unique to the restaurant industry. Vicki Schultz, in her classic 1990 article *Telling Stories About Women and Work*,[63] offers a number of wonderful examples.[64] What is especially disturbing about the *Madison* case described just below, however, is that the behavior—similar to that in several of Schultz's accounts—occurred in the 1990s rather than one to two decades earlier.

Madison v. IBP, Inc. The employer in this case, which was decided in 2001, is the world's leading producer of beef and pork products.[65] IBP hired Sheri Madison in 1989 to work in its plant in Perry, Iowa.[66] Madison's tenure at the firm was marked by repeated rebuffs—often justified explicitly in sex-based terms—of attempts on her part to move into positions that might expand her knowledge base and offer her greater responsibility and pay. Setting the overall tone of the environment was general supervisor Larry Sippel, who referred to female employees as "whores" and "dykes," stated that "women don't belong in packinghouses," and maintained that female employees "can't do physical jobs."[67]

One of Madison's attempts to transfer positions came when she asked to learn shank boning. "[S]upervisors John McNamara and Eugene Jackson told her that shank boning was a 'man's job' and that women were not capable of doing it."[68] These supervisors then determined that she would be permitted to switch jobs only if she obtained a certification that was not typically required of male workers.[69] Madison "experienced a substantial delay in receiving a pay increase because she was required to go through a certification process."[70]

By December 1993, Madison "applied for, and was denied, at least nine different promotions."[71] "She was often passed over in favor of male employees with less job knowledge and seniority."[72] For example, "[i]n November 1993, Madison applied for a . . . position which was eventu-

---

[62] *Id.* at 1270.

[63] Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

[64] *See, e.g., id.* at 1784–87.

[65] Madison v. IBP, Inc., 257 F.3d 780, 785 (8th Cir. 2001).

[66] *Id.*

[67] *Id.* at 785–86.

[68] *Id.* at 786.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

ally awarded to a male coworker."[73] "Madison was told that her coworker received the job because he had better . . . skills, more seniority, a better attendance record, and greater job knowledge."[74] But when management reviewed both personnel files after Madison complained about the decision, it found that "the male employee actually had a significant discipline and absentee record."[75]

"Madison continued to bid for open management support jobs, but she was passed over in favor of male employees, including one who had been fired three years earlier for excessive absenteeism."[76] Posts for which she applied "were usually awarded to males with less seniority, less experience, and poor personnel records."[77] "She eventually stopped applying for promotions in July 1997, by which time she had unsuccessfully applied for at least 23 promotions."[78] Little, it appears, has changed, at least at IBP, from the memorable account given by a female pipefitter almost twenty years ago and quoted in Schultz's article:

> For a long time I wasn't allowed to do certain types of jobs . . . . Some of the men would take the tools out of my hands. You see it is just very hard for them to work with me because they're really into proving their masculinity and being tough. And when a woman comes on a job that can work, get something done as fast and efficiently, as well, as they can, it really affects them. Somehow if a woman can do it, it ain't that masculine, not that tough.[79]

IV.

The material discussed in Parts II and III above shows that sex discrimination of various forms is not an artifact of the past. This conclusion alone is enough to establish that, to an important extent, there remains a serious glass ceiling for women in the labor market. Women are prevented by discrimination from attaining positions that are higher level, and pay more, than the ones they have traditionally occupied. The evidence described above establishes beyond what I consider to be reasonable dispute that in a meaningful set of cases, if absolutely nothing were changed about a female candidate except for her sex—that is, no changes

---

[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 788.
[77] *Id.* at 789.
[78] *Id.*
[79] Schultz, *supra* note 63, at 1836–37 (quoting J. SCHROEDEL, ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES 20–21 (1985)).

occurred in the candidate's personality, background, education, experience, expected tenure, expected leave behavior, and so forth—she would nonetheless have significantly better employment opportunities as a male. Of course, the opposite may be true in some circumstances, but the evidence described above shows the existence of a substantial effect in favor of men and against women.

But things actually get even worse. Not only does such sex discrimination persist, but this discrimination also may be part of the *cause* of other, "objective" sex differences that in turn help to produce a preference for male candidates in labor markets. To take just one concrete example, recall the earlier discussion of potential leave-taking and tenure differences between male and female musicians in major symphony orchestras. Goldin and Rouse's study concluded that such differences did not exist, but suppose that the opposite had been true and that such differences had existed alongside the orchestras' apparent preference for men on other grounds (as shown by the study). The (hypothetical) differences in leave-taking and tenure could precisely have been *caused by* the other forms of sex discrimination exhibited by the orchestras. Suppose, for example, that I am a female musician married to a male musician and that we are trying to decide who should take a leave to care for our newborn child, or that we are trying to decide whether one of us should be willing to leave our current orchestra to allow the other to move to a new city for a better career opportunity. Surely, in any rational world, decisions such as these will be influenced at least in part by the financial ramifications of the alternatives. If, because of sex discrimination in orchestra hiring, female musicians will have fewer opportunities and earn less than their male counterparts, then it makes perfect financial sense for the female rather than the male musician in my example to take the leave or depart from her current employer to provide her better-situated partner with greater career opportunities. And, of course, against this backdrop, it is also natural for aspirations and values to develop such that male employees, more so than female employees, view career advancement as central to their identities and life goals.[80] In such a setting employers will naturally, and for perfectly good reasons, tend to prefer male employees to female employees.

The point here is not, of course, that only such financial considerations will drive career decisions between partners. (Also, the discussion here is obviously limited in scope to opposite-sex partners.) One might conceive, for instance, of a norm of egalitarianism that says something

---

[80] *Cf.* George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, *in* AN ECONOMIC THEORIST'S BOOK OF TALES: ESSAYS THAT ENTERTAIN THE CONSEQUENCES OF NEW ASSUMPTIONS IN ECONOMIC THEORY 123, 125 (George A. Akerlof ed., 1984) ("[P]eople prefer to believe that their work is safe [because] [t]hose who . . . believe the job is safe do not experience the unpleasant feelings of constant fear or unsettling doubts about how wise it was to take such a dangerous job.").

like "because the market is discriminatory and therefore under-recognizes your skills and talents relative to mine, I will compensate you by taking leave or not asking you to move so as to avoid an even further sacrifice of your professional opportunities." But (among other things) not all couples may have the luxury of making decisions that go against their financial self-interest; indeed, one thing that is striking in popular portrayals of "stay at home" fathers is the central role that financial considerations often play in shaping the decision to have the father at home. As one such dad, quoted in a recent *New York Times* article, put it in describing his and his wife's decision, "We didn't want to go the day care route and with her having the better salary potential, we decided I'd quit work and stay home."[81] Another "stay at home" father quoted in the article was Christopher Coby, who "had two kids in diapers at once" and quit teaching elementary school after his son was born because "his wife, who works for a consulting firm, had a higher salary and better benefits."[82]

The idea that financial costs and benefits will factor into decisions about female versus male career choices ultimately is eminently common-sensical and seems unlikely to be contested except perhaps by those holding extreme essentialist views of the "natural" orientations of men and women toward caretaking responsibilities. (And those holding such views might be intrigued to hear that Christopher Coby, the "stay at home" dad quoted above who managed two kids in diapers at once, is a 6-foot-2, 215-pound former tank commander in the Army reserves who owns an apron that reads, "Women want me. Martha Stewart fears me.")[83] It is hard in the end to avoid the conclusion that reduced career opportunities for women on account of sex discrimination in labor markets will play a real role in shaping the "choices" that both women and men make about balancing career and family responsibilities.

Even if one rejects extreme essentialist views of the "natural" roles of men and women, one might believe (as I do not) that women "naturally" or for some other non-labor-market reason take on somewhat more than fifty percent, even if not the lion's share, of family or home responsibilities; indeed a major theme for many audience members at the Federalist Society debate was the idea that legal scholars and policymakers need to think creatively about revamping the workplace to be more hospitable to the demands of (depending on who was making the argument) "mothers" or "parents." Mary Jo Frug, of course, developed this basic theme about the workplace treatment of "mothers" over twenty years ago.[84]

---

[81] Rick Marin, *At-Home Fathers Step Out To Find They Are Not Alone*, N.Y. TIMES, Jan. 2, 2000, § 1, at 1, 18.

[82] *Id.*

[83] *Id.*

[84] Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 BOSTON UNIV. L. REV. 55, 55–59, 94–103 (1979).

My own approach to this question is different. I think it is critical to distinguish between, on the one hand, extra caretaking-type responsibilities taken on by women as a rational response to the sorts of labor market sex discrimination documented above, and, on the other hand, extra caretaking-type responsibilities taken on by women for other reasons. To the extent that labor market discrimination of the sort documented above is part of the cause of women's extra caretaking role, I would *very* much prefer to see the law strike out aggressively against this discrimination (more aggressively than it presently does) than to see us embark upon the highly complex and very politically fraught task of "restructuring the workplace" as a way of improving women's position. My central reason for saying this is that while virtually everyone can agree that the sorts of discrimination documented in Parts II and III above are worthy of the highest degree of condemnation by the law,[85] and while we can thus easily attain both consensus and a high degree of energy around that goal—a goal that I believe is greatly underrecognized in current policy debates about labor markets—the idea of "restructuring the workplace" to improve women's position is controversial for a great many reasons; these include the enormous economic complexities raised by the strategy and the serious risk that the very framing of the question in this way will reify and cement existing sex-based attitudes toward caretaking responsibilities. Thus, my strong preference—which I cannot hope to defend fully here—is *first* to solve the "everyone agrees" problem of uncontroverted sex discrimination in labor markets, a problem whose seriousness I hope to have demonstrated above; *then* to give the solution time to take root in women's and men's consciousness and to shape their values and aspirations for the workplace and the home; and only *then*, if needed, to consider embarking upon the more thorny and politically fraught inquiry into "workplace restructuring" as a way of improving women's labor market position.

---

[85] Richard Epstein is a rare exception to the consensus. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS xii (1992) ("There is no adequate theoretical foundation or practical justification for the employment discrimination laws. The strong national commitment to the aggressive enforcement of the antidiscrimination law is, I believe, mistaken.").