A Grudging Defense of *Wal-Mart v. Dukes*

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ABSTRACT: The Supreme Court's denial of class certification in *Wal-Mart v. Dukes* has been viewed by many as a wholesale rejection of the use of discrimination law for social change. In this Article, I argue that the Supreme Court would have been open to certification had the plaintiffs given more careful attention to the difficult doctrinal and normative issues raised by their case. The plaintiffs' evidence suggested significant problems with the treatment of women at Wal-Mart, but these facts were never tied in any systematic way to a plausible theory of liability under Title VII of the Civil Rights Act of 1964.

The *Wal-Mart* Court squarely endorsed the view already adopted by many lower courts that the common interests required for class certification can be established only by some examination of the theory to be advanced at trial. *Wal-Mart* was a structural lawsuit, one that challenged features of the workplace that are alleged to produce discriminatory outcomes. Structural suits, especially those challenging delegated discretion, raise far more difficult issues that the canonical discrimination case, which focuses on outcomes rather than on employer practices, and which alleges a clear intent to discriminate. Structural claims will be politically and morally acceptable only if they are based on a notion of employer fault such as negligence that is intermediate between strict liability and intentional discrimination. Although current Title VII doctrine does not directly provide for intermediate levels of fault, legal scholars have proposed several thoughtful approaches that would extend existing law to allow for negligence liability. Plaintiffs could have used these theories, in conjunction with an emphasis on Title VII's "pattern or practice" provision, to construct a strong argument that members of the putative class in *Wal-Mart* had claims that were tied together by common questions of fact and law.

The *Wal-Mart* plaintiffs, however, made no serious effort to address the merits of their case, much less to advance a theory based on negligence. These

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failures contributed to the disconcertingly broad language in Justice Scalia's opinion, which in places appears to bar all structural challenges to delegated discretion. Nonetheless, the opinion does not directly reject negligence theories and still leaves open some routes for future plaintiffs to use such theories to challenge delegations of discretion.

INTRODUCTION

Since its passage, Title VII has allowed plaintiffs to challenge workplace structures that impede the progress of historically disadvantaged groups. The nature of these so-called structural lawsuits has evolved over time and today the most litigated workplace structures are those that delegate subjective decision-

making power to supervisors, who are alleged by plaintiffs to have exercised that power in a discriminatory manner.

Last term in *Wal-Mart v. Dukes* the Court engaged for the first time the difficult procedural problems surrounding class challenges to structural discrimination.[1] The Court's denial of class certification has been viewed by many commentators as a "major blow to working women across America"[2] and a wholesale rejection by the Court of the use of discrimination law as an instrument of social change.[3]

In this Article I argue that the result in *Wal-Mart* was not inevitable. The plaintiffs' evidence strongly indicated significant problems with the treatment of women at Wal-Mart, and suggested further that these problems might result from specific Wal-Mart personnel practices. Yet plaintiffs' counsel failed to grapple with many difficult doctrinal and policy problems underlying structural class actions, especially those challenging delegated discretion.

Legal attacks on workplace structures have often been the subject of heated debate, and even commentators who support structural challenges have noted that these suits raise difficult normative and legal issues. A broad public and judicial consensus supports the paradigmatic discrimination suit, which focuses on whether an adverse employment outcome was the result of intentional discrimination. In contrast, a structural suit focuses on facially neutral features of the workplace that tend to produce discriminatory outcomes. Imposing liability for such structures does not fit comfortably into conventional Title VII doctrine, which delineates two discrete classes of wrongdoing, disparate treatment and disparate impact. This distinction has traditionally been seen as marking two extremes on the continuum of fault, with disparate treatment predicated on conscious intent to discriminate and disparate impact imposed on a quasi-strict liability basis. Neither of these extremes is well-suited to structural claims. Only in rare cases will central management evidence the kind of clearly wrongful purpose that deserves the moral condemnation rightly associated with intentional discrimination. However, strict liability shifts to employers the burden of a society-wide problem and creates flawed incentives for the development of personnel practices.

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1. The Court had earlier addressed related problems, most importantly when it held that subjective decision-making was a practice subject to disparate impact analysis. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). However, *Watson* was not a class action and its holding raised many issues that were not addressed by the Court until *Wal-Mart*.

2. Courtney Martin, Wal-Mart v. Dukes *Ruling is Out of Sync with 21st-Century Sex Discrimination*, CHRISTIAN SCI. MONITOR (June 22, 2011), http://www.csmonitor.com/Commentary/Opinion/2011/0622/Wal-Mart-v.-Dukes-ruling-is-out-of-sync-with-21st-century-sex-discrimination.

3. Richard Primus, *The Individual, Above All*, N.Y. TIMES (June 21, 2011, 12:21 PM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/the-individual-above-all; *see also* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004) [hereinafter Hart, *Employment Discrimination*] (pre-*Wal-Mart*, suggesting that concerns about class certification are driven not by procedural issues but by doubts about the value of class actions, especially in employment cases).

Scholars have long questioned the adequacy of a distinction that makes no provision for intermediate levels of fault. The right to choose among workplace practices is in general a legitimate employer prerogative. Judicial intervention will be politically and morally acceptable only if it is based on some notion of employer fault such as negligence that is intermediate between strict liability and the core concept of purposeful differential treatment. Scholars have struggled to fit negligence theories into existing doctrine and have proposed several thoughtful approaches. Most agree that the punitive damages authorized by the 1991 Amendments to the original Act are inappropriate under a negligence theory. Some commentators go further, suggesting that compensatory damages be limited to the two years' back pay authorized by the original Civil Rights Act of 1964.

Structural lawsuits are also complicated by procedural problems, especially when subjective personnel practices are challenged. Rule 23(a) requires that class litigation present "questions of law or fact common to the class."[4] In cases of delegated discretion, this requirement raises difficult questions. Structural problems have an inherently collective character that seems suited to class actions; the discriminatory effects of a workplace practice are best evaluated in the context of the overall pattern of outcomes in a workplace. However, the existence of a common question is not always obvious when each member has been harmed by the individual decisions of an independent supervisor acting without explicit corporate guidance. Especially in disparate treatment claims, the existence of common questions seems most plausible when a class action is conceived as a violation of the pattern or practice provision of Title VII than when a class action is viewed as an aggregation of individual claims. In addition, I argue, a focus on the pattern or practice provision provides a previously unrecognized opening for introducing an intermediate culpability standard into disparate treatment claims.

Structural class actions must also balance the goal of long-term change through collective remedies against the goal of individual compensation. Common questions are necessary but not sufficient for class certification: the common core must be large enough that common adjudication will serve the goals of justice and judicial economy.[5] The relative role of common questions and the appropriateness of class certification shrink as questions specific to individual members increase. Consequently, certifying a class under Rule 23(b) may require focusing on class-wide injunctive relief while limiting requests for individual compensatory damages. Although this result may be dictated by the

4. FED. R. CIV. P. 23(a).

5. Rule 23(b)(3) explicitly requires that common questions predominate, while Rules 23(b)(1) and (b)(2) do so implicitly by requiring a request for injunctive relief that is common to all class members either by its terms or because separate suits might establish inconsistent standards.

rules governing class actions, I suggest that it would be entirely consistent with the policies underlying structural claims.

The analytic difficulties surrounding structural class actions are daunting, and reasonable observers will disagree about the ideal approach. The *Wal-Mart* plaintiffs could not be faulted had they simply failed to craft a perfect theory of liability. Their strategy, however, failed in far more fundamental ways. The *Wal-Mart* Court began by affirming a principle that had already emerged in the lower courts: class litigation requires examining the legal theory that will be presented at trial to determine whether a core set of issues is common to class members. The *Wal-Mart* plaintiffs' claimed that Wal-Mart's strong corporate culture was a "conduit"[6] that permitted discriminatory attitudes to "infect"[7] the subjective decision-making processes of its supervisors. This strategy contained several critical mistakes. First, the idea of a "conduit of infection" was a metaphor, not a legal theory. Plaintiffs nominally advanced both a disparate impact and a disparate treatment claim but made no serious effort to situate their conduit theory within these traditional legal categories. Second, to the extent that a specific claim could be discerned, it was inconsistent with widespread notions of what is fair in structural cases. Plaintiffs suggested that central Wal-Mart management had a deliberate intent to discriminate on the basis of sex. The tone of their argument and their request for punitive damages implied the high degree of moral culpability associated with the most serious type of disparate treatment. Yet their evidence did not indicate anything like what the majority of judges or the public would view as a consistent and conscious purpose to discriminate by Wal-Mart management. By claiming a degree of fault beyond what their evidence could support, the *Wal-Mart* plaintiffs asked the Court to go too far past the boundaries of the broadly-held normative foundation for attacking structural discrimination. Without a plausible and clearly specified legal theory, the plaintiffs could not establish the "questions of law or fact common to the class"[8] required for certification.

Legal realists might argue that many members of the current Court are unsympathetic to discrimination plaintiffs, and that no doctrinal refinements could have persuaded them to rule in the plaintiffs' favor. Certainly some Justices have views that might incline them against plaintiffs, but at the oral argument both Chief Justice Roberts and Justice Kennedy indicated that they were open to a theory of notice liability, a variety of negligence. The plaintiffs failed to pursue this suggestion, and both Justices voted to deny certification.

The failings of the *Wal-Mart* plaintiffs contributed to the disconcertingly broad language in Justice Scalia's opinion, which in places appears to bar all

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6. Brief for Respondents at 13, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277).

7. *Id.* at 46; *see also Wal-Mart*, 131 S. Ct. at 2548; *id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).

8. FED. R. CIV. P. 23(a).

structural challenges to delegated discretion. Nonetheless, the opinion does not directly reject negligence theories and still leaves open some routes for future plaintiffs to present these theories. In this Article, I attempt to chart a course for future litigants seeking to certify structural class actions. Part I discusses how the fundamentally flawed dichotomy between disparate impact and disparate treatment complicates the analysis of structural cases and why negligence liability would be superior on policy grounds. Although negligence theories are not well-recognized under Title VII, they have some basis in existing law. Part II examines the issues raised by the class litigation of structural suits. Class certification requires courts to consider merits issues that bear on commonality. Commonality issues bedevil cases of delegated discretion, which involve decentralized decisions by a large number of supervisors. Part II suggests that a carefully developed disparate impact claim should generally meet the commonality requirement. Commonality in disparate treatment claims presents more difficult issues and can be justified only by giving the pattern or practice provision of Title VII closer attention than it has previously received. That provision, I argue, has previously unnoted implications for culpability issues, suggesting that the entity should be held to a negligence standard for intentional discrimination by supervisors. A pattern-or-practice negligence theory provides the common question that would be absent if a class disparate treatment claim were presented as an aggregation of individual claims. However, though the common question of negligence may be enough to warrant class-wide injunctive relief and attorney's fees, it will not justify punitive damages and may limit the availability of compensatory damages.

Part III examines the *Wal-Mart* litigation, beginning with the evidence presented, the lower court opinions, and the plaintiffs' Supreme Court brief. None of these specified any clear theory of liability, much less one grounded in relatively new concepts like negligence. Part III then examines the oral argument at the Supreme Court, stressing the plaintiffs' failure to take advantage of the negligence theory based on notice suggested by several Justices, including two who ultimately sided with Wal-Mart. The resulting opinion by Justice Scalia contains broad language that may impede the claims of future plaintiffs who offer a well-developed negligence theory. Future courts may be willing to interpret *Wal-Mart* narrowly, but only if plaintiffs do not overreach by asserting more culpability and requesting higher damages than are plausible in structural cases.

I. TITLE VII'S DEFECTIVE DICHOTOMY

The basic doctrinal framework of Title VII recognizes only two types of liability, one based on intentional discrimination and the other on impermissible effects. This distinction has been widely criticized by scholars

for failing to provide explicitly for intermediate standards of culpability such as negligence. This Part explores the general policy case for negligence liability and its special application to cases of structural discrimination.

A. The Basic Framework of Title VII Liability

The central provision of Title VII states that it shall be an "unlawful employment practice" for an employer to discriminate against any individual because of membership in a protected class.[9] Initially through judicial decision and now partially by statute, discrimination law distinguishes between two species of unlawful practice. A plaintiff claiming disparate treatment must show the defendant's intent to discriminate based on protected class membership. In contrast, a disparate impact plaintiff need not prove intent but instead must show that a given employer practice has had a disparate impact on a protected class. Because fault has not been claimed, the defendant is then given the opportunity to prove that the practice was justified by business necessity, a defense which is unavailable under a disparate treatment theory. The early disparate impact cases involved a test or educational requirement that burdened a group whose members had suffered discrimination in the educational system.[10] Since 1991, different remedies have been available for the two theories, attesting to the difference in moral censure attached to each type of behavior. Under either theory, plaintiffs may receive injunctive relief, two years' back pay, and attorney's fees,[11] but for disparate treatment cases, the Civil Rights Act of 1991 further authorized awards of full compensatory damages and even punitive damages.[12]

The vast majority of discrimination suits involve an individual plaintiff alleging disparate treatment under the central prohibition of "unlawful employment practice[s]." The canonical claim asserts a relatively conscious and deliberate decision to use protected class status in making employment decisions. The requirements for proving such claims are the subject of controversy, but the fundamental moral legitimacy of these claims is not.

Title VII also authorizes the Attorney General to bring a civil action against an employer who engages in a "pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]."[13] The Supreme

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9. 42 U.S.C. § 2000e-2 (2006).

10. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

11. Under either disparate impact or disparate treatment theory, a court that finds an unlawful employment practice "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to . . . back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (2006). The prevailing party may also receive attorney's fees.42 U.S.C. § 2000e-5(k)(2006).

12. 42 U.S.C. § 1981a(a)(1) (2006).

13. 42 U.S.C. § 2000e-6(a) (2006).

Court has held that pattern or practice analysis also applies to private class actions,[14] and pattern or practice suits filed either by the government or by private classes are often called systemic claims. In some pattern or practice suits, plaintiffs allege disparate treatment in the form of widespread conscious discrimination from the top management down through the line supervisors.[15] In the strongest cases, the facts suggest a corporate-level policy, sometimes only thinly disguised, of discrimination against members of a protected class. That such a policy would violate Title VII is uncontroversial although, as in individual suits, the requisite evidence of intent is much disputed.

B. The Straitjacket Criticized

Remedies, proof patterns and available defenses all turn on whether liability is based on disparate treatment or disparate impact, yet many troublesome situations cannot comfortably be analyzed in the treatment/impact framework. The framework has been widely criticized by commentators; Professor Noah Zatz has called it a "theoretical straitjacket with two arms."[16] This straitjacket creates problems in a wide variety of cases by requiring that problematic conduct be analyzed using proof patterns that do not capture the salient features of the conduct and by requiring the imposition of an implausibly bifurcated degree of condemnation.

The deficiencies of the treatment/impact framework became a central focus of scholarly attention in the 1990s as commentators considered the problem of unconscious discrimination.[17] The overwhelming majority of Americans today believe that discrimination is wrong, and the overt discrimination targeted by Title VII in 1964 has become a relatively small problem. Yet social science evidence suggests the continued existence of unconscious bias that may be manifested in incremental and almost invisible decisions by individual supervisors.[18]

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14. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 876 n.9 (1984) ("the elements of a prima facie pattern-or-practice case are the same in a private class action.").

15. *See, e.g.*, Wright v. Stern, 450 F. Supp. 2d 335 (2006).

16. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1366 (2009).

17. The first article systematically exploring unconscious bias focused on constitutional problems. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). The foundational articles on Title VII issues are David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) and Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

18. Krieger, *supra* note 17. A voluminous subsequent literature draws on the empirical evidence of unconscious bias. Some representative articles include Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) [hereinafter Green, *Discrimination in Workplace Dynamics*]; Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) [hereinafter

The importance of unconscious motive suggests that the mental states that might play a role in discriminatory outcomes are not readily dichotomized into two classes, intentional or non-intentional. A decision motivated by unconscious views about the protected class is generally agreed to be discrimination,[19] but its status as "intentional" is less clear. "Intent" refers to a state of mind, and is almost by definition conscious. Yet treating unconscious discrimination as wholly unintentional is analytically unsatisfying because it suggests that motive is irrelevant.[20] The analysis is further complicated when discriminatory action is taken not by the employer itself but by one of its agents. In agency cases, conscious states other than intent seem relevant to liability. Suppose two employers, *A* and *B*, sincerely wish to make non-discriminatory decisions and both choose facially neutral personnel procedures. Once instituted, however, these procedures appear to have a discriminatory impact, because the employers persistently hire and promote disproportionately low numbers of members of the protected class.[21] Employer *A* did not (and had no reason to) foresee the effects of the procedure. Employer *B* anticipated the possibility of disparate effects and did not consider mitigating measures. Although the two firms do not seem equally culpable, current doctrine does not allow any straightforward way of distinguishing these cases.

In an important and influential article, Professor David Benjamin Oppenheimer argued that in the absence of clear, conscious intent, liability based on negligence principles is often preferable to either a requirement of intent or strict liability.[22] Title VII, he argued, obligates employers to guard against their own unconscious bias and that of their agents, and to consider the

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Hart, *Subjective Decisionmaking*]; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); and Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000). Some of this literature makes use of the Implicit Association Test (IAT), which measures a subject's non-conscious association of members of a group with certain generalizations and compares that with the subject's self-described views. The extent to which the IAT predicts a propensity to engage in discriminatory behavior is not yet clearly established. R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1188 (2006); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). However, substantial evidence of discriminatory behavior outside the IAT framework does exist, Deborah Weiss, *The Annoyingly Indeterminate Effects of Sex Differences*, 19 TEX. J. WOMEN & L. 99, 138–41 (2010) [hereinafter Weiss, *Annoyingly Indeterminate*], and IAT research suggests that this behavior may be unconscious.

19. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1072-1102 (2009); Linda Hamilton Krieger & Susan T. Fiske, Behavioral realism in employment discrimination law: Implicit bias and disparate treatment, 94 CAL. L. REV. 997, 1053-56 (2006); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1229-30 (1999).

20. Krieger, *supra* note 17, at 1231, 1243 (suggesting motive rather than intent is the critical feature of disparate treatment and arguing that "subjective practices discrimination is a disparate treatment problem, not a disparate impact problem, and it requires a disparate treatment solution.").

21. Here and elsewhere the discussion assumes that the benchmark for ascertaining whether the numbers are disproportionately low is the qualified relevant labor market. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

22. Oppenheimer, *supra* note 17.

probable or known consequences of neutral policies. Yet the potential burden of avoiding all discriminatory effects is high, cautioning against strict liability.[23] And failure to institute cost-justified measures may not be the moral equivalent of intentional discrimination: "[N]egligent discrimination need not and ought not to be viewed as morally reprehensible conduct . . . . Even the best [employers] will inadvertently fail to exercise due care on occasion."[24] Many commentators have concurred with the basic themes of Oppenheimer's proposal: an insistence that most discrimination results from intentional conduct is misguided and a wider range of culpability standards, including negligence, should be available under Title VII.[25]

The courts, Oppenheimer argued, have tacitly acknowledged the importance of intermediate standards of liability in certain areas of discrimination law, including disparate impact jurisprudence.[26] In early cases, the bar of business necessity was set high and disparate impact was virtually a doctrine of strict liability.[27] Over the years, the defense available to employers vacillated, eventually moving somewhat toward a doctrine that relieved employers of liability if they had exercised due care in preventing discrimination. This movement, however, occurred in an unsystematic way that never gave employers a clear sense of their responsibilities.[28] Oppenheimer

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23. *Id.* at 921.

24. *Id.* at 971.

25. *See* Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1647-48 (2007) (liability inappropriate for defendants who adopt best practices that prove less than fully effective) [hereinafter Hart, *Possibility*]; Krieger, *supra* note 17, at 1243-46 (recommending two-tier liability, with limitations on damages when no conscious intent to discriminate proved); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 1001-02 (2005) (advocating use of a variation of disparate impact and noting its similarity to Oppenheimer's proposal); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995) (recommending notice-based negligence liability in individual cases but strict liability in non-structural class actions); Zatz, *supra* note 16, at 1436-39; *see also* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 985-92 (1993) (undesirability of focus on blame and intent in Constitutional race discrimination analysis). For a partially dissenting voice arguing that the characterization of wrongful behavior as intentional serves important goals but still allowing some defense that alternative measures are infeasible, see Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. (forthcoming 2011) (manuscript at 447-49), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793425; Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 885-900 (2007) [hereinafter Green, *Structural Approach*]; Green, *Discrimination in Workplace Dynamics*, *supra* note 18, at 146-51. Professor Samuel Bagenstos approves of intermediate standards in principle but is pessimistic about whether they can be realistically implemented in light of the difficulty of defining what constitutes due care. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 35 (2006). Professor Michael Selmi likewise approves of an intermediate standard in principle, but is skeptical that courts would be willing to impose liability without a showing of intent. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 773-74 (2006) [hereinafter Selmi, *Was the Disparate Impact Theory a Mistake?*].

26. Oppenheimer, *supra* note 17, at 931-34. Negligence principles can also be discerned in employer obligations to accommodate certain employee characteristics, *id.* at 936-44, and in the law governing employer liability for harassment by supervisors and co-workers, Zatz, *supra* note 16.

27. Oppenheimer, *supra* note 17, at 920-21.

28. *Id.* at 917-67.

argued that courts should openly and explicitly announce a negligence-based theory of liability that clearly delineates the level of care to which employers should be held.

C. Negligence as a Foundation for Structural Suits

Structural suits today raise many difficult issues surrounding unconscious intent. Both classic and structural discrimination suits, whether by an individual or a class, challenge adverse employment outcomes. Structural discrimination suits, however, also draw attention to the workplace practices that arguably produce these outcomes. The term "structural suit" is somewhat elastic since the precise role played by the challenged structure may vary. A pure structural suit directly challenges a specified practice and requests relief in the form of an injunction to change the practice. A suit that requests only monetary relief may be considered in some sense structural if it attempts to prove the existence of a discriminatory outcome in part by evidence concerning workplace structures conducive to discrimination. Structural suits have been brought under both disparate impact and disparate treatment theories, although the issue of which is more appropriate remains open and will be discussed at more length later.

The structural features most often challenged have changed over the years. In the first decades of Title VII, plaintiffs often contested tests and hiring channels.[29] The problem of discrimination in the workplace has changed with the passage of time as the workplace itself has evolved. Structural suits typically involve large corporations where supervisors rather than central management make critical decisions about individual workers. In the past, tightly controlled work environments often constrained the discretion of supervisors, an approach that is often replaced today with more fluid organizational styles.[30] As a result, the evaluation of employee performance often allows for more subjectivity than it did in the past. A firm that delegates the power to make subjective evaluations without providing guidance or constraints may allow discriminatory attitudes to enter the evaluation, and such delegation is the most contentious issue in structural litigation today.[31]

Structural problems can occur in a wide variety of factual settings. Cases in which management deliberately chooses personnel policies in order to

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29. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (hiring channel); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (hiring channel); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (test).

30. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

31. In the academic literature, the notion of structural discrimination is now virtually synonymous with the problem of unconstrained subjectivity. The foundational article on structural discrimination was Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

discriminate are probably rare and in any event constitute classic rather than structural discrimination. More often, personnel policies will be chosen for neutral reasons. Sometimes these policies are chosen with care to avoid discriminatory consequences, while at other times they are not. Sometimes discriminatory consequences are foreseeable, and sometimes they are not. After policies are implemented, management may or may not receive notice of any discriminatory consequences, and if it does, it may or may not reexamine its policies.

These widely varying scenarios make negligence-based liability especially appropriate in structural lawsuits. Professor Samuel Bagenstos has noted that courts and the public are reluctant to impose liability without fault, a reluctance that contributes to the relative unpopularity of those versions of disparate impact that most closely approach strict liability.[32] Strict liability effectively makes the employer an insurance company,[33] and public opinion does not and perhaps should not support making employers bear the burden of society-wide ills.

If the public and judiciary are reluctant to impose strict liability without any suggestion of fault, they are even less willing to label conduct as more blameworthy than the evidence indicates.[34] In structural cases, intent to discriminate is seldom conscious even among supervisors and may be absent at the central corporate level. To stigmatize such behavior with the same label attached to conscious and intentional discrimination seriously undermines the judicial and public willingness to impose liability in structural cases. Professor Katharine Bartlett has argued that mislabeling may backfire on a broader scale, creating resentment about the law's demands and reducing the extent to which the public internalizes the norms of anti-discrimination law.[35]

Policy towards structural discrimination must also confront a difficult fact: evidence about the effectiveness of various personnel policies in preventing discrimination is at present incomplete and contested.[36] This uncertainty contributes to public and judicial unease about liability. Monetary damages may seem unfair if employers have no clear way of preventing harm. Judges

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32. Bagenstos, *supra* note 25, at 40-43; *see also* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006); Selmi, *Was the Disparate Impact Theory a Mistake?*, *supra* note 25.

33. Verkerke, *supra* note 25, at 323.

34. Bagenstos, *supra* note 25, at 40.

35. Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009).

36. Hart, *Possibility*, *supra* note 25, at 1644-48; Gregory Mitchell, *Good Scholarly Intentions Do Not Guarantee Good Policy*, 95 VA. L. REV. 109, 110-15 (2010); Sturm, *supra* note 31; Verkerke, *supra* note 25, at 330; Wax, *supra* note 19, at 1158-69.

feel, not without reason, that they lack the institutional competence to resolve a controversial and technical debate.[37]

Uncertainty also greatly complicates efforts to analyze the incentive effects of various liability rules, an issue that has been extensively examined by Professor J. Hoult Verkerke.[38] Professor Verkerke identifies an important group of negligence rules which he calls notice liability rules. The central function of notice liability is to create appropriate incentives for investment in information, and a notice liability rule specifies a pre-notice standard of care, a definition of notice, and a post-notice standard of care.[39] In the discrimination context virtually any plausible negligence rule would be some type of notice rule and this Article will use the term "negligence" to encompass notice theories.

Negligence and strict liability create different incentives.[40] A negligence rule requires courts to determine standards defining what preventive measures are appropriate and creates an incentive for an employer to meet those standards: the employer will not be liable even if discrimination occurs as long as its efforts meet the applicable standard of care.[41] A strict liability rule leaves the decision about appropriate preventive measures in the hands of employers: they will decide whether it is cheaper to take precautions against discrimination or simply to treat discrimination liability as a cost of doing business.

When the effectiveness of employer measures is relatively certain, strict liability may be preferable to negligence. A central corporate management that has intentionally instituted discriminatory policies can reduce discrimination by rescinding those policies. Here, strict entity liability for employment decisions is appropriate. As long as a discriminatory outcome can be demonstrated, the law should require no further showing of culpability.[42] Where intent at the corporate level is more ambiguous, the choice of liability rule is more difficult.[43] On the one hand, a negligence rule requires courts to decide what preventive measures are appropriate, a role to which they are never well-suited,[44] and which is complicated by the uncertainty about the best way to

37. Bagenstos, *supra* note 25, at 25-26; Deborah M. Weiss, The Misplaced Modesty of Title VII Jurisprudence (2012) (unpublished manuscript) (on file with author) [hereinafter Weiss, Misplaced Modesty].

38. Verkerke, *supra* note 25.

39. *Id.* at 318.

40. In simple settings, strict liability and negligence will both produce efficient levels of efforts to prevent discrimination. *Id.* at 323.

41. *Id.* at 321.

42. *Id.* at 323.

43. Professor Verkerke's article was written before structural discrimination became a central concern of discrimination policy and he does not explicitly discuss this case. He focuses instead on the issues surrounding sexual harassment. However, his general analytic framework remains central to any analysis of notice-based negligence liability. Weiss, Misplaced Modesty, *supra* note 37 (explaining different treatment of structural and harassment claims).

44. Bagenstos, *supra* note 25, at 21–26.

prevent discrimination.[45] On the other hand, without clear evidence about preventive measures, strict liability encourages employers to accept discrimination liability as a cost of doing business rather than to search for ways of reducing it.[46] Balancing these considerations is difficult, but many observers have concluded that the best option may be a due care rule that stresses good faith rather than requiring perfection. Such a rule will encourage firms to experiment with various approaches to prevention, leading to improved understanding of what works and what does not.[47]

II. CLASS LITIGATION OF STRUCTURAL CLAIMS

The central contention of the *Wal-Mart* plaintiffs was a classic challenge to workplace structures: Wal-Mart's corporate culture and personnel practices, they argued, had facilitated discrimination by Wal-Mart supervisors. The merits of this structural claim were not directly before the Supreme Court, which instead considered only whether the large nationwide class—potentially the largest in history—could be certified. However, even before the Supreme Court's decision in *Wal-Mart*, lower courts had moved toward the view that certification decisions required some consideration of the plaintiff's theory of recovery. Part II examines the relevant law on certification and the merits of structural claims as it existed before *Wal-Mart* and suggests how the *Wal-Mart* plaintiffs might have used that law to construct their case. Disparate impact doctrine already contains certain negligence-like themes and can provide structural plaintiffs with a plausible theory that supports the common interests required for class certification. Commonality in structural disparate treatment claims presents more difficult issues and can be justified only by giving the pattern or practice provision of Title VII closer attention than it has previously received. In this Part, I argue that that provision has previously unnoted implications for culpability issues, suggesting that an entity should be held to a negligence standard for intentional discrimination by supervisors. This negligence-based theory of disparate treatment should satisfy the common question requirement of Rule 23(a). However, policy considerations and the requirements of Rule 23(b) impose restrictions on the remedies available in negligence-based claims under both disparate impact and disparate treatment theories.

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45. Verkerke, *supra* note 25, at 330 ("[A] far more important goal for employment discrimination liability should be to induce employers to undertake a wide range of experiments with alternative employment practices and policies.").

46. *Id.* at 323.

47. Mitchell, *supra* note 36, at 115; Verkerke, *supra* note 25, at 323.

A. The Evolving Law of Class Certification

At the center of any certification question is whether the members of the class have suffered a common wrong because of the defendant. The theme of a common wrong appears in many forms but most clearly in Rule 23(a)(2), which permits certification only if "there are questions of law or fact common to the class."[48] The modern class action is less than fifty years old,[49] and many fundamental questions surrounding commonality remain unresolved.

The difficulty of ascertaining the existence of common questions varies widely between cases. Where victims of an airplane crash sue an airline for negligence, the existence of a common question is trivial. The members of the potential class have self-evidently suffered a common injury from a common cause, and all of their claims turn on an indivisible question of negligence. In other situations, however, the existence of both a common injury and a common cause may be open to question. Consider a corporation that makes actionable misrepresentations exaggerating the value of its publicly traded securities. Defining a class of buyers who were harmed is far more difficult than defining a class of passengers harmed in an airplane crash. For example, does an individual buyer's right to recover depend on personal knowledge of the misrepresentation? This is a substantive question of securities law, but also critical to determining the scope of common classes of buyers.

For the last thirty years, lower courts have struggled to reconcile two Supreme Court pronouncements on the determination of the common interests central to class certification. In the 1974 *Eisen v. Carlisle & Jacquelin*, the Court cautioned judges not to undertake "a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[50] This passage was read by many courts to dictate strict separation of merits issues from the certification issue, a view that came to be known as the *Eisen* rule. Eight years later, in *General Telephone Co. v. Falcon*, an employment discrimination case, the Court noted that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[51] For much of the next twenty years, courts tended to resolve the apparent tension between these cases in favor of deferential readings of the plaintiffs' assertions during the class certification phase.

In the mid-2000s, the tide began to turn. The new consensus among courts was exemplified by the Second Circuit's opinion in *In re Initial Public Offerings Securities Litigation*,[52] which dealt with a securities law question of

48. FED. R. CIV. P. 23(a)(2).

49. The class action became significant only after the 1966 amendments added Rule 23 to the Federal Rules of Civil Procedure.

50. 417 U.S. 156, 177 (1974).

51. 457 U.S. 147, 160 (1982).

52. 471 F.3d 24 (2d Cir. 2006).

the kind described above. The court concluded that class certification requires a "definitive assessment" that all Rule 23 requirements have been met, even when such determinations require the resolution of factual issues that overlap with merits issues, although no aspect of the merits unrelated to a Rule 23 requirement should be examined.[53] However, determinations made for purposes of class certification do not bind any subsequent court deciding the merits of the case.[54]

During the same period, legal scholars also began to stress the problems that might result from failure to examine the merits of a suit during the certification phase. Professors Robert Bone and David Evans noted that the *Eisen* rule as interpreted by many courts consisted not merely of a rigid separation of merits and certification issues but also of a policy favoring the grant of certification.[55] The presumption in favor of certification, they argued, creates unfair pressure on defendants to settle frivolous lawsuits after certification to avoid trial.[56]

A somewhat different set of concerns was raised by Professor Richard Nagareda, who focused on institutional rather than cost-related issues.[57] He noted the potential of class certification to affect the substantive rights of parties in violation of the Rules Enabling Act, which delegates to the Supreme Court the power to prescribe rules of practice and procedure but provides that those rules shall not "abridge, enlarge or modify" preexisting rights.[58] A class action, therefore, must be built on preexisting rights accorded to individuals by sources of law other than the procedural rules for class actions. Since certification almost invariably leads to settlement, the certification of classes

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53. *Id.* at 41.

54. *Id.*

55. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1289 (2001).

56. This presumption in favor of certification was evidently based on the view that false denials were more costly than false grants, which was in turn based on two premises: (1) class actions often advance broad policy goals that would be frustrated by strict gate-keeping at the certification stage and (2) an erroneous grant is reversible while an erroneous denial is not. *Id.* at 1286. Bone and Evans point out a number of problems with this reasoning. Most importantly, by overlooking the role of settlement, it significantly understates the costs of certification. Class certification puts great pressure on defendants to settle. This results in recovery for plaintiffs even in suits that would be unlikely to succeed at trial. More subtly, since certification is in practice seldom revisited by the court, plaintiffs recover in cases where they should succeed on the merits if they sued as individuals but where certification is inappropriate because the requirements of Rule 23 are not fulfilled. *Id.* at 1291-1305. Further, they argue, the consequences of false denial have been somewhat overstated, since plaintiffs can proceed individually or seek certification in narrower classes. *Id.* at 1305-11. The cost of false denials is highest when these disaggregated proceedings may produce inconsistent injunctive orders. *Id.* at 1307-08. *But see* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (arguing that the pressure to settle created by class actions has been greatly exaggerated).

57. The distinction between institutional and cost-based concerns is not a sharp one, and Nagareda in some ways differs from Bone and Evans in tone and emphasis rather than in underlying principles. *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 189-98 (2003) [hereinafter Nagareda, *Preexistence Principle*].

58. 28 U.S.C. § 2072 (2006).

that do not truly share common questions disrupts two fundamental allocations of decision-making power. By potentially enlarging substantive rights in contravention of the Rules Enabling Act, it transfers legislative power to the judiciary.[59] By encouraging settlement after the certification order, it delegates to private class attorneys a law-making role that properly belongs to the legislature.[60]

To ensure that certification does not have these effects, both Bone and Evans and Nagareda proposed that courts examine the merits of a case to the extent required to ascertain the existence of a common question, and suggested that this task might require a far deeper inquiry into factual questions than previously recognized.[61] Bone and Evans also advanced a more ambitious proposal in which a judge would assess the plaintiffs' entire case and certify a class only if the plaintiffs meet a "likelihood of success" standard that was set below the level needed to prevail at trial.[62]

During the course of the *Wal-Mart* litigation these commentators noted that *Wal-Mart* presented an unusually powerful example of the rationale behind the new certification jurisprudence. Whether a common question existed was inseparable from the merits issue of whether the plaintiffs' claims were tied together by a cognizable structural problem in the employer's workplace. Professor Nagareda noted that the "class certification granted by the district court in *Dukes* . . . advances the structural discrimination account in functional terms, but potentially without a court ever determining its correctness as an interpretation of Title VII."[63] To solve this circularity problem, a satisfactory certification analysis in *Wal-Mart* would therefore require a determination of whether challenges to delegated discretion are *generally* cognizable under Title VII. However, in systemic discrimination cases the argument for significant merits review at the certification stage extends beyond the circularity problem. The policy considerations behind Title VII require that future employers have adequate notice of which policies will pass muster under Title VII and which will not. If all class actions settle, only relatively specific analysis of the merits at the certification stage can provide this information.

Wal-Mart presented the Supreme Court with its first occasion to consider the new certification jurisprudence, and overwhelming arguments supported a move towards more extensive consideration of the merits during certification.

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59. *See* Nagareda, *Preexistence Principle*, *supra* note 57, at 189-90.

60. *See id.* at 189-98; *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 133-63 (2009) [hereinafter Nagareda, *Aggregate Proof*]. Although an integrated position emerges from these two articles, Professor Nagareda does not draw the two arguments together as explicitly as he might have. *Preexistence Principle* focuses on whether plaintiffs should be able to opt out of classes, while *Aggregate Proof* focuses on the certification problem.

61. Nagareda, *Aggregate Proof*, *supra* note 60, at 171-73.

62. Bone & Evans, *supra* note 55, at 1329.

63. Nagareda, *Aggregate Proof*, *supra* note 60, at 161; *see also* Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105, 106 (2010).

A far more difficult question was presented by the merits determination itself. Title VII doctrine governing structural suits was (and is) highly unsettled. *Wal-Mart* thus required the Court to decide the role of merits determinations in all class certifications while addressing difficult substantive issues governing structural lawsuits. Nagareda, writing in the middle of the litigation, suggested that a Supreme Court decision for plaintiffs in *Wal-Mart* would "upend" the substantive law governing structural challenges.[64] Certainly a reading of the plaintiffs' position might leave this impression, and no doubt a decision in favor of the *Wal-Mart* plaintiffs would have represented some expansion of Title VII. In the next Section, I argue that the expansion of Title VII needed by the *Wal-Mart* plaintiffs was not dramatic. The existing scholarly literature contains many analyses of substantive Title VII principles that might have helped plaintiffs, although fewer works examine in detail the connection between these principles and the problem of class certification.[65] More careful development of the plaintiffs' argument might have demonstrated greater continuity between prior Title VII doctrine and at least certain types of structural discrimination claims.

B. The Doctrinal Basis of Negligence Liability For Structural Cases

Structural class actions are most likely to succeed if they provide a theory of liability that appeals to the moral intuitions of judges. As I argued in Part I, the theories mostly likely to have such appeal are based on some version of negligence liability, which establishes a standard of moral culpability intermediate between the heavy condemnation reserved for discriminatory intent and the no-fault strict liability that disparate impact theory approaches. In this Section, I explore how structural plaintiffs might best situate a negligence-based claim within existing doctrine.

A theory of liability in structural class actions must not only have intuitive appeal but must also satisfy the common question requirement. In this Section, I show how structural plaintiffs may arrive at a common question through either disparate treatment or disparate impact theories. Disparate impact theory provides a relatively straightforward route to the common question required for certification and an only somewhat more complex route to a substantive negligence theory. However, structural disparate treatment claims are more difficult: they do not fit simply into existing substantive Title VII law, and as often framed they do not present a clear common question. This Section suggests that the pattern or practice provision of Title VII can be used to craft a

64. Nagareda, *Aggregate Proof*, *supra* note 60, at 161.

65. Two useful examinations of the connection are Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 690-705 (2003) and Hart, *Employment Discrimination*, *supra* note 3.

viable structural disparate treatment claim based on a negligence theory of liability.

1. Disparate Treatment

a) "Pattern or Practice of Resistance"[66] as Negligence Standard under Title VII

Individual discrimination suits are brought under the central provision of Title VII which makes discrimination based on protected class membership an "unlawful employment practice."[67] A disparate treatment claim requires that at least one party associated with the employer[68] have acted with intent, and in individual suits the locus of the requisite intent is clear. An employer that had discriminatory policies is directly liable for discriminatory outcomes. If a plaintiff can prove job-related discriminatory conduct by a supervisor, the entity is strictly vicariously liable.[69]

Systemic suits raise more difficult culpability issues. These suits are brought not under the basic provision barring unlawful practices but under the prohibition against engaging in a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter."[70] The pattern or practice provision is not freestanding. It protects rights secured by Title VII, such as the basic prohibition of unlawful practices, and thus creates a nested culpability requirement. The first requirement, which I will call stage 1 culpability, consists of the culpability needed to demonstrate a violation of rights secured by the chapter. The second requirement, stage 2 culpability, consists of whatever additional culpability requirement is imposed by the pattern or practice provision on the entity itself.

In a classic systemic disparate treatment suit, proof of an entity-level policy to discriminate would demonstrate an underlying unlawful practice of disparate

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66. 42 U.S.C. § 2000e-6 (2006)

67. 42 U.S.C. § 2000e-2 (2006).

68. Sometimes a client or independent contractor may have the requisite degree of association. Zatz, *supra* note 16.

69. *Cf.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Although addressed specifically to the problem of sexual harassment, the language of these two major agency cases is general and suggests that the vicarious liability rule is not unique to sexual harassment.

70. 42 U.S.C. § 2000e-6 (2006). Although the text of this provision authorizes only the Attorney General to bring a civil action, the Supreme Court has held that pattern or practice analysis also applies to private class actions. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 869 n.9 (1984) ("[T]he elements of a prima facie pattern-or-practice case are the same in a private class action."). The rationale for this was never fully spelled out, but the pattern or practice provision would appear to present an easy case for an implied private cause of action. *See generally* Cort v. Ash, 422 U.S. 66, 78-85 (1975) (holding that a private cause of action was implied when the plaintiff was a member of a protected class, legislative intent was to confer private cause, a private right would advance congressional purpose, and state law was inadequate).

treatment, satisfying stage 1 culpability. Since intent is the highest possible culpability level and the entity itself discriminated intentionally, any stage 2 culpability requirement imposed by the pattern or practice provision would also be met. However, in a structural systemic lawsuit, central management is alleged not to have intentionally discriminated itself but to have facilitated intentional discrimination by supervisors. Intentional discrimination by supervisors meets the stage 1 requirement of intent in a systemic suit, and would support liability in individual suits under the rule of strict vicarious entity liability.

Individual litigation, however, would neither provide relief for the class as a whole nor address the systemic causes of discrimination. A fundamental unanswered question in systemic disparate treatment suits is whether supervisorial intent satisfies not only the stage 1 culpability requirement but also any stage 2 culpability requirement imposed at the entity level by the pattern or practice provision. The entity might be liable only in cases of an intentional entity level policy of discrimination; it might be strictly liable for the acts of supervisors; or it might be liable if it acted negligently. As I argued in Section I.C., policy considerations support negligence liability.[71] Although the culpability element of pattern or practice cases has never been closely examined by the courts, the statute and case law provide a framework consistent with a negligence approach.

The language of the pattern or practice requirement suggests that stage 2 culpability need not be the same as stage 1 culpability. Congress could have simply granted the Attorney General the power to enforce violations of the other provisions of Title VII, but it did not.[72] Instead, it created a separate cause of action, using distinct and vivid terminology: defendants are liable for "a pattern or practice of resistance."

The term "resistance," which has received little if any attention in the case law, suggests some culpability requirement in the pattern or practice provision independent of the culpability needed to establish the relevant "rights secured" by Title VII. The legislative history of Title VII indicates that the expression "pattern or practice of resistance" "was not intended as a term of art, and the words reflect only their usual meaning."[73] In ordinary usage, "resistance" implies an awareness of the consequences of one's action and is surely inconsistent with the imposition of strict liability. At the same time, a

71. *See supra* Section I.C.

72. For example, the 1972 Amendments to Title VII gave the EEOC the power to sue when conciliation efforts had failed after a charge had been filed that an employer "has engaged in an unlawful employment practice." 42 U.S.C. § 2000e-5(b) (2006). The provision grants the EEOC the right to "bring a civil action" in court, 42 U.S.C. § 2000e-5(f)(1) (2006), and thus simply provides enforcement power for the central prohibition on unlawful employment practices rather than creating a new right, as does the "pattern or practice of resistance provision," 42 U.S.C. § 2000e-6 (2006).

73. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977) (citing 110 Cong. Rec. 14270 (1964) (remarks of Senator Humphrey)).

requirement of "resistance" covers a range of possible attitudes towards the thing resisted. People may resist change because they affirmatively oppose the long-term consequences of change or because they simply do not want to be bothered with the inconvenience that change requires. Thus, "resistance" does not necessarily imply an intent to engage in an unlawful practice, and would seem to include conduct such as the knowing failure to remove impediments to the plaintiffs' enjoyment of a protected right.[74] That "resistance" is a lower standard than intent is corroborated by the Supreme Court's only comment on the meaning of the pattern or practice requirement,[75] which stated that a "pattern or practice" meant that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[76] This explication seems to focus on the frequency of the conduct and though consistent with some culpability requirement does not suggest a stringent one. The legislative history of Title VII similarly suggests a focus on frequency rather than culpability:

> [A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature . . . The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . .[77]

To require negligence in systemic cases instead of the strict vicarious liability of individual suits accords with the different policies and proof patterns in the two types of suits. To establish the existence of discrimination, an individual plaintiff must satisfy stringent proof requirements.[78] The proof

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74. An intermediate level of fault is also consistent with the policy recommendations of many observers. *See* Bagenstos, *supra* note 25; Green, *Discrimination in Workplace Dynamics*, *supra* note 18; Green, *Structural Approach*, *supra* note 25; Hart, *Subjective Decisionmaking*, *supra* note 18; Krieger, *supra* note 17; Oppenheimer, *supra* note 17; Selmi, *Was the Disparate Impact Theory a Mistake?*, *supra* note 25; Sullivan, *supra* note 25; Verkerke, *supra* note 25; Zatz, *supra* note 16. In his insightful analysis of the potential role of notice-based negligence liability in discrimination cases, Professor Verkerke argues that, from a policy perspective, individual liability should be based on notice while systemic liability should be strict. Verkerke, *supra* note 25. His argument, however, is addressed to discrimination policy generally rather than to the specific problems raised by delegated discretion. As applied to delegated discretion, his arguments may support notice-based negligence rather than vicarious liability for individual cases, but probably do not undermine the case for notice liability in systemic cases.

75. *Teamsters*, 431 U.S. at 336. The Court's only other opinions on the substantive requirements for systemic liability do not address problems of statutory construction. Bazemore v. Friday, 478 U.S. 385 (1986); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1971). Professor Selmi has noted the Court's puzzling failure to provide more guidance on systemic cases. Michael Selmi, *Theorizing Systemic Disparate Treatment Law After* Wal-Mart v. Dukes, 32 BERKELEY J. OF EMP. & LAB. L. (forthcoming 2011) (manuscript at 479-80).

76. *Teamsters*, 431 U.S. at 336.

77. *Id.* at 336 n.16 (citing 110 Cong. Rec. 14270 (1964) (remarks of Senator Humphrey)).

78. The Supreme Court initially set out these proof patterns in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The subsequent development of these proof patterns satisfies no one:

required in systemic class actions, however, is inevitably less definitive at least in the liability phase. The proof pattern for such systemic cases was first set down in *Teamsters v. United States*. In the initial liability phase, the court determines whether the defendant has engaged in an unlawful pattern or practice using statistical evidence supplemented with illustrative examples of discriminatory conduct. In the second or remedies phase, the court determines collective remedies, primarily injunctive, for the class and also the remedies, typically monetary, specific to each plaintiff. The class-wide finding of discrimination creates a presumption in favor of each plaintiff, but the defendant is permitted to try to establish that it would have made the employment decision in question even absent the discriminatory practice.[79] Thus, the primary finding of a pattern or practice requires no compelling proof that the defendant discriminated in any particular case.[80] A plaintiff who has met the demanding standards of individual proof receives the benefit of strict liability while one who has made the somewhat less conclusive showing of a pattern or practice must also demonstrate "resistance," which may include failure to act under appropriate circumstances. The term "resistance" will typically include the failure to exercise due care with actual notice; whether it should include inaction without actual notice is less clear, and might best be resolved in concrete factual settings.

An explicit recognition that the pattern or practice provision provides for an intermediate level of fault such as negligence would constitute new law. Yet it would be an extension grounded both in the statutory text and in the policy considerations relevant to class litigation.

b) Commonality in Pattern or Practice Claims

Since a class action cannot "abridge, enlarge or modify" preexisting rights,[81] the propriety of class certification in a structural case depends on rights provided by Title VII. A private Title VII class action can proceed under either of two distinct theories: an aggregation of individual employment claims under the central prohibition of unlawful practices or an implied private cause of action under the pattern or practice provision.[82]

> The . . . jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence.

Desert Palace, Inc. v. Costa, 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

79. *Teamsters*, 431 U.S. at 362.

80. For this reason, a negligence-based pattern or practice theory that meets Rule 23(a) may satisfy Rule 23(b) only for collective rather than individual remedies, *See infra* Subsection II.C.2.

81. 28 U.S.C. § 2072 (2006); *see also* Nagareda, *Preexistence Principle*, *supra* note 57, at 189-98.

82. The choice between a "case-aggregation model" and the "litigating-group model" is not unique to Title VII cases. *See* Bone, *supra* note 63, at 106-07.

Private class actions must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure,[83] including, in Rule 23(a)(2), a threshold requirement that the suit present "questions of law or fact common to the class." An aggregation model has one key advantage to plaintiffs, the strict liability that attaches to individual claims. However, in a case challenging delegated discretion, an aggregation model is unlikely to satisfy the commonality requirement. Each employee's claim would involve a distinct set of employee qualifications and supervisorial actions. Because of Title VII's complex proof doctrines, each employee's case might well raise factual and legal issues with little if any common nexus. A corporate policy of delegated discretion as such will play only a minor evidentiary role in each case, and any attempt to elevate that role to create a common question could run afoul of requirement that Rule 23 not "abridge, enlarge or modify" preexisting rights of either party.

In contrast, a pattern or practice suit presents an obvious common question, the existence of an entity-wide pattern or practice of discrimination. A classic pattern or practice suit alleges an entity-level policy of intentional discrimination, and such a policy would meet both the requirement of a pattern or practice and the culpability requirement implied by the term "resistance." A structural case, however, is more complicated. A policy of delegated discretion may constitute a pattern or practice sufficient to present a common question but will not suffice to establish liability without some additional showing of culpability constituting "resistance." By choosing a collective rather than an aggregated case approach, plaintiffs can more easily show a common question, but the price of easier commonality is the loss of automatic strict liability.

To say that a company's policy of allowing discretion may provide a common question of negligence liability is not to say that every class that asserts such a claim should be certified. As the new certification jurisprudence suggests, courts must make some determination that the plaintiffs can provide evidence sufficient to provide a jury a reasonable basis for finding their favor, and the putative class must make some showing of disparate outcomes and negligence. Even given such a showing, Rule 23 requires a court to determine how to structure the action by defining classes and subclasses according to the issues that bind them together.[84] Liability under any Title VII theory requires evidence of harm,[85] and even a uniform policy of delegated discretion may

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83. This requirement was long accepted as obvious by lower courts and first discussed at length in *General Telephone Co. of the Sw. v. Falcon*, 457 U.S. 147 (1981). *See* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1979) [hereinafter Rutherglen, *Title VII Class Actions*].

84. FED. R. CIV. P. 23(c)(1)(B), (c)(4).

85. This determination begins with a difficult statistical analysis whose basic methodology is common to both disparate treatment and disparate impact theories. Determining the proper level of aggregation over regions and jobs is a difficult problem for which there is no mathematically clean solution. Too small a unit of aggregation can make almost any variable statistically insignificant. Too large a unit of aggregation can cause false correlations driven by differences between individuals that have been lost in the aggregation process. *See* Daniel S. Klein, *Bridging the* Falcon *Gap: Do Claims of*

have different effects on different groups of employees. Structural discrimination is a consequence of attitudes prevailing among supervisors, and these may differ between geographic regions and job types.[86] A company's response may be negligent towards some subclasses but not towards others.[87] Many possible combinations of classes and subclasses may be appropriate for the issues of notice, harm, and causation, and some employees in the protected group may be excluded from the action altogether.[88]

Some observers have expressed concern that forcing plaintiffs to litigate narrow claims and classes will make structural suits economically infeasible: without larger stakes, attorneys will not be able to take such inherently risky cases. However, attorneys acting purely from self-interest might well choose to litigate first the claim or the subclass that presents the strongest case for certification. Once certification has been granted even on a single claim or to a small class, defendants are often eager to expand the scope of the class and claims during settlement negotiations in order to put the matter to rest.

2. Disparate Impact

a) Individual Claims: Negligence or Strict Liability?

Disparate impact theory, first developed by the Supreme Court in 1971 in *Griggs v. Duke Power Co.*,[89] allows plaintiffs to challenge a policy or practice because of its disparate effect on the protected class. However, the employer is not liable if the practice is sufficiently job-related.

The details of the job-relatedness test have changed over the years. Under *Griggs*, the employer had the burden of proving that the practice in question was a "business necessity"[90] that had a "manifest relationship"[91] to the contested job. In *Albemarle Paper Co. v. Moody*,[92] the Court gave plaintiffs the opportunity to respond to a showing of business necessity with proof that alternative selection devices could "serve the employer's legitimate interest" with less discriminatory impact.[93] In the late 1980s, the Court raised the

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Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(a) Commonality and Typicality Requirements?, 25 REV. LITIG. 131, 165-71 (2006).

86. Supervisors may tend to discriminate in promotion to higher level jobs while making relatively fair decisions in lower level jobs. Discretion might well be exercised in a discriminatory manner in male-typed jobs but not in female-typed jobs. Weiss, *Annoyingly Indeterminate*, *supra* note 16, at 141 (sex-typed jobs).

87. In some circumstances notice as to one group should prompt investigation as to others. However, problems may not be apparent after investigation.

88. The issues in the text concern only whether the common question requirement of 23(a) are satisfied. Further complications are introduced by Rule 23(b). *See infra* Subsection II.C.2.

89. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

90. *Id.* at 431.

91. *Id.* at 432.

92. 422 U.S. 405 (1975).

93. *Id.* at 425.

plaintiffs' burden in *Watson v. Fort Worth Bank & Trust*[94] and *Wards Cove Packing Co. v. Atonio*.[95] The burden of proof on job-relatedness was shifted to the plaintiff,[96] and the term "necessity" was dropped in favor of the less demanding requirement that "the challenged practice serve[], in a significant way, the legitimate employment goals of the employer."[97] Plaintiffs were also required to identify the challenged employment practices with specificity.[98] Defendants were required to accept the alternative procedure proposed by plaintiffs only if it was "equally effective," a standard which was to include considerations of the cost of the practice.[99] The Civil Rights Act of 1991 codified the rules for proving disparate impact, restoring the term "business necessity" and moving the burden of proof of job-relatedness back to the defendant,[100] but retaining with a limited exception the requirement that plaintiff prove causation for each specific practice.[101] Any alternative practice proposed by plaintiffs was to be evaluated by the more pro-plaintiff pre-*Wards Cove* standard.[102]

Disparate impact imposes a kind of strict liability to the extent that it allows recovery whenever the composition of the defendant's workforce departs from that of the relevant labor market.[103] However, the business necessity defense adds some requirement of fault:[104] it may be seen as imposing liability if the employer fails to take reasonable steps to ensure that the practice is job-related and thus to prevent or at least reduce its discriminatory effects.

The exact location of disparate impact doctrine on the continuum of fault has varied with the job-relatedness defense. Standard negligence doctrine places on the plaintiff the duty of showing that the defendant did not take due care. Disparate impact might resemble a negligence rule if, as under *Watson* and *Wards Cove,* the burden of proving lack of job-relatedness were on the plaintiff. However, the negligence standard of due care has no exact parallel in the terms used in various cases to define job-relatedness. The *Griggs* and now statutory standard of "business necessity" does not balance costs and benefits and thus seems clearly higher than due care. The *Wards Cove* requirement, rejected by Congress, that a practice serve "in a significant way . . . legitimate employment goals"[105] sounds somewhat lower than due care though it is vague

94. 487 U.S. 977 (1988).
95. 490 U.S. 642 (1989).
96. *Wards Cove*, 490 U.S. at 660-61; *Watson*, 487 U.S. at 997-98.
97. *Wards Cove*, 490 U.S. at 659.
98. *Watson*, 487 U.S. at 994.
99. *Wards Cove*, 490 U.S. at 661; *see also Watson*, 487 U.S. at 998.
100. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).
101. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2006).
102. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C) (2006).
103. Oppenheimer, *supra* note 17, at 920–21.
104. *Id.* at 930.
105. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

enough that it might be interpreted to impose a due care standard that weighed costs against benefits.

Similarly, the rules for identifying alternative practices do not track due care in any straightforward way. The *Wards Cove* requirement of equal effectiveness clearly fails to balance benefits against costs. The statutory standard from *Albemarle* that the proposed practice "serve the employer's legitimate interest" resembles the *Wards Cove* job-relatedness test: it neither clearly incorporates nor clearly precludes the cost-benefit considerations that are central to due care.

Under current statutory rules, the culpability requirement of disparate impact doctrine is relatively close but not equivalent to strict liability. In practice, however, courts have been extremely reluctant to impose liability in disparate impact cases,[106] perhaps because of distaste for what they regard as *de facto* strict liability. Congress seems to have done plaintiffs no favor by easing their burdens in the Civil Rights Act of 1991. By providing rules too far from what judges and juries will enforce, they may have reduced the level of disparate impact liability below what it would have been under less superficially pro-plaintiff rules. Ultimately, a statutory problem demands a statutory solution, but in the meantime plaintiffs have a kind of self-help remedy. Although current statutory rules do not require that they do so, plaintiffs can cater to judges' and juries' moral intuitions by acting as if they bear the burden of proof on job-relatedness, or alternatively, by assuming that the defendant will meet this burden so that to prevail they must provide an alternative practice.[107] Either approach will require that they provide detailed evidence of the deficiencies of the employers' current practices and the feasibility of alternative practices. If the tests for job-relatedness and alternative practices are moved toward a negligence standard, there may be little practical difference between these approaches: if a practice meets a due care standard of job-relatedness, then there is unlikely to be an alternative practice that can reduce disparate impact in a cost-effective way.

b) Commonality in Subjective Practice Disparate Impact Claims

The commonality required by Rule 23(a) is far easier to establish under a disparate impact theory than under a disparate treatment theory. A disparate impact theory, by its very nature, raises the question of how a practice affects an entire protected group and whether the practice as applied to the whole group is job-related. In the words of one commentator, disparate impact is

106. Selmi, *Was the Disparate Impact Theory a Mistake?*, *supra* note 25, at 738.

107. This argument is developed in more detail in Weiss, Misplaced Modesty, *supra* note 37.

"inherently a class-based theory."[108] In the paradigmatic disparate impact suit challenging a written test, the existence of a common question is so obvious that it typically receives no attention. Whether disparate impact claims are aggregated individual suits or pattern or practice claims is seldom if ever discussed. Indeed, they seem to be almost a third intrinsically collective claim: courts and commentators distinguish between "pattern-or-practice disparate treatment claims" and "disparate impact" claims[109] and note that individual plaintiffs often do not even think of asserting a disparate impact claim.[110]

That disparate impact has a strongly collective character does not imply that all putative disparate impact classes deserve certification. One threshold issue is whether the challenged conduct constitutes a "practice."[111] This issue has been raised in a number of settings,[112] but has been most important in delegated discretion cases. Courts for many years split over the availability of disparate impact theory for subjective personnel practices.[113] In 1988, the landmark Supreme Court case *Watson v. Fort Worth Bank & Trust* held that the delegation of subjective decision-making power to supervisors may be an "unlawful employment practice" under a disparate impact theory if the discretion is exercised in a discriminatory manner.[114]

Watson itself was an individual claim[115] and the opinion did not address the availability of the class certification in subjective practice cases. However, once *Watson* established that subjective evaluation could be a "practice," the basic logic of commonality applies: any disparate impact challenge to a

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108. Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2003); *see also* Bacon v. Honda of Am. Mfg., 370 F.3d 565, 576 (6th Cir. 2004) (noting that commonality is easier to establish in disparate impact cases and disparate impact analysis is more commonly used in class actions than in individual claims); Sullivan, *supra* note 25, at 982.

109. *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 160 (2001); *see also Bacon*, 370 F.3d at 472-73.

110. Sullivan, *supra* note 25, at 982.

111. Conceivably, certain behavior might constitute a "practice" for purposes of disparate impact doctrine but not for purposes of the pattern or practice provision. However, this seems unlikely to be of much importance since the pattern or practice provision does not seem to have the significance in disparate impact cases that it does in disparate treatment cases.

112. *See, e.g.*, EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (finding word-of-mouth recruiting was not a "practice"). The most common reason that the requirement of a "practice" is not met is that the plaintiff fails to identify the supposed practice with adequate specificity. *See, e.g.*, United Ass'n of Black Landscapers v. City of Milwaukee, 916 F.2d 1261 (7th Cir. 1990); Kelber v. Forest Elec. Corp., 799 F. Supp. 326 (S.D.N.Y. 1992); Guntur v. Union Coll., 57 Fair Emp. Prac. Cas. (BNA) 925 (N.D.N.Y. 1991).

113. The principal early case rejecting the application of disparate impact theory to subjective practices is *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. 1982). The earliest case to apply disparate impact theory to subjective judgments is *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972). Note that several circuits contained cases taking inconsistent positions on this issue. For a prescient discussion of the early case law and the underlying issues, see Alfred W. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1 (1987).

114. 487 U.S. 977 (1971).

115. The individual claim was left over after a class challenge was dismissed for lack of commonality. *Id.* at 983.

"practice" raises the common questions of the effect of the practice on the entire protected group and the job-relatedness of the practice. Since individual employees of a firm can each challenge a particular subjective practice under *Watson*, a group of such individuals challenging the *same* practice necessarily have in common the questions of impact and job-relatedness under an aggregation model of class litigation.[116] In contrast to a disparate treatment claim, the employer faces primary, not vicarious, liability for a personnel policy deliberately chosen at the entity level.[117]

Under *Watson*, almost any use of subjective criteria can in theory be challenged by both an individual and by *some* class. However, this is a far cry from saying that any challenge to subjective criteria deserves certification. Plaintiffs must make some preliminary showing of harm to a class. Even given such evidence, the harm may not be uniform across all protected group members subject to the practice, and division into subclasses may be appropriate.[118] And even if a company has an entirely uniform policy of delegating discretion, the issues of job-relatedness and alternative practices may differ between different classes of workers. A high degree of subjectivity may be unavoidable in certain jobs but not others. The high school degree challenged in the original disparate impact case, *Griggs*,[119] might not have been a business necessity for manual labor, but would surely have been acceptable for a position as a bookkeeper or an engineer. These considerable hurdles for plaintiffs to clear are of great practical importance but in no way undermine the basic principle that *Watson* implies—the theoretical possibility of a common issue satisfying the 23(a) requirements for a class challenge to subjective practices.[120]

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116. Such a class may face other obstacles to certification, such as whether the common questions predominate over the individual ones.

117. Disparate treatment claims based on subjective practices are challenges to the outcomes of employment practices, not to the practices themselves. On an aggregation theory, the employer has taken no action common to the class: it faces vicarious liability for the acts of individual supervisors, and thus the aggregated claims of many individuals may have little in common.

118. One recurring problem is the difficulty of proving common impact. *Compare* Brown v. Nucor Corp., 576 F.3d 149 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1720 (2010) (finding commonality based on extremely convincing facts) *with* Carpenter v. Boeing Co., No. 02-1019-WEB, 2004 WL 2661691, at *4 (D. Kan. Feb. 24, 2004), *aff'd*, 456 F.3d 1183 (10th Cir. 2006) (decertifying the overall class and some subclasses where statistical evidence indicated only "pockets" of discrimination).

119. 401 U.S. 424 (1971).

120. *See* Klein, *supra* note 85. Klein analyzes in detail the confusion that has been created in the case law by footnote 15 of *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 (1981). *Falcon* invalidated the Fifth Circuit's across-the-board rule which permitted "an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury." Falcon v. Gen. Tel. Co. of Sw., 626 F.2d 369, 375 (5th Cir. 1980). The Supreme Court held in *Falcon*, quite reasonably, that all class members must complain of a single practice and present significant evidence of that practice. In footnote 15, the Court provided examples of how plaintiffs could satisfy commonality, including evidence of biased testing procedures and "significant proof that an employer operated under a general policy of discrimination . . . such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159. Subsequent courts have placed enormous weight on this aside, even though the questions of how

C. Remedies

In addition to satisfying all provisions of Rule 23(a), class actions must fall into one of the three types described by Rule 23(b). The availability of each type of certification is intertwined with the nature of the relief requested. Thus, to understand what is at stake in Rule 23(b) issues, this Section will examine the appropriate remedies in structural cases, arguing that both case law and policy place significant restrictions on the appropriate remedies for structural harms.

1. Remedies under Title VII

The original Civil Rights Act of 1964 provided for injunctive relief and limited monetary damages to back pay,[121] though it also provided for attorney's fees.[122] This unusual set of remedies resulted from an odd mix of ad hoc compromise and conscious policy. Although the legislative history of the Act is generally agreed to be "chaotic,"[123] certain themes emerge. Congress understood that centuries of ingrained attitudes could not be undone with the stroke of a pen nor even with sustained litigation. Voluntary compliance (or at least relatively voluntary compliance) was essential. The stick of liability should be large enough to induce employers to begin the process of change but not so large as to make them fear that any admission of wrongdoing might subject them to enormous monetary damages. Thus, the statute emphasized

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practices were defined or whether delegated discretion constituted a practice were never certified or argued and even though *Falcon* was decided before *Watson*, which did discuss extensively the proper treatment of subjective practices. As Klein notes, lower courts have tended to give footnote 15 one of two extreme interpretations. Some conclude that any entirely subjective process is automatically entitled to certification while others have concluded that only entirely subjective practices satisfy commonality. Klein, *supra* note 855, at 148-51. Klein observes that neither reading makes sense either as a reading of *Falcon* or as a policy matter and neither can easily be squared with *Watson*. Instead, the plaintiff must isolate the subjective components of the employer's practice and demonstrate causation with specificity, although these requirements erect no conceptual bar to challenging a subjective practice even if that practice is only one of several criteria used to evaluate employees. Watson v. Fort Worth Bank & Trust, 487 U.S. at 994-95.

121. The original Act provided that a court that finds an unlawful employment practice:

> may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without [up to two years of] back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (2006). That "other equitable relief" did not include any monetary damages other than the stipulated two years back pay was soon widely agreed on, Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 835-38 (N.D. Cal 1973), *aff'd*, 497 F. 2d 180 (9th Cir. 1974), but was not authoritatively established until after monetary remedies were broadened. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

122. 42 U.S.C. § 2000e-5(k) (2006).

123. Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 863 (1969).

remediation even at the expense of compensation, and monetary damages were limited.[124]

The Act further attempted to discourage confrontation by providing that all complaints under the Act were to be filed initially with the Equal Employment Opportunity Commission (EEOC), which was to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[125] As Congress considered what should happen if conciliation failed, the element of political bargaining began to inform the debate. Some Senators were concerned about excessively zealous enforcement by the EEOC, and felt the policies of the Act would be best accomplished through suits by private parties in the federal courts. Since minimal damage awards might make private actions economically infeasible, attorneys' fees were made available.[126]

As the original Act began to accomplish its mission, Congress decided that more extensive remedies were appropriate, at least in the case of intentional discrimination.[127] The Civil Rights Act of 1991 authorized awards of compensatory and punitive damages in disparate treatment cases[128] and, as constitutionally required,[129] provided the right to a jury trial in cases where such damages were requested.[130] However, the same policy concerns that support negligence liability in cases of structural discrimination suggest that the appropriate remedies are more akin to those of the 1964 Act, which promoted reform at the partial expense of compensation, than to those of the 1991 Act which provided extensive compensation.

124.

> According to the House Report on the Bill, "[t]he purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment" (House Report No. 914, 1964 U.S. Code Cong. and Admin. News 2401). Additional members of the House Committee which wrote that Report referred to the Commission, the administrative body which would in large part carry out the purpose of the Title, as an agency which would work in a corrective, not a punitive, manner: "It must . . . be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty . . . Its primary task is to make certain that the channels of employment are open to persons regardless of their race" (Id. at 2516).

Van Hoomissen, 368 F. Supp. at 836 (alteration in original).

125. 42 U.S.C. § 2000e-5(b) (2006).

126. Rutherglen, *Title VII Class Actions*, *supra* note 83, at 692-94; Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 453-54 (1965); *see also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (explaining importance of private attorneys general under Title VII); *cf.* Newman v. Piggie Park Enter., 390 U.S. 400 (1968) (explaining the importance of private attorneys general under Title II, which provides only injunctive relief).

127. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 550 (1999) (Stevens, J. concurring in part and dissenting in part) ("[O]ne could reasonably believe, as Congress did, that as our national resolve against employment discrimination hardens, deliberate violations of Title VII and the ADA become increasingly blameworthy and more properly the subject of 'societal condemnation.'" (citation omitted)).

128. 42 U.S.C. § 1981a(a)(1) (2006).

129. U.S. CONST. amend. VII.

130. 42 U.S.C. § 1981a(c) (2006). Jury trials were not available for claims for back pay under the original Act, whose remedies were regarded as equitable in nature.

The remedies scheme of the 1964 Act had three interrelated components: structural remedies, limited damages, and attorney's fees. Injunctive relief is central to the resolution of structural cases, as it was to the early cases under the Civil Rights Act of 1964. Crafting such relief, however, is a difficult task, perhaps more difficult than in the early cases. Plaintiffs must make a detailed request, well-supported by expert testimony, for specific injunctive relief in the form of modified employment practices. Such a request serves a number of critical purposes. First, the existence of a feasible alternative is essential to a negligence theory. Few courts, and surely not the current Supreme Court, will be willing to impose liability on a defendant which had no realistic alternative to the challenged discriminatory structures. Second, discussion of the details of structural reforms now tends to occur, if at all, after certification and during settlement, frustrating several goals of Title VII. Even observers sympathetic to structural cases have expressed concern about the value of personnel policies instituted as a result of settlement negotiations. These negotiations receive little judicial oversight; employees, the true stakeholders, often play little or no role; and the process as a whole may end up primarily benefiting attorneys and consultants.[131] Even if useful reforms are agreed on, the value of these changes is limited to the single case that is settled. Few if any reported opinions examine in any detail which employment practices will protect an employer against Title VII liability, leaving employers with little guidance about their statutory obligations and undermining the long-term goal of the statute, which is prevention and reform. A principal benefit of expanded merits review during class certification would be to provide a more complete body of law on these obligations. Finally, the delineation of specific injunctive remedies goes to the fundamental credibility of the case. The absence of a serious proposal for structural reform casts raises doubt about whether plaintiffs' class lawyers are acting as private attorneys general or merely pursuing cases for their own financial gain.

Many scholars have questioned whether the full range of damages should be available in structural cases. Most obviously, punitive damages are inappropriate.[132] Judicial and public opinion do not strongly support liability in structural cases,[133] and imposing punitive damages risks destroying the support that does exist. Even with more widespread support, heavy penalties would not clearly serve the fundamental remedial goal of Title VII. Considerable uncertainty exists about the best means of preventing structural discrimination, and the objective of Title VII should be to encourage cooperation and

131. Bagenstos, *supra* note 25, at 28-34; Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249, 1324-31 (2003) [hereinafter Selmi, *Price of Discrimination*].

132. *See, e.g.*, Krieger, *supra* note 17, at 1243-44; Oppenheimer, *supra* note 17, at 972.

133. *See supra* Section I.C.

experimentation by employers.[134] The threat of severe sanctions may undermine this cooperation by deterring potentially incriminating self-policing and settlement negotiations.[135]

These concerns strongly militate against the imposition of punitive damages in structural cases and indeed existing law all but precludes punitive damages in cases of negligence-based vicarious liability. The Civil Rights Act of 1991 authorized punitive damages where the defendant acted "with malice or with reckless indifference."[136] Following standard common law principles, the Supreme Court in *Kolstad v. American Dental Ass'n* has held that punitive damages under Title VII requires an "element of conscious wrongdoing" and placed strict limits on the availability of punitive damages for vicarious wrongdoing.[137] A structural plaintiff would need to show that individual supervisors acted with the requisite "element of conscious wrongdoing," that is, "with malice or with reckless indifference." In addition, the corporate defendant would need to meet the stringent culpability standards outlined in *Kolstad.* Any case in which these requirements are met is best characterized as a one of traditional discrimination, not one in which elusive unconscious bias is facilitated by workplace structures.[138]

The proper scope of individual compensatory damages in structural cases presents a more difficult problem. Like punitive damages, full compensatory damages may discourage settlement. The two years' back pay allowed by the original 1964 Act is not a magic number, but several scholars have concluded that it represents a reasonable compromise between the goals of remediation and compensation in structural cases.[139] Limitation of compensatory damages, some might argue, may inhibit class counsel from bringing the private suits for injunctive relief that are central to the enforcement of Title VII. Of course, Title VII provides for statutory attorney's fees, but perhaps fee awards alone do not compensate attorneys for the risk of not prevailing. Conversely, however, contingency damages may result in windfalls, and can create troubling conflicts of interest for class counsel: the possibility of large awards may focus counsel's efforts on monetary awards rather than on structural remedies and the fees

134. *See supra* Subsection I.C.

135. Mitchell, *supra* note 36, at 115.

136. 42 U.S.C. § 1981a(b)(1) (2006).

137. 527 U.S. 526 (1999).

138. *Brown v. Nucor Corp.*, 576 F.3d 149 (4th Cir. 2009), presents an apparent exception, but primarily because the outrageous racial hostility displayed made it a traditional rather than a true structural case. The *Nucor* plaintiffs may have made a strategic mistake by emphasizing the role of structural factors such as subjective decision-making. Although a class was ultimately certified by the Fourth Circuit, certification was initially denied by the district court, Brown v. Nucor Corp., 2:04-22005-CWH, 2007 WL 2284581 (D.S.C. 2007), the Fourth Circuit panel was divided, *Nucor*, 576 F.3d 149, and certification was denied in a companion case in the Eighth Circuit, Bennett v. Nucor Corp., 656 F.3d 802 (8th Cir. 2011).

139. Krieger, *supra* note 17, at 1243.

themselves may come out of the class recovery.[140] Contingency fees cannot substitute for careful calculation of attorney's fees and do not provide a rationale for extending compensatory damages. Even if contingency fees were desirable on policy grounds, the Supreme Court has held that contingency adjustments are not permitted to statutory fee awards,[141] and lower courts should discontinue the practice of allowing settlements that evade this principle.[142]

2. Remedies under Rule 23(b)

Virtually all Title VII class actions have proceeded under either Rule 23(b)(2) or (b)(3) of the Federal Rules of Civil Procedure. Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds generally applicable to the class," so that the appropriate remedy would be injunctive or declaratory relief "with respect to the class as a whole."[143] A (b)(3) action is appropriate when there are differences in the claims of class members but common issues of law or fact "predominate" over individual questions and a class action is superior to other approaches.[144]

Significantly different procedures apply to 23(b)(2) and (b)(3) cases. Cases under 23(b)(3) are thought to present a far greater chance of prejudice to the interests of class members who do not actively participate in the suit, and thus the court must make extensive efforts to notify all possible class members of the suit and its potential effect on their rights.[145] Moreover, members of a potential class under (b)(3) have the right to opt out of the suit, making any judgment not binding on them.

A class seeking only injunctive relief is clearly eligible for certification under 23(b)(2), but the difficult question both in Title VII cases and elsewhere is whether such classes could also obtain any monetary relief. Attorney's fees incurred in the pursuit of class-wide injunctive relief have no individualized component, and the policies of Rule 23(b) present no reason for their exclusion. However, individual relief such as back-pay and other compensatory damages raise more serious problems. Under *Teamsters*, these individual damages are calculated not based on any collective formula but in individual proceedings,

140. *See* Selmi, *Price of Discrimination*, *supra* note 131, at 1275-76.

141. City of Burlington v. Dague, 505 U.S. 557 (1992) (involving a different statute but using reasoning applicable to all federal attorney's fee provisions).

142. Selmi, *Price of Discrimination*, *supra* note 131, at 1328-29.

143. FED. R. CIV. P. 23(b)(2).

144. FED. R. CIV. P. 23(b)(3).

145. The opposite argument can be made, however. Since the injunctive relief will apply indivisibly to all class members, perhaps notice is more important in 23(b)(2) cases.

thus raising questions about the appropriateness of the class action form.[146] Prior to the 1991 amendments, most courts concluded that individually calculated back pay was incidental to the declaratory and injunctive relief being sought and allowed the action under 23(b)(2).

The status of individual damages under 23(b)(2) became more important after the Civil Rights Act of 1991 raised the monetary stakes by authorizing awards of compensatory and punitive damages in disparate treatment cases.[147] Almost all courts continued to permit certification under 23(b)(2) of claims whose monetary damage claims were limited to back pay.[148] However, the Supreme Court cast some doubt on these cases by holding in a non-Title VII case that 23(b)(2) certification was available only when any damages requested were incidental.[149] Subsequent courts split over the proper treatment of other compensatory damages. Some granted 23(b)(2) certification to such classes seeking compensatory or punitive damages.[150] The most restrictive position was taken by the Fifth Circuit, which held in *Allison v. Citgo Petroleum Corp.* that the compensatory and punitive damages allowed by the 1991 Act and the corresponding extensive individualized determinations precluded class certification under both 23(b)(2) and (b)(3).[151] The Supreme Court granted certiorari in *Wal-Mart* in part to resolve the division among lower courts on these issues.[152]

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146. Under *Teamsters*, these individual damages are calculated in special individual proceedings through a procedure that modifies the rules applicable to individual trials. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 371-78 (1977).

147. 42 U.S.C. § 1981a(a)(1) (2006).

148. *See, e.g.*, Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 646-51 (6th Cir. 2006); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Lemon v. Int'l Union of Operating Eng'rs Local No. 139, 216 F.3d 577, 580-81 (7th Cir. 2000); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415-16 (5th Cir. 1998). *But see* Air Line Stewards & Stewardesses Ass'n v. Am. Airlines, Inc., 490 F.2d 636 (7th Cir. 1973); Smith v. Reader's Digest Ass'n, 15 Fair Empl. Prac. Cas. (BNA) 1606 (S.D.N.Y. 1974). *See generally* LEX K. LARSON, 4-81 EMPLOYMENT DISCRIMINATION § 81.07 (2d ed. 1994) (summarizing cases in which courts permit certification under Rule 23(b)).

149. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam).

150. In *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2001), the Second Circuit held that the availability of 23(b)(2) class certification in claims seeking non-incidental monetary relief should depend on "the relative importance of the remedies sought, given all of the facts and circumstances of the case." *Id.* at 160. Certification under 23(b)(2) was appropriate if reasonable plaintiffs would have brought the suit to obtain injunctive relief even without the possibility of monetary damages. *See also* Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003) (rejecting incidental damages distinction in favor of facts and circumstances test).

The Ninth Circuit's opinion in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) provided a different approach, suggesting the availability of 23(b)(2) certification should depend on the balancing of a long list of factors including whether the claim for monetary relief "determines the key procedures that will be used . . . introduces new and significant legal and factual issues . . . requires individualized hearings, and . . . raise[s] particular due process and manageability concerns." *Id.* at 617.

151. *Allison*, 151 F.3d at 416-20. The *Allison* approach was followed by *Reeb*, 435 F.3d at 646-51, *Murray*, 244 F.3d at 812, and *Lemon*, 216 F.3d at 580-81.

152. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010).

III. THE WAL-MART LITIGATION

Having argued that the *Wal-Mart* plaintiffs could have used existing Title VII and class certification doctrine to craft a negligence theory of liability, I now turn in Part III to a closer examination of the plaintiffs' missed opportunities to do so.

A. Evidence

Plaintiff's central theme throughout the *Wal-Mart* litigation[153] was Wal-Mart's subjective and unstructured personnel practices:

> Few objective requirements or qualifications for specific store assignments, promotions, or raises exist. Salaries are supposed to conform to general company guidelines, but store management has substantial discretion in setting salary levels within salary ranges for each employee. Salaries are also adjusted based on performance reviews, which are largely based on subjective judgments of performance.[154]

Plaintiffs also noted that Wal-Mart required as a condition of promotion to store manager that "employees be willing to relocate" even to significantly distant stores, and in practice required "frequent and substantial relocations of its managers."[155] The disadvantage that this created for women had been frequently noted, even by Sam Walton himself.[156]

The plaintiffs produced statistical evidence that female employees at all levels were paid less than comparable male employees.[157] Their analysis further suggested that women were less likely to be promoted than men and that the proportion of women decreased with each step up the hierarchy: Women comprised 72% of the hourly sales employees,[158] but less than 10% of all store managers and 4% of all district managers.[159] Wal-Mart's rate of

153. The *Wal-Mart* litigation took place over a ten-year period, and the evidence stressed by the plaintiffs varied among the filings, motions and briefs introduced at different stages. In this Part, I summarize the evidence, whenever presented, that might have most helped plaintiffs.

154. Plaintiffs' Third Amended Complaint ¶ 23, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ), *aff'd*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

155. *Id.* ¶ 29k.

156. In 1992, shortly before he passed away, Walton said:

> Maybe that was necessary back in the old days, and maybe it was more rigid than it needed to be. . . . [T]he old way really put good smart women at a disadvantage in our company because at that time they weren't as free to pick up and move as many men were. Now I've seen the light on the opportunities that we missed out on with women.

SAM WALTON & JOHN HUEY, MADE IN AMERICA 217-18 (1992).

157. Plaintiffs' Third Amended Complaint, *supra* note 154, ¶ 26.

158. *Id.* ¶ 1.

159. *Id.* ¶ 27.

promotion of women was far lower than that of its competitors[160] and not typical of the retail industry, in which women hold 50% of management jobs.[161]

Plaintiffs introduced about 120 affidavits of individual experiences by store employees. Many of these involved remarkably direct expressions of discriminatory attitudes. Women were told that the position they had applied for was unsuitable for a woman,[162] that women should not pursue careers,[163] or that men should be paid more than women for the same work.[164] Plaintiffs also introduced the expert testimony of Professor William Bielby that subjective practices of the type used by Wal-Mart failed to constrain any bias in the decision making of supervisors, and that such bias remained common. This testimony both summarized general social science findings and applied that social science to the particulars of Wal-Mart's practices.[165]

Wal-Mart management was repeatedly informed about a variety of problems encountered by women throughout the organization. Central Wal-Mart operations gathered extensive information about individual stores, including payroll, labor and other employment data.[166] Internal Wal-Mart studies using this data indicated that the percentage of women in management at Wal-Mart lagged significantly behind other retailers. These reports were presented to several high-level committees[167] and, although management evidently accepted these claims as true, they took no steps to remedy those causes that were understood, such as the relocation policy, or to investigate other possible causes. A group of executive women formed a committee to convey their concerns about the problems faced by women, including their exclusion from informal networking[168] and the choice of venues such as

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160. *Id.* ¶ 28.

161. Motion for Class Certification at 30, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ), *aff'd*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

162. Applicants were told "[y]ou're a girl, why do you want to be in Hardware?"; "[y]ou don't want to work with guns"; and that the supervisor "needed a man in the [sporting goods department manager] job." *Id.* at 6 n.5 (first two alterations in original).

163. One woman was told "you aren't part of the boy's club, and you should raise a family and stay in the kitchen" instead of seeking advancement. Another was told to "resign as an assistant manager and find a husband with whom she could settle down to relieve work-related stress." Another was told that "women should be home barefoot and pregnant and women weren't qualified to be managers because men had an extra rib." *Id.* at 16 n.9.

164. One woman was told that "[m]en need to be paid more than women because they have families to support." When a single mother personnel manager asked why a male associate was receiving a merit raise, a male assistant manager told her it was because he "has a family to support." Another was told that a male assistant manager was making over $10,000 more than she was because he "supports his wife and his two kids." One manager even said, "[y]ou don't have the right equipment. . . you aren't male, so you can't expect to be paid the same." *Id.* at 17-18 n.10 (alterations in original).

165. Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs' Motion for Class Certification, Dukes v. Wal-Mart, 222 F.R.D. 137 (No. C-01-2252 MJJ).

166. Plaintiffs' Third Amended Complaint, *supra* note 154, ¶ 21.

167. Motion for Class Certification, *supra* note 161, at 31-32.

168. One of their reports indicated that women were excluded from the men's informal network in part because it was regarded as inappropriate for men and women to travel together or even to have

Hooters for official business.[169] Individual women executives expressed objections to the use by senior management of the terms "little Janie Qs" and "girls" to refer to female associates in the stores, a request that was ignored.[170]

The plaintiffs devoted a great deal of effort to substantiating their claims that "Wal-Mart employs uniform employment and personnel policies throughout the United States"[171] and that the firm took pains to instill a strong and uniform culture. However, much of their evidence on Wal-Mart's culture concerned general matters of store management such as the uniformity of music and temperature throughout Wal-Mart stores.[172] Only one example was presented that bore directly on central management's attitudes towards women: store managers at the Sam Walton Institute were told that the "reason that so few women had reached senior management at Wal-Mart was because men have been more aggressive in achieving those levels of responsibility."[173]

Wal-Mart, of course, presented contrary evidence, most notably from experts who challenged the plaintiffs' statistical analysis. For the moment, I view the plaintiffs' evidence in the most favorable light, much as a court would in a summary judgment motion, in order to focus on whether the plaintiffs tied their evidence to Wal-Mart's subjective employment practices in a way that might plausibly have met one or more theories of discrimination recognized under Title VII. I argue that they did not. They conflated various theories; they did not carefully connect their evidence to each theory; they introduced irrelevant and confusing evidence; and they omitted certain types of important evidence. These shortcomings ultimately doomed their case to failure.

B. Lower Court Proceedings

In 2001, the *Wal-Mart* plaintiffs filed a complaint in the Northern District of California alleging that local Wal-Mart managers were given "substantial discretion" in pay and promotion decisions and made those decisions largely based on subjective judgments of performance.[174] Plaintiffs claimed that this

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lunch together. Memorandum from Sharon Bilgischer on Women in Leadership, *reprinted in* Brief for Respondents, *supra* note 6, at 48.

169. Motion for Class Certification, *supra* note 161, at 12-14. At the annual retreat, senior executives took part in a quail hunt, a practice which continued even after women participants expressed discomfort and suggested alternatives such as skiing or river rafting. *Id.*

170. *Id.* at 13.

171. Plaintiffs' Third Amended Complaint, *supra* note 154, ¶ 21 ("Regardless of division, there are uniform policies for employees, uniform 'orientation' procedures, uniform salary, assignment, pay, training, and promotion policies. All stores are regularly audited for compliance with these uniform, company-wide policies and procedures.").

172. Motion for Class Certification, *supra* note 161, at 8.

173. *Id.* at 14.

174. Plaintiffs' First Amended Complaint ¶ 22, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ), *aff'd*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

discretion was exercised disproportionately in favor of men.[175] The plaintiffs requested the certification of a class of about one and a half million plaintiffs consisting of all female in-store employees.[176] No suggestion was made that the class might be divided into subgroups. Plaintiffs sought injunctive and declaratory relief, punitive damages, and back pay, but not compensatory damages.

The complaints and motions alleged both disparate treatment and disparate impact[177] but spent essentially no time explaining how their facts supported either theory. Instead, the plaintiffs argued that Wal-Mart created a strong corporate culture that provided a "conduit"[178] for discriminatory attitudes at the corporate level to "infect"[179] the subjective decision-making processes of its supervisors. The filings described in detail the factual allegations summarized in Section III.A, with an emphasis on evidence of a common culture hostile to women intended to support a conduit of infection theory.

The plaintiffs' request for relief was couched in the most general possible terms, without any attempt to specify the types of reforms that would address their concerns. They asked for "[a] preliminary and permanent injunction against Defendant . . . from engaging in each of the unlawful practices, policies, customs and usages set forth herein" and "[s]uch other and further legal and equitable relief as this Court deems necessary, just and proper."[180] In 2004, the district court considered whether the proposed class met the requirements for certification. Like most courts up until that time, the *Wal-Mart* trial court hewed close to the *Eisen* rule, suggesting that a serious inquiry into the merits was not appropriate for class certification purposes.[181] Without examining in any detail the distinction between a disparate treatment and a disparate impact claim, the trial court certified most of the proposed class under 23(b) for claims of declaratory and injunctive relief, punitive damages, and back pay.[182] Wal-Mart immediately appealed the certification.

The *Wal-Mart* litigation took place during a time of rapid change in the law of class certification. The power of the new consensus on commonality was shown when Wal-Mart appealed the class certification. The Ninth Circuit

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175. Class claims were limited to pay and promotion, and did not include hiring, hostile work environment, or retaliation. *Dukes*, 222 F.R.D. at 141. Claims of class retaliation, Plaintiffs' First Amended Complaint, *supra* note 174, ¶¶ 100–01, 104, and a hostile environment, *id.* ¶ 23j, were made in the initial complaint, but dropped by the time the plaintiffs' motion for certification was filed.

176. *Dukes*, 222 F.R.D. at 141-42.

177. *E.g.*, Plaintiffs' Third Amended Complaint, *supra* note 154, ¶ 16.

178. Brief for Respondents, *supra* note 6, at 13.

179. *Id.* at 46; *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548; *id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).

180. Plaintiffs' Third Amended Complaint, *supra* note 154, at 25.

181. *Dukes*, 222 F.R.D. at 144.

182. *Id.* at 188. The certification included the restriction that "class members for whom there is no available objective data documenting their interest in challenged promotions shall be limited to injunctive and declaratory relief with respect to plaintiffs' promotion claim." *Id.*

ultimately issued three opinions. The first opinion, by a three-judge panel affirming certification, was withdrawn and reissued to reflect the changing approach to certification among the circuits.[183] The final en banc opinions were sharply divided in part over the stringency of the scrutiny applicable to plaintiffs' evidence on issues common to the merits and class certification.[184] The majority certified a 23(b)(2) class with respect to injunctive relief, declaratory relief, and back pay. It remanded the question of whether a 23(b)(2) class could pursue a claim for punitive damages, suggesting that the punitive damage claim might be severed and proceed under 23(b)(3).[185] Wal-Mart appealed and the Supreme Court granted certiorari on the questions of whether the plaintiffs had established commonality under 23(a) and whether back pay could be awarded in a 23(b)(2) suit.[186]

C. Supreme Court Briefs and Oral Argument

The successive opinions over the course of the *Wal-Mart* litigation had clearly indicated a growing acceptance of the new commonality consensus and a corresponding burden on plaintiffs to articulate more fully key aspects of their substantive case. The plaintiffs' Supreme Court brief paid slightly more attention to the distinction between disparate impact and disparate treatment claims than had their earlier briefs, but it made no attempt to develop each theory separately.[187] The issue of business necessity was nowhere mentioned. Wal-Mart pointed out that "the Ninth Circuit and the district court failed even to address the intent element, let alone grapple with the fact that determining whether 'excess subjectivity' was exercised in an intentionally discriminatory

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183. *Compare* Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1225-31 (9th Cir. 2007) *with* Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1177-81 (9th Cir. 2007). The second opinion added a statement stressing that "courts are not only 'at liberty to' but must 'consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case.'" 509 F.3d at 1177 n.2 (citation omitted). The second opinion also seemed to apply a more stringent standard to the plaintiff's evidence. For instance, in allowing certain expert evidence, the second opinion eliminated the earlier opinion's statement that "courts need not apply the full *Daubert* 'gatekeeper' standard at the class certification stage," 474 F.3d at 1227 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)), and instead relied on a conclusion that the gatekeeper analysis was logically unnecessary, 509 F.3d at 1179.

184. Dukes v. Wal-Mart Stores, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

185. *Id.* at 577.

186. The Supreme Court granted certiorari on two questions. The first was whether claims for monetary relief can be certified under Rule 23(b)(2). In addition, the parties were directed to brief and argue whether the lower court's grant of certification in *Wal-Mart* was consistent with Rule 23(a). Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010) (citing Petition for a Writ of Certiorari at i, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277)).

187. The four-page "Summary of Argument" mentioned the distinction only to aggregate the two theories: "plaintiffs have identified an 'employment practice'—subjective decision-making adversely affecting women—that may be challenged under either disparate treatment or disparate impact analysis." Brief for Respondents, *supra* note 6, at 4; *see also id.* at 14, 28 (mentioning the different theories only to highlight their common features). The brief also recites very general descriptions of each theory. *Id.* at 9-10.

fashion requires individualized proof."[188] In response, plaintiffs correctly noted that there is a distinction between individual and pattern or practice cases, but failed to address the nature of this distinction, especially the subtle agency problems involved in the definition of "intent" in pattern or practice cases.[189] Their argument stressed a conduit of infection theory, suggesting that discrimination resulted from "excessive subjectivity in personnel decisions, guided by a strong corporate culture infused with sexual stereotyping."[190]

During oral argument, Justice Kennedy requested that plaintiffs' counsel clarify "the unlawful policy that Wal-Mart has adopted, under your theory of the case?" Counsel responded, "Justice Kennedy, our theory is that Wal-Mart provided to its managers unchecked discretion in the way that this Court's *Watson* decision addressed that was used [in a discriminatory manner]."[191] Justice Kennedy responded with a question that highlighted a crucial flaw in the case:[192]

> JUSTICE KENNEDY: . . . [Y]our complaint faces in two directions. Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that's going on. Then in the next breath, you say, well, now these supervisors have too much discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is.[193]

The precise resolution of this apparent inconsistency depends on whether a disparate impact or disparate treatment claim is being asserted. As defendant's counsel had conceded earlier, a policy combining discretionary and non-discretionary standards might be challenged under a disparate impact theory as long as the plaintiff could identify the problematic practice with specificity. That Wal-Mart had some loose guidelines need not have been a problem as long as a significant element of discretion remained, which it in fact did. But by arguing so forcefully that corporate culture had provided a conduit for the transmission of discriminatory attitudes, plaintiffs seemed to imply that in practice little discretion remained, seriously undercutting a disparate impact claim based on delegation of discretion. The plaintiffs need never have made this infection argument: as *Watson* indicated, delegated discretion alone could

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188. Brief for Petitioner at 40, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-227).

189. Brief for Respondents, *supra* note 6, at 42-43.

190. *Id.* at 5.

191. Transcript of Oral Argument at 27, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-227).

192. Lyle Denniston, *Argument Recap: A Fatal Flaw Detected?*, SCOTUSBLOG (Mar. 29, 2011, 12:12 PM), http://www.scotusblog.com/2011/03/argument-recap-a-fatal-flaw-detected/.

193. Transcript of Oral Argument, *supra* note 191, at 27-28. This problem had been noted before the Supreme Court oral argument by Professor Richard Thompson Ford. Richard Thompson Ford, *Discounting Discrimination:* Dukes v. Wal-Mart *Proves That Yesterday's Civil Rights Laws Can't Keep Up with Today's Economy*, 5 HARV. L. & POL'Y REV. 69, 73 (2011).

have served as a basis for a disparate impact claim. Unfortunately, a Supreme Court oral argument is a bit late in the game to back down on a point given such emphasis in earlier stages of litigation.

In principle, a conduit of infection theory might form the basis of a traditional systemic disparate treatment claim alleging a corporate-level policy of intentional discrimination. The plaintiffs certainly provided significant evidence of disturbing attitudes at headquarters. On the facts as a whole, however, this was a weak claim. Evidence of the transmission of these attitudes to a widely dispersed set of stores was thin, amounting to a single ambiguous anecdote about a comment at the Sam Walton Institute. And again Justice Kennedy's observation applied: if store managers had been guided to make discriminatory decisions, then their discretion had been constrained, and the emphasis on subjectivity made no sense.

Even during oral argument, however, the disparate treatment claim could have been reconstructed as a negligence theory of disparate treatment in which the challenged practice was not subjectivity as such but instead Wal-Mart's disregard of evidence of the effects of delegated discretion. The plaintiffs took one step toward this theory by stressing that a Title VII class action was not merely an aggregation of individual cases of "unlawful employment practice[s]" but was based on the separate statutory provision dealing with a "pattern or practice of resistance."[194] They made no effort, however, to suggest that an intermediate level of fault would meet the requisite culpability under this provision. Despite this, the Justices suggested this line of reasoning of their own accord. In their earlier questions to Wal-Mart's counsel, Chief Justice Roberts and Justice Kennedy had indicated support for a negligence theory based on notice:

> CHIEF JUSTICE ROBERTS: I suppose if corporate headquarters had learned that the subjective decision-making or the delegation of decision-making to the field was resulting in several discriminatory practices or a pattern of discrimination—in other words, the decentralized process was leading to discrimination—then I suppose the company—that that could be attributed to the policy adopted by—at headquarters?
>
> MR. BOUTROUS: No, Your Honor. I think that in this situation, if there was a pattern, for example, at a particular store where the decisionmaking unit—
>
> CHIEF JUSTICE ROBERTS: No, I'm talking about—so, they've got thousands of stores, and, you know, every week they get a report from another store saying that, you know, there's an allegation of gender

194. *See supra* Part II.

> discrimination. At some point, can't they conclude that it is their policy of decentralizing decisionmaking that is causing or permitting that discrimination to take place? [195]

Justice Kennedy and Justice Ginsburg followed up with similar questions.[196] When Justice Kennedy raised the critical inconsistency, plaintiffs' counsel might have responded with the notice-based negligence argument to which the Court had indicated openness. Instead, the answer of plaintiffs' counsel amounted to a repetition of the two evidently contradictory principles: "specific features of the pay and promotion process . . . are totally discretionary . . . . But the company also has a very strong corporate culture that ensures that . . . the decisions of the managers will be informed by the values the company provides to these managers in training."[197] Later in the oral argument, Justice Breyer attempted to help plaintiffs' counsel by prompting him with a notice-based negligence argument[198] and asking, "[I]s that a question that every one of the women in this class shares in common?"[199] Counsel's response evidenced no understanding of how a notice-based negligence theory differed from a simple delegation of discretion theory: "I believe so, Justice Breyer, because they've all been the subject in every one of these stores to this very broad discretion."[200]

The plaintiffs' failure to develop an appropriate culpability standard for pattern or practice cases again created problems when Justice Kennedy pressed counsel about the central normative dilemma in structural litigation: to what extent are employers liable for the problem of discrimination in society as a whole? Justice Kennedy inquired as to the liability of a company with a very specific policy against discrimination whose supervisors had discriminatory views that reflected the level of discrimination generally prevailing in society: "Where there's no deliberate indifference and a specific policy prohibiting the discrimination, can you still proceed?"[201] In the same vein, Justice Roberts inquired whether a class action could be maintained in any instance in which even a few managers discriminated despite a clear corporate policy against discrimination. Counsel might have responded that such a company would be not be liable under a disparate treatment theory but that it might be liable under

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195. Transcript of Oral Argument, *supra* note 191, at 4-5.

196. *Id.* at 5-7.

197. *Id.* at 28-29.

198.

> JUSTICE BREYER: Is the—is the common question of law or fact whether, given . . . . the facts about what people say and how they behave, many of which central management knew, and given the results which central management knew or should have known, should central management under the law have withdrawn some of the subjective discretion in order to stop these results?

Id. at 36-37.

199. *Id.* at 37.

200. *Id.*

201. *Id.* at 40.

a disparate impact theory if it failed to institute measures that could have prevented discrimination and that failure was not justified by business necessity. Counsel not only failed to make this critical distinction, but appeared to reject a negligence theory, implying that Title VII would permit a class action on a strict vicarious liability basis.[202] In doing so, he made two key errors. First, if his comments are read as a gloss on the pattern or practice provision, they proposed a standard that is unsupported in current law and is, as argued in Section I.C, inconsistent with public and judicial views on the acceptable bounds of discrimination law. Second, this response undermines commonality: strict vicarious liability is imposed in individual cases, but the *Wal-Mart* plaintiffs' commonality argument depended on characterizing their suit as a pattern or practice claim rather than as an aggregation of individual cases.

D. The Opinion

The plaintiffs' failures during oral argument all but left the result of *Wal-Mart* a foregone conclusion. However, the scope of the opinion and its rationale were far less predictable.

On the question of commonality the Court split 5-4 and, in a decision written by Justice Scalia, held that the plaintiffs had not demonstrated a common question under Rule 23(a). The least controversial part of the Rule 23(a) analysis adopted the central premise of the new jurisprudence of class actions, reaffirming the *Falcon* holding that consideration of the merits is sometimes unavoidable and removing any barrier posed by *Eisen*.[203] The opinion's analysis of Rule 23(a) might well have clarified the role played by the merits in certification questions, but instead failed to articulate clearly a standard of proof for plaintiffs to meet. Through its choice of words at various points, the opinion indicates that the plaintiffs' burden is relatively high: it rejects "a mere pleading standard"[204] and requires that parties seeking

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> MR. SELLERS: I—well, I would submit you still can proceed. . . .
> JUSTICE ALITO: I understand your answer to JUSTICE KENNEDY's question to be that this typical company would be in violation of Title VII; is that correct?
> MR. SELLERS: It . . . could very well be the case. . . . I think that Title VII holds companies responsible for the actions they take with respect to their employees. There certainly are industries, and there were 30 years—many more 30 or years ago when Teamsters was decided, where the entire industry might have had evidence of discrimination. That would not—there is not a negligence standard under this statute that immunizes companies because they follow the same standards as others.

Id. at 41-42. Counsel was certainly correct that Title VII provides for strict vicarious liability in individual cases, but without more, such as notice, there is no basis for commonality, and the answer undermined the plaintiffs' claim that they were proceeding on a pattern or practice theory.

203. This issue was not explicitly discussed in Justice Ginsburg's dissent, which like the majority makes some assessment of the merits of the case.

204. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

certification "affirmatively demonstrate"[205] common questions through "convincing proof"[206] and "rigorous analysis."[207] It reaffirms the suggestion in *Falcon* that claims of a general policy of discrimination must be demonstrated by "significant proof."[208] However, the opinion provides little concrete guidance about the implementation of these principles,[209] instead focusing on the merits of the plaintiffs' Title VII claim.

Like the plaintiffs, Justice Scalia made no explicit distinction between disparate treatment and disparate impact theory, apparently assuming that the same commonality analysis applied to both. Without a legal theory to analyze, the opinion inevitably became a somewhat unfocused examination of specific evidentiary issues. I have argued elsewhere that the evaluation of evidence in discrimination cases unavoidably turns on background assumptions about the societal pattern of discrimination.[210] Justice Scalia's opinion provided an unusually explicit example of such an assumption:

> To the contrary, left 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.[211]

The assumption that "most managers" do not discriminate, which I have called the *Wal-Mart* presumption,[212] is of great importance: *Wal-Mart* can be read broadly to hold that evidence of the discriminatory use of discretion must be evaluated against the background of the *Wal-Mart* presumption.[213] Justice Scalia cannot be faulted for making some assumption about the background rate of discrimination. Such assumptions are unavoidable; indeed, Justice Ginsburg's dissent itself depends in part on a background assumption, albeit a very different one.[214] Whether the Justices should have provided more support

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205. *Id.*

206. *Id.* at 2556.

207. *Id.* at 2551.

208. *Id.* at 2552.

209. Robert G. Bone, Some Notes on *Wal-Mart Stores, Inc. v. Dukes*, (July 13, 2011) (course material from ALI-ABA Topical Courses Telephone Seminar/AudioWebcast) (on file with author).

210. Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. (forthcoming May 2012) [hereinafter Weiss, *Impossibility*], *available at* http://ssrn.com/abstract=1679522.

211. *Wal-Mart*, 131 S. Ct. at 2554.

212. Weiss, *Impossibility*, *supra* note 210 (manuscript at 18).

213. *Id.*

214.

> The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are

for their assumptions is a complex question that this Article does not attempt to address.[215]

Justice Scalia assessed the evidence presented against the background of the *Wal-Mart* presumption. The plaintiffs' statistical evidence was suggestive but not without difficulties,[216] and even a court with Justice Ginsburg's background assumptions might have found it of limited probative value. While Justice Scalia's dismissive tone towards the troubling anecdotal evidence was unwarranted, he was surely correct that taken by itself it was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."[217] Those anecdotes, he noted, represented a relatively small proportion of Wal-Mart's employees—1 in 12,500 as compared with 1 in 8 in *Teamsters v. United States.* The anecdotes supplemented and gave context to other evidence but by themselves were of limited probative value. Moreover, both these anecdotes and plaintiffs' statistical evidence suggested that any discrimination might have been concentrated in certain geographic areas.[218] This concentration need not have precluded the certification of all possible classes, but might have indicated the propriety of certifying regional classes rather than a company-wide class, a possibility that plaintiffs did not raise. Plaintiffs may have missed a similar opportunity by not requesting, should company-wide certification fail, a subclass of women whose promotion to the store manager level was obstructed by the relocation policy.

The plaintiff's social science evidence also contained flaws that should have concerned even a Court that had not adopted the *Wal-Mart* presumption. Under any legal theory, commonality requires a causal relationship between the practices challenged and the disparate outcomes that the statistical evidence purports to show. Plaintiffs attempted to demonstrate this link through the social framework testimony of Professor Bielby, which the Court criticized, rightly in my view, for attempting to link general social science to the particulars of Wal-Mart's practices.[219] However, such general social science

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> predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

Wal-Mart, 131 S. Ct. at 2564 (Ginsburg, J., concurring in part and dissenting in part).

215. On the one hand, the parties did not properly present evidence on this question. On the other hand, courts have not particularly encouraged them to do so, a situation for which the Supreme Court bears some responsibility. *See* Weiss, *Impossibility*, *supra* note 210.

216. For example, there was evidence that any discrimination was concentrated in certain geographic areas, perhaps thus justifying a local but not a nationwide class.

217. *Wal-Mart*, 131 S. Ct. at 2556.

218. The Court noted that more "than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart's operations at all." *Id.*

219. *See* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715 (2008). *But see* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009) (arguing that experts should be permitted to make links between general evidence and specifics of case).

testimony should have been admissible had the plaintiffs instead used it to provide evidence of the societal level of discrimination, about which both Justice Scalia and Justice Ginsburg clearly made assumptions.[220] In addition, more rigorous studies of the effects of Wal-Mart's practices should also have been admissible had they been offered.[221] The Court's rejection of Bielby's testimony in this case should not preclude subsequent plaintiffs from introducing better social framework testimony in the future.

The Court could have defensibly denied certification of a nationwide class because of the plaintiffs' imperfect evidence and their weak theoretical arguments. On a disparate impact claim, whether based on aggregation or pattern or practice, the Court might have concluded that plaintiffs had failed to identify a practice with specificity because their emphasis on a uniform corporate culture undermined their identification of delegated discretion as the problematic policy. Likewise, the Court might defensibly have rejected the two disparate treatment theories mostly easily culled from the plaintiffs' argument: the evidence that any corporate-level intent was actually conveyed to store management was weak, and the mere delegation of discretion without negligence should not constitute a cognizable practice supporting commonality under a disparate treatment theory. Since the notice-based negligence theory had been raised in oral argument though not in the briefs, the opinion might have explicitly reserved judgment on a notice argument.

But Justice Scalia went much further than this. Since Justice Scalia made no explicit distinction between disparate treatment and disparate impact theory, the opinion can be read to imply that the theoretical basis of a plaintiffs' case has no relevance to commonality, thus seeming to reject any possible grounds for class certification of challenges to delegated discretion. In one passage, he wrote that the commonality requirement would not be met even if statistical evidence established a significant discrepancy in each store, since each store manager would offer a different defense based on factors such as the conditions in the local labor market:

> [D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.[222]

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220. Weiss, *Impossibility*, *supra* note 210 (manuscript at 18, 20).

221. *See* Gregory Mitchell, Laurens Walker & John Monahan, *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109 (2011). *See generally* Weiss, *Impossibility*, *supra* note 210 (arguing that general evidence is relevant to background assumptions).

222. *Wal-Mart*, 131 S. Ct. at 2554.

In isolation, this passage seems to preclude any certification of a class challenging the subjective practices of a large company. In context, however, it might be taken to say that even the strongest statistical evidence *alone* cannot establish commonality when the defendant is as large and decentralized as Wal-Mart. Thus viewed, it would not preclude a pattern or practice claim of disparate treatment or disparate impact based on negligence, where the challenged practice was failure to act rather than delegation by itself.

A more difficult question is whether *Wal-Mart* can be distinguished in a future disparate impact claim. Since *Wal-Mart* does not purport to overrule *Watson*, the critical issue may be the opinion's effect on *Watson*. *Watson* notes:

> [T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. *The plaintiff must begin by identifying the specific employment practice that is challenged* . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.[223]

The plaintiffs' uniform culture argument in *Wal-Mart* obscured the identification of discretion as a specific practice, justifying the Court's finding that plaintiffs had failed to meet this requirement. The *Wal-Mart* opinion, however, does not frame the problem in this way:

> *"[T]he plaintiff must begin by identifying the specific employment practice that is challenged."* . . . That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims together.[224]

This *Wal-Mart* passage completely changes the meaning of the *Watson* language from which it selectively quotes. *Watson* requires that the plaintiff separate the subjective practice from objective practices and convincingly show that the subjective practice causes the observed discrepancy. *Wal-Mart* seems to transform this into a requirement that plaintiffs show a practice *in addition to* delegated discretion, a requirement that does not appear anywhere in *Watson*. Future courts have the following choice. They can take this *Wal-Mart* passage at face value, in effect overruling *Watson* even though *Wal-Mart* does not admit to doing so. Alternatively, they can draw on Justice Kennedy's concern

223. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (emphasis added).
224. *Wal-Mart*, 131 S. Ct. at 2555-56 (quoting *Watson*, 487 U.S. at 994) (emphasis added).

in the oral argument and find that the *Wal-Mart* plaintiffs failed to meet their burden of identification by not separating discretionary from non-discretionary practices, and indeed aggravated this problem by their insistence that Wal-Mart had a uniform corporate culture. Such an interpretation would allow future plaintiffs to challenge mixed evaluation systems by carefully delineating the problematic subjective component and demonstrating that it caused the statistical discrepancy at issue.

That *Wal-Mart* bars all class-wide litigation of subjective practice claims is suggested by another statement elsewhere in the opinion:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.[225]

This glib formulation flatly contradicts *Watson*, which *Wal-Mart* claims to follow. A true policy "*against*" having uniform policies would consist of a prohibition of the adoption of common policies, which of course Wal-Mart did not have. Even the absence of a policy would consist of the lack of any rules whatsoever for making personnel decisions but the delegation of discretion to supervisors is itself a rule. The problem of commonality in *Wal-Mart* raises serious doctrinal and policy issues and the difficult task of analyzing them is not served by word-play. I can only hope that future courts will take the "on its face" clause as an implicit notice that what follows is not to be taken as a full analysis.

A unanimous portion of the *Wal-Mart* opinion examined the scope of relief for a class certified under Rule 23(b)(2), which is available when "the party opposing the class has acted or refused to act on grounds generally applicable to the class," so that class-wide injunctive relief would be appropriate. The Court held that no claim that included individualized relief, including back pay, could meet the requirements of 23(b)(2), leaving open the question of whether attorney's fees or punitive damages are available to a 23(b)(2) class. The question of whether any individualized relief should be available under 23(b)(2) is perhaps somewhat more complex than Justice Scalia's ever-confident tone would indicate, but the Court's reasoning, anticipated in an earlier decision, is at least plausible.[226] This holding turns only peripherally on substantive Title VII issues and to evaluate it is beyond the scope of this Article; for present purposes its principal significance is whether the options it

225. *Id.* at 2554.

226. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam).

leaves open for plaintiffs are adequate to allow future structural litigation. This question will be taken up in the next Section, which examines whether structural claims are still viable after *Wal-Mart*.

E. The Future

The central mistake of the *Wal-Mart* plaintiffs was to insist that their case involved a clear and unmistakable intent to discriminate by central management. If they had argued instead that Wal-Mart management negligently failed to act after notice, their theory would in all likelihood have satisfied a majority of the Court that a common question could exist in principle and possibly that a common question did exist under the facts presented.

Had a negligence theory been presented, the resulting opinion would probably have looked quite different. But the *Wal-Mart* opinion is what it is, and it now contains language that poses obstacles to future structural plaintiffs challenging delegated discretion, even those who present a negligence theory firmly grounded in disparate treatment or disparate impact theory. As the previous Section suggested, the problematic language in *Wal-Mart* might be distinguished. The critical question is whether a future Court will *want* to distinguish it. Their desire to do so will depend in significant part on the overall tone of plaintiffs' argument and on the relief requested.

During oral argument, plaintiffs' counsel insisted that the facts of *Wal-Mart* were "really extraordinary."[227] They were not. Really extraordinary facts do still arise in discrimination litigation. In *Brown v. Nucor*, a delegated discretion case litigated during the same time period as *Wal-Mart*, plaintiffs presented evidence that

> white supervisors and employees frequently referred to black employees as "nigger," "bologna lips," "yard ape," and "porch monkey." White employees frequently referred to the black employees as "DAN," which stood for "dumb ass nigger." These racial epithets were broadcast over the plant-wide radio system, along with "Dixie" and "High Cotton."[228]

The principal elements of the Wal-Mart plaintiffs' case did not approach this level of egregious animus. Some anecdotes, relevant to be sure, described the open expression of attitudes thoroughly inconsistent with the fair treatment of women. But such expressions were rare, and open misogyny rarer still. Many executives who failed to act, and indeed many of the supervisors who

227. Transcript of Oral Argument, *supra* note 191, at 36.
228. Brown v. Nucor Corp., 576 F.3d 144, 151 (4th Cir. 2009).

made discriminatory decisions, may have sincerely believed that sex discrimination was wrong. For the most part, the plaintiffs' case rested on the pervasiveness of quieter and most likely unconscious views about the competence of female employees. Such views are a problem that Title VII must address, but they are not "extraordinary." Discrimination plaintiffs who exaggerate the wrong they seek to redress risk not only losing their case but setting back the cause of eliminating discrimination. In the words of Professor Bartlett,

> [T]hreat and confrontation about race and gender bias, which people do not want to possess or exhibit, may inadvertently provoke shame, guilt, and resentment, which lead to avoidance and resistance, and ultimately to more stereotyping. In other words, pressure and threat will often deepen bias rather than correct it.[229]

These words primarily address the effect of confrontation on employers, but the general principles apply to many judges and juries as well. They will wonder if they themselves might have engaged in the conduct of which defendants are accused, provoking defensiveness and resistance if they are asked to condemn the defendant's conduct with the severity appropriate in a case like *Nucor*. Such backlash can only be avoided if plaintiffs refrain from sweeping accusations of animus and, as a corollary, do not request punitive damages.

A negligence theory, presented without exaggeration of the moral wrong involved, will go a long way toward improving the chances that future structural discrimination claims will succeed. Even this strategy, however, will be rendered ineffective by an inadequately developed request for remedies. The *Wal-Mart* plaintiffs fell seriously short of the goal of a well-worked out proposal for injunctive relief. They made a general and conclusory request for an "injunction against Defendant . . . from engaging in each of the unlawful practices, policies, customs and usages set forth herein" and "[s]uch other and further legal and equitable relief as this Court deems necessary, just and proper."[230] In his report, Dr. Bielby, plaintiffs' sole expert, listed several more specific mechanisms that might be used to reduce discrimination[231] but these were not referred to anywhere in the defendant's motions or briefs. Even this report fell short of the ideal support for a request for an injunction. Dr. Bielby is a respected sociologist who is well-qualified to express views on the overall prevalence of discrimination and the general type of mechanism that might

229. Bartlett, *supra* note 35, at 1901.

230. Plaintiffs' Third Amended Complaint, *supra* note 154, at 25.

231. Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs' Motion for Class Certification, *supra* note 165, at 32.

reduce its expression.[232] He is not, however, an industrial organization (I-O) psychologist. To suggest as he did that discrimination can be reduced though a "systematic job analysis" of what "constitutes job-relevant information"[233] is in my view correct, but it is a far cry from the level of specificity needed to evaluate specific personnel procedures or to issue a useful injunction. For these purposes only an I-O psychologist or someone with comparable training will suffice.[234]

The need for careful job analysis underscores another limitation on future claims: even under a notice theory, division into subclasses by job or geography may be necessary. The appropriate injunctive relief may well vary by job class, and indeed liability itself may vary among job groups. A given practice, for example, may meet a business necessity test for some job classifications but not others.

Plaintiffs will only pursue injunctive relief if they are financially able to do so. *Wal-Mart* changed future plaintiffs' incentives by holding that individualized relief was not available to a 23(b)(2) class, precluding all individual compensatory damages, including back pay, in 23(b)(2) suits. However, even without such damages, the 23(b)(2) class may remain useful in structural cases seeking injunctive relief as long as such classes may be granted attorney's fees and costs. *Wal-Mart* only precludes individualized relief to 23(b)(2) classes, leaving open the possibility of "'incidental' . . . 'damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.'"[235] Attorney's fees and costs incurred to obtain class-wide injunctive relief are not individualized and "flow directly from liability to the class as a whole," and are thus not foreclosed by *Wal-Mart*. To exclude them from 23(b)(2) class relief would severely curtail the private enforcement of Title VII clearly intended by Congress.[236] The *Wal-Mart* opinion gives future courts no reason to disallow this relief, since awards of fees and costs raise neither the concerns about judicial economy nor those of unfairness on which the exclusion of individual damages was based.

The greatest uncertainty facing future structural classes is whether individual damages will be realistically available. Individual damages might be pursued by several routes. In one option, the bundled approach, a single class certified under 23(b)(3) pursues all available remedies. In the alternative option, the hybrid approach, a class certified under 23(c)(4) and 23(b)(2) seeks

232. *Id.* at 3-4. For an example of his work, see William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120 (2000).

233. Bielby, *supra* note 232, at 124.

234. The difficult task of providing adequate expert guidance is examined further in Weiss, Misplaced Modesty, *supra* note 37.

235. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)).

236. *See supra* Subsection II.C.1.

to establish liability and obtain injunctive relief. If liability is established, individual proceedings and subclasses certified under 23(b)(3) pursue individual monetary relief.

The hybrid and bundled approaches have different costs and benefits for plaintiffs. Rule 23(b)(3) requires that class issues "predominate." It directs the court to consider whether a class action is the best way to "fairly and efficiently adjudicat[e] [] the controversy"[237] and in doing so to consider "the likely difficulties in managing a class action."[238] The 23(b)(3) language is inherently comparative, requiring an assessment of the relative importance of common and individual claims. In a hybrid suit, the 23(b)(3) class contains only individual damage claims and may well fail the predominance test. However, if the 23(b)(2) class is certified and prevails, individual plaintiffs may pursue their damage claims using the result, which will shift the burden to the defendant to prove lack of causation. When the injunctive and individual damage claims are bundled together into a single 23(b)(3) class, the collective claims are more likely to be found to predominate, permitting class litigation of the individual damage claims. However, predominance is not assured, and the whole claim, including that for injunctive relief, may fail. Moreover, even to pursue injunctive relief, a bundled class must incur the higher notice costs required by 23(b)(3). In contrast, the 23(b)(2) class used for injunctive relief in a hybrid approach has no notice costs and avoids the predominance problem. Thus, the hybrid approach provides plaintiffs with lower costs and a higher likelihood of success on the injunctive claim in return for a lower likelihood that individual damage claims can be litigated on a class basis.[239]

A specific and persuasive claim for class-wide injunctive relief would also raise the possibility of certification under Rule 23(b)(1), which provides for class certification when separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the defendant. Perhaps because of the ready availability of other theories in the past, few reported Title VII cases have been brought under that section.[240] However, an employer must adopt uniform practices for all workers, and will be unable to comply if a multitude of individual suits yield conflicting injunctions. Employment discrimination actions seeking an injunction

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237. FED. R. CIV. P. 23(b)(3).

238. FED. R. CIV. P. 23(b)(3)(D).

239. Some courts may reject the hybrid approach because they are reluctant to make use of issue classes. This reluctance is generally disapproved by commentators. *E.g.*, Robert H. Klonoff, The Decline of Class Actions 75-84 (March 12, 2012) (unpublished manuscript) (on file with author).

240. LARSON, *supra* note 148, § 81.07[1]. Larson cites only one case, *Dennison v. City Dep't of Water & Power*, No. 73-1965-F, 1975 WL 220 (C.D. Cal. Apr. 28, 1975). The potential application of 23(b)(1) is discussed in Michael Fischl, *The Proper Scope of Representation in Title VII Class Actions: A Comment on* East Texas Motor Freight System, Inc. v. Rodriguez, 13 HARV. C.R.-C.L. L. REV. 175, 190-91, 196-97 (1978) and Rutherglen, *Title VII Class Actions*, *supra* note 83, at 704-05.

reforming personnel practices would seem to be potential candidates for certification under 23(b)(1).

Any analysis of how these options affect the incentive to litigate and the value of recovery is highly speculative. It is perfectly possible that the details of how damage claims are certified will matter little. As numerous observers have noted, class certification today almost invariably results in settlement. Perhaps the certification of a suit for injunctive relief under 23(b)(2) will have the same effect in the future as it did before *Wal-Mart*. The availability of attorneys' fees and costs may provide sufficient incentive to pursue injunctive relief, and although not all employees may have damage claims that are worth pursuing,[241] the prospect of numerous individual lawsuits may induce defendants who lose at the certification phase to include monetary compensation in any settlement. Only time can answer these questions.

Since *Wal-Mart*, four opinions have considered challenges to delegated discretion in large firms with multiple units and supervisors.[242] No clear forecast of future law emerges from these cases. Most broadly interpreted, *Wal-Mart* presents a complete bar to class certification of challenges to delegated discretion, a view that has been adopted in full by one unpublished district court opinion.[243] In each of the remaining three cases, the court indicated at least an implicit willingness to narrow *Wal-Mart*. Nonetheless, the basis in each for limiting *Wal-Mart* is not always clear and appears to vary among the cases.

The Ninth Circuit indicated an inclination to disregard the broader dicta in *Wal-Mart* and to treat the *Wal-Mart* plaintiffs' loss as a failure of proof.[244] In *Chen-Oster v. Goldman, Sachs & Co.*, the Second Circuit finessed the inconsistencies between *Wal-Mart* and *Watson*: it paraphrased the broad holding of *Wal-Mart*, then immediately quoted the conflicting language in

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241. A relatively new employee, for example, may be entitled to prospective injunctive relief yet have no serious case for damages.

242. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 11-3639, 2012 WL 592745 (7th Cir. Feb. 24, 2012); Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011); Chen-Oster v. Goldman, Sachs & Co, No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875 (S.D.N.Y. Jan. 19, 2012); Bell v. Lockheed Martin Corp., 270 F.R.D. 186 (D.N.J. 2010). Another case included some allegations of impermissible subjectivity in addition to many other practices, making *Wal-Mart* only marginally relevant. Grant v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 446 F. App'x 737 (6th Cir. 2011). In addition, plaintiffs have lost a similar case for reasons that suggest little about the future of such litigation. Scott v. Family Dollar Stores, Inc., No. 3:08CV540, 2012 WL 113657, at *4 (W.D.N.C. Jan. 13, 2012) (prior to Supreme Court opinion in *Wal-Mart* plaintiffs argued their case indistinguishable from *Wal-Mart*). The size of the class and numerosity of stores were clearly central to *Wal-Mart*, and thus courts view *Wal-Mart* as having little application to small single-establishment firms. Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295 (RMB), 2007 WL 5007976, at *3 (S.D.N.Y. Oct. 18, 2011); Delagarza v. Tesoro Ref. & Mktg. Co., No. C-09-5803 EMC, 2011 WL 4017967, at *8 (N.D. Cal. Sept. 8, 2011).

243. *Bell*, 270 F.R.D. 186.

244. *Ellis*, 657 F.3d at 982. ("In *Wal-Mart*, for example, the Supreme Court considered whether the statistical and sociological studies cited by the plaintiffs were sufficient to link the alleged discriminatory practice to harm suffered by the entire class."); *see also id.* at 982-84 (discussing requisites for proof of a common issue).

Watson without comment.[245] It contrasted the facts of *Wal-Mart* with those at issue by suggesting that plaintiffs had identified more specific policies than those at issue in *Wal-Mart,* yet one such policy was described as the "tap on the shoulder" approach to promotion,[246] precisely the terminology used by the *Wal-Mart* plaintiffs.[247]

A particularly interesting case is *McReynolds v. Merrill Lynch*, a Seventh Circuit opinion by Judge Richard Posner, which certified a class charging Merrill Lynch with race discrimination against its brokers. The opinion provides several characterizations of the *Wal-Mart* holding, including the broad interpretation that delegations of discretion to managers can never constitute an employment practice supporting commonality.[248] However, *McReynolds* held that commonality was supported by another policy that allegedly facilitated discrimination by coworkers—allowing broker-coworkers to form teams. The basic agency principles incorporated into Title VII[249] impose less entity liability for the acts of coworkers than of supervisors, suggesting that some other factor lay behind the court's decision to distinguish *Wal-Mart.*

That *McReynolds* was clearly based on a disparate impact theory may have played a key role in the plaintiffs' success. Purely as a matter of logic, disparate impact is intrinsically collective in a way that disparate treatment is not and thus more readily supports a finding of a common question.[250] Still, Posner did not make this distinction explicitly. The real value for plaintiffs of the disparate impact theory may have derived from the comparatively mild moral judgment it makes of defendants: the *McReynolds* opinion mentions several times that corporate-level intent had not been alleged and that punitive damages would not, without more, be available.[251]

245.

> [T]he [*Dukes*] Court found proof of a general policy of discrimination entirely absent in light of the fact that the defendant's only policy with regard to promotion and pay decisions was one of unfettered managerial discretion. Nonetheless, "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination."

Chen-Oster v. Goldman, Sachs & Co., 2012 WL 205875, at *5 (last alteration in original) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-91 (1988)).

246. *Id.* at *3.

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

248. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 11-3639. 2012 WL 592745, at *5 (7th Cir. Feb. 24, 2012) ("[B]ecause there was no company-wide policy to challenge in *Wal-Mart*—the only relevant corporate policies were a policy *forbidding* sex discrimination and a policy of delegating employment decisions to local managers—there was no common issue to justify class treatment.").

249. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

250. *See supra* Subsection II.B.2.b.

251. *McReynolds*, 2012 WL 592745, at *7 ("There is no indication that the corporate level of Merrill Lynch (or its parent, Bank of America) *wants* to discriminate against black brokers. Probably it just wants to maximize profits. But in a disparate impact case the presence or absence of discriminatory intent is irrelevant . . . .").

The *McReynolds* plaintiffs were clearly helped as well by their adoption of a hybrid strategy. They requested certification of a class under 23(c)(4) on the issue of disparate impact and under 23(b)(2) for injunctive relief.[252] Although they indicated they might pursue certification under 23(b)(3) for purposes of compensatory and punitive damages under a disparate treatment theory, Posner's obvious skepticism about such a class was, as he stressed, immaterial to the case at hand.[253] Like the more muted disapproval implicit in disparate impact theory, this focus on injunctive relief rather than damages made the plaintiffs' more sympathetic, and thus increased the court's willingness to look for grounds to distinguish the case from *Wal-Mart*.

Taken as a whole, these cases suggest little progress towards putting structural litigation on a truly sound doctrinal footing. Yet they also indicate that sensible legal strategy will go some way towards limiting the less cautious language in *Wal-Mart*. None of the plaintiffs made the most egregious mistakes of the *Wal-Mart* plaintiffs: all focused on concrete practices and none confused the delegation of discretion issue by making a conduit of infection argument. Most importantly, *McReynolds* suggests that even judges not known for pro-plaintiff sympathies can give structural suits a fair hearing when plaintiffs modulate the tone of their argument and place reasonable limits on the relief they request.

CONCLUSION

Many observers have decried the poor success rate of employment discrimination plaintiffs in federal court, and most have suggested that the judiciary's lack of sympathy for them plays a principal role.[254] The high loss rates for plaintiffs have many causes and the policy views of many judges may be one of them. But there is plenty of blame to go around, and some of it must go to the plaintiffs' bar.

Long before *Wal-Mart*, courts had displayed some reluctance to certify structural class actions. Some courts had expressed frustration that the facts presented pointed to the possibility of discrimination but that plaintiffs had failed to develop a legal theory to support commonality.[255] In other discrimination contexts, even observers sympathetic to discrimination claims

252. *Id.* at *1.

253. *See id.* at *9.

254. Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2000).

255. *See, e.g.*, Gutierrez v. Johnson & Johnson, 467 F. Supp. 2d 403, 408-13 (2006).

have raised similar concerns about the failure of plaintiffs' counsels to think through their arguments sufficiently.[256]

Wal-Mart need not spell the end of class challenges to subjective practices as long as plaintiffs heed its lessons. The new consensus on commonality dictates an increased role for certain merits issues at the certification stage. In cases challenging subjective decisionmaking, plaintiffs must pay far more attention to the distinction between disparate impact and disparate treatment theory and the statutory basis for their proposed claim.

These doctrinal issues are not simply obstacles on the road to justice. The distinction between disparate treatment and disparate impact claims reflects moral judgments about the significance of different behavior, reflected in the very different damage schemes available for the two theories. A negligence theory of liability reflects a notion of intermediate fault that even the majority in *Wal-Mart* indicated it could accept.

Greater attention to the link between the merits and commonality would not simply permit plaintiffs to navigate around *Wal-Mart*, but could also spur the development of doctrinal guidelines for employers. Until now, class certification has been the first rather than the last step in litigating class employment discrimination claims. If a class is certified, the case usually settles, foreclosing the possibility of a trial and a reasoned opinion on the merits. As a result, much important doctrine remains underdeveloped. The dearth of final judgments creates a vacuum in which employees and employers have no guidance about their rights and obligations. Employers are unlikely to devise structures to prevent discrimination if they cannot rely on these structures to keep them out of court. This situation benefits no one. Neither plaintiffs nor defendants are well-served by uncertainty about the obligations of employers, and more extensive examination of the merits at the phase of class certification would reduce this uncertainty. Plaintiffs seeking class certification must present clearly developed theories of liability and appropriately specific requests for relief. Only when the plaintiffs' bar begins to sweat such doctrinal details can their clients' chances of prevailing begin to improve.

256. George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 90-91 (arguing that city's refusal to abandon position that tests were valid compromised its defense).