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Symphonic metamorphoses

Variations on vulnerability: orchestral musicians' employment in times of crisis

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PART IV DISSONANCE: DISCRIMINATION IN THE ORCHESTRA

14. Of Rowe and race

“In my younger days, I never saw an opera where an orchestra had female players. Then someone had the bright idea to drop the curtain between those auditioning and the panel, and things changed overnight. I wish we could have a drop curtain in every field of human endeavor.”¹⁶⁵³

“When all is said and done, there is a problem, and it lies in the very nature of the symphonic orchestra, an organism that was formed at the onset of industrial revolution and has resolutely resisted egalitarianism, electronics and multicultural values.”¹⁶⁵⁴

To answer the question as to what a *movement* that appraises issues of gender bias in orchestras contributes to research that examines the vulnerability within employment-related struggles in the orchestral workplace, it is important to underscore two points. Firstly, the research is not intended to offer a comparative study of U.S. and NL orchestral cases to generate an inventory of differences and/or similarities. Rather, one objective is to provide a compendium of concerns that shape not only the employment of orchestral musicians but also the perceptions thereof. Secondly, as many of the stakeholders interviewed emphasized, employment embraces a broad panoply of issues that in turn impact status and even as the *Rowe* case indicates, wages. Hence, the inclusion of gender discrimination and #metoo-related topics is not only justified but indispensable to gain a broader perspective on additional vulnerabilities at play in the sector. Notably, the number of cases in which orchestral musicians in the Netherlands have turned to litigation for a solution to pay-disparity issues has increased rapidly in the second decade of the 21st century, with even more cases on the immediate horizon in 2021. This *movement* attempts to answer questions posed by Dutch-based musicians curious to discover how their more litigious U.S. colleagues sought to remedy discrimination at the orchestra. It is dedicated to the musician-plaintiffs who have shown the courage to represent themselves, to make their voices heard.

On July 2, 2018, Elizabeth Rowe, the principal flautist in the storied Boston Symphony Orchestra (BSO) brought a claim against her employer under the Massachusetts Equal Pay Act (MEPA), claiming that they engaged in gender-based pay discrimination.¹⁶⁵⁵ Massachusetts was the first state to prohibit employers from seeking salary history

¹⁶⁵³ Justice Ruth Bader Ginsburg #RuthBaderGinsburg January 1, 2019

¹⁶⁵⁴ Norman Lebrecht “Still all white on the night” posted August 7, 2002. Available at: <http://www.scena.org/columns/lebrecht/020807-BL-equality.html>

¹⁶⁵⁵ Elizabeth A. Rodgers, lawyer for the plaintiff in *Elizabeth Rowe vs. Boston Symphony Orchestra* sent a copy of the initial complaint to the author by email on July 11, 2018. See *Epilogue: Appendix 25*.

and using that information to formulate a salary offer for a prospective employee. California, Delaware, Oregon, Puerto Rico, Connecticut, Hawaii, and Vermont soon followed Massachusetts' example, and enacted laws in harmony with the Massachusetts initiative.

That a news story with an orchestral flautist¹⁶⁵⁶ as protagonist would hit major media outlets¹⁶⁵⁷ was news in and of itself in 2018. After all, the ins and outs within the orchestral world usually occupy the minds and hearts of a small number of insiders. As this musical journey has shown, orchestras operate in a niche market that rarely captures the attention of a wide audience either on or offstage. U.S.-based pundits suggested that this action could open the floodgates for further litigation in the sector as social media and mainstream press reports speculated on the impact the case would have on other purported discriminatory orchestral scenarios.¹⁶⁵⁸ Many critical voices from inside the orchestras in the U.S. and Europe showed astonishment with regard to the claim. To quote one puzzled Dutch-based female performer, "when I read that Ms. Rowe earns \$236,303 per year at the BSO, I almost fainted as this hefty sum is at least three times more than a principal flutist earns here in the Netherlands. She probably has every right to sue her employer. Yet, at the same time, I can't but think about all of her fellow musicians, male-and-female, who do not have the leeway to negotiate such salaries."¹⁶⁵⁹

Women in the orchestral workforce have faced many biases related to gender throughout history. What contemporary researchers reference as the 'gender gap' is difficult to measure and equally as difficult to come to terms with, as it is rooted in long seated and well-accepted practice.¹⁶⁶⁰ Referring to a quantifiable, systematic difference between labor market outputs for men and women, the gender pay gap was a central issue that ignited the feminist equality movements in the late 19th century but had little effect in the cultural performance sector. As previous *movements* have described, orchestras have their own codes of conduct and exhibit the characteristics of a particular culture that is frequently closed to outside scrutiny. These guild-like characteristics have helped to perpetuate discriminatory practices, which are still ongoing.¹⁶⁶¹

¹⁶⁵⁶ 'Flautist' and 'flutist' are used interchangeably to denote a flute-player.

¹⁶⁵⁷ Coverage on CNN, Associated Press, Reuters, major U.S. newspapers, and widespread social media postings between July 2-14, 2018.

¹⁶⁵⁸ Ibid.,

¹⁶⁵⁹ Comment given by a principal wind player in a major Dutch orchestra, anonymity assured.

¹⁶⁶⁰ The **Global Gender Gap Report** measuring gender equality in 144 countries was first published by the World Economic Forum in 2006.

¹⁶⁶¹ The outside scrutiny issue will be further examined in *Singing the #metoo classical blues*.

Women have performed in limited capacity in orchestras for centuries,¹⁶⁶² yet the gender gap evident in terms of the low number of female performers compared to male performers, the restricted positions women have held, the instruments designated as ‘female friendly,’ and the pay discrepancies women have endured form a complex *mélange* of gender-related topics tied to music history and musical tradition. In orchestras, “women have had to contend with the deep-rooted orchestral hierarchy that continues to privilege men and negotiate a role that is still heavily imbued with masculine notions of power, authority and leadership. No matter how successful women might be in assuming this male-defined role, their difference continually remains markedly visible.”¹⁶⁶³

In a *movement* devoted to women in orchestras, this introduction places gender-in-orchestras issues in a wider context of general historic/contemporary bias and socio-economic factors. A historical review including gender-based instrumental stereotyping and the role of women as leaders, leads to the second section that introduces the women’s orchestra as a distinct ‘species’ that ‘legitimately’ segregated women from playing alongside their male counterparts. To usher in an analysis of the capstone case in this *movement*, Ms. Rowe’s fight for equal pay, a discussion of the audition process with specific regard to winning (and keeping) principal positions will be reviewed. Subsequently, a comparative component is added with the introduction of an infamous, at least in musical circles, gender-related orchestral musician’s suit in Germany that expands on the notion of discriminatory practice related to gender-based instrumental stereotyping. Next, Ms. Rowe’s lawsuit is set in the context of relevant legislation and precedent. The intriguing issue of ‘tainted variables’ in court interpretations of employment discrimination will be touched upon as well. A brief evaluation of Dutch legislation and relevant cases *vis-à-vis* equal-pay-for-equal-work precedes the conclusion. The *movement* closes with a consideration of possible repercussions of Ms. Rowe’s claim to equality issues in the orchestra.

14.1 From Saint Cecilia to modern-day musicians: the myth and the message

Before an attempt is made to unwrap how gender issues impact orchestral employment and how discriminatory hiring practices impact female musicians, a paradox is highlighted here. Throughout history, women have taken lead roles in the music profession. From Saint Cecilia, the patron saint of music to pop divas strutting their

¹⁶⁶² Some historians place female performers in Ancient Greece.

¹⁶⁶³ See, B. Bartleet. “Women Conductors on the Orchestral Podium: Pedagogical and Professional Implications” 2008 p.38.

stuff on YouTube, there is no paucity of women in the profession. However, as the following paragraphs will attempt to prove, women have been accepted as musicians of note based on appearance as well as their musical talent. The seductiveness of the female voice, one of the Biblical figure Eve's many attractions, has made its imprint on women-as-musicians throughout history: if women were permitted to make music, their female charms should come to the fore. The ancient Greeks chose Euterpe, translated as 'pleasing' for the muse/goddess who represents music. "You are a woman; the audience reacts differently to you. These stereotypes have lasted for centuries! To please and to be pretty in the heat of performance and to stay as young as possible, this is the message that haunted female soloists as they hear it over and over again."¹⁶⁶⁴ To the feted violinist Nadja Salerno Sonnenberg, oft represented in the press as the 'bad girl' rock star amongst classical musicians, "women are supposed to act according to the submissive roles set forth by males and accepted dominating hierarchies throughout history. . . exceptions were made for exotic female singers whose status as divas brought them fame and of course great sums of money. The vamps who commanded the stage have little in common with female orchestral musicians who have had to fight every step of the way for equality."¹⁶⁶⁵

Marin Alsop,¹⁶⁶⁶ the much-admired conductor and the first woman to be appointed music director of a major U.S. orchestra and most recently, the first to ascend the podium as music director one of Vienna's elite symphonies, advocates the destruction of all barriers to musicians in terms of gender or for that matter any other 'disadvantaged' category. Through word and deed, her rise to the top of the conducting profession, traditionally a bastion of male dominance is a testimony to perseverance and excellence. Frequently put in the spotlight with the question, "why aren't there more female conductors?" Ms. Alsop's quick response: "why ask me, why not pose that question to the men in the business?" Relating the maestro's¹⁶⁶⁷ response to media criticism inferring that Ms. Rowe's equal pay claims were 'disproportional' and merely relevant to 'the overpaid principals in major orchestras' and not relevant to basic, nitty-gritty discriminatory actions at the workplace, the discussion on gender discrimination should focus on inclusionary equality regardless of whether the issue is hiring a woman who conducts or paying a female principal player at the same rate as male

¹⁶⁶⁴ Interview with the great South Korean violinist, Kyung-Wha Chung, the first superstar amongst a galaxy of Asian female violin soloists.

¹⁶⁶⁵ Interview with soloist/violinist Nadia Salerno Sonnenberg, originally conceived for *The Strad*.

¹⁶⁶⁶ Marin Alsop is Music Director of the Baltimore Symphony Orchestra, and the Vienna Radio Symphony Orchestra.

¹⁶⁶⁷ Although 'maestra' might be more linguistically appropriate to designate a 'female conductor,' the leading ladies of the baton unanimously applaud the term conductor/maestro or where applicable, music director.

principals. Like several great contemporary conductors, Ms. Alsop was a professional violinist at the outset of her career.¹⁶⁶⁸ She recollects, “I can attest to the fact that women as violinists have definitely made their mark as soloists and orchestral section members and even increasingly taking over concertmaster positions whereas back a few decades women were only acceptable in second violin sections. Progress, slowly but surely. We still have a long way to go not to speak of conductors!”¹⁶⁶⁹ Turning to the Netherlands, our other geographical area of inquiry, the leading violin pedagogue for youngsters, Coosje Wijzenbeek¹⁶⁷⁰ proposed a new twist on a commonplace Dutch expression, ‘vioolmeisje’ (literally, violin girl) an expression that colloquially refers to a ‘goodie two-shoes.’ In the headline of a press interview ‘Vioolmeisje is geen doetje’ (a violin girl is no pushover)¹⁶⁷¹ Ms. Wijzenbeek observed that although most of her young students (over 75%) are female, this phenomenon could be attributed to their ‘fijne motoriek’ (dexterity, motor skills) and ‘aanleg,’ (physical aptitude). To be a ‘real violin-playing girl’ takes more discipline and guts than the expression infers. As for preconceptions, “perhaps the only kind of modern prejudice at this level is the old fashioned idea that some parents hold on to—music-making is for girls who will not have to make a living at it whereas boys should choose something serious and avoid spending so much time and energy in a field that often does not lead to great financial security.”¹⁶⁷² Reappraising the insider observations brought forward in the paragraph above suggests a deep-rooted acceptance of how perceived differences between the sexes plays out in determining musical choices. The high ratio of females to males who take on violin studies reflects a general trend backed up by statistics provided by conservatories worldwide.¹⁶⁷³ Simply put, the statistics show that more women enter the classical music vocation with high percentages for string instruments (with the notable exception of the bass) and other instruments traditionally placed by women.

¹⁶⁶⁸ Lorin Maazel (1930-2014) and Jaap van Zweden to name a few were great violinists, famously; Jaap van Zweden was Concertmaster of the Royal Concertgebouw Orchestra (1979-1995) before turning his prodigious talents to conducting. At present Jaap van Zweden is Music Director of the New York Philharmonic Orchestra and the Hong Kong Philharmonic.

¹⁶⁶⁹ Interviews with Marin Alsop.

¹⁶⁷⁰ Coosje Wijzenbeek was an internationally recognized pedagogue who specialized in training young violinists. Her string ensemble, Fancy Fiddlers and individual students exemplified by Janine Jansen and Noa Wildschut have attained international recognition, several live interviews with Ms. Wijzenbeek, in preparation for *Strad Magazine* add to the quotes in this section.

¹⁶⁷¹ *Volkskrant* interview reproduced at: <https://www.volkskrant.nl/cultuur-media/-vioolmeisje-is-geen-doetje-~bd25b9aa/>

¹⁶⁷² Quotes gleaned for interview published in *The Strad*.

¹⁶⁷³ The general trend that more women enroll in advanced studies than men according to a 2017 study published in *Atlantic Monthly* deserves mention as well. See, “Why Men are the New College Minority?” available at: <https://www.theatlantic.com/education/archive/2017/08/why-men-are-the-new-college-minority/536103/>

Gender discrimination in the orchestral workplace has been exacerbated by the general assumption that women are more suited to play specific instruments regardless of whether their aspirations are parlor or professional. The same cultural and social norms that kept women out of the workplace to begin with are highly evident in the orchestral world on both sides of the Atlantic through the ages. Women when finally admitted to orchestral violin sections in the 20th century ‘played second fiddle to men’ by playing at the back of sections or even literally ‘second violin.’¹⁶⁷⁴ Stereotypically, the ‘softer’ instruments exemplified by flute, harp, violin, and some other stringed instruments were deemed appropriate for the ‘gentler’ sex. “Women cannot possibly play brass instruments and look pretty, and why should they spoil their good looks?” was an observation penned in 1904 that could well have applied to Abbie Conant’s tribulations to maintain her principal position in a major German orchestra in the 1980s.¹⁶⁷⁵ While female cellists broke through the ranks of female musicians as both soloists and orchestral performers in the 20th century, female cellists in 19th century Great Britain, like female equestrians were required to ‘ride’ their cellos side-saddle. A woman placing an instrument between her legs was looked upon as either immoral or provocative, or both.¹⁶⁷⁶ Low or loud instruments such as the double bass, brass instruments and/or percussion instruments were equally unsuitable as they were considered either too heavy, or indelicate for the fairer sex. As the following paragraphs illustrate, instruments have transmitted gendered meanings for centuries.

14.1.2 Of patron saints and empowerment

Moving back through the annals of history, a closer analysis of music’s female patron, Saint Cecilia, shows that even a patron saint’s affiliation with her metaphorical musical art form is ambiguous. An early ‘secret’ Christian whose past is swathed in mystery, Cecilia became the patron saint to music and musicians after Chaucer immortalized her in the *Canterbury Tales* (“The Second Nuns Tale”) centuries following her purported martyrdom.¹⁶⁷⁷ Her rise to posthumous fame is an early example of public relations through storytelling and art, precursors of modern-day advertising. To bring the message of sacrifice home to the people and underscore church values, feast days and ecclesiastical storytelling were important to transmit approved messages to the masses. Inspirational stories in the popular medieval compilation, the *Golden*

¹⁶⁷⁴ Jane M. Bowers, Judith Tick. *Women Making Music: The Western Art Tradition, 1150-1950* 1987.

¹⁶⁷⁵ Gustave Kerke. *Musical Standard* 1904 cited by Carol Neus-Bates. *Women in Music: An Anthology of Source Readings from the Middle Ages to the Present* 1982 p. 202.

¹⁶⁷⁶ M. Cowling. *The cello* 2nd ed. 1983.

¹⁶⁷⁷ H. Wendall Howard. “Who’s Cecilia, what is she?” 2015.

Legend,¹⁶⁷⁸ were ideal subjects for the visual arts as countless frescos adorning church walls throughout Europe depict.



**The Ecstasy of St. Cecilia, Raphael
(circa 1515-1516)**

The deeply devout High Renaissance artist Raphael put his faith to work in the form of an altarpiece centered on the martyrdom of Saint Cecilia. Inspired by descriptions circulated in the stories of the 'Golden Legend,' the Raphael painting depicts a richly clad young woman as she abandons perceptibly pagan worldly pleasures for an exalted higher calling, the 'true path.' Shown in a musical setting, Raphael's protagonist is on the verge of ascending to the heavens. An organ slips out of her hands and various damaged musical instruments lie at her feet. Cecilia is not depicted as a musician; her role is not that of an earthly performer. She is concentrated on the next world, the world of the spirit and cherubic music-making: her gaze moves upwards with no visual

¹⁶⁷⁸ A collection of hagiographies (lives of the saints), the *Golden Legend* took second place to the Bible as the most widely disseminated book in medieval Europe.

contact with the real world. “The wealth of musical composition, poetry and paintings that turned Cecilia into a musician were inspired by Raphael’s iconic depiction. From text to iconography in art, a catalyst for meaning through message can be traced.”¹⁶⁷⁹ Cecilia’s place as patron saint to music was ‘made possible’ through Raphael, yet her relationship to music is idealized and ephemeral, more in keeping with a world far from the instruments on the ground.

14.2 Women in early day orchestras

Although female singers were a fixture in court, city and Kapelle musical life, the domain of the orchestra was predominantly male until the 20th century. A crack in the male bastion, an exception was afforded to the daughters of famous professionals who were given the opportunity to study instruments thanks to their benevolent male family members. And, in Venice in the 18th and 19th century, the tradition of training orphaned girls to perform in Ospedale (orphanages) added to the city’s prestige; that tradition resulted in widespread acclaim for such compositional stars as the virtuosic Ospedale della Pietà director,¹⁶⁸⁰ the fabled composer, Antonio Vivaldi (1678-1741), who crisscrossed the European continent with his superstar female orchestra. The novelty of witnessing young women playing all instruments attracted adoring crowds. As the French pundit Charles de Brosses observed, “[The girls] are reared at public expense and trained solely to excel in music. And so they sing like angels, and play the violin, the flute, the organ, the violoncello, the bassoon.”¹⁶⁸¹

In the 19th century, a heady mix of post-Enlightenment factors combined with the rapid changes wrought by capitalization, industrialization, urbanization, and the marked rise of a moneyed middle class led to great transformations in the cultural sector described elsewhere in this manuscript. Yet, although gender equality was one of the expected outcomes of the revolutions of the late 18th century, the wheels of change turned slowly in terms of gender integration in all manner of workplaces. Orchestras proved to be no exception to this observation. Even the watershed French Revolution with its calls for Rousseauian emancipation¹⁶⁸² did not open the floodgates to wash away the restrictions

¹⁶⁷⁹ Taken from lecture notes taken at the legendary Vincent Scully’s Introduction to the History of Art, Yale College 1978.

¹⁶⁸⁰ The genial ‘Red Priest,’ Antonio Vivaldi served the Ospedale for almost 40 years beginning his professional career as a violin instructor in 1713.

¹⁶⁸¹ See, Charles de Brosses. *Lettres familières écrites d’Italie en 1739 et 1740* 1885. Available at: <https://archive.org/details/lettresfamiliere01brosiala/page/n7>

¹⁶⁸² Keep in mind Jean Jacques Rousseau’s adage: ‘women’s education should be relative to that of men.’

on women's chances for equal participation in the arts or for that matter any sort of professional arena. The Napoleonic Code that influenced legal systems throughout Europe affirmed the basic precepts of the Revolution, inter alia: equality under law, and freedom of religion. Yet, in terms of women's rights, the Code advanced the idea that a married woman was her husband's property, a subordinate who was barred from entering into property-related transactions. Domesticity not independence was the fate for most educated women including the musically cultivated. Even though musical education was perceived as an enhancement to a woman's social worth at the middle and upper echelons of society, a well-bred woman in the 19th century was not apt to take to the concert stage as her very presence could "undermine the hard-won social status of her bourgeois family."¹⁶⁸³ A woman's chance for a career within an orchestra was thoroughly limited by cultural and competitive restrictions.

Literally groundbreaking developments in transportation, namely the invention of the steamship and the locomotive "the principal determinants of the levels of investment, national income, and employment in the nineteenth century," were key to the expansion of national and international mobility between Europe and the United States.¹⁶⁸⁴ The demand for orchestras increased rapidly in the 19th century both in Europe and the United States as a result of expanding audiences, changes in patronage patterns and civic initiatives to build great concert and opera auditoriums. Patronage moved from the elites associated with church and crown to a broad base of supporters.¹⁶⁸⁵ Orchestras in the United States benefited from European economic migrants who travelled to the United States in the 1800s seeking employment in the orchestra sector. Almost all of these musicians were men: 'women of good reputation' would compromise their social standing if they left their 'proper place.' For all the glowing reports of upward mobility resulting from the aforementioned developments, it is disconcerting to realize that women could only avail themselves of travel for pleasure or family reasons, certainly not travel for professional advancement.

Class differences might well be key to an appreciation of the finer points here. The history of exploitation of women in the factories of the Industrial Revolution contrasts sharply to the portrait of the middle-class woman, an 'angel in the house' responsible to maintain peace and harmony. The rise of the middle class in the 19th century, the

¹⁶⁸³ Nancy Reich. "Women as Musicians: A Question of Class" 1993 p. 131.

¹⁶⁸⁴ Herman Krooss. *American Economic Development* 1956.

¹⁶⁸⁵ See, generally, Spitzer and Zaslaw. *The Birth of the Orchestra: History of an Institution 1650-1815* *supra* at fn. 18.

expansion of the music publishing business, and the perceptive maneuvers of piano manufacturers to market and sell their invention, popularly known as ‘the cottage piano,’ led to the instrument becoming the instrument of choice for both young women in search of well-heeled protection as well as the idealized housewives whose piano became a symbol of personal accomplishment and harmony-at-home.

In this 19th century depiction by a popular Belgian ‘parlor painter,’ a softly beautiful damsel delicately tickles the ivories of a shiny black upright. Exotic iconographical allusions to affluence (the tiger skin at her feet, the cockatoo beckoning) are accouterments of ample bourgeois wealth. The young woman does not ‘play’ the instrument: her relationship to it is completely passive, suitable for the docile female who takes no action independently. Countless paintings and prints *à l’époque* show women in rapturous poses behind the piano often with adoring males standing nigh. To perform in public was restricted to the privacy of a well-appointed parlor. To enter the public eye as an instrumentalist performing on stage was a rarity. To move out of the protection of home to sit alongside men in an orchestral setting strayed far beyond accepted social conventions until the 20th century.



**Woman at the piano with
cockatoo Gustaphe de Jonghe
1870**

14.2.1 *The solo exception*

During the course of the 19th century, audiences gained familiarity with exceptional female soloists such as the pianist-composer Clara Schumann (1819-1896) for whom a career was “the very breath of my body.”¹⁶⁸⁶ Schumann was extraordinary and certainly a grand exception to the ‘parlor piano’ rule. Married to the mercurial and catastrophically suicidal musical genius Robert Schumann, she not only toured extensively as piano soloist but also composed prolifically while serving as the principal breadwinner for her large family.¹⁶⁸⁷ Another prominent exception to the stereotype of female musicians off stage was the American violin virtuoso Maud Powell. She broke every convention of the time to leave the hinterlands of Illinois to seek the top violin pedagogues in Berlin, Leipzig, and Paris. A vociferous champion for equal rights, Powell stood up for all women as well as minority musicians. Beloved by audiences on both sides of the Atlantic, she gave the U.S. premieres of major compositions ranging from the Dvorak Violin Concerto to the concertos by Tchaikovsky and Sibelius. Audiences flocked to hear Maud Powell and Clara Schumann, impressed by their virtuosity and in awe of their star status. Unlike orchestral musicians who form part of a collective relatively indistinguishable as individuals, these women were soloists who occupied center-stage and commanded respect.

14.2.2 *The professional drill: reaching equality through education*

Another change along the path to equality of the sexes within the orchestra lies in the realm of education and the professional drill. Advanced training has always been key to enter the orchestral world at the professional level. The efforts of the German-born Julius Eichberg, the founding father of Boston’s Conservatory of Music (1867) factored prominently into the integration of women into the male-dominated field. A vociferous champion of equal rights, Eichberg accepted talented pupils regardless of gender and presented these superlative students in regular public concerts. Congratulating Eichberg for his revolution on behalf of ‘the softer sex’ an article in the Boston Herald published in 1888 proudly proclaimed progress:

*“Twenty-five years ago, a girl appearing upon frequented street with such a burden would have been subjected to much staring and muttered comment . . . if not downright persecution. But a good many things may happen within 25 years, and under the modern view of things girls may aspire to almost any attainment of which humanity is capable.”*¹⁶⁸⁸

¹⁶⁸⁶ See, *The Letters of Clara Schumann, and Johannes Brahms 1853-1896* 1971 p. 168.

¹⁶⁸⁷ Nancy Reich. *Clara Schumann: The Artist and the Woman* 2001.

¹⁶⁸⁸ “Girl Violinists: An Innovation that has been followed by Good Results” *Boston Herald* January 20, 1888 (microfiche).

Yet, while some emancipation progress was made in terms of education when professional music schools in Europe and the United States opened their doors to female instrumentalists in the mid-19th century, most of these women were not permitted to engage in professional musical activities. More often than not, these educated women were relegated to the position of accomplished housewives whose domestic musicianship was considered to be an asset to home life. As the Clara Schumann and Maud Powell examples show, there was room for exception at the very pinnacle of the profession. Women seeking a place within the collective had but one choice: to become a musical curiosity in an all-female ensemble.

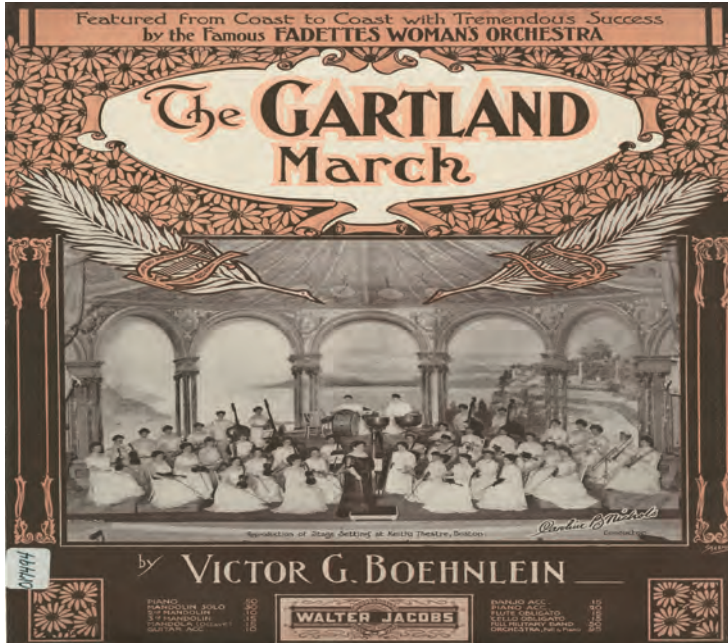
14.2.3 Women's orchestras: if you can't join them, beat them at their own game

Cultural stereotyping was a major factor that kept well-trained women musicians out of orchestras and led to the search for other, more acceptable outlets for musical talent throughout the ages. Yet, in the 19th and early 20th centuries women's orchestras were a popular hybrid form of entertainment and hundreds of women's orchestras toured Europe and the United States to great acclaim. At first blush a positive move forward to provide employment for professional musicians barred women from entering the men's club of professional orchestras; the ladies' orchestras could be viewed as the perfect economic solution to the predicament of 'what shall we do with all these well-trained women entering the profession?' The succinct answer in two words: segregate them.

One of the most popular U.S. women's ensembles, the Boston-based Fadette Orchestra, founded in 1888, toured throughout the United States for over three decades. Like women's orchestras in Europe, the ensemble's repertoire was markedly different from the male-dominated symphonic institutions. The Fadettes' performed light music, selected movements from symphonies, and trendy opera overtures. Despite for their popularity and economic prosperity, the women's orchestras were secondary to male-dominated symphony orchestras in two ways: their repertoire was limited to 'suitably light compositions' and their financial remuneration was significantly less than the fees for 'serious male musicians.'¹⁶⁸⁹ Female musicians could delight and entertain but serious music making was more of an impossible dream as a member of New York's Ladies Elite avowed:

¹⁶⁸⁹ Ralph P. Locke and Cyrilla Barr, editors. *Cultivating Music in America: Women Patrons and Activists since 1860* 1997 p. 35.

*“If I had the chance to substitute for a man I should do so in a minute and should look for more and better opportunities to follow. By accepting them we women gain a foothold in the orchestra world, and that is what we are all ambitious for. Now we are limited to concert work or to musical organizations composed entirely of women. I am sure, a great many of us could hold our own with the majority of men...”*¹⁶⁹⁰



In 1898, the English composer-pianist Mary Wurm founded a women's orchestra in Berlin, one of the finest amongst the many European women's orchestras. A protégé of Clara Schumann and encouraged by no less a musical force than the composer Johannes Brahms, Wurm went down in history as the first woman to be engaged to conduct the Berlin Philharmonic orchestra. Yet even this distinction deserves analysis. Ms. Wurm who performed as soloist during that historic concert in 1887, funded the concert herself: she engaged and paid for the orchestra to showcase her prowess as a piano virtuoso. Her contract made allowance for her to conduct the program's opening overture, a token gesture. Her duties as conductor for the remainder of the program were taken over by the man who was advertised in the press and posters as the real 'conductor,' Gustav Kogel.¹⁶⁹¹

¹⁶⁹⁰ "Opinions of New York Leaders on Women as Orchestral Players" *Musical Standard* 2 April 1904.

¹⁶⁹¹ See <https://www.berliner-philharmoniker.de/en/titelgeschichten/20172018/female-conductors/>

Of the many women's orchestras throughout history, the last of the extant all-female groups in the United States was located in Cleveland, Ohio. Founded by a Cleveland Orchestra violinist Hyman Schandler in 1935, the Cleveland Women's Orchestra (CWO) filled a gap that mainstream orchestras bypassed. The indomitable Maestro Schandler, who remained at the orchestra's helm for 55 years, reminisced on the heartbreak and injustice that female musicians faced in the orchestral world. "If you look at the Cleveland Orchestra today with all its fantastic women members, it is hard to believe how difficult their struggle was just a few decades ago. As a teacher and coach, I met so many excellent female musicians who had absolutely no place to frame their considerable musical talents. The perception that women belong in the kitchen and not on stage for a serious concert was unfortunately one of the reasons that led me to create an ensemble where women would show that they can perform as well as men."¹⁶⁹² Again, it was the 'male-dominated' music world that relegated the ensemble to the periphery where housewives were permitted to dabble with their hobbies.

14.2.4 Media discrimination: the press reinforces women's inferiority

Reviews of the CWO's premiere concert refer to the conductor's skills as 'workmanlike,' while admonishing the orchestral players to adopt "a more masculine touch in other words in the exalted society of Brahms and Beethoven they cannot afford to be too ladylike."¹⁶⁹³ Although dated, this subtext, one may argue, reveals an all-too-typical attitude towards women in orchestras, not only back in the mid-1930s but sadly, taking the Rowe case into consideration, it permeates the 'orchestral business' to the present day. Masculine Brahms and 'no ladylike Beethoven' would make those compositional giants cringe as both men of music held the 'weaker sex' in highest musical regard. The complex nature of Johannes Brahms' and Clara Schumann's interpersonal relationship, based on an enviable level of mutual musical esteem,¹⁶⁹⁴ withstood the vicissitudes of age difference, background dissimilarities, career diversity and the shadow of Clara's first love and Brahms' mentor Robert Schumann.¹⁶⁹⁵ To disparage equality in the name of Brahms would have made the mighty lion roar.¹⁶⁹⁶

¹⁶⁹² Author's interview, Hyman Schandler, Cleveland, Ohio.

¹⁶⁹³ See Herbert Elwell's review of the orchestra's first annual concert published in *Cleveland Plain Dealer* "Women Score in First Debut Concert" November 18, 1936 Available at:http://www.clevelandwomensorchestra.dreamhosters.com/wp-content/uploads/2016/11/Severance_Debut_Review.jpg

¹⁶⁹⁴ Johannes Brahms and Clara Schumann were passionate correspondents, see, Clara Schumann, et al. *Letters of Clara Schumann and Johannes Brahms 1853-1896*.

¹⁶⁹⁵ Styra Avins' carefully crafted Appendix exposes the ups and downs of the Brahms-Clara Schumann relationship in *Johannes Brahms: Life and Letters*.

¹⁶⁹⁶ An allusion to the wonderful 2016 BBC 3 Great Composers series entitled: *The Great Lion (Johannes Brahms) and the Little Leopard (Hans von Bülow)* <https://www.bbc.co.uk/programmes/b07lfzv2>

The fact that musicians entered into lawsuits with regard to discrimination in the 20th and 21st century informs us that prejudices still hold sway in the orchestral workplace. With regard to gender issues, a partial clue lies in the very concept of integration and acceptance as related to female musicians. Women as an object of admiration, an idealized object for worship or a virtuoso capable of amazing feats of technical prowess are a far cry from a female colleague who sit next to men at work.¹⁶⁹⁷ In the late 19th century, women were welcomed to the orchestral club as long as they were hidden behind the harp, an instrument traditionally associated with angels and large enough to obscure the female performer from view.

14.3 Unions and regulation

Where, may you ask, was control or regulation in the form of legislation or the regulatory initiatives of organized labor? Legislation with regard to the employment of musicians would have to wait for the 20th century with dilemmas surrounding fair work hours and fair pay not to speak of nondiscrimination between the sexes and a ban on racial discrimination. If regulation lagged behind discriminatory reality, fledgling unions were not much better at leveling the playing field between genders in the late 19th and early 20th centuries.

It was not until the end of the 19th century that unions inspired by workers' organizations in other fields of employment gained power and respectability both in Europe and the United States. In the 18th and early 19th century regulation in terms of employment was restricted to the venue's 'respectability' rather than labor conditions for musicians; gender equality was a non-issue. The British Amalgamated Musicians Union (1893), the precursor of the present-day Musicians Union (MU), led the way in inclusiveness by moving to let semi-professionals and women join their ranks from its very inception.¹⁶⁹⁸ In the United States, the Musicians Union, a precursor of the American Federation of Musicians (AFM), kept women from performing in all union run public orchestras until the union officially became affiliated with the powerful American Federation of Labor (AFL) in 1904. The statistics are telling: during this time period, 4,500 musicians joined the AFL in New York City, 31 of whom were women.¹⁶⁹⁹

Far from reaping wide-ranging professional benefits of membership, these women were ostracized by the very conductors and managers who held hiring powers. Examples of

¹⁶⁹⁷ Inspired by Rosi Braidotti lectures, Praemium Erasmium seminar 1994.

¹⁶⁹⁸ John Williamson & Martin Cloonan. *Players' Work Time: A History of the British Musicians' Union, 1893-2013* 2016 pp. 36-40.

¹⁶⁹⁹ Christine Ammer. *Unsung: A History of Women in American Music* 2016 p. 5.

this criticism were published in the April 2, 1904 edition of the *Musical Standard*, in an article entitled “Opinions of New York Leaders on Women as Orchestral Players.” It is interesting to note that many of these quotes bear a strong resemblance to the excuses brought to the fore by contemporary orchestras that have barred women from equal participation in their ranks. These quotes shape the underlying preconceived notions that play a role in both the Abbie Conant and Elizabeth Rowe claims, respectively mounted in the 1980s and in 2018.

“Woman, lovely woman is always to be admired except when she is playing in an orchestra.

“In a little while men will wake up to find that they are closely and successfully being pushed in one more sphere by the fairer sex...fewer and fewer positions will be waiting for them.

“Women cannot possibly play brass instruments and look pretty.”

“Women will soon receive equal pay whereas now they are content to be paid what is offered.”¹⁷⁰⁰

The dream of mutual protection was shattered by the perpetuation of a male-dominated, closed hierarchical guild. Musician union alliances forged in the latter part of the 19th century certainly did not pursue nondiscriminatory goals either in terms of gender or race.

14.4 Women side-by-side as orchestral colleagues

One of the most iconic conductors of the 20th century, hailed not only for his prodigious musical abilities but also for his witticisms uttered during rehearsals,¹⁷⁰¹ Sir Thomas Beecham professed, “I do not like, and never will, the association of men and women in orchestras and other instrumental combinations. As a member of the orchestra once said to me, ‘If she is attractive, I can’t play with her and if she is not, I don’t want to.’”¹⁷⁰² Sir Thomas’ tongue in cheek observation adds insult to injury in issues related to discrimination in orchestras. Expressed in more modern times, the words of this revered maestro added grist to the ‘women as second-class musical citizens’ mill. The eminent Szymon Goldberg, former leader of the Berlin Philharmonic in its pre-WWII years, would not have countenanced such a remark. In his sensitive and sophisticated cosmos “music is to be heard, not seen, with a bit of fantasy, one can ‘see’ what one hears.”¹⁷⁰³

¹⁷⁰⁰ Jane M. Bowers, Judith Tick, *supra*, fn. 1674 at p. 333.

¹⁷⁰¹ Sir Thomas Beecham. *Beecham Stories: Anecdotes, Sayings, and Impressions of Sir Thomas Beecham* 1993.

¹⁷⁰² Mary Brown Hinley. “The Uphill Climb of Women in American Music: Conductors and Composers” *Music Educators Journal* 1984 p. 34.

¹⁷⁰³ Conversations with Szymon Goldberg, founder Netherlands Chamber Orchestra, Former concertmaster Berlin Philharmonic; pedagogue at the Juilliard School, and the Yale School of Music.

Academics dispute which 20th century orchestra deserves kudos for paving the way to emancipation: a U.S. based orchestra or perhaps the London-based Queen's Hall Orchestra under the direction of Sir Henry Wood? Wood's orchestra might win the day as records show that in 1913 Queen's Hall Orchestra gave equal contracts to six female violinists and the total number of female orchestral members reached fourteen by 1918. The increase can also be attributed to the dwindling number of males available due to WWI conscription.¹⁷⁰⁴

The Cleveland Orchestra led the way for hiring women when it added four ladies to its roster in 1923. Several decades later, both parents of the Emerson Quartet's violinist Philip Setzer, Elmer (1949-1990) and Marie (1960-1990) won auditions as members of George Szell's legendary Cleveland Orchestra. Fellow musicians characterized Marie as 'humble, quiet and accomplished.' Quiet was perhaps the best reaction to taking one's place in a man's world. "When women joined all-male sections, they were wont to become invisible. I like to think I am training a new generation, all sorts of great performing personalities who can really make their mark in their sections and pave the way for a greater orchestra."¹⁷⁰⁵

To be sure, there were leading lights who broke ranks: Leopold Stokowski granted the harpist Edna Phillips a full employment contract as a principal player with the Philadelphia Orchestra in 1930. And, in 1937, Otto Klemperer hired Ellen Stone to play first horn in the Pittsburgh Symphony Orchestra. At 21, Ms. Stone became the first female brass player to hold a principal position in a major orchestra worldwide.

14.4.1 Gender integration in Dutch orchestras

As mentioned above, in the late 19th century, all-female orchestras were formed to offer 'light amusement' concerts, much along the lines of the women's orchestras in the U.S., U.K., Germany etc., Starting in the 20th century, women were tolerated in small numbers only in the female-friendly instrumental groups: violin (preferably second violin), viola, cello, harp or flute. The reoccurring theme of gender stereotyping of musical instruments silenced women and barred them from competing for a chance to work as orchestral musicians in the Netherlands until the middle of the 20th century. A recent cinema box office offering, 'De Dirigent' portraying the trials and tribulations

¹⁷⁰⁴ This argument has been raised regarding increases in the number of female musicians contracted to work in U.S. orchestras during WWII as well. While it is interesting to consider, it is difficult to find evidence to back up the assumption.

¹⁷⁰⁵ Conversations with Szymon Goldberg,

of Antonio Brico¹⁷⁰⁶ to gain acceptance as a conductor in the 20th century, reminds that orchestral direction worldwide was a bastion of male dominion.

A notable exception to the subordinate role for women in Dutch orchestras is the extraordinary musician and WWII resistance fighter Frieda Belinfante, who served as principal cellist in the *Haarlemse Orkest Vereniging* (precursor of the North Netherlands Philharmonic) in the mid-1920s. Immigrating to the United States in the 1950s, Ms. Belinfante hoped that the New World would offer more opportunities for her conducting career that was relegated to amateur orchestras in her homeland. She gained the distinction to become the first female conductor appointed as music director of a fully professional orchestra, the Orange County Philharmonic Orchestra in California in 1954. Nevertheless, despite her victory at the 'regional' level, her attempts to break into the major leagues as an orchestral conductor were not successful.¹⁷⁰⁷ In 2018, the Netherlands Radio Philharmonic Orchestra appointed the American conductor Karina Canellakis as Music Director, the first woman to take on such a position of leadership in one of the country's leading orchestras. Beyond individual stories of gender-related struggles in Dutch orchestras leading to more opportunities in the post-war era, it is important to note that Dutch orchestral schedules have reacted positively to work-life balance issues associated most-often with female caregivers.

14.4.2 Closed hierarchical world: male control issues

Despite the breakthroughs by female conductors highlighted by the careers of Marin Alsop and Karina Canellakis, the difficulties faced by women conductors at the beginning of their careers are significant: often the esteemed masters who train them hold low opinions of women's chances for success in 'their' profession, as evidenced by remarks made by such greats as Mariss Jansons¹⁷⁰⁸ and the most famous of all 'conducting trainers' Jorma Panula. In an interview published by the Finnish news broadcaster MTV, Panula was asked bluntly if he thought that it is a good thing that women conductors enter the profession. Panula replied with a firm "I do not!"¹⁷⁰⁹

¹⁷⁰⁶ A recent Dutch film release *De Dirigent* charts the career of the Dutch-born, American conductor Antonio Brico (1905-1989).

¹⁷⁰⁷ Toni Bauman. *Een Schitterend Vergeten Leven: de Eeuw van Frieda Belinfante* 2015.

¹⁷⁰⁸ Maestro Jansons opined, "I grew up in a different world, and for me seeing a woman on the podium .well, let's just say it's not my cup of tea." Ivan Hewett's interview with Maestro Jansons on November 23, 2017 *The Telegraph* can be viewed at: <https://www.telegraph.co.uk/music/concerts/mariss-jansons-women-podium-arent-cup-tea/>

¹⁷⁰⁹ The interview and quote reprint available at: <https://www.limelightmagazine.com.au/features/jorma-panula-claims-women-should-not-be-conductors/>

Nonetheless, the ‘times they are a-changin’¹⁷¹⁰ does apply to certain segments within the top echelons of the conductor’s world. In 2013, the director of the Conservatoire de Paris commented: “conducting is too physically demanding for women.”¹⁷¹¹ Just two years later, the French conductor Nathalie Stutzman received the prestigious Chevalier de l’Ordre National du Mérite’ award for her contributions to the art of operatic conducting. Marin Alsop has continued to amass distinctions in her international career: she was the first female conductor to delight the masses at the final night of the London Proms 2013, the “ultimate showcase for great artistry and superb audiences.”¹⁷¹²

While the psychosocial ramifications have been discussed in studies concerned with gender, the glass ceiling and control at the workplace,¹⁷¹³ a link between the manifest male control from the podium to employment and equal pay legal issues brought forward by Abbie Conant and Elizabeth Rowe can be made. As the ‘women in orchestras’ section underlined, the gender inequality in orchestras is historically generated and deeply rooted in long-accepted traditions. The role of the conductor as definitive arbiter of authority, power, and leadership on the podium profession takes on a masculine representation with women belittled in their attempts to join the ‘men’s club.’ To quote Harold Schonberg, the Pulitzer Prize winning *New York Times* music critic: “as for women conductors, a musician knows when the upbeat starts, because that is when the slip starts to show.”¹⁷¹⁴

14.4.3 Orchestras at times of war: a chance for women to join the ranks

A fascinating example of the vicissitudes that women endured in the uphill battle to join orchestras on equal standing with men is provided through a brief encounter with an oft-forgotten page in history: orchestral employment during times of war. Documentary evidence from the U.S. and the U.K. shows that female musicians’ orchestral experiences were similar to the well-documented stories of women as factory worker.¹⁷¹⁵ Labor shortages directly related to conscription provided opportunities for women to replace men in every conceivable segment of labor. Yet even when women were invited to join the ranks of orchestras, their welcome was short-lived.

¹⁷¹⁰ Quoting the prototypical Bob Dylan hit released in 1964.

¹⁷¹¹ Bruno Mantovani, quoted by Jessica Duchon. “Why the male domination of classical music might be coming to an end” *The Guardian* February 28, 2015 available at: <https://www.theguardian.com/music/2015/feb/28/why-male-domination-of-classical-music-might-end>

¹⁷¹² Marin Alsop quoted live BBC Proms 2013 available via YouTube <https://binged.it/2sM8Ztx>

¹⁷¹³ See Bartleet, *supra* at fn. 1663 pp. 31-51.

¹⁷¹⁴ Harold Schonberg. *The Great Conductors* 1967.

¹⁷¹⁵ A topic that has been the focus of a great volume of scholarly research. See Ruth Milkman. *Gender at Work: The Dynamics of Job Segregation by Sex During World War II* 1987.

After WWII, female musicians were fired and replaced by male musicians who had returned from the front. Although entrusted with taking over the ‘male roles’ in times of tribulation, the stereotype of the woman who could cause ‘distress in the ranks’ prevailed and those who made final decisions, the conductors and managers, were exclusively male. Their justifications were rationalized by Sir Thomas Beecham’s remark: “women in symphony orchestras constitute a disturbing element.”¹⁷¹⁶ These examples bring several significant points to the fore. Discrimination against women in the orchestral workplace resulted from a *mélange* of stereotypes tied to cultural views such as ‘a woman’s place is at home,’ ‘females are too frail to really work,’ and/or ‘femininity is equivalent to seduction at the workplace.’ Perhaps the most powerful fear on the part of the male establishment was the threat of direct economic competition.

The road has been long and winding toward complete orchestral integration. The fact that musicians enter into lawsuits with regard to discrimination in the 21st century informs us that prejudices still hold sway in the orchestral workplace. With regard to gender issues, a partial clue lies in the very concept of integration and acceptance as related to female musicians. Women as idealized objects of admiration or virtuosi capable of amazing feats of prowess in distinctly patterned roles are a far cry from a female colleague sitting next to you at work.¹⁷¹⁷ And, although the demand for orchestras increased rapidly in the 19th century as a result of the creation of new halls, expanding audiences, and a broader base of patronage, the competition for well-paid positions was exacerbated by increased mobility and increased educational possibilities for orchestral musicians. “The greater the competition, the greater the fear that men would actually lose out.”¹⁷¹⁸

14.5 The low brass ceiling: Abbie Conant’s struggles in Munich

The infamous case of the American trombonist Abbie Conant’s struggle to keep the job she won at the distinguished Munich Philharmonic (MP) in 1980 is an example of one of the most blatant gender-discrimination cases on record. Although the author attempts to refrain from excessive personal asides, it should be mentioned that I was privileged to play, and occasionally lead the Spoleto Festival Orchestra where Ms. Conant played principal trombone prior to her Munich audition. At the Spoleto Festival, where women far outnumbered men in both violin sections, Ms. Conant was the only female trombonist. Like many members of that celebrated summer orchestra,

¹⁷¹⁶ See, Mary Brown Hinley, *supra* at fn. 1702.

¹⁷¹⁷ Inspired by Rosi Braidotti lectures, Praemium Erasmiaum seminar, 1994.

¹⁷¹⁸ *Ibid.*,

Ms. Conant decided to test the audition scene in Europe after the summer festival ended.¹⁷¹⁹ Of the eleven orchestras she applied to, only one invited her to participate in the audition, and her invitation to compete for the first trombone position at the MP was addressed to ‘Herr’ Conant. Either the MP did not realize that Abbie was a female trombonist, or the orchestra did not consider that a woman could be qualified to take a principal trombone audition.

What many orchestral musicians know as ‘the Abbie Conant story’ is endemic to an understanding of the ‘brass ceiling,’ which has kept women out of mainstream orchestral brass sections in orchestras regardless of location (with the notable exception of horn sections).¹⁷²⁰ Great conductors and critics have opined, “women bring a nuanced technique to horn playing that has helped shift opinions about gender issues in brass sections for decades.”¹⁷²¹ Yet, although female horn players continue to make their mark in orchestras the world over, the scarcity of women principal trumpets (there are women in contemporary trumpet sections) and the ‘count them on the fingers of one hand’ female presence in the lower brass carries on to the present-day. Ms. Conant’s legal proceedings dragged on for more than a decade: eventually she won back the right to play first trombone, however the story seemed never to end as she had to keep fighting to maintain the position. And, while U.S.-based musicians have intimated that her story says more about German patriarchal orchestral traditions, the facts show that female brass players, with the partial exception of horn players, have faced similar challenges regardless of jurisdiction.

Taking the liberty to interject another brief personal note, I experienced a telling introduction to the German orchestral approach to women during the same time period as Ms. Conant’s saga. Participating in an audition for a section violin vacancy in a well-known orchestra in southern Germany, the personnel manager directed the remark *Kinder, Küche, Kirche*¹⁷²² to us, two foreign women, just before the final round was to take place. Taking his utterance as a portent, I skipped the finals and headed north to the Netherlands where women were welcomed in string sections.

¹⁷¹⁹ A brief autobiographical note: the author began her career as a professional orchestral violinist in the Netherlands following a summer stint in the Spoleto Festival Orchestra.

¹⁷²⁰ Examples of notable female horn players in the last quarter of the 20th century include: the Chicago trained hornist Julia Studebaker who won the first horn position at the RCO in 1974. Gail Williams joined the Chicago Symphony Orchestra in 1978, holding the position of Associate principal horn from 1984-1998; Julie Landsman became the first female brass player at the MET after winning the first horn audition in 1984.

¹⁷²¹ Interview, Sir Mark Elder.

¹⁷²² The adage is the German equivalent of ‘women belong in the kitchen. The literal translation ‘children, kitchen, church’ insinuating that women should not seek employment.



The Munich Brass Connection 2018¹⁷²³

Ms. Conant's audition for the principal spot in Munich was legendary: 32 male candidates competed for the coveted position, she was the only American and of course, the only woman to participate at the blind audition. After two rounds behind a screen, number 16 was allowed to step forward as the only candidate selected for the unscreened final round. "There was an audible gasp when I came out."¹⁷²⁴ It was not to be the last gasp.

After winning the position, she entered the orchestra where Sergio Celibidache, the Romanian iconoclastic, ultra-authoritarian maestro was transitioning from principal guest conductor to music director. It is important to note that had the maestro held the role of music director at the time of the audition proceedings, he would have held full veto power over the audition committee's decision and Ms. Conant would not have stood a chance to have won the audition on the basis of her gender.

¹⁷²³ A link to Abbie Conant (trombone) troubling story to maintain her position, as principal trombone with the Munich Philharmonic is pictorial. Reproducing the 'evolutionary pun' that showcases the Munich-based ensemble's male players is intended to relate to Ms. Conant's story without any criticism of this fine contemporary ensemble.

¹⁷²⁴ Abbie Conant's interview on WQXR, New York, replete with quotes is available at: <https://www.wqxr.org/story/trombonist-got-job-munich-philharmonic-then-she-fought-them-court-13-years/>

Perfectionist-as-musician and a paradoxical as a personality who demanded full obedience while embracing Zen philosophy, Celibidache demanded and received extravagant numbers of rehearsals before allowing 'his' orchestras to perform. In a field where mystery and authority construct a heady mix, Maestro Celibidache attained a cult following. Part and parcel of his almost supernatural standing came from "the projection of an unobstructed masculine aura that is not corruptible."¹⁷²⁵ Convinced that no woman, let alone an American woman could play the trombone in his divine orchestra, the newly minted music director demanded that complaints concerning Ms. Conant's playing should be recorded during her probationary year. Although no complaints were filed, she was demoted to the position of second trombone.¹⁷²⁶ The music director's control was absolute: there was no outcry nor was there any form of administrative support for Ms. Conant to take her rightful place as principal. In an ingenious maneuver, the orchestra simply demoted Ms. Conant; had they fired her she would have had grounds for an actionable claim in the Munich municipal court. Adding insult to injury, the orchestra attempted to cancel her residence permit, a move that would have led to her eventual deportation. Additional harassment activities included demands for her to undergo physical examinations to prove that a member of the fairer sex did not have the stamina to hold and maintain the physically demanding principal trombone position.

Orchestral musicians in many European countries are 'semi' civil servants, employed by the state or municipality. To sue the MP meant that Ms. Conant had to sue the MP's employer, the City of Munich. Her quest for justice led to a series of lawsuits in German courts and garnered international support. After four years of proceedings, she won back the right to play first trombone. Nearly five years after that, she won the right to equal pay. Ms. Conant learned only by accident that she had been paid the equivalent of \$1000 less per month than fifteen colleagues in parallel positions. Due to a statute of limitations in German law, she was only able to regain five years of back pay. The ongoing humiliation, unfairness, and nonstop litigation took its toll: "it was slow drip insanity the whole time, and institutionalized male hysteria."¹⁷²⁷

¹⁷²⁵ Quote by former MP chairman, cellist Jörg Eggebrecht as retold by his brother, musicologist and critic Harald Eggebrecht in 2015. The complete text can be found in *Philharmonische Blaetter* February-March 1992.

¹⁷²⁶ Maestro Celibidache quoted as saying, "you know the problem, we need a man for the principal trombone." Quoted by William Osborne "Art is Just an Excuse" 1996 pp. 6-14.

¹⁷²⁷ Abbie Conant's interview on WQXR, New York, replete with quotes is available at: <https://www.wqxr.org/story/trombonist-got-job-munich-philharmonic-then-she-fought-them-court-13-years/>

Thirteen years after Ms. Conant first filed a discrimination suit against the MP and the municipality, the German courts found in her favor and granted her back pay to compensate for the loss of the principal position. The victory was hollow, as it was impossible for her to return to the MP to claim her rightful position regardless of her late-but-yet judicial success.¹⁷²⁸ A tradition of male domination turned the glass ceiling into an upper limit of impenetrable brass: there was simply no place for a foreign female in a German brass section pre-21st century. Ms. Conant abandoned an orchestral career to concentrate on teaching and was appointed to the coveted position of trombone pedagogue at the respected State Conservatory in Trossingen (Staatliche Hochschule für Musik) where she worked on a multiplicity of musical projects.

Ms. Conant's struggle for 'basic acceptance' in a position she won contributes to the discussion on discrimination making headway toward an in-depth description and analysis of Ms. Rowe's 2018 claims against the BSO. Almost three decades prior to Ms. Rowe's claims, Ms. Conant had to fight, first for her position and then for equal pay. The difference between these two cases deserves mention. Whereas Ms. Conant discovered female-male salary discrepancies by chance and eventually claimed those losses, her litigation centered on the more rudimentary issue of the right of a woman to work as a first trombonist. Fast forward to 2018: Ms. Rowe and the BSO agreed that her value to the organization and extra meritorious value as a soloist and much beloved position as 'the face of the orchestra' in marketing were undisputed.¹⁷²⁹ No such affirmation was ever afforded Ms. Conant by the Munich Philharmonic.

14.6 High visibility positions: U.S. orchestras and gender

A study isolating the 'blind audition' variable undertaken by two leading American economists in the late 1990s, Claudia Goldin (Harvard) and Cecilia Rouse (Princeton) focused on the orchestra as a test ground for discriminatory practices. As discussed in other *movements*, significant modification in the audition procedure in major symphony orchestras, the practice of "blind" auditions in which a screen conceals the candidate's identity from the audition panel (jury), changed orchestral demographics. Their data showed that the placement of a screen increased the probability for a woman to advance from the preliminary to the second round by an astounding 50%

¹⁷²⁸ For an appraisal 'in her own words' see, Abbie Conant. "The Status of Women in German Orchestras: A Report Based on Practical Experience" *Viva Voce* 48 (December 1998). Available at: <http://www.osborne-conant.org/status.htm>

¹⁷²⁹ Diverse media reports in Boston newspapers and materials readily available on the BSO's website bolster Ms. Rowe's claim to be 'the poster child of the BSO.'

after the blind audition process became standard practice at U.S. auditions starting in the 1970s.¹⁷³⁰ While women accounted for fewer than 5% of orchestral musicians in 1970, they accounted for over 25% of employed orchestral musicians just thirty years on. Moreover, in string sections within U.S. orchestras, women outnumber men.¹⁷³¹

The variable ‘use of a screen’ paved the way for “a change in the way symphony orchestras recruit musicians and provide[d] an unusual way to test for sex-biased hiring.”¹⁷³² Whereas audition policies pre-1990s advanced a select number of candidates, or in Goldin/Rouse parlance, ‘contenders’ (hand-picked candidates, mainly students of leading orchestral members), the blind audition widened the pool of acceptances to include outsiders. The percentage of women admitted to orchestras as a result of blind auditions was particularly revelatory. Studies published by the League of American Orchestras (LAO) show that general gender inequality within U.S. orchestras improved markedly between 1978 and 2014 based on the general statistic of 46-49% women employed as performers in contracted orchestras.

Factors leading to the acceptance of women within orchestras that were not considered in the LAO study but should nevertheless be noted include the significant increases in the ratio of female to male students at leading conservatories during the same period and continuing into the present. If we study the statistics at major conservatories where female students outnumber men worldwide,¹⁷³³ we witness another interesting phenomenon that might explain the shift in gender acceptance within orchestras. “Parents back in the 70s and 80s did not want their sons moving into a profession with so much uncertainty in terms of financial remuneration and professional success, funnily enough, music became an acceptable profession for young women to study rather than young men. In some cultures, for example in South Korea and Japan, success in classical music became a status symbol, mainly for girls.¹⁷³⁴ For certain instrumental groups, represented by the strings, most of both students and U.S. orchestral members are predominately female in the second decade of the 21st century,

¹⁷³⁰ Claudia Goldin and Cecilia Rouse. “Orchestrating Impartiality: The Impact of Blind Auditions on Female Musicians” 2000 pp. 715-741.

¹⁷³¹ Consider: The New York Philharmonic had no permanent female players employed in the 1963-64 season whereas in the 2016-2017, a majority of string players are female and almost ½ of the total number or 106 players are women, see New York Philharmonic archives <http://archives.nyphil.org/index.php/> and <http://www.nyphilkids.org/newsstand/faq/>

¹⁷³² See, Claudia Goldin and Cecilia Rouse, *supra* at fn. 1730.

¹⁷³³ Comparisons of the Juilliard School, the Curtis Institute and several Dutch Conservatories based on 2014-2016 records.

¹⁷³⁴ Author’s interviews with famed conservatory pedagogues Boris Kuschnir, Jean-Jacques Kantorow, Sylvia Marcovici.

a seismic change within a half-century. Yet a closer analysis of the ‘statistics within the statistics’ confirm that the ‘instrument bias’ so evident in the 19th century is an ongoing factor of inequality challenging female musicians in the 21st century.

The size of the orchestra that was considered to be a stable factor prior to the financial crises of the 21st century, the ‘ever-shrinking’ complement¹⁷³⁵ that has removed players from tenured status, led to breakdowns in CBA negotiations. Nevertheless, if the complement remains stable in a hypothetical orchestra at 100 musicians and the types of jobs the musicians perform do not change (a violinist does not suddenly play in the wind section), then the statistical increase in the number of women cannot be ascribed to a redistribution in which the orchestra has more harp players (female-friendly instrument) as opposed to trombones (traditionally a male bastion). Using statistics gleaned from a broad base of U.S. orchestras in 2016, the results were true to stereotypes regarding female musicians in 19th and early 20th century orchestras where the harp and the violin stood out as ‘female-approved’ instruments. Approximately 95% of the harpists and 59% of the violinists under contract in U.S. orchestras were female; in step with stereotypes from the past, 97% of the trombonists and trumpet players were male.¹⁷³⁶



Peruse stock photos of orchestral brass sections and this is the norm.

Research published by blogger/composer Suby Raman in 2014, based on a statistical review of personnel in the top twenty orchestras worldwide and distributed online by *Classic FM*,¹⁷³⁷ presents proof of the ‘alarming’ gender disparity in orchestras especially when comparing the percentages of women in leadership positions to rank-and-file

¹⁷³⁵ Discussed at length in the *Haydn rewrites history movement*.

¹⁷³⁶ Available at: <http://www.ppv.issuelab.org/resources/25840/25840.pdf>

¹⁷³⁷ Available at: <https://www.classicfm.com/discover-music/latest/gender-inequality-american-orchestras>

positions. Several patterns come to the fore. Firstly, there is a markedly low percentage of women in any orchestral leadership position. Secondly, the ratio of males to females in brass and percussion sections (except for the horn), show an imbalance. Thirdly, women outnumber men in only three instrumental groups in the orchestra: violins, flutes, and the harp. Harkening back to our discussion of women entering the orchestra in the 19th century, it comes as no surprise that women occupy 94% of harp positions and men occupy close to 98% of the trumpet, trombone, and tuba positions worldwide.

14.6.1 High visibility positions: leaders in the ‘hot seat’

Following observations on high visibility positions in orchestras of a general nature, a description of the challenges faced by female concertmasters, the ultimate ‘in-orchestra’ position of leadership, adds to the discussion on gender bias and discrimination. Conversations with Emmanuelle Boisvert, the first female concertmaster in a major U.S. orchestra,¹⁷³⁸ square with conductor Marin Alsop’s observations on trailblazers. Both leading ladies prefer to dwell on their core business rather than to comment on the discrimination they encountered along the way. A striking blonde who sports the latest fashion and has been known to flash a manicured right hand (traditionally string players do not indulge in manicures as long nails are anathema to playing the instrument), Ms. Boisvert spoke out: “Why should we label a woman who leads an orchestra as a ‘female leader’? My life in music has been centered on perfecting my skills, my art. And that art goes beyond male and female. I have spent decades working hard to become the best musician I could possibly be, never to become the best female musician. To my mind, the concertmaster position is equally challenging to both men and women. If you always maintain your level and remain professional above all, you will succeed.”¹⁷³⁹

One year following Ms. Boisvert’s appointment in Detroit, Jorja Fleezanis won the concertmaster position at the Minnesota Orchestra. An outspoken crusader for equality in the broadest sense of the word, Ms. Fleezanis reminds us of the most basic distinguishing factor for musicians: the way they play regardless of color, gender, or any other external happenstance. “Musicianship is what moves the listener, what makes a player unique. A woman horn player can sit up there with five men and

¹⁷³⁸ Following a stint as a section violinist in the Cleveland Orchestra, Ms. Boisvert took the lead position at the Detroit Symphony Orchestra in 1988. She left to take an associate concertmaster position with the Dallas Symphony Orchestra during the Detroit Symphony’s prolonged labor conflict and strike in 2011.

¹⁷³⁹ Interview with Emmanuelle Boisvert.

play as strong, as loud, and as sensitively as any man. We are all endowed with the strength to express ourselves and our instruments have been crafted as vehicles for that expression. To attain the level of expressivity that a leadership role demands takes the same amount of work for a man as for a woman—it takes conviction and dedication and to use the word none of us really like, a ‘talent’ that has been cultivated. It’s genderless.”¹⁷⁴⁰ The international superstar conductor Jaap van Zweden, former concertmaster of the Royal Concertgebouw Orchestra,¹⁷⁴¹ a man of many deeds and few words agrees wholeheartedly: “taking a position at the ‘hot seat’ as leader rests on excellence and has nothing to do with your gender, color, or any other factor. It’s really irrelevant! It’s the music making that counts.” Yet, for all of these rose-colored observations, discriminatory practices have flourished for over 150 years at the very heart of the orchestral world, at its veritable Valhalla, Vienna, Austria.

14.7 High-profile statistics from Europe: *Wien Bleibt Wien*

A world leader in the orchestral world since 1842, the ur-traditional Vienna Philharmonic Orchestra (VPO) rigorously excluded women from ‘full’ membership until 1997.¹⁷⁴² A plethora of arguments were mounted in support of the Viennese traditionalists, encapsulated in the following: the acceptance of women would lead to lower standards, the prestigious Musikverein (home to the orchestra) did not have proper backstage facilities to accommodate women, young women were bound to get pregnant and take long leaves of absence from their orchestral duties, and last but certainly not least, women would distract male musicians onstage and the audience in the hall. Since its inception, the fascination that the VPO has held for prominent composers and conductors, as well as for audiences all over the world, is based not only on a homogenous musical style, carefully bequeathed from one generation to the next but also on its unique history and governance structure.

The VPO is proud of its operating system, a ‘democratic self-administration’ model in which all of the orchestra’s 126 members vote on every issue of concern to the collective. To quote the orchestra’s public relations text: “the foremost ruling body of

¹⁷⁴⁰ Author’s interview with Jorja Fleezanis for *The Strad* at Interlochen School of the Arts 2010 supplemented by text available at: <http://www.americanorchestras.org/exhibitor-information/archive/symphony-magazine/archive/older-issues/144-januaryfebruary-2002/783-shoulders-of-the-orchestra.html>

¹⁷⁴¹ Jaap van Zweden is concurrently Music Director of the New York Philharmonic and the Hong Kong Philharmonic.

¹⁷⁴² The first female member of the Vienna Philharmonic, harpist Anna Lelkes performed with the orchestra for 26 years. She was paid less than the male members of the orchestra for her services and received no mention on programs or further public acknowledgement.

the organization is the orchestra itself.”¹⁷⁴³ Put in place in the mid-1850s, this model was indeed revolutionary. However, noting the orchestra’s longstanding discriminatory practices towards women and minorities, the practical implementation was less than revolutionary.¹⁷⁴⁴ “While the expansion into a mid-sized business enterprise has required the hiring of some extra administrative personnel, it is nevertheless the elected officials, members of the orchestra alone, who make decisions and carry ultimate responsibility.”¹⁷⁴⁵ VPO members are granted full powers to elect a president and a general manager who are both members of the orchestra. The ruling body of the entire organization is the full orchestra membership. The operation of the orchestra in terms of daily decisions is delegated to twelve elected musician members of the administrative committee.¹⁷⁴⁶ These musicians, those who commit to upper echelon administrative positions, are ‘multi-taskers in extremis.’ Consider Dieter Flury, who served as the orchestra’s artistic director, general manager, and principal flute from 2005-2014. As a principal player, his performance pressures were substantial; concomitantly he was responsible to negotiate with conductors, concert promoters, and media programmers.

For those who might assert that the Vienna model of self-administration is a model that other orchestras should emulate in terms of organization and management, several issues related to the orchestras longstanding discriminatory policies with a particular emphasis on gender should be brought to the fore. As the ‘audition’ section in the FAQs supplemented by the *Intermezzo: of competitions* explained, musicians the world over compete in an audition process to gain their seats in an orchestra.¹⁷⁴⁷ While orchestras have their own specific requirements, protocols and traditions, most orchestras invite a considerable selection of qualified candidates to compete in a first round. Strict attention is paid to visa/work permit regulations: the orchestras within the European Union (EU) do not invite candidates who do not possess a valid EU work permits unless no suitable European candidate has been selected in the precedent audition.

¹⁷⁴³ See, <http://www.wupromotion.com/en/about-us/the-company/983-wiener-philharmoniker-austria-2017-2021>

¹⁷⁴⁴ Relate to commentary given by Dieter Flury in 2017. “Revolutionär war im Wiener Vormärz die Idee einer demokratischen Künstlervereinigung, die später die noch heute gültige Rechtsform eines Vereines bekam.“ Available at: <https://blog.lucernefestival.ch/blog/2017/09/09/im-gespraech-mit-dem-schweizer-solofloetist-der-wiener-philharmoniker-di/>

¹⁷⁴⁵ <https://www.wienerphilharmoniker.at/>

¹⁷⁴⁶ Ibid.,

¹⁷⁴⁷ See FAQs and *Intermezzo: of competitions, horse races and orchestral auditions*.

In accordance with Philharmonic statutes, only a member of the Orchestra of the Vienna State Opera can attain the promotion to become a member of the VPO. Thus, the VPO's musicians are peer-chosen from the members of the Orchestra of the Vienna State Opera, which is run by the government. A prerequisite to the privatized VPO is a successful audition for the Orchestra of the Vienna State Opera. Following three-years on probation, the aspirant is deemed eligible to apply for membership to the Association of the Vienna Philharmonic and can compete for a place in the 'private association,' the VPO elite ensemble. As Dieter Flury explained, "we create a family in a system that has been in place for 172 years."¹⁷⁴⁸ For family members who enter the pearly VPO gates, the system is more than functional, "it is a fair system oriented towards perfection settling for nothing less than excellence."¹⁷⁴⁹

Mounting arguments similar to those brought against Ms. Conant in Munich, VPO members claimed that women 'change the sound of the music,' and in terms of employment, women should not play in orchestras as that the chances for a protracted maternity leave would have a direct and negative effect on the orchestra's unique sound quality.¹⁷⁵⁰ To American eyes and ears, the Viennese organization represents the



**Vienna Philharmonic
New Year Concert
2015 Zubin Mehta
conductor**

**Women and
minorities few and
far between⁷⁴⁹**

ultimate 'closed shop': musicians who are not members of the Opera are barred from its audition process. And "the family" approach to the orchestral enterprise might be

¹⁷⁴⁸ See, Flury, *supra*, at fn. 1744.

¹⁷⁴⁹ *Ibid.*,

¹⁷⁵⁰ Quotes from the VPO reprinted in English in the *Los Angeles Times* are available at: <https://www.latimes.com/archives/la-xpm-1997-02-28-mn-33433-story.html>

too close for comfort if judged by balanced criteria that have gained favor in all spheres of activity from the factory work floor to the opera pit. The infamous moniker, ‘we are a white male orchestra playing the music of dead white males’ articulated by Mr. Flury in the late 1980s has been replaced by the clarion call for equality based on excellence regardless of gender, race or any other attribute irrelevant to the act of making music.

A shimmer of light in terms of progress fell on the VPO shortly after the celebrated institution received ongoing international criticism for its lack of a female onstage presence, which intensified in the 1990s. With the threat of cancelled concerts in the prestigious Carnegie Hall, New York and in Los Angeles, the VPO voted in 1997 to accept and induct one female player, the harpist who had performed as principal harp in the orchestra for twenty-six years.¹⁷⁵¹

In the 21st century, after a 2014 round of VPO auditions failed to deliver a suitable candidate in the final round, the orchestra announced an additional concertmaster audition to take place mid-February 2015. Notably, the Orchestra of the Vienna State Opera website stated: “Auditions are due to take place on 16 and 17 June and the deadline for applications is 21 April 2015. All rounds, apart from the last, take place behind a screen. The Vienna State Opera aims at increasing the share of women in the orchestra.” Next challenge: the racial barrier, an issue to be tackled later in this *movement*.

14.8 Auditions and power

“The trouble with women in orchestras is if they are attractive, they will upset the players. If they are not, they will upset me.”¹⁷⁵²

No discussion of audition policies can be comprehensive without an open acknowledgment of the elephant in the room: the power of the principal conductor and/or music director, many of whom exert oversized influence on hiring as well as tenure review. In some major orchestras, the maestros control the audition process (recall Maestro Celebidache’s role in Ms. Conant’s story). In many orchestras, the music director holds the final deciding vote but shares this power in close consultation with

¹⁷⁵¹ Ibid., the aforementioned *Los Angeles Times* article presents an excellent timeline of the struggle for women musicians at the VPO.

¹⁷⁵² Sir Thomas Beecham exercising his notorious wit. Jack Saul, the late, great co-founder of the U.S.-based Sir Thomas Beecham Society generously shared stories, memorabilia, recordings, and tales of the witty conductor who despite for his disparaging remark quoted above supported women’s suffrage and civil rights initiatives.

the artistic/audition committee.¹⁷⁵³ In other orchestras from Amsterdam to Alabama, musicians on an audition or artistic committee share power with the music director to make important decisions relating to membership. “Even if the maestro only has one vote along with the rest of the committee, it is very difficult to ‘vote against him.’ As orchestra players we are part of a very close collective . . . we do not really want to cross that line of irritating the music director. Sometimes, the committee will just ‘vote with the maestro,’ even if it goes against our opinions.”¹⁷⁵⁴

14.8.1 Cronyism at the point of entry

Cronyism, personal recommendations mainly on the part of pedagogues who are concomitantly orchestra members, were often the tried and tested routes to orchestral success until the 1950s. Occasionally, a dark horse candidate would slip through the process. “Mr. Szell had received a recommendation and I was called in for an audition. Joseph Gingold, the concertmaster, was also in the hall. At some point, Mr. Szell called out ‘Joe show him how we do it here.’ I thought I had lost the audition. Before I knew it, I was a member of an elite club, the Cleveland Orchestra. Only 15 years later, the audition became much more of a formalized trial in which a much larger group of orchestra peers serve on the jury.”¹⁷⁵⁵ Changes in audition practices were on the horizon: orchestras formed committees to oversee the auditions. Decisions to hire, once made by a small committee consisting of a few principal players and the music director, or even left to the sole discretion of the music director, were replaced by decision-making *en groupe*: an artistic committee made up of relevant section players and the music director. In some orchestras, the music director has the right of veto while in other orchestras, he/she holds one vote, like the rest of the committee. In other orchestras when principal positions are open, the entire orchestra votes. However, even the most democratizing modifications in the audition procedure did not necessarily guarantee a fair audition. “We humans are tricky and look for ways to sway decisions our way. When it was not à la mode to accept women, we used screens but could still ascertain if a woman was competing. Click, click, click no, not a click track, but the sound of a woman’s shoes on the floor let us know if a woman was in fact playing. The magic carpet was installed so that you could not hear the candidate enter the space.”¹⁷⁵⁶

¹⁷⁵³ For example, the New York Philharmonic Orchestra uses this procedure.

¹⁷⁵⁴ Brass player, Dutch orchestra, anonymity assured.

¹⁷⁵⁵ Gino Raffaelli, a member of the violin section of the Cleveland Orchestra for 44 years was a founder of the International Conference of Symphony and Opera Musicians (ICSOM) and the Cleveland movement of Musicians for Nuclear Disarmament.

¹⁷⁵⁶ Member, Bavarian Radio Symphony Orchestra, anonymity assured.

14.8.2 *Blind auditions*

It is somewhat ironic that the first orchestra to introduce the ‘blind audition’ back in 1952 was the defendant (BSO) in the *Rowe* case. The blind audition practice spread to other U.S. orchestras in the 1970s and 1980s and found its way to change the ‘face’ of some, certainly not all, European orchestras thereafter. The notion of orchestral peer pressure did not make a swift crossing to Europe although Asian orchestras have been relying on blind auditions in recent years. In the 1990s when every U.S. orchestra relied on blind auditions until final rounds, the reaction in Europe was “you could call it a strong reliance on what we feel is ‘right’ for our orchestra. After all, the uniqueness of each musical ensemble is its interpretation, sound, and its musical culture. If we feel that we need to ‘see’ a player in order to ‘hear’ that player, this is our prerogative. It shows our esteem for our orchestral culture.”¹⁷⁵⁷ At present the use of screens varies considerably depending on national traditions with most contemporary orchestras now opting for screened preliminary rounds.

14.8.3 *Implicit bias in orchestral auditions*

A pioneer in the field of how implicit bias works from a law and behavior perspective, Professor Jerry Kang’s findings bear relevance on the audition and tenure practices at play in orchestras worldwide.¹⁷⁵⁸ His theory firmly grounded in extensive psychological research confirms that social categories guide our behaviors and attitudes in all real-world encounters from how we observe strangers to how we react to different races, genders, and age groups. Most socially cognitive behavior is ‘colored’ by stereotypes and attitudes based on preconceived notions, anecdotes from friends and family, and perceptions held by the part of society we feel most comfortable with to create an internal checklist of what is good and/or bad about a specific person.

Implicit bias embraces both implicit attitudes and implicit stereotypes. Judge Mark Bennett, the author of the dissenting opinion in *Kampouris*¹⁷⁵⁹ outlined an outstanding visual replay as to how implicit bias works in an ‘everyday’ situation as cameras track several individuals attempting to unlock a bicycle without the all-important key. To familiarize prospective jurors with the impact of stereotyping and implicit bias, Judge

¹⁷⁵⁷ Conversations with (former) personnel manager Nederlands Kamerorkest (Netherlands Chamber Orchestra) Wim van Loon.

¹⁷⁵⁸ Jerry Kang, “Implicit Bias in the Courtroom” 2012 pp. 1-63. <http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf>

¹⁷⁵⁹ *Kampouris v. Saint Louis Symphony Soc.*, 52 F. Supp. 2d. 1096 (1999). Discussed at length in the movement, A long and winding road.

Bennett shows a video clip filmed on hidden camera by the ABC television crew at “What Would You Do?” that records how bystanders react to plausible real-life situations that are restaged by actors.¹⁷⁶⁰

A description of the situation outlined shows how implicit bias plays a role in seemingly ‘innocent’ situations in which bystanders are likely to be unaware of preconceptions. Reactions following a close-up of a bike chained to a pole near a well-visited bike trail and the scenario that ensues show strong evidence of bias. First, a white male dressed innocuously in jeans, T-shirt, and baseball cap, saunters up to the bike with a hammer and saw in his hands. As he applies full force to free the bike from its chain lock, all passersbys, except for one, say nothing. One brave soul speaks up and asks the young man if he has lost his key. For the most part, the onlookers or passersby remain oblivious to the potential bike ‘thief.’ In the next scene, a young black man wearing the same outfit as the young white man in the previous scene approaches the bike, cautiously carrying the same tools. Instantly, onlookers approach him demanding to know if the bike is his property. A crowd gathers, loud shouting pierces the air and several individuals loudly threaten to call the police.

The final scenario shows an attractive young white woman showing a lot of skin walking slowly towards the bicycle on a warm summer day. As she attempts to free the bike with the same tools as her male predecessors, several men approach her and offer to help her break the bike lock. Vive la difference? Not really. The footage offers disturbing proof of prejudicial decision-making with regard to a similar fact pattern. Judge Bennett goes so far as to support the introduction of a mechanism to filter out such bias in the form of a pledge by prospective jurors to guard against prejudicial decision-making. “Confronted with a robust research basis suggesting the widespread effects of bias on decision-making, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom?”¹⁷⁶¹ Professor Kang is of the opinion that, instead of suppressing the notion of implicit bias, the phenomenon should be legitimized through recognition.

A clarion call from the past, a closer reading of the International Conference of Symphony and Opera Musicians (ICSOM’s) *Ethical Practices for National and International Audition*

¹⁷⁶⁰ See, “What Would You Do?” ABC television broadcast May 7, 2010. Available at: <http://www.youtube.com/watch?v=ge7i60GuNRg>

¹⁷⁶¹ See Kang, *supra* at fn. 1758 p. 63.

Code 1984 deserves repetition, with special attention paid to Article 6. It serves as a reminder that fairness should be at the core of the audition process. Although the audition process and its bias-related mishaps are periodically addressed at orchestra committee meetings and ICSOM conferences, the audition process remains unsound:

“There should be no discrimination on the basis of race, sex, age, creed, national origin, religion, or sexual preference; steps ensuring this should exist in all phases of the audition process.”¹⁷⁶²

Time and again, orchestral CEOs/directors hedge their bets by relying on the traditions of the past as the notion of, “we are a great orchestra and we have always conducted our business this way” status quo is perpetuated along with types of bias that have been incorporated within ‘tradition.’¹⁷⁶³

14.8.4 The MET sets the stage for assessment without bias

It seems impractical to imagine the evaluation process in any field without any knowledge of distinguishing characteristics of the applicant. The news on the beat emanating from orchestral auditions at one of world’s leading opera houses, the New York-based Metropolitan Opera (MET), shows that it is possible to be a leader not only in terms of quality but in terms of how that quality is hired. The MET’s audition system confirms an institutional commitment to neutrality on many fronts, including the ‘prior salary’ issues central to Ms. Rowe’s claims. At the MET, all applicants regardless of ethnicity or background,¹⁷⁶⁴ prior-held position, or education are invited to play. While many orchestras canvassed in both the U.S. and the Netherlands allow for a minimal amount of information-sharing during the audition process, the MET does not distribute candidates resumes during the process and most importantly, there is absolutely no discussion of candidates’ performances during any of the audition rounds. The Music Director and members of the audition panel receive one vote each and the policy calls for ‘vote first, do not discuss.’

Importantly, the MET fills all its positions at the first audition call, a radical departure from the tradition of a great number of orchestras on both sides of the Atlantic that take the option to keep vacancies for years. Conversations with Bruce Ridge, former

¹⁷⁶² Consult the ICSOM Code of Ethical Audition Practices 1984, available at: <https://icsom.org/manual/docs/13D-audition-code-of-ethics.pdf>

¹⁷⁶³ Jan Raes Managing Director RCO quoted in Dutch, *Podium Witteman* television program aired on NPO 2, 26 January 2019.

¹⁷⁶⁴ Reports of orchestras turning down players with ‘obviously’ Asian last names after ‘too many Asians’ fill the sections have been noted in several jurisdictions in both the U.S. and Europe.

chairman at ICSOM, shed light on the financial aspect as to why orchestras opt to keep positions open. “It can be a money saver as we all know that subs cost much less than tenured players in top orchestras. If a budget has to meet certain criteria in a season, jobs are held open from one season to another.”¹⁷⁶⁵

The fact that the MET puts applicants behind a screen for all rounds gives credence to the notion that sex, and race-blind adjudication leads to an increase in both women and minorities on stage at a major orchestra. This policy has reaped positive results not only in terms of filling positions but also in terms of increasing diversity. In the past decade, the MET Orchestra has hired three African-Americans and boasts a horn section in which the majority of players are women, a tribute to the success of a completely screened audition process and a commitment to fill all orchestral vacancies through fair auditions.¹⁷⁶⁶

14.8.5 Potentially tainted variables

Within the larger field of compensation equity - the analysis of whether or not employees who perform the same tasks are paid differently based on ambiguous reasons - the issue of ‘tainted variables’ sets off alarm bells and whistles. Legal scholars in ivy towers as well as ‘boots on the ground’ human resource managers have presented compelling evidence in U.S. courts with regard to a ‘flawed’ determination of membership in a class of protected individuals: how ‘underpayment’ is determined and how courts should undertake the assessment of these variables.¹⁷⁶⁷ This section explores tainted variables related to the *Rowe* claim and discusses best practices in relation to gender bias.

Scholars identify a systematic gender bias inherent in the use of such variables to ascertain salaries for newcomers on the job market. Researchers in the 1990s argued that courts had not sufficiently distinguished between different types of variables to reach decisions concerning appropriate relief in employment discrimination cases.¹⁷⁶⁸ “Even when a variable is known to be tainted with discrimination, the court should require its inclusion in some analyses in order to locate the source of the disparities.”¹⁷⁶⁹ To effectively use these variables in the administration of justice, the disparities that

¹⁷⁶⁵ Discussion with Bruce Ridge ICSOM conference Washington D.C. August 26-27, 2016.

¹⁷⁶⁶ Information gleaned from <http://www.meteororchestramusicians.org/>

¹⁷⁶⁷ A good starting point for reading on the subject, *Handbook of Workplace Diversity* ed. Alison Konrad et al., 2006.

¹⁷⁶⁸ For a full discussion with references to jurisprudence see, Ananda Srijati and Kevin Gilmartin. “Inclusion of Potentially Tainted Variables in Regression Analyses for Employment Discrimination Cases” 1991 pp. 121–152.

¹⁷⁶⁹ *Ibid.*, p. 124.

push women and minorities into the unfairness zone must be analyzed carefully. For the sake of argument and relevance, let us consider the orchestra as an employer. Studies show how the historical perceptions of ‘male’ vs. ‘female’ instruments have played out late in the 20th century: the gendered stereotypes that were visible in the literature and paintings of previous centuries were still reinforced as late as 1994.¹⁷⁷⁰ These studies reinforced the notion that higher pitched and smaller instruments were appropriate for women whereas louder and larger instruments were suitable for males. And as present-day reports cited in previous paragraphs show, there is a marked difference between the percentage of women vs. men within different instrumental groups in both U.S. as well as European orchestras potentially reflecting the aforementioned bias. The question that plays into a legal assessment that applies indirectly to Ms. Rowe’s case and directly to a discussion of gender discrimination in orchestras is: does the fact that there are significantly higher percentages of female-to-male section violinists and lower percentages of brass players reflect nondiscriminatory market forces, gender discrimination or both? Moving on to the BSO and Ms. Rowe, what of the fact that women are not only typecast as flute players but also, their flute sections within professional orchestras are predominately female. Does this fact make Ms. Rowe’s quest for equal pay discussed in the pages to follow even more worthy of attention?¹⁷⁷¹

14.9 Suing for gender pay discrimination in the U.S.: the EPA & Title VII

Pay discrimination has played an important role in the march for equality in legislation and case law since the late 1930s. The Equal Pay Act 1963 (EPA),¹⁷⁷² amending the Depression era Fair Labor Standards Act of 1938 (FLSA), established “the principle of equal pay for equal work regardless of sex”¹⁷⁷³ into the ambit of the law. Six months after President Kennedy signed the EPA into law, Congress passed Title VII of the Civil Rights Act of 1964.¹⁷⁷⁴ Title VII provides broader ‘coverage’ than the EPA with its prohibitions on discriminatory employment practices based on enumerated protected traits including race, religion, sex and national origin.¹⁷⁷⁵ While these two pillars of anti-discrimination legislations seek to protect employees from gender-based wage

¹⁷⁷⁰ H. F. Abeles, and Porter, S. “The sex-stereotyping of musical instruments” 1978 pp. 65–75.

¹⁷⁷¹ Corroborated by statistics, most professional flute players at least in U.S. top twenty orchestras are female, see O’Bannon R. “Boys play trumpet and girls play flute, but why?” 2017. Available at: <https://www.bsomusic.org/stories/boys-play-trumpet-and-girls-play-flute-but-why.aspx>

¹⁷⁷² Equal Pay Act 1963 (EPA) (29 U.S.C., Movement 8 sec. 206(d))

¹⁷⁷³ 29 U.S.C. § 206(d)(1) §6 (2000)

¹⁷⁷⁴ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964)

¹⁷⁷⁵ Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1) (2000) ...

discrimination in employment, statistics show that women were paid 53 cents to the dollar men earned in the 1960s.¹⁷⁷⁶ In 2017 the gap had narrowed to 80 cents to the dollar with wider discrepancies reported for minority women.¹⁷⁷⁷

These two statutes have been interpreted in fundamentally different ways by federal courts, a situation that results in dramatically different outcomes, and, as we will see below, a divisive circuit split with a fundamental lack of legal certainty.¹⁷⁷⁸ In 1981 SCOTUS recognized the problems endemic to suing for discrimination under the EPA as “the language and legislative history of the provision are not unambiguous.”¹⁷⁷⁹ Under Section 206(d)(1) EPA:

“[n]o employer having employees subject to any provisions of this section shall discriminate, between employees on the basis of sex by paying wages to employees in such establishment at the rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”¹⁷⁸⁰

The EPA is subdivided into two parts: the initial prohibitory and the subsequent ‘affirmative defense’ section in which employers can differentiate in pay under specific categories. To create a balance between claims and defenses, the act allows the employer to submit four permissible affirmative defenses. An employer’s assertion that compensation rates are based on a publicized job classification system does not in and of itself count as a valid justification for gender-based pay discrimination. The employer must prove that the job classification system accurately reflects job duties and/or job-related employee qualifications. Moreover, the job classification system must be uniformly applied to men and women. It is the fourth and last defense that employers have used quite ingeniously to evade claims of discrimination. The valid employer defenses under the EPA are:

“A sex-based compensation difference in substantially equal jobs is justified if it is based on:

1. a seniority system;
2. a merit system;

¹⁷⁷⁶ See, *America’s Women and the Wage Gap*. Available at: <http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/americas-women-and-the-wage-gap.pdf>

¹⁷⁷⁷ Data available at: <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html>

¹⁷⁷⁸ For clear analyses see, Peter Avery. “The Diluted Equal Pay Act: How was it Broken? How can it be Fixed?” 2004 and Judge Debra H. Goldstein. “Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both” 1995.

¹⁷⁷⁹ *County of Washington v. Gunther* 452 U.S. 161 (1981).

¹⁷⁸⁰ 29 U.S.C. § 206(d)(1) (2000).

3. a system which measures earnings by quantity or quality of production (“incentive system”); or
4. any other factor other than sex.¹⁷⁸¹

As jurisprudence has shown, the four defenses with special emphasis on the broad fourth defense provide employers with a handy maneuvering method to mask pay differentiation even if such an action breaches the EPA.¹⁷⁸² Another key EPA clause stipulates that employer’s assertion that a compensation differential is attributable to a collective bargaining agreement does not constitute a valid defense. The following section discusses a suit mounted under the EPA and Title VII, which led to the enactment of federal legislation that moved beyond the restrictions that SCOTUS placed upon employees seeking remedies for discrimination.

14.9.1 Lilly Ledbetter’s fight for equal pay and the workings of Title VII

In *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁷⁸³ Lily Ledbetter, a female supervisor for over two decades at the Goodyear Tire and Rubber Corporation filed suit for equal pay after conversations with colleagues led to the discovery that she earned significantly less than two male colleagues. When Ms. Ledbetter first took on her management post, she was paid at the same pay rate as the other male managers. However, once Goodyear introduced a performance-based remuneration system, pay scales changed without explanation. A ‘lifer’ at the Goodyear plant in Gadsden, Alabama, Ms. Ledbetter received consistent positive job reviews, as well as between 15% and 40% less pay compensation than her male counterparts.¹⁷⁸⁴ After opting for early retirement, she filed a charge at the U.S. Equal Employment Opportunity Commission (EEOC) against her employer bringing several discrimination claims under the EPA and Title VII.¹⁷⁸⁵ It is important to note that Ms. Ledbetter filed the EEOC charge prior to bringing the EPA and Title VII claims in order to avoid the time bar set by Title VII. To avoid that restriction, “the claimant must file an EEOC charge within 180 days after the alleged unlawful employment practice occurred.”¹⁷⁸⁶ While the district court ruled in favor of Goodyear regarding Ms. Ledbetter’s EPA claim, her Title VII discrimination passed to trial for reasons discussed in the paragraphs that follow.¹⁷⁸⁷

¹⁷⁸¹ See, EPA defenses at: <https://www.eeoc.gov/policy/docs/compensation.html> - N. 63

¹⁷⁸² *Gunther*, *supra* at fn. 1779 at 169.

¹⁷⁸³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. (2007) hereinafter, *Ledbetter*.

¹⁷⁸⁴ Lilly Ledbetter, Equal Pay for Equal Work: Hearing before the Senate Judiciary Committee 110th Congress.

¹⁷⁸⁵ See *Ledbetter* at 2162, 2165.

¹⁷⁸⁶ “An individual’s charge must be filed with the Commission within 180 days of the alleged discriminatory act.” 42 U.S.C. § 2000e-5(e)

¹⁷⁸⁷ Equal Pay Act 1963, 29 U.S.C. § 206 (d)

Ms. Ledbetter presented evidence that her supervisors had not only given her poor evaluations based on her gender but that these evaluations had a direct link to pay raises under which she was deemed ineligible to receive under the Goodyear performance-based remuneration system. Such discriminatory practices left her with less pay and less pension. The jury agreed, and Ms. Ledbetter was awarded compensatory and punitive damages in the amount of \$3 million.¹⁷⁸⁸ On appeal, Goodyear argued that Ms. Ledbetter's case was time barred regarding all claims that had taken place more than 180 days prior to her EEOC filing. The Eleventh Circuit reversed the trial court's decision, holding that the two pay decisions taken within the 180-day time span were insufficient to prove Goodyear's discriminatory intent. Title VII did not allow for evidence of discrimination to be taken into consideration if the purportedly discriminatory actions occurred prior to the 180-day time limit.¹⁷⁸⁹

Ms. Ledbetter petitioned SCOTUS with the question:

“Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the dis-parate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.”¹⁷⁹⁰

In a close decision,¹⁷⁹¹ the Court affirmed the Eleventh Circuit's holding and was unwilling to grant deference to the argument that the time bar contributed to a discriminatory practice. Reconsideration according to the majority would “jettison the defining element of the legal claim on which her Title VII recovery was based.”¹⁷⁹² Furthermore, Justice Samuel Alito, reading for the majority, stated “current effects alone cannot breathe life into prior, uncharged discrimination.”¹⁷⁹³

Justice Ruth Bader Ginsburg and her fellow dissenters' criticism of the majority was portentous as it paved the way to the Lilly Ledbetter Fair Pay Act of 2009. Chastising the majority for its “cramped” interpretation of Title VII, the dissent was vociferous and scathing, labeling the majority's ruling out of tune with the realities of wage discrimination and accusing the majority of “a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose.”¹⁷⁹⁴ Moving the ball to the

¹⁷⁸⁸ See, *Ledbetter v. Goodyear Tire & Rubber* 421 F.3d (2005).

¹⁷⁸⁹ *Ibid.*, at 2166.

¹⁷⁹⁰ Lilly Ledbetter's Petition for Certiorari, see *Ledbetter* 2007. Available at: <https://www.oyez.org/cases/2006/05-1074>

¹⁷⁹¹ Indeed, a SCOTUS close call at 5-4.

¹⁷⁹² *Ibid.*,

¹⁷⁹³ *Ibid.*,

¹⁷⁹⁴ See, *Ledbetter*, dissenting opinion of Justice Ginsburg, with whom Justice Stevens, Justice Souter, and Justice Breyer join, available at: <https://supreme.justia.com/cases/federal/us/550/618/-tab-opinion-1962369>

congressional court, the dissenters foreshadowed, “the Legislature may act to correct this Court’s parsimonious reading of Title VII.”¹⁷⁹⁵

Following heated debate in congressional halls in the wake of the decision, several legislative attempts were made to give credence to the dissenters’ criticism. Finally, in 2008, President Barack Obama signed the Lilly Ledbetter Act into law, proclaiming: “there are no second-class citizens in our workplaces. . . it is bad for business, to pay someone less because of their gender, age, race, ethnicity, religion, or disability.”¹⁷⁹⁶ Ten years after the Lilly Ledbetter Fair Pay Act of 2009 was signed into law, the Paycheck Fairness Act (PFA) was introduced in Congress as a strong supplement to the EPA. The Act that bears Ms. Ledbetter’s name ensures that ongoing pay discrimination at work can be challenged regardless of when the discrimination began. Under the EPA, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an affirmative defense that the pay differential is based on a “factor other than sex.”¹⁷⁹⁷ Some courts have interpreted this affirmative defense so broadly that factors such as a male worker’s stronger salary negotiation skills or higher previous salaries qualify, even if these factors themselves may be “based on sex.” The PFA tightens this affirmative defense so that it can excuse a pay differential for men and women only when the employer can show that the differential is truly caused by something other than sex, is related to job performance, is consistent with business necessity, and accounts for the entirety of the pay differential.

As an amendment to Title VII’s section on discrimination in compensation based upon race, color, religion, sex or national origin, the Lily Ledbetter Act specifies:

3(a) For the purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation..., when a discriminatory compensation decision or other practice is adopted, ... [becomes subject to same], or when an individual is affected by... [the application of same], including **each time wages, benefits, or other compensation is paid**, resulting in whole or in part from such a decision or other practice.

3(b) Liability may accrue, and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay **for up to two years** preceding the filing of the charge, where the unlawful employment practice that has occurred during the charge filing period are similar or related to unlawful employment practices about discrimination in compensation.¹⁷⁹⁸

¹⁷⁹⁵ Ibid.,

¹⁷⁹⁶ See, Thomas Kneeland. *Today’s Social Issues: Democrats and Republicans: Democrats and Republicans* 2016 p. 113.

¹⁷⁹⁷ For a discussion of potential defenses based on a factor other than sex in the context of sports coach jobs in educational institutions, see *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions* for the EEOC’s elaboration on potential defenses based on a factor other than sex. Available at: <http://www.eeoc.gov>

¹⁷⁹⁸ Lilly Ledbetter Fair Pay Act of 2009. 123 Stat 5 (West 2009).

Yet, despite the swathe of admirable legislative initiatives that followed on the state level as an antidote to wage disparity, prior history checks, and other discriminatory labor practices regarding wages, recent statistics show that women still earn less than men and often face insurmountable challenges in terms of effort and expense to prove wage discrimination in court. As of 2016, the wage gap narrowed to 80 cents on the dollar, a definite improvement but still not par.¹⁷⁹⁹ To quote Lily Ledbetter in the run-up to congressional votes on the PFA, “employers still rely on job applicants’ salary history to set pay, they will be forced to carry these depressed wages throughout their career and into retirement.”¹⁸⁰⁰

14.9.2 Brook Ferguson: a flautist (pre-Rowe) attempts to gain equal pay

As mentioned previously, the difficulties in mounting an EEOC claim are significant and not all gender discrimination claims filed with the EEOC lead to lawsuits. The EEOC enforces the EPA to determine if the evidence submitted by the employee stands in violation to the act. The bar to meet EPA standards is high as the following statistic illuminates: of the 996 gender pay discrimination complaints reviewed by the EEOC in 2017, 65.1% were found to have “no reasonable cause for action.”¹⁸⁰¹

In a case that came to light in a *Washington Post* article in 2018, the Colorado Symphony’s principal flutist, Brook Ferguson, discussed an EEOC discriminatory pay complaint filing that she attempted to pursue after discovering that male colleagues in principal positions earned 28% more than she did.¹⁸⁰² Ms. Ferguson presented the Post’s reporter with evidence to prove that the Colorado Symphony offered her a salary increase, if and only if, she would waive her legal rights. Ultimately, she dropped her EEOC claim for several reasons, the series of explanations most often cited by would-be claimants according to the EEOC: the high costs of litigation and the difficulties inherent in ‘suing the boss,’ in terms of work relationships with fellow employees and management. In a unanimous decision issued on April 13, 2018,¹⁸⁰³ the NLRB echoed the decision of the Administrative Law Judge’s (ALJ) prior decision holding

¹⁷⁹⁹ Bureau of Labor Statistics and the Census Bureau, *The Simple Truth about the Gender Pay Gap* available at: <https://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/>

¹⁸⁰⁰ Lily Ledbetter’s public post via CNN on the eve of a bipartisan Congressional re-introduction of the Paycheck Fairness Act, January 30, 2019. http://lite.cnn.com/en/article/h_d81be4a73dcf52aafd3b3f1b240fce0

¹⁸⁰¹ EEOC Equal Pay Act Charges Filed 1997-2017. Available at: <https://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm>

¹⁸⁰² Geoff Edgers. “A star flutist has sued the Boston Symphony Orchestra” *Washington Post* December 11, 2018.

¹⁸⁰³ *Colorado Symphony Association and Denver Musicians Association, Local 20-623*, 366 NLRB No. 60 (April 13, 2018) Available at: [https://www.nlr.gov/search/all/Colorado Symphony Association](https://www.nlr.gov/search/all/Colorado%20Symphony%20Association)

that the local union was entitled to full disclosure of documents regarding individual overscale contracts entered into between the Colorado Symphony Association (CSA) and principal musicians.

Procedurally Ms. Ferguson's case was complicated by the fact that the flautist did not heed the union's advice with regard to an EEOC filing. During the process of individual contract negotiations with the CSA, Ms. Ferguson attempted to level the playing field between her salary and the higher salaries paid out to male counterparts. The union was not involved in these individual contract negotiations. Intent on filing charges of gender pay discrimination with the EEOC, Ms. Ferguson sought advice at the local's headquarters. The local outlined that they could not engage in drafting her charge. In order to ascertain the facts, the union requested the CSA to provide copies of individual overscale contracts for assessment. Ms. Ferguson filed an EEOC claim two days later prior to written confirmation of pay disparities.

In a decision affirmed by the NLRB, the ALJ found that the CSA was required to provide copies of the individual overscale agreements to the union, notwithstanding the fact that: (i) the CBA expressly authorized the Symphony to negotiate and enter into these agreements, (ii) the union was not a participant in individual overscale agreement negotiations, (iii) the union had not assisted with any claims with regard to individual overscale agreements, nor had such a claim played a part in bargaining for a new CBA, and (iv) the CBA did not contain an express clause that prohibited the CSA from engaging in race or sex discrimination. Paragraph (iv) brought to the fore a particularly troubling notion, namely that Ms. Ferguson could have been barred from mounting a discrimination claim against an employer if the CBA did not contain a clause linked to federal antidiscrimination legislation.

The ALJ, corroborated by the NLRB, found that "investigating possible employer race or sex discrimination is a legitimate purpose related to a union's collective-bargaining duties and responsibilities," even without the presence of a non-discrimination clause in the contract. The ALJ speculated that, because the parties were in negotiations, the union might have utilized the individual overscale agreement information to propose the inclusion of such language in a future agreement. Even if that was not the goal, however, the union was entitled to investigate potential sex discrimination, a well-established and mandatory subject relevant to collective bargaining. The ALJ further noted: "the union may therefore be entitled to information that is relevant and necessary to determining whether a particular employment action is discriminatory, even if the employment action itself is not a mandatory subject [of bargaining]."

The CSA counterclaimed that the union request for the agreements was tantamount to an “improper fishing expedition” to glean information to support Ms. Ferguson’s ‘purported’ EEOC claim (purported since the claim was not filed in advance of the request for overscale information). The CSA’s counterclaim that the union’s request for salary information was actually a ruse, which would give Ms. Ferguson an unfair advantage in said EEOC claim, was deemed immaterial. In further support of the union’s request, the Board noted that whatever the union’s reasons for such a request might be were of no consequence as long as the information was within the ambit of relevance to general collective bargaining.

To conclude, the NLRB held that the time of filing was irrelevant because the union was entitled to investigate pay scale information as a ‘legitimate part of its justifiable CBA obligations.’ Further, this entitlement was of a broad nature: thus, even if a CBA did not expressly contain a pay transparency nondiscrimination provision, the union could request and must receive the relevant information.¹⁸⁰⁴

“[T]he expired CBA does not contain an antidiscrimination clause or any other provision that might support a grievance against the Symphony for discriminating against Ferguson on the basis of her sex. However, the Symphony and the Union were engaged in ongoing negotiations for a new collective-bargaining agreement at the time the Union learned that the Symphony might be discriminating against Ferguson. Thus, as indicated in Westinghouse Electric, if the requested overscale contracts of the principal wind and brass players supported Ferguson’s allegations, consistent with its duty of fair representation the Union could have proposed that a nondiscrimination provision be included in the new agreement.”¹⁸⁰⁵

The Board decision in *Ferguson* underlines the importance of the union’s power to request information concerning the bargaining processes. The leading precedent established by *Truitt* decades earlier emphasized that the only possibility to rebut a request for information rested on two defenses: a showing that the information had no bearing on the grievance/negotiation or, secondly, the interest of confidentiality was significant enough to outweigh the request.¹⁸⁰⁶ *Ferguson* marked a substantial expansion of the scope of requested information, a welcome addition to the arsenal

¹⁸⁰⁴ An example of a pay transparency non-discrimination provision: “xxx name of company, will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor’s legal duty to furnish information. 41 CFR 60-1.35(c)

¹⁸⁰⁵ *Colorado Symphony Association and Denver Musicians Association, Local 20-623 366 NLRB No. 60 April 13, 2018.*

¹⁸⁰⁶ *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 156 [1956].

of legitimate weapons in the struggle to achieve equal pay and eradicate gender pay discrimination.

14.10 **Rizo v. Yovino**¹⁸⁰⁷

The *Rowe* lawsuit that figures prominently in this *movement* foregrounds several critical issues within the general category of gender pay discrimination. Similar to Ms. Ferguson's case, the equal pay for equal positions argument comes to the fore along with the central issue of prior salary within the context of initial individual salary determinations. In *Rizo*, a widely discussed EPA landmark, the Ninth Circuit held that a "factor other than sex" must be "job-related."¹⁸⁰⁸

"For many years, employers have argued that they may consider an applicant's prior, pre-employment salary history ("prior salary") in setting a starting salary, and that this falls under the "catchall" category of "factor other than sex." This argument gained purchase in some courts.... But today's decision throws out the old Ninth Circuit law and arguably goes beyond other courts by setting a bright-line rule barring use of that factor ("factor other than sex.")"

In *Rizo*, a female math consultant who worked at a country educational office in California learned that she earned less than male colleagues who held parallel positions and sued the school system. Ms. Rizo claimed that the Fresno County, California Office of Education breached the EPA by paying her substantially less than male math experts who performed similar jobs. The school system did not dispute that she was paid less for the same job but claimed that it was justified because the decision was based on the prior earnings that she had presented to them upon request during her application process. Thus, the entire case turned on whether an employer can consider prior compensation either as a sole method to determine pay or as part of a series of components that aid in such a determination, or in Court parlance 'either in whole or in part.' The en banc panel¹⁸⁰⁹ in *Rizo* overturned the precedent it had set

¹⁸⁰⁷ *Rizo v. Yovino* No. 16-15372 (9th Cir. Apr. 9, 2018).

¹⁸⁰⁸ See, *Ibid.*, available at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2018/04/09/16-15372.pdf>

¹⁸⁰⁹ Under the U.S. Federal Rules of Appellate Procedure, Title VII, Rule 35, 'en banc' (literally the full bench) refers to a decision by a full panel of judges at the federal circuit level. Applying to jurisdictions in which multiple three- or four- judge panels, en banc is called into play when the court determines that the issue to be adjudicated is of special significance.

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. Many of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

in *Kouba v. Allstate Insurance Co.*,¹⁸¹⁰ where the court had determined that the EPA does not specifically bar a reliance on prior salary if this factor is part of a package of components used to determine initial pay compensation. Thus, the Ninth Circuit's decision in *Rizo* imposes strict liability under an EPA claim even when prior wages are merely one part within a larger constellation of determining factors.

Did the *Rizo* court overreach by prohibiting any discussion and/or consideration of prior compensation? It is very important to take note that in 2005, the Seventh Circuit¹⁸¹¹ ruled that prior pay can be relied upon as a sole justification for pay differentials with the burden of proof placed on the employee to show that prior salary provided pretext for discrimination.¹⁸¹² Is there a defense possible if there is no evidence that the prior compensation was related to gender discrimination? In the future, it will undoubtedly be the role of SCOTUS to take on the role of final arbiter in the circuit split over the contours of gender discrimination and their interpretations under present U.S. legislation. In the meantime, states and municipalities have applied *Rizo* cross-country, a fact that aided Ms. Rowe in her quest for justice.

The *Rizo* decision is binding in the Ninth Circuit Court of Appeals, which covers a large geographical area in the Western United States and Pacific Islands: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and two sets of islands, Guam, and the Northern Mariana Islands. Although the decision is not binding in other federal appellate courts, it has set an influential precedent for other federal courts. In addition to this interpretation of the EPA, ten states and several municipal jurisdictions have passed post-*Rizo* legislation banning inquiries into a candidate's prior compensation and relying on such information in setting wage and benefits. Many of the laws also ban retaliating against an employee for engaging in activities aimed at reducing pay gaps and protecting employees' rights to openly discuss and seek information with their colleagues about their compensation amounts. Penalties range widely across the state and local jurisdictions, with some laws having little to no enforcement clause and others carrying stiff criminal and civil fines.

Legislation in California, Delaware, and Puerto Rico took effect prior to the Massachusetts equal protection law that enabled Ms. Rowe to litigate. On the municipal front, New Orleans and Pittsburgh have implemented legislation banning city government agencies from obtaining prior compensation information from job

¹⁸¹⁰ *Kouba v. Allstate Insurance Co.*, 523 F. Supp. 148 (E.D.Cal.1981).

¹⁸¹¹ The Seventh Circuit covers the area of Illinois, Indiana, and Wisconsin.

¹⁸¹² *Wernsing v. Dep't of Human Services* 427 F.3d 466 (7th Cir. 2005).

applicants in the public sector. Philadelphia also passed a similar bill; however, it has faced legal challenges from the local chamber of commerce, and its implementation has been put on hold pending litigation. Pushing the bans further, New York City leads the way in prohibiting both public and private employers from relying on prior compensation in determining wages.

14.11 Flute foibles

A bit of institutional memory serves an analysis of the *Rowe* case well. In 1952, the BSO welcomed a new member to the position of first flute, Doriot Anthony Dwyer. Headlines in the local press revealed: “Woman Crashes Boston Symphony”¹⁸¹³ and if the point was not clear enough, the *Springfield Morning Union* placed the headline, “Flutist, 30 and Pretty, Here with Boston Symphony” (October 10, 1952). While Ms. Dwyer was praised unanimously for her artistry in critiques of the day, her ‘feminine touch’ and physical beauty were often mentioned. A study of critiques and announcements of male principal appointments makes no such mention of physical attributes in the 1950s or thereafter. The headlines bear mention as they showed evidence of a disturbing tendency to single out a principal player with regard to gender, not performance abilities.

14.12 Background to Ms. Rowe’s claims

With considerable background material to consider, it is time to turn to the 2018 headliner case that pitted a ‘star’ player against her renowned employer. Ms. Rowe joined the BSO after winning the principal (first) flute audition in 2004. Immediately prior to that triumph, she held the position of second flute in Washington D.C.’s National Symphony Orchestra. Her counterpart in the BSO’s wind section, principal oboist John Ferrillo, joined the orchestra in 2001 after what non-musicians would consider as a ‘buy out’ from the prestigious MET, the highest-paid orchestra in the United States.

According to statistics publicly accessible in the BSO’s tax filings,¹⁸¹⁴ Mr. Ferrillo was offered compensation at 200% above the BSO’s base pay rate to sweeten the deal and persuade him to leave the MET for the principal oboe position in Boston. Using the same calculation, Ms. Rowe was offered compensation at 154% above the base when

¹⁸¹³ Reported by Cyrus Durgan in *The Boston Sunday Globe* 12 October 1952.

¹⁸¹⁴ Like all U.S. orchestras, the BSO as a nonprofit organization is required to file salary information. Information is available by tracking the BSO’s Form 990 schedule J available through guidestar at: <https://www.guidestar.org/profile/04-2103550>

she was hired, three years after Mr. Ferrillo. Did gender discrimination play a hand in the BSO's individual compensation schemes? Or is there is a genuine difference between the roles played by the principal oboe and the principal flute that would obviate the necessity to pay a male principal in the wind section considerably more than a female principal in the same section?

Is it possible to explain the disparity between Ms. Rowe's salary and Mr. Ferrillo's compensation because of Ms. Rowe's lack of leverage power when she negotiated for her salary at the BSO? After all, the second flute position at the National Symphony Orchestra, a less musically prestigious organization than the world-renowned MET has less trade-in value in the salary negotiation game. Perhaps she simply did not drive a hard-enough bargain to reach the level of compensation that Mr. Ferrillo was successful in reaching. Is this a telling circumstance that adds to the noxious mix of discrimination, or just one of many factors in this complex case? Or, disturbingly, does this show an unfair and illegal reliance on a prior compensation discussed regarding discrimination in *Rizo*?

Two other points within Ms. Rowe's list of claims are worthy of mention:

1. The BSO also discriminated by the nature of her personal contract, as it provides certain males performing comparable work a fixed percentage ensuring these males get automatic increases whenever the base rate is increased. No female is on an automatic increase contract with respect to the orchestral base rate.
2. The BSO discriminated by paying Ms. Rowe an above scale dollar amount that she is required to renegotiate to get pay increases while males receive automatic pay increases.¹⁸¹⁵

Taking these claims as a pair, the author would be hard pressed to find an appropriate defense on the part of the BSO. In her §54 claim,¹⁸¹⁶ Ms. Rowe raised the fact that she was put in a position of renegotiating salary increases including a cost of living increase each season, a position that was demeaning when compared to the male musicians who receive automatic increases without having to renegotiate on an annual basis.

14.12.1 Other claims pertinent to Ms. Rowe's case

Ms. Rowe brings up another thought-provoking point of contention at §49 in her complaint: "the BSO discriminated in compensation by providing additional assistance

¹⁸¹⁵ All references to Ms. Rowe's claims at *Elizabeth Rowe vs. Boston Symphony Orchestra* in the *Epilogue: Appendix 27*.

¹⁸¹⁶ *Ibid.*,

to reduce the physical demands required of the principal oboist. . .in addition to the overscale pay, [the BSO] provides and pays for the use of an assistant for approximately 6-12 weeks per season to assist the male principal oboist.” Although Ms. Rowe was responsible to play the principal flute part in as equally demanding repertoire as Mr. Ferrillo and played more solos than her illustrious colleague did on a per season bases, she was not offered the luxury of relief by way of an associate/assistant principal player. Associate-assistant players in top-tier U.S. orchestras could be assigned to play the principal part in certain pieces to give the principal player respite from a particularly difficult program.

The tradition of hiring ‘assistants’ to alleviate the burdens placed on principal players is common practice in European orchestras where two musicians ‘share’ premier positions such as the principal string positions and of course principal wind positions including the oboe and flute positions. According to the European model, principals hold 50% positions and are paid 100% salaries. The logic behind this model is that the principals are rewarded for their extra duties and performance pressures by receiving more free time than the rank-and-file players.

Back to Ms. Rowe at the BSO: there are several issues that clouded her demand for an assistant player. Firstly, it is possible that management could have been supportive of Ms. Rowe’s demand for an associate if she really had made such a demand in support of the arduous nature of her position. There is nothing on the record to support such a demand. Further, the BSO’s orchestra committee could have been in opposition to the creation of a newly created contracted position within the orchestra in the form of an associate flute player.

14.12.2 Retaliation-related claims

In addition to Ms. Rowe’s central pay discrimination claim, she brought forward the claim that the BSO engaged in illegal retaliation after she requested a redress of the pay disparity. Sections 58-68 of Ms. Rowe’s complaint show evidence of how the BSO retaliated against Ms. Rowe for allegations of gender inequality. Noting that such a practice is prohibited under Title VII, the EPA and MEPA, Mr. Rowe provided details concerning the BSO’s interference with regard to a National Geographic documentary hosted by the star U.S. reporter, Katie Couric. The segment was scheduled for filming at the BSO’s Symphony Hall in January 2018, and the episode was described as a recreation of a blind audition featuring Ms. Rowe. The BSO’s PR department arranged

for Ms. Rowe to participate. Gender equality activists and academics were also invited to participate in the segment on the complexity of gender bias at the workplace. After Ms. Rowe aired her concerns about salary discrimination, the BSO blocked her involvement. A closer reading of *Rowe* at §64 critiques the BSO for silencing one of its most ‘visible’ players:

“The BSO denied her the opportunity to participate as a witness in a national matter of great social concern in January 2018 and denied her the opportunity to use her acknowledged preeminent talent and recognition to further oppose unequal compensation for similarly situated women.”¹⁸¹⁷

14.12.3 Different strokes for different folks: section vs. principal pay

According to industry practice in the United States, principal players negotiate their own salaries, often an amount considerably higher than the CBA negotiated scale that section players receive. Standard practice holds that section players with equal years of seniority receive the same amount of compensation. To understand another important nuance within Ms. Rowe’s claims of unequal pay and gender discrimination, the reader needs to understand a distinction within the audition process for principal players at major orchestras. At the very top-tier of orchestral competition, major U.S. orchestras have been known to recruit key players from other top orchestras. In other words, beyond asking key performers for recommendations, orchestras go one step further to fill high-profile positions. As mentioned above, Mr. Ferrillo held a top-ranked principal oboe position at the MET prior to his BSO position. In the U.S., where principal positions are not controlled by collectively bargained pay scales, Mr. Ferrillo’s previous position granted him leveraging power in negotiations with both his then former employer (MET) and his prospective future employer (BSO) both in terms of payment and other employment-related benefits. Ms. Rowe’s claim is instructive in many ways regarding discriminatory compensation. It shows that leverage power in highly competitive field can prompt contractual gaps in which ‘similar’ players do not operate within a system of controllable bargaining positions.

14.13 BSO defenses

In its filing posted in response to Ms. Rowe, the BSO brought to the fore the argument that “the flute and the oboe are not comparable instruments, nor are they treated as

¹⁸¹⁷ Guidelines provided by the EEOC give a full restatement of this protected status under the heading of retaliation guidance, available at: <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm> - I. INTRODUCTION

such by most orchestras in the United States.”¹⁸¹⁸ To analyze a bit further, there is some merit to this argument. Oboe players spend a great deal of their free time engaged in making reeds for their ‘double reed’ instrument. The peculiarity and difficulty of not only playing a technically demanding instrument, but the responsibility of making a part of the instrument endows oboists with what other musicians look upon as ‘special powers.’

While an academic endeavor does not frequently bow to the level of the light bulb joke, it is impossible to resist this telling portrait of the oboist in enlightened terms. ‘How many oboists does it take to screw in a light bulb? Only one, but they must go through at least five bulbs before they find one to fit the room and the particular situation.’¹⁸¹⁹ Witticisms aside, the oboist does have an extra burden that is not shared by flute players who do not have to physically create a part of their instrument. Orchestras often offer oboists extra compensation for the reed-making activity, which is essential to performance success. Taking the demands of certain instruments into consideration to offset the higher costs inherent to the instrument is common far beyond the U.S.

Whereas orchestral musicians in the U.S. might have to negotiate for these additional expenses, European contracts exemplified by Dutch contracts take these expenses into consideration within the framework of the negotiated CAO (the Dutch term for CBA). Wind and brass players in Dutch orchestras and symphonies across the continent and in the U.K. are also granted extra pay for dental costs related to the performance vicissitudes of their wind instruments. The Dutch system of including these non-artistic financial benefits into the general CBA is more transparent than the individual negotiations that a principal or for that matter section wind/brass player undergoes to receive remuneration.

The BSO argued that Ms. Rowe’s compensation package put her in fifth place within the ranks of the highest paid musicians in the orchestra: higher than nine other BSO male principals. Interestingly, leaving Mr. Ferrillo out of the discussion, the following principals were paid more than Ms. Rowe: the principal viola at 175% above base pay, the principal trumpet at 173%, the principal timpanist at 165%, and the principal horn at 162%, when compared to Ms. Rowe’s 154%. For the record, no reports were included to discover how these compensations were determined or, for that matter, bargained for. Thus, it is difficult to decipher the gender discrimination within the

¹⁸¹⁸ Court filing, August 31, 2018.

¹⁸¹⁹ Click on the following link to discover the ‘life cycle of the oboist’: <https://goo.gl/images/ci5MKP>

mere recitation of the overscale paid to these males. Arguably, the timpanist received extra compensation for the maintenance of his instruments, a common extra remuneration for timpanists traditionally offered by orchestras. Ms. Rowe maintained that her position was unusual amongst BSO principals because of her prominence as a ‘marketable asset.’¹⁸²⁰ Her combination of musical excellence, professionalism, and charisma supplied her employer with benefits above and beyond the requirements of her principal position. Undeniably, Ms. Rowe was the poster child, the face of the orchestra, featured conspicuously on the BSO website, its official Facebook page and in other marketing initiatives.

14.13.1 BSO makes moves: it offers but does not accept

On August 25, 2018, the BSO offered Ms. Rowe a salary raise to \$250,149 that would narrow the pay gap to \$64,451 from the original \$70,497. Representatives of the BSO repeated the truism “to determine compensation for each musician, particularly principals, is a nuanced process involving many factors.” If that statement is weighed at face value, the question arises as to what is a fair way to contract principal players, the key musicians in an orchestra? And, importantly, does gender discrimination hide behind that nuanced process to perpetuate a system in which a woman’s contribution to the orchestra is valued less than a man’s contribution?

At the beginning of October 2018, the BSO responded to Ms. Rowe’s claim by vigorously denying any form of gender-based discrimination. One of the orchestra’s key defenses rested on the fact that solo instruments in other top orchestras are paid according to differentiated scales: principal oboists often command higher salaries than principal flutists. However, information requested from the League of American Orchestras and nonprofit tax returns regarding the highest paid orchestral musicians proves that there is no prescribed modality to ascertain the salaries of principals as some orchestras pay the principal flute more than the principal oboe and some do not. For example, in Cleveland and Philadelphia the principal flute earns considerably more than the principal oboist whereas in New York, the situation is reversed. Gender at least in terms of compensation does not enter into this reflection, as the four principals in the aforementioned orchestras are male. It could well be argued that Mr. Ferrillo, who is 18 years older than Ms. Rowe, could have received extra remunerations based on an age-experience differential that could lead to higher compensation for the older principal.

¹⁸²⁰ See §56 in Ms. Rowe’s complaint.

Yet, a closer look at the facts verifies that after an adjustment for seniority is taken into consideration Ms. Rowe earned approximately 25% less than her oboist colleague.

14.13.2 Ms. Rowe earns more for solos per performance than Mr. Ferrillo

Since Ms. Rowe joined the BSO, she performed frequently as a soloist, above and beyond her job as principal flute. At the time of the lawsuit, she was the BSO member with the distinction to have played more solos with the orchestra than any other player. To compare to Mr. Ferrillo: Ms. Rowe performed 27 solo concerts while Mr. Ferrillo was featured in 18 solo concerts within the same time frame. Ms. Rowe used this factor to underline her importance as a key principal player, the veritable ‘face’ of the BSO. The BSO claimed that Ms. Rowe’s compensation package proved that she was paid the highest-fee-per-solo of any of the BSO principal players. Even if this compensation is taken into consideration the question concerning the salary differential and the possibility of its gender discrimination basis remains unanswered.

14.14 Flute vs. oboe: apples vs. oranges?

Turning to the letter of the law, MEPA defines “comparable work” as work that requires substantially similar skill, effort, responsibility, and is performed under similar working conditions. How should the term “comparable work” be defined in the orchestral context? Ms. Rowe paralleled her position to that of Mr. Ferrillo in several sections within her complaint. Both are wind players both hold endowed chairs, and both bear great responsibility to play major solos as the leaders of their sections. Orchestral insiders would be quick to point out that the two instruments within the orchestra hold equivalent musical responsibility within much of the repertoire, to quote *Rowe* at §24: “the prominence of their contributions”¹⁸²¹ is analogous. Furthermore, flute and oboe sections are similar in number of players pointing to similar needs of their respective wind sections.

The question arises: who should be the arbiter for the similarity question? The BSO’s Music Director, Andris Nelsons and/or a consortium of musicologists and conductors could have provided testimony or at least backup with regard to Ms. Rowe’s claim. While the music director sits at the helm within the complex nexus of relationships within the orchestra, the notion that he/she would discuss the equivalence of positions may not be advisable as it borders on making a quality call. What if the maestro

¹⁸²¹ See, Ms. Rowe’s complaint at 164.

strongly feels that one of the principals is superior to the other principal in terms of artistic merit, regardless of gender?

How adequate and legally 'satisfying' is Ms. Rowe's claim of pay discrimination when we take into consideration the fact that the oboe is the second most important instrument in the orchestra, the veritable 'leader' of the woodwind section who stands up and tunes the orchestra at the concertmaster's bid. In the hierarchy of the orchestra, each section has a principal player as well as the 'overall' principals. Generally, aside from the conductor who plays the top leadership role, an orchestra's concertmaster is the leader of the entire orchestra, second in command while the principal oboe is 'third in command.' Is it germane to query if the principal flute were male and the principal oboe were female within the ranks of the BSO, would the Rowe-Ferrillo discrepancy have been a hot issue?

14.14.1 Response on the part of John Ferrillo

What of Ms. Rowe's oboe colleague, John Ferrillo? Claiming that the pair plays the Floboe, a combination flute-oboe, he speaks highly of his female orchestral neighbor, a "peer and equal" and signed a statement that Ms. Rowe attached to her complaint that emphasized their outstanding association and musical teamwork. However, he did not go so far as to speak out about leveling the compensation playing field or offering to share a part of his salary with Ms. Rowe.

14.14.2 Responses from the field with regard to individualized bargaining

Beyond the overarching obligation of good faith, a general term in bargaining, is there any form of obligation for orchestras not to engage in this type of individualized bargaining? U.S. managers and musicians respond to that question by underlining the 'realities of the marketplace.' "If you want the best players possible for a top-tier orchestra, you must do everything possible to attract and keep them. Ultimately this is not as individualized or as some might think, 'elitist' as an outsider may think, because a great principal shapes the sound of his/her section and thereby contributes greatly to the collective."¹⁸²² If orchestras are 'only as good as their weakest player'¹⁸²³ traditional logic holds that compensation for the strongest is warranted. The orchestral CBA

¹⁸²² Conversations with 'super' manager Ronald Wilford, founder and motivating force at Columbia Artists Management (CAMI) for 50 years, reputedly 'the most powerful person in classical music.'

¹⁸²³ Much repeated adage quoted by conductors ranging from Leonard Bernstein who believed in raising the level of the weakest to a plethora of contemporary maestros who believe in 'getting rid of' the weakest link as detailed elsewhere in this enquiry.

U.S.-style with its allowance for individualized bargaining for solo-principal positions provides a means to achieve this end.

14.15 The Dutch touch: principal pay

Dutch orchestral managers and musicians respond to their cross-Atlantic colleagues individualized contracts with skepticism. “Our CAOs offer principals extra free time, and we hire doubles: time, free time, is really money from our vantage point.”¹⁸²⁴ In the U.S., after a principal player wins an audition, that musician enjoys a considerable but oft-questionable modicum of freedom of contract that allows for freedom to negotiate for increased benefits. “At a time when orchestral musicians face collective challenges to their very existence based on shrinking finance argumentation, it seems unreasonable to focus on the salaries of the few as it could skew public and political opinion against the many.”¹⁸²⁵

Elizabeth A. Rodgers, the experienced attorney who guided Ms. Rowe in her lawsuit reached out to the author to discuss a particular matter with regard to one of Ms. Rowe’s predecessors, the BSO’s former principal flautist, Jacques Zoon. Serving a four-year tenure from 1997-2001, the Dutch virtuoso chose to leave the orchestra to pursue a variety of projects. Ms. Rodgers was interested to discover if I could gain access to his salary at the BSO. Apparently, there was no information concerning the salary of this particular male principal flutist who had chosen to leave Boston just a few years before Ms. Rowe won the audition. A player of prodigious creativity, Mr. Zoon had performed frequently as principal and soloists in groups that I was privileged to be a member of. Ms. Rodgers was taken somewhat aback when I told her that although I was privy to no inside information concerning negotiations, it would have surprised me if Mr. Zoon had taken the step to negotiate for a high overscale salary.¹⁸²⁶ An American lawyer working for an American client in the context of one of the most high-powered orchestras in the country could not believe that this would have been the case. “How is it possible that a prospective principal would not bargain for the very top of the scale?” In this case, the musician (Mr. Zoon) could well have taken his culture with him to Boston: a section player in the RCO in the late 90s would have

¹⁸²⁴ Interview, Stan Paardekooper, former manager of no less than four Dutch orchestras: het Brabants Orkest; Holland Symfonia; Stichting Muziek van de Omroep orchestras, and Noord Nederlands Orkest.

¹⁸²⁵ Conversations with Evelien Prakke, second solo cellist Het Ballet Orkest (HBO).

¹⁸²⁶ The direct quote as emailed to Ms. Rodgers on 11 July 2018: ‘It would not surprise me if Zoon would not have bargained for a mega-salary. . .between you me and the lamppost, he lived more or less simply, think bicycle no Lexus and really truly does not care about money. Just a hunch that Zoon’s salary might not be as telling as other ‘males with flutes’ (Cleveland Orchestra) or fellow BSO players.’

earned a salary of 75,000 Dutch florins per year, 50% less than their BSO colleagues, with an RCO principal receiving less than 15% in additional compensation.

14.16 Mediation and settlement

The *Rowe* case went to mediation in early December 2018 and the final settlement was announced in February 2019. In the initial claim, Ms. Rowe had requested a jury trial and damages resulting from the ‘unlawful non-payment of wages’ with an award that would be ‘doubled’ along with costs. To quote, both parties, “the matter has been resolved to the mutual satisfaction of the parties.”¹⁸²⁷ The BSO responded to the settlement with a reference to the orchestra’s honorable past as the first to introduce the screen for blind auditions back in 1952 and emphasized that the orchestra continues to strive to be an industry leader in furthering the role of women at every level of the organization, including staff, management, and orchestra.”

In a joint statement, Ms. Rodgers and the BSO emphasized the confidentiality of the mediation resolution, and stated that Ms. Rowe will continue to perform in the BSO in the position of principal flute. Regrettably, the non-disclosure agreement mandatory to the mediated resolution closed the door on the details of the settlement. It would have been beneficial not only for academic research but also for musicians in similar positions in other orchestras to ascertain (think of Ms. Ferguson in Colorado) what their chances for equal remuneration under a similar court order would be. Speaking of *Ferguson*, it would have been equally instructive to have access to the role (if any) played by the local union to request information related to the overscale contracts at the BSO not accessible through nonprofit reporting channels.

As discussed at some length above, pay gaps between the sexes can find no justification in past salary history under MEPA. To further such a laudable goal, the employer can be found liable for double the amount of unpaid wages at the high end of the scale unless the employer can provide proof of ‘reasonable self-evaluation’ of its compensation schemes over a period of three years prior to the claim.¹⁸²⁸ It would have been instructive to discover whether the BSO’s affirmative defenses that could have been construed as a form of evaluation were accepted partially, in total or rejected. With characteristic acuity, Drew McManus noted, “The missed opportunity here is the potential for creating a set of best practices that help prevent bias and demand the processes used to determine individual agreement terms for is free from implicit bias

¹⁸²⁷ Malcolm Gay. “BSO flutist settles equal-pay lawsuit with orchestra” *Boston Globe* February 14, 2019.

¹⁸²⁸ MEPA, M.G.L. c. 149 § 105A.

and subject to routine oversight.”¹⁸²⁹

A more academic critique of *Rowe* circles around two separate issues. Firstly, does the state or for that matter, the federal government hold the right to meddle with regard to a one-on-one contract (i.e., an overscale individual contract entered into by a single performer with his/her orchestral employer)? For those who pondered the constitutionality of this situation and hope for an answer from the highest court, rest assured the chances that SCOTUS would potentially grant certiorari to a case that pits a highly paid musician against her nonprofit orchestral employer are, in the author’s humble opinion, slim to none. Secondly, but no less important, if Ms. Rowe was not able to prove that as a solo player, she was a member of a ‘protected category,’ was her salary differential compelling enough to prove discrimination? Casting this uncertainty aside, the key to Ms. Rowe’s success in a claim under MEPA can be found in her assertion at §26 that “upon information and belief, the BSO had a policy of considering prior salary earned by an applicant.”¹⁸³⁰

14.17 The European approach: limit salaries to CBA levels

The European approach teaches that wind and brass players as well as some key strings (concertmaster, principal cello) are doubled, meaning that two principals share the job, each usually working 50% of the time.¹⁸³¹ Orchestral players in the U.K. and across the continent who hold contracted positions earn salaries based on the CBA stipulations associated with rank/position and seniority. Musicians interviewed in the U.S. are split into two camps with regard to their reactions to the issue of discretionary overscale payment particularly with regard to orchestral finances as a whole. Predictably, many section players and freelancers interviewed feel strongly that the salary inflation for principals as well as the exorbitant level of music director and CEO salaries is of major concern especially in times of financial crisis. Several savvy committee members pointed out that high discretionary over-scale payments undermine the collective bargaining process that leads to section players’ CBAs. “If our board and management want to be difficult and revisit the issue of the complement, in other words ‘how best to reduce the orchestra’ to meet budget, they often bring up these salaries. Interestingly

¹⁸²⁹ Drew McManus, *Adaptistration*, available at: https://adaptistration.com/2019/02/19/rowe-lawsuit-settles/?utm_source=Adaptistration+Weekly+Email+Summary&utm_campaign=49bba437e-

¹⁸³⁰ See Ms. Rowe’s complaint at §26.

¹⁸³¹ Contrast personnel listings at the Royal Concertgebouw (RCO) and the BSO, for example. See, <https://www.concertgebouworkest.nl/en/musicians> and <https://www.bso.org/brands/bsob/about-us/musicians/bsomusicians/woodwinds.aspx>

enough, they never talk about the music director's salary, as he is considered to hold special immunity with regard to almost everything."¹⁸³²

14.17.1 Inadequacies in the regulated Dutch system of salary determination

In Dutch orchestras, with the notable exception of music directors' salaries and guest conductor fees, CAOs regulate salaries in tables related to seniority. Musicians have intimated that there is a small opening for bargaining before the contract is signed on the issue of the starting salary scale level. As these tables of salary levels are directly associated with the musician's years of previous service in a professional orchestra this process can lead to interesting at best and discriminatory at worst results.

Take note, the only discrimination reported in multiple interviews with Dutch-based musicians was with regard to the marked lack of bargaining power on the part of non-Dutch musicians. "They are so happy to win the position that they either do not dare to bargain for higher entry level salary or they lack the street smarts as to how to go about negotiation: if the orchestra manager says this is the salary, take it or leave it, they will accept while locals might well attempt to give reasons for a starting salary at a higher level."¹⁸³³ This and other parallel examples do not provide any evidence of discrimination on the part of Dutch orchestral managers-administrators; it is merely the reflection of a delicate situation directly related to bargaining. While some managers are more open to offer 'more,' i.e., a higher starting salary to secure a 'special' principal, others opt for the 'take the job or leave it' stance. There are no industry standards regardless of the jurisdiction. A consideration for improvement on this front might be for conservatories to offer courses on negotiating for a professional orchestral life through a legal lens.

Turning to the position of principals in Dutch orchestras, interviews with players confirm the assumption confirmed through interviews, that there is a bit of wiggle-room in terms of the extra benefits for principals exemplified by extra free days, not extra financial remuneration beyond the scales set in collective bargaining agreements. The unions meet with orchestra directors to set general terms and flesh out the specifics of the contracts. Amounts of compensation are set in direct relation to seniority and the particular position within the orchestra. Extra compensation for playing another instrument within the same instrumental group¹⁸³⁴ and other forms

¹⁸³² Interview, players committee member, U.S. top-tier orchestra, anonymity assured.

¹⁸³³ Interviews with principal player Dutch orchestra with access to information concerning colleagues bargaining foibles, anonymity assured. Follow up interviews with the colleagues in question took place thereafter.

¹⁸³⁴ The term in orchestral parlance: doubling.

of extra compensation usually related to leave are also spelled out explicitly in CAOs.

In the U.S. system where the union is key to negotiate scale (the minimum pay for section players), the union is absent when individual principals negotiate the exclusive overscale contracts that have led to friction and lawsuits as exemplified by Ms. Ferguson and Ms. Rowe's recent cases. "Mind boggling and unthinkable, can't they be happy with their position in an excellent and certainly well-paid world class orchestra?" questioned a Royal Concertgebouw (RCO) principal. In the U.S., orchestras at the highest level of compensation believe in acknowledging the added value of key principals through financial compensation first and foremost. In Europe, while there is an allowance for extra remuneration, this allowance is held under the surveillance of the bodies responsible for orchestral subsidies, the state, the province, and/or the municipality. This 'control' precludes the level of individuation in contracts with regard to creating a new position to alleviate the workload of a principal player. Certainly, Ms. Rowe brought forth this specific claim to provide yet another example of Mr. Ferrillo's privileged position. As the questions above disclose, however, this is a claim that is fraught with irregularities.

Ms. Rowe's claim with its focus on pay differentiation amongst 'equals' opens the floodgates to another issue of consequence in a comparative inquiry: orchestral remuneration. The differences between U.S. top-tier orchestras' and the second and third-tier orchestras' salaries are eye-opening with differences best illustrated by the contrast between a six-figure salary in the top eight U.S. orchestras¹⁸³⁵ and salaries well below \$50,000 a year in the remainder (and majority) of U.S. professional orchestras.¹⁸³⁶

14.17.2 Treading on shaky ground: compensation comparisons?

Of more relevance to a comparative study are the differences in compensation between top-tier U.S. orchestras and the leading Dutch orchestra, the RCO. Every few years, the RCO's general manager will take to the press to plead for more funding for the orchestra, bringing forward the argument that as a world leader in the field, it is impossible to attract and keep top players without offering remuneration commensurate to other top orchestras elsewhere in the world.¹⁸³⁷ Studying benchmarks gleaned from statistics on compensation at top orchestras worldwide (including the Berlin Philharmonic, Vienna

¹⁸³⁵ In terms of salary, the Chicago Symphony, Los Angeles Philharmonic, San Francisco Symphony, Boston Symphony Orchestra, New York Philharmonic, National Symphony Orchestra, Cleveland Orchestra, and Philadelphia Orchestra all offer six-figure base pay to section players as of 2017.

¹⁸³⁶ More information available through the International Conference of Symphony and Opera Musicians (ICSOM) and the ever-informative Adaptistration website at: <https://adaptistration.com/>

¹⁸³⁷ See (in Dutch), Hilda Bouma "Concertgebouw wil lonen verhogen" *Financieele Dagblad* 25 februari 2019.

Philharmonic and several U.S. top-tier orchestras) the difference in salaries between the RCO section members and their colleagues abroad was on average 135% lower.¹⁸³⁸ The article was peppered by quotes from the RCO's managing director who noted that "the differences are so great that one does not know if that impacts the decision of top players to audition at the RCO."¹⁸³⁹ The discussion of comparative cross-border salaries takes the reader down a slippery slope: after all, these are the discussions that have led top banks and investment corporations to offer outrageous bonuses at times of financial crisis. The argument 'if we can't offer highly competitive salaries, who will want to work here' rings false for several reasons. Firstly, the RCO has not suffered in terms of the level of its players in the last few decades (take note, the same article quoted a salary discrepancy of 100% in 1998 when comparing RCO section players to the highly subsidized Berlin Philharmonic). Secondly, as the other excellent orchestras within the Dutch subsidy constellation struggle for a piece of the competitive subsidy pie in an economic environment of continued cutbacks, the RCO's appeal has "raised the anxiety level for those of us who are really struggling."¹⁸⁴⁰

14.17.3 Top-tier orchestral general remuneration and gender

Taking the cue from Dutch practice, transparency in terms of disclosure should be the norm for U.S. orchestras to include disclosure of salaries including individually negotiated contracts as well as music director and conductor's salaries. Simple disclosure would reveal gaps, if any and promote accountability. Since 2008, nonprofits in the United States are required to file salaries of all employees who earn over \$100,000.¹⁸⁴¹ A brief summary of the highest base musician annual salaries shows that the top earning female musician in U.S. orchestra earns \$410,912 while the highest paid male musician brings in \$545,789. Within the ranks of the top five U.S. orchestras in terms of prestige and of course, pay, there are 73 listed principal positions; 12 of those positions are held by women.¹⁸⁴² The connection between high earnings and principal positions is direct. As nonprofits, U.S. orchestras are additionally required by tax laws to list the earnings of the five highest earners, those have earned more

¹⁸³⁸ Ibid.,

¹⁸³⁹ Ibid., translated by the author.

¹⁸⁴⁰ Principal player, Netherlands Radio Philharmonic Orchestra (RFO), anonymity assured.

¹⁸⁴¹ IRS Form 990 Part VII (Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors) sets reporting requirements for inter alia., the five current highest compensated **employees** other than officers, directors, trustees, or listed key employees (only if earning more than \$100,000)

¹⁸⁴² Statistics taken from a *Washington Post* analysis of top orchestras and League of American Orchestra records, see, https://www.washingtonpost.com/graphics/2018/entertainment/music/orchestra-gender-pay-gap/?utm_term=.18dbc4b183db

than \$150,000.¹⁸⁴³ Statistics reported in 2016 show that a mere 14 of the 78 orchestral musicians in U.S. orchestras listed on tax filings were women.

14.18 Enforcement policy for best practices

As noted in a previous *movement*, endowments and other forms of gifts and donations account for a large part of U.S. orchestral financing. Good patronage should rest on principals of supporting institutions committed to fair employment practices. Thus, from a basic governance point of view, orchestral organizations should support real best practices policies that rest on transparency in all areas of orchestral employment starting with nonbiased hiring and compensation policies. And, as a MET principal player perceptively reflected, the orchestra owes its public the assurance that the workplace is not only of the highest artistic standard but also of the highest standard in terms of fairness.¹⁸⁴⁴

It comes as no surprise that there is no evidence of specific gender pay gap jurisprudence within the orchestral profession in the Netherlands. As the discussion on overscale in the U.S. versus CAO-regulated wage scales in the Netherlands highlights, the variance in principal's salaries is controlled. That a male or for that matter female principal player could bargain for remuneration that added up to tens-of-thousands of euros above a colleague is "beyond comprehension and frankly, unheard of in my considerable experience running Dutch orchestras before, during and after the culture cuts in the Netherlands."¹⁸⁴⁵

14.19 Social media weighs in

A perusal of Facebook and Twitter feeds following the commencement of Ms. Rowe's lawsuit shows that orchestral stakeholders worldwide followed the case closely. Social media discussions reached a high pitch with some commentators pointing to the BSO with its possibility to right past wrongs. As mentioned above, historically speaking, the BSO was a front-runner in holding blind auditions since 1952. That the very same

¹⁸⁴³ As of January 1, 2008, the U.S. Internal Revenue Service (IRS) Form 990, calls for nonprofits to report the five current highest compensated employees (HCEs) other than officers, directors, trustees, or listed key employees (only if earning more than \$100,000) "individuals who have received over \$150,000 in reportable and other compensation" must comply with Schedule J, see IRS 990, available at: <https://www.irs.gov/pub/irs-pdf/f990.pdf>

¹⁸⁴⁴ Interview with William Short, principal bassoon, Metropolitan Opera Orchestra (MET) available at: <http://www.metorchestramusicians.org/blog/2014/4/16/auditioning-for-the-met-orchestra>

¹⁸⁴⁵ Conversation with Stan Paardekooper.

orchestra that pioneered the ‘sex-race blind’ procedure could engage in discriminatory pay practices fifty years later squares the circle instead of rounding it. If the BSO had really shown courage anno domini 2019, the institution would have shared its response to Ms. Rowe’s claims in the interest of leading the way to promote fairness.

As Ms. Conant’s fight to maintain the position she won in Munich in 1980 and Ms. Rowe’s equal pay lawsuit in Boston 2018 underline, the influence of male stereotypes has had a marked impact on hiring practices and overscale compensation in the orchestral workplace up and to the present day. Rewriting the history of orchestras with women as equal musical partners remains a test for orchestras to pass. As long as conductors turn to a brass section and address them as ‘Gentleman’ or as long as a conductor asks the violins to play like ‘female angels’¹⁸⁴⁶ the challenges remain.

14.20 A leap of faith? A bridge from Ferguson and Rowe to #metoo

Is it possible to draw a link between *Ferguson* and *Rowe* to a particular aspect of legal actions that fall loosely under the aegis of #metoo? Is it conceivable to think that the NLRB would be influenced to accept greater union participation for information requests as a legitimate responsibility of a union as the employee’s collective bargaining stage in #metoo related cases? What remains to be seen is how far a union will go to protect its female members from sex discrimination and how much information the NLRB will require an employer to provide on non-mandatory subjects of bargaining where a union claims its request relates to investigating possible discrimination.

The next *movement* will move into another confrontational subject that has not only affected the careers of individual orchestral musicians but has shaped the future of the entire collective. The #metoo revolution has made its mark on orchestras in the U.S. and the Netherlands. The dissimilarities that characterized management’s reaction to #metoo allegations at a leading Dutch and top-tier U.S. orchestra will be described in the pages that follow. But first, as major studies have proven that racial discrimination increases during periods of economic decline,¹⁸⁴⁷ I will turn to the state of diversity at the orchestra.

¹⁸⁴⁶ Comments at rehearsals in professional Dutch orchestras 2013-2018, conductors’ identities protected.

¹⁸⁴⁷ See, Amy R. Krosch and David M. Amodio “Economic scarcity alters the perception of Race” *Proceedings of the National Academy of Sciences*, June 25, 2011. Available at: <https://www.pnas.org/content/pnas/early/2014/06/04/1404448111.full.pdf>