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THE FAMILY AND THE MARKET AT WAL-MART¹

Naomi Schoenbaum*

INTRODUCTION

One of the core tenets of Wal-Mart culture is that of family. Not only has the company sought to cultivate an identity based on “family, community and the supposedly traditional values of a bygone era,” but it has also marketed itself as becoming a stand-in family for its employees.² Wal-Mart’s reliance on the family metaphor straddles the divide between the family and the market that feminist scholars have long debunked as false and harmful to women.³

But the company’s focus on the Wal-Mart family obscures the omission of another relevant family for the Wal-Mart worker: the legal family. And it is the legal family that underlies an often overlooked piece of the *Wal-Mart Stores, Inc. v. Dukes* sex discrimination class action: the challenge to the relocation policy.⁴ The policy required anyone interested in a managerial position be “willing to relocate . . .

1. I owe the title to Frances Olsen’s seminal work, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

* Associate Professor of Law, George Washington University Law School. For helpful conversations and comments, I thank Michael Abramowicz, Kelli Alces, Naomi Cahn, Laura Dickinson, Stephen Galoob, Michael Selmi, Peter Smith, and Lesley Wexler.

2. NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS* 70, 90–96 (2009). Wal-Mart’s posting of the following quotes (among other similar ones) on its website evidence this effort: a financial analyst in the home office whose husband was deployed in Iraq stating that “Wal-Mart truly has become my second family,” *id.* at 72; an employee in the legal department stating that she found the “Wal-Mart family culture” in the Florida distribution center and in the home office, *id.* at 68; a loss prevention associate in Georgia who, in response to attacks on Wal-Mart in the media, states, “I am confident that we, as a family, will overcome the obstacles that stand in our way. . . . I stand by my Wal-Mart,” *id.* at 68.

3. See generally Olsen, *supra* note 1 (arguing that life and law both construct and presuppose this family–market divide, which creates a hierarchy with family and women at the bottom). I will explore the crossover of family and work metaphors and the relevance for legal boundaries in later work.

4. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011) (noting “a willingness to relocate” as a condition of promotion); *id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part) (discussing plaintiffs’ challenge to the relocation policy). As I have written in earlier work, the two primary social and legal motivations for long-distance moves are employment and family. See Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169, 1171, 1176–93. Wal-Mart’s family metaphor renders a long-distance move for the company overdetermined, as it can then be motivated by both employment and family(-like) reasons.

whenever and wherever [Wal-Mart] needed them.”⁵ This relocation policy may hurt employees’ families by forcing employees to choose between uprooting their families, or giving up the benefits of promotion altogether. The plaintiffs alleged that the relocation policy contributed to women’s considerable underrepresentation in the company’s management ranks.⁶ They challenged the policy on the basis of both a disparate treatment theory—that managers did not consider women for promotions on the assumption that they would not move because of their priority of family over work—and a disparate impact theory—that women in fact were less likely to move due to their family priorities and thus were disproportionately excluded from management positions.

These disparate treatment and disparate impact challenges amounted to twin flaws in the company’s application of the policy as it intersected with an employee’s legal family: Wal-Mart considered the employee’s family both too much by applying sex stereotypes about women’s family priorities, and too little by failing to appreciate the impact of the policy on women due to their family role. As the *Dukes* case shows, however, Title VII fails to remedy this overreliance and underreliance on the family as a barrier to women’s employment opportunities and, in fact, merely replicates it. Employment discrimination law simultaneously pays too little and too much attention to the family in addressing sex inequality that arises at the intersection of the family and the market. The law both ignores the systematic sex-based

5. Declaration of William T. Bielby, Ph.D in Support of Plaintiffs’ Motion for Class Certification at 28, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (2004) (No. C-01-2252 MJJ) [hereinafter Bielby Decl.] (internal quotation marks omitted). While there was some disagreement about whether the policy formally remained in place, the reality for those who wanted to advance in the company was long-distance relocation: over 60% of store managers, assistant managers, and management trainees change regions at least once, and many relocate multiple times as they move up the corporate ladder. See Declaration of Richard Drogin Ph.D in Support of Plaintiffs’ Motion for Class Certification at 45, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (2004) (No. C-01-2252 MJJ) [hereinafter Drogin Decl.]; Bielby Decl., *supra*, at 27–28 (noting “[l]ess consistent . . . testimony about whether an employee must be able and willing to relocate their place of residence in order to be considered for a management position,” but giving multiple examples of upper level management requiring employees to “certify in writing” their willingness to move and reporting that “hourly employees usually move to a different store when they become management trainees and are promoted to Assistant Store Manager positions, and promotion to Co-Manager and Store Manager almost always involves relocation as well”); LICHTENSTEIN, *supra* note 2, at 137 (“Assistant Managers who want to advance are constantly on the move, taking new posts far away from family and friends.”). The policy’s focus on employees’ broadest possible availability—a willingness to relocate anywhere—before a specific need of the employer arises suggests that the relocation policy is standing in as a proxy for commitment to Wal-Mart, as well as the priority of the Wal-Mart family over the legal family.

6. Although 65% of hourly employees were women, only 33% of managerial positions were filled by women. Drogin Decl., *supra* note 5, at 9–10.

harm to the employee's family that arises from the intersection of an employer policy with gendered family structures and risks presupposing these family phenomena in a way that reinforces the very stereotypes that the law is meant to eradicate. By simultaneously ignoring the family and assuming its contradiction with the market, Title VII continues to uphold and reinforce the theoretical divide between family priorities and the demands of the market.

Title VII's insufficient recognition of the family can be seen through the class of plaintiffs who challenged the relocation policy: Wal-Mart's women employees who failed to advance pursuant to the policy. Denying any individual woman employee a promotion under the relocation policy on the basis of gender stereotypes about family roles would constitute unlawful disparate treatment.⁷ As plaintiffs' sociologist explained, "The company's practice of requiring relocation across stores in order to move into salaried management positions makes the promotion process especially vulnerable to gender stereotyping."⁸ But another group of women are also harmed by Wal-Mart's relocation policy: the wives (and partners) of male employees who *do* move pursuant to the policy. Gendered family dynamics mean that husbands are more likely to drive long-distance employment moves, and wives are more likely to trail, which has substantial negative effects on women's employment outcomes and earnings.⁹ Because employment discrimination law provides remedies only to prospective or current employees, the law is too limited in its recognition of the family to address sex inequality that results from the intersection of the relocation policy and gender dynamics within the family. So although the relocation policy premises an employee's advancement on uprooting

7. Even if women as a class are less willing to relocate, an employer is not entitled to evaluate any individual woman employee on that basis. See *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707–11 (1978) (striking down a policy requiring women to make larger pension contributions based on actuarial data that women live longer because it was sex discrimination to treat any individual woman according to the characteristics of the class); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (upholding a ruling for a female plaintiff who was denied a promotion that required her to move because her supervisor did not think she wanted to relocate her family).

8. Bielby Decl., *supra* note 5, at 27. These stereotypes are especially strong for mothers. See Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004) (finding that mothers are "viewed as less competent and less worthy of training than their childless female counterparts" and "less competent than they were before they had children," and that adding a child lowered interest in training, hiring, and promoting a woman); Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 690 (2004) (noting that while mothers are expected to always be "on call for their children," a worker is expected to be "unencumbered by competing demands and be always there for his or her employer").

9. See Schoenbaum, *supra* note 4, at 1215–16.

the employee in a way that systematically harms women's employment opportunities, Title VII provides no relief for these women. This forces any relief for these women into other areas of law, leading to both inadequate remedies and inadequate recognition of structural barriers to women's employment opportunities.

The only way to seek recognition of the family through Title VII is through a disparate impact challenge. On this theory, the *Dukes* plaintiffs claimed that the relocation policy disproportionately took women out of consideration for management positions because women were less willing to move for promotions than men, again due to family roles.¹⁰ If such a policy that disproportionately burdens women is not a job-related business necessity, or if a less discriminatory alternative exists, the policy is an unlawful barrier.¹¹ But proceeding on this theory risks overreliance on the family. Plaintiffs must submit statistics to prove the relocation policy's adverse impact on women. In cases in which the adverse impact arises from gendered family structures rather than an immutable physical trait, the claim itself and the proof on which it relies can be read as evidence that women in fact are more committed to family than to work. For example, in the *Dukes* case, evidence that women are excluded from management positions due to the relocation requirement runs the risk of supporting the already held view that women are in fact less willing to move for work due to family constraints. So while Title VII aims to

10. Even Sam Walton conceded this. See SAM WALTON WITH JOHN HUEY, *MADE IN AMERICA: MY STORY* 170–71 (1992) (“[The relocation policy] really put good, smart women at a disadvantage in our company because at that time they weren’t as free to pick up and move as many men were.”).

11. Wal-Mart would likely defend such a policy as a way to maximize flexibility and to avoid workplace strife created when an employee ascends to manage his former coworkers. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1005–06 (1988) (explaining that the employer can defend against a disparate impact by showing the practice is a job-related, business necessity, but the employees can still prevail by showing that “other selection processes that have a lesser discriminatory effect could also suitably serve the employer’s business needs”). These concerns stem from the primary attachment Wal-Mart seeks to develop in its managers: to corporate Wal-Mart rather than to a particular store or to the manager’s coworkers. See Nelson Lichtenstein, Op-Ed., *Wal-Mart’s Authoritarian Culture*, N.Y. TIMES, June 22, 2011, at A21. Courts are split on whether these workplace dynamics justifications constitute business necessity. See Timothy D. Chandler et al., *Spouses Need Not Apply: The Legality of Antinepotism and No-Spouse Rules*, 39 SAN DIEGO L. REV. 31, 47–50 (2002) (discussing a split regarding morale justifications in disparate impact challenges to antinepotism policies). But even Sam Walton explained why the policy was *bad* for business: “[A]s the company grows bigger, we need to find more ways to stay in touch with the communities where we operate, and one of the best ways to do that is by hiring locally, developing managers locally, and letting them have a career in their home community—if they perform.” WALTON, *supra* note 10, at 170–71. And there may be suitable alternatives that would achieve the policy’s goal. See *id.* (noting that the relocation policy may have been “more rigid than it needed to be”).

reduce family-based stereotypes that impede women's employment opportunities through its disparate treatment branch, it may entrench these very same stereotypes through its disparate impact branch, leading to a tension between these two branches of Title VII, particularly in the context of sex discrimination.

Following the Introduction, this Article proceeds in three Parts. Part II addresses Title VII's shortcomings related to too little recognition of the family. Part III addresses Title VII's opposite dangers related to too much recognition of the family. Finally, Part IV introduces the possibility of Title VII addressing the family-market divide through a more considered recognition of the family that acknowledges the family's role in limiting employment opportunities without entrenching harmful sex stereotypes.

II. THE LIMITS OF TITLE VII: TOO LITTLE FAMILY

Women are often disadvantaged in the market by the intersection of gendered family structures that disproportionately impose family responsibilities on women and workplace policies constructed around market norms of complete commitment to work.¹² Scholars have observed how this makes it difficult for women to succeed in the workplace to the extent these market norms are directly imposed on them as employees.¹³ Title VII limits this barrier to advancement by prohibiting employers from stereotyping women applicants and employees based on family responsibilities and by prohibiting specific employer policies with an unjustified disparate impact on women due to family responsibilities.¹⁴ Employer policies constructed around market norms can also have a systematic impact on women's employment opportunities, not only as employees subject to these policies, but also as the wives or partners of employees subject to such policies. To the extent such policies expect "ideal worker"¹⁵ performance from men in the market, this can lead their women partners to take on stereotypically feminine roles in the family, causing these women harm in their market roles and contributing to systematic gender inequality in the market.

12. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1–6 (2000).

13. *Id.*

14. See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man. § 615 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>; Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313, 1344 (2008).

15. See WILLIAMS, *supra* note 12, at 1.

This Part uses the challenge to Wal-Mart's relocation policy to illustrate how Title VII selectively takes account of only the direct harms of sex discrimination on employees. By failing to account for the harms that discriminatory employer policies indirectly impose on the family, Title VII takes too little account of the family. Long-distance moves, including those made pursuant to Wal-Mart's relocation policy, cause women to suffer in employment outcomes not only as employees who are denied promotion opportunities, but also as the wives and partners of Wal-Mart employees who move for their jobs. But employment discrimination law does not recognize these harms to the family, and other areas of law do so in only a limited—and potentially harmful—way. By selectively recognizing only the direct market harms of sex discrimination and ignoring harms to the family that originate in the market, Title VII reinforces the family–market divide even as it provides some relief for sex discrimination.

A. *Gendered Family Dynamics and Title VII*

In light of the existence of the legal family and the gendered dynamics therein, Wal-Mart's relocation policy has implications for sex equality that extend beyond its employees and into the family. Because a family typically picks one location for both husband and wife, geographic mobility makes salient the linked employment trajectories of husbands and wives.¹⁶ If the family agrees that one spouse will relocate for employment, the other typically follows, often disrupting

16. In the context of geographic mobility, this link is often clearest with married couples because the law mostly facilitates and rewards co-location of the family when one spouse relocates for employment purposes. See Schoenbaum, *supra* note 4, at 1187–93 (describing ways in which family law, unemployment insurance, and tax benefits foster co-location of married couples). Unmarried partners, both same sex and opposite sex, may of course move together for one partner's employment prospects, even if the law does not support such moves with the same incentives. And at least for unmarried couples who seek the legal benefits of domestic partnership, the law may do more than facilitate and reward co-location; in many jurisdictions, co-location may be a legal *requirement* as an indicia of the relationship's authenticity. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1774 (2005) (discussing how domestic partnership laws often require cohabitation of partners). This Article will generally refer to affected wives and nonmarital partners of relocated employees as a group as "partners," recognizing that the extent to which the law operates on the partner's co-location, if at all, varies by the nature of the legal relationship.

Same-sex couples of course do not display consistent sex-based inequality in their moves. Their moves may show more egalitarian patterns, or they may nonetheless be "gendered," in that one partner takes the more stereotypically masculine "driving" role and the other partner takes the more stereotypically feminine "trailing" role. Cf. Deborah Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 783–88 (2012) (citing studies showing that same-sex couples may divide market and household labor more equally, but positing that same-sex marriage may change this as the law of marriage encourages specialization).

the latter's employment.¹⁷ These relocation decisions are not sex equal. Husbands' jobs are more likely to determine residential location of the family unit.¹⁸ Married women are less likely to relocate for work than their husbands.¹⁹ This makes women more likely to be "tied *stayers*."²⁰ On the flip side, wives are more likely to leave a job to accommodate a partner's job change.²¹ This makes women more likely to be "tied *movers*."²²

By requiring relocation as a condition of advancement, a relocation policy like Wal-Mart's contributes to negative economic consequences for tied movers—the mostly female partners of the mostly male employees who move pursuant to the policy.²³ Gendered mobility dynamics mean that a family relocation has significant effects on the economic lives of men and women, enhancing men's careers and incomes, while diminishing women's prospects and earnings.²⁴ When couples move, the income gap between husbands and wives increases significantly, on average to the tune of nearly \$3,000.²⁵ And the income gap can grow over time with repeated moves, as the first mover reaps employment-related rewards from the first move and then is more likely to drive the next move.²⁶ By contributing to occupational segregation and to differential opportunities in the labor market for men and women more generally, gendered tied-mover dynamics may also help explain the ongoing gender gap in employment outcomes even outside of marriage.²⁷

17. This sentence glosses over bargaining over the relocation decision. See, e.g., Robert Pollak, *Comment on Mary Anne Case's Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 261, 267–68 (2011) (positing a two-stage bargaining game in marriage in which wage rates affect a spouses' bargaining power and explaining how the inability of a spouse to make a credible commitment not to exploit additional bargaining power conferred by a move that enhances that spouse's wage rate may lead moves not to occur); William T. Bielby & Denise D. Bielby, *I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job*, 97 AM. J. SOC. 1241, 1245, 1261 (1992) (explaining how gender-role ideology introduces asymmetry into the process by which husbands and wives decide how to respond to a job opportunity in a different location such that the wife's net economic gain (or loss) from a prospective geographic move is likely to be discounted relative to that of the husband).

18. See Schoenbaum, *supra* note 4, at 1216.

19. *Id.*

20. *Id.*

21. *Id.* at 1215.

22. *Id.* at 1215–16.

23. Indeed, historically, Wal-Mart's managers were all "family men." See LICHTENSTEIN, *supra* note 2, at 56.

24. See Schoenbaum, *supra* note 4, at 1216.

25. *Id.*

26. *Id.* at 1217.

27. Lower paying, pink-collar jobs overpopulated by women are geographically ubiquitous, making it easier for women to fill the trailing role. *Id.* at 1218. Employment exit or threat of exit

Relocation policies like Wal-Mart's also reinforce stereotypes of men's role in the labor market and the family. The flip side of the stereotype of women valuing family over work is the stereotype of men valuing work over family. A Seventh Circuit opinion, in a sex discrimination promotion denial case based on the employer's stereotypical view of women and relocation, provides a vivid example of just this reverse stereotype. Even in upholding the employee's claim, Judge Posner noted that "[r]ealism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city."²⁸ Just as employers may assume that a woman would not relocate for a promotion, an employer may likewise expect that a man will relocate, making it harder for him to object to these terms for a promotion or to turn down opportunities that hinge on relocating. It is precisely the stereotype of the male ideal worker who is unfazed by relocation that contributes to relocation policies and broader pro-mobility laws and norms.²⁹ To the extent that work-related relocations are viewed as relatively low cost for men, the costs of relocation tend not to be seen at all—either by employers, or by the law. This is so despite the significant costs imposed by mobility for sex equality.³⁰

But as the *Dukes* case illustrates, only female employees who were denied a promotion under the relocation policy—the tied stayers—can sue for relief under either the disparate treatment or disparate impact theories of Title VII.³¹ Tied movers—disproportionately women—who give up employment opportunities and income by relocating with a Wal-Mart employee find no relief under Title VII. There is a straightforward doctrinal reason for this: Title VII only provides remedies for harms experienced by the employees of a discriminating employer and not for the harms imposed on third parties, including family members.³² Statutory language³³ and standing requirements³⁴

is more likely to aid men's careers because it signals upward mobility, whereas for women it will signal family trailing. *Id.* at 1217–18.

28. *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

29. See WILLIAMS, *supra* note 12, at 1–6 (describing the concept of the ideal worker as infinitely available and flexible, without responsibilities to others).

30. Mobility also imposes other costs for relationships that support individuals and families at home and at work, including extended family, friends, neighbors, and coworkers, as well as costs for employers and the community in the form of lost social capital. See Schoenbaum, *supra* note 4, at 1193–1209 (exploring the costs of mobility and how the law fails to recognize them).

31. A successful disparate impact suit could lead to elimination of the relocation policy, which could essentially prevent harm that would otherwise befall future tied movers. For further discussion of this point, see *infra* Part II.C.

32. Title VII recognizes relational aspects of discrimination in limited ways, but none would provide a cause of action for a non-employee family member. The following offers a few examples. The closest Title VII has come to recognizing sex discriminatory harms to the family

present obstacles to allowing anyone beyond an employee to sue an employer for discrimination. And an employee who moved pursuant to the policy could not bring a claim on behalf of a disaffected spouse because the employee would have faced no adverse employment action.³⁵

In light of the family–market divide, it may not be surprising that employment discrimination law only addresses the category of harms to tied stayers, who are employees, and not to tied movers, who are family. Nonetheless, scholars have begun to criticize employment discrimination law’s failure to take account of the harms that discrimination visits on members of an employee’s family. Professor Zachary Kramer, for example, has noted how employment discrimination can create additional stress on the employee by limiting or straining family relationships.³⁶ But the law currently recognizes these harms only as harms to the employee and not as harms to the family members themselves.³⁷ This Article joins the nascent literature urging further consideration of the harms that discriminatory employer policies visit on the family, particularly systematic harms that arise due to the linked employment trajectories of husbands and wives.

through the effect of an employer’s policy on male employees was the recognition of sex discrimination when a benefits package was less generous to the wives of male employees than to husbands of female employees, but these harms were framed in terms of the value of the benefits package to the employees themselves. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683–84 (1983). A plaintiff employee may recover damages when discrimination limits or strains her relationship with her partner or child. See Zachary A. Kramer, *After Work*, 95 CALIF. L. REV. 627, 629 (2007) (citing *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 503 (9th Cir. 2000)). The Americans with Disabilities Act allows an employee to bring a claim for discrimination based on her family or other relationship with a disabled person. See 42 U.S.C. § 12112(a), (b)(4) (2006) (prohibiting discrimination as a result of “the known disability of an individual with whom [the employee] is known to have a relationship or association”). An employee can bring a claim for race discrimination when an employer discriminates against an employee because of the employee’s race *in relation to* the race of a romantic partner (i.e., an interracial relationship). See Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 211 (2012). And a recent ruling by the Supreme Court held that an employee could raise a claim for retaliation based on her employer’s termination of her fiancé. See *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868, 870 (2011).

33. Title VII makes it unlawful for an employer “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.” 42 U.S.C. § 2000e-2(a)(1).

34. A non-employee family member would unlikely be seen as within “the zone of interests” of the statute. See *Thompson*, 131 S. Ct. at 870.

35. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (“A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”).

36. See Kramer, *supra* note 32, at 655–58.

37. See *id.* at 664–66 (arguing that employment discrimination law should independently recognize harms to the family as additional, separate costs of discrimination).

In the context of *Dukes*, taking the plaintiffs' allegations of discrimination as true—that fewer women advanced because the relocation policy amounted to either disparate treatment or disparate impact—the result of Wal-Mart's discrimination was that a disproportionate number of men relocated under the policy, along with their tied-mover partners. This means that a systematic consequence of Wal-Mart's relocation policy was harm to the employment prospects of its relocated employees' partners—disproportionately women. While these women are not Wal-Mart employees, they faced adverse employment consequences as a result of the sex-discriminatory decisions of an employer, and these adverse employment consequences are systematically and disproportionately suffered by women. But neither the male employees who move pursuant to the policy nor their partners are harmed in any way that Title VII recognizes.

While Title VII's current statutory limits undoubtedly bar these suits, it is nonetheless worth probing some of the theoretical objections to recognizing this type of harm to the family under Title VII. One might object that given the lack of employment relationship, it is not at all obvious that an employer should have any legal obligation to non-employees. But this may be an overly formal view of that relationship. Sociology of the workplace has long explored the ways in which family members, and wives in particular, support the work of the employee and the employer. In the seminal work on the subject, *Men and Women of the Corporation*, Rosabeth Moss Kanter details how wives of employees support the corporation by, for example, entertaining clients, maintaining files, transcribing notes, and beyond, and are thus an integral part of the corporate structure, regardless of their formal employment status.³⁸ Tied movers for example often provide support to the relocating spouse and the family that is invaluable in helping the relocating spouse succeed in the new location, with benefits accruing to the employer.³⁹ From a functional perspective of the employment relationship, the boundary between the employee and the family is somewhat porous.

One might further object that the employer's discriminatory policy imposes a harm on the family by conferring a benefit on the employee that the employee chose to accept; the household would not have

38. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 110 (2d ed. 1993); see also Marcia L. Bellas, *The Effects of Marital Status and Wives' Employment on the Salaries of Faculty Men: The (House)Wife Bonus*, 6 *GENDER & SOC'Y* 609, 610 (1992) (noting the concept of the "two-person career" and discussing ways in which employed and unemployed wives contribute directly to husbands' careers).

39. See Schoenbaum, *supra* note 4, at 1214–15.

made this choice if it did not make the household better off. It is worth disaggregating the claim about choice and the claim about overall welfare effects. As for choice, we cannot trust the decisions of households to reflect the aggregated preferences of their members. In particular, women are more likely than men to sacrifice their own preferences for other goals, such as accounting for other family members' preferences.⁴⁰ And there are reasons to believe that employees and their families may not adequately account for the costs of long-distance moves.⁴¹ Therefore, despite the fact that the move was chosen, this choice might not be a product of an accurate calculus of its impact on the household and, in particular, women tied movers.

As for the overall welfare claim, the household may be made better off by the move if the total income of the household increases (or the move brings other benefits, such as a lower cost of living, better weather, or proximity to extended family), despite the tied mover's employment losses. But even in cases in which this holds, it should not assuage concerns from a gender equality perspective because of the role of women's market work in contributing to self-esteem and economic independence,⁴² as well as the importance of gender equality in the labor market as an end in itself. So although the statutory standing and adverse employment action limits on Title VII take such concerns outside the statute's scope, the systematic harm to women's employment opportunities resulting from relocation and other policies that presume fully flexible family arrangements militate in favor of thinking about ways to bring these harms within the statute's reach, a subject taken up in Part III.

B. *Extra-Title VII Remedies*

The previous Part showed how Title VII fails to provide a remedy for harms visited on the partners of employees due to the intersection of employer policies and gendered family dynamics. In light of the current boundaries of antidiscrimination law at the intersection of the family and the market, the legal remedy for the negative employment effects on employees' (disproportionately women) partners is left to other devices, all of which are imperfect. They provide limited remedies and risk incentivizing the very gendered dynamics they seek to

40. Amartya K. Sen, *Gender and Cooperative Conflicts*, in *PERSISTENT INEQUALITIES* 123, 125–26 (Irene Tinker ed., 1990) (discussing how the influence of family identity makes it difficult for some women to formulate notions of individual welfare separate from the family's welfare).

41. See Schoenbaum, *supra* note 4, at 1210–13 (recounting cognitive biases and other features of decision making that would lead movers to underestimate the costs of relocation).

42. Vicki Schultz, Essay, *Life's Work*, 100 *COLUM. L. REV.* 1881, 1891–92 (2000).

ameliorate. They also lack the expressive function of antidiscrimination law: a moral judgment of the harm caused by systematic barriers to equal employment opportunity.

Policymakers have attempted to address the impact of gendered family dynamics on employment for partners through unemployment insurance (UI) benefits. The federal stimulus package included incentive funds for state UI programs to provide benefits when workers quit for “compelling family reasons.”⁴³ Under this “compelling family reason” provision, a number of states now grant UI benefits to tied movers who quit their jobs to move with a spouse who relocates for employment purposes.⁴⁴

UI benefits provide compensation to afford affected partners more time to search for a better job (in the case of tied movers, in the new location).⁴⁵ But UI benefits for affected partners such as tied movers do not compensate for all of the losses that accompany their loss of employment. They provide only partial wage replacement and do not compensate for the gap of employment on a resume or lost investments with a particular employer. Also, for many employees, work provides a critical sense of identity and meaning.⁴⁶ So even if UI benefits did provide full monetary compensation for employment losses, psychic losses associated with unemployment and lesser attachment to the workforce are not compensated and may not be compensable.⁴⁷ And they often provide no relief to unmarried partners or for employment losses that stop short of unemployment.⁴⁸

43. 42 U.S.C. § 1103(f)(3)(B) (Supp. II 2010).

44. *Id.* § (B)(iii); see also Schoenbaum, *supra* note 4, at 1170, 1186.

45. See Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 342–43 (2001).

46. See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 14, 118 (2003); Schultz, *supra* note 42, at 1892, 1909–10.

47. Although these limits are always true of UI, they are more concerning when UI is used as a substitute for antidiscrimination remedies.

48. The federal law that provides additional funding to states who “modernize” their UI schemes, including by providing benefits to relocating spouses, defines the benefit in terms of married spouses. 42 U.S.C. § 1103(f)(3)(B)(iii). Some states have awarded benefits to unmarried partners under appropriate circumstances. See CAL. UNEMP. INS. CODE § 1256 (West 1986) (including registered domestic partners); *Macgregor v. Unemp’t Ins. Appeals Bd.*, 689 P.2d 453, 454 (Cal. 1984) (granting benefits when the unmarried couple were engaged and had a child so they could maintain the established family unit); *Reep v. Comm’r of the Dep’t of Emp’t & Training*, 593 N.E.2d 1297, 1301 (Mass. 1992) (granting benefits to an unmarried woman who quit her job to be with her partner of thirteen years). *But see Norman v. Unemp’t Ins. Appeals Bd.*, 663 P.2d 904, 906 (Cal. 1983) (denying benefits to a woman who quit her job to follow cohabiting fiancé because “[s]he did not . . . represent that her marriage was imminent, that her presence . . . was required to prepare for the wedding, or, indeed, that she had any definite or fixed marital plans”).

Moreover, UI benefits provide compensation to affected partners—again, disproportionately women—for taking on stereotypical gender roles in the family and the market. The UI benefits are, in effect, subsidizing, and perhaps incentivizing, this role-consistent behavior without fully accounting for the losses it entails to the partners themselves and to the broader goal of gender equality in the market. In the case of Wal-Mart’s relocation policy, for example, the policy imposes costs for tied movers, which the law then partially compensates. Due to this compensation, the benefits that relocation confers on the employee now do not need to be so great to offset the losses to the tied mover to justify relocation. In this way, UI benefits subsidize Wal-Mart’s relocation policy, despite its effect on women’s employment equality, which may not only generate more moves, but may also create fewer incentives for Wal-Mart to internalize the costs of its policy.⁴⁹ This supports the critique of Wal-Mart’s overreliance on government subsidies to support its employees.⁵⁰

Family law provides only an incomplete remedy for the effects of gendered family dynamics on participation in market work through the division of assets at the time of divorce. Taking the mobility example, family law takes some account of the unequal distribution within the family of the employment benefits of mobility through property division and alimony awards to tied movers. But even to the extent that property is divided equally between a tied mover and her husband, most families have very little property. The law generally does not account for differences in future income streams, typically the largest asset remaining after a divorce.⁵¹ This means that, for example, a husband who moved pursuant to Wal-Mart’s relocation policy will be entitled to continue owning his salary after divorce—a salary that likely benefited from the relocation. His tied mover wife will likewise own her salary after divorce—a salary that likely was diminished by the relocation.

49. See Schoenbaum, *supra* note 4, at 1217 (“If gender drives relocation decisions despite efficiency, as research suggests, there is less reason to be concerned about these incentive effects, as husbands’ careers may dictate family relocation decisions regardless of UI benefits.”). If the trailing spouse is compensated for some employment losses, this may make men more willing to take on this role, which would help to reform the underlying gendered mobility dynamics.

50. See generally LICHTENSTEIN, *supra* note 2, at 216 (documenting how the company pays sufficiently low wages to keep employees eligible for public health care benefits); Alice Hines, *Walmart’s New Health Care Policy Shifts Burden to Medicaid, Obamacare*, HUFFINGTON POST (Dec. 1, 2012), http://www.huffingtonpost.com/2012/12/01/walmart-health-care-policy-medicaid-obamacare_n_2220152.html (explaining how a recent change in the company’s health care policy will lead to more employees being covered by Medicaid and Obamacare).

51. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2251–52 (1994).

Of course, to the extent family law does provide some remedy for the unequal distribution of gendered family dynamics, it does so only at the dissolution of a marriage, and only for couples who were legally married.⁵² Moreover, even if divorce law fully compensated tied movers for their lost income, it is not clear whether this would be a desirable result from the perspective of gender equality in the market. Insuring women against these employment losses upon divorce essentially creates a moral hazard for women to incur such losses. So despite financial compensation, women still would not get the non-monetary benefits of market work,⁵³ nor would progress be made toward women's employment equality.⁵⁴

Whether unemployment insurance or family law provides some relief to affected partners like tied movers, locating the legal system's response to harms systematically visited disproportionately on women outside of antidiscrimination law obscures broader issues of gender equality in the market. Sam Walton's view of Wal-Mart's relocation policy reveals how these broader equality issues are hard to see. Although even Walton came to recognize that Wal-Mart's relocation policy might be bad for tied stayers—that it “really put good, smart women at a disadvantage in our company because at that time they weren't as free to pick up and move as many men were”—he paid no attention to the consequences for tied movers or the movers themselves.⁵⁵ The legislative history of UI benefits for “compelling family reasons” makes clear that these benefits were intended to address the gendered tied-mover problem, as they “would particularly help women, who are . . . more likely to need to leave work . . . [to] follow[

52. See Schultz, *supra* note 42, at 1908.

53. See *id.* at 1889–92, 1909–10 (recounting self-esteem and other nonmonetary benefits of work); see also Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 25–31 (2005).

54. The social security system attempts to compensate for sex inequality in the family that affects eligibility for social security benefits, which turns on labor market participation. A spousal benefit is paid to the spouse of a person (the primary beneficiary) who earned credit for social security benefits through market work when the primary beneficiary retires. But these benefits only help spouses whose primary service has been in the home. A spouse who has worked both in the market and in the home cannot join the spousal benefit with credits accrued on her own behalf through market labor; she will receive the greater of her own benefits or one-half the amount of her spouse's. Thus, these benefits do not help those who are out of work for periods of time after a move or whose employment outcomes are worsened by mobility. See Katherine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 38–39 (1996).

55. See WALTON, *supra* note 10, at 171. Sam Walton's wife has been quoted as saying, “Sam, we've been married two years and we've moved sixteen times. Now, I'll go with you any place you want so long as you don't ask me to live in a big city.” *Id.* at 21.

] a spouse.”⁵⁶ This is a step forward in recognizing the importance of women as workers and the impact of gendered family dynamics on women in the market. Nonetheless, the provision of UI benefits merely addresses the unequal *effects* of gendered mobility dynamics, and in effect approves the underlying dynamics by subsidizing them.

Unlike the protection offered by antidiscrimination law, the provision of UI benefits and the allocation of assets upon divorce carry no community judgment about the impact of structural gender inequality at the intersection of the family and the market for women’s employment opportunities. It is the role of antidiscrimination law to highlight inequality and pass judgment on its associated harms. The fact that extra-Title VII remedies may further entrench gendered mobility dynamics by compensating tied movers for their losses is at odds with the antistereotyping strain of Title VII sex discrimination jurisprudence, which aims to make women’s roles maximally revisable.⁵⁷ Therefore, in addition to being inadequate, these extra-Title VII remedies may actually cause harm.

III. THE DANGERS OF TITLE VII: TOO MUCH FAMILY

One potential remedy for the limits of Title VII’s consideration of the family is a disparate impact suit premised on gendered family dynamics that, in interaction with a particular employer policy, create a disparate impact on women. A successful disparate impact suit could seek the elimination of the offending policy as injunctive relief. So although Title VII provides no remedy for the harms to partners caused by discriminatory policies at the intersection of work and family, it could be used to eliminate the policy, which would incidentally prevent future harms to partners. In *Dukes*, for example, if the suit eliminated the relocation policy, it would provide no relief to tied movers who had already relocated, but would likely result in fewer tied movers. And elimination of the relocation policy of course would make it easier for tied stayers to be promoted at Wal-Mart.

Despite the potential for Title VII to challenge such a policy under the disparate impact theory, a disparate impact suit based on women’s family roles runs the risk of relying too *much* on the family by presupposing the very gendered family mobility dynamics that the disparate treatment claim aims to make irrelevant. In *Dukes*, for example, the plaintiffs alleged that the relocation policy had a disparate impact because women were in fact less likely than men to move due to differ-

56. See H.R. REP. NO. 110-414, at 72 (2007), reprinted in 2007 U.S.C.C.A.N. 69, 71.

57. See *infra* note 70 and accompanying text.

ential attitudes and responsibilities toward work and family. In presupposing these dynamics, however, the disparate impact suit relies on the family–market divide, putting women firmly on the family side and reinforcing the very stereotypes about women’s commitment to market work that Title VII was meant to prevent. So while the critics of the family–market divide have criticized legal interventions like Title VII for only helping those women who are most like men,⁵⁸ a disparate impact challenge to a relocation policy like Wal-Mart’s may suffer the opposite problem: only when women are shown to be least like men can their claims succeed.

A. Strands of Disparate Impact: First Generation Claims

To raise a disparate impact claim, plaintiffs must allege a specific facially neutral policy with a disproportionate adverse effect on a protected class. In *Dukes*, the plaintiffs would have to establish, through statistical proof, that women were less likely to be promoted because of the relocation policy. There are two readings of such proof, which correspond to two theories of disparate impact litigation. First, disparate impact is meant to “smoke out” intentional discrimination. Under this view, the adverse impact of the policy reflects discrimination, either conscious or not, against women, and nothing about women’s willingness to relocate.⁵⁹ Second, disparate impact is meant to hold employers responsible for policies that disproportionately exclude members of a protected class from advancing in the workplace based on characteristics of that protected class when the employer could use a less discriminatory option.⁶⁰

The first theory does not say anything about the characteristics of the protected class. The discrimination occurs because the employer acts based on the employees’ membership in the protected class. In the context of *Dukes*, this could mean that Wal-Mart failed to consider women for promotion because the relevant decision makers believed they would not be willing to move, or that Wal-Mart held women to a more stringent standard under the policy because they needed to

58. See Olsen, *supra* note 1, at 1552 (“Antidiscrimination law does not end the actual subordination of women in the market but instead mainly benefits a small percentage of women who adopt ‘male’ roles.”).

59. See Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 498–99, 520–21, 532 (2003) (setting forth the “evidentiary dragnet for deliberate discrimination” theory of disparate impact as compared with other non-intent-based theories, but categorizing disparate impact as a remedy for unconscious discrimination in the latter theories).

60. See Ricci, 557 U.S. at 595; Primus, *supra* note 59, at 498–99, 521–24.

demonstrate their commitment to the job. Disparate impact is a way to get at this intentional discrimination without proving intent.

The second theory, on the other hand, is based on underlying characteristics common to the class. Under this theory, a policy burdens a protected class because of a trait the class shares that other workers do not. The adverse impact is due to the interaction of the policy and the trait, and not anything conscious or unconscious the employer is doing (other than putting the policy in place). In the *Dukes* case, this would mean that the adverse impact arose from the fact that women are less willing or able to relocate for a managerial position than men.

Here, I am interested in the second theory, which differentiates it from disparate treatment as a theoretical and doctrinal matter.⁶¹ This theory of discrimination poses a danger that sex discrimination cases like *Dukes* based on a nonbiological family-related trait—for example, that women are less likely to relocate for work—will reinforce stereotypes about women and the family–market divide by proving the truth of these stereotypes. Given that plaintiffs do not need to specify which theory of disparate impact forms the basis of their suit (indeed they may not know), the danger may arise whenever the suit implies this second theory. Before further exploring this argument about the dangers of disparate impact litigation for this class of cases based on non-biological traits (“second generation” disparate impact claims), it will be helpful to distinguish this class of cases from other disparate impact sex discrimination cases (“first generation” disparate impact claims).

First generation disparate impact claims are based on sex-differentiated physical attributes. *Dothard v. Rawlinson*, in which the Supreme Court struck down height and weight requirements for state prison guards, is the seminal case.⁶² Policies like those at issue in *Dothard* disproportionately exclude women because they are less able to conform to the policy due to anatomical differences between men and women.⁶³ While these disparate impact claims based on physical traits are premised on sex-based generalizations (i.e., all women are not shorter than all men), they run little risk of entrenching stereotypes because these physical traits are immutable and thus not subject to the prescriptive force of a stereotype: that is, the fact of the generalization

61. See Primus, *supra* note 59, at 521–24.

62. *Dothard v. Rawlinson*, 433 U.S. 321, 323, 332 (1977).

63. See *id.*; *Lynch v. Freeman*, 817 F.2d 380, 388–89 (6th Cir. 1987) (holding that an employer’s provision of unsanitary bathroom facilities had a disparate impact on women due to sex-differentiated anatomical features that led to higher rates of infection for women resulting from the use of such bathrooms).

does not make the generalization more likely to happen.⁶⁴ There is nothing that women can do to make themselves taller on average as a class. Therefore, beliefs about women's height will have no impact on women's ability to advance in the workplace, as they will not make women more likely to be or remain short.⁶⁵

B. *Stereotyping Risks of Second Generation Claims*

Second generation disparate impact claims are based not on physical traits, but on characteristics with origins in gendered family dynamics that have a disproportionate impact on women in the workplace. For instance, in *Dukes*, the adverse impact is due to the fact that women are less likely than men to move for a promotion.⁶⁶ The second generation claim is founded on statistical evidence of the way family life affects the market: it presupposes—and indeed is premised on—a fact from family life about men and women. What distinguishes these family-based facts from the physical facts of the first generation claims is their capacity for prescriptive force. Even if the family-based fact is descriptively accurate (e.g., women are less likely to move for a promotion than men), unlike a physical trait, it runs the risk of entrenching preexisting stereotypes founded on the fact—indeed, the very stereotypes that are challenged by the disparate treat-

64. See Meredith Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133, 151–52, 162 (2010) (arguing that the harm of sex stereotypes is not their overbreadth but their prescriptive force in terms of entrenching gender roles consistent with the stereotype).

65. Disparate impact challenges to job requirements based on physical skills (such as strength and speed), as compared with physical traits, are harder to classify. See, e.g., *EEOC v. Dial Corp.*, 469 F.3d 735, 742 (8th Cir. 2006) (affirming a finding that a pre-employment strength test had an unlawful disparate impact on female applicants); *Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286, 288 (3d Cir. 2002) (upholding the district court's determination that a running test for transit officers with a disparate impact on women was justified by business necessity). These differences result from sex-based anatomical differences that are mutable in a limited way. Women can, with training, become stronger and faster. So despite their basis in physical reality, disparate impact challenges on the basis of physical skills run the risk of naturalizing sex differences that are subject to change. See generally Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (arguing that even the concept of biological sex is constructed). Nonetheless, if men and women both train equal amounts, men on average will have more upper body strength and be faster than women. So stereotypes based on these physical skills may be less dangerous than stereotypes based fully in social construction because their biological reality already limits their revisability. These cases highlight how disparate impact sex discrimination claims may be best placed along a spectrum of prescriptive force, rather than the binary I propose. Nonetheless, I will retain the dichotomy here for disquisition ease.

66. Although one can imagine many gendered aspects of the family that would have a disparate impact on women in the workplace—for example, the disproportionate number of hours women spend on care work in the home—not all will meet the requirement that a disparate impact suit challenge a “specific employment practice.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011).

ment claim raised in *Dukes*. It is this prescriptive force—that the fact of generalization makes the generalization more likely to happen—that amounts to the key danger of sex stereotypes.⁶⁷ Precisely because these family traits, unlike physical traits, are subject to change, entrenching stereotypes about them can concretize them and enhance their prescriptive force as “gender rules” about how men and women should behave.⁶⁸

1. *The Prescriptive Force of Second Generation Claims*

Second generation claims can give credence to stereotypes about traits that make women worse workers than men because evidence is brought in court that makes these differences real and verifiable. To prove the claim, the plaintiffs must put forward evidence suggesting that women are less able than men to conform to the employer’s policy. This suggests permanence and immutability to this fact, and in this way solidifies it.⁶⁹ This type of proof of women’s distinctness related to work set forth in litigation makes these differences salient to judges, employers, and the public for a case with even a fraction of the media coverage of *Dukes*. Once the evidence winds up in a legal document, and especially a legal opinion, it is hard to overcome these facts or show that they have changed. Concretizing a social fact about women’s distinctiveness is at odds with the purpose of sex discrimination law with respect to stereotypes: to keep them maximally revisable, and especially not to reinforce them.⁷⁰

Plaintiffs in these suits may posit a family-based reason for the disparate impact evidence they put forward, providing a narrative that activates a stereotype consistent with existing cultural narratives. In *Dukes*, for example, one of the plaintiffs’ experts, Dr. William Bielby, writes in his report: “*While it may indeed be the case that, on average, more women than men face family constraints that limit their ability to relocate for a management position, stereotypes lead people to act on an [sic] assumptions that overstate the extent to which that is true.*”⁷¹ In the italicized portion of this statement, Dr. Bielby himself may be acting on a stereotype, as he makes this statement about women’s relationship to work and family without citing any evidence, and for no

67. See Render, *supra* note 64, at 151–52, 162.

68. See *id.*

69. See Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1450 (2000) (noting the harm associated with “generalizations” that “embody . . . ‘fixed notions concerning the roles and abilities of males and females’”).

70. See Render, *supra* note 64, at 162.

71. Bielby Decl., *supra* note 5, at 27 (emphasis added).

reason. Sex stereotyping is a wrong under Title VII regardless of whether the employer acts on stereotypes about women that are simply overbroad *or* entirely unjustified. Moreover, putting forward a reason for the disparate impact and locating it in women's commitment to the family provides a rationale consistent with a ubiquitous preexisting stereotype, allowing that stereotype to gain greater resonance.

Judges too may play a role in entrenching stereotypes. In the Seventh Circuit relocation case referenced above, Judge Posner wrote: "Realism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city . . ." ⁷² Perhaps surprisingly, this statement came in the context of a disparate treatment claim, and thus there was no reason for referencing the "reality" of how likely men and women are to relocate. Even beyond positing this reality without evidentiary basis, the court goes further, again with no evidence, in giving the reason behind this assumed "reality": that mothers are more likely to prioritize family over work than fathers (and, on the flip side, that fathers are more likely to prioritize work over family). Again, this narrative fits neatly into preexisting stereotypes and helps to solidify them. That this statement could arise in the context of a disparate treatment claim aimed precisely against these stereotypes shows the even greater danger such statements could pose in a disparate impact claim, in which judges are likely to pay less attention to avoiding stereotypes.

By entrenching stereotypes, second generation lawsuits may also enhance their prescriptive force on employers' and employees' behavior. To the extent the second generation lawsuit makes its factual predicate—e.g., that women are less likely to move for work than men—more concrete, permanent, and salient, the factual predicate becomes more of a fact in the world about how men *qua* men and women *qua* women behave. This factual predicate can begin to harden into a "gender rule" that is followed simply because it is perceived as the appropriate gender-conforming behavior.⁷³ In other words, the more men and women believe that women, as a rule, do not move for work (and conversely that men, as a rule, do move for

72. *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

73. Render explains the prescriptive force of gender rules as two-fold: a gender rule acts as a regulatory rule in that it comes to provide an independent reason for action (i.e., that women and men follow its constraints simply because of the existence of the rule), and a gender rule acts as a constitutive rule in that it polices the boundaries of gender conformity (i.e., it tells us the appropriate behavior for a man and for a woman). See Render, *supra* note 64, at 172–78.

work), the more this fact in itself tells men and women how they should behave. The more these kinds of facts are broadcast through disparate impact litigation, the more that these beliefs about men's and women's behavior are entrenched, increasing the likelihood that both employers and employees will abide by these gender rules, whether consciously or not.

While the risk of entrenching stereotypes with disparate impact claims is not unique to sex discrimination claims, sex-based disparate impact claims present a far greater concern for prescriptive force than race-based disparate impact claims. This is because, as compared with race-based cases, sex segregation in the workplace is more likely to be viewed as a result of employees' own choices rather than employer discrimination. This can be seen through the different views courts have taken of the lack of interest defense in sex- and race-based claims. The lack of interest defense essentially says that the underrepresentation of the protected class in a given position is due to members of the underrepresented class's own choice not to seek access to the position rather than discrimination by the employer.⁷⁴ As Vicki Schultz has explained, courts have held different assumptions about the role of choice and discrimination in shaping minorities' and women's work aspirations.⁷⁵ In race discrimination cases, courts have recognized the history of race discrimination in the labor market and acknowledged that minorities' current employment choices have been shaped by that discrimination.⁷⁶ Judges thus applied the futility doctrine, which held that if minorities failed to apply for segregated jobs, this did not signal lack of interest in the work, but rather a sense of futility created by the employer's history of discrimination.⁷⁷

In interpreting sex-based segregation in the workplace, by contrast, courts, and especially conservative judges, have been more likely to see women's current work aspirations as a product of women's own choices rather than as a product of past discrimination. For women, differential outcomes in the market have been consistently rationalized as based on unrevisable biological differences, equally firmly rooted pre-labor-market gender socialization, or some combination of

74. EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 313–14, 322 (7th Cir. 1988).

75. 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, 1771–81 (1990).

76. *Id.* at 1771–75.

77. *Id.* at 1772; see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979) (recognizing in the affirmative action context that the exclusion of minorities from certain jobs was due to vestiges of discrimination rather than choice).

the two.⁷⁸ Regardless of whether the source is nature or nurture, courts have accepted that women do not want jobs with stereotypically masculine features, and that women do not want to prioritize work over family.⁷⁹ Therefore, setting forth evidence of a sex-based disparate impact in a second generation claim further reinforces the already held view that men and women simply have different work preferences, as compared with race-based disparate impacts, which are more likely to be attributed to past discrimination.

2. *Tension Between Disparate Impact and Disparate Treatment*

The risk of the prescriptive force of second generation claims leads to a tension between the disparate impact and disparate treatment causes of action.⁸⁰ For example, in *Dukes*, the plaintiffs might be claiming both that (1) women are less likely to move for a promotion than men and thus that Wal-Mart must eliminate its relocation policy if it is not a job-related business necessity or there is a less discriminatory alternative, and that (2) employers may not assume any individual woman will refuse a promotion because she is less likely to move. To be sure, this is not strictly a contradiction, as employers are not entitled to stereotype any individual employee on the basis of even accurate stereotypes about her protected class unless the stereotype is *perfectly* accurate.⁸¹ Nonetheless, there is some tension in putting forth evidence of exactly the facts on which employers are not entitled to act. And in any event, putting forward the facts may undermine one of the goals of Title VII: to limit employers acting on the basis of stereotypes.

78. See Schultz, *supra* note 75, at 1800.

79. For example, in *Sears*, the lack of interest defense for sales commission jobs was granted based in part on the notion that women do not want jobs requiring these types of masculine traits and because commission sales jobs required working longer and more irregular hours that were presumably incompatible with women's family obligations. See *Sears*, 839 F.2d at 313. In the affirmative action context, limited opportunities for women in traditionally male jobs has been recognized as a source of women's underrepresentation. See *Johnson v. Transp. Agency*, 480 U.S. 616, 635 (1987).

80. In a case addressing whether an employer could use race-conscious measures to avoid disparate treatment liability without running afoul of the prohibition on disparate treatment, Justice Scalia wrote a concurring opinion taking up the question of whether the disparate impact cause of action was in tension with the formal equality ideal behind disparate treatment, as well as constitutional equality protections. See *Ricci v. DeStefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring). The concerns raised in the sex discrimination context are different. They sound in the prescriptive harms of stereotyping, which is especially problematic in the context of sex discrimination, rather than in the harms that flow from the mere act of classifying by race that motivate proponents of a colorblindness view of antidiscrimination law.

81. See *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707–11 (1978) (holding that the fact that women lived longer than men could not form the basis for employer decision making because not all women lived longer than all men).

Of course, Title VII bars employers from judging any individual woman by the characteristics of her group. So even if women were less willing to relocate, Wal-Mart could not lawfully deny any particular woman a promotion on that basis.⁸² But the law does not come close to enforcing this perfectly. Many of the employment opportunities that women would be denied due to stereotyping would be at the hiring stage, which is notoriously difficult to detect.⁸³ And many of the stereotypes would operate on an unconscious level,⁸⁴ which employment discrimination law generally does not recognize.⁸⁵ Even when plaintiffs bring claims for hiring, pay, or promotion discrimination, they have the cards stacked against them.⁸⁶ They are the least successful plaintiffs in federal court aside from pro se prisoners.⁸⁷

It is obvious to see the stereotyping dangers for a losing disparate impact claim, as it would bring to the forefront bases for stereotypes about women in the workplace without the countervailing benefit of eliminating the policy that led to the inequality in the first place. Disparate impact plaintiffs are even less successful than disparate treatment plaintiffs.⁸⁸ But even for the rare successful second generation claim that eliminates the policy it challenges, the key question is whether more harm is caused by portraying women as an ill fit for current workplace norms or by having women disproportionately suffer for failing to meet norms that are not justified by business necessity. A full examination of this question is outside the narrower scope of this Article. The aim here is to highlight the potential for en-

82. See *supra* note 7 and accompanying text.

83. See Naomi Schoenbaum, *It's Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an "Information-Shifting" Model*, 30 HARV. J.L. & GENDER 99, 125–26 (2007).

84. See sources cited *supra* note 8; Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. 16,474, 16,477 (2012).

85. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 85, 100 (2011). Nonetheless, some scholars have pointed to limited circumstances in which Title VII recognizes disparate treatment without discriminatory intent. See, e.g., Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1364 (2009) (describing harassment by third-parties as one such circumstance).

86. See generally Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012), <http://yalelawjournal.org/2012/10/16/gertner.html> (arguing that structural features of discrimination decision making have led to plaintiff-unfriendly dynamics); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (arguing that misperceptions of the ease of winning discrimination cases and judicial biases lead to the trouble plaintiffs face in these cases).

87. See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276, 1282–85 (2012).

88. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734 (2006).

trenching stereotypes as a cost to raising a second generation disparate impact claim that should be weighed against its expected benefits. In raising this concern, I will briefly sketch out a few factors that might count in assessing second generation suits and the risk of stereotyping, starting with the theoretical, and turning to the practical.⁸⁹

One consideration is whether it is best for women to conform to the norms of the workplace or for the norms of the workplace to conform to women. It may simply be the case that it will be difficult for women to conform to the norms of the workplace given current gendered features of the family without a significant change in public policies that support the family. This is all the more true given that it would also require significant changes in men being more involved in the family to better support the role of women in the market.⁹⁰ On the flip side, changing norms of the workplace may benefit men as well as women, as men are not only benefited but are also burdened by the demands of ideal worker stereotypes.⁹¹ By lessening worker demands and creating more space for caregivers to serve as ideal workers, changing workplace norms could allow both men and women more flexibility in their choice of market and family roles. And, as some feminists have emphasized, the market is premised on masculine values—e.g., individualism, competition, and arm's-length bargaining—that warrant challenge and would benefit from the injection of feminine values—e.g., interdependence, cooperation, and connection—that would come with conforming to women's needs.⁹²

There is also a countervailing risk of stereotyping that results from *not* challenging a policy that disproportionately excludes women from certain roles in the workplace. Sex segregation and other gendered aspects of work can powerfully influence women's (and men's) work choices and aspirations. The workplace is an important site of gender socialization that constructs men's and women's work preferences according to the appropriate gender roles of the workplace.⁹³ There-

89. I will explore this question in a future piece that more fully addresses the dangers of disparate impact lawsuits in the context of sex discrimination.

90. Women still do more housework and childcare than men. See Deborah A. Widiss, *Reconfiguring Sex, Gender, and the Law of Marriage*, 50 *FAM. CT. REV.* 205, 207 (2012) (citing studies).

91. Cf. Elizabeth Emens, *Integrating Accommodation*, 156 *U. PA. L. REV.* 839 (2008) (explaining how, in the context of the ADA, accommodations can benefit those beyond their intended beneficiaries).

92. See Olsen, *supra* note 1, at 1499–1501.

93. See Schultz, *supra* note 75, at 1824–39 (explaining sex segregation as a response to gendered features of the workplace); Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 *HARV. WOMEN'S L.J.* 1, 4–5 (2004) (explaining sex segregation as

fore, leaving in place policies that create distinct work roles for men and women can perpetuate sex segregation and sex stereotypes.

These potential benefits of second generation disparate impact litigation must be weighed against the reality of the limited ability of disparate impact claims to bring about the types of changes just discussed. Disparate impact claims are ill-suited to move the market away from masculine norms given that many employer policies and structures will not be subject to a successful disparate impact challenge, either because they do not amount to a specific employer practice,⁹⁴ because a statistical disparate impact cannot be established,⁹⁵ or because they are justified by business necessity.⁹⁶ In particular, the specific employer practice requirement hamstrings Title VII from providing a capacious enough mechanism to support broad-based attacks on workplace arrangements founded in market values, and indeed it has blocked efforts at such changes.⁹⁷ So even if a narrower challenge like the one to Wal-Mart's relocation policy succeeds, if most market norms will remain in place, this increases the harm of portraying women in a way that makes them an ill fit as workers under these norms.

This risk is especially acute because the stereotypes that are enforced may not be limited simply to the social fact that forms the basis of the claim; they may go far broader in undermining women as equal employees. In the context of the *Dukes* case, for example, proving that women are less likely than men to relocate at Wal-Mart might also signal that women are less committed workers. By relying on statistical proof meant to show that the protected class is less able to meet the employer's demands, the second generation claim threatens to reinforce stereotypes, not only of this particular trait's role in limiting women's ability to conform to the norms of the workplace, but of women's ability to conform to the norms of the workplace in general. In this way, second generation disparate impact claims might only further reinforce negative stereotypes of women's commitment to the workplace and induce more statistical discrimination against women.

women's response to avoiding an all-male workplace that would pose a high risk of discrimination and harassment).

94. See *supra* note 66 and accompanying text.

95. See *supra* note 11 and accompanying text.

96. See *supra* note 11 and accompanying text.

97. See *Am. Fed'n of State, Cnty., & Mun. Emps. v. Washington*, 770 F.2d 1401, 1405-06 (9th Cir. 1985) (rejecting comparable worth claim under disparate impact theory because the plaintiffs challenged not a specific workplace practice, but the entire market-based system of determining wages).

IV. RECALIBRATING TITLE VII'S RECOGNITION OF THE FAMILY

Wal-Mart's relocation policy, like many employer policies that expect a fully and freely available worker, presents a barrier to women's employment opportunities because of the way the policy intersects with gendered family features. Remedies may thus aim to adjust either the application of the policy or the gendered family dynamics. Title VII aims to adjust the application of the policy, but, as explained above, does so in a way that either ignores relevant effects on the family, or relies on the family so much as to risk entrenching dangerous stereotypes. Alternative approaches to removing the barrier would focus on ways to remedy the underlying family features or to remedy the application of the policy in ways that are less harmful than Title VII's current approach.

As for addressing the underlying gendered family features, to the extent that the distribution of care within the family could be redistributed such that men are taking on more family responsibilities, this would lessen the disparate impact of employer policies on women. This redistribution of family care would simultaneously reduce both the need for Title VII to recognize the family and the risk associated with doing so. It would also likely lead men to pay more attention to the way that employer policies affect those with family responsibilities and perhaps better incorporate this impact into household decision making. Moreover, as employer policies have a greater impact on male employees, this broader impact may help with the problem of underrecognition of the family, if not by Title VII, then at least by the employers who put the relevant policies in place. A full discussion of the ways in which the law might remedy the underlying gendered family features that intersect with employer policies to create barriers for women's employment opportunities is outside the scope of this Article. Aside from an existing literature that focuses on this approach,⁹⁸ these solutions do not directly address the problem of Title VII's under- and overrecognition of the family.

An alternative, then, would be to consider how Title VII might be used to recognize the impact of employer policies on the family without the stereotyping currently risked by a second generation disparate impact claim. I suggest an alternative "third generation" disparate impact claim, as well as a few more modest ways that plaintiffs and judges might reduce the risk of stereotyping when raising or deciding second generation claims. These modifications demonstrate the po-

98. See, e.g., Lester, *supra* note 53, at 79-82 (discussing various paid family leave arrangements aimed at redistributing caregiving labor within the family).

tential for a Title VII claim that can challenge inequality at the intersection of the family and the market that pays neither too little nor too much attention to the family.

A. The Third Generation Disparate Impact Claim

The third generation disparate impact suit would provide an alternative mechanism to challenge employer policies that have a disparate impact on women without risking Title VII's overreliance on the family. The third generation claim, rather than focusing on the disparate impact of employer policies on women, would instead focus on identifying employer policies that create or entrench primary worker and primary caregiver/secondary worker roles in the family, and use this as a proxy for sex-based disparate impact.

Taking the relocation policy as an example, the policy has a disparate impact on women because relocation is incompatible with both partners in the family being primary workers. By premising an employee's advancement on uprooting the employee in a way that interrupts a partner's employment, the policy envisions a primary worker with a portable family. To the extent the portable family includes a partner, that partner is either a primary caregiver or a secondary worker. The policy has a disparate impact on women because men are disproportionately likely to be the primary worker, and women are disproportionately likely to be the primary caregiver or secondary worker. For third generation claims, instead of proving a disparate impact on women, the plaintiffs would prove that the policy assumes these primary worker and primary caregiver/secondary worker dynamics.

Although the legal wrong (in terms of the violation of Title VII) would still be based in the underlying disparate impact on women, the claim would not be proven with statistics that women fare worse under the policy. Rather, the plaintiffs would put forth evidence that the policy leads an employee subject to it to take on the primary worker role in such a way that generally makes it harder for the employee's partner to advance in employment. This could be shown with data about a negative employment effect on the partners of employees who were subject to the policy.

This shift in focus to the sex-neutral impact on the employee, which in turn impacts the family, would mean that such claims would not risk entrenching stereotypes about women's family and work priorities. First, because such claims would not be tied to sex, they present much less risk of activating and reinforcing sex-based stereotypes of work and family roles. The third generation claim would take the focus off

of women's incompatibility with workplace policies and reframe the problem as incompatibility between the workplace policy and family more generally. This framing also brings attention to the way that these types of policies affect primary workers—disproportionately men—who are less able to live balanced lives and become involved in the family due to such policies. In this way, such claims would focus less on women's excessive family roles and more not only on women's insufficient work roles but also on men's excessive work roles. A focus on balance between work and family for both sexes could bring its own benefits.⁹⁹

Some households may *prefer* to divide their labor along the traditional primary worker and primary caregiver/secondary worker arrangements. To the extent that the third generation disparate impact claim makes such arrangements less available in the market (that is, that at least some employer policies implicated by the third generation claim would not be supported by business necessity), these households would bear the burden of fewer employment options that match their preferences. However, this burden likely would not be so great. Given the availability of the business necessity defense, many of these jobs would likely still be available.¹⁰⁰ The cause of gender equality may justify the modest burden that results.

Of course, Title VII does not protect against a disparate impact on those who desire balanced work and family lives; it only recognizes a disparate impact on the basis of one of the statute's protected classes. To the extent that the third generation claim relies on the primary worker dynamics identified above as a proxy for a disparate impact on women, it would be based in currently recognized grounds for Title VII liability. Given current gendered family dynamics,¹⁰¹ the use of such a proxy is warranted. Of course, without proving that any specific employer policy indeed does have a statistical disparate impact on women, the elements of the disparate impact claim would not be met. So while the third generation claim does not stray far from the current parameters of Title VII, its acceptance would nonetheless require judicial recognition of this alternate means of showing a disparate impact sex discrimination claim.

99. See, e.g., Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834 (2002) (“[B]oth individuals and society would benefit from a fuller integration of employment, family, and civic commitments than is now possible in most workplaces . . .”).

100. See Selmi, *supra* note 88, at 742–44 (describing courts' increased acceptance of the business necessity defense).

101. See *supra* note 90 and accompanying text.

B. Minimizing the Family in Second Generation Cases

In light of the fact that this alternative disparate impact suit might not be a feasible solution under current Title VII jurisprudence, there are a few more modest steps that could be taken with the existing disparate impact suit that might go some way towards reducing its stereotyping risks, even if they do not directly address the tension between disparate impact and disparate treatment. First, plaintiffs could emphasize that their disparate impact claims fall within the first theory of “smoking out” disparate impact discussed above.¹⁰² So, for example, in *Dukes*, the plaintiffs could argue that the adverse impact of the challenged policy at least in part reflects discrimination, either conscious or not, against women, rather than women’s unwillingness to relocate. The disparate impact theory is relied upon because the proof of intent is too hard to come by. Explaining that the adverse impact is (at least in part) a result of discrimination by the employer, rather than any characteristics of the women, could curtail stereotyping. In fact, statistics of a disparate impact alone reveal nothing about whether the impact is due to actions by the employer or choices of the employee (or some interaction of the two).¹⁰³ In many cases, without further evidence, the employer discrimination theory will be at least as plausible as the employee choice theory, and plaintiffs have no reason not to offer the former explanation.

In a case like *Dukes*, in which the plaintiffs challenge the application of the policy on both disparate treatment and disparate impact grounds, such an argument is especially plausible. In these cases, disparate impact can be viewed as simply an alternative means of proving disparate treatment. This suggests that to avoid stereotyping, plaintiffs raising disparate impact claims should accompany them with disparate treatment claims on the same ground to further support the “smoking out” theory of disparate impact.

As noted above, the *Dukes* plaintiffs did not follow this strategy. They instead presumed that the disparate impact was due to women’s relative family and work priorities.¹⁰⁴ Justice Ginsburg’s dissent in *Dukes* provides an example of the better approach. She states that “[a]bsent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to

102. See *supra* note 59 and accompanying text.

103. See Schultz, *supra* note 75, at 1824–39 (explaining how employees’ work “choices” are constructed in the face of gendered (and discriminatory) work structures).

104. See Bielby Decl., *supra* note 5, at 27 (“While it may indeed be the case that, on average, more women than men face family constraints that limit their ability to relocate for a management position . . .”).

husband and children, are less mobile than men.”¹⁰⁵ This makes clear that employers may be acting on an unfounded assumption that reflects nothing about the reality of women’s willingness to move.

Second, plaintiffs can make reference to women (and men) who do not conform to the patterns underlying their charge to make clear that the statistics they are presenting are not universal. These counterexamples can go some way to undermining stereotypes of the roles women as a group and men as a group take on at work and in the family. A judge may also then reference these counter-stereotypical examples in a decision. The challenge with this approach is to incentivize plaintiffs to adopt this strategy, because such counterexamples would seem to undermine a disparate impact claim. Of course, one incentive would be to emphasize the stereotyping risks that are the focus of this Part, through outreach efforts and perhaps even EEOC guidance. For plaintiffs’ lawyers who are repeat players in this area, and particularly advocacy organizations whose institutional interests are to support broader sex equality concerns—both of whom represented plaintiffs in the *Dukes* case¹⁰⁶—this may be sufficient incentive to protect their long-term interests.¹⁰⁷ And these lawyers who are likely to be responsive to this incentive are also the most likely to be involved in precisely the type of very public cases, like *Dukes*, that most risk entrenching stereotypes. This may be sufficient to curb a significant amount of risk.

Third, education outreach for plaintiffs’ lawyers could be accompanied by education outreach for judges on how to avoid acting on and entrenching stereotypes in their decision making and opinion writing. For several decades now, gender bias task forces have tried to counteract the ways that ingrained assumptions about men and women inform judicial decision making and become entrenched in the law, including in employment discrimination cases.¹⁰⁸ Such programs

105. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (2011) (Ginsburg, J., concurring in part and dissenting in part).

106. The plaintiffs in *Dukes* were represented by multiple nonprofit civil rights and women’s rights legal advocacy organizations, as well as several plaintiff-side employment discrimination law firms.

107. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 97–107 (1974) (discussing different litigation incentives for repeat players as opposed to “one-shotter” litigants and lawyers).

108. See Morrison Torrey, *You Call that Education*, 19 *WIS. WOMEN’S L.J.* 93, 93 n.1 (2004) (listing various state and federal judicial task forces on gender bias); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 *S. CAL. L. REV.* 745, 883–89, 974–77 (1994); Dorothy W. Nelson, *Introduction to the Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 *S. CAL. L. REV.*

could include a focus on the risks of gender stereotyping in Title VII decision making.

Finally, plaintiffs' lawyers could avoid some of the risk of entrenching stereotypes with second generation suits by limiting the publicity of the evidence they are presenting. This could be achieved by filing such evidence under seal or by working towards voluntary conciliation or early settlement. Because publicity and litigation have benefits in themselves for sex discrimination plaintiffs,¹⁰⁹ the costs of limited publicity would have to be weighed against the benefits. This analysis would be difficult because the benefits are internal to the plaintiffs, while the stereotyping costs are externalities that plaintiffs are unlikely to take adequate account of. These costs are most likely to be considered by the repeat players discussed above, who are more likely to bear the costs of these stereotypes in future litigation.¹¹⁰ Again, given that these repeat players are most likely to be involved in higher profile cases that most risk stereotyping, consideration of the costs by these lawyers may go some way towards containing stereotypes.¹¹¹

V. CONCLUSION

Title VII's simultaneous under- and overrecognition of the family not only presupposes and reinforces the family-market divide, it also points to a larger tension within the statute itself. The *Dukes* disparate treatment and disparate impact challenges to Wal-Mart's relocation policy exposes a statutory rift that arises from Title VII's ambivalence about the family. The disparate treatment claim takes aim at Wal-Mart's subjective decision-making practices that are particularly susceptible to biases about women's roles in the family while ignoring the underlying gendered family dynamics. The disparate impact suit takes account of these family dynamics, but in so doing, entrenches stereotypes about women's family roles that are the target of the disparate treatment claim. The tension between the two causes of action, as highlighted by *Dukes*, militates in favor of careful consideration of whether and how to pursue a second generation sex discrimi-

731, 731 (1994) (discussing judicial education workshop on gender bias in Title VII decision making given in the Ninth Circuit).

109. See generally Lesley M. Wexler, *Extralegal Whitewashes*, 62 DEPAUL L. REV. 817 (2013) (discussing how publicity can lead to pressure for voluntary corporate changes); Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008) (noting the importance of litigation for normative judgment, public accountability, and policy change).

110. See Galanter, *supra* note 107, at 97-107.

111. See *id.*

nation disparate impact claim as a means to furthering gender equality. This tension suggests a need for further theoretical work to reconcile the role of Title VII and its two causes of action as a means of furthering women's employment opportunities. This Article is meant as a first step towards that goal.