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Civil Rights and Systemic Wrongs

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Civil Rights and Systemic Wrongs

Melissa Hart[†]

Systemic employment discrimination is a structural, social harm whose victims include not only those who can be specifically identified, but also many who cannot. Pattern and practice claims in employment litigation are an essential tool for challenging this structural harm. Unfortunately, the Supreme Court's decision in Wal-Mart v. Dukes *brushes aside the systemic nature of the plaintiffs' claims, making both theoretical and doctrinal mistakes in its application of the procedural and substantive law applicable in employment discrimination class action litigation. The most troubling part of the Court's opinion—its rejection of statistical modeling for remedial determinations—has received little attention. This article critiques the Court's novel and careless interpretation of Title VII and explains the threat the opinion poses to the continued viability of pattern and practice claims.*

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I.
INTRODUCTION

A claim of "pattern and practice" employment discrimination is a claim that challenges a systemic wrong. The harm done when

† Associate Professor, University of Colorado Law School. I am grateful to Tristin Green, Noah Zatz, Richard Ford, and Michael Selmi for their comments both in our initial conversation as a working group and in their feedback on this article.

discrimination is an employer's "standard operating procedure—the regular rather than unusual practice" is not simply the aggregation of a large number of individual wrongs.[1] It is a structural, social harm whose victims include not only those who can be specifically identified, but also many who cannot.

And yet, even in cases purporting to address systemic claims, courts have too often remained focused on the individual wrongs that are data points in the overarching story of structural injury.[2] This has not been uniformly true; in many cases over the past few decades, courts have recognized the importance of widening their focus to the structural and systemic harm caused by an employer's discrimination.[3] The district court in *Dukes v. Wal-Mart* followed in this tradition, particularly in framing a proposed remedial phase that would account for the ways in which the harm caused by a pattern and practice of discrimination often cannot be observed by a narrow focus on individual decisions.[4]

In sharply criticizing the district court, the Supreme Court's *Wal-Mart* decision brushed aside the systemic nature of the plaintiffs' claims without a word of analysis.[5] The Court's myopic focus on the individual claims that each woman at Walmart might have against the company—or more accurately, on the individual defenses that Walmart might have to each individual claim—was essential to each part of the Court's opinion. While a good deal of attention has been paid to the heightened requirements the opinion announces for proving Rule 23(a) "commonality," equally troubling is the opinion's cursory concluding section, which asserts that statistical modeling is not a permissible method for assessing damages at the remedy phase of a pattern and practice case.[6] Instead, the Court concludes, a district court considering whether to certify a class must

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1. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360 (1977).

2. As Professor Green explains well in her piece, The Future of Systemic Disparate Treatment, neither courts nor commentators have been entirely careful in their theoretical explanations for the law of systemic disparate treatment. . *See generally*, Tristin K. Green, *The Future of Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 Berkeley J. Emp. & Lab. L. 395 (2011). Just as the substantive harm done by systemic discrimination is distinct from the substantive harm of individual discrimination, however, systemic disparate treatment law has long played a separate and essential role in the enforcement of Title VII. *See id.* at 452-457.

3. *See, e.g.*, McClain v. Lufkin Indus., Inc., 519 F.3d 264, 281 (5th Cir. 2008); Domingo v. New Eng. Fish Co. (*Domingo II*), 727 F.2d 1429, 1442-45 (9th Cir. 1984); Pettway v. Am. Cast Iron Pipe Co. (*Pettway V*), 681 F.2d 1259, 1264-66 (11th Cir. 1982); Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 519-21 (8th Cir. 1980); Wells v. Myer's Bakery, 561 F.2d 1268, 1274-75 (8th Cir. 1977); Women's Comm. Equal Employment Opportunity v. National Broad. Co., 76 F.R.D. 173, 178 (S.D.N.Y. 1977); Stewart v. General Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976).

4. 222 F.R.D. 137, 173-86 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), *rev'd*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

5. *Wal-Mart*, 131 S. Ct. at 2553-61.

6. *Id.* at 2560-61.

assume that a defendant will present each and every defense it might have to each individual class members' right to relief.[7]

This essay considers the many theoretical and doctrinal flaws that underlie the Court's casual conclusion (a conclusion made even more troubling by the fact that all nine Justices joined it at least in part). The Court's rejection of statistical modeling for remedial determinations rests on a novel interpretation of Title VII that leads to a misapplication of the Rules Enabling Act.[8] The fact that the four dissenting Justices in the case signed on to this section of the decision is itself evidence of how little thought or discussion went into it. There is no way to reconcile the assertion that a defendant has a statutory right to insist on trying every single individual defense it might have to each individual potential plaintiff with the dissent's view that employment discrimination class actions could be certified under Federal Rule of Civil Procedure 23(b)(3), which requires that common questions predominate over individual questions.

The logical and doctrinal flaws in the Court's assertions about the remedial phase of an employment discrimination class action are deeply consequential. Statistical modeling to determine class-wide remedies is the only way that many systemic claims can be remedied. In many cases, the "rough justice" of a class-wide remedy will be the fairest and most efficient deterrent remedy and will be the best way to make whole those who have been harmed by discrimination. In fact, without the statistical modeling that is often necessary for systemic remedies, the continued viability of pattern and practice claims will be substantially undermined. Individual claims alone simply will not ensure—or even permit—full enforcement of federal civil rights laws.[9]

I will begin in Part II by explaining what the Court concluded in its final section of *Wal-Mart* and why the conclusions are legally unsound and reflect a lack of careful analysis. Part III considers the need for statistical modeling in assessing remedies for systemic discrimination. Finally, in

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7. *Id.*

8. 28 U.S.C. § 2072 (2006). The Rules Enabling Act authorized the promulgation of the Federal Rules of Civil Procedure. If a Federal Rule were to "abridge, enlarge or modify any substantive right," it would be outside the scope of the Enabling Act. Harsh application of procedural rules often leads to limitations on substantive rights. This is one of those exceedingly rare moments in which unreasonable interpretation of the substantive rules has led to similarly unreasonable interpretation of the Federal Rules of Civil Procedure.

9. *See, e.g.*, Marcia L. McCormick, *The Truth is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 Berkeley J. Emp. & Lab. L. 193 (2009)(discussing a range of enforcement limitations, including excessive reliance on individual claims); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 841-844 (2004)(noting that multi-party claims are essential to full enforcement of civil rights laws); Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. Rev. 91, 151-157 (2003)(discussing the need for systemic claims to challenge structural workplace discrimination).

Part IV, I suggest some paths forward that could preserve the viability of the pattern and practice claim.

II. WHAT THE COURT SAID AND WHY IT IS WRONG

In the section of the *Wal-Mart* opinion that received unanimous support, the Supreme Court addressed whether class actions could be certified under Federal Rule of Civil Procedure 23(b)(2) when the plaintiffs sought both injunctive relief and monetary damages. 23(b)(2) provides a mechanism for certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[10] Although most circuits had concluded that back pay or other monetary relief could be included in class suits certified under 23(b)(2), there was considerable disagreement among the lower courts about the precise circumstances in which such inclusion was appropriate.[11]

The bulk of the Court's discussion of 23(b)(2) considers the broad question of whether that provision of the rule can be used to certify claims that seek any type of monetary damages.[12] The Court's conclusion—that 23(b)(2) is not an appropriate provision for certification of employment discrimination claims that include requests for back pay—upended settled law in almost every circuit. Despite its considerable disruption of existing law, that holding was not surprising. More than 15 years ago, the Court had foreshadowed concern about permitting class claims for monetary damages without a clear provision for individual plaintiffs to opt out of the class.[13] Moreover, this portion of the Court's analysis alone would not seriously inhibit employees' ability to challenge structural discrimination. While obtaining certification under Rule 23(b)(3)'s "catch-all" provision would be harder for class plaintiffs than the Rule 23(b)(2) approach has been, it would not be impossible, if that was all that the Court had said on the matter. The troubling portion of this section of the decision comes in the final, unnecessary paragraphs.

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

11. *See, e.g.*, Brief for Respondents at 56, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 686407.

12. *See Wal-Mart*, 131 S. Ct. at 2547-60.

13. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994).

A. Giving Old Law New Meaning

In the brief, final sub-part of the *Wal-Mart* opinion, the Court noted that some of the Courts of Appeals had held that claims in which money damages were "incidental" to injunctive relief could be certified under Rule 23(b)(2). The Court declined to decide whether that view was correct, noting that the *Wal-Mart* plaintiffs would not have been able to meet that standard and were not arguing that they could.[14]

Having introduced the question as one that was not necessary to its decision in this case, the Court nonetheless went on to comment on it and to do so in a couple of paragraphs with very little analysis or discussion, but considerable potential to make systemic disparate treatment claims next-to-impossible to certify.

The Court began with the statement that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."[15] As support for this conclusion, the Court cited sections 706(g)(1) and 706(g)(2)(A) of Title VII of the Civil Rights Act of 1964.[16] These are two among the statute's remedial provisions, both describing the scope of a court's authority to award certain types of damages. Section 706(g)(1) provides that, after making a finding of discriminatory conduct, a court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[17] Section 706(g)(2)(A) provides that "[n]o order of the court shall require the . . . payment to [an individual] of any back pay if such individual [suffered an adverse action] for any reason other than discrimination . . . ."[18] The *Wal-Mart* Court reads these provisions, and particularly 706(g)(2)(A), as granting the defendant a right to put on individualized defenses as to each class member, and thus as foreclosing statistical modeling to assess an appropriate class-wide back pay remedy.[19]

Despite the novelty of this reading of 706(g)(2)(A), the opinion goes on to suggest that it was these provisions of Title VII that were interpreted in *Teamsters v. United States,* the case that established the framework for trying pattern and practice claims.[20] In *Teamsters*, a decision that never

14. *Wal-Mart*, 131 S. Ct. at 2560.
15. *Id.*
16. *Id.*; *see* 42 U.S.C. § 2000e–5(g) *et seq.* (2006).
17. 42 U.S.C. § 2000e–5(g)(1).
18. § 2000e–5(g)(2)(A).
19. *Wal-Mart*, 131 S. Ct. at 2560-61.
20. *Id.*

cited either of these sections of Title VII,[21] the Court held that "[w]hen the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, 'a district court must usually conduct additional proceedings . . . to determine the scope of individual relief.'"[22] The *Teamsters* decision itself goes on to emphasize the importance of district court flexibility in fashioning the remedial phase of pattern and practice litigation to satisfy the goals of Title VII.[23] In *Wal-Mart*, however, the Court reads the flexibility out of *Teamsters* and reframes that venerable decision to stand for the proposition that, at this remedial stage of the litigation, the defendant "will have the right to raise any individual affirmative defenses it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'"[24]

The Court then quickly dismissed what it described as the district court's "Trial by Formula" proposal for handling the remedial phase in *Wal-Mart*.[25] The district court in *Wal-Mart* had proposed a remedial phase that did not include individualized hearings on each class member.[26] Instead, if the plaintiffs successfully demonstrated a pattern or practice of discrimination, the court proposed that it would calculate both total class-wide damages and individual entitlement to damages using some system for estimating lost wages and taking account of mitigation. The district court declined to set forth a specific system for remedial assessment at the class certification stage, but it did determine that the remedies would be calculated "through a formula" determined at the appropriate time.[27] But the Supreme Court rejected this approach, concluding that it would deny Walmart its statutory right to put on individualized defenses to every claimant and therefore would violate the Rules Enabling Act's prohibition against procedural rules that "abridge, enlarge or modify any substantive right."[28]

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21. At the time of the *Teamsters* decision, these provisions of Title VII were numbered differently, but were, in substance, identical to what they are today. The addition of 706(g)(2)(B) in the Civil Rights Act of 1991 led to the renumbering of these pre-existing remedial provisions. See Pub. L. No. 108-198, 105 Stat. 1071 (1991); 42 U.S.C. § 2000e-5.

22. *Wal-Mart*, 131 S. Ct. at 2560-61 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977)).

23. *Teamsters*, 431 U.S. at 364.

24. *Wal-Mart*, 131 S. Ct. at 2561 (quoting *Teamsters*, 431 U.S. at 362).

25. *Wal-Mart*, 131 S. Ct. at 2561.

26. 222 F.R.D. at 175-178.

27. *Id.* at 182-83 and 185-86. The district court rejected Walmart's argument that individualized hearings were required because of the Civil Rights Act of 1991's so-called "same action" defense, added as § 706(g)(2)(b), because the plaintiffs were not claiming that Walmart had engaged in "mixed-motive" discrimination, prohibited under § 702(m). The district court concluded that the same-decision defense is only available when plaintiffs are asserting mixed-motive claims. *Id.* at 186-87. The Supreme Court did not consider these provisions of Title VII in reaching its decision.

28. *Id.*; *see also* 28 U.S.C. § 2072(b) (2006).

These brief paragraphs of the *Wal-Mart* decision, joined by all nine Justices, could cause more trouble for pattern and practice claims than any other part of the decision. By rejecting statistical modeling as a permissible remedial approach, the Court reduces the structural and systemic claim to the sum of its individual parts and gives those individual parts the power to destroy the whole. The decision rests on the weak foundation of: (1) a novel interpretation of Title VII's section 706(g)(2)(A); (2) a narrowing of the *Teamsters* decision; and (3) a misunderstanding about the substantive nature of a finding of pattern or practice liability. Moreover, the decision is entirely inconsistent with the views of the dissenting Justices as to the viability of class certification of employment discrimination claims under 23(b)(3).

B. Logical Leaps, Analytical Flaws

The Court concluded that certifying a class on the theory that the remedial phase of the lawsuit could be conducted without individualized hearings on each class member's right to damages would violate the Rules Enabling Act. For this conclusion to be correct, two things must be true: (1) defendants must have a substantive right to present individualized defenses to each class members' claim to damages; and (2) that right must be altered by the operation of Rule 23. Neither of these premises is correct.

1. Section 706(g)(2)(A)

The provision of Title VII on which the Court focused to justify its assertion that defendants have been given a statutory right to individualized remedial hearings has been the subject of very little judicial analysis. Not until this decision has the Supreme Court read the language of section 706(g)(2)(A) to confer a substantive statutory right on the defendant.[29] It is a reading unsupported by the language of the statute, which is written as a command to the court, not as a grant of rights to any party. It is also inconsistent with the Court's discussion of the provision in earlier cases, which have focused exclusively on the appropriateness of court-ordered affirmative action as a remedy for discrimination.

Section 706(g)(2)(A) directs that "[n]o order of the court shall require the . . . payment to [an individual] of any back pay if such individual [suffered an adverse action] for any reason other than discrimination . . . ."[30] By its terms, the provision "does not speak to the actions of private parties;

29. When Title VII was amended by the Civil Rights Act of 1991, the language at issue here received a new subsection number. *See supra* note 21. The language itself was unchanged, and this discussion considers both pre- and post-1991 analysis.

30. § 2000e–5(g)(2)(A).

only a court is limited by it."[31] Not surprisingly, therefore, the Court's prior decisions have consistently described the provision as one "which defines the remedies available under Title VII."[32] Moreover, section 706(g)(2)(A) is included in the section of the law titled "Enforcement Provisions,"[33] and the language of the provision very plainly directs itself only to the remedies a court may order.

In other parts of Title VII, Congress has granted defendants the statutory right to present particular defenses in clear and straightforward language. For example, when the legislature codified the "mixed motive" provisions of Title VII in the 1991 Civil Rights Act, it included not just a command to the courts about the appropriate scope of their remedial authority, but also directives to the parties about their respective burdens of proof. Specifically, this subsection of the statute provides that:

> "On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> "(i) may grant [certain remedies]; and
>
> "(ii) shall not award damages or [certain other remedies]."[34]

In specifying proof requirements for both mixed-motive claims and the corresponding "same action" defense, the language of this subsection is very different from section 706(g)(2)(A)'s directive about the content of a court's remedial order. The remedial portion of the mixed motive claim was added to the statute in a section immediately following what is now section 706(g)(2)(A). If Congress had meant to grant defendants a statutory entitlement to present individual defenses in section 706(g)(2)(A), it could have done so explicitly when it was specifying that right in 706(g)(2)(B).[35]

Given the differences between the two provisions, it is perhaps not surprising that Walmart's arguments about individualized defenses actually rested on 706(g)(2)B)—the "same action" defense available when a plaintiff or plaintiffs argue that a defendant's actions were the result of both discriminatory and non-discriminatory motives. The district court rejected Walmart's argument because the plaintiffs had not asserted claims under the

31. United States v. Brennan, 650 F.3d 65, 91 (2d Cir. 2011) (citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 521 (1986)).

32. Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 444 (1986).

33. 42 U.S.C. § 2000e-5 (2006). The section heading for § 2000e-5(g) reads, "Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders."

34. 42 U.S.C. § 2000e–5(g)(2)(B).

35. *Cf.* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (observing that congressional failure to include heightened pleading standards in the Title VII mixed-motive provisions "is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances").

mixed-motive provision of Title VII.[36] What is more surprising is that the Supreme Court's decision never mentions section 706(g)(2)(B) or addresses the district court's conclusion that that the provision was inapplicable in this case. Instead, the Court simply imports the reasoning urged by the defendant as to 706(g)(2)(B) into its discussion of the entirely different language of section 706(g)(2)(A).

Nothing in the Supreme Court's prior discussion of the language on which it rested its decision suggested that the Court understood the provision as a statutory grant of particular rights to defendants. All of the Supreme Court's prior discussion of the provision has arisen in the context of challenges to court-ordered or court-endorsed affirmative action plans.[37] In these cases, both litigants and courts have treated the provision as limiting in some way what a judicial order may include and have argued over the scope of those limitations. In that context, the Court has held that a court could order affirmative remedies even though it was possible that some people benefitted by those remedies might not have been the victims of past discrimination by the employer.[38] Indeed, the Court specifically stated:

> We . . . hold that § 706(g) does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination. Specifically, we hold that such relief may be appropriate where an employer . . . has engaged in persistent or egregious discrimination, *or where necessary to dissipate the lingering effects of pervasive discrimination.*[39]

In *Sheet Metal Workers*, the Court explained why relief that might reach beyond compensating individual litigants might be necessary in cases of systemic discrimination. While an injunction to stop discrimination may be sufficient in some cases, in situations of "particularly longstanding or egregious discrimination" or when "informal mechanisms may obstruct equal employment opportunities" affirmative remedies might be necessary to serve the purposes of Title VII.[40] The Court recognized in assessing the statute's remedial provisions that "[i]n order to foster equal employment opportunities, Congress gave the lower courts broad power under § 706(g) to fashion 'the most complete relief possible' to remedy past discrimination."[41] The *Wal-Mart* Court's interpretation of this same language thirty-five years later could hardly be more different. Breaking

36. *See* 222 F.R.D. at 186-87.

37. *See Sheet Metal Workers*, 478 U.S. at 421; Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976).

38. *See Sheet Metal Workers*, 478 U.S. at 422. *See also* Kathleen M. Sullivan, *Sins of Discrimination: Last Terms Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

39. *Sheet Metal Workers*, 478 U.S. at 445 (emphasis added).

40. *Id.* at 448-51.

41. *Id.* at 448 (citing *Franks*, 424 U.S. at 770).

with a long tradition of invoking 706(g)'s broad remedial scope, the Court instead wielded this remedial provision as a tool to eliminate what may often be the only available remedial approach in a systemic discrimination claim.

This re-reading of 706(g)(2)(A) to mean something quite different than its plain meaning and prior interpretation suggests it was the Court's first analytical misstep, but not its only one. Even if the language of section 706(g)(2)(A) could be reasonably read as a grant of a statutory right to Title VII defendants, there is nothing in the language of the statute that specifies that the right so granted is the right to "individualized determinations of each employee's eligibility for backpay."[42] To get to this reading, the Court had to reinterpret the thirty-four-year-old *Teamsters* decision.

2. Reinterpreting Teamsters

In *Teamsters*, the Court explained that at the liability phase of a claim of systemic discrimination the plaintiffs must establish by a preponderance of the evidence that "discrimination [is] the company's standard operating procedure – the regular rather than unusual practice."[43] If the plaintiffs make that showing, a court "may then conclude that a violation has occurred and determine the appropriate remedy," such as "an injunctive order against continuation of the discriminatory practice . . ."[44] In circumstances where a plaintiff or plaintiffs seek "individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief."[45] During this second stage of the proceedings, if the defendant seeks to challenge an individual's entitlement to damages, "the burden then rests on the employer to demonstrate that the individual" was not harmed by the "policy of discriminatory decisionmaking."[46]

The *Wal-Mart* opinion describes these statements in *Teamsters* as establishing a required procedure for pattern and practice cases in which the remedial stage must involve individualized hearings on each employee's entitlement to back pay. In fact, *Teamsters* very explicitly went on to note that the district courts must have flexibility in crafting a process for identifying individuals who were "potential victim[s] of unlawful discrimination" and apportioning a remedy in a manner that balanced the interests of those potential victims with other employees in the workforce.[47] The Court emphasized that "the purpose of Congress in vesting broad

42. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560-61 (2011).
43. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).
44. *Id.* at 361.
45. *Id.*
46. *Id.* at 362 (citation omitted).
47. *Id.* at 363, 367-77.

equitable powers in Title VII courts was "to make possible the 'fashion(ing) (of) the most complete relief possible.'"[48] This focus on flexibility in remedial assessment was fundamental to every major pattern or practice decision during the years that the Court was first interpreting and applying the provisions of Title VII.[49] It was a focus that was consistent not only with the language, but also with the legislative history of the statute. The Conference Report accompanying amendment of Title VII in 1972, which was the genesis of the current language of section 706(g)(2)(A), noted that:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that the person aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.[50]

The Supreme Court recognized this as "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require . . . ."[51]

The *Teamsters* two-phase proceeding for pattern and practice cases has been applied in a myriad of different circumstances over the past three decades. While some cases may have involved individual hearings at the remedial phase, many district judges have used other, more class-wide approaches to remedial assessment.[52] The flexibility inherent within the *Teamsters* framework has, until now, permitted courts to determine how best to calculate a remedy that would serve the statutory purposes of deterrence and compensation.

In one quick paragraph, *Wal-Mart* changed the meaning of *Teamsters* and its two-stage pattern and practice litigation structure entirely, transforming it from a flexible approach to pattern and practice litigation

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48. *Id.* at 364-65 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (citation omitted)).

49. *See, e.g.*, Albemarle Paper, 422 U.S. at 418 (emphasizing the equitable power and wide discretion the legislature gave courts under Title VII); *see also*, Franks v. Bowman Transp.Co., Inc., 424 U.S. 747, 763-64 (1976).

50. S. Rep. No. 92-118, at 7168 (1972) (Conf. Rep.) (Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972)

51. *Franks*, 424 U.S. at 764.

52. *See, e.g.*, McClain v. Lufkin Indus., Inc., 519 F.3d 264, 281 (5th Cir. 2008) (noting that in circumstances where "the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessary"); *see also*, Domingo v. New Eng. Fish Co. (*Domingo II*), 727 F.2d 1429, 1444 (9th Cir. 1984); Pettway v. Am. Cast Iron Pipe Co. (*Pettway V*), 681 F.2d 1259, 1264-66 (11th Cir. 1982).

into a source of proof that defendants are entitled to individualized hearings on each plaintiff's claims for relief in a systemic discrimination suit.

3. *The Rules Enabling Act?*

When Congress gave the Supreme Court the power to "proscribe general rules of practice and procedure," the legislature specified that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[53] Assessing whether a particular application or interpretation of the Rules of Civil Procedure would abridge a substantive right requires identifying both the scope of the substantive right and also what it is that the procedural rules are doing to abridge that right.

Only with the building blocks of a novel interpretation of section 706(g)(2)(A) and a narrowing of the *Teamsters* decision could the *Wal-Mart* opinion make the claim that the district court's certification of the class violated the Rules Enabling Act. It is a claim that does not withstand scrutiny.

First, the substantive right identified by the Court—the right to individualized hearings as to each plaintiff's remedial rights—is not a right granted by statute. It is a novel "right" created by the Supreme Court. The language of 706(g)(2)(A) declares what a court cannot do: a court cannot order payment of back pay to an individual who was not the victim of discrimination.[54] But a statistically modeled class-wide recovery does not constitute a court order to pay an individual who was not discriminated against. The court order is a direction to the defendant found liable for a pattern or practice of discrimination that it must pay the class a certain amount. Allocation of that class-wide recovery is rarely done by court order. Instead, in a typical pattern or practice case, "where a defendant's total backpay liability to the class is set by formula in the form of a lump sum award, there is no need for the defendant to participate further in the issue of which class members are eligible to share in the award."[55] The defendant's interest is in its total liability, not the distribution of that total sum to individual class members.[56]

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53. 28 U.S.C. § 2072 (2006).

54. *See* 42 U.S.C. § 2000e–5(g)(2)(A).

55. *See also Pettway V*, 681 F.2d 1259, 1266 (11th Cir. 1982) (finding that the defendant had no basis for objecting to a formula approach on due process grounds so long as the "amount found due to the class does not exceed the amount which all members of the class together would have been entitled to receive under a correct hypothesis, which we must assume the trial court would adopt").

56. It is in part for this reason that neither defendants nor courts are generally involved with the individualized allocation of a total settlement amount or damages award among plaintiffs. Once the total dollar amount owed by the defendant and, in many cases, some kind of an allocation formula are determined, distribution of funds to specific individuals is generally handled by a special master or other fund administrator. See, e.g., Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, 7AA Fed. Prac. & Proc. Civ. S. 1784 (3d ed.)(observing that courts often determine "a single

Neither the language of 706(g) nor the procedure established by the Court in *Teamsters* prohibits the calculation of a class-wide back pay award that is allocated among potential victims in circumstances where even individual hearings would not realistically identify all of the victims of discrimination. As discussed further in Part III, cases like *Wal-Mart* present precisely these circumstances. Thus, to the extent that classes certified under Rule 23 take this remedial approach, there is no abridgement of a substantive right. Indeed, a more serious concern to the courts should be that an overly restrictive application of Rule 23 will abridge plaintiffs' substantive Title VII rights, as it will render pattern and practice claims impossible to pursue.

Furthermore, it is not at all clear that it is Rule 23 that courts have read as authorizing statistical modeling at the remedial phase of a pattern or practice case. *Teamsters*, the case in which the Court first established the procedure for judicial evaluation of pattern or practice claims, was brought by the Attorney General, not by private plaintiffs. In pattern or practice suits brought by the government, Rule 23 does not come into play at all. The Attorney General (now the Equal Employment Opportunity Commission (E.E.O.C.)) is authorized by Title VII to pursue pattern or practice claims and does not have to seek class certification in order to do so.[57] It is not, therefore, the operation of Rule 23 that risks "denying" a defendant employer the right to present individualized defenses. It is the operation of Title VII that makes the remedial phase of a pattern and practice case look quite different from the remedial portion of an individual discrimination suit. A finding of pattern or practice liability is a substantive conclusion. The damages phase of a pattern or practice case is part of the substantive law—not part of the procedural analysis.

One of the risks of the sort of dicta that these final paragraphs of the *Wal-Mart* decision epitomize is that they contain statements of law that are hard to correct, but were not briefed or argued in any serious way by the parties. Each step that the Court took to reach the conclusion that the district court's application of Rule 23 was a violation of the Rules Enabling Act was controversial and deserved the kind of careful analysis that it plainly did not receive.

Perhaps one of the best pieces of evidence that this section of the decision was not thoroughly vetted is that the four dissenting Justices signed on to this part of the majority opinion. Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented because "[a] putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e.g.*,

award for the class, and then develop an expeditious administrative means of dividing the lump sum among the class members").

57. *See* General Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 321-25 (1980).

qualification for, and the amount of, back pay or compensatory damages—and that a class action is "superior" to other modes of adjudication."[58] That position is entirely consistent with their willingness to sign on to that part of the Court's opinion that held Rule 23(b)(2) cannot be used to certify employment discrimination class actions seeking back pay.

The dissent cannot, however, be reconciled with the conclusion that district courts evaluating employment discrimination class actions must assume that every individual plaintiff's claim will be individually defended. If a defendant has a right to assert that it will want to litigate each and every individual damages claim at the remedial phase of a pattern and practice case, it is nearly impossible to imagine a successful 23(b)(3) certification because individual issues will always predominate over common questions.[59]

If the final paragraphs of the *Wal-Mart* decision are not simply careless dicta that the Justices included without evaluating their potential ramifications, then they are a very calculated effort to make challenges to structural and systemic discrimination nearly impossible. As I discuss below, the kind of statistical modeling that the *Wal-Mart* Court seems to have rejected is essential to fully capturing the nature of the harm caused by pattern or practice discrimination.

III.
THE NEED FOR STATISTICAL MODELING

Statistical modeling at the remedial phase is in some contexts the only effective tool for assessing the harm caused by a pattern and practice of discrimination. This may increasingly be the case in the modern workplace, and especially in workplaces like Walmart, which are characterized by "a large low wage workforce, high turnover, a decentralized management structure" and highly subjective criteria for employee evaluation.[60] The systemic problems of discrimination that have emerged in these environments cannot be captured with the highly individualized model for civil rights litigation that the Court endorsed in its *Wal-Mart* decision. In many contexts, eliminating statistical modeling as a mechanism for

58. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (Ginsburg, J., dissenting).

59. *But see* Bouaphakeo v. Tyson Foods, Inc., No. C07-04009, 2011 WL 3793962, at *3-4 (N.D. Iowa Aug. 25, 2011) (declining to certify a class certified under 23(b)(3) and holding that unlike *Wal-Mart* the instant case is supportable by class-wide proof and so individualized hearings are not necessary).

60. Richard Ford, *Beyond Good and Evil in Civil Rights Law: The Case of* Wal-Mart v. Dukes, 32 Berkeley. J. Emp. & Lab. L. 513, 516 (2011). Professor Ford observes that the individual discrimination model embodied in cases like McDonnell-Douglas v. Green, 411 U.S. 792 (1973), were relatively effective in the manufacturing workplaces of the 1970's, but that the models developed in that context do not translate well into the new economy. *Id.* at 516-17.

assessing the harm of discrimination will not mean substituting a more effective individualized assessment of remedies. Instead, it will mean leaving those employees harmed by discrimination without any remedy.

There are two primary justifications generally offered for the focus on individual remedial hearings following a finding of pattern or practice discrimination by an employer: first, to avoid unfairly penalizing the employer, and second, to ensure that those who were truly the victims of discrimination are compensated.[61] However, the remedial purposes of Title VII give courts both the authority and the obligation to make victims of discrimination whole in the best way practicable under the circumstances. As the Court explained in one of its earliest Title VII decisions, district courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[62] The justifications for individual remedial hearings must be examined in light of this broad equitable obligation.

As to the first justification, the assumption that individual hearings are necessary to avoid an unfair penalty on the employer is flawed. The mistake in this assumption is in significant part the consequence of what Tristin Green aptly describes as "overreliance on the principal-agent model in delineating the limits of entity responsibility" for discrimination.[63] Too often, when litigants, courts and scholars talk about employer liability for systemic discrimination, they tend to think of the employer, as the principal, being liable vicariously for an aggregation of the many individual acts of supervisor-agents. However, when employees are injured by a pattern or practice of systemic discrimination in the workplace, the employer is liable "not vicariously, based on a finding of an individual instance or even several instances of disparate treatment, but directly and systemically, based on a finding that individual instances of disparate treatment are so widespread within the organization... that the entity is in some part to blame."[64] Since employer liability for systemic disparate treatment is appropriately understood as liability for creating the discriminatory structural and cultural context of the particular workplace, the appropriate penalties imposed on the employer do not depend on the results individualized hearings.

Furthermore, in some cases, a class-wide approach to remedies will come closer to accurately assessing the appropriate remedy than individualized hearings can do. As Professor Joshua Davis has explained:

61. *See, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976).

62. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (quoting Louisiana v. United States, 380 U.S. 145, 152 (1965)).

63. Green, *supra* note 2 at 425.

64. *Id.* at 428.

> [C]lass-wide recoveries can allow courts to require defendants to pay precisely the amount of harm that they cause. Doing so is important to various policy goals, most notably achieving optimal deterrence. Individual recoveries, in contrast, tend to lead to defendants paying more or less than the damages they caused and, as a result, to excessive or insufficient deterrence.[65]

Davis illustrates this point with a scenario in which a class of one hundred women sue a company and allege that promotions were given in an illegally discriminatory manner. If the court finds that the company did in fact operate under a pattern of discrimination, how should the court conduct the remedial phase of the litigation? Imagine now that sixty of the one hundred women would in fact have been promoted but for sex discrimination. In individualized hearings, every woman would be able to show that she was more likely than not the victim of discrimination. The defendant would be required to pay damages to one hundred percent of the plaintiffs, even though the defendant was only truly liable for sixty percent of that damages award. If the court had taken a statistical modeling approach to assessing the remedy, it would have awarded a class-wide damage amount equal to that sixty percent. On the other hand, if only forty of the class members had lost promotions due to sex discrimination, using a statistical model, none of them would be able to satisfy the preponderance of the evidence standard. "The employer would face no liability despite compelling evidence that it violated the legal rights of 40 women."[66]

Courts applying statistical models to determine class-wide remedies first identify what number of positions would have gone to class members absent discrimination, then estimate the total amount of earnings that class members would have received over the relevant time had they held those positions and, finally, subtract a mitigation amount that represents what the class members earned or would have earned.[67] The increasing sophistication of statistical analyses makes assessment of an appropriate class-wide remedy easier today than it might have been when Title VII was first enacted. Ultimately, concerns about imposing too high a penalty on a

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65. Joshua P. Davis, *Class-Wide Recoveries*, 3 (Feb. 1, 2011) (on file with author), *available at* http://srrn.com/abstract=1768148.

66. *Id.* at 20.

67. *See, e.g.*, Domingo v. New Eng. Fish Co. (*Domingo II*), 727 F.2d 1429,1444 (9th Cir. 1984) ("Determination of the [formula] award could proceed along any of several avenues, all of which are designed to estimate the difference between what non-whites actually earned and what they would have earned but for the discrimination.") (citation omitted); EEOC v. O & G Spring & Wire Forms, 38 F.3d 872, 879 n.9 (detailing actual formula); Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 520 (8th Cir. 1980)(same); Stewart v. Gen. Motors Corp., 542 F.2d 452-54, 452 (7th Cir. 1976),; Pettway v. Am. Cast Iron Pipe Co. (*Pettway III*), 494 F.2d 211, 262-63 (5th Cir. 1974); Green v. USX Corp., 896 F.2d 801, 807-08 (3d Cir. 1990)(approving district court's calculating of damage award).

defendant, while they have been rhetorically effective, do not withstand closer analysis.

As to the second justification for requiring individual remedial hearings, in cases very similar to *Wal-Mart*, courts have concluded that it is better to risk some uncertainty in the precise measure of compensation to any individual than to offer no compensation.[68] Where the choice is between no recovery at all for any of the plaintiffs and a slightly rough justice in allocation of damages, the goals of Title VII are better served by the class-wide approach.

Thus, courts have recognized over the years that there are circumstances in which a statistical model for allocating back pay damages will be fairer and more efficient than a model that requires individual assessments.[69] "When courts deal with harm to a large number of individuals on a class-wide basis—assessing the overall injury a defendant's conduct caused—litigation can be more expeditious and less costly to everyone involved."[70] In fact, statistical modeling at the second stage of pattern or practice litigation has been part of Title VII litigation for decades. In many cases, individualized hearings have been discounted as likely to result in a "quagmire of hypothetical judgments."[71] In employment discrimination cases challenging pay and promotion disparities, reconstruction of individual employment histories and outcomes will often be extremely difficult, if not impossible. Where, for example, the employer's record retention or other conduct has made individualized reconstruction of employment decisions impossible, courts have concluded that allocating relief based upon statistical analyses "has more basis in reality . . . than an individual-by-individual approach."[72]

The circumstances in *Segar v. Smith*, a challenge to the Drug Enforcement Agency's employment practices, provide an excellent example of a case in which individualized determinations, if even possible, would be both unfair and inefficient. In that case, agents challenged the evaluation and promotion practices at the Drug Enforcement Agency (D.E.A.). The district court found that the plaintiffs had demonstrated that the criteria used

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68. *See, e.g.*, *Stewart*, 542 F.2d at 453 ("Given a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages, we choose the latter."); *see also* Segar v. Smith, 738 F.2d 1249, 1291 (D.C. Cir. 1984) ("If effective relief for the victims of discrimination necessarily entails the risk that a few nonvictims might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk.").

69. Brief for Respondents at 22-25, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 686407

70. Davis, *supra* note 65 at 4.

71. *Pettway III*, 494 F.2d at 260.

72. *Id.* at 263. *See also* Shipes v. Trinity Indus., 987 F.2d 311, 316-19 (5th Cir. 1993); *Stewart*, 542 F.2d at 452-53; *Hameed*, 637 F.2d at 520; *Domingo II*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); Pitre v. W. Elec. Co., 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Pettway V*, 681 F.2d at 1266 (citation omitted); *Segar*, 738 F.2d at 1289-91.

for promotions were pervasively tainted by illegal discrimination.[73] But, while the court concluded that discrimination had skewed evaluations of black agents, it "could have had no way of knowing how much more favorable a particular agent's evaluation should have been, or how a fair evaluation might have affected the agent's chances for obtaining a particular promotion."[74] The court also found that black agents were assigned a disproportionate share of undercover assignments, and that those undercover assignments made promotion less likely, "but the court could have had no way to divine what other broadening experiences a particular agent might have had, and no way to gauge how this hypothetical additional experience would have affected particular promotion decisions."[75] And, finally, while the district court concluded that the evidence showed black agents had received more frequent and more severe discipline, "the court could have had no way of knowing exactly what effect the disproportionate disciplinary sanctions had on a particular agent's chances for particular promotions."[76]

The court in *Segar* thus concluded that, under these circumstances, it would be impossible to reconstruct the promotion history of individual agents, and a statistical model for the assessment of remedies would be the fairer and more efficient approach. This conclusion was *not* a conclusion that discrimination did not occur, or that any individual agent was not discriminated against. It was a conclusion that the circumstances of the workplace would make individual reconstruction impossible.

Consequently, the court ordered class-wide back pay, first determining a formula for calculating the total amount of the pool and then distributing the pool evenly among eligible class members.[77] As the court of appeals explained in affirming the district court's remedial order:

> To require individualized hearings in these circumstances would be to deny relief to the bulk of DEA's black agents despite a finding of pervasive discrimination against them. In effect, DEA would have us preclude relief unless the remedial order is perfectly tailored to award relief only to those injured and only in the exact amount of their injury. Though Section 706(g) generally does not allow for backpay to those whom discrimination has not injured, this section should not be read as requiring effective denial of backpay to the large numbers of agents whom DEA's discrimination has injured in order to account for the risk that a small number of undeserving individuals might receive backpay.[78]

73. *Segar*, 738 F.2d at 1264.
74. *Id.* at 1290-91.
75. *Id.* at 1291.
76. *Id.*
77. *Id.* at 1264-65.
78. *Id.* at 1291.

The circumstances in *Wal-Mart* were similar to those in *Segar*, in that a finding of pervasive discrimination by the district court would not have answered the question of which specific women were victims of that discrimination. Following the path mapped by *Segar* and other cases, the district court approached the remedial phase in *Wal-Mart* from the starting point that courts "must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief."[79] In a case like this one however, the court explained:

> [W]hile a formula approach is certainly not the norm, it is a potential option where the employer uses largely subjective criteria for hiring or promotion decisions, objective requirements are minimal, and many more class members qualified for the positions than would have been hired or promoted even absent discrimination. Because it is virtually impossible in such cases to determine which class members would actually have been hired or promoted (and thus which class members were the actual victims of the defendant's discriminatory policy), there is little point in going through the exercise of individual hearings.[80]

The district court concluded that, under these circumstances, what made the most sense was to hold the company liable for an appropriate total amount and then divide that amount among class members. In reaching this conclusion, the district court aligned itself with many other courts that had previously confronted similar problems with individualized assessment of harm. Moreover, in endorsing this approach, the district court was quite aware of the concern that those individual class members entitled to share in the class-wide award be identified as accurately as possible.[81]

In situations in which the specific victims of systemic discrimination cannot be identified with certainty, courts have instead sought to identify which class members "were at least *potentially* victimized by the employer's discriminatory policy."[82] In the case of a failure to promote claim, this group would include those who met the minimum qualifications and either applied for a promotion or were deterred from applying. This was the approach the district court proposed to take at the remedial phase of the *Wal-Mart* litigation, if the case ever reached that stage.[83]

79. 222 F.R.D. 136, 175 (N.D. Cal. 2004) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977)).

80. *Id.* at 176-177. *See also* EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 879-880 & n.9 (7th Cir. 1994) (approving district court's use of formula approach); Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 520-521 & n.18 (8th Cir. 1980) (approving district court's award of back pay and detailing formula approach); Stewart v. Gen. Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976) (same); EEOC v. Chicago Miniature Lamp Works, 668 F. Supp. 1150, 1151-53 (N.D. Ill. 1987).

81. *Dukes*, 222 F.R.D. at 117.

82. *Id.*

83. *Id.*

The Supreme Court rejected the district court's approach with no analysis of either what this approach would actually entail or what the true alternatives might be. In fact, particularly given the increasing sophistication of statistics, the approach that the district court proposed for handling damages has proved very effective in determining the appropriate deterrent damages. While issues about under- or over-payment to particular class members should not be ignored, the solution of no remedy at all offers nothing to any class member. And no remedy at all is the most likely alternative to statistical modeling at the remedial phase of systemic disparate treatment litigation. The serious consequences of the Court's casual rejection of this approach to assessing and allocating damages warranted a level of careful analysis that was entirely missing from the decision.

IV.
MOVING FORWARD

The Court's rejection of statistical modeling at the remedial phase of a systemic discrimination suit was curt and in many respects illogical. The Court quite clearly failed to consider the complex issues raised by alternative approaches to systemic remedies with any analytical or practical care. That failure of careful analysis calls the weight of the Court's opinion as to this issue into serious doubt. Moreover, litigants and courts facing similar circumstances in future cases should not forget that the brief discussion of "trial by formula" in *Wal-Mart* was not necessary to the Court's holding and should not be accorded precedential value for that reason as well.

For the time being, however, it is essential to consider other solutions to the bind that the *Wal-Mart* decision has incorrectly put the lower courts and litigants in. One possible solution might be a legislative fix. New language could be added to 706(g), to provide that "If the court finds that individualized hearings as to remedies in pattern or practice cases are infeasible, the court may use alternative methods to determine appropriate class-wide relief." An amendment of this sort would address the problem created in this one section of the *Wal-Mart* decision. For some advocates, it might seem like too narrow a solution, as it would leave intact the Court's cramped interpretation of Rule 23(a). A more limited approach might, however, be more politically viable. Also, the Court rejected statistical modeling as part of an interpretation of Title VII, not Rule 23. A legislative effort that sought to address both issues in a single measure would risk the

unintended consequences that always accompany complex, bundled legislative measures.[84]

For the immediate future, the question is how litigants and courts can move forward to address claims of systemic discrimination in the light of this decision and without new legislation. One possibility is a greater reliance on the enforcement efforts of the E.E.O.C. Given that pattern or practice claims pursued by the E.E.O.C. are not subject to the requirements of Rule 23, these actions may be a more effective tool for addressing structural discrimination than private litigation subject to the post-*Wal-Mart* interpretation of Rule 23. Of course, the challenge in E.E.O.C. litigation will be whether defendants can successfully argue that they are entitled to present individualized defenses as to every specific employee in these cases as well.

Some hope may also come from the discretion that the Federal Rules of Civil Procedure vest in district courts. Rule 23(c)(4) gives district courts discretion to certify a class only "with respect to particular issues."[85] Rule 42 of the Federal Rules permits courts "[f]or convenience, to avoid prejudice, or to expedite and economize," to order separate trials of separate issues.[86] Using these flexible tools given to them by the Rules, courts confronted with claims of systemic discrimination like those presented in *Wal-Mart* may decide to certify a class only for purposes of determining liability and assessing any appropriate class-wide remedy. At the remedial phase of the litigation, any individual plaintiffs who sought back pay damages based on that liability determination could pursue their individual claims. They could do so, under settled law, with the benefit of a presumption that the employer had discriminated in their particular cases.[87]

Bifurcation of class action suits in this manner is not new.[88] And, in fact, this was the approach taken by one court just after *Wal*-Mart was decided. In *United States v. City of New York*, the district court examined the impact of *Wal-Mart* on a certification order and observed that "*Wal-Mart* interpreted only Rule 23(a)(2) and (b). The Supreme Court did not have occasion to decide whether a district court may order (b)(2) certification, under Rule 23(c)(4), of particular issues raised by disparate impact or pattern-or-practice disparate treatment claims that satisfy (b)(2)'s

84. See, e.g., Hart, supra note 9 (discussing the unintended consequences of certain provisions of the Civil Rights Act of 1991).

85. Fed. R. Civ. P. 23(c)(4).

86. Fed. R. Civ. P. 42(b).

87. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358-60 (1977).

88. *See, e.g.*, Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 516 (1987) ("A class action should not be found unmanageable without exploring the procedural devices available [including] bifurcating liability and damages . . . .").

requirements."[89] This approach to class certification would permit consideration of the systemic nature of the claims at the liability phase without running afoul of *Wal-Mart*'s focus on the individual in considering certain remedies. Unfortunately, it would present a significant likelihood of denying compensation to class members who were victims of illegal discrimination, and a corresponding likelihood of under-penalizing an employer for systemic discrimination. It would, however, preserve the possibility of looking at the systemic claim at the liability phase for what it is—not an aggregation of many individual claims, but a wrong in itself, with harms that go beyond the specific, quantifiable damages payable to particular members of the class.

Recognizing the unique and independent nature of the harm caused by systemic discrimination is an essential goal for the future of discrimination law. Individual disparate treatment law is not sufficient to address the kinds of structural discrimination faced by many women today.[90] It is therefore essential to preserve some mechanism for widening a court's view to give an accurate picture of the structural, systemic harms being challenged in cases like *Wal-Mart*. To treat those few thoughtless paragraphs in the Supreme Court's decision as the last word on the viability of systemic disparate treatment claims would be to do a tremendous and unwarranted disservice to the fundamental principles of equal opportunity and nondiscrimination.

89. United States v. City of New York, No. C07-2067, 2011 WL 3174084, at *1396 (E.D.N.Y. July 8, 2011).

90. See, e.g. Green *supra* note 2 at 435 ("For reasons both practical and doctrinal, individual disparate treatment law, even properly constructed and applied, cannot fully address discrimination in the modern workplace."); Michael Selmi, *Theorizing Systemic Disparate Treatment Law After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477 (2011).