A prominent, if not the preeminent, Title VII story of the past decade has been one of procedural setbacks. Heightened pleading standards, \(^1\) “cramped” interpretations of Title VII’s administrative filing requirements, \(^2\) and newly
erected barriers to plaintiff class actions3 are understood to make enforcement
of employers’ nondiscrimination obligations more difficult.4 It would be a
mistake, however, to focus too narrowly on these procedural setbacks as
heralding the end of antidiscrimination law, to allow them to define the entire
realm of private Title VII enforcement. The procedural decisions that the
Supreme Court has delivered over the past decade are best understood as
stemming from concern about fairness to large organizations, and large
organizations are but one slice, even if an expanding and important one, of the
world of work to which Title VII applies.

I urge in this Symposium Article (invited on the theme of “Procedural
Barriers to Civil Rights”) an alternative tack: focusing attention on working
families outside of large organizations. Specifically, I turn attention to work
spaces that exhibit exclusion—segregation and sexist work environments—and
that thereby serve to limit working options for low-wage working families.
There is a story to tell in this area of low-wage work that resonates with
individualism, traditional family values, and a strong work ethic, moral threads
that currently run deep and broad across much of American society. This is a
place where a rich and compelling story that emphasizes the need for working
options can be told, a story that can then be used as counterweight in the
fairness-to-large-organizations debate. It is also a place where Title VII has
much work to do.

I have two main goals for this Article. The first is to think practically and
strategically about next legal steps for Title VII enforcement in light of recent
procedural setbacks. But my goal here is deeper and more complex than this
account may suggest: I seek to shift the balance of debate in ways that resonate
with American morals and in ways that are true to people’s real lives and
struggles. This leads me to my second goal, which is to better link, in our
minds, our literatures, and our visions for Title VII, people’s lived lives,
including their families and communities, with their working lives. In so doing,
I hope that we can better see, among other things, that economic conditions and
job options affect family well-being and gender norms in numerous and diverse
ways.

dissenting), superseded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2,
123 Stat. 5.
4. See Michael Zimmer, Inequality, Individualized Risk, and Insecurity, 2013 Wis. L.
REV. 1, 32 (explaining that “the Supreme Court has erected formidable procedural barriers”
to employment discrimination claims reaching trial); see also Raymond H. Brescia, The
Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing
Discrimination Litigation, 100 Ky. L.J. 235, 238-39, 284-85 (2012); Suzette M. Malveaux,
The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-
Mart v. Dukes, 62 DEPAUL L. REV. 659, 661 (2013); Marcia L. McCormick, Implausible
Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment
The Article is organized in four Parts. In Part I, I show that the Supreme Court’s recent procedural-barrier decisions rest at least in part on concern about fairness to large organizations. \textit{Ashcroft v. Iqbal}, governing federal pleading standards,\(^5\) \textit{Ledbetter v. Goodyear Tire & Rubber}, involving administrative filing requirements,\(^6\) and \textit{Wal-Mart v. Dukes}, concerning class actions,\(^7\) as well as several lines of cases leading up to them, can be understood in this way. Two of the decisions, \textit{Iqbal} and \textit{Wal-Mart}, are distinctly cross-substantive; they have been applied well beyond the employment discrimination context, largely to the advantage of defendants, individuals as well as organizations of all sizes. But the Court’s concern about fairness to organizations in the discrimination context in particular lurks beneath the surface of all three.

\textit{Wal-Mart} and \textit{Ledbetter} both involved relatively low-wage, working class jobs in large organizations. Interestingly, the low-wage aspect of the plaintiffs’ jobs and importantly the interplay between the family and working lives of the women and men involved in these cases received almost no attention in the mainstream press or legal scholarship. In Part II of the Article, I begin the telling of a fresh story, one without the looming shadow of concern about fairness to large organizations. Drawing on sociological research on low-wage work in rural areas, I tell a story of family and work struggle that points to the need for working options, and I show how sex-based exclusion through segregation and sexist work environments serves to limit those options.

In Part III of the Article, I explain how private plaintiffs suing under Title VII might successfully engage in conversations about working options and challenge segregated and sexist work environments that limit those options for working families. In doing so, I highlight several ways in which basic procedural tools might be helpful.

In Part IV, I conclude and bring large employers back in. Large organizations dominate the labor landscape in numerous ways. Proponents of an effective antidiscrimination law will have to wrestle with the Court’s concern for fairness to these organizations. Building a compelling story of the need for working options for working families may provide the counterweight to do that well.

\section*{I. Beneath Procedural Setbacks: Concern about Fairness to Organizations}

The legal scholarship of the last few years is replete with analyses of the consequences of the Supreme Court’s procedural decisions for private plaintiffs suing under Title VII.\(^8\) Many commentators see these decisions as extreme

\begin{itemize}
\item \textit{Ashcroft}, 556 U.S. at 678.
\item \textit{Ledbetter}, 550 U.S. at 621.
\item \textit{Wal-Mart}, 131 S. Ct. at 2250-51.
\item See, e.g., Christopher S. Burrichter, \textit{Introduction: Wal-Mart v. Dukes and the
setbacks for Title VII plaintiffs, while others see them as more modest reminders of the role that procedure plays in disputes in the American legal system. I do not seek to enter that particular debate here. Rather, using as examples three of the Court’s most prominent recent decisions, on pleading (Ashcroft v. Iqbal), timing of administrative filing requirements (Ledbetter v. Goodyear), and class actions (Wal-Mart v. Dukes), I seek to show that the procedural decisions of the last decade are grounded in the Court’s concern about fairness to large organizations, even as the holdings have radiated across substantive areas of law and beyond organizations as defendants.

A. Ashcroft v. Iqbal: Plausibility Pleading

Ashcroft v. Iqbal involved a claim by a man whom federal officials had detained in New York City during the weeks following the September 11 attacks. Javaid Iqbal alleged that he had been subjected to especially harsh incarceration and that these conditions were imposed on him because he was Arab and Muslim. Iqbal brought a Bivens claim, a challenge to the actions of federal officials on the ground that they violated his constitutional rights, here the right to equal protection and to free exercise of religion. Iqbal alleged that defendants John Ashcroft, Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, had adopted an unconstitutional policy of heightened detention that subjected Iqbal to harsh conditions of confinement on account of his race, religion, or national origin.

Iqbal was therefore not just a case involving an organization as large as the United States federal government; it was a case involving federal law enforcement dealing with terrorism. But the Court in Iqbal was very much aware of the fact that, under Bivens, Iqbal would have to prove that Ashcroft and Mueller engaged in purposeful discrimination, regardless of the nature of the context in which they acted. Iqbal would have to prove that Ashcroft and Mueller had adopted the federal policy with intent to single out members of certain religions or national origins for harsh treatment, and not just with an
awareness of the consequences of their policy. Indeed, Ashcroft and Mueller would have had to have acted, in the Court’s words, “not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”

This kind of proof is hard to come by. It is particularly hard to come by in a case like *Iqbal* because high-level decision makers within the federal government (as in any large organization) are assumed to have other, more important things in mind when making policy decisions. Indeed, this is why the Court found *Iqbal*’s pleading implausible. On the pleading question, the Court held that to survive a motion to dismiss, a plaintiff’s complaint must contain factual matter that when accepted as true is sufficient to “state a claim to relief that is plausible on its face.” On the merits, although it might have been plausible that lower-level officials acted with inappropriate motives, according to the Court it was not plausible from *Iqbal*’s statement of the facts that Ashcroft and Mueller did so. The Court thought that the goal of protecting national security by keeping “suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity” was much more likely to have been motivating these high-level policymakers than any discriminatory goal.

Beyond the national security context, the Court’s reasoning in *Iqbal* suggests that it would pose a similarly tall hurdle for plaintiffs alleging that high-level decision makers within any other organization acted with discriminatory intent. High-level decision makers are assumed to have important institutional goals, and not discriminatory ones, in mind when they make their decisions. Giving weight to this assumption at the pleading stage protects the organization as a whole from the perceived unfairness of having to bear the costs of discovery.

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16. *Id.*
17. *Id.* at 677.
18. See infra note 49 and accompanying text (noting that the Supreme Court gave unwavering credit to the fact that Walmart had a nondiscrimination policy and “imposes penalties for denials of equal employment opportunity”).
20. *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).
21. *Id.* at 683.
22. *Id.*
23. See infra note 49. In contrast, courts sometimes infer discriminatory intent of lower-level decision makers from indirect evidence, such as differences in applicant qualifications. See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57 (2006) (rejecting the “slap you in the face” standard for whether a difference in qualifications can give rise to an inference of discrimination).
B. Ledbetter v. Goodyear Tire and Rubber Co.: Stale Claims and Notice

In Ledbetter v. Goodyear, the Court held that even in cases involving pay discrimination, the plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the discriminatory pay decision, and not of the later issued paycheck. Although the Court's holding was overruled by statute in 2009, the Court's decision serves to illustrate its ongoing concern about fairness to large organizations.

Lilly Ledbetter worked at Goodyear Tire and Rubber Company's Gadsden, Alabama tire plant for almost twenty years. For much of that time, she worked as an area manager, supervising the tire builders in several different assembly sections of the tire assembly center at the plant. She discovered in 1998 by anonymous note left in her locker at work that she was being paid less than all of the other area managers in tire assembly, all of whom were male. At the time, Ledbetter was being paid $3,727 per month. The lowest paid male Area Manager was making $4,286, and the highest paid was making $5,236.

Title VII requires that all private plaintiffs file a claim with the EEOC within 180 or 300 days, depending on the jurisdiction, before filing a federal claim in court. Ledbetter submitted the required questionnaire to the EEOC alleging discrimination in pay in March 1998. Ledbetter's claim subsequently went to trial, where she submitted testimony regarding a number of sex-based incidents over the years at Goodyear, including biased statements and harassment by Mike Maudsley, her supervisor in the 1980s and her performance auditor in the early- to mid-1990s. She also submitted evidence that other men, including the plant manager, expressed bias against women at the plant, stating, for example, “that [the] plant did not need women, that [women] didn’t help it” and “caused problems.” In addition to testimony regarding these incidents, Ledbetter presented evidence on the stark disparity

27. Ledbetter, 550 U.S. at 621.
29. LILLY LEDBETTER WITH LANIER SCOTT ISOM, GRACE AND GRIT: MY FIGHT FOR EQUAL PAY AND FAIRNESS AT GOODYEAR AND BEYOND 5-6 (2012) (describing Ledbetter’s discovery of the note).
30. Ledbetter, 421 F.3d at 1174.
31. Id.
34. Joint Appendix at 40-46, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074) (describing instances of workplace harassment by Maudsley); see also Ledbetter, 550 U.S. at 622, 632 n.4.
35. See Ledbetter, 421 F.3d at 1189 n.27.
between her pay and that of male area managers, evidence that her work did not warrant her low pay, and testimony of other women regarding their discriminatory experiences at Goodyear.\textsuperscript{36}

Writing for a majority of the Court, Justice Alito framed Ledbetter’s case as relying exclusively on her allegations about Mike Maudsley: that he retaliated against her in the 1980s by recommending low pay increases after she rejected his sexual advances and that he did so again in the 1990s by submitting false audit reports.\textsuperscript{37} This presented to the Court a case that relied on evidence of biased decisions of a single individual that, in some instances, occurred more than ten years in the past. And this got the Court thinking about fairness to the defendant organization; for in the Court’s view, it is very different for an organization to defend allegations of biased decisions by a discrete individual than to defend allegations of biased decisions at high levels of an organization concerning the organization’s practices or policies for setting pay.\textsuperscript{38} As the Court explained:

Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, \textit{Bazemore} [a decision holding that each paycheck starts a new filing period] is of no help to her. Rather, all Ledbetter has alleged is that Goodyear’s agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks.\textsuperscript{39}

The result followed easily from this concern. Employers being at a disadvantage in litigating claims about a low-level agent’s biased decision long past is reason to adhere rigidly to a filing requirement. “[T]he passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.”\textsuperscript{40} The larger the organization, the more removed the low-level decision makers become from those at the highest levels who set the policies and practices of the organization.

\textsuperscript{36} See \textit{Ledbetter}, 550 U.S. at 659-60 (Ginsburg, J., dissenting) (describing evidence).

\textsuperscript{37} Id. at 622; see also id. at 632 n.4 (focusing on evidence regarding Mike Maudsley).

This is not surprising given the framing of the question on which Ledbetter sought review: whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period. See generally id. at 621.

For an argument that \textit{Ledbetter} reflects an overarching trend toward insular individualism, the belief that discrimination can be reduced to the action of an individual decision maker (or group of decision makers) isolated from the work environment and the employer, see Tristin K. Green, \textit{Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear}, 43 HARV. C.R.-C.L. L. REV. 353, 359-60 (2008).

\textsuperscript{38} \textit{Ledbetter}, 550 U.S. at 637.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 632; see also id. at 632 n.4 (stressing that Maudsley had since died and his death would make the case more difficult for defendants to defend).
Indeed, Ledbetter belongs to a long line of cases in which the Court has increasingly emphasized the perceived rogue nature of individual discriminatory acts and has questioned the fairness of asking organizations to defend those acts. As Justice Scalia for the Court explained in St. Mary’s Honor Center v. Hicks, for example, in rejecting the dissent’s argument that the employer should be worse off after presenting a nondiscriminatory reason for a particular decision that is false than if it had presented no reason at all:

[I]n these Title VII cases, the defendant is ordinarily not an individual but a company, which must rely upon the statement of an employee—often a relatively low-level employee—as to the central fact; and that central fact is not a physical occurrence, but rather that employee’s state of mind.

Notice to the organization that discrimination is occurring takes center stage in this line of cases. Once the individual discriminator is conceptually presumed to be acting against organizational interest, questions begin to arise about whether it would be fair to hold the organization liable for the act of an individual discriminator if high-level decision makers were not aware of the acts. In hostile work environment cases, for example, the Court has created limits to employers’ vicarious liability arguably on this ground, placing a burden on the victims of harassment to complain about any harassing conduct.

C. Wal-Mart Stores, Inc. v. Dukes: Class Actions

Wal-Mart v. Dukes, too, arguably rests on concern about fairness to organizations, especially large organizations. The case involved the largest private organization in the United States, and one of the largest class actions ever certified. It involved the question of class certification of a nationwide, 1.5 million member class of women suing Walmart under Title VII for discrimination in pay and promotion. The Court held that because the plaintiffs “provide[d] no convincing proof of a companywide discriminatory

41. See generally Green, supra note 37 (describing the rise of insular individualism); Tristin K. Green, The Future of Systemic Disparate Treatment Law, 32 BERKELEY J. EMP. & LAB. L. 395, 423-24 (2011) (drawing attention to the influence of the principal-agent model of organizational misconduct on employment discrimination law).
43. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); see also Green, supra note 37, at 359-60 (explaining the Court’s holding in Burlington).
45. Id. at 2547.
46. I have used “Wal-Mart” to refer to the case, Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541 (2011), and “Walmart” to refer to the organization, as the corporation changed its name after the Supreme Court decision.
47. Wal-Mart, 131 S. Ct. at 2547.
pay and promotion policy,” they did not establish the existence of a common question required for class certification, and the class could not be certified.48

The similarity between *Iqbal* and *Wal-Mart* is striking. Like the Court in *Iqbal*, the Court in *Wal-Mart* (the same five justices in majority) required evidence that high-level decision makers, and not just low-level ones, acted with bias against women at Walmart by adopting a discriminatory policy or practice.49 And, like in *Iqbal*, the Court assumed that the high-level decision makers had nondiscriminatory motives, giving full and unwavering credit to the company’s stated nondiscrimination policy.50 Of course, it is well settled that the law at issue in *Iqbal* requires discriminatory intent on the part of the high-level decision makers named as defendants.51 In contrast, as I have argued elsewhere, this was a new turn in employment discrimination law.52

Without re-entering that debate here, my goal is to expose the *Wal-Mart* Court’s concern about fairness to large organizations. The majority opinion hews very closely to its interpretation of the commonality requirement for class certification. The case must be understood, however, as part of the broader class action debate that has been raging in the United States for some time now. Class actions, especially large ones that rely on statistics to generate inferences of organizational wrongdoing, have been under attack as putting undue pressure on organizations to settle and as twisting the law to make it too easy to hold large organizations liable.53

The other hint that the *Wal-Mart* Court was concerned about fairness to large organizations lies in its treatment of the plaintiffs’ statistical evidence. Again, what the Court was looking for was evidence that “the entire company ‘operate[s] under a general policy of discrimination.’”54 In addition to evidence

48. Id. at 2556.
49. Id.
50. Id. at 2553 (stating that “Wal-Mart’s announced policy forbids sex discrimination”). Indeed, the Court went on to assume that when an organization has a policy of nondiscrimination, most people will not discriminate. See id. at 2554 (“[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”).
52. See Green, supra note 41, at 423-24.
of underrepresentation of women at Walmart compared to similar retailers,\footnote{Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1180 n.7 (9th Cir. 2007) (explaining that plaintiffs’ expert compared or “benchmarked” Walmart against twenty other similar general merchandise retailers).} evidence of a policy of leaving promotion and pay decisions to the largely unfettered discretion of mostly male supervisors,\footnote{Id. at 1179.} and evidence indicating a work culture permeated with stereotypes and bias against women,\footnote{See Plaintiffs’ Motion for Class Certification at 17 n.10, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252).} plaintiffs submitted statistical studies showing disparities in pay and promotion for similarly qualified women and men at Walmart.\footnote{Id. at 25-28 (describing Dr. Richard Drogin’s statistical analysis).} An analysis of Walmart’s payroll and personnel data showed, for example, that women in hourly positions at Walmart made $1,100 less annually than men, and in salaried positions the annual gap was $14,500.\footnote{Id.; see also Dukes, 222 F.R.D. at 146, 151 (describing evidence). The statistical analysis was conducted regionally as well as nationally. See Wal-Mart, 131 S. Ct. at 2555.}

In considering the entirety of statistical analysis evidence presented by the plaintiffs, the Wal-Mart majority first explained its view that relying on large, cross-shop samples to generate an inference of widespread disparate treatment within an organization is methodologically suspect. Citing to Judge Ikuta’s dissent from the en banc decision below, the Court stated that “[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.”\footnote{Wal-Mart, 131 S. Ct. at 2555.} According to the Court, “A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.”\footnote{Id.}

But the Court indicated that even satisfactory proof of widespread disparate treatment, had it been presented, would be insufficient to satisfy the commonality requirement. Why? Because of the size of the organization. The Court reasoned that without express direction from company policy, managers in an organization of Walmart’s size and geographical scope are unlikely to exercise their discretion in a common way.\footnote{Id.}

If, as I argue, the Court’s recent procedural decisions are based at least in part on the Court’s overarching concern about fairness to large organizations, then one tack for proponents of Title VII enforcement is to pull back on challenges to large organizations that are likely to raise this concern. This is what litigants post-Wal-Mart have done. They have simply reduced the size of
the class by geographical scope of the defendant, to limited success. Another potentially more useful way to pull back is conceptual: by stepping away from large organizations to rebuild the story of why Title VII continues to be important. In the next Part, I begin to build that story.

II. THE NEED FOR WORKING OPTIONS: FAMILIES, LOW-WAGE WORK, AND GENDER BIAS OUTSIDE OF LARGE ORGANIZATIONS

In her book, *Grace and Grit*, Lilly Ledbetter describes her desire to get paid work and her improved sense of freedom and self-value when she did. She also explains that she felt she needed to work to earn money to sustain her family: “What I also hadn’t told [her doctor, who had asked about stress in the family] was that Charles’s job was only part-time, and the income, even with his supplement from the National Guard and selling encyclopedias, just wasn’t enough.”

Ledbetter describes her arguments with her husband, Charles, over her decision to go to work when their two children, Vickie and Phillip, were still young: “Charles and I argued about it well past midnight. He couldn’t understand why I wouldn’t let him be the sole provider—the way things were supposed to be, and had been since biblical times, he said. I couldn’t justify my position in a way that Charles accepted.”

She also describes the family’s, including Charles’s, later decision to support her:

The next evening, before I started cooking dinner, I gathered the family in the living room. Charles told Vickie and Phillip that I was quitting [her job at H&R Block filling out tax returns].

Phillip asked, “Can we still go to Jack’s for a hamburger?”

A hamburger cost fifteen cents. That expense would have to go. I recalled all the times I unsuccessfully begged my mother for a bicycle or piano lessons. I couldn’t believe it, but here I was telling Phillip no.

... Vickie ... asked why I didn’t want to work anymore. When I explained that I couldn’t get all of the housework done, she was silent at first, then she, too, became animated. “We can pitch in. I’ll clean my room every night before bed, and Phillip can clean his.” Vickie jumped up and ran into her bedroom,


64. LEDBETTER, supra note 29, at 45. Among other things, the Ledbetters’ son, Phillip, needed speech therapy for which they could not afford to pay. Id. at 46, 50; see also id. at 50 (“More than anything, I wanted Vickie and Phillip to have a different childhood than we’d had; I wanted to do more than just get by.”).

65. Id. at 47.
returning with a pencil and the lined writing paper she practiced her cursive writing on. "I'll make a list for me and one for Phillip, and we can hang it on the refrigerator so we don't forget."

. . . Charles began shouldering a good portion of the responsibilities that had once fallen solely to me, such as picking up the kids [from the caregiver's]. As Vickie and Phillip became more involved in school activities, Charles was the one who participated in the PTA meetings, attended Phillip's football and baseball games, and worked the concessions when Vickie was a cheerleader and in the marching band—I was grateful that not once did she have to worry about buying a uniform. Over time, he became accustomed to my working, and the day my paycheck became greater than his he finally accepted the fact that I had a knack for what I did. Eventually, he found a good job he liked . . . and stayed there until he retired . . . .

Lilly Ledbetter's story reflects more than just a woman wanting to work for self-empowerment or to make some extra spending money; it shows a family working together to sustain basic amenities and care. Ledbetter was worried about affording prescribed speech therapy for her small son. She was worried about earning enough money to buy a house and to send her children to college.

Lilly Ledbetter and her low-wage counterpart Betty Dukes, the lead plaintiff in Wal-Mart who started there as a part-time cashier earning five dollars an hour, are famous for suing large organizations for sex-based discrimination in pay and promotion. But the need for working options for working families extends well beyond large organizations. In this Part, I take large organizations out of the story by focusing on rural communities, not because rural communities are unaffected (as I will revisit later), but because the rural space of America today is a good place to get a picture of the struggle of working families as traditional, male breadwinning jobs have turned to more contingent, low-wage work. It is also a part of America that is often overlooked.

The story here draws primarily on social science research, a combination of ethnographies of real communities and analysis of job and economic trends. Two initial caveats are in order: first, on the definition of "family." I use the

66. Id. at 57-59.
67. Id. at 45-47.
68. Id. at 54-55, 61-62.
term "family" quite loosely. Although I highlight here families with two adults and children or elder dependents, I do not intend to suggest that family is or should be limited to that model. Single-parent families and families that build more organically through strong friendships rather than solely by blood would also benefit from increased working options. I also do not intend to suggest that two adults in a family should be of different sex, even though for numerous reasons, including strong strains of homophobic beliefs, most rural working families studied are made up of different-sex couples.

Second, the rural communities described in the ethnographies here are mostly white. Where possible, I bring in data on race and gender together in job exclusion. Race and gender intersect in this area in important ways that I will revisit briefly in Part IV.

A. A Story of Gender, Family, Life, and Work in Rural America

In her recent ethnography of a small rural community in Northern California, sociologist Jennifer Sherman describes the struggle of working families in the face of modern economic realities.\(^71\) She calls the town of roughly two thousand people “Golden Valley.”\(^72\) Golden Valley sits in the least populated county of California (fewer than fifteen thousand residents according to the 2000 census) and is two hours by car to the nearest interstate freeway and seventy miles over mountains on hairpin roads to the nearest city of less than one hundred thousand people.\(^73\)

Golden Valley’s economy has always depended on the land. Native Americans settled first in the area, and descendants of several tribal groups still reside there.\(^74\) Located in mountains with forests, rivers, and abundant wildlife, the local culture values highly subsistence activities like hunting, fishing, and gardening, as well as building one’s own housing, and gathering one’s own wood for heat.\(^75\) European Americans arrived in large numbers during the gold mining boom of the nineteenth century, and the area turned to agriculture and ranching in support of the mining operations nearby.\(^76\) Over time, ranching was replaced by timber production as the community’s main industry.\(^77\) The U.S. Forest Service employed workers for logging, road building, and reforestation.\(^78\) Most significantly for the local economy, moreover, were the mills that operated in the area, including Northwest Timber Industries, which

\(^{72}\) Id. at 27.
\(^{73}\) Id.
\(^{74}\) Id. at 30.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id.
\(^{78}\) Id.
opened a large-scale mill in Golden Valley that by the early 1990s employed about 150 people year round. Most people believe that the logging industry would have declined some in the 1990s, whether from market pressure or sustainability (the area was being heavily logged), but any market- or preservation-based decline from within the industry was abruptly accelerated by the passage of the Federal Endangered Species Act in 1990. That act resulted in a ban on timber harvesting through much of the Pacific Northwest. The result was dramatic economic restructuring and change in employment patterns that marked a new time for Golden Valley. Numerous mills in the area closed, including Northwest Timber, which closed in 1996. Jobs were also lost in the local U.S. Forest Service. The bulk of remaining jobs in Golden Valley are in the service and sales sectors. The community’s payroll fell by more than 40% during the 1990s, with much of the loss in manufacturing, and unemployment rose from 11% in 1990 to 21% in 2000. For women, the rise in unemployment is likely related to a rise in women looking for work, as both workforce participation (actively seeking work) and employment rose for women in the area between 1990 and 2000. Sherman set out to study the micro effects of this economic reality. She lived in the community for a year, from summer 2003 to summer 2004, volunteered in local business and charitable organizations, and gathered ethnographic data and formal interview data from many community members during her time there. Her book reveals several threads of inquiry and discovery important to understanding rural, struggling communities in America. Most relevant to this Article is the thread that describes the relationship between gender norms in family and work.

Few people would be surprised to hear the gendered norms and identities expressed by residents of a small, poor, rural town in America. Indeed, when asked why they stay in Golden Valley, despite the difficulty with jobs, men often turned to the outdoors as the main reason that holds them there (e.g., “It’s for me, just all this country, bein’ able to explore it. I love to hunt, fish, 79. Id. at 30-31.

80. Id. at 31-32, 49 (describing time when businesses were “booming”).

81. Id. at 31.

82. Id.

83. Id.

84. Id. at 32.

85. Id. The rise in unemployment was mostly in men’s unemployment, which rose from 10% to 25.5%, while women’s unemployment rose from 11% to 15%. Id.

86. Id.

87. Id. at 29 (“I was ... looking for an isolated rural community with a long-standing tie to a specific industry that had rapidly and recently abandoned the area due to industrial and economic forces beyond the community’s control.”)

88. On methodology, see id. at 13-20.
backpack, camp, and just all those mountain things." 89 “I’m not a city person. The city and I—I would be dead or in jail. I didn’t do the city very well. I gotta go out and hunt.” 90), while women turned to a sense of community and helping others (e.g., “What it all comes down to is the fact that in a small community everybody is there for everybody else.”). 91

Men and women alike in Golden Valley depend on moral values to define social categories and status, holding in particularly high esteem the value of hard work. 92 Government assistance is a last resort, and carries with it a high stigmatic cost. 93 The most socially acceptable form of government assistance is unemployment insurance because it is conceived of as income that a person deserves, and “has basically worked for.” 94 The next socially acceptable form of government assistance is disability assistance, followed by far by welfare, which is highly stigmatized as incongruent with the work ethic of the community. 95 According to Sherman, “living off of welfare [in Golden Valley] is only slightly less detestable than selling drugs, and most believe that the two go hand in hand to some degree.” 96

As for the shift in work, men have been pushed out of the sole breadwinner role in many families. When men held year-round mill jobs and forestry jobs, jobs that were generally full-time, paid more than minimum wage, and included benefits, families in Golden Valley could manage to have only the man working outside of the home. 97 The men working at the mill would work all day and stop by the local pub for a drink together on the way home. 98 Women stayed home to do housework, cook, and care for children. 99

Today, without the jobs at the mill and with fewer jobs in forestry (and more of those jobs seasonal rather than year round), 100 fewer men can support their families without additional income, and more women are going to

89. Id. at 42.
90. Id. at 43.
91. Id. at 45 (“While the men commonly felt they couldn’t survive somewhere urban or away from the mountains, women tended to be more open to the idea of living elsewhere but committed to staying in the area because of their strong social and kinship ties.”).
92. Id. at 8-9 (“Moral discourses focused around work ethics are generally the most powerful there and have the most influence over social life and behavior in the community.”).
93. Id. at 68.
94. Id. at 69.
95. Id. at 69-71.
96. Id. at 72. For an expanded discussion of the moral significance of work in some rural communities, see Pruitt, supra note 70, at 794-802.
97. SHERMAN, supra note 71, at 58.
98. Id. at 93. Sherman also describes the change in conceptions of substance abuse over time. See id. at 92-96.
99. Id. at 106 (describing views of the “traditional” roles for fathers and mothers of an earlier generation).
100. Id. at 68.
work.\textsuperscript{101} Not surprisingly, men in Golden Valley struggle with their masculine identities as they relinquish the sole breadwinner role.\textsuperscript{102} Indeed, research shows that unemployment and job loss can be particularly devastating for rural men, whose masculine identities are tied not only to breadwinning but to labor in specific, male-dominated industries, like logging.\textsuperscript{103}

Nonetheless, Sherman did find that some men in Golden Valley had adopted more flexible ideas of masculine identity. These men focused less on breadwinning and more on things like hard work and family values.\textsuperscript{104} Men with flexible masculine identities in Golden Valley were more likely to share power, child care, and household chores with women.\textsuperscript{105} These men did not consider themselves feminist or forward thinking. Rather, they "harked back to morality and family values discourses to help construct changes as returns to tradition."\textsuperscript{106}

Although the specifics of Sherman’s descriptions and interviews hew to a real town in far northern California, the overarching story of gender and working families in a time of economic and job restructuring is not unique to a particular rural area. Across the country, well-paying, traditionally male jobs with benefits (such as in manufacturing and logging) have declined dramatically.\textsuperscript{107} These were the jobs that allowed men to support a family. At the same time, in many areas there has been an increase in the number of low-paying, service-oriented jobs.\textsuperscript{108} These jobs typically do not provide sufficient

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\textsuperscript{101} Id. at 33. \\
\textsuperscript{102} Id. at 160. \\
\textsuperscript{104} Sherman, supra note 71, at 170 ("Most of the 'flexible' male respondents focused on involved parenting as the most important part of a father’s job and downplayed the importance of financial support."). \\
\textsuperscript{105} Id. at 159-75. \\
\textsuperscript{106} Id. at 175. \\
\textsuperscript{107} See Kristin E. Smith & Ann R. Tickamyer, Introduction, in Economic Restructuring and Family Well-Being in Rural America 3 (Kristin E. Smith & Ann R. Tickamyer eds., 2011) [hereinafter Economic Restructuring] (noting that this trend holds across urban, suburban, and rural areas). The decline can also be seen in the size of organizations employing workers in some communities. See, e.g., Margaret K. Nelson, Job Characteristics and Economic Survival Strategies: The Effect of Economic Restructuring and Marital Status in a Rural County, in Economic Restructuring, supra, at 139 ("[W]hile the proportion of labor force in manufacturing was declining, a number of new, locally owned firms started up, and they brought with them a change in the character of manufacturing employment. The average size of manufacturing firms dropped precipitously, from sixty-three employees in 1980 to twenty-eight employees in 1993, where it remained until 2004."). \\
\textsuperscript{108} Smith & Tickamyer, supra note 107, at 3; see also Rebecca Glauber, Wanting More but Working Less: Involuntary Part-Time Employment and Economic Vulnerability, Issue Brief No. 64, Carsey Institute (2013) (showing that involuntary part-time employment
benefits or sufficient wages to support a family. Moreover, wages are down, even in manufacturing and other historically male breadwinner jobs.

Families across the county are turning to women to get by. Women, including married women with children, are working more hours and contributing more to the family income. By 2006, the incidence of husbands as sole providers had dropped to 22% nationwide. Couples in which the wife contributed 60% or more to the combined couple’s earnings grew from 4% in rural families and 3% in urban families in 1969 to 12% in 2006.

From a feminist viewpoint, it is easy to see the potential of the economic challenges facing rural (and many urban) communities today for women’s equality, particularly empowerment of women as breadwinners and greater sharing and flexibility in caregiving and financial support roles. What this story risks missing, however, is the difficulty families face in fitting their needs to the structures of available jobs, even without sex-based exclusion, and the role that sex-based exclusion plays in limiting their working options.

B. Challenges for Families and Sex-Based Limitations

1. Making Lives Meet: Structural Challenges for Low-Wage Working Families

A closer look at Sherman’s and other work shows that the challenge facing rural communities is not just a matter of loss of higher-paying jobs with benefits that can sustain a family on one income; it is a matter of change in the structure as well as the pay of jobs in the overall job market in these areas.


109. Smith & Tickamyer, supra note 107, at 4-13 (describing chapters showing change in jobs, wages, and family roles).

110. Id. (stating that rural workers earn less than urban workers and suggesting that lower wages in rural areas “relate to unfavorable levels and shifts in job structure (industries and occupation) relative to other areas, and differences in educational attainment by place”); see also id. at 19 tbl.1.4.

111. See Kristin Smith, Recessions Accelerate Trend of Wives as Breadwinners, Issue Brief No. 56, Carsey Institute (2012) (showing greater reliance on women’s earnings, particularly in families with men holding less than a college degree).


113. Id. at 72.
Indeed, low-wage working families are juggling jobs that are inherently difficult to juggle.

The proportion of employees in the United States with variable working schedules that their employers, not they, control has increased substantially since the late 1990s. These jobs include full-time jobs with variable overtime as well as part-time jobs with variable start and end times and variable hours to work each week, or each day. An employee might be required to check in early in the week, for example, to find out what her hours will be for the next five days. Or she might wait on-call to see if she can (or must) fill in as needed.

A recent analysis of the May Work Schedules Supplement of the Current Population Study in the 2005 Census shows that "D-schedules," as researchers call them, grew by almost 75% from 1997 to 2004, from 6.6% to 11.5% of the working population.114 Employer-controlled variable schedules are also disproportionately likely to be tied to hourly, part-time jobs rather than salaried jobs, and they are often poorly paid.115 This means that low-wage work is more likely to be variable in ways that are employer rather than employee controlled.

In fact, employer-controlled variable schedules among rural residents rose between 1997 and 2001 in all job fields, except the field of public administration.116 At the same time, regular, rigid job schedules decreased for rural workers in all industries except agriculture.117 By 2004, the employer-controlled variable schedule was especially common in the rural growth industry of leisure and hospitality, as well as in mining, trade, and transportation.118

Employer-controlled variability in scheduling makes it difficult for workers to plan their free time, whether they are trying to pick up children from school, or to sit down together as a family or a couple and talk or see a movie. Tied as they often are to part-time, hourly work, the last-minute, variable schedules mean that the income in these jobs is also variable, making it difficult for families to plan financially.

In addition to struggling with employer-controlled variable schedules, low-wage workers are also more likely to experience variation in ability to work within their families. Just 13% of adults in rural areas in 2004 listed a bachelor's degree as their highest level of educational attainment.119

115. Id. at 41.
117. Id. at 183.
118. Id. at 182.
level of educational attainment makes it likely that only one person in a couple (if any) will have a degree sufficient to take a higher paying job.120

Industries such as logging and manufacturing commonly located in rural areas are also often dangerous, which means that those higher-paying, stable jobs with benefits that remain may be difficult for men to retain. For example, almost all of the men that Sherman interviewed who had worked in logging and sawmill jobs had been seriously injured at some point.121 At the time of her study, nearly 40% of Golden Valley’s men between the ages of twenty-one and sixty-four were disabled, and 76% of the disabled were not employed.122 In addition, rural communities with low-wage job opportunities are also likely to include military veterans, who may have mental or physical disabilities that similarly prevent them from working in the higher-paying, more stable jobs.123

Taken together, the structural realities of the job market and of families in rural communities like Golden Valley reveal how important it is for working families to have all working options on the table. Policy recommendations addressing the struggle of low-wage, rural workers have included measures that alter the structure of work (e.g., reducing employer-controlled variability and/or the amount of contingent and part-time work), the pay of work (e.g., raising the minimum wage), and the availability and flexibility of child care.124 One measure that has so far been overlooked is to open working families’ working options by reducing sex-based exclusion from jobs.

120. Sherman tells the story of Angelica, whose husband was on disability due to a serious injury. Angelica attended community college to finish her high school equivalency and to work toward her associate’s degree: “The eventual receipt of her degree bolstered both her self-esteem and her earning potential and helped her to land her current job as a low-level administrator at Golden Valley Elementary School. With a higher-paying job, she was able to pull her family out of intense poverty.” SHERMAN, supra note 71, at 85; see also Smith & Tickamyer, supra note 107, at 5 (stating that “[o]verall, the rural workforce has a lower level of education than central city or suburban workforces”); id. at 21 tbl.1.6 (showing education levels by place).

121. SHERMAN, supra note 71, at 69.

122. Id.

123. See Econ. Research Serv., U.S. Dep’t of Agric., Economic Brief No. 25, Rural Veterans at a Glance (2013) (stating that “rural Americans are disproportionately represented in the veteran population” and that “over twenty percent of rural, working-age veterans report disability status compared with eleven percent of nonveterans”).

124. See, e.g., McCrate, supra note 116, at 187-88 (making several recommendations). Some states have also instituted “reporting pay” laws, which require employers to pay for a minimum number of hours of an employee’s scheduled shift, even if the worker is sent home without working all of those hours. See generally Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, Stabilizing Low Wage Work: Legal Remedies for Unpredictable Work Hours and Income Instability (Sept. 18, 2013) (unpublished manuscript) (on file with author) (critiquing existing law and recommending changes to stabilize worker schedules).
2. Segregation and Sexist Work Environments: Limiting Working Families' Options

Sex-based exclusion through segregation and sexist work environments limits families' working options. Women and men alike who would otherwise be capable of taking on some of the higher-paying, stable jobs with benefits are prevented from doing so. And, similarly, men and women are also limited in the part-time, contingent work that they might take on. In this SubPart, I document the sex-based exclusion of many low-wage work fields and show how it limits working options and harms working families.

The sex-based segregation of jobs in Golden Valley is evident in almost every family story that Sherman relays. The men worked for the U.S. Forest Service,\(^{125}\) as loggers,\(^{126}\) and as clerks at gas stations,\(^{127}\) while the women worked as secretaries,\(^{128}\) hairdressers,\(^{129}\) and day care providers.\(^{130}\) Indeed, the story of Golden Valley is not just one of change in job structures, but of segregated job options, with some jobs being available only to women and others only to men.\(^{131}\)

Data again bear this out across the country and across all wage sectors. Among the 502 occupations identified by the Census Bureau, four of ten women worked in female-dominated occupations (those where incumbents are at least 75% female) and slightly more than four of ten men worked in male-dominated occupations (those where incumbents are at least 75% male).\(^{132}\) The divide is particularly acute for jobs that do not require a college education.\(^{133}\) High school graduate women entered the workforce at roughly the same pace as college-educated women since the 1960s, but they entered and continue to enter a more segregated workforce.\(^{134}\) This means that heavily male jobs have become increasingly blue collar. Mechanics, electricians, firefighters, truck drivers are some of the most male-dominated jobs; secretaries and bank tellers

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125. SHERMAN, supra note 71, at 47.
126. Id. at 42-43 (describing two interviewees as “former loggers,” now unemployed).
127. Id. at 47.
128. Id. at 44.
129. Id. at 48.
130. Id. at 73.
131. Id. at 29 (pointing out the restructured job market has resulted in “the replacement of full-time, well-paid work by part-time, low-wage, and often feminized work”); see also Smith, supra note 112, at 60 (“The rise in educational attainment among women, coupled with an increase in typically female jobs in the service sector, increased opportunities for women to secure employment in the paid labor market.”) (emphasis added).
134. Id. at 27.
are some of the most female-dominated jobs. One report calculates that while in 1970 about 53% of men employed in heavily male jobs were in blue-collar occupations, 71% of men employed in heavily male jobs were in blue-collar occupations in 2009.

There is a tendency in the literature to assume that sex-based segregation (and therefore the availability of working options for families) is due entirely to personal choice and not driven by employer-side factors. Sherman, for example, provides the following description of sex segregation in work in Golden Valley:

The bulk of remaining jobs in Golden Valley are in the service and sales sectors, feminized sectors characterized by low wages and part-time employment. Women are to be found working behind the cash registers at most local businesses, as well as in administrative positions in the local government and schools. They also make up the bulk of local schoolteachers of all grade levels and find employment caring for the very young and the elderly in both formal and informal settings. These jobs make up the majority of employment in Golden Valley now and are generally unappealing to its men. While men are willing to take retail positions in a few instances, such as clearly masculine settings like the hardware and feed stores, they by and large refuse to consider employment in other types of service and administrative settings and rarely do care work for either young children or the elderly.

Sherman is right to point out that gendered norms and stereotypes around work remain particularly strong in rural areas. But at least some of the feminized jobs in Golden Valley that Sherman describes have the potential of being "good" jobs (e.g., administrative positions at the local government and schools), even if not as high paying and stable as the former mill jobs. If jobs in Golden Valley were not typed "masculine" and "feminine," some families might choose to have both members of a couple working in these jobs. The stability in schedule alone would help those families juggle jobs and family care. Other families might choose for the man to work in even the "bad" jobs, if that was the only work available, or if it meant his partner could take an available stable job that allowed for easier caregiving. The same, of course, might be true for the "masculine" jobs in forestry, truck driving, and construction. As families make decisions based on family preferences and available options, gendered typing of jobs aside, they would likely put some women in those jobs, either because they are more stable, pay more, or because they are seasonal or are the jobs best suited to their temperament and/or skill set.

Despite the common belief that low-wage jobs are segregated solely by worker choice, a rich body of research shows that occupational segregation

135. Id. tbl.5.
137. SHERMAN, supra note 71, at 33.
continues to be a product of employer-side factors as well, including gender bias in employment decisions. People making hiring decisions, after all, are steeped in the same gender norms and stereotypes as those seeking work. A hiring agent, moreover, may have less incentive than an applicant to overcome his or her biases and normative views. The male applicant for a feminized job, for example, has made a decision to act against prevailing gender norms in seeking a feminized position. The hiring agent, in contrast, may doubt the applicant’s sincerity and misjudge his or her aptitude for the job, knowing that there are numerous applicants to choose from, including many that better fit the agent’s normative framework (e.g., a woman for feminized work).

Many male-dominated, low-wage jobs also come with sexist work environments that limit families’ working options by making it difficult for women (and some men) to work in those jobs. Stories of hypermasculine and sexually dominating behavior among men on oil rigs, in forestry and firehouses, and on construction sites are commonplace. Less commonly acknowledged, however, is that these work environments contribute to sex segregation and limit working options for working families.

Limited working options harm families by constraining their ability to structure their own lives to best financially sustain their families and also to structure their own gender roles to ease tension and better align their roles with their normative visions. Hostile gender relations stemming from stress associated with men’s job loss have been linked to rising rates of divorce as well as drops in marriage and birth rates in affected rural communities. Opening working options might allow a man in a couple that values traditional gender roles, for example, to take on a relatively stable breadwinning job, while the woman takes a job that supplements the principal income of the man.

Focusing Title VII enforcement in the area of low-wage work to expand working options for working families has great potential, for the story resonates with American moral values held across political and social divides. It speaks of individualism and opportunity, even as it acknowledges the role of structure

142. See, e.g., SUSAN EISENBERG, WE’LL CALL YOU IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION (1998).
143. See generally FAMILIES IN TROUBLED TIMES: ADAPTING TO CHANGE IN RURAL AMERICA 7-8 (Conger et al. eds., 1994); SHERMAN, supra note 71, at 142-43. Many women in Sherman’s interviews downplayed their contribution to family income, even as it neared primary breadwinner status. Id. at 150.
in shaping choices. And it highlights the strong work ethic that permeates many communities across America. Moreover, it allows those who wish to preserve traditional family values, including gender roles, the option of doing so by giving them (rather than the employers) the power to organize their working and their family lives.

III. USING TITLE VII TO OPEN OPTIONS

Title VII makes it unlawful to refuse to hire someone because of their sex and to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive them of employment opportunities. Moreover, it makes unlawful sex-based work environments that are subjectively and objectively perceived as hostile. In this Part, I identify two principal hurdles that plaintiffs encounter when challenging sex-segregated and sexist work environments, and I turn back to the procedural theme to propose several ways in which private plaintiffs might use procedure creatively to enhance solidarity and to better tell their stories to overcome those hurdles.

A. Challenging Sex Segregation in Hiring: Joining Plaintiffs

One principal hurdle in challenging sex-segregated workplaces is that of failure of proof. Refusal-to-hire cases are notoriously difficult to prove because the hiring agent in most cases has multiple applicants to consider, each with different backgrounds and skill sets such that the agent’s ultimate decision can easily be rationalized, even if made along gender lines. Imagine a man who applies for an administrative position at the local school. The position has always been held by a woman. The hiring administrator, though, has five applicants to choose from, four of them women and one of them a man. When the man is denied the position, he has little in the way of proof that his gender played a role in the decision.

How can this hurdle be minimized, or overcome? One possibility is to use joinder under Rule 20 of the Federal Rules of Civil Procedure (or similar state

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144. Indeed, the thread of individual opportunity seems to hold particular sway with the Supreme Court. In Ricci, for example, the Court held that the New Haven Fire Department had violated its nondiscrimination obligation when it decided not to rely on a certain test’s results out of concern about the test’s disparate impact on black and Latino test takers. Important to the Court was the fact that individuals who had taken the test were denied the opportunity to compete for a promotion based on those test results. Ricci v. DeStefano, 557 U.S. 557, 562-63 (2009).


147. See Sachin S. Pandya & Peter Siegelman, Underclaiming and Overclaiming, 38 Law & Soc. Inquiry 836, 854 (2013) (citing audit studies that suggest underclaiming in the area of discrimination in hiring).
procedural rules) to expand the number of plaintiffs suing in a single lawsuit. Sex segregation rarely means that there are no men, or no women, working for a particular employer. Rather, the more likely scenario is that men are hired in one type of job and women in another.\footnote{148} For example, men might be hired for merchandize stocking or warehouse jobs by a local grocery store, while women are hired as cashiers. A man who applies for a cashier job and is denied employment, or offered a warehouse job instead, may join up with a woman who worked as a cashier and then sought a managerial job in the warehouse.

Rule 20 requires a common issue of law or fact,\footnote{149} which these plaintiffs can establish by pointing to the person who makes personnel decisions at the store. This would satisfy even the Court in \textit{Wal-Mart v. Dukes}, which emphasized that to satisfy commonality (required both for joinder under Rule 20 and class certification under Rule 23), plaintiffs’ claims must “depend upon a common contention—for example the assertion of discriminatory bias on the part of the same supervisor.”\footnote{150}

Joining together in a single lawsuit will allow the plaintiffs to present to a judge (or a jury) their combined evidence of steering. That evidence might include anecdotal testimony of biased statements and different treatment by the decision maker, such as statements about availability of jobs, as well as statistical evidence of segregation within the organization.\footnote{151}

Moreover, the plaintiffs once joined together will become cohorts in a larger project to open working options for them and their families. With electronic communication, joined plaintiffs (and their families) can maintain frequent contact, texting or emailing, for example, with words of encouragement to keep morale up in what is unquestionably a difficult endeavor.\footnote{152}

The lack-of-interest argument that is often raised by defendants in cases involving sex segregation would not be available in these cases.\footnote{153} These cases involve individual claims of discrimination that will be proven for each

\footnote{148}{See Barbara Reskin, \textit{Sex Segregation in the Workplace}, 19 \textit{Ann. Rev. Soc.} 241, 247 (1993) (describing continued segregation in jobs even as segregation decreased in occupations); \textit{id.} at 250-51 (describing how stereotypes can affect distribution of jobs within organizations).}

\footnote{149}{Rule 20 provides that plaintiffs may be joined if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action. \textit{FED. R. CIV. P. 20 (a)(1).}}

\footnote{150}{\textit{Wal-Mart Stores, Inc. v. Dukes}, 131 S. Ct. 2541, 2551 (2011).}

\footnote{151}{\textit{See, e.g.}, Duling v. Girstede’s Operating Corp., 267 F.R.D. 86, 89-90 (S.D.N.Y. 2010) (describing evidence of steering or channeling at the initial hiring stage).}

\footnote{152}{I thank attorney Angela Alioto for pointing out this benefit to me.}

\footnote{153}{\textit{See, e.g.}, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1286 (N.D. Ill. 1986), \textit{aff’d}, 839 F.2d 302 (7th Cir. 1988) (accepting defendant’s argument that statistical studies were “meaningless” because women lacked interest in the more competitive and higher paying sales jobs at Sears).}
plaintiff rather than a systemic claim that relies in part on statistics to prove that discrimination is widespread within an organization. Indeed, this is one of the benefits of stepping outside of large organizations and large-scale lawsuits, at least for the moment. The plaintiff’s application for the job, after all, demonstrates his or her interest.

Nonetheless, challenging sex segregation by use of individual plaintiffs assumes plaintiffs who are willing to apply for gendered positions in the first place. Strong gender norms work against male applicants for feminized jobs, and vice versa. This is another place where the working-options-for-working-families story is useful. Community organizations that offer skills training and job search support should highlight the importance of opening working options. Sherman’s work shows men willing to bend their masculine identities to save their families. Understanding the role that the workplace plays in limiting their options may give some men and women the courage to challenge gendered norms by reframing the story as one of individualism and work ethic.

B. Challenging Sexist Work Environments: Joining Defendants

The above scenario envisions two points around which gendered norms operate to maintain sex segregation in low-wage work: norms and stereotypes operating outside of work (e.g., masculinity as it affects interest in feminized work) and norms and stereotypes operating within the workplace (e.g., biases of the hiring agent, even if understood to be informed by culture inside and outside of work and other features of the workplace). But worker preferences are also affected by knowledge about work environments, both the demographics of a work site (e.g., how many women and how many men, of various races) and also the nature of the work environment itself.154 Sex-based hostile environments make it much more difficult for potential female applicants to become applicants, knowing that they will face difficulty avoiding abuse and getting their work done. Challenging the sex-based hostile work environments that pervade many male-dominated, blue-collar work sites is therefore another way to expand working families’ working options.

Judicial resistance, however, presents a substantial hurdle to claims challenging gendered, sexually-charged work environments that serve to exclude many women and some men. Courts have by now largely accepted that a woman can prevail in her hostile work environment claim when she is subjected to severe or pervasive conduct, including sexual conduct, that is carried out by men.155 Nonetheless, courts continue to struggle to make sense of

154. Reskin, supra note 138; see also 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, 1824 (1990) (describing how features of the workplace can affect interest).

155. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (stating that “[c]ourts and juries have found the inference of discrimination easy to draw in most
hostile work environment law as it applies in blue-collar workplaces, where even extreme masculine work cultures are often seen as the product of natural, normal gendered behavior. This judicial resistance to change in gendered work cultures is particularly evident in cases involving claims of hostile work environment brought by men in all-male worksites.156

The recent en banc decision in *EEOC v. Boh Brothers Construction Co.* provides a good example.157 In that case, Kerry Woods, a male iron worker and structural welder, brought a hostile work environment claim against Boh Brothers Construction.158 Woods worked on an all-male crew assigned to repair and maintain the Twin Spans Bridge between New Orleans and Slidell, Louisiana.159 He worked under the supervision of superintendent Chuck Wolfe.160 Workers on the crew regularly “used very foul language” and “locker room talk.”161 Wolfe in particular was “rough” and “mouthy” with the workers, and Woods became Wolfe’s most frequent target.162 As the court describes:

Wolfe referred to Woods as “pu—y,” “princess,” and “fa—ot,” often “two to three times a day.” About two to three times per week—while Woods was bent over to perform a task—Wolfe approached him from behind and simulated anal intercourse with him. Woods felt “embarrassed and humiliated” by the name-calling and began to look over his shoulder before bending down. In addition, Wolfe exposed his penis to Woods about ten times while urinating, sometimes waving at Woods and smiling.

One time, Wolfe approached Woods while Woods was napping in his locked car during a break. According to Woods, Wolfe “looked like he was zipping his pants” and said, “[i]f your door wouldn’t have been locked, my d—ck probably would have been in your mouth.”

Doctrinally, men have difficulty succeeding in cases like this one because courts require evidence that the hostile work environment experienced by the plaintiff was “because of sex,” narrowly construed to focus on harasser intent.164 This is why one sees such careful attention given by the court to evidence that the men who engaged in the hostile conduct perceived the plaintiff to be feminine. The plaintiff in *Boh Brothers* prevailed in the en banc circuit decision, for example, because he submitted evidence that Wolfe had made fun of him for using “wet wipes,” and a majority of the court was willing to see this evidence as indicating Wolfe’s gendered enforcement of
masculinity, punishing the plaintiff for appearing too feminine.\textsuperscript{165} The dissenting judges, in contrast, were unwilling to see this evidence as indicating that Wolfe perceived Woods as feminine.\textsuperscript{166}

Yet judges are usually willing to assume that sexually charged, dominating conduct by men experienced by women is sex based. This means that if a woman were to bring a claim on similar facts, she should have an easier time prevailing than a similarly situated man. Comments made by dissenting judges Jolly and Jones in Boh Brothers suggest as much.\textsuperscript{167} In Judge Jolly’s words, “The majority thus engages in a distraction from the proper legal analysis by treating this case as if it were sexual harassment between male and female when the inference of sex discrimination may be presumed by words and conduct.”\textsuperscript{168}

Thinking strategically about the strength of the story of working options and how litigants might persuade courts to better see the role that sexist work environments play in limiting working options for working families, Rule 20 joinder again comes to mind. This time, however, we might think in particular about joinder of defendants.\textsuperscript{169} Imagine a woman who works for a supply company that requires deliveries to the Boh Brothers bridge site on a regular basis, several times a week. The nature of the delivery requires that she be on-site for several hours at a time. During her time on the site, she directly experiences the behavior of Wolfe and other men on the job, including Wolfe’s acts of simulated intercourse. Assuming that she was qualified for an open position at Boh Brothers, she might join the supply company and Boh Brothers as defendants, stating the following two claims: (1) that the supply company discriminated against her in employment because of sex by failing to do anything about the hostile environment when she complained;\textsuperscript{170} and (2) that Boh Brothers discriminated against her in employment by maintaining a hostile

\textsuperscript{165}. Id. at 457-58.
\textsuperscript{166}. Id. at 470-71 (Jolly, J., dissenting).
\textsuperscript{167}. Id. at 472, 477.
\textsuperscript{168}. Id. at 472. For similar comments by Judge Jones, see id. at 477 (“Perhaps dispensing with ‘objective truth’ would be acceptable in opposite-sex discrimination cases: everyone knows what such stereotyping is and how it functions to demean a victim and place the victim at a disadvantage in the workplace.”) (Jones, J., dissenting).
\textsuperscript{169}. Rule 20 provides that defendants can be joined if:
(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
(B) any question of law or fact common to all defendants will arise in the action.
FED. R. CIV. P. 20 (2).
work environment that dissuaded her from applying for a position for which she was qualified.

The hostile work environment forms the basis for both of the plaintiff’s claims, which should satisfy commonality required for joinder. To obtain relief on either claim, she will have to show that the environment that she experienced was sufficiently severe or pervasive that it would be perceived as hostile or abusive by a reasonable person.

But there remains a related problem: the emphasis placed on whether the conduct was because of sex in the all-male hostile work environment cases seems to serve as cover for judicial reluctance to disrupt all-male work cultures, particularly in the blue-collar, low-wage work areas. Many judges are wary of finding a sex-based violation of Title VII when conduct like that engaged in by Wolfe and colleagues in Boh Brothers takes place in an all-male environment in an industry that is known for its masculine work culture. As Judge Jolly explains in Boh Brothers, “It is important to the case, and to any conclusion of sexual harassment, that these actions occurred in an all-male environment and on the construction site. This setting is customarily vulgar and crude.” Judge Jones goes on to add that in her view, “In an all-male workplace . . . crude sexual epithets are ubiquitous to the point of triviality.”

I expect that Judge Jolly and his fellow dissenting colleagues would be quick to point out that their reluctance lies not in disrupting the work cultures (men can choose to disrupt those cultures if they like), but rather in the use of Title VII (or any existing law) to do the disrupting. But in the end it comes down to the same thing. Judge Jolly believes that Title VII is aimed solely at actions targeting a specific person for harassment because of their sex. Such a narrow view would leave hypermasculine cultures in place in most blue-collar industries, where such cultures exist before women come onto the scene.

Title VII, however, is not and should not be so limited. Indeed, it has long been understood to prohibit even practices that are neutral on their face but have a disparate impact on members of protected groups. It would be a stretch to call the hypermasculine conduct engaged in by men at the Boh

171. See Fed. R. Civ. P. 20 (2) (requiring that there be a common issue of law or fact).
172. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that an employee’s terms and conditions of employment are altered in violation of Title VII “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive”).
173. See L. Camille Hébert, Sexual Harassment as Discrimination “Because of . . . Sex”: Have We Come Full Circle?, 27 Ohio N.U. L. Rev. 439 (2001); Diffee, supra note 156.
175. Id. at 474 (pointing to considerations that in Judge Jolly’s view prevent Title VII from “mutating into an ‘all-encompassing code of civility’”)
Brothers worksite "gender neutral." But the gendered nature of the conduct should not be allowed to overshadow the impact that the conduct has on would-be applicants.

My point is not that all sexualized behavior necessarily excludes all women, but rather that at the extreme, indeed in the realm of hostile work environment, where the plaintiff has shown that the particular environment was subjectively and objectively severe or pervasive, the masculine, sex-based domination behavior like that displayed by Wolfe and possibly others on the Boh Brothers worksite amounts to sex-based discrimination. It serves to exclude many women, and some men, from an array of jobs that should be open to them.

Having a woman bring a claim of exclusion against Boh Brothers, with substantial evidence that she was aware of, indeed experienced the hostile environment, might bring the case into more compelling focus for a group of judges who are reluctant to interpret Title VII as a gendered-culture-disrupting statute. The exclusion claim presses to judges the reality that most workplaces are not completely isolated from the outside world. Moreover, the two claims together make it more difficult for judges to turn a blind eye to the plaintiff's working reality. The traditional hostile work environment claim allows the plaintiff to establish experienced severity or pervasiveness in a context in which judges are most comfortable (a woman working in a male-dominated environment) and her exclusion claim allows her to tell her story of the need for working options. Being dissuaded from the ironworker job indeed may be more of a setback for her and her family than suffering a hostile work environment in her existing job, and joining the two defendants together can be used to highlight that reality.

CONCLUSION

In this Article, I have begun the telling of a new story: a story of limited working options outside of large organizations. For most women and men working and living in the United States today the story is more complex than the one begun here. Specifically, race, national origin, and citizenship intersect with gender in important ways that are not immediately revealed by ethnographies conducted in rural areas that are primarily white. Employers in

177. See Hébert, supra note 173, at 480-81 (arguing that sexualized conduct is rarely gender neutral); cf. Steven L. Willborn, Taking Discrimination Seriously: Oncale and the Fare of Exceptionalism in Sexual Harassment Law, 7 WM. & MARY BILL RTS. J. 677, 687-88 (1999) (arguing that sexualized conduct is not gender neutral and is understood by the Court as a form of disparate treatment).


179. The moral language of Golden Valley also masked deep imbedded racism and fear of racial, ethnic, and class differences. SHERMAN, supra note 71, at 189. Homophobia in
many parts of the country, for example, achieve segregation in work by relying on seemingly neutral practices like hiring only by referral to capitalize on social networks, language preferences, and stereotypes of their workers.\textsuperscript{180} Segregation then serves to lock in those networks and to reinforce stereotypes. As several scholars have pointed out, these complexities need to be uncovered, incorporated, and intertwined before the story will represent the American experience in many geographical areas.\textsuperscript{181} Indeed, there is some real tension here: the story of working options for working families may hold greater appeal to judges when it revolves around white working families, but the true story involves race and national origin, and often immigrant status, as well as gender.

There is also the question of sexuality and gender roles. “Family” conjures a certain image in the minds of many Americans, an image that I have expressly disavowed. Even as the power of the story lies in part in the resonance of that image, however, telling the story offers an opportunity to strategically push new conceptions of family by showing concretely how individuals of various sexualities, ages, capabilities, and blood affinities come together to make ends meet and to build social capital and resilience under the pressure of a labor market that confines their options and tugs them to scatter and to struggle.

Along these same lines, I expect that some people may at least initially resist this particular counterweight story, not because they disagree over whether segregation and hypermasculine environments limit working families’ working options, but because they fear that opening options for families will slow the progress of change in gender roles. There is evidence, however, that allowing greater flexibility within families to maintain gender norms may actually do more for the gender revolution than forcing new roles through workforce constraints. Greater autonomy to shape change around family-centered, traditional discourse appears to result in new gender dynamics more quickly being accepted as normal, even superior.\textsuperscript{182} Add to this advantage of easing pay disparities by breaking down segregation and gender advantages in jobs, and even staunch feminists will likely be convinced.

\textsuperscript{180} See John D. Skrentny, After Civil Rights: Racial Realism in the New American Workplace 216-64 (2014) (describing employment practices that have served to segregate in some low-wage industries).


\textsuperscript{182} Sherman, supra note 71, at 188 (describing new understandings of family values, including a woman’s freedom from abuse, as being “traditional”).
Large organizations dominate the labor landscape of America today,183 and it would be unrealistic and unwise to pretend otherwise, at least for long. Many of the jobs that are available in rural communities are service jobs at organizations like Walmart that favor part-time, contingent, employer-controlled variable schedules that place risk of market dips on employees rather than on their employers.184 Knowing that the Supreme Court is concerned about fairness to these organizations makes their rise even more troubling, particularly since statistical analyses showing widespread disparities within organizations are likely to continue to be one of the best ways to trigger change. But a rich and very real story that emphasizes the need for working options for working families can provide a strong counterweight to the Court’s concern about fairness to large organizations. Individualism, traditional family values (even as the family is reconceived and restructured), and a strong work ethic are powerful concepts that are not easily ignored, even by a Court that leans toward protection of organizations.

We should not understate the impact of recent procedural barriers and of the Court’s rising concern about fairness to large organizations, but neither should we abandon a longstanding tool for obtaining justice and equality. Taking a step back strategically to rebuild a story of the importance of Title VII for opening working options and breaking down segregation seems a wise next step for keeping Title VII on track.

183. One recent survey estimates that sixty-six percent of low-wage workers are employed by companies with 100 workers or more. NATIONAL EMPLOYMENT LAW PROJECT, BIG BUSINESS, CORPORATE PROFITS, AND THE MINIMUM WAGE (2012), available at http://nelp.3cdn.net/e555b2e361f8f734f4_sim6btdzo.pdf.

184. McCrate, supra note 116, at 184 (noting that the increased proportion of part-time workers at Walmart has gone hand in hand with increasing the number of workers on D-schedules). On the shift in risk, see generally JACOB HACKER, THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK (2006) (describing changes in norms about distribution of risk in the wake of global and domestic economic changes), and PETER GOSSelin, HIGH WIRE: THE PRECARIOUS FINANCIAL LIVES OF AMERICAN FAMILIES (2008).