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JOB SEGREGATION, GENDER BLINDNESS, AND EMPLOYEE AGENCY

Tracy E. Higgins

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JOB SEGREGATION, GENDER BLINDNESS, AND EMPLOYEE AGENCY

Tracy E. Higgins*

I. INTRODUCTION

Almost forty years after the enactment of Title VII,¹ women's struggle for equality in the workplace continues. Although Title VII was intended to "break[] down old patterns of segregation and hierarchy," the American workplace remains largely gender-segregated.² Indeed, more than one-third of all women workers are employed in occupations in which the percentage of women exceeds 80%.³ Even in disciplines in which women have made gains, top status (and top paying) jobs remain male-dominated while the lower status jobs are filled by women.⁴ This pattern of gender segregation, in turn, accounts for a substantial part of the persis-

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1. 42 U.S.C. § 2000e (2000). Title VII provides in part:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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

2. *Johnson v. Transp. Agency*, 480 U.S. 616, 628 (1986) (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979)).

3. See Barbara H. Wootton, *Gender Differences in Occupational Employment*, MONTHLY LAB. REV. 15 (Apr. 1997).

In the 1980s, approximately 60% of all male and female workers would have been required to switch to occupations atypical for their sex in order to achieve integration. See, e.g., JERRY A. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS* 10, 28-29 (1989). These estimates nevertheless tend to understate sex segregation because even women in occupations that are relatively integrated tend to be segregated within departments and jobs that are segregated. See, e.g., Williams T. Bielby & James N. Baron, *A Woman's Place is with Other Women: Sex Segregation Within Organizations*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES* 27 (Barbara F. Reskin ed., 1984). More recent studies indicate that, while women made some gains during the last decade, gender segregation remains the norm for working women. See Wootton *supra*, at 15 (noting that "despite these shifts, women and men still tend to be concentrated in different disciplines"). Moreover, occupational data collected by the Bureau of Labor Statistics does not reveal gender differences within broadly-defined occupations or within firms. See U.S. DEPT. OF LABOR, *infra* note 4.

4. See U.S. DEPT. OF LABOR, *HIGHLIGHTS OF WOMEN'S EARNINGS IN 2001*, at 1, 2 (2002) (noting that "[a]lthough professional specialty occupations were the highest paid for women, men were much more likely to be employed in the highest paying professions. . . . In contrast, women were more likely to work in lower paying professional occupations").

tent wage gap between men and women.⁵ As of the end of 2001, women working full-time still earned only seventy-six cents for every dollar earned by their male counterparts.⁶ Thus, we have not only the persistence of job segregation, but job segregation with particular implications for equality—men are on top and remain there.

The central question addressed by this essay is “Why?” Why has gender segregation of the work force persisted so stubbornly in the face of Title VII and myriad state antidiscrimination statutes? Part II explores the relationship between our common understanding of discrimination and the continuation of gender segregation. This Part suggests that the elimination of discrimination as it has been defined under Title VII might well leave undisturbed a significant amount of gender segregation, regarding it as a product of individual choice rather than workplace bias. Part III explores the operation of this rhetoric of choice in specific examples from Title VII doctrine. Part IV turns to feminist critiques of the concept of individual choice or agency. This Part suggests that, although feminists have called into question assumptions about women’s agency under patriarchy, these critiques have been too limited in the Title VII context. The essay concludes by suggesting ways in which feminist critiques of agency might be brought to bear more effectively in a challenge to workplace segregation.

II. GENDER SEGREGATION AND GROUP-BLINDNESS

One answer to the question as to why gender segregation has been so resistant to antidiscrimination law is that those laws have simply been inadequately enforced.⁷ According to this theory, continuing gender segregation is a result of old-fashioned discrimination by employers in the hiring and promotion of women.⁸ Without intending to downplay the importance of this explanation, this essay suggests a more complex analysis by first asking whether and why one might expect

5. See, e.g., William J. Carrington & Kenneth R. Troske, *Sex Segregation in U.S. Manufacturing*, 51 INDUS. & LAB. REL. REV. 445 (1998) (finding that differential pay across gender segregated establishments can statistically account for a substantial fraction of the overall gender pay gap).

6. See U.S. DEPT. OF LABOR, *supra* note 4, at 1.

7. Another response to the question regarding the persistence of gender segregation in the wake of Title VII is that the statute was never intended to eliminate segregation as such. Indeed, the statute included a provision expressly exempting employers from liability based on imbalance in their work forces. Section 703(j) of the Act reads:

Nothing contained in this subchapter shall be construed to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (2000). Since its enactment in 1964, this provision was modified in very minor respects in 1972.

8. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Defense*, 103 HARV. L. REV. 1750 (1990) [hereinafter Schultz, *Telling Stories*] (arguing that the segregation of women into lower paying, lower status jobs is a product of illegal discrimination rather than women’s preferences).

gender segregation to disappear if discrimination were eliminated. Answering this question depends, in turn, on one's definition of discrimination.

In the United States, antidiscrimination law is commonly understood as targeting a particular and relatively narrow harm—namely, invidious or at least inaccurate judgments about the worth of individuals based on certain characteristics.⁹ With the specific and increasingly limited exception of affirmative action,¹⁰ the Supreme Court has at least rhetorically embraced a standard of group-blindness. The Court has explained that “in passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.”¹¹ Hence, an employer may not take “gender into account in making employment decisions Gender must be irrelevant to employment decisions.”¹²

At the same time, despite its insistence that gender be treated as irrelevant to employment decisions, the Supreme Court has never embraced the idea that gender-based characteristics are in fact irrelevant. Indeed, even while striking down gender-based classifications, the Court has acknowledged that differences between men and women exist and are a “cause for celebration.”¹³ Moreover, these differences may operate to the relative advantage of men or women as a group under different circumstances. Thus, in *United States v. Virginia*,¹⁴ Justice Ginsburg acknowledged that even a facially gender neutral admissions policy at the Virginia Military Institute will likely screen out more women than men.¹⁵ The Equal Protection Clause of the Fourteenth Amendment merely requires that the state avoid the assumption that particular characteristics *necessarily* track biological sex. Under Title VII, an employer may justify facially neutral standards that have a negative impact on women by showing business necessity.¹⁶

These two premises, that employment decisions must be gender-blind and that gender-based differences nonetheless matter, have important implications for the relationship among antidiscrimination law, sex discrimination, and sex segregation. Imagine a world in which surface gender identity, maleness or femaleness, could be easily and effectively concealed from an employer: upon entering the

9. For an interesting argument regarding the logic of American antidiscrimination law, see Robert Post, *Prejudicial Appearances: The Logic of American Anti-discrimination Law*, 88 CAL. L. REV. 1 (2000) (explaining that antidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based on inaccurate judgments about their worth or capacities).

10. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979) (upholding voluntary affirmative action policy against a challenge under Title VII).

11. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (Brennan, J., plurality opinion).

12. *Id.* at 239-40. The Court has been even more explicit and stringent in its application of a group-blindness standard in the context of race, particularly in equal protection doctrine. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204-05 (1995) (striking down minority preference system in federal government contracts).

13. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

14. *Id.*

15. See *id.* at 542 (noting that the question is “whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords”). See also *id.* at 550 n.19 (conceding only that “admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs”).

16. See *infra* text accompanying notes 26-30.

workplace employees lose their physically-manifested gender identity and regain it when they leave.¹⁷ In a literal sense, employer decisions in such a world would necessarily be gender-blind; and yet, gender segregation across occupations and industries might persist for several reasons. First, personal attributes relevant to the performance of a particular job may be distributed unequally across genders. The clearest examples of this would be physical attributes such as height, weight, strength, or speed. An unequal distribution of such attributes would not justify per se exclusion of one gender or another; however, the inclusion of a height requirement, for example, would mean that either women (in the case of a minimum requirement) or men (in the case of a maximum requirement) would be disproportionately screened out of the positions.¹⁸

Second, skills or aptitudes, whether acquired or innate, might be distributed unequally across gender lines. For example, women, as a group, may acquire care-based skills because they tend to bear a greater responsibility for domestic care taking.¹⁹ Such responsibilities also impose on women opportunity costs in terms of acquiring other types of skills, including higher education, or occupational or professional training. Although the causal relationship is complex, and certainly not free of gendered norms within the culture, so long as a pattern exists along gender lines, the pattern may be reflected in work place segregation. Finally, and more generally, cultural expectations about the nature of certain jobs perpetuate gender segregation by influencing individuals to make occupational choices along gender lines.²⁰

The current model of discrimination as group-blindness ascribes none of these causes of gender segregation to employer wrongdoing. From the standpoint of intentional discrimination, so long as the employer makes decisions without regard to the sex of otherwise similarly situated persons, he has not violated his obligation of neutrality, whatever his actual pattern of hiring.²¹ Yet, even in the absence of intentional discrimination, gendered employment patterns may arise

17. Professor Robert Post offers the example of gender blind orchestra auditions in which the musician is concealed by a screen and evaluated only by her sound. Post, *supra* note 9, at 14-16.

18. For example, the Alabama Board of Corrections's height and weight requirements at issue in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) screened out 40% of women but less than 1% of men applicants for the job of prison guard. Although Diane Rawlinson successfully challenged these criteria as violating Title VII, she relied upon a disparate impact theory rather than a theory of intentional discrimination. *Id.* at 328-29. The Supreme Court upheld the district court's finding that the requirements were not justified by business necessity. *Id.* at 336-37.

19. Recent studies reveal that women still do 80% of child care and two-thirds of housework. See, e.g., JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* 104-05 tbl.3 (1997) (charting trends in family care, by gender and employment, in hours per week, for those aged 18-64 from 1965-1985 in the United States).

20. See generally Margaret Mooney Marini & Mary C. Brinton, *Sex Typing in Occupational Socialization*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES* 192 (Barbara F. Reskin ed., 1984) (discussing gender differences evident in the work aspirations of adolescents and young adults).

21. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L. J. 2009, 2028-30 (1995). Disparate impact analysis, in contrast, does not require a showing of discriminatory intent and may in fact require employers to take into account group-based characteristics or order to counteract unnecessary discriminatory impact. *Id.* at 2019.

either from "naturally" occurring gender differences or the (incidentally gendered) choices of individuals.²² Under some circumstances, the former may be regarded as a cause for remedy or redistribution. Both the Americans With Disabilities Act (ADA),²³ and to a lesser extent Title VII, take this approach.²⁴ The ADA obliges employers affirmatively to accommodate the particular needs of persons with disabilities, a departure from a group-blindness norm.²⁵ Title VII imposes on employers a heavier burden of justification for policies that disadvantage particular groups.²⁶

In contrast, differences resulting from private choice are almost never regarded as giving rise to a remedy.²⁷ Indeed, whether a gendered characteristic can be understood as a product of individual choice rather than innate differences very often will determine whether an employer bears any responsibility to compensate for that difference in making employment decisions. In short, choice becomes the touchstone of responsibility under this model. The next Part explores the ways in which the rhetoric of choice has come to limit the reach of Title VII both in disparate impact and disparate treatment contexts.

III. TITLE VII AND THE RHETORIC OF CHOICE

A. Disparate Impact

In *Griggs v. Duke Power Co.*,²⁸ the case in which the Court first articulated the disparate impact rationale for employer liability, the Court explained:

Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.²⁹

22. *Id.*

23. 42 U.S.C. §§ 12101-12213 (2000).

24. 42 U.S.C. § 12112(b)(5)(A); 42 U.S.C. § 2000e-2(a) (2000).

25. The ADA's definition of "discriminate" includes "not making reasonable accommodations" for the employee's disability. 42 U.S.C. § 12112(b)(5)(A).

26. See *infra* at pp. 251-52 (discussing disparate impact litigation and the obligations imposed on employers under Title VII).

27. The exception that proves the rule may be religious worship. Although religion is not "immutable" in the way that sex and race are assumed to be, nevertheless it is not treated as discretionary and is subject to change in order to accommodate employment obligations. Moreover, since 1972, Title VII has specifically required employers to accommodate employees' religious practices. See 42 U.S.C. § 2000e(j) (2000). This accommodation provision has prompted some to argue by analogy that Title VII should be amended to accommodate parenting obligations as well. See Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons From Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445 (arguing that "religious accommodation case law has much to offer to the development of a legal paradigm that can promote parenting as a social good that deserves greater workplace support"); but see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 321 (1997) (noting that religious plaintiffs "lose most of the time").

28. 401 U.S. 424 (1971).

29. *Id.* at 436.

And yet, the test as applied requires employers to act in a sufficiently group-conscious way so as to remove obstacles that, although applied evenhandedly to all, affect particular groups in an unequal way. Thus, in theory, for the employer to act in a gender neutral way requires something other than complete indifference to the gender of employees or job applicants. It requires the creation of a workplace and hiring system that does not unnecessarily and unduly burden applicants or employees based on sex.³⁰ The effect of this standard on gender segregation depends, however, on often implicit assumptions about the nature of gender identity and the scope of employee choice.

Consider how this works in practice. In a disparate impact case, the plaintiff's *prima facie* case requires a showing that a facially neutral employment practice has a disproportionately adverse impact on a protected class.³¹ Once that threshold is reached, the burden of persuasion shifts to the employer to demonstrate that the challenged practice is job-related and justifiable as a matter of business necessity.³² Finally, the plaintiff has an opportunity to prove that there exists an alternative practice that would serve the employer's objectives equally well but have a less severe adverse effect.³³ The plaintiff must also identify a particular employment practice (or inseparable cluster of practices) claimed to have caused the disparate effect.³⁴

From the plaintiff's perspective, an important virtue of a disparate impact claim is that it does not depend upon a showing of discriminatory intent. In other words, proof of disparate impact is sufficient to establish liability unless the defendant can prove that the hiring process is justified by business necessity.³⁵ This means that the employer has an obligation to alter hiring and promotion practices that burden women, for example, whether or not those practices were adopted for the purpose of maintaining a segregated workplace.

So defined, the disparate impact theory of liability seems promising as a basis for attacking some of the reasons for persistent gender segregation cited above.³⁶ For example, if the expectation of overtime hours prevents employees from advancing if they have substantial childcare obligations and this leads to gender segregation, keeping women in lower ranking positions, the employer might be required to justify the overtime rule as business necessity.³⁷ Alternatively, if the use

30. For an interesting argument that the 1991 Civil Rights Act effected a shift from a color-blindness to an accommodationist standard, see Flagg, *supra* note 21, at 2013-15.

31. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (holding that liability is established when facially neutral policy affects members of protected class in significantly discriminatory manner); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

32. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993) (noting that once the plaintiff establishes disparate impact, the burden of proof shifts to the defendant to prove business necessity).

33. *Albemarle Paper Co. v. Moody*, 422 U.S. at 425 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

34. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

35. In the Civil Rights Act of 1991, Congress assigned the burden of persuasion to the defendant on the issue of business necessity. By doing so, Congress made clear that a plaintiff can prevail without demonstrating discriminatory intent on the part of the employer. See Flagg, *supra* note 21, at 2024-25.

36. See *supra* text accompanying notes 7-23.

37. For a discussion of the potential (and potential difficulties) of such a suit, see Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305 (1999); but see Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1517-21 (expressing skepticism toward the potential for expanding Title VII given the difficulties facing plaintiffs under current doctrine and hostility of federal courts toward Title VII claims).

of informal networking as a means of identifying, hiring, and promoting candidates disadvantages women, the employer might be forced by a disparate impact claim to investigate other, equally effective but less discriminatory recruitment practices.³⁸

In practice, however, plaintiffs have faced a number of obstacles. First, in order to establish a *prima facie* case under disparate impact, the plaintiff must identify a specific employment practice (or inseparable group of practices) responsible for the identified disparity, and demonstrate a causal connection between the two.³⁹ For example, a plaintiff might challenge an employer's use of a standardized test as a screen for hiring by showing that women tend to score lower on the test than men and are therefore disproportionately screened out of the process at an early stage. The plaintiff would rely on test results to prove the link between the practice and the gender disparity. If a plaintiff sought to establish that the absence of parent-friendly policies disproportionately affected women's advancement, she would have a much more difficult time for several reasons. First, the argument attacks the *absence* of affirmative policies rather than the existence of a particular barrier. Yet, as Nancy Dowd has argued, "[d]iscrimination analysis is designed to ensure that no one is denied an equal opportunity within the *existing* structure; it is not designed to change the structure to the least discriminatory, most opportunity-maximizing pattern."⁴⁰ Hence, challenging the absence of a beneficial policy is much more difficult for plaintiffs than challenging the existence of a discriminatory one.

Second, although the plaintiff might rely on expert testimony to show that women on average bear more responsibility for childcare and that this, in turn, affects their ability to work overtime, such testimony would likely be based on general population statistics rather than on the particular work force at issue. Yet, in *Ward's Cove Packing Co. v. Atonio*,⁴¹ the Supreme Court required the disparate impact plaintiff to make a more precise showing regarding the challenged practice and the pattern of employment.⁴² Following *Ward's Cove*, some courts have re-

38. Courts have held that disparate impact, as well as disparate treatment analysis, may be used in cases involving subjective criteria. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988); *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972).

39. 42 U.S.C. § 2000e-2(k)(1)(B)(i) provides:

With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

There is an additional exception:

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

40. Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 139 (1989) (emphasis added).

41. 490 U.S. 642 (1989).

42. *Id.* at 656.

quired plaintiffs to establish such an impact based on the individuals in an employer's workforce as opposed to the broader population.⁴³ Thus, the plaintiff in our hypothetical might be required to prove that women applicants for employment or advancement were actually deterred by the overtime rule relative to men applicants, a costly and difficult task.

Assume, however, that our plaintiff is capable of showing a disparate impact on women. It is still far from clear that she will succeed in shifting the burden to the employer to prove business necessity. Whether she succeeds may depend upon the extent to which the court views conformity to gender roles as a matter of individual choice. In many cases, courts have denied disparate impact claims when they regard the impact as within the control of the claimant. The clearest examples of such analysis may be cases involving employee grooming. For example, in *Rogers v. American Airlines*,⁴⁴ a court rejected an argument of a black woman plaintiff that the employer's rule against braided hair was discriminatory.⁴⁵ The court suggested that even if discriminatory impact could be established, the employer should not be held liable because the alleged impact resulted from the employee's own choice.⁴⁶ Similarly, courts may view an argument regarding the gender-based impact of overtime requirements as a product of the private choices of individual women. Parents make decisions regarding the allocation of childcare responsibilities. Even if those choices track a broader gender pattern, the employer does not bear responsibility for accommodating them.

B. Disparate Treatment

A plaintiff may challenge a gender-segregated workplace under a disparate treatment theory of discrimination as well. In a disparate treatment claim, the employee alleges that the pattern of gender segregation results from intentional discrimination on the part of the employer. Unlike with a disparate impact claim, the plaintiff need not isolate a particular hiring mechanism that resulted in the segregation, but she must establish that the discrimination was intentional.⁴⁷

In *McDonnell Douglas Corp. v. Green*,⁴⁸ the Supreme Court established the basic framework for establishing a disparate treatment claim.⁴⁹ The plaintiff must present a prima facie showing of discrimination, essentially a showing that she applied for a position for which she was qualified and was turned down in favor of a male candidate in the case of gender discrimination.⁵⁰ Once the plaintiff makes this showing, the burden of production shifts to the defendant to articulate a non-discriminatory reason for the decision.⁵¹ The plaintiff then has an opportunity to

43. Compare *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980) (holding that workforce statistics are a necessary element of a disparate impact claim), with *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (accepting population statistics regarding the average height of women and men as establishing the disparate impact of minimum height and weight requirements).

44. 527 F. Supp. 229 (S.D.N.Y. 1981).

45. *Id.* at 231.

46. *Id.* at 232-33.

47. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

48. *Id.*

49. *Id.* at 802-05.

50. *Id.* at 802.

51. *Id.* at 802-05.

demonstrate that the defendant's proffered reason is actually a pretext for discrimination.⁵² This entails more than simply showing that the reason is false; she must show that the real reason for the decision was gender.⁵³

Given this basic framework, imagine a woman plaintiff who applied for a position in an area overwhelmingly staffed by men. The employer denies her application and hires a man for the job. Based on these facts alone, the plaintiff can establish a *prima facie* case of discrimination. The employer then points to differences between the qualifications of the plaintiff and the male applicant as a justification for the employment decision. The plaintiff responds by citing the pattern of gender segregation in the workplace as evidence of intentional discrimination against women. What is the court to make of this evidence?

The answer depends to a large degree on one's expectations regarding gender integration in the absence of deliberate discrimination by an employer. As in the disparate impact context, case law reveals a willingness on the part of judges to accept a benign explanation of gender segregation rooted in the voluntary choices of women and men rather than conclude that segregation is a product of discriminatory actions by the employer.⁵⁴

Perhaps the most notorious example of such reasoning can be found in *EEOC v. Sears, Roebuck, & Co.*⁵⁵ In the *Sears* case, the Equal Employment Opportunity Commission (EEOC) claimed that Sears had discriminated against women in the hiring of employees for commissioned sales jobs.⁵⁶ The EEOC argued that Sears had preferred men for the higher paying commissioned jobs while relegating women to noncommission jobs paying an hourly wage.⁵⁷ In support of its claim, the EEOC presented statistical evidence that women who had applied for sales jobs were significantly less likely than men to be hired for commission jobs.⁵⁸ In its defense, Sears argued that the preferences of the applicants could account for the gender disparity in hiring practices.⁵⁹ Indeed, the district court found that women "disliked the perceived 'dog-eat-dog' competition" of the commission jobs and preferred the more secure, noncompetitive atmosphere of the wage-based sales jobs.⁶⁰

52. *Id.* at 804-05.

53. *See id.* at 805; *see also* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) (stating that ultimate question for trier of fact is whether plaintiff has proved discrimination on basis of race).

54. Vicki Schultz has called this the "lack of interest" defense. Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1076 (1992). She explains that "employers seek to rationalize the patterns of segregation revealed by statistical evidence by arguing that such patterns resulted not from discrimination, but from protected class members' own lack of interest in the higher-paying jobs in which they are underrepresented." *Id.* (documenting courts' willingness to accept the lack of interest defense, particularly in gender discrimination cases but increasingly in race discrimination cases as well).

55. 628 F. Supp. 1264, 1305-08, 1352-53 (N.D. Ill. 1986).

56. *Id.* at 1278.

57. *Id.*

58. *Id.* at 1296-98. Between 1973 and 1980, for example, women comprised 61% of all full-time sales applicants at Sears, but only 27% of those hired into commissioned sales jobs. *See* Brief for the Equal Employment Opportunity Comm'n as Appellant at 7, *EEOC v. Sears, Roebuck, & Co.*, 839 F.2d 302 (7th Cir. 1988) (Nos. 86-1519 and 86-1621).

59. *EEOC v. Sears, Roebuck, & Co.*, 628 F. Supp. at 1305.

60. *Id.* at 1307.

As the *Sears* case makes clear, the ideology of choice offers an alternative understanding of sex segregation that undermines women's claims of discrimination. This happens in two ways. First, the possibility that gender segregation emerges as a product of women's choices undermines a plaintiff's ability to rely on statistical proof. Instead of simply showing a clear pattern created by employers' preferences and practices, the plaintiff must counter judicial assumptions about women's desire for certain types of work. Second, even assuming that women's preferences account for some part of gender segregation, the ideology of choice constructs those preferences as preexisting the workplace. The model does not allow for the possibility that women's preferences may be shaped at least in part by a pattern of discrimination for which the employer is directly responsible.

As these examples suggest, a strong conception of employee choice or agency constrains the scope of employer liability under both disparate impact and disparate treatment models of discrimination and, in turn, limits the effectiveness of anti-discrimination law in dismantling workplace segregation. Relying on the rhetoric of choice, courts regard segregated employment patterns as a product of individual preference rather than illegal discrimination.

IV. TITLE VII, WOMEN'S CHOICES, AND FEMINIST LEGAL THEORY

The limitations on the effectiveness of Title VII that stem from the embrace by courts of a liberal model of individual choice and state (or employer) neutrality seem a particularly ripe target for feminist critique. After all, feminists have long argued that the self that lies at the heart of liberal theory embodies assumptions about the scope of individual choice or agency that does not comport with women's selves under patriarchy.⁶¹ Accordingly, feminists have begun to examine in a range of different contexts the implications of an alternative conception of the self, one that assumes that women's (and men's) choices are both socially constructed and gendered.⁶² This Part reviews this work very briefly and then explores the implications of the analysis for gender segregation in the workplace with particular focus on the recently rekindled debate over the allocation of the costs of care work.⁶³

61. Even a liberal theorist like Mary Wollstonecraft recognized the significance of social constraints on gender roles. She wrote: "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative." Mary Wollstonecraft, *The Same Subject Continued*, in *VINDICATION OF THE RIGHTS OF WOMAN* 123, 129 (Miriam Brody Kramnick ed., Penguin Books 1978) (1792).

62. Feminist theorists sometimes express the relationship between the self and socially-constructive forces as the distinction between biological sex and culturally defined gender, a distinction perhaps first emphasized by Simone de Beauvoir in her claim: "One is not born, but rather becomes, a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature" SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley ed. & trans., Vintage Books 1989) (1949).

63. Of course, feminists have long studied the issue of work/family conflict. See, e.g., Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986). Professor Vicki Schultz's article *Life's Work*, 100 COLUM. L. REV. 1881 (2000), seems to have

The standard feminist critique of liberalism's assumptions about choice goes something like this: Liberal theory assumes that individuals enjoy a relatively robust and undifferentiated capacity for choice.⁶⁴ This assumption, in turn, informs economic theory, social policy, and conceptions of justice and fairness.⁶⁵ If, however, women and men are differently situated with respect to capacity for choice, then facially neutral social policies premised on assumptions of equal agency will in fact perpetuate gender hierarchy.⁶⁶ Conversely, taking into account the ways in which women are constrained differently from men can reveal situations in which often unstated assumptions about responsibility and choice contribute to women's inequality and suggest how public policy and law might best respond to such inequality.

Feminist accounts abound as to how, why, and to what extent women's choices might be different from men's. Some have characterized women's limited agency as a problem of patriarchy, broadly conceived. For example, Nancy Hirshmann has suggested that patriarchal rules constitute "not only . . . what women are allowed to do but . . . what they are allowed to *be* as well: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are."⁶⁷ Others have focused on the role of the state. For example, Catharine MacKinnon has argued that "[t]he State is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society."⁶⁸ Elaborating on the mechanism of state power, Deborah Rhode has suggested that "[t]he state does not simply respond to expressed desires; it plays an active role in legitimating, suppressing, or redirecting them. Attempts to challenge inequality through conventional democratic measures fall short when subordinate groups adapt or accommodate their preferences to the unequal opportunities available."⁶⁹ Still others have emphasized experiential differences between men and women. For example, Robin West posits that "[liberalism's] descriptive account of the phenomenology of choice . . . may be wildly at odds with the way women phenomenologically experience the act of consent."⁷⁰

triggered another round of debate within feminist circles. See, e.g., Joan Williams, *It's Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812 (2002) (responding to Schultz's article); a number of articles included in the Chicago-Kent Law Review's Symposium on Care Work, 76 CHI.-KENT L. REV. 1387 (2001).

64. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 29-35 (1993) (describing the subject of political liberalism as free in three respects: to determine their individual conceptions of the good; to regard themselves as self-authenticating sources of valid claims; and to take responsibility for their ends).

65. See *id.* at 33-34. Note that Rawls's third form of freedom explicitly links freedom (or choice) and responsibility for ends, thereby defining a foundational conception of justice under political liberalism. *Id.*

66. See, e.g., Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1696 (1997) (arguing that "the assumption that the self is adequately protected by negative liberties so as to enable her full participation in both public and private life is problematic not because it is inaccurate but because it implies a level of agency that, under patriarchy, may be more accurate for men than for women").

67. See Nancy J. Hirschmann, *Toward a Feminist Theory of Freedom*, 24 POL. THEORY 46, 52 (1996).

68. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 163 (1989).

69. Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1189 (1994).

70. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 92 (1987). West explains the implications of her assumptions as follows:

[I]f women "consent" to transactions not to increase our own welfare, but to increase

Whatever the foundation, these theoretical insights have yielded doctrinal and political critiques focusing on issues ranging from constitutional theory to criminal law.⁷¹ Curiously, however, the application of feminist critiques of agency to Title VII has been relatively limited. Kathryn Abrams has explored the possibility of applying a concept of women's limited agency as a means of interpreting the factual predicate of "unwelcomeness" in a sexual harassment claim under Title VII.⁷² Specifically, she suggests that "[m]aking . . . constrained forms of resistance visible in the context of sexual harassment trials would enhance women's ability to show pervasiveness or respond to evidence regarding their clothing or demeanor."⁷³ More broadly, Martha Chamallas has begun to explore the potential implications of structural and cultural domination theories to Title VII, noting that "[r]esearch of the last two decades supports the view that differences in the motivations or choices of individuals cannot adequately explain . . . persistent patterns of tokenism and segregation."⁷⁴ Her analysis of cultural domination theory, however, is, like Abrams's, confined to sexual harassment cases.⁷⁵

With these limited—though important—exceptions, feminists have left largely unassailed the liberal paradigm connecting responsibility and choice in Title VII doctrine. Indeed, although feminists often disagree on the fairness and effectiveness of employment policy alternatives, much feminist work on employment policy tends to assume rather than to disrupt the underlying liberal assumption connecting choice and fairness.

For example, feminists have recently renewed their focus on "care work," defined as the work of caring for the family, especially children, and the burden such work imposes on women's performance in the paid labor force. In the current debate over policy alternatives, the concept of social construction tends to be subordinate to the standard paradigm of choice. This is surprising given that the debate over care work implicates rather directly the issues of women's agency with respect to the acquisition of human capital, job choice, and attachment to the workforce. Yet, feminists whose work has been among the most important and influential in this area have not fully exploited theories of limited agency developed in other contexts. Instead, most seem to assume, if only implicitly, the liberal model prioritizing individual choice.

the welfare of others—if women are "different" in this psychological way—then the liberal's ethic of consent, with its presumption of an essentially selfish human (male) actor and an essentially selfish consensual act, when even-handedly applied to both genders, will have disastrous implications for women.

Id.

71. See, e.g., Higgins, *supra* note 66, at 1662-70 (discussing implications of women's limited agency for constitutional theory); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 34-43 (1991) (discussing women's agency under conditions of oppression in the context of domestic violence).

72. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 364-66 (1995).

73. *Id.* at 365-66.

74. Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2372 (1999).

75. See *id.* at 2402-09.

For example, in her important work on gender segregation and the lack of interest defense,⁷⁶ Professor Vicki Schultz rejects the idea that job aspirations and preference pre-exist women's entry into the marketplace.⁷⁷ Instead, she begins from an insight regarding the social construction of women's work choices through workplace conditions and employer policies.⁷⁸ In Schultz's view, "[s]ex segregation persists not because most women bring to the workworld fixed preferences for traditionally female jobs, but rather because employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs."⁷⁹ Schultz acknowledges that men and women are socialized differently from a young age but contends that this socialization is not monolithic.⁸⁰ Rather, women's preferences change in response to the marketplace and the workplace, and continue to change throughout their lives.⁸¹

On one hand, Schultz seems to embrace a thoroughgoing notion of social construction meant to challenge what might otherwise appear to be the autonomous, agentic expression of preference by women for certain types of jobs and career paths. On the other hand, she seeks to shift responsibility to the employer for imposing constraints on women's choices. Given the liberal premises of Title VII, she must characterize the construction of women's preferences as a departure from employer neutrality rather than a product of women's agency. Thus, Schultz retreats from her more subtle social constructionist assumptions to revive a notion of agency that fits more easily within the liberal paradigm, insisting that women "act reasonably and strategically within the constraints of their organizational positions in an effort to make the best of them."⁸²

Schultz's implicit acceptance of the liberal paradigm underlying Title VII is reflected in her selection of examples of the ways employers construct women's work preferences. Schultz focuses on two issues: low expectations for advancement and promotion in traditionally female jobs; and proprietary expectations in male-dominated jobs (often translated into sexual harassment in the workplace).⁸³ Significantly, in this early work she does not talk about the way the workplace affects women as mothers or simply as workers with disproportionate domestic responsibilities.

76. Schultz's work in this area includes Schultz, *Telling Stories*, *supra* note 8; Schultz & Petterson, *supra* note 54; *Life's Work*, 100 COLUM. L. REV. 1881 (2000) [hereinafter Schultz, *Life's Work*].

77. See Schultz, *Telling Stories*, *supra* note 8, at 1756. She argues that "[b]y assuming that women form stable job aspirations before they begin working, courts have missed the ways in which employers contribute to creating women workers in their images of who 'women' are supposed to be." *Id.*

78. *Id.* at 1757 (noting that "women develop their work preferences only in the context of and in response to structural features of the workworld itself").

79. *Id.* at 1816.

80. *Id.* at 1816-17.

81. See *id.* at 1821-22.

82. *Id.* at 1825.

83. *Id.* at 1827-39.

In her more recent work, Schultz has addressed the issue of care work if only to deny or downplay its role in structuring women's employment choices. In *Life's Work*, Schultz criticizes a particular feminist response to the work/family problem, which she terms "family wage ideology."⁸⁴ Schultz explains such "ideology" as follows: "[i]n policy terms, [family wage thinking] finds expression in the proposition that it is women's position within families, rather than the workworld, that is the primary cause of women's economic disadvantage, and hence should be the primary locus for redistributive efforts."⁸⁵ Schultz disagrees. Citing various empirical studies, she insists that women's job segregation and lack of attachment to the work force is a product of employment discrimination rather than disproportionate domestic responsibilities.⁸⁶ According to Schultz's reading of this literature, "socially-constructed features of the workworld help create the very gender differences (manifested in work aspirations, employment patterns, and familial divisions of labor) that human capital theory attributes to women themselves."⁸⁷ Feminist proposals for joint property or for paid housework, Schultz insists, simply reify the gender specific allocation of responsibilities within families and gender segregation of the work force.⁸⁸ In other words, forces other than women's preferences for paid work versus care work determine the balance women strike between the two. Given a *choice*, Schultz implies, women's work patterns would be similar to men's.

Professor Joan Williams, another important participant in this debate, offers a different account of women's choices with respect to care work and paid work.⁸⁹ In *From Difference to Dominance to Domesticity*, she argues that "[t]he institutional arrangements people face in their work and family lives include, first, workplaces structured around an ideal worker who is not a primary caregiver."⁹⁰ Williams acknowledges that women may do more care work than men because they have a preference for it.⁹¹ At the same time, Williams emphasizes the ways in which women's choices with respect to care work and market work are constrained by institutional structures both within the workplace and outside of it. She notes that a "woman might well describe her decision to quit as [a] 'choice,' when what she really means is that her employer is inflexible and her children's father should help shoulder the responsibility of caring for them."⁹² Or "a mother might well

84. Schultz, *Life's Work*, *supra* note 76, at 1884 (defining family wage ideology as "'the sex/gender/family system that prescribes earning as the sole responsibility of husbands and unpaid domestic labor as the only proper long-term responsibility of women'") (quoting LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935*, at 53 (1994)).

85. *Id.*

86. *Id.* at 1903-04.

87. *Id.* at 1904.

88. *Id.* at 1905-08.

89. Williams has written extensively in this area. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305 (1999); Joan Williams, *From Difference to Dominance to Domesticity: Care As Work, Gender As Tradition*, 76 CHI.-KENT L. REV. 1441 (2001); Joan Williams, *It's Snowing Down South: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812 (2002) (responding to Schultz's *Life's Work*, *supra* note 76).

90. Williams, *From Difference to Dominance to Domesticity*, *supra* note 89, at 1474.

91. *Id.* at 1475.

92. *Id.*

say she wishes she could quit—when what she really means is that she wishes she had high-quality childcare.”⁹³ Hence, she does not disagree with Schultz that workplace factors influence women’s choices. Rather, she simply emphasizes that other factors such as family dynamics, norms of domesticity, or even women’s preferences play a role as well.

In her essay *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted*,⁹⁴ Professor Mary Ann Case takes yet a third approach. The essay does not directly address the issue of gender segregation in the workplace and its connection to women’s care work. Rather, Case criticizes proposals (made by others including Joan Williams) to shift the responsibility and cost of caring for children away from parents and to employers or the state.⁹⁵ Nevertheless, her fairness-based arguments reveal an underlying account of women’s agency with respect to care work and market work. To a much greater extent than either Schultz or Williams, Case is willing to assume that parents make relatively unencumbered choices regarding family creation and the care work that comes with those obligations. She does not focus on the allocation of responsibility between fathers and mothers except to say that men’s resistance to taking on more care work must be overcome.⁹⁶ Emphasizing the inequality between men who have children (and wives to care for them) and childless women, Case insists that shifting the costs of care work done primarily by women to the employer, for example, will result in a disproportionate burden on women who have chosen not to take on those care responsibilities.⁹⁷

Notice how in each of these three accounts, the author’s assumptions about choice drive not only the story about care work and market work that she embraces, but the policy implications that flow from the story. Williams assumes that preferences are socially constructed and gendered and that family arrangements are relatively fixed. In other words, she takes for granted that people will have children and that the work of caring for them must get done.⁹⁸ These assumptions lead her to the conclusion that accommodation of care work is appropriate and

93. *Id.*

94. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

95. See *id.* at 1957 (criticizing Williams for her failure to acknowledge that “in female-dominated jobs, like those so many women occupy, ‘the existing employee’ on whom the ‘excess work’ resulting from schedules favoring mothers on the job is ‘dump[ed]’ are other women, most likely women without children”).

96. *Id.* at 1756.

97. *Id.* at 1756-62.

98. Williams makes this assumption explicitly and strategically as a way of bridging the gap between feminist advocating integrationist approaches and women who continue to define themselves largely in terms of domesticity. Joan Williams, *supra* note 63, at 829. Williams explains that:

If the goal is to create an effective coalition to improve the economic position of women, one key is to bridge the divide between women with a workplace identity and women without one. This requires an empathetic stance in which women identified with a job are open to the truths of women without jobs, and family-identified women are open to truths of women who retain commitments both to family work and market work.

Id.

just. For Williams, a variety of social forces combine to deprive women of choice and therefore the cost of a remedy is justly allocated broadly.

Schultz, like Williams, acknowledges that women's choices are constrained, but she roots those constraints primarily in the discriminatory behavior of employers.⁹⁹ Employment structures constrain women's choices and therefore the cost of integrationist policies may be imposed justly on employers.¹⁰⁰ Her effort to downplay other constructing forces outside the workplace seems to reflect a concern that acknowledging such forces necessarily shifts responsibility from employers to women themselves. This conclusion follows, of course, only if one accepts the liberal paradigm inevitably linking choice and responsibility.

In contrast, Case seems to assume that preferences reflected in family formation are fully an expression of individual choice.¹⁰¹ Hence, any associated workplace consequences are simply a product of that choice, not an unfair penalty or act of discrimination.¹⁰² Conversely, any reallocation of the costs of parenting may be unjust to the extent that those costs are borne by workers who have made the choice not to undertake such responsibilities.¹⁰³

Close reading of these works reveals at least two distinct uses of the concept of choice in relation to public policy, one empirical and the other fairness-based. The empirical strand considers why women make the choices that they make, or how women's choices would change under a given policy or rule. The fairness/justice strand ties the quality of choices available to women to the availability of a remedy, asserting either that women lack choice and therefore deserve a remedy or that women exercise choice and therefore must live with the consequences.

At times, Schultz and Williams seem to disagree over the empirical description of choice—what would women choose if their options were better all around? For example, in *Life's Work*, Schultz criticizes feminists advocating a family-based approach for “rely[ing] on the human capital literature to assert that it is women's disproportionate responsibility for housework and child care that accounts for our lower wages and our inferior position in the workplace.”¹⁰⁴ Williams counters

99. See Schultz, *Life's Work*, *supra* note 76, at 1904.

100. *Id.* Emphasizing the role of work-based structures, Schultz explains:

[It] creates greater possibilities for change. If the sources of women's disadvantage lie not in sociobiological force that commit women more heavily to child care and housework but instead in the political economy of paid work, we can challenge the sex bias in allegedly gender-neutral forces in labor markets and work places. We can create more empowering gender arrangements by demanding work and working conditions that will give women more economic security, more political clout, more household bargaining power, and perhaps even more personal strength with which to pursue our dreams.

Id. at 1904-05.

101. Case's assumptions about the choice to become a parent or to assume care work is not explicit but follows from her comparison of child care responsibilities to other uses of leisure such as studying the history of feminism or writing poetry. See Case, *supra* note 94, at 1767.

102. *Id.* at 1754. Interestingly, Case's linking of choice and fairness with respect to the accommodation of care responsibilities of children has the effect of privileging her own claim for accommodation of the burden she bears in caring for her mother, a care burden that she has accepted but not chosen. *Id.* Case describes this burden extensively in the notes of the piece. *Id.* at 1754 n.5.

103. *Id.* at 1757-59.

104. Schultz, *Life's Work*, *supra* note 76, at 1903.

that "[t]he important insight that workplace dynamics play a role in creating women's employment preferences does not prove that workplace dynamics alone account for women's economic position."¹⁰⁵ Williams also criticizes Schultz's dichotomy between "'scholars [who] argue that women's economic disadvantage arises from their primary commitment to their families' and scholars [(like Schultz herself)] who argue that women's economic disadvantage arises 'from sexist dynamics in labor markets and firms.'"¹⁰⁶

At other times, they seem to link the issue of choice to fairness, at least implicitly. For example, Schultz criticizes feminists and human capital theorists such as Mary Becker for treating women as "inauthentic workers."¹⁰⁷ Such a charge, however, depends upon the value judgment that the authentic worker is one whose priority is wage work rather than any one of a range of other commitments. Williams, in contrast, argues:

[T]he crucial point—politically, strategically, and ethically—is that a variety of different social forces feed into the choices made by women, including not only employer behavior but also the lack of social supports for childrearing and gender performance norms. We need not adopt a simplistic model that employer behavior alone creates women's "choices". We need only point out that every choice currently available is deeply flawed . . .¹⁰⁸

Case's use of choice, in contrast, is all about the justice strand. For example, she cites a study revealing that women with children earn 73% of men's wages while childless women earn 90% of men's wages.¹⁰⁹ Her question is "How do you account for the other 10%?" Although this is an important question, Case's overriding focus is on the consequences to childless women of efforts to reduce the 27% wage gap suffered by women with children.¹¹⁰ Case's priorities make sense from a fairness standpoint only if one accepts a strong connection between justice and individual choice. That is, for Case, the most aggrieved group in this analysis is not the group with the lowest wages (mothers) but the group that has chosen to avoid the obligations of motherhood and are nevertheless *unjustly* penalized relative to men.¹¹¹

If feminist critiques of agency are correct, however, the exercise of choice is deeply problematic on a moral level as a measure of fairness. On a practical level, allocating the costs of care work according to a liberal model of choice is very likely to operate to the systematic disadvantage of women. Of course, debates over the empirical dimensions of women's exercise of choice within our culture are necessary and productive to the extent that they yield insight into individuals' likely responses to policy changes. How will women respond to policies recognizing the market value of housework within marriage? To what extent will enhanced supports for parenting (work that is currently mostly done by women) reinforce traditional patriarchal structures within marriage? These are obviously important questions that need to be answered. At the same time, feminists must consciously

105. Joan Williams, *supra* note 63, at 824-25.

106. *Id.* at 824 (quoting Schultz, *Life's Work*, *supra* note 76, at 1900).

107. Schultz, *Life's Work*, *supra* note 76, at 1892-93.

108. Joan Williams, *supra* note 63, at 832-33.

109. Case, *supra* note 94, at 1759 n.17.

110. *Id.*

111. *Id.*

and carefully separate these empirical questions from conceptions of justice that link responsibility and choice. Feminists should begin instead from an assumption that the concept of choice is deeply gendered and that justice-based theories that deploy choice as a limit on redistribution will not lead to gender equality.

V. CONCLUSION

This essay has only begun to answer the question posed: Why has gender segregation in the work force persisted so stubbornly in the face of Title VII? It has suggested that the ideology of choice, in effect, detaches gender segregation from gender discrimination by limiting the reach of both disparate impact and disparate treatment theories under Title VII. Feminist conceptions of women's unequal agency have helped to reveal the gendered implications of this ideology of choice. Yet, feminist theorists must move beyond a focus on the ways in which women's agency is circumscribed to challenge the underlying link between choice and fairness. Breaking this link, in turn, may lead feminists to articulate alternative accounts of justice and human flourishing that are more likely to lead both to gender integration and gender equality than those prevailing under our current liberal model.