Theorizing Systemic Disparate Treatment Law

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I. Introduction

The "pattern or practice" cause of action is the most potent and least understood of the various causes of action recognized by Title VII. This is particularly true within the class action arsenal as the Supreme Court has devoted considerably more time exploring the contours of the disparate impact cause of action than the pattern or practice claim, and even the bona fide occupational qualification standard is conceptually clearer and far better understood. In contrast, over the course of thirty years, the Supreme Court has only directly addressed the theoretical underpinnings of the pattern or practice class action in a pair of cases from 1977, with one other case decided a decade later that has some application to the theory.[1] In no other area of antidiscrimination case law – indeed, perhaps no other area of law – are the leading cases now three decades old.

The lack of more extensive case law development is surprising given that there has been a substantial increase in disparate treatment class actions over the last fifteen years. This increase was prompted in large part by statutory changes implemented by the Civil Rights Act of 1991, which for the first time made damages available for claims of intentional discrimination.[2] While the damage provisions are capped at a relatively low $300,000 per individual, in the aggregate the claims can lead to staggering amounts of potential liability. With a possible class of a million members, the Wal-Mart case currently pending before the Supreme Court is potentially worth $30 billion. Not only have these outsized sums drawn attorneys – some of whom have migrated from securities claims – but they have also created strong incentives to settle cases. As a result, there is a surprising dearth of case law, even in the lower courts, regarding the liability requirements for pattern or practice claims.

Instead, what case law exists, has been created primarily in the context of class certification decisions.[3] And here there have been two strains to the law. One has focused

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[1] The two cases are: Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) and Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977). A case that also involved a disparate treatment class action was Bazemore v. Friday, 478 U.S. 385 (1986) but the relevant part of that case has to do with analyzing regression analyses in the context of salary discrimination.

[2] There has been a well-documented increase in class action claims, particularly among pattern or practice claims that provide the possibility of damages. How many cases are filed is far more difficult to assess. *See* Nancy Levit, *Megacases, Diversity & the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 368 (2008) (discussing rise in claims).

[3] *See, e.g.*, Dukes v. Wal-Mart, Inc., 556 F.3d 919 (9th Cir. 2010) (upholding class certification decision); Brown v. Nucor, 576 F.3d 149, 154-56 (4th Cir. 2009) (discussing statistics in race discrimination claim); Cooper v. Southern Co., 390 F.3d 695, 717-19 (11th Cir. 2004) (discussing statistical analysis in upholding denial of class certification). Because so many of the cases either settle or are abandoned after class certification, there are far more cases at the district court level. *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, et al., 2010 U.S. Dist. Lexis. 80002 (N.D. Ill.

primarily on the damage provisions, while another strain has concentrated on whether a common policy has been alleged to justify class action treatment. In terms of the law, the damage provisions have generated the most controversy. Prior to the 1991 Civil Rights Act, Title VII cases were routinely certified under rule 23(b)(2) because only injunctive and equitable relief were at issue.[4] From a plaintiff's perspective, the primary advantage of a 23(b)(2) certification is that there is no requirement to provide notice to class members until the remedies phase, thus preserving a large class from opt-outs and saving substantial sums of money.

In light of the 1991 damage provisions, several courts have refused to certify class actions because the damage determinations for individual class members require too much individualized consideration to warrant class treatment.[5] In most instances, this broad determination is flatly wrong. Remedies for class members have always required individual determinations, as was recognized thirty years ago in the *Teamsters* case even though at that time only backpay was at issue.[6] Moreover, the punitive damage assessment is unquestionably a classwide issue since no individual claim could justify a sufficiently large punitive damage award to serve as either a penalty or deterrent.[7]

The other line of cases focuses more on the question of "commonality" – whether the putative class members have been subjected to a sufficiently common practice that classwide treatment is appropriate.[8] This issue is more complicated than the damages question, and relates directly to the larger questions regarding the disparate treatment cause of action discussed in this essay.

2010) (denying certification); Duling v. Gristede's Operating Corp., 267 F.R.D. 86 (S.D.N.Y. 2010) (granting certification); Puffer v. Allstate Ins. Co., 255 F.R.D. 450 (N.D. Ill. 2009) (denying certification); Velez v. Novartis Pharms. Corp., 244 F.R.D. 243 (S.D.N.Y. 2008) (granting certification);Gastar v. Evelon Corp., 247 F.R.D. 75 (E.D. Pa. 2007) (denying certification); Nelson v. Wal-Mart Stores, Inc., 245 F.R.D. 358 (E.D. Ark. 2007)(granting certification); Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Ca. 2007)(same).

[4] Back pay was treated as equitable, and both disparate treatment and disparate impact cases were certified as 23(b)(2) classes. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1261 (D.C. Cir. 1984); Paxton v. Union Nat'l Bank, 688 F.2d 552, 566 (8th Cir. 1982); Chisholm v. United States Postal Serv., 665 F.2d 482, 488 (4th Cir. 1981); Pettway v. American Cast Iron Co., 494 F.2d 211, 257 (5th Cir. 1974).

[5] The best known of the cases is Allison v. Citgo Petrol. Corp., 151 F.3d 402 (5th Cir. 1998), which held that class certification was inappropriate unless the damages claim was "incidental" to injunctive relief, and further held that certification under Rule 23(b)(3) was inappropriate because the damage remedies were too individualized. Id. at 420. Only the 11th Circuit has taken a similar extreme position. *See* Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004).

[6] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358-59 (1977). The individualized hearings are colloquially known as Teamsters' hearings, and each class member begins with a presumption that she was discriminated against, which can be rebutted by the defendant. *Id.* at 359. The reality has been that the hearings prove too expensive and time-consuming, so class claims invariably settle and monetary relief is typically provided through a formula.

[7] Although the *Allison* case has received the most attention, the majority of courts to have addressed the issue have adopted more lenient certification standards. *See* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001)(permitting certification under 23(B)(2); Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003). The Seventh Circuit has held that certification under Rule 23(b)(3) may be the best course when damages are sought. See Jefferson v. Inersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999). For a discussion of the issues see Melllisa Hart, *Will Employment Class Actions Survive?* 37 Akron L. Rev. 813 (2004).

[8] This is the issue primarily at stake in the *Wal-Mart* case, namely whether plaintiffs have established a common practice that can warrant class treatment.

This paper will explore the origins and development of the pattern or practice cause of action, and then seek to position the sex discrimination case involving Wal-Mart in the context of that development. Regarding the *Wal-Mart* case currently pending before the Supreme Court, one of the central issues is determining whether it is a civil procedure case or a sex discrimination case, and I will concentrate on the latter issue and raise some concerns regarding the way the case has been presented. In particular, I will contend that it is no longer acceptable to rely on statistics without context to establish a pattern or practice claim; rather, it is incumbent upon plaintiffs to explain the story the statistical presentation is telling, and that story will generally deviate from the notion that class actions alleging systemic disparate treatment are merely a way to aggregate a large number of individual cases. Today the theory that underlies the pattern or practice claim involves a more complicated, and subtle, form of discrimination that is not tied to the aggregation of individual claims but instead identifies patterns that would not be evident if the focus was on the individual decisions.

II. The Origins of the Disparate Treatment Cause of Action

A. The Early Years.

When Title VII began to be enforced in the late 60s and early 70s, many of the cases were relatively easy and it made little difference whether a case was pursued as a disparate impact or disparate treatment claim. The remedies were the same, and the proof was also largely the same. Both causes of action involve an initial stage of proof that relies on statistics, and in both instances, the statistical proof proceeds in largely the same manner.

To establish either cause of action, a plaintiff must demonstrate a statistically significant disparity in the employer's workforce, relying on the appropriate benchmarks. If the case involves a hiring claim, the plaintiff will typically measure the hiring statistics against the applicant base, what is known as the applicant flow rate. If twenty-five percent of the applicants are African American, then the working hypothesis is that it would be expected that 25% of the hires would also be African American. Those expected hires are then measured against the actual hires to identify any statistical disparity in the process. (In a promotion context, eligible or qualified members of the workforce will typically be the benchmark.) Determining whether the observed disparity is meaningful is measured in standard deviations; borrowing from the social sciences, a disparity that is more than two standard deviations is defined as significant, and in the context of discrimination claims, is generally attributable to discrimination since the function of the standard deviation analysis is to rule out chance fluctuations.

This statistical means of proof is well-known but the causal attribution is less well understood, and raises an important contrast to the disparate impact claim. Although the statistical proof is identical, in a disparate treatment, or pattern or practice claim, the statistics are used to prove intent, whereas under the disparate impact theory, no intent is required and the statistics are used to establish that an employer's practice has an adverse effect on a protected group. Here we see the primary difference between the two theories – in a disparate impact case, the plaintiff is challenging a particular practice, most commonly a written test, and is effectively arguing that the use of the test is unjustified in light of the demonstrated adverse impact.

A quick example will help illustrate the contrast with the pattern or practice claim. In the famous case of *Duke Power Co. v. Griggs*, the employer administered two written tests on which African Americans fared much worse than their white counterparts.[9] Because of that adverse impact, the employer was called upon to justify its test, to demonstrate that the examination provided valuable information to the employer in a way a different test, or different practice, could not do with less adverse impact. Importantly, a disparate impact cause of action is not so much concerned with why the test had adverse impact but rather is focused on why the employer is using the test.

The law, and I would say the justifications, surrounding the disparate impact theory are well-established but it has always been controversial because of the absence of intent. Indeed, since its creation, the disparate impact theory has drawn the ire of conservatives, and is frequently derided as prompting employers to institute quotas in order to avoid a disparate impact claim.[10]

The contrast with the pattern or practice claim is telling. As noted previously, in a pattern or practice claim, the statistics are used to establish an intent to discriminate. Here we can look to the seminal case of *Teamsters v. United States*, where the government sued an employer and the union because of a dearth of African American and Latino line drivers. Although there were a substantial number of African Americans and Latinos who worked for the company, very few were line drivers, which were the most lucrative jobs with the best promotional opportutities.[11] The observed disparity was statistically significant but rather than identify the practice that caused the disparity, as would be required in a disparate impact case, the burden was on the employer to explain why the observed pattern was not the product of discrimination. The employer might have suggested that Africans did not want to be drivers, or perhaps that they did not have drivers' licenses, or were worse drivers but no matter the explanation, the presumption that arose from the statistics was that the employer had a pattern of discriminating against African Americans in its hiring process, that discrimination was "the standard operating procedure," to borrow the talismanic phrase of the case.[12]

What is perhaps most important to understanding the theory, if the employer is unable to explain away the statistical disparity, no other defense is available. There is a certain amount of logic to this because the absence of an employer explanation leaves discrimination as the only reasonable inference, at least in the way the cases unfold because the statistical presentation establishes discrimination as the presumptive explanation for the disparities by eliminating chance as the cause. But this is quite different from a disparate impact claim where the plaintiff

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[9] 401 U.S. 424 (1971).

[10] This concern with quotas was made explicit in two controversial disparate impact cases decided in the late 1980s. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[11] 431 U.S. at 337. Approximately 9% of the employer's workforce was comprised of African Americans and Latinos, but less than 1% served as line drivers. *Id.* Approximately 80% of the Latino and African American workers "held the lower paying city operations and serviceman jobs . . ." compared to only 39% of the white employees. *Id.* In a closer case, a plaintiff might have focused on a broader labor pool, rather than looking to the employer's workforce, assuming discrimination may have affected the original hiring decisions.

[12] *Id.* at 336.

must identify the practice that has caused the disparity and thereafter the employer has the opportunity to justify its practice as dictated by the needs of the business. In a pattern or practice claim, there is no business justification, rather the employer offers alternative explanations, or challenges the meaningfulness of the plaintiffs' statistics.

There is, to be sure, a potential overlap to the theories. Returning to the *Teamsters* example, if it turned out there were no African-American line drivers because as a class African Americans did not have the requisite drivers' licenses, then the case might be transformed into an impact case with the question being whether the employer could justify the use of a drivers' license as a hiring qualification. Obviously, this does not sound like a viable disparate impact claim because a drivers' license seems essential but the point is that there is often an intersection between the cases, and when the remedies were identical, it did not matter much what the case was called, even though the proof structures varied then and now.

It was also relatively easy to draw inferences of discrimination based on statistics when the cases arose in the 1970s. In the early cases, there was often not much of a need to explain the source of the statistical disparity given that employers routinely discriminated against African Americans and women prior to the passage of the 1964 Act, and those habits appeared to die quite slowly. A central question in many of the early cases was whether employers could be held responsible for their blatant discrimination that occurred before the 1964 Act became effective, and an important part of the *Teamsters* case involved a seniority system that privileged whites over African Americans because African Americans had been purposefully excluded from employment prior to the 1964 Act. The Supreme Court upheld the seniority system, and approved of similar systems so long as they were not enacted with the intent to preserve a segregated workforce.[13]

This is where the theoretical schism develops. In the seniority context, or in a case like *Griggs*, an intent to discriminate would require proof that the employer adopted the practice in order to perpetuate the past discriminatory regime. So in the *Griggs* case, this would have meant that the employer chose the particular tests, or implemented the testing requirement, to ensure that African Americans would be confined to the lowest rung of jobs, as they had been prior to the 1964 Act.[14] Or in the *Teamsters* case, the employer would have had to implement a seniority system with the intent to keep African Americans out of the most desirable jobs.

The concept of intent that underlies the pattern or practice claim is quite different, at least on the surface. In a disparate impact claim, it is generally possible to pinpoint a decision -- to locate an agent or an explicit policy that is at the center of the allegations, and it is mostly a specific act.[15] The pattern or practice claim, on the other hand, does not necessarily involve an agent or policy, though either or both might be present. It instead represents a legal judgment about the source of the disparity and traditionally this has been a legal judgment based almost entirely on statistics. This is akin to how George Rutherglen described the disparate impact

[13] 431 at 343-61.

[14] Under *Personnel Adminstrator v. Feeney* it is not enough that an employer is aware of the disparity or the effects of a practice. *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

[15] It is possible to challenge a subjective decisionmaking process under the disparate impact theory, but those claims typically proceed as intentional discrimination cases.

theory – a sophisticated means of proving intentional discrimination that might otherwise go undetected because the proof was too complicated.[16] But in the early years, the statistics simply supported both history and one's own intuitions, as there was no mystery why there were no African-American truck drivers in the *Teamsters* case, or why, in the other pattern or practice case decided at the time, there were so few African-American teachers in the suburbs of Saint Louis.[17] Absent some explanation offered by the defendant, it was reasonable to conclude that the disparities were the product of intentional discrimination.

The curious *Furnco* case actually provides the best insight into the inferences the statistical proof permits.[18] *Furnco* involved three African-American bricklayers who complained about a company's refusal to hire among those who showed up at the gate, but instead relied on employee referrals. The case was too small to be a class action but part of the discussion in the lower courts was whether the case should be treated as a disparate impact case, with the referral policy serving as the practice that had a disparate impact.[19] Another part of the case involved the question whether an employer was required to use a practice that would maximize the likelihood of having a diverse workforce, a question the Court answered in the negative.[20] But in the Court's discussion, there was the best explanation for why we are able to draw inferences of intentional discrimination based solely, or primarily, on statistical proof.

As the Court explained, we assume employers have taken their actions purposefully, in other words the composition of the workforce was not accidental or random, and we also assume the employer is aware of that composition.[21] It is always possible that the observed disparities are the product of chance or are too small to be attributable to intentional acts, but the statistical presentation eliminates both of those possibilities, indicating that something else must have caused the pattern. Under the *McDonnell-Douglas* schema developed for individual cases but with application to the pattern or practice cause of action, the other obvious explanations are the qualifications of the applicants and the lack of available jobs,[22] and there might be other explanations as well, but without some plausible explanation, courts reasonably conclude that the statistically significant disparity is the product of intentional discrimination. As a result, the

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[16] *See* George Rutherglen, *Disparate Impact Theory Under Title VII: An Objective Theory of Discr*imination, 73 Va. L. Rev. 1297 (1987).

[17] *See* Hazelwood Schl. Dist. v. United States, 433 U.S. 299 (1977)(challenging the absence of African-American teachers in St. Louis suburb). In the same year, the Supreme Court addressed (and upheld) a policy that prohibited women from working as correctional officers in a male prison. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977)(challenge to policy excluding women from serving as correctional officers in male prison). The *Dothard* case has always been a bit of a curiosity as it had both a disparate impact claim (challenge to height and weight requirements) and an explicit exclusionary policy that was defended as a bona fide occupational qualification (bfoq).

[18] 438 U.S. 567 (1978).

[19] *Id.* at 575 (agreeing with Court of Appeals that disparate treatment was the proper framework). In dissent, Justices Marshall and Brennan disagreed that the case should only be addressed as a disparate treatment claim. *Id.* at 582 (Marshall, J., dissenting).

[20] *Furnco*, 438 U.S. at 578 ("noting that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.").

[21] *Id.* at 577 ("[W]e are willing to presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such a race.").

[22] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Teamsters and *Hazelwood* cases allow an inference of discrimination based solely, or primarily on statistical analysis, and it is up to the employer to explain why that inference is inappropriate.

This proof structure worked reasonably well in the 1970s and through much of the 1980s when few would contest drawing such an inference in light of compelling statistical proof. Yet, as we moved further away from the time when employers plainly and openly excluded African Americans, Latinos and women from their workforces, it was less clear, at least to the courts, that discrimination always provided the best explanation for the observed disparities. Importantly, while social conditions have surely changed, the theory underlying the pattern or practice cause of action has not, and indeed, the mid-1970s cases of the *Teamsters* and *Hazelwood* remain surprisingly relevant today. Those cases, however, were of a particular era, and neither offered sophisticated statistical analyses or a deep discussion of the theory for why statistics can prove intent. And, for reasons discussed in the next section, drawing inferences when the case involves gender discrimination requires a deeper explanation.

B. Gender and the Pattern or Practice Cases

Many of the early pattern and practice cases involved issues of race discrimination, whereas the early gender cases often involved explicit gender policies that were analyzed under the bona fide occupational ("BFOQ") qualification affirmative defense. This was not just a difference in statutory focus but it also highlights an important difference between race and gender that made the pattern and practice claim less obviously suitable for gender cases. The question in the BFOQ cases was whether an employer's explicit gender policy could be justified under a rigorous test of necessity; could, in other words, an employer exclude women from working as correctional officers in a male prison, or alternatively, could an employer only hire women as flight attendants?[23] In the context of race, no such question is permissible because the law does not recognize distinctions between whites and African Americans in the way that it does for gender. Returning to the *Teamsters* case, while there was some theoretical possibility that African Americans were not interested in being line drivers, that assumption would be quite tenuous and a court would likely have no trouble drawing an inference that the absence of African Americans in those positions was the product of discrimination. But the same is not true when the focus is on women – the absence of women as truck drivers would not lead, at least without some further proof, to the same conclusion. Truck driving is a traditionally male job for which women may simply have been uninterested for reasons independent of the employer's actions. Or, to take another example on which there was considerable litigation in the 1970s, lawsuits alleging gender discrimination in fire departments had to determine what the appropriate benchmark might be as it seemed unlikely that women would be interested in firefighting at the same levels of men.[24] In the context of race, there again would be no reason to think that African Americans had different interests than whites in firefighting.

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[23] As noted previously, the Supreme Court answered the first question affirmatively in a case involving male prisons in Alabama that were, in the Court's language, "out of control." *See* Dothard v. Rawlinson, 433 U.S. 321 (1977). Since then, there have been a number of successful challenges to policies that restrict women to women's prisons. *See, e.g.*, Gunther v. Iowa State men's Reformatory, 612 F.2d 1079 (8th Cir. 1980); Griffin v. Michigan Dept. of Correction, 654 F. Supp. 690 (E.D. Mich. 1982). One of the more well-known BFOQ cases is the district court decision invaliding Southwest Airlines' policy of only hiring women as flight attendants. *See* Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981).

[24] *See, e.g.*, Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983).

This leads to one of the more well-known disparate treatment cases involving Sears and its commissioned sales positions. This was an early case that has drawn a substantial amount of attention from academics but it also demonstrates the need for a deeper theoretical understanding of the pattern and practice cause of action for claims of gender discrimination. At Sears, most of the commission jobs – which paid substantially more than the non-commission jobs – were held by men, and the EEOC sued alleging that the company was discriminating against women in those job assignments.[25] Had this been a race case, an inference likely would have arisen rather straightforwardly, but when it came to women, discrimination did not appear to be the most obvious explanation for the predominance of men. Maybe women were not interested in the commissioned sales jobs, maybe they did not like the pressure or the hours, the uncertainty of pay, or maybe they did not have the knowledge necessary to sell the big-ticket items.[26] This is not to suggest that any of these explanations were true only that they seemed plausible and required refutation.

Many of the class action gender discrimination cases that have arisen over the years have lent themselves to statistical proof, as no great leap, or even a baby step, was required to draw the necessary inference of discrimination. This was true in the many cases involving the exclusion of women from stock broker positions or similarly the cases involving insurance brokers.[27] In both cases, women were concentrated in lesser jobs but the nature of the industries made it rather clear that the more desirable jobs were male bastions of privilege and that intentional discrimination best explained the clear patterns of job assignments. This statement should be qualified in that all of the cases settled so it is not entirely clear what a court might have accepted but, in context, these cases presented compelling claims of gender discrimination.[28]

The cases just discussed arose in the 1970s and early 1980s, although some carried over into the 1990s. This was also a time when the Court's docket was still occupied with express gender classifications involving pensions, leave practices or restrictions on hazardous jobs.[29] As those restrictions and relatively easy claims faded, the cases have necessarily become more complicated – not in all circumstances, but it was no longer as easy to ascribe the absence of women to discrimination and stronger proof was required.

C. The Wal-Mart Class Action

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[25] *See* EEOC v. Sears, 829 F.2d 302, 320-21 (7th Cir. 1988).
[26] *Id.* at 320-22.
[27] There were a large number of cases filed in the 1990s, particularly in the securities industry, and most of the cases followed a typical format where the plaintiffs demonstrated that women were largely excluded from jobs as brokers. I have discussed these cases in detail in Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 Empl. Rts. & Employ. Pol'y J. 1, 6-12 (2005).
[28] One of the cases involving grocery stores went to judgment on liability and then settled in the remedies phase. *See* Selmi, *supra* note --, at 5-6. The case involving Lucky Stores is discussed further below.
[29] *See* City of Los Angeles v. Manhart, 435 U.S. 702 (1978)(sex-based actuarial tables); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Monell v. Dept. of Social Serv., 436 U.S. 658 (1978)(mandatory leave for pregnant employees). There were also a significant number of constitutional cases involving explicit gender classifications. The constitutional cases are discussed in a recent lecture by Ruth Bader Ginsburg, who was the principal attorney in many of the cases. *See* Ruth Bader Ginsburg, *Muller.v. Oregon: One Hundred Years Later*, 45 Williamette L. Rev. 359, 373-78 (2009).

In this section, I want to explore why the Wal-Mart class action raises concerns within the pattern or practice framework, and not just among conservatives who are likely skeptical of all current class actions but as a broader means of fitting the claims within the disparate treatment framework. Before I do so, I should say that based on all that I know about Wal-Mart, I have little doubt that over the years they have discriminated against women and most likely as a result of companywide perceptions about the proper role of women who are likely seen as incidental employees rather than management material. The point I want to make below is that the current litigation is a poor vehicle for proving discrimination.

The *Wal-Mart* case has drawn attention because of its size but, in contrast to their early strategy, the defendant has now realized that simply emphasizing its size offers a weak defense. It simply cannot be the case that an employer is too big to sue. Yet, the size of the employer is not irrelevant either, particularly in the case of Wal-Mart which provides substantial discretion to local stores on their employment practices. Indeed, the plaintiffs' legal theory sounds internally contradictory – their principal argument is that Wal-Mart has a central policy of decentralization. While that argument seems a bit strained, the underlying theory is perfectly ordinary – Wal-Mart has consigned women to the least desirable jobs and has discriminated against them in promotional opportunities, and pay. There are two facets to the proof scheme that are also perfectly ordinary. The case is modeled on a series of cases involving grocery stores that date back to the 1980s, which in turn influenced the Home Depot litigation a decade later.[30] Additionally, the plaintiffs have employed a team of experts who have performed a number of statistical analyses that consistently demonstrate large statistical disparities in promotions and pay of women, holding relevant factors constant.

In her dissenting opinion from the Ninth Circuit's decision, Judge Ikuta wanted more.[31] Although her call for an explicit policy is plainly misguided, her instincts are understandable. Unlike the situation with race, there is no natural inference that the observed disparities are the product of discrimination, particularly with an employer the size of Wal-Mart. One of the well-known statistical principles that has particular force in class action litigation is that it is generally easier to find statistically significant relationships the larger the sample size (and conversely, progressively more difficult the smaller the sample, an issue I will turn to in a moment). There are, to be sure, various statistical techniques that take into account the sample size, but it is still the case that finding statistically significant relationships amongst a million or more employees is not particularly difficult.

This does not mean that the relationship is spurious, in fact, some would argue it makes the relationship more meaningful because of the greater number of observations. At the same time, it makes one wonder, and that is true with much of the way this case – and many like it – has unfolded. Indeed, I would suggest that a significant problem with the Wal-Mart class action is that it is a template cause of action – the arguments made by both sides in the Wal-Mart litigation have been advanced for at least the last twenty years, and typically by the same set of

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[30] *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 Tex. L. Rev. 1249, 1283 (2003) (noting that the Home Depot litigation was modeled on the "successful litigation against grocery stores . . . ").

[31] *See* Dukes, 603 F.3d at 632 (emphasizing the absence of a formal policy of discrimination).

experts, one set of which always sees discrimination while the other never does. As I noted previously, this strikes me as a terrible way to establish the presence of discrimination.

There are a large number of experts doing battle in the Wal-Mart litigation but I want to focus on two of the experts who are particularly important to the ultimate determination whether the observed patterns should be defined as discrimination. Joan Haworth is the defendant's primary expert, and she has been testifying for defendants in class action discrimination cases going back to the 1980s. As the founder of ERS Group, it is no surprise that she is a professional expert witness but it is her methodology that should raise concerns. Going as far back as the *Sears* litigation, Dr. Haworth has relied on a strategy of divide and conquer – no matter the circumstance it seems that she finds a way to disaggregate the data into smaller units so that statistical significance will often be difficult to identify.[32] In the context of the *Wal-Mart* litigation, Dr. Haworth's modus operandi is to evaluate the company's practices not on a nationwide level, or regional level, or even on a store level but at the department level within stores, the smallest unit of analysis possible. There is some possibility that this is a correct means of analysis but it is certainly not a new strategy for Dr. Haworth – she made a very similar argument in the early 1980s in the Sears litigation, and in virtually every published case in which she has testified.[33] Moreover, at least from the published opinions, it seems that Dr. Haworth has never identified discrimination within any employment context.

Dr. Haworth has not been alone in her rote methodology. Her worthy adversary for the plaintiffs has been Professor William Bielby, who first did battle with Dr. Haworth in a case involving Lucky Grocery stores that was filed in the 1980s. Like Dr. Haworth, Dr. Bielby seems to move from case to case relying on the same methodology, namely that the observed gender disparities are the product of gender stereotyping.[34] One problem with his analysis is that it is too often more generic than specific. He references the subjective nature of the promotion system, typically mentioning that the employer uses a "tap on the shoulder" promotional system rather than relying on formal job posting, and talks about the perceptions of the proper role of women.[35] But the methodology has rarely changed. To give an example, we can take a quick

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[32] *See, e.g., id.* at 334 (criticizing Dr. Haworth's adjustment for "product lines" which had the effect of reducing expected female promotions). Dr. Haworth also conducted "cohort analyses" on the wage claims, which compare individuals on very specific criteria and has the tendency to mask significant relationships because the comparisons are among very small grouping.

[33] *See, e.g.*, McReynolds v. Sodexho Marriott Servs., 349 F. Supp.2d 1 (D.D.C. 2004); Cooper v. Southern Co. 390 F.3d 695, 718 (11th Cir. 2004); Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 653 (N.D. Ga. 2003); Donaldson v. Microsoft Corp., 205 F.R.D. 558, 563 (W.D. Wa. 2001); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 755 (4th Cir. 1998); McKnight v. Circuit City, 1996 U.S. Dist. LEXIS 11616 (E.D. Va. 1996); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1287 (5th Cir. 1994). Dr. Haworth has been testifying for just about as long as there has been employment discrimination testimony. *See* James v. Stockholm Valves & Fitting Co., 559 F.2d 310 (5th Cir. 1977).

[34] While Dr. Bielby does not seem quite as prolific in his testimony as Dr. Haworth, he makes frequent appearances in the judicial process. *See, e.g.*, McReynolds v. Merill Lynch, Pierce, Fenner & Smith, 2011 U.S. Dist. LEXIS 14360 (N.D. Ill. 2011); Dlin v. Gritede's Operating Corp., 267 F.R.D. 86 (S.D.N.Y. 2010); Gutierrez v. Johnson & Johnson, 467 F. Supp.2d 403 (D.N.J. 2006).

[35] The "tap on the shoulder" claim also makes frequent appearances in litigation. *See* Duling v. Gristede's Operating Corp., 266 F.R.D. 66 (S.D.N.Y. 2010); Johnson v. Kraft Foods N. Amer., Inc., 2007 U.S. Dist. Lexis 55403 (D. Kan. 2007); Carlson v. C.H. Robinson, 2005 U.S. Dist. Lexis 5674 (D. Minn. 2005); Shores v. Publix Super Mkts., 1996 U.S. Dist. Lexis 3381 (M.D. Fla. 1996).

look at the case involving Lucky stores, which involves the only published opinion on liability in the series of grocery store cases.

The grocery store cases, including Lucky's, focus on job assignments and limited promotional opportunities for women. In most of the cases, women were clustered in less desirable departments, particularly bakeries which were relatively new at the time the cases began, while men dominated in the more important and profitable departments, which included produce and meat. Those assignments led to differences in pay and differences in management opportunities. In his testimony that was delivered in the late 1980s, Professor Bielby attributed the patterns to gender stereotyping: "Stereotypical perceptions sustain sex discrimination in higher level jobs, as individual women are evaluated according to Store Managers' perceptions of women as a group rather than as individuals."[36] His testimony, as summarized by the court, also noted that subjective decisionmaking is more prone to the influence of stereotyping. The District court noted:

> Dr. Bielby concluded that Lucky's NCD workforce is highly segregated by sex in the assignment of employees to jobs, departments, shifts, and hours. Vague and ambiguous criteria and limited accountability reinforces the influence of gender stereotypes on manager's decisions about assignment of women to jobs, departments, shifts, hours, and training opportunities and manager's decisions about promotion of women into management level positions. Given the high level of ambiguity and individual discretion involved in making such decisions, it is inevitable that personnel practices will be influenced by stereotypes regarding gender and race.[37]

This conclusion could have been lifted directly from the Wal-Mart class certification material, or any of the many cases in which a pattern of sex segregation is observed. Indeed, the primary problem with this testimony is that it is so generic in nature without any clear reference to the particular employment practices of Lucky stores. And the generic nature of the testimony is likely the kind of issue that prompts a more conservative judge to ask for more, for a specific policy or identifiable practice as Judge Ikuta did in her dissenting opinion.

Dr. Haworth's testimony fares no better but the nature of the case produced slightly different statistical moves. Consistent with the notion that defendants want smaller samples, Dr. Haworth sought to work with fewer applications than the parties had agreed to.[38] She also disregarded "applications that were for jobs other than those at issue in the litigation," even though "55.18%" of the applications that sought "any job' were from women.[39] Much like her testimony in the *Sears* case, and again in *Wal-Mart* litigation, Dr. Haworth testified that women have different preferences than men which may have led to the different assignments, hours and pay.[40]

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[36] Stender, 803 F. Supp. at 302.
[37] *Id.* at --.
[38] The initial database included 28,000 applications and the parties stipulated to a sample, though Dr. Haworth ultimately reduced that sample by nearly a quarter. "The sample which Dr. Haworth obtained contained about 24% fewer applications than was prescribed in the original sample plan." *Id.* at 311.
[39] *Id.* at 312. The Court ultimately found that Dr. Haworth's data and conclusions were unreliable. *Id.* at 329.
[40] *Id.* at 313-14.

It may seem unfair to criticize the expert testimony in this fashion; after all, experts are not expected to be neutral and the experts involved in these class actions are likely no different than the hundreds or even thousands of experts who testify in similar cases. At the same time, this returns us to what I stated at the outset of this paper – the pattern or practice cause of action is undertheorized particularly in the context of gender. The pattern of these cases is so plain that we are left with little more than a normative judgment regarding what best explains the segregated nature of the workplace – stereotypical thinking in the form of subjective and ambiguous criteria or different preferences of men and women. How one chooses between these options is likely to depend more on ideology than on any factual presentation and experience tells us that plaintiffs typically do not fare well under those circumstances.

Here we can contrast the disparate impact cause of action. Although experts typically testify both as to whether there is a statistical adverse impact, and whether the employment practice is valid or can be justified under the business necessity test, there is no need for the inference of discrimination that is called for under the pattern or practice claim. Rather, the cause of action provides the necessary inference: where a neutral practice has adverse impact, the employer must justify that practice or the law labels the situation as discriminatory. In that context, we know what caused the disparity, it was the neutral identified employment practice. However, in the pattern or practice setting, the primary question is what caused the disparity, not whether the disparity can be justified.

This leads us to a precarious spot but one that should be familiar to any litigator. Ultimately, the question of what caused the disparity is a factual question for the jury and there may not be much to improve on from that perspective. The problem, of course, is that most of the class action cases will settle long before a jury is impaneled, and it is difficult to know how this fact should play into the class certification analysis. From a purely legal standpoint, this fact should be mostly irrelevant to whether a class is certified but from a practical standpoint it is difficult to deny the reality that class certification is most often akin to a determination of liability, and that is why it is difficult to avoid some inquiry into the merits, and why, I also think it is important that the cases be presented with a sound theoretical foundation, an issue I turn to now.

III. Defining Discrimination in a Pattern or Practice Case.

One reason why the disparate impact theory conceptually works is that there is the equivalent of a statutory definition of discrimination. Under the disparate impact theory, discrimination is defined as an employment practice that causes an adverse effect upon a protected group that is not justified by the needs of the business. There is, however, no equivalent statutory definition for the pattern or practice claim, other than the loose definition derived from the *Teamsters* case that the plaintiff must establish that discrimination is "the standard operating procedure."[41] But that phrase does not move the debate forward because it does not tell us when an employer's standard operating procedure is discrimination. The pattern or practice cause of action has escaped scrutiny for the last twenty years, but now that it is under

[41] 431 U.S. at 336.

scrutiny, we need a better understanding of what discrimination means when a pattern or practice claim is alleged.

We can initially attempt to define discrimination in the negative, by what it is not, or more accurately by what contemporary courts are not likely to accept as the equivalent of discrimination. Falling into this category is a statistical imbalance in the workforce, without at least some attention paid to qualifications and interest. This may be less true of some issues than others. Gender segregated job assignments are more likely to give rise to an inference of discrimination than promotional positions because the latter turns more on qualifications, seniority and interests than the former. A plaintiff, however, will almost always have to do more than establish a statistical imbalance, as it will also have to demonstrate that the cause of that imbalance is discrimination. Statistics will be the starting point but they will rarely be sufficient to prove a claim.

The caveat mentioned above – what a court is likely to accept -- proves important here because under a strict reading of the *Teamsters* case, a statistical imbalance is sufficient to establish a claim, at least for unskilled jobs. In *Hazelwood*, the Court emphasized the importance of looking at the qualified pool, which requires taking into account minimum requirements though once qualifications are controlled for, a statistical imbalance can be sufficient to demand an explanation from the employer.[42] Today, however, it would be a mistake to rest solely on a statistical imbalance. Although neither case has been overruled or even modified, their force has clearly eroded over time, and in other contexts, the Supreme Court has repeatedly cautioned against the possibility of holding employers liable solely for a statistical imbalance in its workforce.[43]

Along the same lines, it seems insufficient to suggest that a statistical imbalance is invariably the product of subjective decisionmaking or the lack of formal job posting. There is little question that subjective decisionmaking – the presence of discretion – can lead to gendered job patterns, but it cannot be the case that the presence of subjectivity or discretion, in combination with a statistical showing, is per se proof of discrimination.[44] That conclusion is simply too far reaching, and something the law is not likely to recognize.

That is why many, like Judge Ikuta and the late scholar Richard Nagareda,[45] seek a formal policy, although as noted previously, a formal policy is not required and would likely be adjudicated under other causes of action. An informal policy, on the other hand, is really what is at issue, and it seems that to establish a pattern or practice of discrimination will require some specific showing of the influence of gender on the particular defendant, rather than more

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[42] *Hazelwood*, 433 U.S. at 309-10 (noting that "one a prima facie case has been established by statistical workforce disparities" the employer has an opportunity to demonstrate the disparities are the product of lawful forces).

[43] *See* Watson, 487 U.S. at 992 ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."). A similar sentiment has guided case law in the context of contract set-asides and voting rights. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989); Shaw v. Reno, 509 U.S. 630, 647 (1993).

[44] The Supreme Court noted this proposition many years ago. *See* Watson, 487 U.S. at 990 ("It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.")

[45] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU L. Rev. 97, __ (2009).

generically. While I fully agree that discrimination often is a structural practice where it is difficult to pinpoint specific agents or causes, I do not believe courts are likely to hold employers liable for facilitating discrimination in a passive way, either by allowing external forces to influence labor patterns or by failing to take affirmative steps to ensure gender parity in positions or pay. Holding employers liable in such situations would come close to requiring some form of affirmative action, something no court is likely to require. Instead, it is necessary to establish that the employer should be held liable for its own acts of discrimination, whether those acts are traced to particular individuals or broader cultural norms within the firm.[46] This latter point is important in that I want to distinguish broader cultural norms from generic lessons on stereotyping. Let me offer an example by turning to a recent litigated case involving the drug manufacturer Novartis.

The case, which involved 5,600 female sales representatives, had many similarities to the Wal-Mart claims – the representatives were arguing that they had been denied pay and promotions and subjectivity and stereotyping were part of the plaintiffs' claims. But the case also had a more distinctive story. Central to the claims were companywide practices that penalized pregnant women, particularly those who took maternity leave who were often denigrated for their allegiances.[47] There was also considerable testimony regarding a firm culture that permitted and tolerated sexual advances by doctors on the female sales representatives. One individual testified that she was raped by a doctor at a company-sponsored outing and then repeatedly told to drop her allegations because the doctor was a heavy prescriber of Novartis drugs. Although much of the testimony involved individual women and individual corporate employees, the plaintiffs were able to paint a picture to demonstrate that sex discrimination infiltrated the entire company. Obviously, 5,600 employees is considerably smaller than the Wal-Mart class, but rather than the size it was the way in which the case focused on the culture at Novartis that distinguishes the case from other more generic claims.[48]

By emphasizing the individual stories in the Novartis litigation, I do not mean to place any importance on the anecdotal evidence that traces its pattern and practice origins to the *Teamsters* case.[49] Anecdotal evidence is largely meaningless in a class action pattern or practice case, though it may offer some context for the statistical evidence, which is always the most important. What was significant about the Novartis litigation is that the plaintiffs were able to weave together a coherent narrative about corporate culture through a collection of individual stories that reached the top echelon of management and thus could be seen as indicative of a

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[46] Here I part company with the position articulated by Professor Green. Tristin K. Green The Future of Systemic Disparate Treatment Law, manuscript Dec. 2010 at 43 ("[S]ystemic disparate treatment law does not require plaintiffs to present social science testimony to the effect that particular organizational or institutional features either are producing or did produced the observed disparity. Plaintiffs need only prove widespread disparate treatment within the organization, and social science testimony can be used to help make that showing.").

[47] *See, e.g.*, Velez v. Novartis Pharms. Corp., 244 F.R.D. 243 (SDNY 2007); Editorial, *Could You Throw in Some Sex With That? Female Sales Reps at Novartis Were Expected to Offer Special Premiums*, Pittsburgh Post Gazeette, May 23, 2010, at B-3; Duff Wilson, *Women Win Bias Suit Against Novartis*, May 18, 2010, NY Times, May 18, 2010, at B3; Duff Wilson, *Novartis Bias Trial to Begin*, NY Times, April 7, 2010, at B1.

[48] After a $250 jury verdict, most of which came in the form of punitive damages, the parties later settled for more than $150 million. Larry Neumeister, *Novartis to Pay Up to $152 Million in Bias Award*, Detroit Free Press, July 15, 2010, at B5.

[49] 431 U.S. at 439 (noting that "[t]he government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination.").

companywide policy. That narrative was then bolstered by the statistical presentation, rather than having the statistical presentation do all of the work.

Something similar occurred in the series of cases that were filed against the securities firms, where the boorish daily behavior by male stockbrokers evinced a hostility to women that supported the claims of pay and assignment discrimination. Given the historic all-male nature of the securities industry, and the macho behavior evident in even the contemporary workplaces, it was not difficult to assign women's lower pay and segregated job assignments to discriminatory treatment.[50] Indeed, in this situation no social framework evidence was necessary as the workplace effectively spoke for itself.

This is not to suggest that it should always be necessary to have this kind of harassment evidence for a pattern or practice case to succeed – what might be seen as a form of "pattern or practice plus" building on the much (and properly) maligned pretext plus theory.[51] But it is to suggest that plaintiffs should do more than provide a generic claim of discrimination of the form subjective decisionmaking is a vehicle for stereotyping and thus explains the observed gender disparities. Plaintiffs should craft a story, a narrative, that explains how stereotyping has, in fact, crept into the defendants' workplace, and how the workplace is, in fact, influenced by stereotyping. This does not have to be in the form of a written policy or practice, or overt statements by management, and I believe that the continued search for such explicit indicators is a misguided quest for the kind of discrimination that is largely a thing of the past. The desire for such explicit statements and policies is attributable to our societal failure to conceive of discrimination in a broader context, our failure to understand the way in which contemporary discrimination operates.[52] Against this backdrop, the plaintiffs' task is to explain the contours of contemporary discrimination but explain it in ways a jury, or a judge, is likely to accept.

This is the intent of the social framework evidence but its generic nature, at least as implicated in the employment discrimination cases, renders the evidence far less convincing than it should be. Here I am focusing on the social framework testimony of experts like Dr. Bielby who opines on how subjective decisionmaking is vulnerable to the influence of gender stereotyping.[53] The problem with such testimony is that it condemns all subjective decisionmaking, and would apply to virtually any employer who relies on subjective assessments as part of its employment practices, as most employers do in one form or another. In contrast, is the testimony that was introduced in *Novartis*, where the presence of stereotyping could be seen in the employers' actions over time, or in the well-known *Price Waterhouse* case where the

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[50] *See* references cited *supra* note --.

[51] The concept of "pretext-plus" is that a plaintiff in an individual case must offer evidence beyond pretext in order to prevail on a discrimination claim. See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991). The theory was put to rest by the Supreme Court which has stated quite definitively that proof of pretext can suffice as proof of discrimination. *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

[52] I have discussed this issue at greater length in Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279 (1997).

[53] In what appears to be a very similar case filed against Costco, Dr. Bielby was replaced by the eminent sociologist Barbara Reskin, but it appears that her testimony largely mimics what Dr. Bielby has been offering. *See* Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (2010)(certifying the class).

expert witness testified about the company's actual practices and explained why those practices should be seen as influenced by gender stereotypes.[54]

As an abstract matter, I am not at all certain plaintiffs should be required to provide such evidence tailored to the specific workplace but this determination is influenced by my own views of how discrimination operates, which is largely consistent with the emphasis on structural discrimination. Yet, it is structural discrimination that is influenced by a distinctive culture, and it is that culture that I think plaintiffs should explain and explore in the course of the litigation. This is quite different from the rather absurd suggestion that a plaintiffs' expert should be required to conduct a study of a particular workplace to unearth discrimination.[55] Such a suggestion is simply a way to insulate employers from liability as no employer would tolerate a plaintiff-driven study, and if they did, it would be extremely difficult to identify the influence of gender or racial stereotypes through a single study.

Instead, the plaintiff should do what many plaintiffs are already doing – explain not just how a system is vulnerable to discrimination but how discrimination has influenced the employment process. In many circumstances, one could begin with the defendants' preferred defense in gender discrimination cases, that women lacked interest in promotions or different job assignments. Assuming that defense is not based on meaningful empirical data, it is likely the product of stereotypical thinking. Similar arguments about women's availability that are again not supported by anything other than management's perceptions should also support the stereotyping inference. Those arguments can be developed through depositions and often documents, and the social framework kind of evidence can then be used to interpret those statements and documents, much like was done in the *Price Waterhouse* case.

There is another, in some ways more complicated, means of telling a story through the data. Plaintiffs might seek to explain the patterns evident in the data. Currently, most plaintiffs are content to rely on statistically significant differences as proof of discrimination without much additional explanation, but as noted previously, this inference no longer flows so readily from the data. Instead, plaintiffs need to provide meaning to the observed patterns. For example, a statistical pattern might simply be an efficient means of aggregating individual decisions. Under this view, each individual discriminatory decision could be identified but doing so would be time consuming and patterns might be elusive. As a quick example, the employer may have made 100 promotions, and 60 of them were discriminatory in nature in that a lesser qualified man received the promotion over a more qualified woman. If this were the case, it should be possible

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[54] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In *Price Waterhouse*, social psychologist Susan Fiske testified that certain writings and statements of male partners were likely the product of gender stereotyping, which is quite different from the more generic evidence offered in many of the class action gender discrimination cases that focus on the connection generally between subjective decisionmaking and stereotyping.

[55] This was the proposal put forward recently by two scholars, two of whom are associated with the origins of the phrase "social framework" and the other of whom is a frequent defense expert in discrimination cases. *See* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendence of "Social Frameworks,"* 94 Va. L. Rev. 1715 (2008). For a powerful critique of the article see Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37 (2009). While I agree with much of the critique put forward by Professors Hart and Secunda, I am much less enthusiastic about the social framework testimony that is at issue in the Wal-Mart case, and other class actions.

to identify the sixty individuals, and in this scenario the remedial phase would become particularly important because it is there that the victims of the discriminatory practices would be identified.[56]

This, however, is a very limited view of the pattern or practice claim, and the data might be capturing a different kind of discriminatory pattern. Rather than aggregating individual claims, the data might be elucidating a more subtle kind of discrimination. The aggregated statistics might reflect patterns that would not be evident by focusing on the individual cases. For example, on promotions claims the statistical pattern might reflect that women must have stronger qualifications than men in order to be promoted, even if in individual cases women were sometimes losing out to very, or more, qualified men.[57] What the statistics might suggest is that if the female candidate had been a man, her qualifications may have been evaluated differently. It might also be that all close cases go to men, again even if in specific cases it might be difficult to identify a particular woman who was the victim of discrimination. Yet, if all ties are going to men, that should be an indication that the process itself is discriminatory.

This latter view of a more subtle pattern of discrimination is consistent with the presentations by plaintiffs' experts, particularly those who rely on regression analyses.[58] The primary point of a regression analysis is to measure the importance of variables that are relevant to the underlying decisions, and the significance of the variables cannot be readily identified by focusing solely on isolated or individual cases. Looking at a variable that is often relevant in employment disputes, a woman may need more experience or seniority to be considered for a promotion than a man, or a man's experience might be weighted more heavily. A regression analysis is designed to measure these variables and does not look at head-to-head matchups but seeks, instead, to divine a pattern amidst the data.

It should be apparent that there can be a disconnect with the use of regression analyses to prove a pattern or practice claim. In many contexts, it will be difficult to identify specific victims; rather, the data will demonstrate statistically significant disadvantages that women face in the process, disadvantages that might be modified by various forms of injunctive relief that would alter the decisionmaking process. To the extent courts want to be able to identify specific victims, and specific agents of discrimination, a regression analysis may appear to be inadequate.

At the same time, this is precisely the kind of discrimination that can only be challenged through a pattern or practice claim, and it is certainly the kind of discrimination that pervades

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[56] This is effectively the kind of statistical analysis that was at issue in the *Teamsters* case where the Court acknowledged simple comparison between the available pool of African Americans and Latinos to the actual number of line drivers without exploring the relevance of qualifications. Similarly, the *Hazelwood* case involved a simplistic comparison, only this time the Court required that basic qualifications of the teachers be included in the analysis.

[57] *See, e.g.*, D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 555 (2008) (discussing situation where "the defendant firm is valuing years of education less for women than for men" which he goes no to note "might support an inference of gender discrimination"). Professor Greiner's article discusses different ways in which regressions can be helpful in proving discrimination, with a particular focus on salary discrimination.

[58] In contrast, the disparate impact theory typically relies on rudimentary statistics comparing pass/fail rates, or analyzing the rank order list.

contemporary workplaces. For that reason, it is critical that plaintiffs explain what their statistical presentation demonstrates, and avoid the generic claims that rely on statistical significance and gender stereotyping. This analysis will likely work better in some contexts than in others. A regression analysis has its greatest force in analyzing salary disparities since there are often agreed up relevant factors that play a role in salary determinations, and those factors can often be isolated through the regression.[59] Hiring claims can be assessed in a similar manner because, at least for large employers, individuals rarely go head to head in a hiring decision.

In contrast, a regression analysis may have its least persuasive force in a promotion claim since courts tend to conceive of promotions as involving specific decisions that should be analyzed in isolation. As a result, it is imperative that plaintiffs explain the meaning of the regression in a descriptive fashion – what it is that the regression is demonstrating rather than to emphasize the variables that have been controlled and the statistically significant results. It may not be easy to explain the nature of the statistical pattern but, in the context of the Wal-Mart claim, this might be one way to explain what otherwise might appear to be anomalous – why at the store level there was frequently no statistically significant disparities.[60]

I think it is also important to tie the discriminatory patterns to actual actors or to provide concrete examples of discriminatory patterns because there is a clear danger in moving towards a structural, or agentless, theory of discrimination. By removing the agent, we also are likely to remove the blameworthy component of an intentional discrimination claim, moving the claim towards a negligence theory. That not only seems inconsistent with the requirement of intent, but it seems to ask too much of most courts, and certainly the Supreme Court. The sociological evidence marshaled in the briefs filed in the *Wal-Mart* case and in the work of many legal scholars, including Professor Green, offers a complicated and I believe accurate description of the cause of continuing gender disparities in the workplace but I fear that the Court would be unlikely to see that material as evidence of discrimination. Such a theory is likely better suited, at least at this point in time, for consultants or those firms that desire to eradicate gender disparities and discrimination from their workplace. But it likely goes beyond our current social norms regarding gender discrimination, and while the Supreme Court occasionally gets out ahead of our society on issues of discrimination, it is more often congruent with broader social norms. And that is why there is a desire to ask for "something more" in these cases, and why it would make good sense for plaintiffs to seek that something more, and by digging deep, it is quite likely that they will find something to place the disparities in a deeper cultural context.

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[59] Although regression analyses have become commonplace in pattern or practice claims, they appear in judicial decisions primarily in the context of salary discrimination claims, where it is possible to identify particular factors that are relevant to salary determinations. *See, e.g.*, Rudebusch v. Hughes, 313 F.3d 506 (9th Cir. 2002Ottavinni v. State Univ. of New York, 875 F.2d 365 (2d Cir. 1989); Sobel v. Yeshiva University, 839 F.2d 18 (2d Cir. 1988); Penk v. Oregon Higher Educ., 816 F.2d 458 (9th Cir. 1987).

[60] While this essay may appear critical of the way the Wal-Mart case has been presented, it is important to note that the case is still in the class certification stage, and the plaintiffs have been focused on establishing the criteria for certification rather than proving discrimination. The plaintiffs also have the makings of some of the elements that I deem necessary to a successful claim, for example, noting that women take significantly longer to obtain promotions than men, and the longer time period cannot be explained based on differences in qualifications. Additionally, the plaintiffs are limited in their claims because there was no formal promotional process and many of the relevant documents were not retained. As a result, if the case progresses it is quite possible the plaintiffs would put together a more compelling narrative to support their claim.

IV. Conclusion

The pattern or practice claim has operated below the legal radar for the last thirty years, but once the *Dukes v. Wal-Mart* case landed in the Supreme Court scrutiny has intensified. In the Supreme Court, there has been too much focus on the stereotyping evidence and too little attention paid to the meaning of the statistical presentation, and why it is that statistics are capable of providing evidence of an intent to discriminate. As discussed in this essay, the pattern or practice claim is primarily a vehicle for identifying patterns of discrimination that do not entail the aggregation of individual claims. This may make them appear incompatible with the emphasis on individual victims of discrimination, but these claims also highlight the importance of injunctive relief to remedy the pattern of discrimination, as well as the need to articulate the story that underlies the data.