YALE LAW & POLICY REVIEW

Uncovering Systemic Discrimination: Allowing Individual Challenges to a "Pattern or Practice"

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INTRODUCTION

Despite the passage of the Civil Rights Act of 1964,[1] the workplace remains a site of wide racial and gender disparities. Many employees today claim to experience more subtle forms of discrimination associated with informal systems of promotion, mentorship, and evaluation. Largely undocumented or unconscious,[2] these "tap on the shoulder"[3] practices suggest more than the exceptional

* The author would like to extend special thanks to Professor Christine Jolls and David Louk for their insights and suggestions on an earlier version of this Comment, as well as to James Anglin Flynn and his colleagues at the *Yale Law & Policy Review* for their thoughtful feedback during the editing process. She is also grateful to Linda Evarts, Chris Lapinig, and Shayak Sarkar for their support and encouragement.

1. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2006)) (prohibiting discrimination by employers on the basis of race, color, religion, sex, or national origin).

2. The shifting nature of discrimination has been well documented by scholars. Almost two decades ago, Linda Hamilton Krieger wrote on the increasingly subtle forms of discrimination, often finding individuals unaware of the discriminatory character of their own decisions. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); *see* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 749-50 (2005); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006).

3. In *Wal-Mart Stores, Inc. v. Dukes*, plaintiffs entered evidence indicating that Wal-Mart managers were not required to announce new job openings or training opportunities. Instead, the managers could "tap on the shoulder" of their favorite employees, who were disproportionately male. 131 S. Ct. 2541, 1562-64 (2011) (Ginsburg, J., dissenting). In her dissenting opinion, Justice Ginsburg noted that although women at Wal-Mart filled "70 percent of the hourly jobs in the retailer's stores," they made up only "33 percent of management employees." *Id.* at 2563. *But see* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 155 (2009) (suggesting that Wal-Mart's employment statistics are not unusual when compared to the economy at large).

instance of individual discrimination; they point to persistent, system-wide violations of Title VII and biased employment decisions stemming from "excessive subjectivity."[4]

Plaintiffs seeking relief have challenged these employment practices under Title VII, often pointing to a "pattern or practice" of discrimination—what is commonly referred to as systemic disparate treatment or systemic discrimination.[5] The pattern or practice claim has been described as "the most potent and least understood of the various Title VII causes of action."[6] Even with recent academic efforts to fill this gap,[7] it is an area of antidiscrimination law that remains surprisingly undertheorized.

Proving systemic disparate treatment requires plaintiffs to overcome complex procedural and evidentiary hurdles.[8] Some scholars have noted that pattern or practice claims are "invariably class actions" and often fail in the process of seeking class certification.[9] Others suggest that the Supreme Court's decision to decertify the plaintiff class in *Wal-Mart v. Dukes* has "called into question the future of systemic disparate treatment law."[10] Yet these concerns appear to overlook the more fundamental question of who has access to the pattern or practice claim: do individual complainants have a cause of action in the absence of a certified class? Although an answer in the affirmative would have obvious implications for the continuing vitality of these claims, many courts and commentators

4. Hart, *supra* note 2, at 767.

5. Some commentators warn against too close an association between "pattern or practice discrimination" and system-wide discrimination. Maurice Munroe suggests that "the term 'pattern or practice' is more flexible than [system-wide] and covers any discrimination which is more than an isolated or infrequent occurrence." Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 228 n.48 (1995). Other commentators have added that in addressing systemic harm, "courts have too often remained focused on the individual wrongs that are data points in the overarching story of structural injury." Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 456 (2011).

6. Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 478 (2011).

7. *See* Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387 (2011).

8. For example, plaintiffs often struggle to obtain the direct or circumstantial evidence necessary for proving such claims. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (discussing the courts' reliance on "comparators" in evaluating discrimination claims).

9. Selmi, *supra* note 6, at 478-79. Michael Selmi notes that the pattern or practice case law has emerged primarily in the context of class certification. *Id.* at 479 n.6.

10. Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011).

have simply assumed without further discussion that systemic disparate treatment is inherently a class action matter.[11] Though the Supreme Court has remained silent on the issue, circuit courts have similarly denied non-class pattern or practice suits.

This Comment argues that limiting the pattern or practice claim to certified class actions is historically and theoretically unsupported. Part I provides a brief overview of the origins and evolution of the pattern or practice cause of action. Part II considers judicial efforts to address the availability of individual pattern or practice claims and the arguments made in the leading circuit court decisions. Finally, in Part III, I argue that the history of the pattern or practice framework and a theory of discrimination based on the source of harm, rather than number of plaintiffs, favor the recognition of a pattern or practice claim for individual litigants.

I. The History of a "Pattern or Practice"

The pattern or practice cause of action was not a creation of Congress. It emerged from the courts' attempt to create workable standards and evidentiary requirements for challenges against systemic discrimination. With limited statutory roots, most guidance on the structure and interpretation of these claims stems from two foundational 1977 Supreme Court cases. Michael Selmi notes that "[i]n no other area of substantive antidiscrimination case law—indeed, perhaps no other area of law—are the leading cases three decades old."[12]

The original pattern or practice claim appeared in response to the significant public harm of systemic discrimination cognized by the Civil Rights Act of 1964. The phrase "pattern or practice" appears in only one part of Title VII. Section 707 authorizes government action "against an employer 'engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights secured by' the statute."[13] The original grant of authority to bring a section 707 action belonged exclusively to the Attorney General and was later delegated to the EEOC.[14] Both

11. Some courts recognize as "settled law" the fact that pattern-or-practice claims "either may be brought by the EEOC if there is 'reasonable cause to believe that any person or group of persons is engaged in a pattern or practice' of discrimination, 42 U.S.C. § 2000e-6(a) (1994); . . . or by a class of private plaintiffs under 42 U.S.C. § 2000e." EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000); *see infra* Part II (discussing the availability of an individual pattern or practice claim in the circuit courts).

12. Selmi, *supra* note 6, at 478.

13. Chin v. Port Auth., 685 F.3d 135, 147 (2d Cir. 2012) (emphasis added) (citing 42 U.S.C. § 2000e-6 (2006)).

14. 110 Cong. Rec. 12,722 (1964) (statement of Sen. Humphrey) ("[T]he Attorney General is authorized by section 707 to institute suit whenever he has reasonable cause to believe that there is a pattern or practice of discrimination in violation of title VII."); *see* EEOC v. Waffle House, Inc., 534 U.S. 279, 286 (2002) ("When Title VII

the statutory text and early history of section 707 suggest that Congress intended to create a broad public enforcement authority to prosecute systemic discrimination unencumbered by administrative or procedural requirements.[15] Indeed, neither Congress nor the courts attempted at any point to impose a Rule 23 requirement on the enforcement actions of the Attorney General or EEOC.[16]

In the 1973 case of *McDonnell Douglas Corp. v. Green*,[17] the Court provided a method of proof for assessing individual disparate treatment claims that emerged as the dominant standard.[18] In phase one under *McDonnell Douglas*, a prima facie case of discrimination can be established by showing that: (1) a plaintiff belongs to a protected class; (2) the plaintiff was qualified for the job he was working or seeking; (3) the plaintiff was terminated or rejected; and (4) the position remained open or was filled by someone with similar qualifications.[19] Although *McDonnell Douglas* allowed plaintiffs to enter statistical evidence, it was considered merely a probative factor within the four-part test. More recently, many scholars have criticized the *McDonnell Douglas* framework as being "ill suited to

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was enacted in 1964, it authorized private actions by individual employees and public actions by the Attorney General in cases involving a 'pattern or practice' of discrimination." (quoting 42 U.S.C. § 2000e-6(a) (1994))). The Senate failed to pass an amendment to the original language of Title VII limiting the power of the Commissioner, "recognizing that it was necessary to combat discrimination even when individual victims did not take the initiative." Munroe, *supra* note 5, at 250.

15. Munroe, *supra* note 5, at 249 ("The Attorney General was not required to follow any administrative procedures prior to suit because Congress originally devised pattern or practice suits to allow swift federal prosecution of particularly harmful practices.").

16. *See, e.g.*, Gen. Tel. Co. of Nw. v. EEOC, 446 U.S. 318, 327 (1980) ("In [no suit] was it ever suggested that the Attorney General sued in a representative capacity or that his enforcement suit must comply with the requirements of Rule 23."). Still, the legislative history of the 1972 amendments indicates that Congress was aware of a connection between pattern or practice discrimination and class action lawsuits, noting that Title VII claims "involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints." 118 CONG. REC. 4942 (1972) (statement of Sen. Williams); *see also* 118 CONG. REC. 4080 (1972) (statement of Sen. Hruska) (describing section 707 actions as "in the nature of class actions").

17. 411 U.S. 792 (1973).

18. Krieger, *supra* note 2, at 1163 (noting that "well over 90 percent of all Title VII cases" proceed "under the 'disparate treatment' theory of discrimination first established in *McDonnell Douglas*").

19. *McDonnell Douglas*, 411 U.S. at 802; Krieger, *supra* note 2, at 1177.

addressing the subtle types of discrimination . . . most common in the modern workplace."[20]

Four years later, the burden-shifting framework now commonly associated with pattern or practice claims was operationalized by the Supreme Court in two companion cases.[21] *International Brotherhood of Teamsters v. United States* involved a civil action brought by the government against a motor freight company for subjecting African-American and Latino employees to a pattern or practice of discrimination. The *Teamsters* Court created a two-phase method of proof that differed from *McDonnell Douglas* in three important respects: first, it held that statistical evidence could be sufficient to establish a prima facie case of systemic discrimination;[22] second, it awarded a presumption of *individual* discrimination after finding a pattern or practice of *workplace* discrimination; and third, it allowed a court to grant prospective relief before reaching the question of individual discrimination.[23] In so doing, the Court appeared to recognize the tools for proving systemic discrimination as necessarily different from those for individualized harm.[24]

The two phases of the *Teamsters* framework—liability and remedy—guide courts in determining whether a plaintiff has shown a company's discriminatory behavior to be "standard operating procedure."[25] In the liability phase, plaintiffs must establish a prima facie case of discrimination by producing statistical evidence and anecdotal testimony showing that an employer engaged in a pattern or practice of discrimination based on a protected trait.[26] Where a gross disparity

20. Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 112 (2007) (citing literature critical of the *McDonnell Douglas* framework).

21. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

22. *Teamsters*, 431 U.S. at 337-40. The *Teamsters* Court did acknowledge that "this was not a case in which the Government relied on 'statistics alone'" and that the testimonies of around forty employees "brought the cold numbers convincingly to life," though the opinion did not discuss the testimony in any detail. *Id.* at 339. Some scholars have argued that the individual testimony provided appeared to be neither essential nor dispositive. *See, e.g.*, Selmi, *supra* note 6, at 485 (noting that the early pattern or practice cases "relied almost entirely on statistics to prove intent").

23. *Teamsters*, 431 U.S. at 360-62.

24. *See id.* at 358 (noting that *McDonnell Douglas* "did not purport to create an inflexible formulation" for establishing a prima facie case of discrimination).

25. *Id.* at 336.

26. The *Teamsters* Court was persuaded by statistical evidence showing African-American and Latino employees to be limited to the lowest paying jobs at the company. *Id.* at 337-38. Approximately 80% of the African-American and Latino workers held lower-paying jobs in operations and servicemen positions, as compared to approximately 40% of the white employees. Although the company workforce was about

exists, statistical evidence alone may be sufficient.[27] The burden then shifts to the defendant to produce evidence explaining "why the observed pattern was not the product of discrimination."[28] To show that a plaintiff's claims are "inaccurate or insignificant,"[29] a defendant will try to impugn the "source, accuracy, or probative force" of the evidence offered by the plaintiff or present his own statistical and anecdotal evidence.[30] If the defendant satisfies its burden of production, the trier of fact must then determine whether the plaintiff has shown by a preponderance of the evidence that the employer participated in a pattern or practice of intentional discrimination.[31] Otherwise, plaintiffs receive a presumption of discrimination. Even absent any proof of harm to specific employees, a successful phase one liability determination justifies an award of prospective relief. This might include, for instance, "an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII."[32]

In the remedial stage, plaintiffs seeking individual relief, such as reinstatement or back pay,[33] must demonstrate that they were victims of the discrimina-

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9% African-American and Latino, less than 1% of all line drivers were African-American and Latino. All of the African-American line drivers, with only one exception, were hired after litigation had commenced. *Id.*

27. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) ("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII." (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977))). Courts have emphasized, however, that statistics are not "irrefutable" and "may be rebutted." *Teamsters*, 431 U.S. at 340.

28. Selmi, *supra* note 6, at 483.

29. *Teamsters*, 431 U.S. at 360.

30. Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 159 (2d Cir. 2001) (internal quotation marks omitted). A defendant may, for example, claim that individuals lacked the necessary qualifications for higher-paid positions or were not interested in applying. *E.g.*, EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 322 (7th Cir. 1988) (affirming the district court's acceptance of the claim that women were not interested in commissioned positions).

31. *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.7 (2011) (holding that establishing a pattern or practice will justify equitable relief against discriminatory behavior).

32. *Teamsters*, 431 U.S. at 361.

33. *Wal-Mart*, 131 S. Ct. at 2560-61 ("When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, 'a district court must usually conduct additional proceedings . . . to determine the scope of individual relief.'" (quoting *Teamsters*, 431 U.S. at 361)).

tion established in the liability stage and that they suffered an adverse employment decision.[34] Each individual plaintiff benefits from the presumption "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."[35] The defendant has the burden to raise affirmative defenses and offer lawful reasons for its employment decision.[36] In turn, the plaintiffs must assert the company's nondiscriminatory justifications were merely "a pretext for unlawful discrimination."[37] A plaintiff becomes entitled to individualized relief if the employer fails to meet its burden or if, based on the arguments offered by both sides, the plaintiff successfully proves his claim of discrimination.

Though *Teamsters* was a government-initiated claim, lower courts quickly came to apply the burden-shifting framework to both public and private actions.[38] The application of the *Teamsters* framework to private class actions appeared uncontroversial to lower courts.[39] By contrast, private non-class litigants

34. *Teamsters*, 431 U.S. at 361-62.

35. *Id.* at 361; *see Wal-Mart*, 131 S. Ct. at 2552 n.7 (finding that a pattern or practice of discrimination "will support a rebuttable inference that all class members were victims of the discriminatory practice"). Some courts have noted that this "substantially lessen[s] each class member's evidentiary burden relative to . . . an individual disparate treatment claim under the *McDonnell Douglas* framework." *Robinson*, 267 F.3d at 159.

36. *Wal-Mart*, 131 S. Ct. at 2561 (citing *Teamsters*, 431 U.S. at 362); *see* Hart, *supra* note 5, at 460 (suggesting that the *Wal-Mart* Court read "the flexibility out of *Teamsters*" and "reframe[d]" the decision).

37. *Teamsters*, 431 U.S. at 362 n.50 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-06 (1973)).

38. *See, e.g.*, Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1034 (W.D. Va. 1979) ("[I]n a class action, plaintiffs make out a *prima facie* case when they prove a discriminatory pattern and practice."); Presseisen v. Swarthmore Coll., 442 F. Supp. 593, 598 (E.D. Pa. 1977) (holding that the terms "pattern or practice" when used in a private class action reflect their usual meaning). Cases decided in 1977 by district and appellate courts applied the burden-shifting framework of *Teamsters* to section 707 claims, as well as to private class actions. A WestLaw search reveals that, in 1977 alone, over 20 opinions considering private class action pattern or practice claims cited *Teamsters*.

39. Not one case noted that the Supreme Court had yet to explicitly extend the "pattern or practice" claim to private class actions. Private class actions before *Teamsters* appeared to have brought challenges against the discriminatory policies or practices of employers, though they may not have used the term "pattern or practice" specifically. In *Jenkins v. United Gas Corp.*, for example, a Title VII class action plaintiff sought an injunction to prohibit the employer "from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII . . . without discrimination on the basis of race or color." 400 F.2d 28, 31 (5th Cir. 1968). *See* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title*

have largely been denied access to the *Teamsters* method of proof, though the Court has never affirmatively ratified or disallowed such claims.

II. A Majority of Circuit Courts Oppose a Private Non-Class Right

A handful of circuit court rulings have considered whether individual plaintiffs have access to claims of pattern or practice discrimination. The majority view allows pattern or practice suits only when brought by a certified class.[40] Two explanations offered by the circuit courts warrant closer consideration. One suggests that the *Teamsters* framework should be limited to class litigation until the Supreme Court provides affirmative support for individual claims. Plaintiffs, the courts argue, should not be able to circumvent the traditional elements of a *McDonnell Douglas* prima facie case by appeal to the statistical evidence allowed under *Teamsters*. The Second Circuit has offered a second and more nuanced explanation: that the *Teamsters* burden-shifting framework should be limited to the class-action context in which it was originally developed.

First, the majority view points out that the Supreme Court has never before extended *Teamsters* to an individual, non-class suit.[41] The courts appear to view the pattern or practice cause of action as an inherently limited one but have provided little explanation for the suggestion that a non-class suit would require the express authorization of the Court. In language relied on by other circuits, the Fourth Circuit found a "'manifest' and 'crucial' difference" between an individual claim and a class claim in "the nature of the proof and remedies."[42] However,

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VII of the Civil Rights Act of 1964, 31 VAND. L. REV. 905, 934 (1978) ("The development of the Title VII class action was critical in the private enforcement efforts.").

40. *See, e.g.*, Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 632 (10th Cir. 2012); Chin v. Port Auth., 685 F.3d 135, 147 (2d Cir. 2012); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 967-69 & n.24 (11th Cir. 2008); Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 575 (6th Cir. 2004); Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 356 & n.4 (5th Cir. 2001); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 760-61 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); Gilty v. Vill. of Oak Park, 919 F.2d 1247, 1252 (7th Cir. 1990); Craik v. Minn. State Univ. Bd., 731 F.2d 465, 467-71 (8th Cir. 1984). *But see* Davis v. Califano, 613 F.2d 957, 961-62 (D.C. Cir. 1979); Karp v. CIGNA Healthcare, Inc., 882 F. Supp. 2d 199, 213 (D. Mass. 2012) (noting that "[i]t is by no means obvious that this device should be available to class-action plaintiffs but not to individual plaintiffs; indeed, the distinction seems arbitrary and illogical"). *See generally* David J. Bross, *The Use of Pattern-and-Practice by Individuals in Non-Class Claims*, 28 NOVA L. REV. 795, 796-97 (2004) (compiling circuit court opinions addressing the availability of an individual pattern or practice claim).

41. *E.g.*, Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1095 (10th Cir. 2001); *Celestine*, 266 F.3d at 355-56; *Lowery*, 158 F.3d at 760-61; *Gilty*, 919 F.2d at 1252; *Craik*, 731 F.2d at 469-70.

42. *Lowery*, 158 F.3d at 761.

it offered little reasoned basis for this distinction.[43] Some courts relied simply on the "weight of authority" of the other circuits.[44]

Chief among the concerns of the majority view are the doctrinal inconsistencies that may emerge from an individual plaintiff's use of the *Teamsters* framework in lieu of the traditional *McDonnell Douglas* standard. Courts have reasoned that an inference of discrimination has never been awarded until the plaintiff had proven all prongs of the *McDonnell Douglas* test (only one of which includes the use of statistics). Proof of a discriminatory pattern or practice under *Teamsters* would allow a plaintiff to circumvent the requirements of a prima facie case by permitting a plaintiff to shift the burden of proof to an employer without first making an individualized showing of discrimination.[45]

Relatedly, the circuit courts have expressed concern that a non-class pattern or practice claim would violate more recent jurisprudence on the burden of persuasion. In the 1981 case of *Texas Department of Community Affairs v. Burdine*, the Supreme Court held that, in the context of private, non-class disparate treatment litigation, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[46] Indeed, under *McDonnell Douglas*, plaintiffs bear the burden of *persuasion* at all times, though the burden of *production* might shift to the defendant.[47] A burden of production requires a party to produce evidence, while the burden of persuasion requires "the party to prove to the fact finder the truth or existence of those facts for which the party has the burden."[48] The argument suggests that *Teamsters* could only have been intended to apply to private class actions because the burden-shifting framework of *Teamsters* would allow a plain-

43. For example, the *Lowery* court stated that class actions began by litigating common questions of fact and explained that the *Teamsters* and *McDonnell Douglas* frameworks offered different remedies. It appeared not to recognize that an individual might hope to seek the forms of injunctive relief available to a plaintiff class under *Teamsters*. *Id.*

44. *E.g.*, *Bacon*, 370 F.3d at 575.

45. Although this evidence "remains relevant in assessing whether the plaintiffs proved discrimination using the individual disparate treatment and disparate impact methods of proof," *Chin*, 685 F.3d at 147, it is nonetheless true that "such proof cannot relieve the plaintiff of the need to establish each element of his or her claim," *id.* at 149.

46. 450 U.S. 248, 253 (1981).

47. *E.g.*, *id.* at 253; Vivenzio v. City of Syracuse, 611 F.3d 98, 106 (2d Cir. 2010).

48. Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics As Substance*, 39 AM. U. L. REV. 615, 620 (1990).

tiff to shift the burden of persuasion to the employer in violation of this principle.[49] There is some indication, however, that the scope of *Burdine* should not be interpreted as applying to a prima facie case established under *Teamster*.[50]

Only the Second Circuit offers a more intellectually satisfying justification of the narrow view of the pattern or practice claim. In *Chin v. Port Authority*,[51] the Second Circuit asserted that the *Teamsters* framework was adopted from an earlier case involving a certified class action, *Franks v. Bowman Transportation Co.*,[52] and should be limited to the class action context from which it was derived. The court reasoned that *Franks* used the term "'pattern and practice' to refer to the common question of fact (whether the employer had engaged in a practice of discriminatory hiring) to be litigated by class plaintiffs, and apparently viewed its holding as no more than an application of *McDonnell Douglas*' burden-shifting framework in the class-action context."[53] Thus, the *Franks* burden-shifting framework was intended to apply only to the limited scope of private class actions and, only by express extension under *Teamsters*, section 707 government actions. The Second Circuit therefore held, by appeal to the origins of the claim, that a non-class pattern or practice suit would require the express authorization of the Court.

On the other hand, the opinion most often cited in favor of the individual pattern or practice claim is comparatively underreasoned. In *Davis v. Califano*, the D.C. Circuit argued broadly in support of the sufficiency of statistical evidence in proving a prima facie case.[54] The *Davis* court allowed an individual female employee to bring a suit against gender discrimination in hiring, promotions, and other conditions of employment. It found that statistical evidence—data showing disparities in the salary structures and promotion rates of male and female employees—had equal probative weight in an individual case as in a class

49. *See Developments in the Law—Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1568, 1579-1602 (1996).

50. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (noting that *Burdine* "involved the 'narrow question' whether, after a plaintiff had carried the 'not onerous' burden of establishing the prima facie case under *McDonnell Douglas*, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed" (quoting *Burdine*, 450 U.S. at 250, 253)).

51. 685 F.3d 135 (2d Cir. 2012). The plaintiffs in *Chin* were eleven Asian-American police officers currently or formerly employed by the Port Authority of New York and New Jersey who brought a suit under Title VII based on allegations that they were passed over for promotions because of their race. *Id.* at 140. Although the Second Circuit had never directly addressed this question prior to *Chin*, it had suggested that the pattern or practice claim was likely intended exclusively for class actions. *See* Brown v. Coach Stores, Inc., 163 F.3d 706, 711 (2d Cir. 1998).

52. 424 U.S. 747 (1976).

53. *Chin*, 685 F.3d at 148 (citing *Franks*, 424 U.S. at 773).

54. 613 F.2d 957, 961-62 (D.C. Cir. 1979).

action. A more recent district court case, affirmed on other grounds by the D.C. Circuit,[55] throws the status of *Davis* into question and argues that the case has been misinterpreted as standing for the proposition that individuals may pursue a pattern or practice suit.[56]

Of the three remaining circuits still silent on the issue, courts have either avoided the question[57] or provided only slight indication that a non-class pattern or practice suit might be available.[58] The Ninth Circuit has left open the possibility of individual claims, even as district courts have adopted the reasoning of the majority view.[59] In *Obrey v. Johnson*, the Ninth Circuit allowed an individual employee of a naval shipyard to bring suit against the Secretary of the Navy for discriminatory hiring based on an allegation of a "pattern or practice" of discrimination, making reference to *Teamsters* and an evidentiary burden of showing systemic discrimination.[60]

55. Schuler v. PricewaterhouseCoopers, LLP, 739 F. Supp. 2d 1, 6 (D.D.C. 2010), *aff'd on other grounds*, 421 Fed. App'x 1 (D.C. Cir. 2011).

56. Rather, the district court reasoned that *Davis* merely affirmed the ability of statistical evidence to establish a prima facie case of discrimination within the *McDonnell Douglas* framework. *Id.* at 6-7 ("We have previously indicated, and now explicitly hold, that statistical evidence may establish a [p]rima facie case of employment discrimination in an individual case." (quoting *Davis*, 613 F.2d at 962)).

57. The First Circuit has identified this issue without deciding it, acknowledging in a footnote that "[w]hether in a non-class action, proof of a prima facie case different from the [*McDonnell Douglas*] elements would require the defendant to do something other than produce a 'legitimate reason' is a matter we need not decide now." Loeb v. Textron, Inc., 600 F.2d 1003, 1017 N.17 (1st Cir. 1979).

58. The Third Circuit heard a case involving a single African-American employee's claim of a pattern or practice of racial discrimination, which though "at most[] isolated or sporadic," did not fail due to the absence of a certified class. Berry v. Jacobs IMC, LLC, 99 Fed. App'x 405, 410 (3d Cir. 2004).

59. *E.g.*, Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis, No. CIV. 2-03-02591, 2007 WL 3046034 (E.D. Cal. Oct. 18, 2007).

60. Although the scope of the court's decision was limited to a finding that the district court erred in refusing to allow statistical evidence to enter the record, the court discussed Obrey's claims with extensive reference to the *Teamsters* opinion and noted that Obrey had to demonstrate, "by a preponderance of the evidence, that racial discrimination was the Navy's 'standard operating procedure—the regular rather than the unusual practice.'" 400 F.3d 691, 694 (9th Cir. 2005) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)).

III. A Case for the Individual Pattern or Practice Claim

According to a majority of circuit courts, a cause of action against a pattern or practice of discrimination is available only to the EEOC under section 707 or to a certified private class under the *Teamsters* framework. But the reasoning put forward is problematic in at least two respects. First, the narrow view of the *Teamsters* framework conflicts with both the methodological flexibility advocated by the early decisions of the Court and the well-established remedial purpose of Title VII. Second, the circuit courts have failed to fully conceive of an individual *systemic* disparate treatment claim as separate from an individual disparate treatment claim. Allowing plaintiffs to pursue private non-class suits is consistent with an approach that recognizes this critical distinction, focusing on the *source of harm* rather than the number involved.

A. The Expansive Origins of Title VII

The rationale of the circuit courts for barring individual claims relies on an unsubstantiated assumption: that the scope of the pattern or practice claim is narrow and cannot be applied beyond the private class context without express judicial or legislative approval. It is undisputed, of course, that neither the Supreme Court nor the statutory text has ever explicitly authorized the *Teamsters* method of proof for the individual plaintiff. Yet neither have such claims ever been explicitly foreclosed by those authorities. The problem with the courts' conclusion is the presumption that the original burden-shifting framework was intended to apply narrowly. The courts have largely failed to provide a reasoned justification for this narrow application.

As noted, the Second Circuit does attempt to offer a coherent theory for the limited scope of the pattern or practice claim.[61] However, the derivation narrative offered by *Chin* is not entirely persuasive; ultimately, it too fails to provide a sound rationale for the narrow construction it adopts. Though *Franks* involved a class action, the *Franks* Court did not stipulate that its alternate method of proof was unavailable to an individual plaintiff subject to systemic harm. Rather, the Court stated that its decision was guided by the broader anti-discriminatory purpose of Title VII. It emphasized that "the statutory scheme of Title VII implicitly recognizes that there may be cases calling for one remedy but not another."[62] Systemic discrimination may be one such case. Indeed, an equally plausible and convincing interpretation of the adoption of *Franks* exists.[63] That is, it was the

61. *See supra* notes 51-53 and accompanying text (describing the argument that *Teamsters* originated in the class action context in *Franks* and was only later extended to cover section 707 pattern or practice claims).

62. Franks v. Bowman Transp. Co., 424 U.S. 747, 779 (1976) (internal citations and quotation marks omitted).

63. Recall that the critical holding in *Franks* (later adopted in *Teamsters*) provides that once a plaintiff class establishes "the existence of a discriminatory hiring pattern

difficulty and importance of rooting out systemic discrimination that led the *Teamsters* Court to adopt an alternative framework for a prima facie case of discrimination, a framework which itself emerged as an attempt to provide a more plaintiff-friendly method of proof for establishing systemic disparate treatment. Viewed in this context, these cases suggest that the *Franks-Teamsters* burden-shifting framework emerged not because of a certain individual-class distinction, but rather in response to new patterns and practices of system-wide discrimination.

Moreover, the narrow view of the pattern or practice claim appears at odds with the original purpose of Title VII. In focusing on the foundations of the claim, the Second Circuit appears to overlook the context in which those early cases were decided. The Court, around the time it heard *Franks*, consistently emphasized the broad remedial purpose of Title VII. The *Teamsters* opinion included the strong purposive language typical of the Court's jurisprudence at the time, noting that "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'"[64] Furthermore, the Court did not believe then that *McDonnell Douglas* was the only method of proof (or even a strict method of proof) available for establishing a prima facie case of individual disparate treatment. In fact, *Teamsters* noted that the "importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof," but rather "in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."[65] Both the purpose of Title VII and the Court's rationale for offering alternative methods of proof to *McDonnell Douglas* weigh against a narrow construction of the pattern or practice claim.

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and practice" through the use of statistical evidence, the burden shifts "to the employer 'to prove that individuals who reapply were not in fact victims of previous hiring discrimination.'" *Teamsters*, 431 U.S. at 359 (quoting *Franks*, 424 U.S. at 772).

64. *Id.* at 348 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)); *see* Leonard v. St. Rose Dominican Hosp. (*In re* Majewski), 310 F.3d 653, 660 (9th Cir. 2002) ("[T]his circuit and most of the other circuits have consistently construed the anti-discriminatory provisions of [various] remedial statutes broadly."); Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859-60 (2003) (arguing that the goal of Title VII is not just to eradicate formal bias but also to promote full inclusion).

65. *Teamsters*, 431 U.S. at 358.

B. *Identifying the Source of Harm*

Another concern of the circuit courts is that a non-class *Teamsters* claim would allow a plaintiff to circumvent the requirements of a prima facie case under *McDonnell Douglas*,[66] resulting in doctrinal inconsistencies for individual claimants.[67] Traditionally, courts have evaluated individual claims involving specific instances of harm—such as being fired or overlooked for a promotion—under *McDonnell Douglas*. Only where a class is certified have courts allowed broad patterns of discrimination to substantiate a prima facie case with statistical evidence under *Teamsters*.

But this construction of the doctrine admits of a failure by the circuit courts to conceptualize the difference between harm to an individual based on particular instances of discrimination and harm to an individual based on a broad pattern of discrimination. I refer to this distinction—individual disparate treatment versus individual systemic disparate treatment—as *the source of harm*. An individual experiences discrimination in either situation, though the current law of pattern or practice fails to cognize the latter category of harm. By focusing on *the source of harm*, we find two forms of discrimination giving rise to two separate frameworks—individual *McDonnell Douglas* claims and individual *Teamsters* claims—with doctrinal requirements specific to each.

This approach is consistent with other forms of antidiscrimination. In cases of individual disparate treatment and disparate impact, the courts appear to determine the best method of proof by considering the cause of the injury. For example, a single employee rejected from a job or promotion based on a protected characteristic experiences an individualized instance of harm. The claim is reviewed under the *McDonnell Douglas* standard, which was designed to uncover discriminatory intent hidden in specific individual determinations. On the other hand, if an employer introduced a test used in the hiring process that produced a significant racial or gender disparity, an employee would experience a system-wide harm. The resulting disparate impact claim would challenge the test through the use of aggregated data—statistical analysis of the relevant employee pool revealing a broad policy-based skew. Interestingly, disparate impact claims can be brought by an individual or a plaintiff class.[68]

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66. Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998) (citing *McDonnell Douglas*, 411 U.S. at 802).

67. Chin v. Port Auth., 685 F.3d 135, 149 (2d Cir. 2012) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

68. Without directly addressing the issue, the Supreme Court has ruled on other grounds in two separate disparate impact cases brought by individual plaintiffs. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Connecticut v. Teal, 457 U.S. 440 (1982). Several appellate courts have also noted the availability of disparate impact claims for individual plaintiffs. *E.g.*, Melendez v. Illinois Bell Tel. Co., 79 F.3d 661, 667-68 (7th Cir. 1996); Robinson v. Polaroid Corp., 732 F.2d 1010, 1016 (1st Cir. 1984); Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 451 (10th Cir. 1981).

For private actions alleging a discriminatory pattern or practice, however, the courts deviate from this approach. Rather than looking first to the site or source of harm to determine the appropriate method of proof, courts begin instead by considering the number and composition of those injured. Under this approach, how a court conceives of the underlying harm caused by a pattern or practice of discrimination—and thus the requirements of a prima facie case—varies depending on whether a similar allegation of discrimination is brought by an individual or a class. In foreclosing the individual pattern or practice claim, courts have adopted an approach that is at odds with the treatment of antidiscrimination claims in other contexts and that cannot be justified.

One possible response of opponents to the individual pattern or practice suit suggests itself: that class certification warrants the departure from the strict *McDonnell Douglas* factors by providing additional evidentiary value. It could be, for instance, that certifying a class provides information, evidence, and anecdotal accounts of harm that would otherwise be required by *McDonnell Douglas*. Yet there is no indication, at any level of review, that the process of certification in *Franks* helped serve some evidentiary need. Further, class certification, which was designed for a specific purpose, is at best an imperfect tool for obtaining reliable evidence of discrimination. There appears to be little reason, then, to entangle the requirements of class certification with those of a prima facie case of discrimination.

Conclusion

Both *McDonnell Douglas* and *Teamsters* reflect an awareness of the difficulties involved in identifying and rooting out discrimination in the workplace. Over time, the methods of proof created by these early cases, which never suggested they were to be inflexibly applied, have become calcified.[69] As a result, circuit courts have refused to allow non-class pattern or practice claims, even as plaintiffs continue to struggle to bring successful challenges against potentially discriminatory employment actions.

The pattern or practice claim is a relevant and effective method for addressing the increasingly subtle or unconscious forms of discrimination today. Even viewed in the most favorable light, the most convincing rationales for precluding individual claims cannot be sustained. They demonstrate a misconstruction of the pattern or practice framework: both in the understanding of the original scope of the claim and in how it locates the source of harm within a discrimination suit. For Title VII to remain relevant to the purposes for which it was adopted, individual pattern or practice suits should be allowed and encouraged.

69. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011).