

Spring 2013

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Online ISSN: 2643-7759

### Recommended Citation

Nicole B. Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 FIU L. Rev. 447 (2013).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol8/iss2/13>

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# The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women

*Nicole Buonocore Porter\**

## ABSTRACT

In 2013, fifty years after the Equal Pay Act guaranteed women equal pay for equal work, almost fifty years since Title VII made discrimination based on sex unlawful, thirty-five years since the Pregnancy Discrimination Act made it unlawful to discriminate against women because of pregnancy, and nineteen years after the Family and Medical Leave Act provided twelve weeks of unpaid leave for some caregiving reasons, there is still a significant achievement gap between men and women in the workplace. Women still make less money, and rise more slowly and not as high in workplace hierarchies. Why? The common narrative states that because these laws have given women access to formal equality for many years, the fact that women have not achieved equality in the workplace must be blamed on something else. Specifically, the “something else” relied upon by society, the media, employers, and courts, is that women’s own choices are to blame for the achievement gap. The blame game asserts that women’s relative lack of success in the workplace is caused by three interrelated choices: (1) women’s decision to not pursue high-pressure, high-status professions, or jobs that are seen as “men’s work”; (2) women’s unwillingness to negotiate on their own behalf; and (3) women’s decision to devote more time and effort to caregiving and homemaking tasks.

## I. INTRODUCTION

Despite presidential-hopeful Mitt Romney’s reference to “binders full of women”<sup>1</sup> available to work in high-level government jobs,

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there is ample evidence that there is still a significant achievement gap between men and women in the workplace. “Women as a group earn less than men, progress more slowly through the ranks of most businesses, and rarely rise as high.”<sup>2</sup> Whether we call it a glass ceiling,<sup>3</sup> a maternal wall,<sup>4</sup> or some other metaphor for women’s comparative lack of success in the workplace, the reality is that women simply do not progress as high up the corporate ladder as men, nor do they progress as quickly as men in the workplace.<sup>5</sup> And in almost all industries and occupations, women make less than men working in similar jobs.<sup>6</sup>

Because there are several laws designed to end discrimination against women the oldest of which, the Equal Pay Act of 1963,<sup>7</sup> is fifty years old — most people assume that these laws have successfully

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<sup>1</sup> As many will undoubtedly recall from the 2012 presidential campaign, during the third presidential debate, Romney stated that when he was Governor of Massachusetts, he was unhappy with the number of women in high-ranking government positions, and he allegedly requested to have more female candidates to consider. During the debate, he said that his aides brought him “binders full of women,” a phrase that caused criticism by some, and laughter by almost everyone else.

<sup>2</sup> LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* 104 (Princeton Univ. Press 2003).

<sup>3</sup> There are many different definitions of glass ceiling. Professor Christine Jolls has defined it as follows: if barriers exist in the workplace that “block the advancement of qualified women, then a glass ceiling is present.” Christine Jolls, *Is There a Glass Ceiling?* 25 *HARV. WOMEN’S L.J.* 1, 1 (2002) (citations omitted). Another definition of glass ceiling “refers to situations where the advancement of a qualified person within the hierarchy of an organization is stopped at a lower level because of some form of discrimination based on a protected characteristic,” such as sex. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 *SMU L. REV.* 17, 19 (2010); *see also* M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 *HOFSTRA LAB. & EMP. L.J.* 61, 63-64 (2003) (defining the glass ceiling as a “metaphor that describes hidden barriers that prevent individuals from advancing upward in their organizations into high-level managerial positions”); Diane L. Bridge, *The Glass Ceiling & Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 *VA. J. SOC. POL’Y & L.* 581, 581 (1997) (defining the glass ceiling as the “transparent promotion barrier that prevents qualified women from reaching the highest levels in their professions”).

<sup>4</sup> Professor Joan Williams coined this term. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 69-70 (Oxford Univ. Press 2000).

<sup>5</sup> *See, e.g.*, Jolls, *supra* note 3, at 15.

<sup>6</sup> Eisenberg, *supra* note 3, at 25.

<sup>7</sup> 29 U.S.C. § 206(d) (2006). Title VII of the Civil Rights Act of 1964, which prohibits all types of employment discrimination based on sex as well as race, color, religion, and national origin, is almost fifty years old. 42 U.S.C. § 2000e-2 (2006). Congress passed the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006), which amended Title VII to define the term “because of sex” to include “because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” *Id.* Even the youngest of the statutes protecting women’s employment rights, the Family Medical Leave Act, 29 U.S.C. § 2601 (1994), et seq., was passed in 1994 and is almost twenty years old.

broken down barriers for women in the workplace, and therefore something else must be to blame for women's lack of achievement.<sup>8</sup> This article explores the "blame game," the prevalent<sup>9</sup> belief that women's own choices are responsible for the achievement gap between men and women in the workplace. This common narrative blames the achievement gap on three distinct but related "choices" women allegedly make.

First, the blame narrative asserts that women deliberately do not choose high-pressure, high-status occupations or jobs that are seen as "men's work." Second, regardless of occupation, women's pay is less than men's pay in similar jobs allegedly because many women choose not to negotiate their starting salary or raises. Third, the narrative maintains that women's decisions to devote more time to caregiving and homemaking influence their career choice, in that they are less likely to take positions that require excessive hours, inflexible schedules, or frequent travel,<sup>10</sup> and influence their performance on the job, which can in turn influence their pay and contribute to the pay gap.

In other words, instead of looking at possible discriminatory reasons for the achievement gap between men and women, society, the media, employers, and courts blame women themselves.<sup>11</sup> To be clear, plenty of scholars have discussed this "rhetoric of choice" and demon-

<sup>8</sup> See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html?pagewanted=all> (stating that the barriers for women in the workplace are down, there is parity in education, women are getting high-status professional jobs, but then, "suddenly, they stop" as only 16% of partners in law firms are women, only 16% of corporate officers are women, and only eight fortune 500 companies are run by women); Judith S. Kaye, *Moving Mountains: A Comment on the Glass Ceiling and Open Doors Report*, 65 FORDHAM L. REV. 573, 574 (1996) (stating that despite the fact that barriers for lawyers are down, women attorneys are still encountering many of the same obstacles as decades ago).

<sup>9</sup> See, e.g., JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 2* (Harvard Univ. Press 2010) ("Conservatives argue that what keeps women back today is not workplace discrimination but the choices they make in family life. Liberal feminists join in, exhorting women to 'man up' and insist on equality within the household."); see also Browne & Giampetro-Meyer, *supra* note 3, at 68 (stating that some writers assume that choices women make account for almost the entire glass ceiling phenomenon, but also noting that others assume that employers' discriminatory practices constitute most of the problem).

<sup>10</sup> But see Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1820 (1990) (indicating that studies show that contrary to conventional wisdom, sex segregation does not persist because women's commitment to the family leads them to choose lower-paid, female-dominated occupations).

<sup>11</sup> Some scholars argue that too much emphasis is placed on workplace discrimination as an excuse for the glass ceiling rather than looking at the decisions women have made. Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 977 (1995). *Id.* at 978-79 (arguing that it is seldom considered that the gender pay gap may be a reflection of real differences between men and women).

strated — not always critically<sup>12</sup> — that society tends to blame women for their own lack of success in the workplace.<sup>13</sup> However, most of that scholarship focuses on one of the three choices that women make. For instance, Vicki Schultz<sup>14</sup> and others have discussed how women’s alleged “choice” of occupation has led to both gender segregation as well as women’s relative lack of success in the workplace. Linda Babcock and Sara Laschever, in their popular book *Women Don’t Ask*,<sup>15</sup> discuss how women’s “choices” to not negotiate has contributed significantly to the pay gap.<sup>16</sup> Joan Williams has also discussed the common narrative that women’s success in the workplace is negatively affected by their “choices” related to caregiving, either the choice to opt-out of the workforce completely or to “choose” to put family first and career second.<sup>17</sup> Where this article differs is that it is the first attempt to bring all three “choices” together, and to demonstrate that these three choices work in tandem to encompass all of the ways in which women’s achievement in the workplace falls short of men’s.

One *huge* disclaimer is in order. I believe that the majority of these “choices” are not freely-made, autonomous decisions. Rather, all three of these choices are, to a greater or lesser extent, constrained — women are constrained in their decisions by gender norms within their families, by society’s expectations, and most importantly, by workplace attitudes and structures that operate to discriminate against women, forcing them into decisions that contribute to the achievement gap between men and women. Therefore, I believe that it is unjust to blame the achievement gap on women’s choices when these decisions are not truly autonomous.<sup>18</sup> Because I could not make this normative argument in the relatively short space of this symposium article, I will leave the discussion of the “autonomy myth” for an-

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<sup>12</sup> *Id.* at 971.

<sup>13</sup> See, e.g., WILLIAMS, *supra* note 9, at 153; Belkin, *supra* note 8; BABCOCK & LASCHEVER, *supra* note 2, at 114; Schultz, *supra* note 10, at 1754.

<sup>14</sup> See generally Schultz, *supra* note 10.

<sup>15</sup> BABCOCK & LASCHEVER, *supra* note 2.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> WILLIAMS, *supra* note 9, at 10; see also Belkin, *supra* note 8; Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 384 (2010) [hereinafter Porter, *Why Care?*]; Browne & Giampetro-Meyer, *supra* note 3, at 71 (stating that scholars agree that choices women make about how to spend their time affect their ability to rise to a high-level position); Catherine J. Weinberger, *In Search of the Glass Ceiling: Gender & Earnings Growth Among U.S. College Graduates in the 1990s*, 64 INDUS. & LAB. REL. REV. 949, 949 (2011) (stating that “it is a well-known fact that the gender gap in earnings tends to be larger among older workers is sometimes attributed to gender differences in the rate of accumulation of human capital due to family responsibilities”).

<sup>18</sup> I have made a similar argument regarding caregiving and regarding negotiating for pay. Porter, *Why Care?*, *supra* note 17, at 389; Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 195 (2011).

other day and another paper. Thus, this article is, by necessity, purely a descriptive one, demonstrating to the reader that the common narrative blames women's relative lack of workplace success on the choices women are alleged to have made and are often believed to have freely made.

Part II of this article will demonstrate how the rhetoric of choice is used to blame women for their relative lack of achievement in the workplace. It will proceed in three sub-parts. First, courts and employers have argued that much of what seems like discrimination against women, causing either job segregation or the glass ceiling, is actually caused by women choosing to avoid certain careers; either because they want to avoid high-pressure, high-status jobs, or because they want to avoid jobs that are traditionally seen as "men's work." The second sub-part will address the pay gap, discussing the case law and literature where employers, courts, and scholars argue that part of the reason the pay gap exists is because women choose not to negotiate their salaries and raises. The third and final sub-part will discuss the most frequent use of the rhetoric of choice — the argument that women do not progress as far in the workplace, or make as much money, because of the choices they make to spend more time than men on caregiving and homemaking tasks. Part III will then turn to how these three choices converge, using a story to demonstrate how the intersection of these three choices affect the achievement gap between men and women. Finally, Part IV will conclude.

## II. THE RHETORIC OF CHOICE<sup>19</sup>

As stated by psychologist Virginia Valian in her book, "Why So Slow," "men dominate virtually every prestigious or high-paying profession in the United States."<sup>20</sup> "It is undeniably true that women do not attain the very highest levels in business hierarchies at a level commensurate with their representation in the general labor force[.]"<sup>21</sup> The achievement gap between men and women is also evidenced by the fact that women *still* suffer a wage penalty that is not explained by "market characteristics, working conditions, individual characteristics,

<sup>19</sup> Some of this discussion is derived from my prior work. See Porter, *Why Care?*, *supra* note 17, at 375 (discussing the rhetoric of choice regarding caregiving responsibilities).

<sup>20</sup> VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 14 (1999).

<sup>21</sup> Browne, *supra* note 11, at 1064; Weinberger, *supra* note 17, at 967 (stating that the glass ceiling metaphor sometimes refers to gender differentials at the top of the hierarchy). Of course, there are some who believe that what causes the biggest obstacle for women is not just being a woman, but rather, being a mother. Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 *HASTINGS L.J.* 1267, 1296 (2012) [hereinafter Williams, *Ginsburg*].

children, housework time, and observed productivity.”<sup>22</sup> Although the amount of the gap varies, virtually every study reveals some pay gap.<sup>23</sup>

As stated above, because most people agree that overt forms of discrimination have decreased significantly — if not been virtually eliminated — since the passage of Title VII and other laws protecting women, most people believe something else is to blame for women’s lack of success in the workplace.<sup>24</sup> In this Part, I demonstrate that women’s relative lack of success in the workplace is blamed on their own choices.

The rhetoric of choice is a powerful one in our society. Liberal theory emphasizes that we are all autonomous individuals, engaging in freely-made decision-making.<sup>25</sup> Similarly, Law and Economics’ “rational choice theory” argues that all humans are motivated by self-interest and therefore, if a person engages in an action, it must be in his or her self-interest.<sup>26</sup> Thus, employers, courts, scholars, and the media find it fairly simple to blame women’s fate in the workplace on the choices women have made. Whether the choices are regarding occupation, whether to negotiate, or how to divide time and energy between work and family, the story told is that women make choices that in turn affect their success in the workplace.<sup>27</sup> This Part will discuss those choices.

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<sup>22</sup> Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 582 (2006).

<sup>23</sup> And even a small but consistent pay gap (e.g., five percent) is problematic. VALIAN, *supra* note 20, at 189-90 (“Only 100 percent parity is equality and only equality is good enough. The demands of justice are clear. No difference based on sex is acceptable.”).

<sup>24</sup> MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 14 (Wolters Kluwer, 3d ed. 2013) (“The old notion that women are not intelligent enough or lack the moral accountability to be leaders in business, politics, or the academy has been replaced by justifications entered on women’s choice.”).

<sup>25</sup> Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 150-51 (1998).

<sup>26</sup> Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 441 (2001).

<sup>27</sup> Joan C. Williams, *Tough Guise*, in 9 ISSUES IN LEGAL SCHOLARSHIP Iss. 2 Art. 11, Legal Feminism Now 1 (2011) [hereinafter Williams, *Tough Guise*] (stating that: (1) in the business community, people still assert that women lead differently than men and are more focused on relationships, and (2) newspapers perpetually announced a new trend of women opting out when they find out they have different values than men).



A. The “Choice” of Occupation<sup>28</sup>

Despite much progress,<sup>29</sup> occupational segregation in this country is still at very high (almost staggering) levels.<sup>30</sup> As stated by Professor Vicki Schultz: “Social science research has documented, and casual observation confirmed, that men work mostly with men, doing ‘men’s work,’ and women work mostly with women, doing women’s work.”<sup>31</sup> Additionally, it is well known that occupational segregation has consequences for women workers because work done by women traditionally pays less and has less status.<sup>32</sup> This is true despite the fact that sex segregation is arguably the primary evil that Title VII aimed at correcting.<sup>33</sup>

This occupational segregation could be blamed on one of two things: (1) either women are not interested in men’s work, whether those jobs are blue collar “men’s work” or high-status, professional jobs that require substantial amounts of ambition and hard work; or (2) employers are not hiring women, or are putting up barriers for women’s entry into those positions.<sup>34</sup> The blame narrative asserts that women are choosing “women’s work” instead of “men’s work.”<sup>35</sup> When these cases are litigated, this is called the “lack of interest” de-

<sup>28</sup> To be clear, some argue that it is not just the “choice” of occupation that causes the glass ceiling — it is also women’s behavior once on the job. In other words, even when women are working in male-dominated occupations, some argue that they are less competitive and less “single-minded about acquiring resources,” and that these things contribute to their relative lack of success. Browne, *supra* note 11, at 980.

<sup>29</sup> Eisenberg, *supra* note 3, at 23 (stating that in 2007, women were 51% of all employees in management, professional, and related occupations and they were 33% of all lawyers and 43% of all judges, magistrates, and other judicial workers).

<sup>30</sup> See generally Schultz, *supra* note 10, at 1750; Bridge, *supra* note 3, at 593 (stating that occupational segregation has existed throughout the history of the United States). *But see* Eisenberg, *supra* note 3, at 22-23 (stating that, although occupational segregation still exists and women are underrepresented in managerial positions, many professions have become more integrated).

<sup>31</sup> Schultz, *supra* note 10, at 1751.

<sup>32</sup> *Id.*; see also Bridge, *supra* note 3, at 593 (stating that women are still heavily concentrated in lower paying and less prestigious occupations traditionally dominated by women); see also *id.* at 597 (stating that women are still heavily concentrated in occupations in which women have been overwhelmingly employed since the 1950s).

<sup>33</sup> Schultz, *supra* note 10, at 1778. There is also evidence that Congress intended sex discrimination to be taken as seriously as the other protected classes. *Id.* at 1778, n.151.

<sup>34</sup> Browne & Giampetro-Meyer, *supra* note 3, at 73 (giving an example of either women choosing or employers forcing them into occupations that require the ability to help others get along).

<sup>35</sup> Of course, some might back date the decision-making even more and argue that women are not only choosing women’s work but that they are also less likely to “choose the most remunerative technical college majors.” Weinberger, *supra* note 17, at 950.



fense, and if the court accepts the defense, it is a complete defense to liability.<sup>36</sup>

The most famous<sup>37</sup> of the “lack of interest” cases is *EEOC v. Sears Roebuck & Co.*<sup>38</sup> In this case, the EEOC sued Sears, alleging that Sears has discriminated against women by not hiring them into the higher-paying commission sales jobs (selling appliances, draperies, and other home improvement products and services) and instead only employed them in the sales jobs that did not pay commission (such as clothes, shoes, etc.).<sup>39</sup> The EEOC used statistics to prove their claim, and their statistical data showed that Sears had significantly underhired women sales applicants for the more lucrative commission sales positions, even after controlling for potential sex differences in qualifications.<sup>40</sup> The judge refused to credit the statistics, stating that they were “virtually meaningless” because they failed to account for the fact that women were not as interested in the higher-paying commission sales jobs and preferred the lower-paying, non-commission jobs.<sup>41</sup> In other words, women were underrepresented in the higher-paying jobs because they “chose” to not apply for them. According to the judge, women chose the lower-status and lower-paying positions because their feminine traits, such as being friendly, cooperative, and nurturing, conflicted with the requirements of the higher-paying sales jobs, which required employees to be aggressive and assertive.<sup>42</sup>

In her article, Vicki Schultz studied all of the published decisions since 1965 addressing the lack of interest defense.<sup>43</sup> The results are illuminating and confirm that there is a strong focus on the concept of choice. Interestingly, Schultz first noted that this defense does not succeed in the race context. In fact, in two Supreme Court race discrimination cases, *Teamsters*<sup>44</sup> and *Hazelwood*,<sup>45</sup> the employers defended the systemic race discrimination claims by arguing that racial minorities were not as interested in the better paying “line driver” positions in *Teamsters* or the school teacher positions in the *Hazelwood*

<sup>36</sup> Schultz, *supra* note 10, at 1780.

<sup>37</sup> *Id.* at 1753 (stating that fewer cases had received as much attention or provoked as much controversy as the *Sears* case).

<sup>38</sup> 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd* 839 F.2d 302 (7th Cir. 1988).

<sup>39</sup> Schultz, *supra* note 10, at 1752. For instance, women constituted 61% of all full-time sales applicants but only 27% of the commission sales workers. In contrast, women made up approximately 75% of the non-commission sales force. *Id.* at n.6.

<sup>40</sup> *Id.* at 1752.

<sup>41</sup> *Id.*

<sup>42</sup> *Sears*, 628 F. Supp. at 1302; *see also* Schultz, *supra* note 10, at 1804 (discussing details of the *Sears* case).

<sup>43</sup> Schultz, *supra* note 10, at 1754.

<sup>44</sup> *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977).

<sup>45</sup> *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 (1977).

case. In both cases, the Supreme Court rejected a per se lack-of-interest defense and required the employer to prove that minorities were not interested in those positions.<sup>46</sup>

In *Teamsters*, the Court rejected the employer's argument that minority employees did not apply for those jobs because they were not interested. Instead, the Court stated that most minority employees would have been deterred from applying for these positions because the employer's discriminatory practices were well known and the minority employees would have therefore assumed that applying for those positions was a futile gesture.<sup>47</sup> Similarly, in *Hazelwood*, under a slightly different analysis, the Court also rejected the lack of interest defense in the race context.

Similar to the Supreme Court cases, lower court cases also reveal a difference between how race is addressed versus how sex is addressed. In race segregation cases, there is a presumption that racial segregation is attributed to historical labor market discrimination.<sup>48</sup> The courts seem to recognize in race cases that preferences are shaped by jobs historically open to black workers, as well as their experiences in the workplace.<sup>49</sup> But in sex cases, courts use different frameworks than for race discrimination cases, and the result is that defendant employers win on the "lack of interest" argument in sex cases over 40% of the time.<sup>50</sup> In other words, almost half of all courts blame women for sex segregation.<sup>51</sup>

One prominent difference between race and sex cases is how the courts handle evidence of past employer discrimination. Courts note that the evidence of past discrimination (especially if it is well-known) indicates that minority employees would not apply for those jobs because they would know that doing so would be futile. This "futility" argument is often successful in race discrimination cases.<sup>52</sup> However, in sex discrimination cases, evidence of past discrimination is not persuasive<sup>53</sup> because courts believe that past discrimination was also based on women's choices. Even more liberal courts are skeptical that past generations of women would have wanted to work in non-

<sup>46</sup> Schultz, *supra* note 10, at 1759.

<sup>47</sup> *Id.* at 1760.

<sup>48</sup> *Id.* at 1770.

<sup>49</sup> *Id.*; see also *id.* at 1771-75 (discussing the systemic race discrimination cases where the employer argued that minorities were not interested in the higher pay, higher status jobs).

<sup>50</sup> *Id.* at 1776.

<sup>51</sup> *Id.* at 1777.

<sup>52</sup> *Id.* at 1781.

<sup>53</sup> *Id.* at 1782. However, interestingly, courts are more likely to give weight to evidence of past discrimination if that evidence is anecdotal rather than statistical. *Id.* at 1783.

traditional jobs even if employers allowed them to.<sup>54</sup> In these cases, courts do not consider that the past segregation could have been caused by women being deterred from applying for non-traditional jobs because they would recognize that it was futile to do so.<sup>55</sup>

Courts also have a tendency to insist on anecdotal evidence in sex discrimination cases, despite the fact that evidence of a few employees being discriminated against does not get the court any closer to deciding the reason for the widespread *statistical* differences.<sup>56</sup> Nevertheless, courts look for anecdotal evidence because it proves that the “modern” woman exists and that *some* women have aspirations for non-traditional work.<sup>57</sup> In fact, the lack of anecdotal evidence seemed to be the main factor that led to the employer succeeding on the lack of interest defense in the *Sears* case. The judge stated: “It is almost inconceivable, that, in a nationwide suit alleging a pattern and practice of intentional discrimination for at least eight years involving more than 900 stores, EEOC would be unable to produce even one witness who could credibly testify that Sears discriminated against her.”<sup>58</sup> Thus, according to the judge, the EEOC’s failure to produce individual victims confirmed that Sears’ segregation was attributable to women’s own choices.<sup>59</sup>

The way that employers and conservative courts use the lack of interest defense is to emphasize the masculinity of the work in blue-collar jobs and the femininity of women in white-collar jobs.<sup>60</sup> For instance, for blue-collar jobs, courts adopt the lack of interest defense by invoking images of work that is heavy, dirty, demanding, and unappealing.<sup>61</sup> Once the court describes the work in such masculine terms, women’s lack of interest is assumed as a matter of “common sense.”<sup>62</sup>

By contrast, in white-collar jobs, courts begin by describing not the job, but women, as feminine. For instance, in the *Sears* case, the court stated:

Women tend to be more interested than men in the social and cooperative aspects of the workplace. Women tend to see them-

<sup>54</sup> *Id.* at 1785.

<sup>55</sup> *Id.* at 1786.

<sup>56</sup> *Id.* at 1798 (“Because there is no way of verifying whether the plaintiffs’ or the employer’s witnesses are representative of the larger pool of eligible women, anecdotal evidence gets the court no closer to determining what proportion of the women in the pool were interested in the work.”).

<sup>57</sup> *Id.* at 1795.

<sup>58</sup> *Id.* at 1796 (quoting *Sears*, 628 F. Supp. at 1324-25).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1801.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1802.

selves as less competitive. They often view non-commission sales as more attractive than commission sales, because they can enter and leave the job more easily, and because there is more social contact and friendship, and less stress in non-commission selling.<sup>63</sup>

The women were “romanticized as friendly and noncompetitive” and the commission sales jobs required the opposite. The manual described a commission salesperson as a “special breed of cat” who has a “sharper intellect” and “more powerful personality.”<sup>64</sup> Sears also administered a sales applicant test that included questions such as: “Do you have a low-pitched voice?;” “Do you swear often?;” “Have you ever done any hunting?;” and “Have you played on a football team?”<sup>65</sup> As Schultz stated, the “story portrays gender as so complete and natural as to render invisible the processes through which gender is socially constructed by employers.”<sup>66</sup> Thus, it leaves courts free to blame segregation on women’s decisions to enter certain jobs.

Liberal courts try to suppress gender difference by looking at the few women who defy gender norms and stereotypes. According to liberal courts, Title VII was supposed to rid employers and society of stereotypical decisions so these courts emphasize the fact that not all women fit the gender stereotype of desiring traditionally female jobs.<sup>67</sup> This approach asserts that even though women as a group might be less interested in non-traditional work, some individual women might be interested in such work and, therefore, an employer is forbidden from presuming that all women will not aspire to do non-traditional work.<sup>68</sup> This approach assumes, like the conservative approach, that women form job preferences through pre-work socialization.<sup>69</sup> The only disagreement between the two approaches is the number of women who have been socialized to prefer non-traditional work.<sup>70</sup>

Like courts, the media also assumes that women deliberately choose low-pressure, low-status jobs. Possibly the most famous (or infamous) example is Lisa Belkin’s *New York Times* article in 2003, titled “The Opt-Out Revolution,”<sup>71</sup> where the author asks the ques-

<sup>63</sup> *Id.* at 1803.

<sup>64</sup> *Id.* at 1804 (citing *Sears*, 628 F. Supp. at 1290).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1805.

<sup>67</sup> *Id.* at 1806.

<sup>68</sup> *Id.* Of course, this approach is not necessarily logical because the employer is not asserting that no individual woman is interested in nontraditional work, but rather, that women as a group are sufficiently less interested than men to explain their statistical underrepresentation. *Id.* at 1807.

<sup>69</sup> *Id.* at 1808.

<sup>70</sup> *Id.*

<sup>71</sup> Belkin, *supra* note 8.

tion: “Why don’t women run the world?” and answers it: “Maybe it’s because they don’t want to.”<sup>72</sup> While Belkin is mostly talking about the choice to opt-out of the workplace because of motherhood (which will be discussed further below), some of her article can be (and was) read more broadly as an argument that women do not care about the money and prestige that come with success in the workplace.<sup>73</sup> Even though this story was nothing new,<sup>74</sup> the media latched on to it, telling the tale that women are “getting real about their limitations.”<sup>75</sup>

## B. The “Choice” to Not Negotiate

When women try to remedy the pay gap by suing for pay discrimination, some employers defend these cases by arguing that the reason the female employee was paid less than the male employee is because he negotiated for his salary and she did not.<sup>76</sup> Obviously, other factors contribute to the pay gap between men and women including, as discussed above, occupational segregation,<sup>77</sup> and as discussed below, women’s decisions regarding work/life balance. But here, I am only referring to situations where men and women are performing “equal work,”<sup>78</sup> but men are paid more because they “choose” to negotiate and women do not.<sup>79</sup> Some courts have allowed employers to defend a pay differential under the catch-all Equal Pay Act affirmative defense “any other factor other than sex,” by pointing to the fact that the man negotiated and the woman did not.<sup>80</sup>

For instance, in *Horner v. Mary Institute*,<sup>81</sup> the plaintiff was being paid \$7,500 annually as a physical education instructor.<sup>82</sup> Shortly after hiring the plaintiff, the defendant offered a male physical education

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (stating that women are deciding that they don’t want to do what it takes to get to the top). “Women are redefining success. They are redefining work.” *Id.*

<sup>74</sup> Joan Williams, *The Opt-Out Revolution Revisited*, THE AMERICAN PROSPECT, (Feb. 19, 2007), <http://prospect.org/article/opt-out-revolution-revisited> (stating that the *New York Times* has been using the choice rhetoric since 1953).

<sup>75</sup> *Id.*

<sup>76</sup> See Porter & Vartanian, *supra* note 18, at 178.

<sup>77</sup> At least one scholar has argued that women’s choices of college major also explain a substantial portion of the gender gap in earnings among college graduates. See Weinberger, *supra* note 17, at 950-51.

<sup>78</sup> “Equal work” is the standard under the Equal Pay Act—a plaintiff bringing an EPA suit must prove that she was being paid less than a male who was performing “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” See 29 U.S.C. § 206(d)(1).

<sup>79</sup> For a discussion of employers relying on the willingness to negotiate and other “market excuses,” see Porter & Vartanian, *supra* note 18, at 178-79.

<sup>80</sup> *Id.*

<sup>81</sup> 613 F.2d 706 (8th Cir. 1980).

<sup>82</sup> *Id.* at 709.

instructor the same salary, but the male instructor was unwilling to accept less than \$9,000, so the employer paid him the higher salary and kept the plaintiff's salary at the lower amount.<sup>83</sup> The court accepted salary negotiation as a legitimate affirmative defense under the catch-all affirmative defense.<sup>84</sup> The court stated that the employer "may consider the market place value of the skill of a particular individual when determining his or her salary."<sup>85</sup> Other courts have followed suit.<sup>86</sup>

In a book that became very popular with the press, "*Women Don't Ask*,"<sup>87</sup> authors Linda Babcock and Sara Laschever argue that much of the pay gap can be attributed to women not negotiating on their own behalf:<sup>88</sup>

Women don't ask. They don't ask for raises and promotions and better job opportunities. They don't ask for recognition for the good work they do. They don't ask for help at home. In other words, women are much less likely than men to use negotiation to get what they want.<sup>89</sup>

In one study, twenty percent of women surveyed said they never negotiate anything.<sup>90</sup> And it is rare that an employer will pay a woman more if she does not ask for more.<sup>91</sup>

This decision to not negotiate has significant financial consequences. Even a one-time decision to not negotiate a starting salary

<sup>83</sup> *Id.* at 710.

<sup>84</sup> *Id.* at 714.

<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g.,* Reznick v. Assoc. Orthopedics & Sports Med., P.A., 104 F. App'x 387, 391-92 (5th Cir. 2004) (finding no EPA violation where a male surgeon negotiated higher compensation level in his initial employment contract than the plaintiff); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (finding no EPA violation where a male comparator negotiated a higher salary); EEOC v. Home Depot U.S.A., Inc., No. 4:07CV0143, 2009 WL 395835, at \*10 (N.D. Ohio Feb. 17, 2009) (finding a valid factor other than sex where male employees were able to negotiate higher starting salaries than the plaintiff); *see also* Porter & Vartanian, *supra* note 18, at 179. *But see* Mulhall v. Advance Sec., Inc., 19 F.3d 586, 596 (11th Cir. 1994) (rejecting the employer's defense that wage disparities resulted from negotiations surrounding the purchases of comparators' businesses); Day v. Bethlehem Ctr. Sch. Dist., No. 07-159, 2008 WL 2036903, at \*9 (W.D. Pa. May 9, 2008) (rejecting the school district's defense at the summary judgment stage that male comparators negotiated salaries that were higher than the standard salary scale); Klaus v. Hilb, Rogal & Hamilton Co., 437 F. Supp. 2d 706, 723-24 (S.D. Ohio 2006) (denying summary judgment where the employer defended a \$36,000 wage disparity based on the male comparator's negotiation of higher salary).

<sup>87</sup> *See* BABCOCK & LASCHEVER, *supra* note 2.

<sup>88</sup> *Id.* at 5-6, 11.

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.* at 25.

<sup>91</sup> *Id.* at 21.

can lead to an enormous pay disparity.<sup>92</sup> As stated by Babcock and Laschever, molehills really do become mountains.<sup>93</sup> One study estimates that a woman who negotiates her starting salary and her salary increases will earn over one million dollars more by the time she retires than a woman who just accepts what she is offered.<sup>94</sup> The net result of women not asking is a “huge imbalance in the distribution of resources and opportunities between men and women. Because women ask for what they want less often than men do, and therefore get what they want much less of the time, the inequities in our society, and all the problems they create, continue to pile up.”<sup>95</sup>

### C. The Caregiving Choice

Perhaps the “choice” most often blamed for women’s relative lack of success in the workplace is the choice women make in balancing work and family.<sup>96</sup> As stated by Joan Williams: “Conservatives argue that what keeps women back today is not workplace discrimination but the choices they make in family life. Liberal feminists join in, exhorting women to ‘man up’ and insist on equality within the household.”<sup>97</sup> It is undoubtedly true that even today, women, on average, spend far more time on caregiving and homemaking tasks than men, even when they work full time.<sup>98</sup> This choice contributes to both as-

<sup>92</sup> *Id.* at 20. The authors point to the example of an equally qualified man and woman who both receive job offers for \$25,000 per year. The man negotiates and gets his offer raised to \$30,000, but the woman does not negotiate. Even assuming identical three percent raises every year (which is unlikely), by the time they are sixty, the gap has expanded to more than \$15,000 per year. This does not seem like a very big disparity until one remembers that he has earned more every year, with his extra earnings totaling \$361,171. *Id.*; see also Weinberger, *supra* note 17, at 972 (stating that the large gender gap in earnings seems to have very little to do with falling behind over the course of career and instead is confined to the early years of a woman’s career).

<sup>93</sup> BABCOCK & LASCHEVER, *supra* note 2, at 22-23.

<sup>94</sup> *Id.* at 21.

<sup>95</sup> *Id.* at 23.

<sup>96</sup> See, e.g., Eichner, *supra* note 25, at 152 (stating that because society views autonomous individuals as “unencumbered” the attachment and obligation of children must be considered the product of free choice). Even when not stated as a negative, writers still emphasize “choice.” See, e.g., Browne & Giampetro-Meyer, *supra* note 3, at 82 (noting that women who are close to shattering the glass ceiling have already raised children or choose to place more of an emphasis on their jobs than on their families). Of course, I presume that stating that a woman is “choosing” to care more about her job than her family would be seen as a negative by many, putting women in a “catch-22.”

<sup>97</sup> WILLIAMS, *supra* note 9, at 9. For instance, feminist Linda Hirshman blames the feminist movement for placing so much of an emphasis on respecting women’s choices because she does not believe that all choices are equal—she believes all women should work. LINDA R. HIRSHMAN, GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD 9-10 (Viking 2006).

<sup>98</sup> See, e.g., VALIAN, *supra* note 20, at 36; WILLIAMS, *supra* note 9, at 31 (stating that mothers spend much more time than fathers on children’s enrichment activities and achievement-



pects of the glass ceiling: 1) women are believed to avoid long-hour, high-pressure jobs (or they might not get chosen because of their caregiving responsibilities), and 2) their “choice” to spend time on caregiving tasks often means that they will earn less in salary, raises, and bonuses.<sup>99</sup> As stated by Martha Chamallas:

The conventional wisdom is that because women place more importance on their families, they voluntarily choose to subordinate their career and job aspirations for the sake of their children or their partners. This rationale allows employers to make the paradoxical claim that women actually prefer lower-paying jobs or jobs that offer little opportunity for advancement.<sup>100</sup>

This “choice” rhetoric became very popular<sup>101</sup> in the media after Lisa Belkin’s *New York Times* article, “The Opt-Out Revolution.”<sup>102</sup> While some part of Belkin’s article dealt with opting out of the workplace entirely, she was also referring to women who choose very part-time, contractual positions.<sup>103</sup> While she recognizes that workplaces *might* be at fault, she mainly “blames” (although does not appear to be critical of) women’s decisions to leave the workforce completely.<sup>104</sup> She states: “It’s not just that the workplace has failed women. It is also that women are rejecting the workplace.”<sup>105</sup> Based on her study of a small group of professional women, she argues that women do not want to work that hard to achieve the highest level of success in the workplace, and that feminism “is the freedom to choose.”<sup>106</sup> Some have argued that the opt-out revolution is a myth,<sup>107</sup> which was debunked by a 2009 report by the U.S. Census Bureau that revealed

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related activities); *see also* Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate over Changing Gender Norms*, 41 SW.L. REV. 1, 36 (2011).

<sup>99</sup> Women’s choice to not travel (especially travel abroad) also creates an informal barrier to women’s success in the workplace. Browne & Giampetro-Meyer, *supra* note 3, at 72.

<sup>100</sup> CHAMALLAS, *supra* note 24, at 14.

<sup>101</sup> *See* Selmi, *supra* note 22, at 574 (discussing the fact that the view that women are “opting out” of the workforce “pervades the popular media”).

<sup>102</sup> Belkin, *supra* note 8.

<sup>103</sup> WILLIAMS, *supra* note 9, at 21 (describing Lisa Belkin’s “opt-out” narrative as referring to not only quitting work altogether, but stepping off the fast track by working part-time, becoming independent contractors or working full time on the “mommy track”).

<sup>104</sup> Belkin, *supra* note 8 (emphasis added); *see also* Selmi, *supra* note 22, at 575 (stating that the common narrative alleges that women are choosing to opt out rather than being forced out for reasons of discrimination or some other factor that complicates the choice).

<sup>105</sup> Belkin, *supra* note 8.

<sup>106</sup> *Id.*

<sup>107</sup> *See* WILLIAMS, *supra* note 9, at 10 (stating that the opt-out stories represent a highly misleading picture of what it means to opt out); *id.* at 23 (stating that the major drawback of the opt-out story line is that it is not true); Weinberger, *supra* note 17, at 971 (noting that recent media reports discuss highly educated women opting out of the labor force even though there is no statistical evidence to support that opting out is a widespread phenomenon).

most stay-at-home mothers were part of low-income families with limited educations, rather than the high-status professional women Belkin highlighted in her article.<sup>108</sup> Nevertheless, this narrative of women either opting out or going on the “mommy track” has not lost traction in the media.

Of course, this “choice” to opt out completely has also been criticized. In her aptly titled book, *Get to Work: A Manifesto for Women of the World*, Linda Hirshman criticizes women for making the “meaningless” choice of opting out, and criticizes feminism for allowing women to think that all choices are equally valuable.<sup>109</sup> She states:

Bounding home is not good for women and it’s not good for society. They aren’t using their capacities fully; their so-called free choice makes them unfree dependents on their husbands. Whether they leave the workplace altogether or just cut back their commitment, their talent and education are lost from the public world to the private world of laundry and kissing boo-boos. The abandonment of the public world by women at the top means the ruling class is overwhelmingly male. If the rulers are male, they will make mistakes that benefit males. . . . [T]he alternative to a meaningless “choice” is value, the value of a flourishing life[, which] includes using your talents and capacities to the fullest and reaping the rewards of doing so.<sup>110</sup>

Another example (still controversial albeit not nearly as radical) is Sheryl Sandberg in her best-selling book, *Lean In: Women, Work, and the Will to Lead*.<sup>111</sup> Sandberg argues that we need more women in leadership roles.<sup>112</sup> Although she recognizes that there are societal barriers to women getting ahead in the workplace, she also thinks that women are hindered by internal barriers, such as the fact that women “continue to do the majority of the housework and childcare” and “compromise [their] career goals to make room for partners and chil-

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<sup>108</sup> Melissa J. Anderson, *Free to Choose: Does Our Culture of Individualism Harm Working Moms?*, THE GLASS HAMMER (Aug. 18, 2011), <http://www.theglasshammer.com>. Joan Williams noted that the opt-out stories focused on professional women when only eight percent of U.S. women hold these jobs and highly educated women are much more likely, not less, to remain in the labor force. WILLIAMS, *supra* note 9, at 10.

<sup>109</sup> HIRSHMAN, *supra* note 97, at 9-10.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (Alfred A. Knopf 2013). I describe Sandberg as “not nearly as” radical because, unlike Hirshman, who believes that all women should work, Sandberg is careful to recognize that not all women want the same things, and that some women will want to be caregivers. *Id.* at 14.

<sup>112</sup> *Id.* at 11. As she states: “A truly equal world would be one where women ran half our countries and companies and men ran half our homes.” *Id.*

dren who may not even exist yet.”<sup>113</sup> And although she does discuss the workplace and societal barriers, she believes focusing on women’s internal barriers is productive because those barriers are in women’s control to change.<sup>114</sup> Sandberg recognizes that some will see her message as “blaming the victim,” but she believes that having more female leaders is the key to women’s success in the workplace.<sup>115</sup> The message I took from her book is that even though she is careful to acknowledge that not all women will want to be leaders, she believes that too many women are making the choice to opt out or not pursue ambitious, rewarding careers.<sup>116</sup>

In addition to “opting out,” the other “choice” women are said to make regarding work and caregiving is the choice to be the primary caregiver of their children and therefore to not meet the ideal worker norm.<sup>117</sup> The rationale of some commentators is that women who choose to have children and choose not to be ideal workers are choosing to not be similarly situated to their non-caregiver counterparts (whether male or female) and therefore deserve to be treated differently.<sup>118</sup> Many scholars argue that the decision to have children, and the decision about how to balance work and family, are unconstrained choices for which only the parent is responsible — and the market or state should have nothing to do with the parent’s choice.<sup>119</sup>

In addition to scholars, courts too, often place value judgments on women’s choices regarding caregiving. In one case, the court contrasted justifiable leaves of absence, such as those for an employee suffering an extended incapacity from illness or injury, to less justifiable leaves for “young mothers *wishing* to nurse their babies for six months.”<sup>120</sup> Courts also emphasize that women could “choose” not to parent or could “choose” to parent in a way that did not interfere with work.<sup>121</sup> As aptly summarized by one commentator: “When women are

<sup>113</sup> *Id.* at 12.

<sup>114</sup> *Id.* at 13.

<sup>115</sup> *Id.* at 14.

<sup>116</sup> *Id.* at 14, 17 (quoting Judith Rodin, president of the Rockefeller Foundation and the first woman to serve as president of an Ivy League University as stating: “We believe in choices. But choosing to leave the workforce was not the choice we thought so many of you would make.”).

<sup>117</sup> Porter, *Why Care?*, *supra* note 17, at 382 (stating that many blame mothers for the choices they have made that contribute to their inequality in the workplace); *see also* Kaye, *supra* note 8, at 574-75 (stating that regardless of whether female attorneys will leave or stay after having children, the “perceptions about mothering continue to be a big negative”).

<sup>118</sup> Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L. J. 573, 574-75 (2007); Porter, *Why Care?*, *supra* note 17, at 383.

<sup>119</sup> Eichner, *supra* note 25, at 150-51; Martha Albertson Fineman, *Cracking the Foundational Myth: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 14 (2000); Porter, *Why Care?*, *supra* note 17, at 384.

<sup>120</sup> Eichner, *supra* note 25, at 146.

<sup>121</sup> *Id.*

forced to leave work to accommodate these domestic responsibilities, they are deemed to have made a ‘choice’ and to have only themselves to blame. The ideology of choice therefore privatizes and individualizes a system of subordination and then uses the notion of consent to justify it.”<sup>122</sup>

### III. THE CONVERGENCE OF CHOICES: A STORY ABOUT “JULIE”

As stated in the Introduction, I am certainly not the first scholar to discuss the rhetoric of choice. Many scholars have demonstrated in their scholarship how the law and society are focused on and perhaps even fascinated with the concept of choice.<sup>123</sup> But, as stated earlier, most of this literature has focused on one kind of “choice” — the choice of occupation, the choice to negotiate, or the choices women make in balancing work and family.<sup>124</sup> This is (to my knowledge) the first attempt to explore all three choices together. This Part will briefly describe how these three choices work together, and will then illustrate the convergence through the story of a fictional (but very realistic) woman, Julie. To reiterate my disclaimer in the introduction: I do not believe these choices are freely made, unconstrained choices. I believe they are influenced by gender norms, family dynamics, the structure of workplaces, and discrimination in the workplace. But, constrained or not, there are still choices, and this Part will discuss how the convergence of these three choices creates the achievement gap between men and women.

First, the most common use of the blame game is the allegation that women choose to devote significantly more time and effort to caregiving than men do. That choice inevitably influences other choices. Women who are primary caregivers might choose an occupation where the hours are reasonable and there is flexibility in the workplace. Furthermore, caregiving responsibilities might influence a woman’s decisions about how hard to work, whether to apply for a promotion, or whether to take on an extra assignment, all of which might also affect her pay. The choice to be a primary caregiver might also cause a woman to choose a part-time job, and in this country, part-time work is synonymous with second-class citizenship, negatively affecting pay, as well as opportunities for promotion.<sup>125</sup>

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<sup>122</sup> *Id.* at 148.

<sup>123</sup> *Supra* Part II.

<sup>124</sup> *Supra* notes 13-17 and accompanying text.

<sup>125</sup> Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777 (2010).

Second, as discussed above, employers and courts often argue that women tend to be friendly, cooperative, and selfless, and that these traits might lead women to choose jobs that are more cooperative than competitive, perhaps causing them to avoid the most high-status, high-stress jobs, which typically require aggressive, competitive personality styles.<sup>126</sup> These same traits might also cause women to choose to not negotiate for their own salaries or benefits because they fear that negotiating will harm their relationships with others.<sup>127</sup>

To illustrate how these choices converge, I borrow one of the moves from feminist legal theory: telling a story.<sup>128</sup> Below is the story of “Julie”:

*Julie has a college degree in business from a very good state school. She received very good grades in college and had an externship at a Fortune 500 company. Immediately after college, she became pregnant unintentionally with her long-term boyfriend, and they decided to get married. She decided not to apply for jobs because she felt uncomfortable lying about her pregnancy and assumed no one would hire her while pregnant. Once her baby was about six months old, she applied for a few jobs, but because she lacked self-confidence, she aimed her sights low and only applied for jobs where a college degree was a plus, but not required. She also avoided jobs where travel was necessary because her husband was an attorney and worked crazy hours, and she knew travel would be impossible with her baby.*

*One job she applied for, an inside sales position at an automotive supplier, called her for an interview. During the interview, the woman who was interviewing her (Susan, the manager of the inside sales department) noticed her impressive credentials and asked her if she was interested in applying to the outside sales department.<sup>129</sup> Susan told Julie that the outside sales department is an aggressive and competitive group of mostly men. They work long hours but the earning potential is much higher, although Susan also told Julie that the base salary was quite a bit lower than the inside sales position because the outside sales employees made most of their income from commissions. Susan suggested that if*

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<sup>126</sup> See generally *supra* Part II.A; see also BABCOCK & LASCHEVER, *supra* note 2, at 107, 116.

<sup>127</sup> BABCOCK & LASCHEVER, *supra* note 2, at 108 (discussing how women caring more about relationships than personal gain is a powerful gender norm).

<sup>128</sup> CHAMALLAS, *supra* note 24, at 4-6 (discussing how one of the “opening moves” of feminist legal theorists is to talk about “women’s experiences”).

<sup>129</sup> The inside sales department spends most of its time in the office, managing the accounts of current customers. While the job is mostly one of relationship management, there are occasionally opportunities to make additional sales. In contrast, the outside sales department is on the road, soliciting new business. The ability to negotiate and close the sale is very important for this position.

*Julie was interested, Susan could see if Michael, the manager of the outside sales department, was available for her to talk to. Julie said no thank you; she was happy applying for the inside sales position.*

*Julie was given the job, and in her first couple of years, established herself as efficient, great with customer relationships, and overall a great employee. Each year she received the standard three percent raise in salary. She had heard of some employees requesting more than three percent and receiving it if they were extraordinary employees, but Julie did not think she could put herself in that category and never asked for more. In Julie's third year with the company, Susan, the inside sales manager, announced that she was leaving the company for another opportunity. Susan suggested to Julie that she should apply for the manager position. Julie asked about the position and found out from Susan that the inside sales manager worked about fifty hours per week, handling a full load of customers plus all of the administrative and managerial functions. The inside sales manager also occasionally traveled to customers' businesses. Some of these trips were just long day trips (2-3 hours drive each way) but some were overnight trips. Of course, Susan also mentioned that the salary for the sales manager position was significantly higher than what Julie was making at the time. Julie was fairly bored with her current job and knew she would like the challenge and higher income of the sales manager job, so she talked to her husband about it. She told him about the job and how excited she was to apply for it. He replied that he thought she would be great at it, but he did not know how she was going to handle the care of their young daughter if she was working those kinds of hours and traveling. He did not explicitly say that he would not help with drop-off or pick-up from daycare or with the occasional sick days or doctor's appointments, but he never had helped before, so she did not even bother to ask him. Instead, she just did not apply for the promotion.*

*Shortly after, Julie learned she was pregnant with her second child. When her baby boy arrived, she took six weeks off (as allowed by the company's short-term disability policy) and then returned to work. She found working full-time with two children significantly harder than with one. The baby was sick more often than their older child, and Julie constantly had to take time off for doctor's appointments, or to go pick up a sick child from daycare. Even though she was still doing a great job fulfilling all of her responsibilities (because she was very efficient), she often felt guilty about missing so much time, which was made worse by some snide comments made by her new sales manager, a man named John. Julie finally decided to consider a nanny, so she talked to her husband about it. They crunched the numbers based on her salary (minus taxes, etc.) and the going rate for nannies in their area, and realized she would only clear about \$10,000 per year. Her husband asked her: if*



*she were only able to contribute that small amount to the family income, wouldn't she be better off not working? He had recently been promoted to partner and they could live off his income alone. So even though Julie loved working and thought she might be bored being home full-time, she quit because she did not see any other way of handling her job with two young children and very little help from her husband.*

This story is a compelling example of how the three choices work together to contribute to Julie's inability to reach her full potential, and her eventual decision to opt-out of the workplace entirely. First, because of her low self-confidence and because of her caregiving responsibilities for her baby, she set her sights low and did not apply for the outside sales job that would have been more prestigious and would have allowed her to earn much more money. Second, her lack of self-confidence also caused her to be uncomfortable asking for more than the standard raises, even though she likely deserved more than the standard raise. Third, her caregiving responsibilities caused her to turn down the opportunity for a promotion. And finally, her decision to opt-out completely can be largely described as a choice about caregiving, but other factors also contributed to it. If Julie had originally applied for the outside sales position or if she had applied for the inside sales manager position, she would likely have been making enough money that the nanny would have been more affordable; if she had asked for more than the minimum raises, she might have been making enough money to make the nanny worthwhile. Thus, Julie's story, which is a common one, demonstrates how the three "choices" operate in tandem to contribute to the achievement gap between men and women in the workplace. While there are certainly other explanations for Julie's behavior (a theme I will be exploring in later work), most outsiders would hear Julie's story and believe she had made several voluntary choices regarding the course of her career.

In sum, these three choices — the choice of occupation, the choice to not negotiate, and the choice regarding work/life balance — converge to affect women's achievement in the workplace. Women's relative lack of progress in the workplace hierarchies is influenced by their decisions regarding their role as caregivers as well as their alleged lack of interest in men's work. Women's pay is also influenced by all three choices. Thus, the blame game tells a fairly compelling story of how women's achievement gap in the workplace is caused by their own choices.

#### IV. CONCLUSION: WHEN A CHOICE IS NOT REALLY A CHOICE

Despite the fact that there are many laws that provide women formal equality in the workplace, there is still a significant achieve-



ment gap between men and women in the workplace. This article described the “blame game” — the allegation that women are making choices that affect their ability to succeed in the workplace. This common narrative blames women’s lack of success on their choice of occupation, their choice to not negotiate on their own behalf, and their choice to devote considerable time to caregiving and their families. But blaming women’s own choices is only one potential explanation for the achievement gap in the workplace. The primary, competing explanation is that what look like voluntary choices are not.<sup>130</sup> Instead, women’s choices are constrained by gender norms and society’s expectations, as well as by structural discrimination in the workplace. Perhaps once this “autonomy myth” is exposed, we can start working towards solutions that avoid the blame game.

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<sup>130</sup> WILLIAMS, *supra* note 9, at 51 (“As a culture we need to stop lying to ourselves, stop pretending that the ‘choices’ thrust on us by outmoded norms are actually choices made of free will. We need to stop ignoring the fact that the available choices are dismally inadequate.”).