

# *Wal-Mart v. Dukes*: The Feminist Case Against Individualized Adjudication

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## INTRODUCTION

In October of 2017, the Harvey Weinstein scandal precipitated a nationwide awakening about sexual harassment and assault. At least 122 prominent men were accused of sexual misconduct in the wake of the Weinstein allegations<sup>1</sup>—often by large numbers of women.<sup>2</sup> After actress Alyssa Milano posted a tweet

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1. Those accused of sexual misconduct after Weinstein have ranged from prominent actors such as Ben Affleck to former U.S. President George H.W. Bush. See Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Nov. 9, 2017), <http://time.com/5015204/harvey-weinstein-scandal/> [https://perma.cc/8V2V-GFRS]. For the original report of the Weinstein allegations, see Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [https://perma.cc/MN8R-SEHM].

2. Bill Cosby was accused of sexual harassment and assault by sixty women. Carly Mallenbaum et al., *A Complete List of the 60 Bill Cosby Accusers and their Reactions to His Prison Sentence*, USA TODAY (Apr. 27, 2018), <https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002/> [https://perma.cc/J5AW-GT3B]. Harvey Weinstein was accused of sexual harassment and assault by eighty-seven women. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [https://perma.cc/M6

encouraging women who had been sexually harassed or assaulted to tweet #MeToo,<sup>3</sup> this movement acquired a name.<sup>4</sup>

The #MeToo movement has sparked widespread story-sharing on social media, and (to some degree) has resulted in the firing or forced resignations of powerful men in the entertainment industry and in politics.<sup>5</sup> #MeToo has even implicated the judiciary, as evidenced by the sexual harassment scandal that preceded the resignation of former Ninth Circuit judge Alex Kozinski.<sup>6</sup> The #MeToo movement almost certainly increased the weight given to the sexual assault allegations that arose during Justice Kavanaugh's confirmation.<sup>7</sup>

56-FQCR]. Larry Nassar is reported to have victimized at least 332 women. Rex Santus, *Larry Nassar's 332 Victims Are Getting \$425 Million from Michigan State*, VICE (May 16, 2018), [https://news.vice.com/en\\_us/article/9k8yap/larry-nassars-332-victims-are-getting-dollar425-million-from-michigan-state](https://news.vice.com/en_us/article/9k8yap/larry-nassars-332-victims-are-getting-dollar425-million-from-michigan-state) [https://perma.cc/HS6N-JPB4]. Though most of these allegations have involved male sexual violence against women, it is important to acknowledge that not all the survivors who have spoken out since the rise of #MeToo are women. Kevin Spacey has been accused of sexual assault and other types of sexual misconduct by fifteen men. Maria Puente, *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 7, 2017), <https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/> [https://perma.cc/RRU8-CFCZ].

3. While Milano sparked the use of #MeToo for this movement, the phrase was actually coined by activist Tarana Burke in 2006. Morgan Greene, *#MeToo's Tarana Burke Tells Local Activists Movement 'By Us and for Us' Must Include Women of Color*, CHI. TRI. (Oct. 11, 2018), <http://www.chicago.tribune.com/news/local/breaking/ct-met-tarana-burke-me-too-20181010-story.html> [https://perma.cc/9A FR-T4G5].

4. Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [https://perma.cc/E824-FQ6J].

5. NBC host Matt Lauer was fired after allegations of "inappropriate sexual behavior in the workplace." David Osborne, *The Peacock Patriarchy*, ESQUIRE (Aug. 5, 2018), <https://www.esquire.com/news-politics/a22627827/matt-lauer-nbc-me-too/> [https://perma.cc/Y9TK-9FLX]. Fox News let host Bill O'Reilly go under similar circumstances. Emily Steel & Michael S. Schmidt, *Bill O'Reilly is Forced Out at Fox News*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html> [https://perma.cc/JCW6-8RZF]. Senator Al Franken (D-MN) and Rep. Blake Farenthold (R-TX) resigned after sexual harassment allegations against them surfaced. See Elana Schor & Seung Min Kim, *Franken Resigns*, POLITICO (Dec. 7, 2017), <https://www.politico.com/story/2017/12/07/franken-resigns-285957> [https://perma.cc/2UV4-BZ3Z]; Joe Tacopino, *Congressman Resigns After Using Taxpayer Funds to Settle Sex Harassment Suit*, N.Y. POST (Apr. 6, 2018), <https://nypost.com/2018/04/06/congressman-resigns-after-using-taxpayer-funds-to-settle-sex-harassment-suit/> [https://perma.cc/4M37-L62H].

6. Dan Berman & Laura Jarrett, *Judge Alex Kozinski, Accused of Sexual Misconduct, Resigns*, CNN (Dec. 18, 2017), <https://www.cnn.com/2017/12/18/politics/alex-kozinski-resigns/index.html> [https://perma.cc/T2MU-AAGZ]; Dahlia Lithwick, *He Made us All Victims and Accomplices*, SLATE (June 7, 2018), <https://slate.com/news-and-politics/2018/06/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [https://perma.cc/8QCS-XYTM].

7. The people who mobilized and spoke out against Justice Kavanaugh's confirmation largely adopted the #MeToo framing, and news coverage of the confirmation battle reflected this. See, e.g., Emanuella Grinberg, *What's Next for #MeToo After Kavanaugh's Confirmation*, CNN (Oct. 14, 2018), <https://www.cnn.com/2018/10/13/us/kavanaugh-whats-next-metoo/index.html> [https://perma.cc/E5V5-NCM4]; Celina Scott-Buechler, *It's Not Surprising that Beneath his Toxic Politics, Brett Kavanaugh is a Toxic Man*, BUZZFEED NEWS (Sept. 27, 2018), <https://www.buzzfeednews.com/article/celinascottbuechler/our-own-brett-kavanaugh-christine-blasey-ford> [https://perma.cc/6TYB-XQ82]; Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html> [https://perma.cc/Q6EX-KUU7].

However, only a few of the most prominent #MeToo cases—involving Larry Nassar,<sup>8</sup> Bill Cosby,<sup>9</sup> and Harvey Weinstein<sup>10</sup>—have resulted in legal action.

These recent examples demonstrate the importance (and powerful impact) of scores of women acting in numbers. They can also help contextualize a recent, unsuccessful women-led movement—the class action brought by 1.5 million female Wal-Mart<sup>11</sup> employees that was denied certification in *Wal-Mart v. Dukes*.<sup>12</sup> Unsurprisingly, much of the literature on *Dukes* has focused on evaluating the decision from a jurisprudential standpoint.<sup>13</sup> However, *Dukes* also illustrates the normative implications of the American legal focus on individualized (rather than collective) adjudication.

As Frances Olsen points out, classical liberal thought has tended to structure thinking into seemingly opposing dichotomies, many of which are gendered: “rational/irrational,” “objective/subjective,” and “principled/personalized” are only a few.<sup>14</sup> One dichotomy that is particularly prominent in discussions of civil procedure is the “individual/group” distinction: discussions of due process often focus on individualizing trials in order to provide persons an opportunity to be heard.<sup>15</sup> In keeping with this traditional understanding, Justice Scalia’s majority

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8. See Scott Cacciola & Victor Mather, *Larry Nassar Sentencing: “I Just Signed Your Death Warrant,”* N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-sentencing.html> [<https://perma.cc/JLG2-A4DX>]; Matt Mencarini & Justin A. Hinkley, *Michigan State and 332 of Larry Nassar’s Victims Reach “Historic” \$500 Million Settlement*, LANSING STATE J. (May 16, 2018), <https://www.lansingstatejournal.com/story/news/local/2018/05/16/larry-nassar-michigan-state-settlement-lawsuit/614502002/> [<https://perma.cc/4JUL-Z37R>].

9. Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 Years in Prison for Sexual Assault*, CNN (Sept. 26, 2018), <https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html> [<https://perma.cc/GYC3-JBUM>].

10. Maria Puente, *Harvey Weinstein Heads to Court on Sex-Crime Charges as Video Surfaces of him Touching an Accuser*, USA TODAY (Sept. 12, 2018), <https://www.usatoday.com/story/life/movies/2018/09/12/weinstein-heads-court-video-surfaces-showing-him-touching-accuser/1285157002/> [<https://perma.cc/XN3G-WPRR>]; Samantha Schmidt, *Enabling Harvey Weinstein’s Sex Life was ‘Condition of Employment,’ New York Attorney General Says in Lawsuit*, WASH. POST (Feb. 12, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/02/12/new-york-attorney-general-sues-harvey-weinstein-and-his-company-for-egregious-civil-rights-violations/> [<https://perma.cc/D9BV-5GRW>].

11. As of Feb. 1, 2018, Wal-Mart’s legal name has been changed to Walmart. *Walmart Changes its Legal Name to Reflect How Customers Want to Shop*, WALMART (Dec. 6, 2017), <https://news.walmart.com/2017/12/05/walmart-changes-its-legal-name-to-reflect-how-customers-want-to-shop> [<https://perma.cc/EXR5-6JFJ>]. However, since *Dukes* uses Walmart’s former legal name, this Comment refers to Walmart as “Wal-Mart” for the sake of clarity.

12. 564 U.S. 338 (2011).

13. See, e.g., Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover all their Bases after the Supreme Court’s Interpretation of Federal Rule of Civil Procedure 23(a)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH L. REV. 1087, 1120 (2012); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. LAW 395, 477 (2011); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 174 (2012); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection out of Protected Cases*, 16 LEWIS & CLARK L. REV. 409, 462 (2012).

14. Frances Olsen, *Feminism and Critical Legal Theory: An American Perspective*, in SOURCEBOOK ON FEMINIST JURISPRUDENCE 342, 342 (Hilaire Barnett ed., 1997).

15. See, e.g., Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976).

opinion in *Dukes* described class actions as “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”<sup>16</sup>

The “usual rule” of individualized adjudication, however, makes it much more difficult for the American legal system to adequately evaluate claims of widespread discrimination. When such claims arise from the behavior of numerous bad actors operating within an institutional context, the adjudicative focus on individuality tends to obscure how oppressive institutional dynamics have made the discrimination possible. These dynamics often only become evident when individual experiences are considered in the aggregate, in two key ways. First, as the #MeToo movement shows, aggregation of claims results in *believability*: one woman accusing a powerful man of sexual misconduct can be easily dismissed, but hundreds of accusers are more difficult to ignore. Second, aggregating claims can often demonstrate the *institutional dimension* of discrimination, proving that discriminatory behavior is not due to a single bad actor, but rather has been enabled by institutional structures that must be changed to prevent the behavior from recurring.

A case brought by one individual against another, then, simply cannot carry the “unique and powerful” symbolic importance of a class action.<sup>17</sup> As the feminist cry that “the personal is political”<sup>18</sup> demonstrates, experiences that appear singular are often manifestations of widespread systemic oppression. As Patricia Hill Collins wrote, “[w]hile my *individual* experiences with institutionalized racism [as a black woman] will be unique, the types of opportunities and constraints that I encounter on a daily basis will resemble those confronting African Americans as a *group*.”<sup>19</sup> As a legal mechanism that facilitates the aggregation of claims, class actions have incredible potential for imbuing individual, personal harms with group, political meaning.

Some of the benefits of class actions have long been recognized: they increase access to the courts, making actions more efficient and cheaper.<sup>20</sup> Moreover, there is currently no other practicable way for very large groups to resolve issues in a single litigation.<sup>21</sup> But, as the above discussion illustrates,

16. *Dukes*, 564 U.S. at 348.

17. As Suzette Malveaux put it in her discussion of *Dukes*: “There is strength in numbers, especially when that number is 1.5 million.” Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 35 (2011).

18. On the origins and significance of this phrase, see KERRY T. BURCH, *DEMOCRATIC TRANSFORMATIONS: EIGHT CONFLICTS IN THE NEGOTIATION OF AMERICAN IDENTITY* ch. 8 (2012).

19. Patricia Hill Collins, *Comment on Hekman’s ‘Truth and Method’: Feminist Standpoint Theory Revisited: Where’s the Power?*, 22 SIGNS: J. WOMEN IN CULTURE & SOC’Y 375, 375 (1997).

20. Malveaux, *supra* note 17, at 35. See generally David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) (discussing the benefits of class actions).

21. The federal rules gives federal courts the ability to break up one case into multiple actions “[f]or convenience, to avoid prejudice, or to expedite and economize.” FED. R. CIV. P. 42(b). A judge faced with a large group of plaintiffs who were not united as a class would likely exercise this power. Moreover, even smaller numbers of plaintiffs might struggle to bring collective actions under Rule 20(a)(1), which allows Permissive Joinder of Parties. *Id.* 20(a)(1). While there is technically no limit on how many

class actions are also uniquely able to increase certain plaintiffs' believability, and the ability to uncover and provide redress for the institutional dimensions of discrimination in a single action. By heightening the "commonality" requirement for class action certification, then, *Dukes* has not merely decreased access to the courts in certain cases. It has also made it exponentially more difficult for the legal system to evaluate and redress claims brought by groups that are negatively impacted by institutional discrimination.

Part I of this Comment explains how *Dukes* raised the bar that plaintiffs must meet in order to have "commonality" for the purposes of class certification. Part II illustrates the stakes of this discussion by describing a class action that would be barred under *Dukes*' heightened commonality standard, and arguing that alternative legal avenues fail to similarly increase the plaintiffs' believability and ability to show the institutional dimensions of bad behavior as much as a class action. This Part focuses on an ongoing harm committed against a particularly vulnerable group of women: the federal government's consistent under-investigation of sexual assaults against Native American women who live on reservations. Part III discusses the limited legal avenues for collective adjudication of gender discrimination claims post-*Dukes*.

## I. BACKGROUND: *WAL-MART V. DUKES*

Federal Rule of Civil Procedure 23(a) establishes several prerequisites for class action certification, one of which is that "there are questions of law or fact common to the class."<sup>22</sup> Prior to *Dukes*, lower courts disagreed over the application of the commonality requirement in cases where employees claimed that their employers' policy of allowing managers to base decisions (such as hiring or promotion) on their subjective evaluations of employees facilitated or caused discrimination by allowing managers to abuse their authority.<sup>23</sup> The Supreme Court had last addressed the commonality requirement in *General*

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plaintiffs may join an action under Rule 20(a)(1), in order to join an action as plaintiffs, persons must demonstrate that they are asserting a right to relief "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences." *Id.* Moreover, even if this standard is met, Rule 20(b) gives the court the power to order separate trials "to protect a party against embarrassment, delay, expense, or other prejudice." *Id.* 20(b). Most states' rules parallel the federal rules. Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 261 & n.52.

22. FED. R. CIV. P. 23(a)(2). The other requirements are numerosity, typicality, and adequacy. *See id.* ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.")

23. Daniel S. Klein, Note, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(a) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131, 133 (2006). *But see* Clegg, *supra* note 13, at 1089 ("Prior to [*Dukes*] the commonality requirement . . . was not widely debated").

*Telephone Co. of the Southwest v. Falcon*.<sup>24</sup> In a famous footnote, the *Falcon* Court suggested that commonality could be satisfied by “[s]ignificant proof that an employer operated under a general policy of discrimination . . . [that] manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.”<sup>25</sup>

Without additional guidance on this notoriously ambiguous footnote,<sup>26</sup> the lower courts split: some courts found that this type of subjective decisionmaking policy supported a finding of commonality, while others concluded that the inherently individual application of subjective decisionmaking meant putative class members could not meet the commonality requirement for allegations of discriminatory employment practices.<sup>27</sup>

*Wal-Mart v. Dukes* entered this contested landscape as the largest employment class action lawsuit in American history.<sup>28</sup> Female employees<sup>29</sup> claimed that Wal-Mart’s policy of subjective decisionmaking by individual store managers denied women equal pay and promotions in violation of Title VII.<sup>30</sup> Because Wal-Mart was aware that its policy disadvantaged female employees, the plaintiffs argued that its refusal to limit managers’ authority constituted disparate treatment under Title VII of the Civil Rights Act of 1964.<sup>31</sup> Plaintiffs

24. 457 U.S. 147 (1982).

25. *Id.* at 159 n.15.

26. *See, e.g.*, Klein, *supra* note 23, at 138 (referring to *Falcon*’s footnote fifteen as “oracular”).

27. *Id.* at 133-34.

28. Elizabeth Tippett, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 433 (2012).

29. This Comment focuses primarily on the gendered nature of the discrimination against the female employees in Wal-Mart. However, it is important to acknowledge that this discrimination was facilitated by the fact that female Wal-Mart employees were disadvantaged along other axes of oppression. For instance, named plaintiff Betty Dukes, a black woman, was described by her niece upon her death as “a voice fighting for equal rights and against racial and gender discrimination in the workplace.” Michael Corkery, *Betty Dukes, Greeter Whose Walmart Lawsuit Went to Supreme Court, Dies at 67*, N.Y. TIMES (July 18, 2017) (emphasis added), <https://www.nytimes.com/2017/07/18/business/betty-dukes-dead-walmart-worker-led-landmark-class-action-sex-bias-case.html> [<https://perma.cc/RDX6-YMBX>]. Named plaintiff Cleo Page, also a black woman, described her struggle to remain afloat financially after being unfairly passed over for promotions in favor of male applicants: without savings, she lost her house and the foster children for whom she had been caring. Ritu Bhatnagar, *Dukes v. Wal-Mart as a Catalyst for Social Activism*, 19 BERKELEY WOMEN’S L.J. 246, 246-47 (2004). Dukes’ and Page’s experiences are not unique: Wal-Mart workers are overwhelmingly low-income—50 percent of Wal-Mart’s workforce is composed of part-time workers, who receive lower pay and fewer benefits than full-time workers. Nandita Bose, *Half of Walmart’s Workforce are Part-Time Workers: Labor Group*, REUTERS (May 25, 2018), <https://www.reuters.com/article/us-walmart-workers/half-of-walmarts-workforce-are-part-time-workers-labor-group-idUSKCN1IQ295> [<https://perma.cc/RU92-XXLB>]. Wal-Mart employees are among the largest groups on food stamp subsidies. *Id.* According to Wal-Mart, 43 percent of its domestic “associates” are people of color and 55 percent are women. (Wal-Mart does not break down racial statistics by gender). WALMART, *Road to Inclusion: 2017 Culture, Diversity, and Inclusion Report* 10, <https://cdn.corporate.walmart.com/11/0d/f9289df649049a38c14bdeaf2b99/2017-cdi-report-web.pdf> [<https://perma.cc/T3D6-7EZZ>].

30. *Dukes*, 564 U.S. at 343. The Court in *Dukes* also held that claims where monetary relief is not incidental to the injunctive or declaratory relief could not be certified under Rule 23(b)(2), *id.* at 360, but that portion of the holding is not relevant to this discussion. For more on this aspect of the opinion, see Malveaux, *supra* note 17, at 45-52.

31. *Dukes*, 564 U.S. 338 at 345 (citing 42 U.S.C. § 2000e-2(a)).

further claimed that “a strong and uniform ‘corporate culture’” was part of what allowed bias against women to infect managers’ decisionmaking, “thereby making every woman at the company the victim of one common discriminatory practice.”<sup>32</sup>

In an opinion by Justice Scalia, the *Dukes* Court held that the plaintiffs failed to provide “significant proof” that Wal-Mart “operated under a general policy of discrimination.”<sup>33</sup> Plaintiffs had provided the testimony of a sociological expert that conducted a social framework analysis of Wal-Mart’s culture, but the Court found the testimony insufficiently robust, and potentially inadmissible.<sup>34</sup> The Court was similarly unconvinced by statistics showing gender disparities in pay and promotions, as well as 120 affidavits by female Wal-Mart employees reporting discrimination.<sup>35</sup>

The Court further reasoned that Wal-Mart’s choice to allow managers’ subjective decisionmaking over employment matters was “just the opposite of a uniform employment practice that would provide the commonality needed for a class action,” since it was “a policy *against having* uniform employment practices.”<sup>36</sup> Under a subjective decisionmaking system, the Court wrote, “demonstrating the invalidity of one manager’s use of discretion w[ould] do nothing to demonstrate the invalidity of another’s,” since each individual manager was entirely free to make decisions based on (1) sex-neutral performance-based criteria, (2) general aptitude tests or educational achievements that produce disparate impact, or (3) intentional discrimination against women.<sup>37</sup> In short, the Court held that “[m]erely showing that Wal-Mart’s policy of discretion ha[d] produced an overall sex-based disparity” was insufficient to meet Rule 23(a)(2)’s commonality requirement.<sup>38</sup>

In explaining its reasoning, the Court noted that the commonality requirement is met when

claims . . . depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.<sup>39</sup>

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32. *Id.*

33. *Id.* at 353.

34. *Id.*

35. *Id.* at 358. As Malveaux points out, “by analyzing each type of evidence *in isolation* to determine whether it provided ‘significant proof’ of a general discriminatory policy, the Court diminished the overall import of plaintiffs’ evidence.” Malveaux, *supra* note 17, at 39 (emphasis added). For a critique of the majority’s treatment of the plaintiffs’ evidence, see *id.* at 39-43.

36. *Dukes*, 564 U.S. 338 at 355.

37. *Id.* at 356.

38. *Id.* at 357.

39. *Id.* at 350.

In other words, class certification depends not on “the raising of common ‘questions,’” but on “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.”<sup>40</sup> This holding has been roundly criticized for incorporating the Rule 23(b)(2) “predominance requirement” into the 23(a)(2) commonality analysis.<sup>41</sup>

Some commentators have nevertheless interpreted *Dukes* narrowly as holding that “a system of delegated decision-making that produces large statistical disparities cannot furnish the requisite commonality to support a class action, even where the corporate culture is infected by gender stereotypes.”<sup>42</sup> However, the principle that commonality exists only when the outcome of a class action turns on claims having the same answers (i.e., is “capable of a classwide resolution”)<sup>43</sup> has implications that reach far beyond subjective decisionmaking class actions.

As Roger Reinsch and Sonia Goltz have noted, *Dukes*’s heightened commonality requirement is most likely to negatively impact cases that involve second-generation discrimination.<sup>44</sup> Unlike first-generation discrimination, which “involves easily recognizable, blatant discrimination,” such as “the exclusionary sign on the door,”<sup>45</sup> second-generation discrimination “cannot be reduced to a single, universal, or simple theory of discrimination.”<sup>46</sup> Second-generation discrimination is “subtler and involves patterns of interaction that exclude certain groups over time. . . [It is] structural, situational, and hard to identify.”<sup>47</sup> The company policy the plaintiffs challenged in *Dukes* is a “classic”<sup>48</sup> example of second-generation discrimination.

It is highly unlikely that *Dukes* will make cases involving first-generation discrimination more difficult. Imagine, for instance, a company that sends out a memo telling all supervisors that women could not be promoted to managerial positions because they are too emotional. Adjudicating these employees’ claim of discrimination would clearly involve a common contention the truth or falsity of which would resolve an issue that is central to each of the claims in one stroke.<sup>49</sup>

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40. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 94 N.Y.U. L. REV. 97, 132 (2009)).

41. *See, e.g.*, Clegg, *supra* note 13, at 1105; Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L. J. 759, 794-800 (2012). The dissent also makes this point. *Dukes*, 564 U.S. at 376.

42. Tippet, *supra* note 28, at 434.

43. *Dukes*, 564 U.S. 338 at 350.

44. Roger W. Reinsch & Sonia Goltz, *You Can’t Get There From Here: Implications of the Walmart v. Dukes Decision for Addressing Second-Generation Discrimination*, 9 NW. J. L. & SOC. POL’Y 264 (2014).

45. *Id.* at 281 (quoting Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 473 (2011)).

46. *Id.* at 281.

47. *Id.*

48. *Id.*

49. *Dukes*, 564 U.S. 338 at 350.

Second-generation discrimination is more subtle and likely to manifest in a variety of different ways, making it unlikely that such claims will meet *Dukes*'s stringent commonality standard. And yet, as the next Part argues, it is claims of second-generation discrimination that benefit most from aggregation. Alone, a claim of second-generation discrimination can be easily dismissed as caused by other factors, such as singular bad actors or the existence of larger societal factors disadvantaging a particular group. However, when numerous claims of second-generation discrimination are placed together, it becomes clear that the problem is not only driven by a few bad actors, but also enabled by institutional structures.

## II. THE IMPOSSIBLE CLASS ACTION

Consider the problem of sexual violence against Native American women on reservations. According to the Department of Justice, 35 percent of American Indian and Alaska Native women have experienced sexual violence with penetration.<sup>50</sup> Native women are thus 1.7 times more likely than non-Hispanic White women to be victims of sexual violence.<sup>51</sup> The complicated legal relationship between the U.S. government and Native tribes means that the task of prosecuting sexual assaults on reservations typically falls on the federal government,<sup>52</sup> and there is some evidence suggesting that the federal government systematically under-enforces sexual assault laws on Native American reservations. Federal prosecutors decline to prosecute 26 percent of cases filed in federal court, but decline to prosecute sexual assaults against Native women on tribal reservations 65 percent of the time.<sup>53</sup> This is likely because federal agents are reluctant to take on such cases.<sup>54</sup> As former U.S. Attorney Margaret Chiara observes, Assistant U.S. Attorneys “want to do big drug cases, white-collar crimes, and conspiracy,” while federal judges “look at these Indian Country cases and say, ‘What is this doing here? I could have stayed in state court if I wanted this stuff.’”<sup>55</sup>

Imagine that Native women who have been victims of rape wish to sue the federal government for consistently failing to adequately investigate sexual assault on the reservation in which they live. Such a lawsuit would not be entirely unprecedented—in *Cole v. Oravec*, the families of two Native murder victims sued an FBI investigator for consistently under-investigating murder cases

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50. U.S. DEP'T OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN, 14 TBL. 2.1 (2016).

51. *Id.*

52. Jasmine Owens, 'Historic' in a Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims, 102 J. CRIM. L. & CRIMINOLOGY 497, 504-508 (2012).

53. *Id.* at 512

54. *Id.* at 511.

55. *Id.* (quoting Bill Moyers Journal, PBS television broadcast (Nov. 14, 2008) (transcript available at <http://www.pbs.org/moyers/journal/11142008/transcript4.html> [<https://perma.cc/T5NE-9MP4>])).

involving Native American victims.<sup>56</sup> Because a class action is more efficient and less expensive than individual lawsuits, the impacted women seek 23(b)(2) certification.<sup>57</sup>

After the Supreme Court's decision in *Dukes*, it is difficult to see how such a class could ever be certified. *Dukes* construes the 23(a)(2) requirement that there be "questions of law or fact common to the class" extremely narrowly. Since the women would likely be alleging discriminatory under-investigation by several officials (much as the women in *Dukes* alleged employment discrimination by different supervisors), the class would likely fail the commonality requirement. In a case such as this, as in *Dukes*, each official could argue that their behavior was motivated by permissible (rather than discriminatory) reasons. Thus, as the Court held in *Dukes*, a class-wide proceeding could not generate a "common answer."<sup>58</sup>

Certainly, one of the impacted Native women could file a lawsuit asserting the same claims against an individual investigator, as occurred in *Oravec*. However, the focus of the trial would center on the decisionmaking of the specific federal investigator that investigated the woman's claim. Such a case likely would not bring to light any evidence that the federal government *as an institution* consistently fails to adequately investigate and prosecute sexual assault on Native American reservations.

Sexual assaults against Native women in the U.S. have been committed with impunity for centuries, and there is great historical significance in "the ongoing rape [of Native women] and [the] colonization of their tribes."<sup>59</sup> One lawsuit against a single federal prosecutor for failing to pursue a Native woman's rape case can be dismissed as an isolated instance of discrimination, or as justified by the facts of that woman's assault. In contrast, a class action lawsuit brought by Native women against the federal government would not only make the problem of systematic under-enforcement of their sexual assaults impossible to ignore, but also situate this problem within the broader history of American exploitation of and violence towards Native tribes.

By privileging individual over group adjudication, *Dukes*' heightened commonality requirement has stripped class actions of much of this symbolic potential, and reduced their ability to hold institutions (rather than merely individuals) accountable for discriminatory conduct. Thus, *Dukes* greatly

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56. 465 Fed. Appx. 687 (9th Cir. 2012). The suit was a *Bivens* action seeking damages for equal protection violations under the Fifth Amendment Due Process Clause. *Id.* at 688. For a detailed description of the case, see Adrian Jawort, *Parents in Crow Reservation Death Still Seeking Justice*, LAST BEST NEWS (Jan. 19, 2017), <http://lastbestnews.com/2017/01/parents-in-crow-reservation-death-still-seeking-justice/> [https://perma.cc/GY2P-YYB9].

57. Their attorney decides the predominance requirement in Rule 23(b)(3) is best avoided—if the class action is won, monetary damages can be sought on a case-by-case basis.

58. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 94 N.Y.U. L. REV. 97, 132 (2009)).

59. Owens, *supra* note 52, at 503.

abridged one mechanism through which marginalized groups could assert their rights, limiting the degree to which collective storytelling can challenge the “normal,” “objective,” “individualistic” focus of adjudication.

### III. MOVING FORWARD: OPTIONS FOR COLLECTIVE ADJUDICATION POST- *DUKES*

Commentators are split on the real-world impact of *Dukes*. On the one hand, Title VII “pattern or practice claims” like that brought in *Dukes* can still be brought by the Equal Employment Opportunity Commission, which is exempt from class action certification requirements.<sup>60</sup> Moreover, class actions the size of *Dukes* are extremely rare.<sup>61</sup> On the other hand, the plaintiffs’ theory of liability in *Dukes* is fairly common, raising concerns that judges may use *Dukes* to require “a stronger causal connection between an employer’s discretionary decisionmaking policy and a disparity or adverse employment action,” making it more difficult for employees relying on this theory to act collectively.<sup>62</sup>

While *Dukes* would seem to make it quite difficult to seek redress based on the discretionary actions of multiple individuals within an organization,<sup>63</sup> not all hope is lost. For one, some courts have read the case fairly narrowly. Approximately 2,000 plaintiffs alleging gender discrimination in pay and promotions at Goldman Sachs were recently awarded partial class certification.<sup>64</sup> District Judge Analisa Torres distinguished *Dukes* because that case lacked a “common . . . evaluation procedure” used to discriminate against the plaintiffs,<sup>65</sup> whereas the Goldman Sachs plaintiffs were all subject to common “360 review,” “quartiling,” and “cross-ruffing” evaluation processes.<sup>66</sup>

Moreover, multiple plaintiffs remain able to hold institutions accountable, though to a lesser degree. In the #MeToo context, three women have filed a class action suit on behalf of themselves and others similarly situated against Harvey

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60. See e.g., Tippet, *supra* note 28, at 443 (explaining that Title VII “pattern or practice claims” like that brought in *Dukes* can still be brought by the Equal Employment Opportunity Commission, which is exempt from class action certification requirements). *But see* Malveaux, *supra* note 17, at 37 (noting that “government agencies—burdened by budgetary and political constraints—often cannot fill the gap left by the lack of private enforcement”).

61. Malveaux, *supra* note 17, at 44.

62. *Id.* at 44-45.

63. See *supra* Parts I & II.

64. *Chen-Oster et al. v. Goldman Sachs & Co. et al.*, No. 10 Civ. 6950 (S.D.N.Y. Mar. 30, 2018), available at [http://goldmangendercase.com/wp-content/uploads/2018/03/Dkt\\_578-OPINION-AND-ORD-ER.pdf](http://goldmangendercase.com/wp-content/uploads/2018/03/Dkt_578-OPINION-AND-ORD-ER.pdf) [<https://perma.cc/TWG2-5WP9>]; see also Jonathan Stempel, *U.S. Judge Certifies Goldman Sachs Gender Bias Class Action*, REUTERS (Mar. 30, 2018), <https://www.reuters.com/article/us-goldman-sachs-bias-lawsuit/u-s-judge-certifies-goldman-sachs-gender-bias-class-action-idUSKBN1H61SN> [<https://perma.cc/WEN8-VKNE>].

65. *Chen-Oster*, No. 10 Civ. 6950 at 26.

66. *Id.* at 27.

Weinstein and the company he owned, Miramax.<sup>67</sup> Because the complaint primarily brings claims against the company for knowingly enabling a single bad actor, it poses a question that determines the claims of all class members: namely, what did Miramax executives know about Weinstein's actions, and when did they acquire this knowledge? Thus, this class action likely does meet the *Dukes* standard.

All in all, then, avenues for change remain open for those seeking to challenge institutional discrimination. Even in the wake of *Dukes*, there are non-legal mechanisms through which institutions can be held accountable for discriminatory conduct. Google recently ended its practice of forced arbitration for claims of sexual harassment or assault after 20,000 employees walked out in protest.<sup>68</sup> However, *Dukes*'s prioritization of individualized adjudication has come at a cost. Those who seek to bring claims of second-generation discrimination against institutions have lost some of the key benefits of a class action—increases in efficiency, access to the courts, believability, and the ability to prove institutional dimension of discrimination.

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67. *Harvey Weinstein Faces New Rape Accusation in Class Action Lawsuit*, GUARDIAN (June 1, 2018), <https://www.theguardian.com/film/2018/jun/01/harvey-weinstein-accusation-lawsuit-latest> [<https://perma.cc/S6QQ-EP9T>].

68. Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [<https://perma.cc/K3L8-TYU9>].