The Future of Systemic Disparate Treatment Law

Tristin K. Green†

At the same time that it becomes increasingly clear that organizational change is crucial to reducing workplace discrimination, longstanding theories of systemic discrimination are under attack. This Article exposes the threat posed to the mainstay of systemic theories—systemic disparate treatment theory—under which plaintiffs frequently use statistics (along with other evidence) to establish that discrimination is widespread within the defendant organization. The threat to private enforcement of Title VII against systemic disparate treatment was starkly evident in the recent battle over class certification, a battle largely lost by plaintiffs in Wal-Mart v. Dukes, but the current threat to systemic disparate treatment law goes much deeper than whether private plaintiffs will be able to obtain class certification—it goes to the shape of the substantive law.

This Article uncovers the "policy-required" view of entity responsibility that underlies the majority opinion in Wal-Mart v. Dukes and exposes the implications of that view for the future of systemic disparate treatment law. It also shows how an individualistic model of organizational wrongdoing more broadly has led to under-theorizing, even mis-theorizing, of entity responsibility for systemic disparate treatment. Drawing on developments in other areas of organizational wrongdoing, the Article advances a "context" model as theoretical grounding for existing systemic

† Professor of Law, University of San Francisco School of Law. This article was the subject of the Working Group on The Future of Systemic Disparate Treatment Law, which met at the University of San Francisco School of Law on March 18, 2011. Members of the working group include me and Noah Zatz (co-organizing), Richard Ford, Melissa Hart, and Michael Selmi. Papers from the working group are published together in this issue of the Berkeley Journal of Employment and Labor Law.

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disparate treatment law. A context model emphasizes the role of organizational context in producing wrongdoing. Viewed through a context lens, systemic disparate treatment law imposes direct liability on employers for regular, widespread disparate treatment as well as for discriminatory policies because in those circumstances the employer is likely to be producing or to have produced disparate treatment within the organization.

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INTRODUCTION

The battle has just begun. In *Wal-Mart v. Dukes* the Supreme Court held that the female plaintiffs suing Wal-Mart for sex-based employment discrimination in violation of Title VII of the Civil Rights Act could not proceed on behalf of a nation-wide class of women. But the Court did more than pull the procedural rug out from under the decade-long lawsuit; it called into question the future of systemic disparate treatment law. What must those few plaintiffs who do obtain class certification after *Wal-Mart* (or who can convince a court to allow them as individuals to pursue a systemic disparate treatment claim) prove to establish liability? Alternatively, the Equal Employment Opportunity Commission (EEOC), the administrative agency charged with enforcing Title VII, can sue on behalf of a class of women without obtaining class certification. What must the EEOC prove to establish liability for systemic disparate treatment?

The majority opinion in *Wal-Mart* reveals a particular view of systemic disparate treatment theory. According to this view, to succeed on a claim of systemic disparate treatment plaintiffs must prove that high-level decision makers within the defendant organization adopted a policy of discrimination. This "policy-required" view of systemic disparate treatment theory, if it succeeds in gaining conceptual foothold beyond *Wal-Mart*, will result in a drastic reshaping of systemic disparate treatment law. Plaintiffs will no longer be able to use statistics like those long ago approved by the Supreme Court to prove systemic disparate treatment. Courts and juries will also be asked to weigh and evaluate evidence tending to prove or disprove a particular state of mind on the part of high-level decision makers, including

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2. See infra note 232.
5. See infra Part I (describing the use of statistics approved by the Supreme Court).
evidence that the firm's policy makers adopted formal nondiscrimination policies, created diversity offices, and made statements espousing the benefits of diversity and nondiscrimination.

The policy-required view of systemic disparate treatment theory, though, is not the only view. Several justices, including Justice Kennedy, who ultimately joined the majority opinion in *Wal-Mart*, have hinted at an alternative: a principal-agent view of systemic disparate treatment theory. Under this view, systemic disparate treatment theory holds entities liable for failing to adequately police the wrongdoing of individuals. Sometimes articulated as a deliberate indifference standard (e.g., by Justice Kennedy at oral argument) and at other times as a negligence standard, this view has achieved some traction in the legal scholarship. But this view too is problematic. It would reshape systemic disparate treatment law to focus inquiry not only on the state of mind of individual decision makers at lower levels of the organization, but also on the knowledge of high-level decision makers about those decisions, as well as the cost and feasibility of policing measures.

Each of these two competing approaches focuses narrowly on individual instances of discrimination in drawing the limits of entity liability. Under the policy-required view, identified individuals at the top of the organizational hierarchy must be proven to have acted with discriminatory purpose or bias, while under the principal-agent view, identified individuals at the lower levels of the organizational hierarchy must be proven to have acted with discriminatory purpose or bias, and the entity must have failed to correct or prevent that purpose or bias. Moreover, each of these approaches positions the entity as innocent bystander to the wrongdoing of these identified individuals. Even under the principal-agent view, where the law may impose a duty on the entity to police the action of its agents, the entity is not understood to bear a casual role in the wrongful actions of those agents.

Rather than endorsing either of these individualistic views of systemic disparate treatment theory, I argue in this Article that systemic disparate treatment theory is best understood through a systemic lens. Turning the spotlight from individuals to entities, I theorize entity liability for widespread disparate treatment within organizations. I draw on advancements in other areas of organizational wrongdoing, including corporate criminal law, to urge a "context" model of organizational wrongdoing as theoretical grounding for systemic disparate treatment law. A context model captures institutional influence as a basis of liability apart from acts of individual policymakers or agents. It asks whether the entity is producing wrongdoing on an aggregate basis within its walls rather than asking exclusively whether an identifiable high-level policy maker or low-
level decision maker acted with purpose or intent to harm or whether the entity has done enough to police wrongdoing of individual actors.

Existing systemic disparate treatment law, I argue, operationalizes this theoretical grounding by imposing liability when disparate treatment is the regular rather than the unusual practice within the defendant organization. A wealth of social science research makes clear that individuals necessarily act within the organizational context created and controlled by their employers. When disparate treatment is widespread within an organization—when it is the regular rather than the unusual practice—context created and controlled by the organization is likely to have played a causal role in that disparate treatment taking place within its walls.

The Article is organized in five Parts. Part I provides a brief background of existing systemic disparate treatment law as established by the Court in Teamsters and Hazelwood, two cases from the 1970s. This Part also explains the authority of the Attorney General and the EEOC to bring lawsuits alleging systemic disparate treatment, and the role and requirements of private plaintiffs bringing systemic disparate treatment claims.

Part II uncovers the policy-required view of entity responsibility that underlies the majority's opinion in Wal-Mart v. Dukes and lays out the implications of that view for the future of systemic disparate treatment law. The argument in this Part is primarily descriptive and doctrinal, rather than normative. I ask what the Supreme Court's adoption of the policy-required view would mean for litigants seeking to impose or defend against systemic disparate treatment liability. To date, these implications have gone entirely unnoticed by both courts and commentators.

Part III then teases out a more complicated story than might be expected of why the policy-required view might be embraced by the Supreme Court, despite the likelihood of wrenching change on systemic disparate treatment law. It is easy to see the connection between the policy-required view and economic approaches to legal regulation of business that would curtail substantially enforcement of antidiscrimination laws. It is also easy to see a link between language of "purpose" in the Court's early systemic disparate treatment decisions (and in conceptualizations of discrimination commonplace at the time) and the policy-required view. But I argue that progressive legal scholars, too, have been thinking about

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7. See infra notes 89-90 and accompanying text (noting the common reliance on early language of "purpose" to justify or explain an assumption that the Court has adopted a narrow range of entity liability).
employer liability for systemic disparate treatment in the wrong way. By overemphasizing individuals and individual mindsets as the source of discrimination and over-relying on a principal-agent model of organizational wrongdoing, legal scholars have, albeit inadvertently, mis-theorized entity liability for systemic disparate treatment. Justice Kennedy's suggestion at oral argument that a deliberate indifference standard might govern entity liability for systemic disparate treatment exemplifies this misstep.

Part IV draws on advancements in other areas of organizational wrongdoing to develop a solid theoretical grounding for existing systemic disparate treatment law as a systemic theory rather than an individualistic one. Organizational context takes center stage as a driving influence on human behavior under this model, including behavior based on discriminatory biases. A context model of organizational wrongdoing pulls back from individuals to ask whether the entity is producing disparate treatment within its organization. Understood through this theoretical lens, systemic disparate treatment law, by imposing direct entity liability for widespread internal disparate treatment, identifies those entities that are likely to be producing disparate treatment within their organizations. I illustrate in this Part that a context model of organizational wrongdoing better situates systemic disparate treatment theory within the regulatory scheme of Title VII than does an individualistic model, and I explore the contours of systemic disparate treatment law, including the role of social science testimony and of judicial oversight of organizational choices.

Part V circles back to consider briefly how the substantive law of systemic disparate treatment—understood as a systemic theory to impose liability for widespread, internal disparate treatment—might inform and help resolve pressing procedural issues. It also highlights again the reality that judges' views of the substantive law already are informing their thinking about these and other procedural issues.

I.

SYSTEMIC DISPARATE TREATMENT LAW: A BRIEF BACKGROUND

Systemic theories of discrimination are typically understood to impose direct rather than vicarious liability on the employer. The employer as an entity, in other words, has taken some action that is considered discriminatory. The most obvious example is the adoption of a formal

policy of exclusion or segregation. But liability for systemic discrimination is not limited to facially discriminatory policies. Indeed, after the passage of Title VII of the Civil Rights Act in 1964, most formal, facially discriminatory employment policies ended, even as less formalized discrimination continued.

Under systemic disparate treatment theory, even when plaintiffs cannot point to a facially discriminatory policy adopted by the employer, they can still establish direct entity liability by using statistics and other evidence to show that discrimination within the organization was or is widespread, that it is, in the Court’s words, “the regular rather than the unusual practice.” Systemic disparate treatment theory, which requires proof of different treatment within the defendant organization based on sex or race or other protected characteristic, is distinct from systemic disparate impact theory, under which an employer is held liable for using an employment practice that is neutral in its treatment of different groups but that has effects that fall more harshly on one group than another if the practice cannot be justified as job related and consistent with business necessity. While disparate impact theory requires employers to remove barriers to advancement, even when factors outside of the organization rendered the practice a barrier, disparate treatment theory requires employers only to

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9. See, e.g., City of Los Angeles v. Manhart, 435 U.S. 702, 704 (1978) (“As a class, women live longer than men. For this reason, the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees.”).

10. This is consistent with changes in social norms as well as with enforcement of the Civil Rights Act. See infra note 95 (detailing changes in norms); see also infra notes 98-105 and accompanying text (describing research on continuing role of biases in decision making).

11. For this reason, the term “systemic disparate treatment” is often used interchangeably with the term “pattern or practice” of discrimination. See, e.g., Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). The language “pattern or practice” is drawn from the statutory authorization section in Title VII authorizing governmental enforcement (either the Attorney General or the EEOC), on its own initiative. 42 U.S.C. § 2000e-6(e) (2006). For an explanation of the roles of the government and private litigants in Title VII enforcement, see infra notes 32-36 and accompanying text.

12. See, e.g., Teamsters, 431 U.S. at 335 n.15; Griggs v. Duke Power Co., 401 U.S. 424 (1971). Congress codified disparate impact theory in 1991. See 42 U.S.C. § 2000e-2(k) (2006) (delineating burdens of proof in disparate impact cases). Commentators have tended to characterize the line drawn by the Supreme Court between disparate treatment and disparate impact cases in terms of “intent,” suggesting that disparate treatment liability requires a conscious awareness or purpose on the part of a discriminator, and have also tended to conflate “intent” at the individual level and “intent” at the organizational level. See, e.g., Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1161 (1995) (stating that “Title VII’s disparate treatment model of discrimination is premised on the notion that intergroup bias is motivational in origin”); David Benjamin Oppenheimer, Negligent Discrimination, 141 U. PA. L. REV. 899 (1993). Although these commentators ultimately endorse a broader scope of disparate treatment liability, by characterizing existing law narrowly in terms of purpose or conscious intent they arguably (albeit inadvertently) opened the door for others to argue that disparate treatment theory is both doctrinally and normatively narrow. See infra notes 89-90 and accompanying text.
attend to biases operating in employment decisions within their organizations.

In the 1970s the Supreme Court decided several well known cases involving claims of systemic disparate treatment under Title VII. In International Brotherhood of Teamsters v. United States, the government alleged that the trucking company T.I.M.E.-D.C. Inc. had engaged in a "pattern and practice of employment discrimination against Negroes and Spanish-surnamed Americans" throughout its transportation system by failing to place minorities equally with whites in long-distance, line-driver positions. Because the defendant lacked any facially discriminatory policies, the government sought to prove its case by pointing to the stark disparity between the percentage of blacks and Hispanics employed as line drivers within the company and the percentage of blacks and Hispanics in the general population surrounding the company's terminals. The government "bolstered" its statistical evidence with "testimony of individuals who recounted over 40 specific instances of discrimination," including testimony recounting statements by managers that they were unwilling to place black or Hispanic workers in line-driving positions.

The Teamsters Court described the legal principles governing a systemic disparate treatment claim as "relatively clear." Plaintiffs must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." They must establish by a preponderance of the evidence "that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." Pointing to the government's statistical and anecdotal evidence, the Court held that the government had met its burden of proof. In doing so, the Court flatly rejected the defendant's argument that statistics could not be used to prove the existence of systemic disparate treatment. It explained that statistics showing racial or ethnic imbalance can be probative of systemic disparate treatment because "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more

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13. Teamsters, 431 U.S. at 329. The United States also claimed that the union had violated Title VII "by agreeing with the employer to create and maintain a seniority system that perpetuated the effects of past racial and ethnic discrimination." Id. at 328.
14. Id. at 329.
15. Id.
16. Id. at 338 n.19.
17. Id. at 334-35.
18. Id.
19. Id. at 336. In a footnote, the Court explained that the "pattern or practice" language in Title VII "was not intended as a term of art," and quoted Senator Humphrey, who stated that "a pattern or practice would be present only where the denial or fights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." Id. at 336 n.16.
20. Citing to cases permitting statistical proof of racial discrimination in jury selection, the Court explained that "[s]tatistics are equally competent in proving employment discrimination." Id. at 339-40.
or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

Although Teamsters involved what is sometimes referred to as the "inexorable zero"—meaning that the defendant organization had hired almost no black or Hispanic line drivers—other cases have involved less stark disparities and more sophisticated statistical methods. Hazelwood School District v. United States, decided just one month after Teamsters, involved allegations of discrimination in hiring of teachers in the Hazelwood School District, located in a predominantly white suburb of St. Louis. The Court endorsed use of statistics, specifically binomial distribution analysis (which calculates the likelihood that a particular outcome, when there is a random choice between two outcomes, is due to chance) and explained that "if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that teachers were hired without regard to race would be suspect."

Since Hazelwood, even more sophisticated statistical techniques have emerged that can better account for nondiscriminatory factors that might distinguish men from women, for example, or blacks from whites, such as level of education, interest, or years of experience. Judicial acceptance of statistics to create an inference of discrimination in employment, however, continues to rest on the same central assumption accepted by the Court in Teamsters and Hazelwood: Discrimination is one reasonable inference to be drawn from a disparity between the makeup of the job category in question and the makeup of the relevant labor pool or from a disparity in pay or promotion that is unlikely to occur by chance. Statistics cannot tell us whether one would see a particular observed disparity in the absence of discrimination, but they can indicate the likelihood that an observed disparity (after accounting for legitimate variables) is due to chance. The Supreme Court in Teamsters and in Hazelwood instructed that if the disparity after accounting for legitimate factors is statistically significant—meaning that it is unlikely due to chance—then an inference of internal systemic disparate treatment can be drawn and entity liability imposed.

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21. Id. at 339 n.20.
22. Id. at 342 n.23.
23. 433 U.S. 299 (1977). See also id. at 307-08 (stating that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination").
26. Of course, plaintiffs are unlikely to prove a pattern or practice case on the basis of statistics alone. They must, after all, convince the fact finder that discrimination within the organization rather
Teamsters and Hazelwood both involved systemic disparate treatment claims brought by the Department of Justice, rather than by the EEOC or private plaintiffs. The lawsuits were filed under section 707 of Title VII, which authorized the Attorney General to bring a civil action whenever there was "reasonable cause" to believe that any person or group of persons is engaged in a "pattern or practice" of discrimination. In 1972, Congress amended Title VII to provide the EEOC with this enforcement authority. The 1972 amendments transferred to the EEOC the Attorney General's power to bring pattern or practice suits under Section 707 on its own motion, without waiting for private individuals to complain. At the same time, the amendments expanded the EEOC's authority to sue to enforce private rights and to vindicate the public interest under Section 706.

By the mid-1970s, defendants had challenged the EEOC's authority to sue under section 706 without certification as a class representative under Rule 23 of the Federal Rules of Civil Procedure. The Supreme Court held in General Telephone v. EEOC that the EEOC need not comply with Rule 23 to pursue a claim under section 706 and obtain relief for a group of individuals. Since General Telephone, the EEOC has regularly brought systemic disparate treatment claims under section 706 and section 707 without obtaining class certification. Because the EEOC's authority did not supersede private enforcement, private plaintiffs also continued to bring claims of systemic disparate treatment against their employers under section 706 of Title VII. These private plaintiffs, as any private plaintiff without than factors outside of the organization or legitimate factors within the organization is the reason for the disparity. See, e.g., Teamsters, 431 U.S. at 338 (explaining that anecdotal evidence "bolsters" statistics). Defendants are equally likely to present evidence suggesting that something else can explain the disparity. See infra Part III.B.1. (discussing the role of anecdotal and social science testimony in systemic disparate treatment cases).


30. See General Tel., 446 U.S. at 325-26.

31. FED. R. CIV. P. 23.


34. See generally Tristin K. Green, Targeting Workplace Context: Title VII as a Tool for Institutional Reform, 72 FORDHAM L. REV. 659 (2003) (describing recent systemic disparate treatment cases brought by private litigants).
express statutory authorization of class treatment, must satisfy the
requirements of Rule 23 to proceed on behalf of a class.

II. THE POLICY-REQUIRED VIEW OF ENTITY RESPONSIBILITY

Critics of recent large-scale employment discrimination lawsuits frequently accuse plaintiffs and judges of manipulating the substantive law to achieve class certification. I show in this Part that quite the opposite is true: If the Supreme Court continues down the path set by the majority opinion in Wal-Mart and adopts an individualistic theoretical foundation for systemic disparate treatment law—particularly one that requires plaintiffs to establish the existence of a company-wide policy of discrimination—the Court’s "procedural" decision will result in drastic change in the substantive law of systemic disparate treatment as it has been practiced for more than three decades.

Requiring a policy of discrimination focuses inquiry on the state of mind of high-level decision makers (the policy makers) of a defendant organization. It is not enough according to this view that discrimination proliferates within the organization, even if fueled by organizational structures, institutional practices, and work cultures implemented and controlled by the employer. The fact finder must find that the entity employer adopted a policy of discrimination. If there exists no formal, facially discriminatory policy, then the fact finder must find that high-level policy makers, acting on behalf of the entity, adopted an informal policy of discrimination.

A. The Policy-Required View of Systemic Disparate Treatment Theory

The battle over class treatment of employment discrimination suits involving allegations of widespread disparate treatment in organizations with highly decentralized and largely subjective decision-making practices has been underway for several decades. Class certification in many of these cases has turned on the issue of commonality—whether the plaintiffs of the proposed class share a common issue of law or fact as required by Rule

35. See, e.g., 29 U.S.C. § 216(b) (authorizing FLSA claims to proceed as a "collective action").
36. FED. R. CIV. P. 23.
37. See, e.g., Richard A. Epstein, Class Actions: Aggregation, Amplification, and Distortion, 2003 U. CHI. LEGAL F. 475, 509 (2003) ("The need to preserve a class action at all costs drives a court to distort the underlying theory of substantive liability beyond recognition."); Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 104 (2009) (arguing that the use of aggregate proof in Dukes v. Wal-Mart offers "an implicit demand for a new and... controversial conception of the substantive law that governs the litigation").
The courts that denied certification tended to construe claims of disparate treatment as inherently individual in nature and therefore as not generally suitable to class treatment, while those courts that permitted certification tended to find common issues at the organizational level, in the employer’s decision making practices, for example. The majority and dissenting opinions in Wal-Mart v. Dukes map roughly onto this divide. The majority opinion in the case, however, also illustrates the implications of an overly individualistic model of wrongdoing for the future of systemic disparate treatment law.


In 2001, Betty Dukes and a group of female plaintiffs seeking to represent current and former female employees of Wal-Mart sued in federal court in the Northern District of California alleging that Wal-Mart had engaged in (and continued to engage in) systemic discrimination against women in pay and promotion in its U.S. stores in violation of Title VII of the Civil Rights Act. Among other things, the plaintiffs claimed that Wal-Mart’s personnel system, which involved highly subjective and unguided pay and promotion decisions, resulted in pay and promotion decisions that

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38. To obtain certification under Federal Rule of Civil Procedure 23, plaintiffs must show, among other things, that members of the proposed class share a common issue of law or fact and that the named representatives have claims that are typical of class members' claims. *Fed. R. Civ. P. 23(a)*. These requirements overlap substantially.

39. See, e.g., Bacon v. Honda of Am. Mfg. Inc., 205 F.R.D. 466, 478 (S.D. Ohio 2001) (holding that "commonality is not established where the decisions allegedly constituting discrimination were made by different supervisors and decision makers"); Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 670 (N.D. Ga. 2001) (same); Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 238 (W.D. Tex. 1999) (holding that subjectivity in evaluation and promotion decisions "would be useful evidence in an individual's claim of intentional discrimination by that supervisor, [but] it does not lend itself readily to class treatment where there are 523 autonomous supervisors in locations spread across the United States").

40. See, e.g., Brown v. Nucor Corp., 576 F.3d 149, 153 (4th Cir. 2009) (pointing to subjectivity in decision-making practices as satisfying commonality); McClain v. Luften Indus., Inc., 519 F.3d 264, 275 (5th Cir. 2008) (same). See generally Green, *supra* note 34, at 691-92 (describing both lines of cases).

41. Justice Ginsburg dissented from the majority’s reversal of the trial court’s determination that the commonality requirement of Rule 23 was met. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (Ginsburg, J., dissenting).

42. Justice Ginsburg in dissent on the commonality issue reveals less about her view of the substantive law of systemic disparate treatment. See *infra* note 153.

were based on gender stereotypes.\textsuperscript{44} They alleged claims of systemic disparate treatment and disparate impact\textsuperscript{45} and sought prospective, class-wide injunctive relief as well as back pay and punitive damages.\textsuperscript{46}

The plaintiffs submitted a variety of evidence to support their motion for class certification, including statistical studies showing disparities in pay and promotion for women and men,\textsuperscript{47} testimony of social scientists to the effect that Wal-Mart had a policy of decentralized decision making regarding pay and promotion,\textsuperscript{48} testimony of managers and other employees reflecting a work culture permeated with gender stereotypes and bias,\textsuperscript{49} and testimony by women who alleged that they were denied promotions and paid less than men at Wal-Mart because of their sex.\textsuperscript{50}

In 2003, the trial court certified a class.\textsuperscript{51} A panel of the Ninth Circuit Court of Appeals affirmed the trial court’s decision in 2007,\textsuperscript{52} and in April 2010, a majority of the Ninth Circuit Court of Appeals sitting en banc
affirmed, with five judges dissenting.\textsuperscript{53} The Supreme Court granted
certiorari in December 2010, and reversed in June 2011.\textsuperscript{54} The Justices
were unanimous in their conclusion that class certification was
improvidently granted under Rule 23(b)(2).\textsuperscript{55} Justice Ginsburg, joined by
Justices Breyer, Sotomayor, and Kagan, wrote an opinion departing from
the majority decision reversing also on the ground that the plaintiffs had
failed to satisfy the commonality requirement of Rule 23(a).\textsuperscript{56}

   "Company-Wide Policy of Discrimination"}

In his majority opinion in \textit{Wal-Mart}, Justice Scalia, like Judge Ikuta
writing for the dissent in the en banc Ninth Circuit before him, embraces a
policy-required view of systemic disparate treatment theory. Throughout
the \textit{Wal-Mart} opinion, Justice Scalia insists that the plaintiffs must prove
(and in order to obtain class certification must submit "significant proof")
that the employer "has a company-wide policy of discrimination.”\textsuperscript{57}

Justice Scalia points out that one way of establishing commonality
between plaintiffs in a class would be to show that each plaintiff suffered
from discriminatory action taken by a single decision maker, a supervisor
within a particular Wal-Mart store, for example.\textsuperscript{58} But what about the
plaintiff who works in only one Wal-Mart store and seeks to represent
plaintiffs in other Wal-Mart stores? According to Justice Scalia, these two
plaintiffs lack common issues unless there is evidence of a "company-wide
discriminatory policy.”\textsuperscript{59} The company-wide discriminatory policy would
serve as the "glue holding the alleged reasons for all [the millions of
employment discriminations] together.”\textsuperscript{60}

To Justice Scalia, these two scenarios exhaust the possibilities for
satisfying commonality in a systemic disparate treatment case. Notice,
however, that in scenario one—where a single decision maker (or even a

\textsuperscript{53} Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc).
\textsuperscript{54} Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
\textsuperscript{55} Id. at 2544.
\textsuperscript{56} Id. at 2562.
\textsuperscript{57} Id. at 2555. Judge Ikuta dissenting in the en banc decision used this phrase or variations of it
twenty-one times in the space of twenty-four pages. \textit{Dukes}, 603 F.3d at 628-52 (Ikuta, J., dissenting).
\textsuperscript{58} \textit{Wal-Mart}, 131 S. Ct. at 2545 (2011) (stating that “[t]heir claims must depend upon some
common contention—for example, the assertion of discriminatory bias on the part of the same
supervisor”).
\textsuperscript{59} Id. (stating that “[w]ithout some glue holding the alleged reasons for all those decisions
together, it will be impossible to say that examination of all the class members’ claims for relief will
produce a common answer to the crucial question \textit{why was I disfavored})” (emphasis in original). Justice
Scalia also pointed to evidence of a “testing procedure or other companywide evaluation method that
can be charged with bias” as satisfying commonality but declared that this “obviously has no application
here.” Id. at 2553.
\textsuperscript{60} Id.
small group of decision makers working together) takes discriminatory action against multiple individuals—the plaintiffs need not rely on a systemic theory of discrimination. Rather, these plaintiffs would likely assert individual claims of disparate treatment and use evidence of a common biased decision maker or decision makers to support the individual claims. The employer if it is liable in this scenario would be liable vicariously for the discriminatory decisions of its agents.

It is only in the second scenario that plaintiffs would rely on a theory of systemic discrimination, and this is where Justice Scalia would require the plaintiffs to prove a company-wide policy of discrimination. In short, according to Justice Scalia, plaintiffs must do more than prove that members of the plaintiff class suffer from widespread disparate treatment in employment decisions at Wal-Mart; they must prove that Wal-Mart policies or practices themselves are discriminatory in the sense that the policies or practices make express sex-based distinctions or are the product of discriminatorily biased actions by high-level policy makers within the organization.

Indeed, to find an informal policy, the fact finder under this view must find that policy makers at Wal-Mart acted with a purpose to keep women down. It is possible, of course, for unconscious biases to infect policy decisions (and for the law to define “intent” to include those decisions), but the term “policy” of discrimination implies that someone made a conscious decision to discriminate. Webster’s Dictionary defines a “policy” as “a definite course or method of action selected from among alternatives.” If the president and CEO Sam Walton and other policy makers at Wal-Mart did not adopt an express policy of discrimination against women, then they must have at least decided to keep women down more subtly and surreptitiously. They must have authorized, in other words, the use of subjective decision-making practices with the purpose of keeping women down. Only then would one say that there is the “general policy of discrimination” that Justice Scalia requires.

Justice Scalia admittedly says little expressly about his view of the substantive law of systemic disparate treatment in the Wal-Mart opinion, and for that reason some may argue that I read too much from the opinion about his view (and possibly that of other justices joining his opinion) of the

61. See infra note 88, 91.
63. Justice Scalia asked at oral argument: “[D]espite the fact of an explicit written central policy of no discrimination against women, do you think you’ve adequately shown that the policy is a fraud, and that what’s really going on is that there is a central policy that promotes discrimination against women?” Transcript of Oral Argument at 33, Wal-Mart, 131 S. Ct. 2541, (No. 10-277), 2011 WL 1131405 (Scalia, J). Justice Scalia and Justice Roberts also both mentioned several times concern that the pay disparity at Wal-Mart might be less than the national average. See, e.g., id. at 26; id. at 41-42. See infra Part I.B.1.a. for discussion of this point.
substantive law. He relies heavily, for example, on the Supreme Court’s class certification decision in General Telephone Co. of the Southwest v. Falcon and derives his language of a “policy of discrimination” from a footnote in that decision.\(^6\) Falcon, however, involved a plaintiff who was denied promotion and sought to represent a class of plaintiffs that included individuals who were denied employment. It is difficult to see how Falcon stands for the proposition that a plaintiff employee who works in one store or division and alleges systemic disparate treatment in promotion decisions cannot represent class members who suffered denial of promotion in other stores, unless one relies on an individualistic model of organizational wrongdoing that locates the wrong of discrimination exclusively at the discrete moment of biased decision making, whether by high-level policy makers or lower level supervisors. In stretching to read Falcon as he does, Justice Scalia accordingly frames systemic disparate treatment theory as imposing entity liability only for individual moments of disparate treatment at high levels within the organization. This is a substantive view, not a procedural one.\(^6\)

In the next section, I illustrate that if systemic disparate treatment theory is limited as Justice Scalia envisions to cases in which plaintiffs can prove a company-wide policy of discrimination, the substantive law of systemic disparate treatment will be substantially altered.

B. Implications of the Policy-Required View for the Future of Systemic Disparate Treatment Law

The policy-required view, if adhered to by the Supreme Court, is likely to result in a drastic reshaping of systemic disparate treatment law. I focus here on two immediate practical implications: (1) a restriction of the statistical showing permitted to prove systemic disparate treatment; and (2) a shift in the relevance of nondiscrimination efforts and statements by policy makers to entity liability.

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\(^6\) In Falcon, the Court explained that one way that a plaintiff denied a promotion might establish sufficient commonality and typicality with a class that included individuals denied employment would be to submit “[s]ignificant proof that an employer operated under a general policy of discrimination... if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” 457 U.S. 147, 159 n.15 (1982). Justice Ginsburg critiques the majority’s reliance on Falcon on an additional ground: “The plaintiff-employee [in Falcon] alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast were advanced under the adverse impact theory...” Wal-Mart, 131 S. Ct. at 2565 (Ginsburg, J. dissenting) (internal quotations omitted).

\(^6\) It is possible that Justice Scalia would hold that private plaintiffs cannot bring a systemic disparate treatment claim at all and accordingly maintain that the requirement of proof of a policy really is solely to meet the commonality requirement necessary for plaintiffs’ claims of individual disparate treatment to be adjudicated on a class basis. However, given his acknowledgement that plaintiffs’ contention is that “Wal-Mart engages in a pattern or practice of discrimination” and his quotation of Teamsters, this explanation seems unlikely. Wal-Mart, 131 S. Ct. at 2545.
1. Statistics

It is well settled that to succeed on a systemic disparate treatment claim, plaintiffs must show at least widespread different treatment within the defendant organization because of membership in a protected group. It is not enough, in other words, for plaintiffs to show that there are few women managers at Wal-Mart if there is no evidence that the dearth of women managers is attributable to disparate treatment within the organization rather than exclusively to factors outside of the organization, such as lower levels of experience or education.

In this way, systemic disparate treatment claims share common ground with mass toxic tort claims, where, for example, plaintiffs must prove that exposure to the defendant's product caused the disease from which they suffer. This causation element in the toxic tort context is usually broken down into two requirements: general causation (e.g., exposure to defendant's asbestos generally causes lung cancer) and specific causation (e.g., exposure to defendant's asbestos caused each individual plaintiff's lung cancer). Under Teamsters, entity liability for systemic disparate treatment has long turned on a variation of the former inquiry. If the plaintiffs can establish internal membership causation (widespread disparate treatment within the organization), then the employer is liable under systemic disparate treatment law. If, on the other hand, the plaintiff cannot make that showing or if the employer can show that an observed disparity is due to a factor other than disparate treatment within the organization, then the employer is not liable.

67. The common ground between toxic tort and employment discrimination should not be overstated. See infra notes 69 & 75 and accompanying text.
68. See Albert C. Lin, Beyond Tort: Compensating Victims of Environmental Toxic Injury, 78 S. Cal. L. Rev. 1493, 1445 (2005) (describing general and specific causation in toxic tort cases). Sometimes the general causation inquiry is framed as whether exposure to the defendant's product is "capable" of causing the plaintiffs' lung cancer. See id. at 1447; see also Sterling v. Weliscal Chemical Corp., 855 F.2d 1188, 1200 (6th Cir. 1988) (describing the general causation inquiry in terms of whether the plaintiffs had shown that the substances to which they were exposed were capable of causing their injuries).
69. I say a "variation" on the former inquiry because the question of general causation in toxic tort cases is different than the question of whether an entity has engaged in systemic disparate treatment. General causation is usually understood in tort as a question of whether exposure to the defendant's product generally causes (or can cause) the plaintiff's condition. In discrimination cases, we know that discriminatory behavior can cause disparities in pay and promotion levels for different groups; the question is whether widespread disparate treatment within the organization is a likely explanation for an observed disparity in pay or promotion. Nonetheless, the analogy to tort can be useful to illustrate the distinction between requiring a plaintiff to prove widespread disparate treatment (systemic disparate treatment) and requiring a plaintiff to prove specific or individual disparate treatment (that he or she was the victim of disparate treatment).
In toxic tort cases, and even in some discrimination cases, plaintiffs typically make the required general internal causation showing by comparing the rate of the experienced disease or event in the exposed population to the background rate of the disease or event in the general population. In an asbestos case, for example, plaintiffs would rely on epidemiological studies that compare the rate of asbestosis or cancer in the group exposed to the defendant’s asbestos product to the rate of asbestosis or cancer in the general population.

But while statistics using background rates may be one way of proving discrimination in employment—in fact, the plaintiffs in 

Wal-Mart did compare the disparity between men and women managers at Wal-Mart with the disparity at other big-box stores—they are not the only way. 

Teamsters and Hazelwood provide plaintiffs in employment discrimination cases with another way of using statistics to prove widespread, internal disparate treatment. Under Teamsters and Hazelwood, plaintiffs are not required to compare the rate of discrimination (or risk of discrimination) in similar organizations or even in the labor market as a whole to the discrimination (or risk of discrimination) experienced in the defendant organization. As discussed earlier, under Teamsters and Hazelwood plaintiffs can compare the percentage of the protected group in the challenged job category to the percentage of the protected group in the relevant labor pool.

Failure to distinguish the use of statistics authorized by the Court in 

Teamsters and Hazelwood for employment discrimination cases from the use of statistics in other areas, including the use of epidemiological studies in toxic torts, risks basic misunderstanding (and possible reshaping) of systemic disparate treatment law. The danger of the policy-required view

70. The use of statistics to prove discrimination in traffic stops is one example that has proven controversial. See, e.g., Melissa Whitney, The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the use of Statistics to Prove Discriminatory Intent, 49 B.C. L. REV. 263 (2008).

71. See Lin, supra note 68, at 1446 (describing the role of epidemiological studies in toxic tort cases).

72. Id.

73. See Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168, 1180 n.7 (9th Cir. 2007) (explaining that plaintiffs’ expert compared or “benchmarked” Wal-Mart against twenty other similar general merchandise retailers).

74. See supra notes 14-26 and accompanying text.

75. See, e.g., Allan G. King, “Gross Statistical Disparities” as Evidence of a Pattern and Practice of Discrimination: Statistical versus Legal Significance, 22 LAB. LAW. 271, 288-89 (2007) (arguing that plaintiffs seeking to obtain individualized relief, including back pay, in systemic disparate treatment cases should be required to present statistics proving a relative risk greater than 2.0); Nagareda, supra note 37, at 156 n.229 (stating that “[i]n technical terms, one way of looking at the statistical proof in Dukes is by comparison to epidemiological evidence in a toxic tort or product liability case” and arguing that:}
of entity responsibility for the future of systemic disparate treatment law, however, goes much deeper. The policy-required view pushes a reshaping of the use of statistics in systemic disparate treatment cases on theoretical, even normative grounds. If the law seeks to hold liable only those employers whose high-level policy makers acted with a purpose to discriminate, then the statistics presented by plaintiffs must support that inference. By this account, Title VII requires a comparison between background rates of discrimination in the labor market as a whole and statistical disparities within the defendant organization. Only if the disparity within the defendant organization is substantially higher than it is in comparable businesses—or in the labor market as a whole—will the defendant be liable.

Indeed, this is what Professor Richard Nagareda argued in his article, *Class Certification in an Age of Aggregate Proof*, cited several times by Justice Scalia in his opinion. According to Nagareda, the statistical disparity identified by the plaintiffs in *Wal-Mart* was insufficient proof of systemic disparate treatment not because women working at Wal-Mart do not suffer from widespread discrimination in employment decisions within Wal-Mart, but because they do not suffer significantly more discrimination than they would suffer in the market as a whole. He explains:

If one looks not at Wal-Mart specifically but across the United States economy as a whole, it is not as if statistically significant differences in pay and promotion to management as between women and men somehow disappear or even lessen markedly. Quite the opposite. The General Accounting Office found that, when one accounts for differences in work patterns and other factors that may lead to differences in pay, men earned, on average, twenty-five percent more than women in 2000. As for promotion to management, moreover, the term “glass ceiling” has become commonplace.

From this, Nagareda asserts that “if Wal-Mart were indeed discriminating [in what he calls the “old-fashioned, intentional sense”], then its execution of that enterprise was startlingly inept. If a highly organized, national employer really intended to keep down its female hourly employees,” says

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76. This assumes, of course, that it is empirically correct to say that not all employers discriminate, that it is appropriate, in other words, to use the labor market to determine a background rate.

Nagareda, “then one would think that it could manage to become more than just a ‘conduit’ for broader labor-market characteristics.”

This passage reveals both Nagareda’s embrace of the policy-required view (requiring that Wal-Mart have “really intended to keep down its female hourly employees”) and the immediate implication of that view: a drastic reshaping of the use of statistics embraced by the Supreme Court in Teamsters and Hazelwood.

2. Other Evidence of Policy Maker State of Mind

The second implication of the policy-required view is perhaps more obvious, but no less a dramatic shift in systemic disparate treatment law. If systemic disparate treatment law requires purpose on the part of high-level policy makers within an organization, then evidence that negates that state of mind works against imposing liability. Enter formal nondiscrimination policies, diversity offices, and statements by policy makers.

In a recent case in which plaintiffs sought to prove systemic disparate treatment through, in part, evidence of statistically significant disparities between the percentage of women and racial minorities in high-level positions and the percentage of members of those groups in the relevant labor pool, the district court stated the following:

[C]ontrary [to the position of the plaintiff’s presentation of expert testimony of sociologist Barbara Reskin] that Cintas [the defendant company] has a white male business culture, Cintas has presented evidence of sincere attempts to achieve greater diversity in its company. Cintas has a company policy in favor of diversity and personnel devoted to diversity considerations in the company. Internal memoranda and statements by Cintas’s CEO at Cintas’s annual meeting demonstrate endeavors to target women and racial minorities in the interest of increasing diversity.

These facts led the court to conclude that the plaintiffs’ claims were not suitable for class certification. But, like with Justice Scalia’s opinion in Wal-Mart, the court’s ruling also reflects its view of the substantive

78. Id.

79. Nagareda’s embrace of the policy-required view is evident throughout his article. See also Richard A. Nagareda, Class Actions in the Administrative State: Kalven and Rosenfield Revisited, 75 U. Chi. L. Rev. 603, 622 (2008) (stating that “to task the court at the class certification stage . . . with the making of a ‘definitive assessment’ of compliance with Rule 23 would be to call, as a practical matter, for an assessment of which side is right on the merits with regard to the existence of a company-wide policy”) (emphasis added).

80. Others commentators have challenged Teamsters and Hazelwood directly by questioning the central assumption on which the use of statistics endorsed by the Court relies. See, e.g., Amy L. Wax, The Discriminating Mind: Define It; Prove It, 40 Conn. L. Rev. 979 (2008).


82. Id. at 12. The court assumed that “sincere attempts to achieve greater diversity” meant that the company could not have a gendered culture common to all members of the proposed plaintiff class.
requirements for a systemic disparate treatment claim. According to the court, plaintiffs must prove that Cintas’s policy makers, including its CEO, adopted the decision-making systems and fostered a white male business culture with the purpose of keeping women and racial minorities down. The defendant made no showing that its “sincere attempts” at diversity were effective, and the court asked for none.

This focus on the state of mind of high-level policy makers departs from longstanding disparate treatment law, which has imposed liability for difference in treatment in employment when such treatment is because of the plaintiff’s membership in a protected group. The Supreme Court has repeatedly held in cases involving facially discriminatory policies that plaintiffs need not show purpose to harm. And, even when there are no formal policies of discrimination, the Court has explained systemic disparate treatment as involving simple difference in treatment because of a protected characteristic. In Teamsters, the Court stated that disparate treatment occurs when “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” It cited to congressional testimony of Senator Humphrey prior to the passage of Title VII stating: “What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It

83. See also id. (noting that statements by individual decision makers “illustrate that the circumstances of discrimination are highly individualized”). Wal-Mart also stressed the number of ways in which it “promoted diversity.” See Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 154 (N.D. Cal. 2004) (pointing out that Wal-Mart has established diversity “goals” and imposed penalties for EEO violations; it has earned national diversity awards and its executives discuss diversity and include it in the company handbooks and trainings). Justice Scalia referred to the company’s “policy” of nondiscrimination without examining whether that policy was adequately implemented. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011). But see Declaration of William T. Bielby, PhD, in Support of Plaintiff’s Motion for Class Certification at ¶¶ 53-62, Dukes v. Wal-Mart Stores, Inc., No. C-01-2252 (Apr. 21, 2003), 2003 WL 24571701 (critiquing the implementation of Wal-Mart’s nondiscrimination policy).

84. Id. See also Reap v. Continental Cas. Co., 199 F.R.D. 536, 544 (D.N.J. 2001) (stating that “disparate treatment claims alleging that a company’s policy of delegating discretionary employment decisions to local supervisors are not appropriate for class certification absent an allegation that the company intended to use this policy to discriminate against a protected class”).

85. City of Los Angeles v. Manhart, 435 U.S. 702, 711 (1978) (holding that a policy requiring women to fund pension plan at higher rate than men based on assumptions concerning life expectancy violated Title VII because it did not pass the “simple test of whether evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different’”); Int’l Union v. Johnson Controls, 499 U.S. 187, 200 (1991) (holding that a policy prohibiting fertile women but not fertile men from occupying certain hazardous positions was disparate treatment regardless of “the beneficence of the employer’s purpose”). This point is further buttressed by the Court’s recent decision in Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) (holding that the employer’s decision to not certify test results was race-based and stating that “[w]hatever the City’s ultimate aim—however well intended or benevolent it might have seemed—the City made its employment decision because of race”). For an argument that the cognitive turn in the social sciences as it has been incorporated into the legal scholarship has led to a mischaracterization of the meaning of intent in disparate treatment law, see Stephen M. Rich, Against Prejudice, 80 G.W.L. REV. 1 (2011).
provides that men and women shall be employed on the basis of qualifications..."86

Nor have courts historically accepted defendants’ arguments that they should be excused from liability for systemic disparate treatment because their high-level decision makers adopted a policy of nondiscrimination or the firm otherwise could show that those individuals did not act with discriminatory bias or intent to harm.87 Rather, courts have staunchly resisted employer efforts to escape liability by presenting evidence that they sincerely sought to combat discrimination. Even in the well-known case of EEOC v. Sears Roebuck, in which the court found persuasive Sears’s argument that statistical disparities were caused externally by women’s lack of interest rather than internally by discrimination, the court considered evidence that Sears had undertaken efforts to hire women into the higher-paying sales commission jobs as relevant to lack of interest (internal v. external causation) rather than as relevant to an inquiry into the state of mind of either the employer or high-level policy makers.88

As many readers are surely aware, the Supreme Court has used language that reflects a conception of disparate treatment as driven by prejudice and animosity. In Teamsters, for example, the Court stated, “Statistics showing racial or ethnic imbalances are probative [in systemic disparate treatment cases] only because such imbalance is often a telltale sign of purposeful discrimination.”89 Commentators and courts alike have

88. EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988). The Sears court is open to critique for its willingness to assume that stratification in an organization like Sears is the result of outside forces, see, e.g., Tristin K. Green & Alexandra Kalev, Discrimination-Reducing Measures at the Relational Level, 59 HASTINGS L. J. 1435, 1458 (2008); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749 (1990), but the determination was nonetheless one of causation rather than of purpose. For a critique of Sears as representing the dangers of an overly individualistic conceptualization of discrimination, see Green, Discrimination in Workplace Dynamics, supra note 45, at 122-23.
89. Teamsters, 431 U.S. at 339 n.20. The Teamsters Court also refers to a “policy” of discrimination, though it regularly qualifies its use of that term with discussion of a “pattern” of discrimination. See, e.g., id. at 360 (stating that the plaintiff’s “initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers” and describing the plaintiff’s showing in terms of a “pattern or practice”). Similarly, the Court in Teamsters defines a pattern or practice to include a pattern of discrimination that extends to a “group of employers” as well as to individual employers. See, e.g., id. at 336 n.16 (quoting Senator Humphrey’s example of a pattern or practice as involving “a number of companies or persons in the same industry or line of business”); id. at 360.
pointed to this and other mention of purpose or motive in *Teamsters* as evidence that systemic disparate treatment law requires a particular state of mind—usually purpose—on the part of high-level policy makers within the defendant organization.90

Nothing in *Teamsters*, or in any other of the Supreme Court’s decisions interpreting Title VII, however, compels an interpretation that disparate treatment liability requires purpose.91 To the contrary, the Court’s language as well as the statutory language, including the term “pattern or practice,” suggests otherwise.92 Moreover, as I have shown, such an interpretation would substantially alter the internal-causation-focused doctrinal formulations and use of statistics endorsed by the Court and relied on by lower courts and litigants for decades.

III.
THE PRINCIPAL-AGENT VIEW: ENTITY RESPONSIBILITY FOR INDIVIDUALS AT LOW LEVELS OF DECISION MAKING

A narrow view of entity liability, one that turns on purpose or deliberately discriminatory action by high-level policy makers, clearly serves the immediate interests of employers and also maps onto what seems to be a strengthening movement to cut back on regulation of businesses in

90. See, e.g., Krieger, supra note 12, at 1227-28; Nagareda, supra note 37, at 117; Oppenheimer, supra note 12, at 925; see also generally Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 465-68 (2001) (placing *Teamsters* within what she calls “first generation discrimination”). I am also guilty of this misstep. See Green, Discrimination in Workplace Dynamics, supra note 45, at 120.

91. A growing body of scholarship has elaborated on the mistake of reading purpose or a state-of-mind requirement into disparate treatment law, although this scholarship has focused primarily at the level of individual disparate treatment. See, e.g., Ralph R. Banks & Richard T. Ford, (How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality, 58 EMORY L. J. 1053 (2009); Katherine T. Bartlett, Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination, 95 VA. L. REV. 1893, 1922-25 (2009); Melissa Hart, Subjective Decisionmaking and Unconscious Discrimination, 56 ALA. L. REV. 741 (2005); Rich, supra note 85. Indeed, that the Court relied on rhetoric of purpose in a case like *Teamsters* should not be surprising. Not only was individual discrimination likely to be motivated by purpose and animus, but employers and unions—often through their high-level policy makers—actively resisted the nondiscrimination obligation imposed by Title VII. See HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW (1977) (detailing institutional resistance by employers and unions to early civil rights laws). Discrimination was also understood in the scientific community during this time as resulting from conscious attitude. See generally Krieger, supra note 12, at 1174-77 (describing a shift in the research and theoretical work on prejudice in the social sciences).

92. See supra notes 16-20 and accompanying text (detailing the *Teamsters* Court’s explanation of systemic disparate treatment in terms of different treatment rather than purpose). In the individual disparate treatment context, see McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973) (stating that Title VII “tolerates no racial discrimination, subtle or otherwise”); id. at 805 (stating that “statistics as to petitioner’s employment policy and practice may be helpful to a determination of whether petitioner’s refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks”); Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (stating that Title VII requires that “gender must be irrelevant to employment decisions”).
the United States. I argue in this Part, however, that the most commonly proposed alternative to this view—also an individualistic view, but one grounded in a principal-agent model of organizational wrongdoing—is similarly misguided. Under this view, systemic disparate treatment law imposes direct liability on those entities that fail to adequately police the known actions of individual bad actors. In the legal scholarship, this view emerges primarily in arguments for a negligence standard. At oral argument in Wal-Mart, Justice Kennedy described it as a deliberate indifference standard. I begin this Part with a brief discussion of how legal scholars and Justice Kennedy may have arrived at this view, before drawing out implications of the view—if it is adopted—for the future of systemic disparate treatment law.

A. From Purpose to Cognitive Bias: A Focus on Individuals

Discrimination is a human problem. Research and theory aimed at understanding individual biases is therefore essential for any antidiscrimination project. Nonetheless, an overemphasis on individual biases risks conceptual embrace of what I call "insular individualism," defined as the belief that discrimination can be reduced to individual decision makers (or groups of decision makers) acting in isolation from the work environment and contrary to the interests of the organizations within which they work.93 I argue that the emphasis in the legal scholarship on cognitive bias and on theorizing limits of employer liability for individual acts of discrimination has overshadowed the rich research probing structural causes of discrimination and has led to an under-theorized embrace by some of a principal-agent view of systemic disparate treatment law.

In the early years after Title VII was enacted, when employers actively resisted integration and individuals overtly expressed attitudes of racism and sexism, employees as well as employers were perceived by courts and by commentators as possible, even probable, purposeful discriminators.94 Over time, however, as egalitarian norms took hold, individuals made fewer blatantly and overtly racist or sexist decisions and were understood as less likely to consciously and purposefully discriminate.95 Employers, too,


94. This perceived alignment of interests led courts to conflate questions of employer and employee motivation. See id. at 356-59 (describing some of the early Supreme Court opinions in which the Court conflated questions of employer and employee motivation).

95. Surveys consistently report that expressed attitudes of racism and sexism have declined over the years. See, e.g., HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA 103-108 (1997); JAMES M. JONES, PREJUDICE AND RACISM 93-100 (2d ed. 1997); see also Barbara Reskin, Sex Segregation in
formally adopted nondiscrimination policies, opened equal employment offices, and began to tout diversity as a business benefit.96

Scholarly attention turned in the social sciences during this period to documenting lingering discriminatory biases in individuals.97 A wealth of research in the fields of psychology and social psychology revealed that discriminatory biases continue to operate, even absent purpose or conscious animus or prejudice, and that these biases continue to influence behavior.98 The Implicit Association Test ("IAT"), which "measures reaction time to capture the strength with which social groups are implicitly or automatically associated with good/bad evaluations and other characteristics," is probably the most well known of the methodological innovations studying implicit bias,99 but it is just one among many methods of measuring subtle biases and their influence on individual action.100

Legal scholars during this period picked up on the cognitive bias research and used it to show how individuals could continue to make decisions that treat members of different racial and gender groups differently even as they subscribe expressly to egalitarian norms.101 This thread of scholarship, which stretched across a range of areas of substantive law, emphasized individuals as a continuing source of discrimination.102
The importance of the cognitive turn in the social sciences, including research relying on the IAT, cannot be understated. It has unquestionably advanced our understanding of how discrimination operates and also our thinking about how discrimination might be reduced. We can expect to learn even more as social cognition research engages neuroscience. But the attention to cognitive bias research in the legal scholarship has tended to overshadow an equally important and rich body of research on structural and systemic causes of discrimination within organizations, including the influence of organizational context on biases and behavior.

In addition to emphasizing a particular strain of social science research and literature, the legal scholarship on employment discrimination over the past two decades has focused theoretical efforts almost exclusively at the individual level. Seeking to stave off a cramped interpretation of Title VII that would limit liability to discriminatory decisions motivated by conscious animus, legal scholars in the 1990s drew on the cognitive bias literature to theorize an interpretation of individual disparate treatment law that centers on membership causation (whether an individual has been treated differently because of his or her membership in a protected group) rather than on purpose or conscious intent on the part of decision makers. Professor Linda Hamilton Krieger's article, The Content of Our Categories, has proven one of the most influential of this line of scholarship. Professor Krieger drew in her article on social cognition research and what

103. See Green & Kalev, supra note 88, at 1437-45 (detailing existing antidiscrimination efforts, which have included efforts to debias individuals and to insulate key decisions from individual biases).


105. For a sampling of scholarship by social scientists emphasizing the role that context plays in discrimination, see Robert L. Nelson & William P. Bridges, Legalizing Gender Inequality: Courts, Markets, Unequal Pay for Women in America 244 (2d ed. 1999) (describing organizational bases of the “male, profit-making club” at a banking institution and its effect on equality within the organization); Rosabeth Moss Kanter, Men and Women of the Corporation (1977) (highlighting the role of group demographics in the environment on perception and bias); Barbara Reskin, The Proximate Causes of Employment Discrimination, 29 CONTEMP. SOC. 319, 323 (2000) (noting that “[t]he proximate causes of discrimination are the contextual factors that permit or counter the effects of the . . . habits of the brain”).

The emphasis on individuals that has emerged from the cognitive bias turn also tends to miss the relational nature of much workplace discrimination. See Green & Kalev, supra note 88. For recent critique of the emphasis on cognitive bias in employment discrimination scholarship, see Banks & Ford, supra note 81. See also Rich, supra note 85.

106. Krieger, supra note 12; see also White & Krieger, supra note 87. Professor Krieger does not ignore situational effects on implicit biases, see, e.g., Krieger, supra note 12, at 1193-98 (discussing research on bias and stereotyping involving tokens); Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 CAL. L. REV. 997, 1028 (2006) (identifying a “fourth key principle emerging from empirical social psychology—the surprising power of situations”), but her work does emphasize individual moments of decision and focuses doctrinal and theoretical effort on individual disparate treatment law, see, e.g., Krieger, supra note 12; Krieger & Fiske, supra, at 1029-61.
it tells us about the operation of biases and individuals’ efforts to control those biases to argue against an “intent” or “motivational” standard for cases of individual disparate treatment.107 Other commentators similarly focused on cognitive bias and individual disparate treatment law.108 Indeed, even as employment discrimination scholars have broadened substantially the base of empirical research from which they draw to include research on structural and systemic sources of discrimination, they have continued to focus theoretically and doctrinally on individual disparate treatment law.109

This theoretical work, too, has been tremendously important; one might even say that it has been largely successful, as a causation approach to individual disparate treatment seems to have secured a substantial foothold among commentators and in the courts.110 The emphasis on cognitive bias and on the individual as the primary, if not exclusive, source of discrimination, however, has left entity responsibility for systemic disparate treatment under-theorized. Indeed, it has left largely unchallenged a sense in the wider discourse on workplace discrimination that

107. Krieger, supra note 12, at 1242 (“To establish liability for disparate treatment discrimination, a Title VII plaintiff would simply be required to prove that his group status played a role in causing the employer’s action or decision. Causation would no longer be equated with intentionality.”).

108. See, e.g., Bartlett, supra note 91 (focusing on the effects of antidiscrimination law on individuals’ motivations to reduce their biases rather than on the effects of antidiscrimination laws on organizational settings); Ann C. McGinley, [Viva La Evolucion!: Recognizing Unconscious Motive in Title VII], 9 CORNELL J. L. & PUB. POl’Y 415 (2000) (focusing on proposals to rework individual disparate treatment law); Natasha Martin, Pretext in Peril, 75 MO. L. REV. 313, 399 (2010) (arguing for a “deeper and more sophisticated understanding of bias” and critiquing individual disparate treatment law for failing to capture that understanding); Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129 (1999) (framing “unconscious” discrimination as a problem of individuals and asking whether employers should be held responsible for the unconscious acts of those individuals). My aim is not to critique these scholars particularly—like Krieger, most (though not all) do not entirely ignore research on contextual influences on bias and stereotyping. Rather, I aim to point out that the legal scholarship as a whole has tended to focus on individuals and on individual instances of discrimination and in doing so has played into a view of discrimination as a exclusively a problem of “bad actors,” even those acting on the basis of unconscious biases. See William T. Bielby, Accentuate the Positive: Are Good Intentions an Effective Way to Minimize Systemic Workplace Bias?, 95 VA. L. REV. IN BRIEF 117, 118 (2010) (explaining that “the flaw in the legislative approach is that legal scholars, litigators, human resource professionals, and diversity consultants have become so enamored with the notion of ubiquitous unconscious, implicit, or hidden bias that they are quick to attribute systemic workplace racial and gender inequality to what is going on in people’s heads”).

109. See, e.g., Suzanne B. Goldberg, Discrimination by Comparison, 120 YALE L.J. 728 (2011) (drawing on “structural discrimination theory” to critique the demand by courts for comparators in cases involving allegations of individual disparate treatment).

110. See, e.g., Faigman et al., supra note 100, at 1399 (noting that the Court “has never held that only consciously held and explicit motives qualify under the applicable law” and that “[e]specially in light of the science, such a construction seems particularly crammed and artificial”); Wax, supra note 80, at 985 (stating that “what really matters, and what ought to matter, is whether people are treated worse because of their race—or other protected characteristic, such as sex—in the real world. Specifically, the focus should not be on attitudes or sympathies, but on . . . actionable discrimination . . . . [D]iscrimination occurs when an individual is victimized by ill treatment that is causally linked to or based on a protected characteristic.”); Zatz, supra note 87, at 1374-75 (stating that “[s]cholars agree that the causal definition best captures the doctrinal category of ‘disparate treatment’”).
employers—having adopted nondiscrimination policies, established equal opportunity offices, even embraced diversity as a business imperative—have become innocent bystanders to the discriminatory acts of their employees.\textsuperscript{111}

\textbf{B. The Rise and Dominance of the Principal-Agent Model and Its Effect on Theorizing Entity Liability}

Closely aligned with the conceptual shift toward seeing employers as innocent bystanders to discrimination is the principal-agent model of organizational misconduct. The principal-agent, rational-actor model tends to view rogue, self-interested individuals as the primary source of organizational wrongdoing.\textsuperscript{112} Individuals under this model are thought to act against the interest of the organization, which prefers compliance with the law. Imposing vicarious liability on organizations under this model is therefore intended to induce better internal policing, such as the implementation of systems of detection and internally imposed sanctions on individuals who engage in wrongdoing.\textsuperscript{113}

The principal-agent model and agency principles that derive from that model have a long history in tort law.\textsuperscript{114} In the past decade, the model has also dominated theorizing of entity liability for individual acts of employment discrimination. In fact, it has gained such a strong hold that it

\textsuperscript{111} The \textit{Wal-Mart v. Dukes} case, for example, was construed in the mainstream media as a case about managers' "unconscious" biases. See Roger Parloff, \textit{The War Over Unconscious Bias}, \textit{FORTUNE}, Oct. 15, 2007, at 90; Michael Orey, \textit{White Men Can't Help It}, \textit{BUSINESS WEEK}, May 15, 2006, at 54. For a similar sense in the legal scholarship, see Samuel R. Bagenstos, \textit{The Structural Turn and the Limits of Antidiscrimination Law}, 94 \textit{CAL. L. REV.} 1, 43 (2006) (arguing that courts are "particularly unlikely to conclude that particular employers are at fault for failing to police conduct that has been programmed into our brains by overarching societal influences"); Wax, \textit{supra} note 108. Some legal scholars have pointed to practical and political benefits of removing blame from entities. See, e.g., Oppenheimer, \textit{supra} note 12, at 971-72.


\textsuperscript{113} Reinier H. Kraakman, \textit{Corporate Liability Strategies and the Costs of Legal Controls}, 93 \textit{YALE L.J.} 857, 869 (1984) (noting that the legal system relies on vicarious liability to motivate firms to monitor and sanction agent behavior). There is an obvious parallel between this view in the criminal context and the emerging view of discrimination as individual wrongdoer divorced from organization.

has crossed over to influence thinking about entity responsibility for systemic disparate treatment.

1. Individual Incidences of Discrimination and the Principal-Agent Model of Organizational Misconduct

Title VII imposes liability on employers both for their own acts of discrimination and for the discriminatory acts of their "agents." In cases involving individual instances of discrimination, liability usually attaches under the latter of these two bases. It is well settled that the employer is liable under Title VII for adverse employment actions, such as refusals to hire or promote or decisions to discharge, made by its employees on the basis of race or sex in the course of business. The employer is liable for the discriminatory acts of these agents regardless of whether it condoned the acts, or even of whether it knew of them. All that is required is that the adverse employment action was taken by an agent of the employer because of the plaintiff's membership in a protected group.

The rise in the dominance of the principal-agent model for theorizing entity responsibility in employment discrimination law began in the area of sexual harassment in the 1980s and '90s, when the Court struggled to delineate limits of employer responsibility for what the Court saw as individual, rogue acts by employees. In 1998, in Burlington Industries, Inc. v. Ellerth, the Court relied on agency principles—and the principal-agent model of entity responsibility—as a way of delineating those limits.

115. This principle is rooted in the statutory language of Title VII, which includes "agents" within the definition of employer. 42 U.S.C. § 2000e(b) (2006) (defining "employer" to mean "a person engaged in an industry affecting commerce . . . and any agent of such a person"). See generally Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (identifying agency principles as providing a limit on employer liability for individual acts of discrimination).


117. See Burlington Indus., 524 U.S. at 760-61 (acknowledging a longstanding consensus in the courts that employers are liable "for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor's actions") (quoting Meritor, 477 U.S. at 70-71).

118. Although hostile work environment theory is capable of encompassing hostile environments that are not attributable to specifically identified individuals, see, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (involving sexualized images in the workplace), the hostile work environment cases decided by the Supreme Court have tended to focus on individual harassers. See, e.g., Meritor, 477 U.S. at 57; Burlington Indus., 524 U.S. at 742; Harris v. Forklift Syst. Inc., 510 U.S. 17 (1993); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

119. Burlington Indus., 524 U.S. at 754-55. Although the Court had held in an earlier case that employer liability for harassment should look to principles of agency law, the Court in that case declined to resolve the issue of employer liability for harassment. Meritor, 477 U.S. at 57. The EEOC had urged in Meritor that agency principles of respondeat superior apply to impose vicarious liability on the employer for all supervisor harassment. See generally Oppenheimer, supra note 12, at 960-61.
Drawing on agency principles laid out in the Restatement of Agency (Third), the Court held that sexual harassment by a supervisor is neither conduct within the scope of employment nor conduct aided in the agency relation—and therefore is not conduct for which the entity is vicariously liable—unless the supervisor took a “tangible employment action” as part of the harassment.120 This is so, according to the Court, in large part because “a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer.”121 These individual actors, in other words, are rogue actors acting in their own interests and against the interests of the employer.

Instead of absolving the entity of all responsibility for sexual harassment carried out by supervisors who did not take tangible employment action, the Court created an affirmative defense to vicarious liability.122 It held that the employer is vicariously liable for the harassing supervisor’s conduct if it fails to show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”123 The Court relied on the principal-agent model to justify its decision. It stated that employers should be provided this defense because “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms” and because “limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive.”124 Employers are asked under this model to police their bad-actor employees, and victims of harassment are asked to aid their employers in that endeavor.

The principal-agent model now has a firm grip on theorizing of entity liability in the individual disparate treatment context. It is likely to continue to influence the shape of individual disparate treatment law in various ways over the coming decades.125 In addition, the model has crossed over to influence theorizing of entity responsibility for systemic disparate treatment.

120. *Burlington Indus.*, 524 U.S. at 744, 757 (holding that because “[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer,” the general rule is “that sexual harassment by a supervisor is not conduct within the scope of employment”); *id.* at 744 (holding that the aided in the agency standard requires “the existence of something more than the employment relation itself”).

121. *id.* at 756.

122. *id.* at 764-65.

123. *id.* at 764-65 (relying in part on tort concept of “avoidable consequences”).

124. *id.* at 765.

125. See Green, *supra* note 93.
The Influence of the Principal-Agent Model in Theorizing Systemic Disparate Treatment Liability

In this section, I examine how overreliance on the principal-agent model in delineating the limits of entity responsibility for individual acts of disparate treatment has skewed theorizing of entity liability for systemic disparate treatment. Specifically, I argue that overreliance on the principal-agent model has led progressive legal scholars to propose that systemic disparate treatment law should apply a negligence standard to determine entity liability for widespread disparate treatment. This proposal is problematic on several fronts. First, as a theoretical and doctrinal matter, it incorporates (without justification) concepts of notice and cost into systemic disparate treatment law where they do not now exist. Second, as a practical matter, it inaccurately frames the adoption of a negligence standard as a progressive move, thereby framing the policy-required view of systemic disparate treatment liability as the currently prevailing view.

Negligence as a proposed standard of entity liability for disparate treatment emerged in employment discrimination scholarship in the early 1990s and, like the turn to the social science research on cognitive bias more generally, it emerged as part of an effort to stave off a narrow interpretation of Title VII as requiring purpose to discriminate. In a well-known article titled Negligent Discrimination, Professor David Oppenheimer observed that employers as entities are frequently held in employment discrimination law to what might be understood as a negligence standard. Specifically, he pointed to cases of employer liability for co-worker harassment and to employer liability for the use of policies and practices that are neither facially discriminatory nor adopted with a purpose to discriminate but that have a disparate impact on members of protected groups. In each of these cases, he argued, the employer is held liable under Title VII for failing to act reasonably to protect its employees from risk of harm, whether harm from acts of discriminatory

126. Oppenheimer, supra note 12. For a more recent framing of this argument, see MICHAEL K. BROWN ET AL., WHITENASHING RACE 238 (2003) (proposing that Title VII be interpreted to apply a negligence standard, one that "requires employers to take reasonable steps to avoid discrimination") (Professor Oppenheimer is one of the book's seven authors). The authors suggest strict liability as an alternative, but their vision of strict liability emphasizes societal effects rather than disparate treatment within the defendant organization. See id. at 239 (drawing analogy to products liability law). The authors' prescription seems driven in part by their belief that disparate treatment doctrine currently requires proof of "conscious" intent on the part of the employer. See id. at 238 (stating that the "current standard usually requires proof that an employer consciously intended to discriminate against a person of color").

127. Oppenheimer, supra note 12.

128. Id. at 931-936; 944-967. He also pointed to failure to accommodate but saw accommodation requirements as establishing "a higher duty." Id. at 967.
harassment or from discriminatory impact, of which it knew or should have
known.\textsuperscript{129} From this, Oppenheimer argued in favor of “general application”
of a negligence principle under which the employer would be liable if it
“fails to act to prevent discrimination which it knows, or should know, is
occurring, which it expects to occur, or which it should expect to occur.”\textsuperscript{130}

Professor Oppenheimer did not distinguish in his article between entity
liability rooted in the principal-agent model—the entity’s failure to act to
prevent discrimination by individual decision makers—and entity liability
rooted in the entity’s primary action apart from individual wrongdoers.\textsuperscript{131}
Assuming for purposes of this argument that one agrees with
Oppenheimer’s reading of disparate impact law, entity liability for using an
employment practice that has a disparate impact would fall within the latter
category, while entity liability for co-worker harassment would fall
squarely within the former. This distinction matters because it helps draw
out the influence of the principal-agent model on theorizing entity
responsibility for systemic disparate treatment and ultimately exposes the
danger in Oppenheimer’s proposal and those like it. If the principal-agent
model exhausts the realm of entity liability for disparate treatment, then
entities can only be liable for identifiable (and provable) acts of disparate
treatment taken by individuals.\textsuperscript{132}

A recent article by Professor Noah Zatz provides a useful backdrop for
exploring the dangers of theorizing entity responsibility from the principal-
makes an important theoretical contribution to employment discrimination
law by drawing connections between employer liability for third-party
harassment and employer liability for failure to accommodate an individual

\textsuperscript{129} \textit{Id.} at 933 (stating that “Title VII establishes a duty on the part of employers not to
discriminate” and that “[u]nder the Griggs line of authority, that duty includes a duty not to adopt or use
selection devices that have a discriminatory impact, unless manifestly necessary to the operations of the business”); \textit{id.} at 966 (pointing to negligence concepts in sexual harassment law, including the position
of courts and the EEOC Guidelines that employers are liable for failure to “prevent a hostile or offensive
work environment of which management-level employees knew, or in the exercise of reasonable care
should have known”).

\textsuperscript{130} \textit{Id.} at 969-70. Oppenheimer seems to conflate individual and systemic discrimination. \textit{See id.}
at 970. To the extent that he advocates a negligence standard for employer liability for individual
instances of discrimination, he arguably (albeit inadvertently) would advocate cutting back on vicarious
liability. \textit{See id.} (stating that “[w]here an employer has created job screening procedures which fail to
correct for unconscious discrimination, and such discrimination influences the process, the employer
ought to be subject to negligence liability”). Whether in fact his approach would cut back on vicarious
liability depends on whether disparate treatment includes unconscious bias.

\textsuperscript{131} Oppenheimer, \textit{supra} note 12, at 968-72.

\textsuperscript{132} Although Professor Oppenheimer’s article is frequently cited for its negligence proposal, to
my knowledge it has never been critiqued for its assumption that negligence is the appropriate standard
for primary entity liability for widespread disparate treatment within an organization.
with a disability.\textsuperscript{133} He shows that in both scenarios the employer is required to avoid or correct a workplace harm that would have been caused by an individual’s membership in a protected group, even if none of the employer’s agents treated the individuals at issue differently based on their protected group status.\textsuperscript{134} More importantly for thinking about systemic disparate treatment law, Professor Zatz also shows that employers are regularly held directly liable in several areas of employment discrimination law, particularly cases involving co-worker harassment and customer discrimination, even when the entity (or its high-level decision makers) lacked discriminatory intent or purpose.\textsuperscript{135}

Despite these important contributions, by focusing exclusively on employer responsibility for individual moments of discrimination (whether an act of harassment or customer discrimination, or an incident of failing to accommodate), as a principal-agent model of entity responsibility would do, Zatz risks misjudging the limits of his argument. \textit{Managing the Macaw} suggests that entity responsibility for identifiable incidents of individual disparate treatment exhausts the realm of entity responsibility for disparate treatment and that the concepts of notice and cost—hallmarks of a negligence standard—should govern entity liability for systemic disparate treatment.\textsuperscript{136}

It is quite possible that a negligence standard for entity liability is appropriate in the individual disparate treatment context as a back up to vicarious liability. Courts and commentators generally agree that an employer can be liable for harassment (or other discriminatory acts) carried out by a co-worker if the employer knew or should have known about the co-worker’s harassment and failed to act reasonably, or if it was negligent in the hiring of that co-worker.\textsuperscript{137} As Zatz deftly illustrates, negligence also

\textsuperscript{133} Zatz, \textit{supra} note 87.

\textsuperscript{134} Id.

\textsuperscript{135} Professor Zatz’s development of the internal/external membership causation terminology is also useful. The concepts of internal and external causation have been around and important for some time across areas of law, including systemic disparate treatment law, \textit{see supra} notes 14-27 and accompanying text, but they have been less well developed in the employment discrimination context, where the focus has been so prominently on “intent.” Zatz’s work deftly shows that the assertion that primary liability for disparate treatment has always required purpose or intent on the part of high-level policy makers, \textit{see}, e.g., Nagareda, \textit{supra} note 37, is patently wrong.

\textsuperscript{136} In fairness to Professor Zatz, I should make clear that he limits his reference to the shape of systemic disparate treatment law to a single footnote, \textit{see id.} at 1475, n.270, but he emphasizes more broadly and consistently in \textit{Managing the Macaw} notice and cost as determining inquiries for entity liability beyond vicarious liability and seemingly places entity liability for widespread disparate treatment within an organization outside of his definition of disparate treatment. \textit{See id.} at 1503-05 (describing notice and cost as “leading considerations” in an inquiry of employer responsibility); \textit{id.} at 1409-10 (defining “internal causation”/disparate treatment); \textit{id.} at 1475 n.270 (suggesting that entity liability for widespread disparate treatment lies outside of “internal causation”/disparate treatment).

\textsuperscript{137} \textit{See}, e.g., Swenson v. Potter, 271 F.3d 1184, 1191-92 (9th Cir. 2001); Curry v. District of Columbia, 195 F. 3d 654, 660 (D.C. Cir. 1999); Richardson v. New York, 180 F.3d 426, 446 (2d Cir.
extends easily to cases involving harassment carried out by non-employees of the entity, including independent contractors and customers.\textsuperscript{138}

It is important to recognize, however, that each of these scenarios—whether discrimination by co-worker, independent contractor, or customer—involves a claim of individual disparate treatment. In each case, the plaintiff has pointed to an individual who has engaged in discriminatory behavior that violates Title VII, and the plaintiff has asked that the employer be held responsible for that behavior. Agency principles trigger direct entity liability in these cases only because the entity cannot be vicariously liable for the individual discriminatory act. In this way, direct entity liability sounding in negligence serves as a safety net, or back up, to vicarious liability for the discriminatory acts of individuals.\textsuperscript{139}

Even assuming that negligence is the appropriate direct liability back-up to vicarious liability for individual acts of discrimination, however, it is a mistake to assume that negligence defines the outer limits of entity liability for systemic disparate treatment. Systemic disparate treatment has always been understood as a theory of primary entity liability. Entity liability is established in systemic disparate treatment cases 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 (as shown by statistics and other evidence of disparate treatment in the aggregate) that the entity is in some part to blame.\textsuperscript{140}

Scholars and judges who assume that negligence forms the outer limit of direct entity liability for discrimination miss this important point. Professor Oppenheimer's proposal, for example, rests entity liability on the entity's failure to prevent individual acts of discrimination.\textsuperscript{141} Because his proposal is rooted in a principal-agent model (much like the negligence standard for co-worker harassment), he invokes the limiting concept of

\textsuperscript{138} Zatz, supra note 87, at 1416-22; see also Dunn v. Wash. County Hosp., 429 F.3d 689, 691 (7th Cir. 2005) (explaining that the employer's liability in third-party harasser cases is "direct rather than derivative"). The Dunn court cites to Restatement (Second) of Agency § 213(d), which the commentary characterizes as resting in tort rather than in agency. RESTATEMENT (SECOND) OF AGENCY § 213 cmt. a. For a critique of Zatz's extension of his argument to subordinate-bias cases, see Green, supra note 116.

\textsuperscript{139} Green, supra note 116.

\textsuperscript{140} See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (requiring a showing that discrimination is "the regular rather than the unusual practice").

\textsuperscript{141} Oppenheimer, supra note 12, at 969-70.
notice. Professor Zatz, too, suggests that concepts familiar to a negligence standard, notice and cost, should be invoked in determining entity responsibility. But, as illustrated in Part I, entity liability for systemic disparate treatment has never turned on these concepts. Rather, once the fact finder determines that disparate treatment was widespread, "the regular rather than the unusual practice" within the defendant organization, the entity has been held liable. Incorporating concepts of notice and cost—like imposing a policy-required view—would substantially alter the existing law of systemic disparate treatment. Movement in this direction requires justification that has not been provided.

Moreover, because negligence, with its attendant concepts of notice and the weighing of costs and benefits, as a standard for entity responsibility has been proposed by progressive scholars (some of whom have construed disparate treatment law to require conscious intent or purpose to discriminate), the theoretical debate surrounding entity responsibility for systemic disparate treatment—to the extent that one has developed—has been skewed toward negligence versus purpose. The future of systemic disparate treatment law has accordingly been mis-framed as a choice between a "new" negligence standard and an "old-fashioned" purpose or policy of discrimination standard, like the one embraced by Professor Nagareda and by Justice Scalia in Wal-Mart.

Justice Kennedy made the same misstep at oral argument in Wal-Mart. The deliberate indifference standard, which he drew from section 1983

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142. Id. at 969 ("Whenever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur, it should be held negligent.").
143. Zatz, supra note 87, at 1403 (identifying "[n]otice and cost" as "leading considerations" in coupling membership causation and employer responsibility); see also id. at 1415 ("[C]ountervailing considerations involve notice and feasibility . . . .").
144. See Teamsters, 431 U.S. 324.
145. Other disadvantages of the principal-agent model include an over-emphasis on organizational policing of individual behavior. See, e.g., Bartlett, supra note 91, at 1901 (arguing that a strong employment discrimination law might backfire by interfering with individuals' "good intentions"). See also infra Part IIIA2 (describing one of the advantages of the context view of entity liability for systemic disparate treatment as opening up contextual change that social science suggests may be more effective than policing efforts in reducing discriminatory bias in workplace decisions and interactions).
146. See supra note 127.
147. See Transcript of Oral Argument at 6, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)(No. 10-277), 2011 WL 1131405 (Kennedy, J.) (referring to section 1983 and Monell); id. at 40 (Kennedy, J.) (referring to "deliberate indifference"). In Monell v. Department of Soc. Serv., the Supreme Court held that municipal entities could be liable for constitutional violations under section 1983 but not vicariously liable using a theory of respondeat superior for the actions of its agents; rather, plaintiffs must prove that the municipality acted with deliberate indifference to violations of plaintiffs'
jurisprudence and which also governs entity liability in some cases brought under Title IX of the Civil Rights Act.\textsuperscript{148} rests on the same individualistic groundwork as the negligence standard proposed by Oppenheimer and hinted at by Zatz. Deliberate indifference determines the limits of entity liability under section 1983 and Title IX only because the Court has held that the entity will not be vicariously liable for the actions of its agents in those contexts.\textsuperscript{149} The claims at issue in the section 1983 and Title IX cases applying a deliberate indifference standard involve individual, identifiable acts of discrimination (or violation of constitutional rights) by specific actors and questions about when the school district or governmental body will be liable for the actions of those individuals.\textsuperscript{150} The cases do not involve claims seeking to impose entity liability for systemic, widespread discrimination or wrongdoing.\textsuperscript{151}

Another way to approach this point is to think about how employer liability under Title VII differs from entity liability under Title IX and section 1983. It is well established that Title VII imposes vicarious liability upon employers for acts of their agents. This means that if individual plaintiffs, whether numbering just a handful or in the hundreds or thousands, can prove that specific managerial decisions denying a pay raise

\textsuperscript{148} See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998) (holding that unlike claims for damages against employers under Title VII, a damage remedy will not lie under Title IX against a federal fund recipient unless “an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond” and adopting a “deliberate indifference” standard like the one applied under section 1983).

\textsuperscript{149} It is possible that Justice Kennedy meant to refer to deliberate indifference as a way of broadening entity liability for systemic disparate treatment beyond Scalia's policy-required view, particularly given the role of the deliberate indifference standard in section 1983 jurisprudence, but the point here is that deliberate indifference as a standard for entity liability even in section 1983 cases has grown out of the Court's insistence that the governmental entity cannot be held vicariously liable for individual acts of wrongdoing. It is a standard, in other words, that seeks to determine when the entity should be liable for an individual act rather than a standard that seeks to determine when the entity should be liable for widespread acts.

\textsuperscript{150} See supra note 149.

\textsuperscript{151} See generally Chemerinsky, infra note 171 (critiquing individualistic approaches to police misconduct); see also Craig B. Futterman et al., The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System, 1 DEPAUL J. FOR SOC. SCI. 251 (2008) (critiquing Monell for closing out statistical evidence like that used in the employment discrimination context under Title VII).
or promotion to each of those individuals were made because of the individuals' sex, then the employer will be liable of every one of those instances of discrimination, regardless of whether the employer knew of the discriminatory nature of the decisions or acted reasonably under the circumstances. Because co-workers are not considered agents of the employer, in contrast, the employer is not vicariously liable for the discriminatory actions of co-workers. Instead, the plaintiff who is discriminated against by a co-worker must show that the defendant entity or high level decision makers within the entity knew or should have known of the co-worker discrimination and failed to correct it. Similarly, under Title IX and section 1983, because entities cannot be held vicariously liable for acts of their agents, the plaintiff who suffered discrimination by an agent of the school or governmental entity must show that the entity—acting through high-level decision makers within the organization—knew of or should have known of the specific acts of or risk of discrimination and failed to adequately police those acts (to the standard of care established by the Court, whether negligence or, in the case of section 1983 and Title IX, deliberate indifference).

In none of the scenarios above is the law moving beyond entity liability tied to specific individual instances of discrimination or wrongdoing. The law may ultimately attach the label of wrongdoing to the entity and its behavior, for example, to its response or lack of response to a known act or acts of discrimination, but under a principal-agent model the law always requires a wrongdoer at a lower level, for example, the supervisor, co-worker, police officer, or teacher who has been shown to have acted on his or her discriminatory biases. This, as I will show in the next Part, is the fundamental difference between direct entity liability founded on an individualistic, principal-agent model of organizational wrongdoing and direct entity liability founded on a systemic, context model of organizational wrongdoing.153

152. See generally Zatz, supra note 87 (describing the co-worker cases).

153. In her opinion dissenting from the majority's reversal for failure to meet the Rule 23 commonality requirement, Justice Ginsburg reveals very little about her view of the substantive law of systemic disparate treatment. Indeed, she emphasizes the plaintiffs' disparate impact claim over their systemic disparate treatment claim. See Wal-Mart v. Dukes, 131 S.Ct. 2541, 2564-65 (2011) (Ginsburg, J., dissenting). She points to the similarity in the plaintiffs' allegations in Wal-Mart to those of the plaintiffs in Lesiner v. New York Tel. Co., a case brought in the early 1970s that involved allegations that women were being discriminated against in hiring and promotion to high-level management positions at New York Telephone. Id. In that case, the district court judge, Judge Constance Baker Motley, relied heavily on Griggs, the disparate impact case decided by the Supreme Court just two years earlier, in framing the plaintiffs' claim and, among other things, in finding commonality satisfied for class certification. See Lesiner, 358 F. Supp. 359, 368 (D.C.N.Y. 1973). Justice Ginsburg also pointed to the Court's decision in Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988), holding that subjective decision making practices can be challenged using a disparate impact theory. Wal-Mart, 131 S.Ct. at 2565.
For now, I have shown that an individualistic model of organizational wrongdoing—whether in the form of a policy-required view or a principal-agent view—would substantially alter the shape of systemic disparate treatment law. In the next Part, I undertake to make the normative case for preserving the shape of systemic disparate treatment law as a means of holding employers directly liable for widespread disparate treatment within their organizations. I argue that systemic disparate treatment theory is an aggregate theory that rests on a context model of organizational wrongdoing. Systemic disparate treatment law imposes liability on entities in which disparate treatment is the regular rather than the unusual practice because those entities are likely to be producing disparate treatment within their organizations.

IV.
SYSTEMIC DISPARATE TREATMENT LAW AS SYSTEMIC THEORY: DIRECT LIABILITY FOR WIDESPREAD INTERNAL DISPARATE TREATMENT

One of the principal drawbacks of an individualistic theoretical foundation for systemic disparate treatment law is that it would severely

Nonetheless, at oral argument in Wal-Mart, Justice Ginsburg and Justice Breyer both asked questions that may reveal an inclination on their part to view systemic disparate treatment theory as a systemic theory. In her first question, directed to counsel for Wal-Mart, Justice Ginsburg asked:

The company gets reports month after month showing that women are disproportionately passed over for promotion, and there is a pay gap between men and women doing the same job. It happens not once, but twice. Isn’t there some responsibility on the company to say, “Is discrimination at work?” and if it is, isn’t there an obligation to stop it?

Transcript of Oral Argument at 6-7, Wal-Mart, 131 S. Ct. 2451- (No. 10-277). This question suggests that Justice Ginsburg is thinking about direct entity liability without requiring proof of purpose on the part of high-level policy makers and independent from identification of specific instances of disparate treatment at lower levels within the organization. She hints at notice when she refers to receipt of reports, but her notice is notice of widespread disparities rather than of specific instances of disparate treatment, and this may set her view apart from a principal-agent view.

Later during the argument, Justice Breyer directed the following question at counsel for the plaintiffs:

[O]n facts about what people say and how they behave, many of which central management knew, and given the results which central management knew or should have known, should central management under the law have withdrawn some of the subjective discretion in order to stop these results?

Id. at 36. Justice Breyer here too seems here to be thinking about direct entity liability independent from liability for specific, individual instances of disparate treatment, though he goes further than Justice Ginsburg toward a negligence standard by referring to knowledge of “facts about what people say and how they behave.”

Neither Justice Ginsburg nor Justice Breyer fully theorizes systemic disparate treatment as a systemic theory, and neither adequately explains how knowledge plays into their view of organizational responsibility. It is quite possible that, if pressed, either or both of them would describe their view under a principal-agent account rather than a systemic one, and that they would therefore adhere to the negligence frame that a principal-agent account tends to produce. Nonetheless, these questions suggest at least that these Justices may be inclined to embrace a view of systemic disparate treatment law that assigns liability to entities for producing widespread disparate treatment within their walls and that preserves the law of systemic disparate treatment as it has been understood since Teamsters and Hazelwood.
undermine the law’s ability to combat discrimination in the workplace. For reasons both practical and doctrinal, individual disparate treatment law, even properly constructed and applied, cannot fully address discrimination in the modern workplace.

As a practical matter, disparate treatment is often difficult to discern on an individual basis—it occurs subtly in day-to-day interactions, in decisions that do not lend easily to immediate comparison, and in unstated judgments and perceptions of value and skills—and therefore can frequently only be identified in the aggregate, where it can be shown that members of a particular group are being denied more promotions or provided less pay.\(^{154}\) Along these lines, studies also show that individuals are particularly reluctant to see themselves as victims of discrimination when incidences are viewed in isolation.\(^ {155}\)

Discrimination in isolated employment decisions can also be difficult to prove, particularly given the reduced likelihood that biased decision makers will utter statements reflecting their biases in the process of making their decisions.\(^ {156}\) Individual disparate treatment law as most courts understand it also requires that individuals wait for an adverse employment action such as a discharge or failure to promote before suing.\(^ {157}\) Yet individuals must nonetheless adhere to relatively strict time limits once they do suffer an adverse employment action.\(^ {158}\) My point here is not that individual disparate treatment law is too cramped, although that argument

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154. See Green, Discrimination in Workplace Dynamics, supra note 35 (on practical limitations of individual disparate treatment claims for addressing the full range of workplace discrimination). This reality was the major impetus for congressional override of the Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).


156. See supra note 96.

157. Courts have held, for example, a poor evaluation, change of job title, exclusion from training, and intra-department transfers insufficient for a claim of individual disparate treatment. See Green, supra note 45, at 116-17. How many individual moments of discrimination go unaddressed will depend on how the subordinate-bias issue is resolved, which is likely to depend in large part on the interpretation and application of the Supreme Court’s recent decision in Staub v. Proctor Hosp., 131 S. Ct. 1186, 1187 (2011) (holding in a case brought under the Uniform Services Employment and Reemployment Rights Act, with identical statutory language as Title VII, that “if a supervisor performs an act motivated by antimititary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable”). For discussion of the subordinate-bias issue under Title VII pre-Staub, see Green, supra note 93; see also Green, supra note 116.

158. See Lewis v. City of Chicago, 130 S. Ct. 2191, 2199 (2010) (stating that “for disparate-treatment claims . . . the plaintiff must demonstrate deliberate discrimination within the limitations period”). It is not clear what the Court sought to capture with the term “deliberate.” Cf. Green, supra note 93 (describing insular individualism in earlier Supreme Court cases).
might be made, but, rather, that a systemic disparate treatment law that captures disparate treatment in the aggregate serves a role in the regulatory scheme that a law focused on individual instances of disparate treatment does not.

An individualistic theoretical grounding also fails to capture the role that organizations play in creating the context within which individuals work. A substantial body of research and literature shows that organizations shape the work environments in which their employees work. Indeed, corporations spend millions of dollars each year developing and implementing corporate cultures and theories of management to serve managerial needs. The neglect of organizational influence by the individualistic theories is largely a conceptual and empirical mistake, but it links to practical problems for enforcement of employment discrimination law. If employers are perceived as innocent bystanders, as having little control over discriminatory decisions that take place within their walls, then courts will be much less willing to impose liability for disparate treatment, even when it is widespread within the organization. Moreover, when individuals are perceived as the source of the problem, solutions tend also to narrowly focus on individuals over broader organizational structural and cultural change.

In this Part, I argue that systemic disparate treatment law holds (and should hold) entities directly liable for widespread disparate treatment within their organizations. Drawing from advancements in other areas of organizational wrongdoing, I develop a "context" model of organizational wrongdoing as theoretical grounding for existing systemic disparate treatment law. A context model situates individuals within the organizational context in which they work and interact. Systemic disparate treatment law I argue operationalizes this theoretical foundation by imposing liability on organizations in which disparate treatment is the regular rather than the unusual practice.

A. A Context Model of Organizational Wrongdoing

1. The Rise of a more Situationist Approach to Organizational Wrongdoing in Other Areas of Law

Historically, legal regulation and theory of organizational misconduct have tended—like current thinking about employment discrimination—to

159. See supra note 106.
161. See Green & Kalev, supra note 89, at 1437-45 (describing the individualism that underlies existing antidiscrimination efforts).
overlook the ways in which the firm’s environment affects individual behavior. Over the past several decades, however, scholars have developed models of organizational misconduct that adopt a more situationist approach to wrongdoing and acknowledge that wrongdoing can be driven by context and can occur even absent individual, amoral actors. These models build on research in the social and organizational sciences highlighting the role that organizational context plays in shaping individual and group conduct. Research shows, for example, that organizations with incentive structures that value bottom-line results are more likely to produce violations of laws and conduct codes. Similarly, research shows that organizational culture and employees’ beliefs regarding the sincerity of upper management’s commitment to ethical or other socially desirable conduct can affect behavior. In short, this research shows that organizations, as one scholar has put it, can “socialize individuals into evildoing.”

162. Courts and legislators incorporated entity liability for crimes from tort law in the 1900s. See New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909); see Wayne A. Logan, Criminal Law Sanctuaries, 38 HARV. C.R.-C.L. L. REV. 321, 353 (2003) (“[B]y the early 1900s, legislators and judges realized that the criminal law required modification to properly account for wrongs committed by increasingly powerful and prevalent corporate collectives.”). For a survey of instrumentalist accounts of the entity, see Daryl J. Levinson, Collective Sanctions, 56 STAN. L. REV. 345 (2003).

163. See, e.g., Malloy, supra note 112, at 459 (“routine noncompliance”).

164. See, e.g., Donald C. Langevoort, Monitoring: The Behavioral Economics of Corporate Compliance with the Law, 2002 COLUM. BUS. L. REV. 71 (2002) (describing how the influence of group setting can make it difficult to recognize and stop harmful behavior once it has begun); ALEXANDER HASLAM, PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH (2001) (articulating the role that entities play in the perception of self); see Adrian E. Tschoegl, The Key to Risk Management: Management, in RISK MANAGEMENT: CHALLENGE AND OPPORTUNITY 103 (Michael Frenkel et al. eds., 2000) (pointing out a failure to develop a sufficient understanding of organizational misbehavior because of over-reliance on agency cost explanations).

165. Krawiec, supra note 112, at 599.


Drawing on this and other research, legal scholars across disciplines have begun to argue in favor of regulation that incentivizes change in organizational context.\textsuperscript{168} These scholars focus in regulatory areas where much like with employment discrimination it can be difficult to isolate identifiable wrongdoers and where effective solutions require attention to organizational and institutional practices beyond policing of individuals. In the environmental area, for example, Professor Timothy Malloy has detailed the substantial empirical work showing that routines and systems can drive noncompliance with environmental laws.\textsuperscript{169} From this, he has proposed that the law should create incentives for firms to adopt specialized “environmental management systems,” which he defines as “formal, integrated set[s] of organizational routines (consisting of rules, procedures, authority structures and resource allocations).”\textsuperscript{170}

Professor Erwin Chemerinsky similarly took a situationist approach to organizational wrongdoing in his critique of efforts to reduce misconduct by officers in the Los Angeles Police Department (LAPD).\textsuperscript{171} In his independent analysis of the Board of Inquiry Report, issued in response to a corruption scandal discovered in the late-1990s within the LAPD, Chemerinsky pointed to a lack of attention to the structures within and culture of the LAPD as an organization and a failure to identify structural solutions. Commentators (and the U.S. Justice Department) have since followed Chemerinsky’s lead with proposals for a new paradigm of governance that focuses on contextual change.\textsuperscript{172} As Professor Samuel Sociologist Diane Vaughan has detailed a variety of ways in which institutional norms and organizational structures and policies can shape behavior and lead to organizational mistakes and wrongdoing. Her work crosses substantive disciplines from violation of securities laws to an extensive sociological analysis of the NASA Challenger disasters. Her research consistently reveals the importance of context for understanding organizational wrongdoing. Diane Vaughan, Rational Choice, Situated Action, and the Social Control of Organizations, 32 LAW & SOC. REV. 23 (1998) (calling for more research on the relationship between structure and agency); Diane Vaughan, Toward Understanding Unlawful Organizational Behavior, 80 MICH. L. REV. 1377 (1982).

\textsuperscript{168} Calls for “ethical culture(s)” and “integrity-based programs” as better ways of reducing organizational misconduct than formal compliance programs have also surfaced in this area. This move is based in part on research showing that individuals are more likely to obey the law when they perceive a moral obligation to follow the rules. Tom Tyler, Why People Obey the Law (1990). The idea is to shape (or reshape) organizational cultures so that those cultures encourage individuals to discuss ethical issues, to ask questions, and to act responsibly. See David Hess, A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines, 105 MICH. L. REV. 1781, 1806 (2007) (on “hardware and software” changes).

\textsuperscript{169} Malloy, supra note 112, at 478-91.

\textsuperscript{170} Id. at 492; see also David W. Case, Changing Corporate Behavior through Environmental Management Systems, 31 WM. & MARY ENVTL. L. & POL’Y REV. 75 (2006) (describing environmental and EPA regulatory guidelines as they apply to EMS).


Walker describes the new approach, it emphasizes the systematic collection and analysis of data for identifying problems and "changing police organizations, as opposed to pursuing individual officers guilty of misconduct . . . ."\textsuperscript{173}

Glimpses of this turn toward recognizing the influence of organizational context on individual and group behavior can also be seen in recent laws regulating organizational misconduct. Although there is reason to believe that the shift in the treatment of entity liability under some of these laws may be attributable to concerns about the "fairness" of holding entities vicariously liable for criminal or other wrongful conduct of individual employees (thus retaining a substantial foundation in the principal-agent model),\textsuperscript{174} some of the more recent regulatory changes suggest an awareness of the influence of organizational context beyond merely limiting or failing to limit individual amoral behavior.

One prominent example of this regulatory recognition of organizational context as a mechanism for wrongdoing appears in recent revisions to the Federal Sentencing Guidelines for Organizations.\textsuperscript{175} For several decades, the Guidelines have provided for reduced penalties for organizational misconduct if the organization has an "effective internal compliance system" in place.\textsuperscript{176} Historically, and consistent with a principal-agent model of organizational wrongdoing, the Guidelines emphasized the role of the organization in policing individual misconduct through systems of reporting and sanctioning.\textsuperscript{177} In the past five-to-ten

\textsuperscript{173} Id. at 7; see id. at 29-30 (describing the importance of systemic collection and analysis of data to identify problems).


\textsuperscript{175} See \textit{U.S. SENTENCING GUIDELINES MANUAL} (Nov. 1, 1990).

\textsuperscript{176} Id. Under the Guidelines, the fine ranges for organizations are calculated using a base fine amount multiplied by a "culpability score." That score is determined "primarily by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed"). U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f). See generally Diane E. Murphy, \textit{The Federal Sentencing Guidelines for Organization: A Decade of Promoting Compliance and Ethics}, 87 IOWA L. REV. 697 (2002) (describing changes put forward by the Commission).

\textsuperscript{177} Id. See generally Jennifer Arlen & Reinier Kraakman, \textit{Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes}, 72 N.Y.U. L. REV. 687 (1997) (describing internal compliance measures in terms of the rational action model as "policing" measures that deter misconduct by increasing the probability of detection and "preventive" measures that deter misconduct by altering the costs and benefits of misconduct). Similar incentives for internal compliance systems were adopted in other contexts. See, e.g., NASD Conduct Rule 3010, National Association of Securities Dealers Manual (CCH) 4831 (2004) (requiring NASD members to establish and maintain a system to supervise employees); NYSE Rule 342.21, 2 New York Stock Exchange Guide (CCH) P 2342 (2004) (requiring that trades by subjected to review procedures). For a discussion of some of the dangers of this move,
years, however, the view of the organization’s role has shifted to include organizational culture and context as well as policing systems. A 2003 report of the U.S. Sentencing Commission Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, for example, urged corporations to "promote an organizational culture that encourages a commitment to compliance with the law." 178 Shortly thereafter, in 2004, the Sentencing Commission modified the Organizational Sentencing Guidelines to define an "effective" compliance program as one that includes efforts to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." 179

At first glance, these regulatory efforts may not seem all that different from the Supreme Court’s embrace of non-discrimination policies, reporting mechanisms, and diversity training in Burlington v. Ellerth. 180 But while the Burlington Court stressed organizational policing of individual actions, efforts in these other areas are more likely to stress organizational structural and cultural change to alter the contextual influences on individual and intergroup actions. Movement in this direction has been slow, and the principal-agent, rational actor model continues to dominate. 181 Nonetheless, these regulatory moves represent a significant departure from the principal-agent model that underlies the limits of entity liability as conceived by the Burlington Court and as carried by legal scholars into systemic disparate treatment law.

2. Systemic Disparate Treatment Law as Direct Entity Liability for Systemic (Not Individual) Disparate Treatment

The theoretical and regulatory shift toward recognizing context in understanding organizational wrongdoing supports a view of the entity as distinct from the individuals who act within it and as capable of bearing responsibility directly and independently, not just vicariously or dependently, for harms caused. This view provides room for a context-
based model of entity responsibility. Scholars who endorse this model—sometimes called a model of "self-identity" or "ethos"—see the organization as "not only a collection of people who shape it and activate it, but also a set of attitudes and positions, which influence, constrain, and at times even define the modes of thinking and behavior of the people who populate it." Under this view, the entity can be held liable if it encouraged, either through its activity or its policy, explicitly or implicitly, violations of the law.

A context model of organizational wrongdoing helps make clear why entity liability for systemic disparate treatment is direct rather than vicarious. The employer is being held responsible for something that it has done. Importantly, moreover, the employer's responsibility under this model turns not on identification of a single instance or even multiple instances of disparate treatment; rather, its responsibility turns on its own role in producing disparate treatment within its walls.

Instead of focusing directly on the question of whether the entity has produced or is producing disparate treatment, existing systemic disparate treatment law operationalizes its theoretical foundation by identifying those organizations in which disparate treatment is the regular rather than the unusual practice. When disparate treatment is not regular within an organization, then one cannot say that the employer is doing anything wrong apart from identifiable acts of disparate treatment by individuals (for which it might be held vicariously liable or, as a backup, directly liable for failure to control the individual). But when disparate treatment becomes the regular rather than the unusual practice within an organization, then it is reasonable to infer that the entity is doing something to produce decisions based on race or sex or other protected characteristic within its organization. A practice of regular, systemic disparate treatment, in other words, is unlikely to be the result of select rogue individuals acting on biases uninfluenced by the work cultures/practices/norms of the organization.

182. Eli Lederman, Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity, 4 BUFF. CRIM. L. REV. 641, 677-704 (2000) (describing a model of "self-identity"); Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095 (1991) (proposing an "ethos" understanding of corporate identity); see also Daryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. PA. L. REV. 1295, 1319 (2001) (arguing that corporate criminal liability doctrine constitutes recognition that "responsibility, in some settings at least, is not fully captured by the model of individual moral agency that underlies traditional criminal law" and that to "prevent crime, we need to direct liability not only at the individual actor, but at the social context in which she acts—the social context that shares responsibility for her criminal conduct").

183. Lederman, supra note 182, at 686

184. Id. at 695.

The focus on widespread internal disparate treatment as a means of identifying those employers that are producing disparate treatment makes sense in light of the wealth of social science research and literature on the influence of context on bias in decision making and in interaction. A large body of social science research demonstrates that context affects the discriminatory biases and behavior of individuals and groups, not just as a policing mechanism, as the principal-agent, rational-actor model predicts, but by creating the environment in which interactions and decisions take place. A large body of social science research demonstrates that context affects the discriminatory biases and behavior of individuals and groups, not just as a policing mechanism, as the principal-agent, rational-actor model predicts, but by creating the environment in which interactions and decisions take place.186 Formal personnel systems and organizational structures as well as informal work cultures, even the makeup of the physical environment in which employees act and interact all affect the operation of biases and behavior based on those biases.187 When disparate treatment within an organization is widespread—the regular rather than unusual practice, as systemic disparate treatment law requires—this research tells us that context is likely to have played a role in producing that disparate treatment. The entity is likely, in other words, to have produced the disparate treatment.188

With this in mind, some commentators might ask: If plaintiffs need only prove widespread disparate treatment within the organization, where does systemic disparate treatment law leave the employer that merely permits biases acquired outside of the workplace to influence employment decisions? This concern—that employers will be held liable for being an unknowing "conduit" for the discriminatory biases of its employees—permeates judicial opinions and legal scholarship alike.189 The concern is

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186. See supra note. For brief review of some of this research, see Green, supra note 34; Green & Kalev, supra note 92 (describing commonly proposed discrimination-reducing measures).


188. It is also much simpler and more cost-effective for a liability system to leave evaluation of an organization’s precise combination of discrimination-reducing measures to the entities rather than to the courts. Systemic disparate treatment law in this sense uses proof of widespread disparate treatment within the organization as an alternative to regulating organizational choice directly. See Buell, supra note 186, at 527 (pointing out some of the difficulties of regulating context directly).


189. Nagareda, supra note 37, at 155-56; Richard Posner, An Economic Analysis of Sex Discrimination Laws, 56 CHI. L. REV. 1311, 1318 (1989) (describing harassment as a “conduit" type of discrimination “because ordinarily it is not the employer himself (more often, itself) who harasses women, but male employees. The employer merely doesn’t want to go to the expense of preventing harassment by its employees’’); Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 640 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting) (explaining her view that evidence that Wal-Mart policies provide a
deeply rooted in a principal-agent model of wrongdoing. As such, the impulse might be to turn to the concept of notice, arguing, for example, that the plaintiffs' showing of widespread disparate treatment should put the employer on notice of its responsibility to take measures to police the biased actions of its employees. But a context model turns in another direction. Under a context model, individuals are understood to necessarily act within organizational and institutional context, and entities are understood to necessarily shape that context. If plaintiffs have shown that disparate treatment is widespread within an organization and not just an isolated occurrence, then under a context model the entity is directly liable for producing that disparate treatment and must make changes to reduce it.

3. Situating Systemic Disparate Treatment Liability in the Title VII Regulatory Scheme

The preceding section focused on the distinction between individualistic and systemic theories, arguing that systemic disparate treatment theory as grounded in a context model is (and should be)

“potential ‘conduit’” for discrimination is insufficient evidence of systemic disparate treatment (or commonality). Although Nagareda seizes most prominently onto the district court's use of the term “conduit,” see Nagareda, supra note 37, scholars who see employers as innocent bystanders to the discriminatory acts of their employees evince a similar view. See supra note 37 and accompanying text. The term “conduit” may also have crossed over from the individual disparate impact context, where it is sometimes used by courts to describe a situation in which a person who is not influenced by his or her own discriminatory bias takes an adverse employment action based on information supplied by a biased subordinate. In the individual disparate treatment context, however, courts agree that the employer is liable when the decision maker acted as a “conduit” for bias. See, e.g., Muhleisen v. Wear Me Apparel LLC, 644 F. Supp. 2d 375, 388 n.19 (S.D. N.Y. 2009); Pleniceanu v. Brown Printing Co., No. C05-5675, 2007 WL 281762, at *8 (N.D. Ill. Mar. 12, 2007).

190. See, e.g., Oppenheimer, supra note 12.

191. This understanding, of course, rests on empirical foundation on the influence of context on individual biases and behavior. See supra note 92. In this way, a context model adheres more closely to empirical reality than to abstract hypothetical. It is hypothetically possible, in other words, that one or two individuals in a particular case will bring their biases into the organization from outside and will act repeatedly on those biases, not at all influenced by organizational culture, but in practice, when disparate treatment is widespread within an organization, we can expect the entity to have produced that widespread discrimination.

192. In some cases, of course, disparate treatment will be so common and blatant within an organization (or the organization will have undertaken study and then failed to do anything in response to findings) that a fact finder will be able to infer that high level policy makers had knowledge of and tolerated a discriminatory culture; that finding would open the entity up to punitive damages. For a recent example of such a case, see Velez v. Novartis Pharmaceutical Corp., No. CV04-09194 (S.D.N.Y. 2007) (jury award of punitive damages following argument that the defendant “tolerated a culture of discrimination in pay, and promotion, tolerated a culture of sexism, a boy’s club atmosphere”). See also Motion to Certify Class at 3, Dukes v. Wal-Mart Stores, Inc., No. C01-2252 (N.D. Cal. Apr. 28, 2003) (No. 99) (stating that “Wal-Mart’s executives at the highest level have long been aware that women have been disproportionately excluded from management positions and underpaid compared to men”); id. at 31-37; Steven Greenhouse, Report Warned Wal-Mart of Risks Before Bias Suit, N.Y. TIMES, June 3, 2010, at B1.
understood through a systemic rather than an individualistic lens. What about the distinction, though, between systemic disparate treatment theory and disparate impact theory, the other principal systemic theory of discrimination? Furthermore, when is proof of state of mind on the part of the entity or high-level policymakers required in a systemic disparate treatment case, if ever? This section addresses these latter questions. It shows that systemic disparate treatment theory as direct entity liability for widespread disparate treatment sits squarely in the Title VII regulatory scheme between entity liability for using practices that have a disparate impact and entity liability for disparate treatment that is carried out "with malice or reckless indifference to federal rights" (the standard for punitive damages, once systemic disparate treatment liability has been established).

How is systemic disparate treatment theory different from disparate impact theory? To succeed on a systemic disparate treatment claim, plaintiffs must prove that employment decisions within the defendant organization were regularly based on a protected characteristic. This means that plaintiffs who rely on statistics to prove systemic disparate treatment must convince the fact finder that an observed statistical disparity was due to internal disparate treatment—discriminatory biases operating within the organization—rather than to legitimate factors or factors external to the organization.193

Under disparate impact theory, in contrast, liability is imposed on employers for using practices that are neutral on their face and applied neutrally but that have a disparate impact on protected groups, even when the reason for the disparate impact is disadvantage or discrimination outside of the organization.194 Because disparate impact theory imposes costs (the costs of altering employment practices) on employers for societal wrongs (biased actions taken outside of the employment relationship and not just within it), disparate impact law provides employers with a defense: The entity will only be liable for using a practice that has a disparate impact if the entity cannot justify its use of the practice as "job-related and consistent with business necessity."195

Systemic disparate treatment law provides no similar defense. This makes sense because under a context model of organizational wrongdoing—and pursuant to social science research on the influence of

193. See supra notes 64-67 and accompanying text (discussing internal and external causation).
194. See supra note 12 and accompanying text (describing disparate impact theory); see generally Green, Structural Approach as Antidiscrimination Mandate, supra note 45. This is also how systemic disparate treatment theory is distinguishable from an accommodation requirement. The employer that is liable for systemic disparate treatment has produced disparate treatment in employment decisions within its organization.
organizational context on discriminatory bias—the entity is being held liable not for societal wrongs but for its own wrong of producing disparate treatment within its organization. In this way, the context model of organizational wrongdoing as theoretical foundation for systemic disparate treatment law loosens further the grip of intent at the organizational level as the unassailable boundary between disparate treatment and disparate impact. It makes no sense to seize upon intent as a defining characteristic of systemic disparate treatment once disparate treatment (if shown to be operating within the organization) is understood to occur within organizational context. Indeed, a systemic disparate treatment law that imposes liability for widespread internal disparate treatment aligns systemic disparate treatment law with individual disparate treatment law, where the focus increasingly is on internal membership causation (whether a particular decision was caused by the plaintiff’s membership in a protected group) over conscious intent.196

Proof of state of mind, either of the entity or its high-level policymakers, is required neither for a systemic disparate treatment claim or a disparate impact claim. However, proof of state of mind is required in order for the plaintiffs to obtain punitive damages in a systemic disparate treatment case. Section 1981a of the Civil Rights Act authorizes punitive damage awards for disparate treatment in violation of Title VII but limits the awards to those cases in which the plaintiff can prove that the employer “engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”197 In Kolstad v. Am. Dental Assoc., the Supreme Court held that this standard identifies a subset of disparate treatment cases and requires that the employer “at least discriminate in the face of a perceived risk that its actions will violate federal law.”198 This heightened standard arguably does require proof of a particular state of mind on the part of the employer, beyond showing that the employer has produced widespread disparate treatment on the basis of a protected characteristic. To obtain a punitive award plaintiffs must prove that the employer—the entity—acted in bad faith.199

196. See also Zatz, supra note 87.
198. 527 U.S. 526, 536 (1999). Kolstad involved the additional question of “the proper legal standards for imputing liability [from an individual’s actions] to an employer in the punitive damages context.” Id. at 540. On that issue, the Court held that an employer may not be vicariously liable, even for the discriminatory employment actions of its managerial agents, where the individual’s decisions “are contrary to an employer’s good-faith efforts to comply with Title VII.” Id. at 545 (internal quotations omitted).
199. See supra note 193.
B. Proving Systemic Disparate Treatment

In this section, I explore how a context model of organizational wrongdoing informs the shape of systemic disparate treatment law, particularly the role of social science testimony and judicial oversight of organizational choices.

1. Statistics and the Role of Social Scientist Testimony

As explored in depth above, a context model provides theoretical grounding for existing systemic disparate treatment law regarding the use of statistics. Statistics serve as evidence of regular, widespread internal disparate treatment. The model also helps clarify the role of anecdotal testimony and social science testimony in modern systemic disparate treatment cases. As the Court has noted, sometimes an inference that disparate treatment is the regular rather than the unusual practice within an organization as required by Teamsters can be drawn from statistics alone. But plaintiffs rarely will rely solely on statistics. This is because the required showing involves two elements: that an observed disparity is the result of (1) regular (2) disparate treatment within the organization. While these two elements are interrelated, the difficulty for plaintiffs in systemic disparate treatment cases is less one of showing regular or widespread harm (the statistics take care of that: e.g., women as a group are paid substantially less than men at Wal-Mart) than of showing that disparate treatment within the organization—rather than some other factor external to the organization—caused the disparity. By controlling for external factors, sophisticated statistical analyses can serve as evidence of both elements, but history shows that courts tend to be wary of finding internal causation based on statistical analyses alone.

In the early days after Title VII was enacted, plaintiffs often presented anecdotal evidence, testimony of individual instances of disparate treatment frequently involving overtly biased statements by supervisors, to "bolster" their statistical evidence. The anecdotal testimony bolstered the statistical evidence by providing more reason to believe that discrimination within the organization rather than some non-discriminatory or external cause

200. Hazelwood Sch. Dist. v. United States, 433 U.S. 229, 307-08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

201. EEOC v. Sears, Roebuck & Co. provides a famous example. 839 F.2d 302, 310-12 (7th Cir. 1988) (describing the crucial role that the EEOC's decision not to present individual anecdotal testimony played in the district court's finding that statistical disparities presented by the EEOC did not demonstrate widespread discrimination within Sears).

explained the observed disparities. Today, with overtly biased statements at the moment of key employment decisions much less common, plaintiffs tend to rely more on social science testimony to the effect that the particular structures, systems, and cultures in place at the defendant organization are likely to result in regular, widespread disparate treatment. Like the anecdotal evidence in Teamsters, the expert social science testimony in these cases contributes to an inference that an internal explanation for the observed disparity (disparate treatment) is more likely than an external one (e.g., lack of interest, discrimination in education, poverty, etc.).

Social science testimony is useful in these cases not to prove that high level policy makers acted with a purpose of keeping women or minorities down but, together with statistical analysis, to support a finding of internal causation. The plaintiffs’ social scientist will testify, for example, about whether the particular features of the defendant organization taken together (e.g., lack of objective decision making criteria together with demographic disparities between supervisors and their supervisees and a culture pervaded by gender stereotyping) are likely to result in biased employment decisions.

203. Even the early cases indicate there is no reason to believe that testimony of individual instances of discrimination support an inference of purpose on the part of employers whose work policies are challenged as discriminatory. See, e.g., id. at 338 (explaining that anecdotal evidence “bolsters” the statistics). Justice Scalia’s suggestion that anecdotal testimony like that submitted in Teamsters, and in Wal-Mart, stands apart from statistical evidence and is “significant” only if the anecdotes are in certain proportion to the number of class members is particularly misplaced. See Wal-Mart, 131 S. Ct. at 2553-54. As Justice Ginsburg points out in dissent, the Court has never suggested that plaintiffs must submit a particular percentage of anecdotal incidences to support the inference created by statistics that members of a class suffered widespread disparate treatment within an organization. Id. at 2565 n.4. (Ginsburg, J., dissenting).

204. See, e.g., Declaration of William T. Bielby, PhD, in Support of Plaintiffs’ Motion for Class Certification, Dukes v. Wal-Mart, No. C-01-CC52 (April 21, 2003), 2003 WL 24571701; Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 638 (N.D. Cal. 2007) (presenting testimony of Barbara Reskin “to show that Costco has a pervasive culture of gender stereotyping and paternalism”), rev’d 657 F.3d 970 (9th Cir. 2011). In Butler v. Home Depot, Inc., plaintiffs presented testimony of four social scientists to testify on issues of: diversity management techniques and operation of stereotypes, 984 F. Supp. 1257, 1260-62 (N.D. Cal. 1997) (discussing testimony of Dr. Mary Gentile); subconscious processes of stereotyping, see id. at 1262-65 (discussing testimony of Dr. Susan Fiske); the interplay of stereotyping and subjective employment practices, see id. at 1265 (discussing testimony of Dr. William Bielby); and difficulties in the processes of determining level of interest in particular positions, see id. at 1266 (discussing testimony of Dr. Carl. Hoffman).

205. See, e.g., Declaration of William T. Bielby, PhD, in Support of Plaintiffs’ Motion for Class Certification at ¶8, Dukes, No. C-01-CC52 (Apr. 21, 2003). In a recent law review article, cited by the majority in Wal-Mart, 131 S. Ct. at 2553 n.8, Professors John Monahan, Laurens Walker, and Gregory Mitchell argue that expert social science testimony should be limited in a case like Wal-Mart to describing “social science findings on the circumstances under which . . . stereotyping is more or less likely to occur within . . . research settings,” making no link at all to the particular features of the defendant organization. John Monahan et al., Contextual Evidence of Gender Discrimination, 94 VA. L. REV. 1715, 1743, 1747 (2008). They argue that social scientists should be required to undertake audit studies and other “objective observational study[es] of conditions.” Because Dr. William Bielby, a sociologist who testified for the plaintiffs in Dukes v. Wal-Mart, expressly linked the general research on
In response, of course, defendants might introduce evidence of external causes, as they often do. They might also introduce their own social science experts to testify about whether, based on their own understanding of the relevant literature, the particular features of the defendant organization are likely to produce widespread disparate treatment within the organization. Alternatively, or in addition, defendants might challenge plaintiffs' description of the features of the organization, arguing for example that the personnel decision-making system in place had significant objective components that were not revealed by plaintiffs' evidence of subjectivity in decision making and therefore not taken into account by plaintiffs' expert.

It is important at this point to reinforce a point made earlier: Existing systemic disparate treatment law does not (and should not) require identification of the precise practices, cultures, and policies that produce widespread disparate treatment within the defendant organization. In other words, systemic 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 produce 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.

2. *Judicial Oversight of Organizational Choices*

There is no reason why systemic disparate treatment law under a context model should shift judicial inquiry to focus directly on entity efforts taken to reduce discrimination. Entity liability for systemic disparate treatment—as easily under a context view as under existing law—turns on the question of whether the entity is producing widespread disparate treatment; it does not turn on an assessment of whether the employer is “doing enough” to limit individual instances of disparate treatment. Nor is systemic disparate treatment law under a context view of a piece with “new governance” efforts, efforts that offer deference to entities who seem to be acting pursuant to established overarching norms or provide protection from liability for imposition of certain compliance measures.208

Some commentators have argued that employers should be able to invoke something of a good faith defense to liability for systemic disparate treatment. Professor Melissa Hart, for example, has argued that the employer in a case like *Wal-Mart v. Dukes* should not be liable if it “made substantial compliance efforts, even if those efforts have not eliminated inequalities.”209 Although driven by different concerns, I have also suggested that courts might inquire into organizational structures and cultures directly to determine whether those structures and/or cultures are unreasonably facilitating discriminatory biases in day-to-day decision making at work.210

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Hart's argument is motivated largely by political/legitimacy concerns: She is worried that courts will resist systemic disparate treatment lawsuits like the one brought against Wal-Mart without "some articulation of what employer practices would be sufficient to demonstrate legal compliance sufficient to forestall a suit . . . ." Although Professor Hart is certainly right in her broader concern—the political traction of employment discrimination law depends in part on its ability to accurately identify those entities that are "part of the problem" from those who are not—she fails to acknowledge the change that her proposal would effect on systemic disparate treatment law. Courts under this proposal would be expected to evaluate the measures taken by the entity directly, something that the law of systemic disparate treatment has never required. Moreover, and arguably more importantly, Hart misses the fact that systemic disparate treatment law already does distinguish between those entities that are "part of the problem" and those that are not. It does this by identifying those entities that are producing widespread disparate treatment.

My own earlier proposal was driven by concern about empirical uncertainties. Recognizing the danger in adopting a "reasonableness" component to entity liability, even one that avoided concepts of cost or notice, I explained:

It will . . . be important to construe the meaning of reasonableness carefully in order to sustain the employer's substantive obligation to minimize the operation of discriminatory bias. As we learn more about the ways in which organizational choices and structured environments affect the operation of discriminatory bias in the assignment of merit and disbursement of opportunity, it seems likely that we will conclude that employers have more rather than less control over subtle forms of discrimination in the workplace . . . . However, it is also possible that as we learn more about the operation of discriminatory bias and begin to institute the most obvious institutional safeguards, we will come to consensus that employers have little additional control over the subtle operation of bias in their workplaces.

Even these empirical uncertainties, however, are not enough to justify casting aside existing systemic disparate treatment law. Research showing the influence of context on individual and group behavior has only continued to grow. Indeed, it has become increasingly clear that entities not only have substantial control over context, but that contextual change is

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Title VII, however, he makes no mention of systemic disparate treatment law as a possible tool for effective organizational change. See id. at 12-15 (describing theories of discrimination and their limits for addressing discrimination).

211. Hart, supra note 207, at 1653 (judicial resistance); see also id. at 1623 (public and judicial resistance).

212. Id. at 1623.

213. Green, Discrimination in Workplace Dynamics, supra note 45, at 150-51.
likely to be more effective than policing as a mechanism for reducing
discrimination.214 This research pushes us to break our habit of
categorizing discrimination as an individual problem. It pushes us to
recognize that entities necessarily shape the context in which individuals act
and interact and that they accordingly drive behavior as much as they limit
(or fail to limit) it.215

The context model of organizational wrongdoing as theoretical
grounding preserves existing systemic disparate treatment law, leaving
decisions about best practices to the regulated entity. Expert evaluation of
measures taken by an entity may be relevant to the question of internal
causation. An employer, for example, might present expert testimony to the
effect that its systems and culture, including measures taken to reduce
discrimination, are not likely to produce discrimination, urging the fact
finder to conclude that the statistical disparity identified by the plaintiffs is
cased by something other than discrimination within the organization. But
the employer will not be relieved of liability on the ground that measures
taken, while ineffective, were taken in good faith by high-level policy
makers.

The risk remains, of course, that courts and other players—including
class action lawyers—will defer to employer-initiated compliance efforts or
will rubber stamp symbolic measures over effective ones.216 That risk is
substantially tempered, however, by a substantive law that treats best
practices as possible mechanisms for reducing discrimination rather than as
evidence of nondiscrimination.217 Employers need not eliminate gender or
racial inequalities to avoid liability for systemic disparate treatment, but
they must minimize disparate treatment to the point that it is not a regular,
widespread practice.

Implications of Unexamined Discrimination: Gender Bias in Employment as a Case Study,
BEHAVIORAL FOUNDATIONS OF POLICY (Eldar Shafir ed., forthcoming); Robert L. Nelson et al.,
Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social
Sciences, 4 ANN. REV. L. & SOC. SCI. 103, 113 (2008). For research illustrating the latter point through
analysis of outcomes of lawsuits in federal courts from 1988 to 2003, see Laura Beth Nilsen et al.,
Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-
Civil Rights United States, 7 J. EMPIRICAL LEGAL STUD. 175, 196 (2010) (arguing based on study results
that existing employment discrimination litigation “is not so much an engine for social change, or even a
forum for carefully judging the merits of claims of discrimination, as it is a mechanism for channeling
and deflecting individual claims of workplace injustice”)


216. See Green, supra note 34, at 708-23 (recognizing this risk in formulation and approval of
consent decrees and proposing safeguards).

217. See Lauren B. Edelman et al., When Organizations Rule: Judicial Deference to
Institutionalized Employment Structures, 117 AM. J. OF SOC. 888 (2011) (finding greater judicial
decision-making to organizations when judges are asked to rule on organizational attributes that are not directly
observable).
CIRCLING BACK: SUBSTANCE INFORMS PROCEDURE

This Article uncovers the threat to the future of systemic disparate treatment law posed by the Court’s class certification decision in Wal-Mart v. Dukes. A seemingly procedural decision hides a view of entity responsibility for systemic disparate treatment that would substantially alter the substantive law. In this Part, I come full circle to consider how a view of systemic disparate treatment based on a context model of organizational wrongdoing might affect resolution of pressing procedural issues.

A. Class Certification

What does a substantive law of systemic disparate treatment theory that holds employers liable for widespread, internal disparate treatment mean for class certification? Put another way, if members of the Supreme Court—or Congress—agree with the arguments made here about the theoretical foundation for and shape of the substantive law of systemic disparate treatment, pattern or practice claims, how should the Court decide the procedural questions lingering after Wal-Mart? A full analysis of the range of class certification issues presented is beyond the scope of this Article, which has as its principal focus the future of substantive systemic disparate treatment law as enforced by the EEOC and private litigants. Nonetheless, it is useful to revisit the procedural issue highlighted in Wal-Mart: What do plaintiffs need to show in order to satisfy the commonality and typicality requirements of Rule 23(a)?

If systemic disparate treatment law imposes liability for regular, widespread disparate treatment, then a plaintiff employee who allegedly suffered discrimination in promotion should be able to represent plaintiff employees in other stores who allegedly suffered discrimination in promotion as part of the same regular practice of discrimination. The representative plaintiff need only produce proof of regular, widespread internal disparate treatment that encompasses the multiple stores or, in the case against Wal-Mart, the chain as a whole.218

No doubt wary of staking a position that would seem too liberal for class certification, neither counsel for the plaintiffs nor the trial court or majority appellate courts in Wal-Mart consistently acknowledged this reality.219 But each nonetheless answered the commonality question by

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219. Both the district court and the majority in the Ninth Circuit stressed, for example, the plaintiffs’ “significant evidence of central control.” See Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 596 n.18 (9th Cir. 2010) (en banc); see also Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 151-53
pointing to plaintiffs' evidence of widespread disparate treatment within the organization as a whole. In certifying the class, the district court found, for example, that "there are significant factual and legal questions common to all class members with respect to whether Wal-Mart has engaged in company-wide discrimination against female employees in pay and promotions." It pointed to plaintiffs' evidence of Wal-Mart's subjective personnel practices and its uniform culture of pervasive gender stereotyping, of individual instances of discrimination, and of significant statistical disparities in pay and promotion. The court explained that this evidence taken together supported "an inference that Defendant's policies and procedures have the effect of discriminating against Plaintiffs in a common manner." If one understands systemic disparate treatment theory to impose liability for widespread internal disparate treatment, these findings should be sufficient to satisfy the Rule 23(a) commonality requirement and to permit a female plaintiff denied promotion in one Wal-Mart store to represent female employees denied promotion in another Wal-Mart store.

B. Aggregation, "Distortion," and Recovery

Several scholars have argued that class treatment of employment discrimination lawsuits like Wal-Mart "distorts" the substantive law by allowing entity liability to turn on aggregate proof. Much to the contrary, as I have shown in this Article, it is the substantive law of systemic disparate treatment, and not class treatment, that makes entity liability turn on the aggregate.

Indeed, this reality tees up another example of the importance of setting a strong theoretical foundation to guide resolution of procedural

220. Dukes, 222 F.R.D. at 145.
221. Id.
222. Id. at 166. The court relied on a line of cases in which courts have found commonality satisfied when plaintiffs presented evidence of high and consistent degrees of subjectivity together with evidence linking that subjectivity to widespread disparate treatment within the firm. See id. at 149-50 (stating that "while the presence of excessive subjectivity, alone, does not necessarily create a common question of fact, where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts have not hesitated to find that commonality is satisfied"); see also id. at 150-51 & n.13 (citing Shipes v. Trinity Indus., 987 F.2d 311 (5th Cir. 1993); Caridad v. Metro-N. Commuter R.R., 191 F.3d 283 (2d Cir. 1999); Beckmann v. CBS, Inc., 192 F.R.D. 608 (D. Minn. 2000); Shores v. Publix Super Markets Inc., No. C95-1162, 1996 WL 407850 (M.D. Fla. Mar. 12, 1996)). For a more thorough treatment of the commonality issue raised in these and other cases, see Green, supra note 34, at 690-98.
223. Epstein, supra note 37; Nagareda, supra note 37.
224. Systemic disparate treatment theory, in other words, is not just a label that we use to describe a case in which many claims of individual disparate treatment are brought together for adjudication; it is an independent theory of employer liability.
debates. The district court in Wal-Mart described a trial plan under which, once liability was established,\footnote{Under Teamsters, liability is established upon plaintiffs' demonstration that the entity has engaged in widespread disparate treatment. See 431 U.S. at 362.} it would calculate and distribute a back-pay award by using a formula to calculate a "lump sum" that Wal-Mart owed to the class and then undertake a separate procedure to distribute the lump sums to class members entitled to share in that sum.\footnote{See Dukes, 222 F.R.D. at 175-80; see also Dukes, 603 F.3d at 571, 624 n.49 (describing the district court's trial plan).} In Part III of his opinion, a portion of the opinion joined by all of the Justices, Justice Scalia rejects that approach. According to Justice Scalia, Wal-Mart is "entitled" to individualized determinations, to present evidence with respect to each member of the class to the effect that she did not suffer disparate treatment.\footnote{See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011).}

This position makes sense only if entity liability for systemic disparate treatment is merely a method of replicating entity liability for individual instances of discrimination (in which case systemic disparate treatment law does no work). Under this view, consistent with the principal-agent model of organizational wrongdoing, the entity is liable vicariously for the individually discriminatory acts of its agents, and it should therefore be permitted to challenge each of those alleged instances of discrimination as being otherwise explained.

However, as Professor Hart details in her contribution to this symposium, the Supreme Court in Teamsters emphasized flexibility rather than rigidity for trial courts in remedial design.\footnote{Melissa Hart, Civil Rights and Systemic Wrongs, 32 BERKELEY J. EMP. & LAB. L. 455 (2011).} Systemic disparate treatment law, moreover, has always played a larger role in Title VII's regulatory scheme than Justice Scalia's opinion acknowledges. Particularly in cases in which widespread disparate treatment has taken place through subjective decision making practices and in which, as the district court in Wal-Mart put it, "many more class members qualified for the positions than would have been hired or promoted even absent discrimination," courts have long used aggregate techniques to determine back pay.\footnote{See, e.g., Shipes v. Trinity Indus., 987 F.2d 311, 316-19 (5th Cir. 1993); Catlett v. Missouri Highway & Transp. Comm'n, 828 F.2d 1260, 1266-67 (8th Cir. 1987); Domingo v. New England Fish Co., 717 F.2d. 1429, 1444 (D.C. Cir. 1984); Segar v. Smith, 738 F.2d 1249, 1291 (D.C. Cir. 1984).}

Of course, acknowledging the systemic nature of systemic disparate treatment law does raise questions about the relationship between private litigation and public enforcement. Systemic theories step away not only from rigid adherence to individualized inquiries in litigation and determinations of individualized culpability, but also from precise accountings of individualized relief. This move, as Professor Ford rightly points out in his contribution to this issue, is in some tension with common
conceptions of civil rights as providing individualized justice, or individually tailored relief for individual harm suffered.\textsuperscript{230} Indeed, along individualized-justice lines, several courts have recently held that systemic disparate treatment pattern or practice claims can be brought by private litigants only if the plaintiffs obtain certification to proceed on behalf of a class.\textsuperscript{231} Other courts would limit the remedies available for EEOC-initiated systemic disparate treatment, pattern or practice claims to broad injunctive and declaratory orders.\textsuperscript{232}

The Supreme Court faced similar issues in \textit{General Telephone v. EEOC}.\textsuperscript{233} The EEOC presented a systemic disparate treatment claim in that case, alleging "company-wide exclusion of women from management positions."\textsuperscript{234} General Telephone argued, among other things, that the EEOC was required to meet the requirements of Rule 23 before proceeding on behalf of a group of individuals under section 706 of Title VII. Rejecting this argument, the Supreme Court firmly resisted any insistence that the EEOC's role under section 706 was simply to enforce the rights of private individuals and that because backpay relief to individuals is authorized under section 706, Rule 23 requirements must be met. As the Court explained, "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."\textsuperscript{235} The Court concluded that the wide discretion given to courts by the statute to exercise their equitable powers was sufficient to alleviate hardship on either plaintiffs' or defendant's side.\textsuperscript{236}

A full treatment of these issues lies beyond the scope of this Article. The larger point, however, comes full circle. The "right-to-individualized-rebuttal" argument made by defendants in recent cases and accepted by the Court in \textit{Wal-Mart} rests upon a particular view of systemic disparate

\textsuperscript{230} Ford, \textit{supra} note 210.

\textsuperscript{231} Some courts have held that systemic disparate claims brought by private litigants can only be adjudicated if the plaintiffs succeed in obtaining class certification. \textit{See}, e.g., Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 965-69 (11th Cir. 2008); Bacon v. Honda Am. Mfg., Inc., 370 F.3d 565 (6th Cir. 2004); \textit{see also} Baylie v. Federal Reserve Bank, 476 F.3d 522 (7th Cir. 2007) (implying same).

\textsuperscript{232} \textit{See}, e.g., Serrano v. Cintas, 711 F. Supp. 2d 782, 784-85 (E.D. Mich. 2010) (explaining that "plaintiffs [including the EEOC] in a Section 706 action pursue their claims under the familiar burden-shifting scheme outlined in \textit{McDonnell Douglas}"; "[\textit{General Telephone}] is regarded as the seminal Section 707 case"; and "the EEOC is not authorized to seek compensatory or punitive damages under § 707"); EEOC v. CRST Van Expedited, Inc., 611 F. Supp. 2d 918, 932 (N.D. Iowa 2009). I thank David Offen-Brown for pointing me to these cases.

\textsuperscript{233} 446 U.S. 318 (1980).


\textsuperscript{235} \textit{Id} at 326.

\textsuperscript{236} \textit{Id} at 332-33.
treatment law, a view that is very much aligned with an individualistic view of systemic disparate treatment theory. The same view undergirds the Court's commonality decision. The shape of the substantive law of systemic disparate treatment should guide the resolution of these and other procedural issues, but it should do so only after open and frank debate about the theoretical grounding for and shape of systemic disparate treatment law.

CONCLUSION

Systemic organizational change is crucial to reducing workplace discrimination. Yet longstanding systemic disparate treatment law—the law best able to trigger that change—is under attack. If the policy-required view of entity responsibility takes hold, entity liability for systemic disparate treatment will be relegated to a narrow set of cases involving deliberate, purposeful discrimination by high-level policy makers. At the very least, it is important that we face head on the battle that is upon us.

A context model of organizational wrongdoing provides the theoretical grounding needed to preserve systemic disparate treatment law as an effective regulatory tool. Under this view, systemic disparate treatment law holds entities directly liable for producing widespread discrimination within their organizations and, by doing so, holds entities responsible for the organizational structures, systems, and cultures that frame the context for day-to-day interaction and decision making at work. A context model of organizational wrongdoing is neither newfangled nor bold; it simply breaks free from the individualistic obsession that has gripped both courts and scholars in the employment discrimination area to expose the role of organizations in persistent workplace discrimination and inequality.