In this essay, Professor Selmi assesses the future of systemic discrimination litigation through the lens of the case Wal-Mart Stores, Inc. v. Dukes. First, Professor Selmi traces the history of the disparate treatment class action to demonstrate how that case law was a product of its era and has substantially less resonance for contemporary claims of discrimination. The essay then analyzes the Wal-Mart case particularly focusing on the substantive claim that the plaintiffs put together as a product of the older era of disparate treatment class actions with its emphasis on the underrepresentation of women in the management ranks. The final section emphasizes the need to go beyond statistical analysis to create a narrative of discrimination so as to justify a claim of systemic discrimination.

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I.

INTRODUCTION

The pattern or practice claim is the most potent and least understood of the various Title VII causes of action. This is particularly true within the class action arsenal, as the Supreme Court has devoted considerably more time to the contours of the disparate impact theory than pattern or practice claims, and even the bona fide occupational qualification standard is conceptually clearer and better understood.1 In contrast, over the course of the last thirty years, the Supreme Court has only directly addressed the theoretical underpinnings of the pattern or practice class action in a pair of cases from 1977, with one additional related case decided a decade later.2 In no other area of substantive antidiscrimination case law—indeed, perhaps no other area of law—are the leading cases three decades old.

Pattern or practice claims—what are also known as systemic discrimination claims—involve proof of intentional discrimination primarily through statistics, and are invariably class actions. The lack of more extensive case law is surprising given that there has been a substantial increase in disparate treatment class actions over the last fifteen years. This increase was largely prompted by statutory changes implemented by the Civil Rights Act of 1991, which for the first time made damages available for claims of intentional discrimination.3 While the damage provisions are capped at a relatively modest $300,000 per individual, in the aggregate the claims can lead to staggering amounts of potential liability.4 The sex discrimination class action filed against Walmart, with its million-member


3. See Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat 1071, § 201 (codified as amended 42 U.S.C. § 1981a (1991)). There has been a well-documented increase in class action claims, particularly among pattern or practice cases that provide the possibility of damages. How many cases are filed is more difficult to assess. See Nancy Levit, Megacases, Diversity & the Elusive Goal of Workplace Reform, 49 B.C. L. REV. 367, 368 (2008) (discussing rise in claims).

4. See 42 U.S.C. § 1981a (providing for punitive and compensatory damages up to a combined $300,000).
plaintiff class, was potentially worth more than $30 billion. Not only have these outsized sums attracted attorneys, but they have also created strong incentives to settle cases. As a result, there has been a surprising dearth of case law, even in the lower courts, regarding the liability requirements for pattern or practice claims.

The case law that exists has been created primarily in the context of class certification decisions. Until recently, there had been two general strains to the law. One focused primarily on the damage provisions, while another concentrated on whether a common policy had been alleged to justify class action treatment. The Supreme Court recently resolved some of the class certification issues, and in doing so raised serious questions about the continuing viability of large class actions. In *Wal-Mart v. Dukes*, the Supreme Court decertified what had been the largest employment discrimination class action in history, and the conservative majority of the Court held that the plaintiffs had failed to establish commonality sufficient to proceed as a class action. It is not yet clear what impact the Court’s *Wal-Mart* decision will have but it is likely to make certification of a nationwide class far more difficult.

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5. See Adam Liptak, *Supreme Court Tightens Rules in Class Actions*, NEW YORK TIMES, June 21, 2011, at A1 (noting that in the employment discrimination class action against *Wal-Mart* plaintiffs “sought billions of dollars” in liability). There was some dispute regarding the actual size of the class in the *Wal-Mart* litigation, in large part because of the significant passage of time between when the district court certified the case in 2004 and the Supreme Court decision. Estimates of class size ranged from 500,000 to 1.5 million members. Id. (stating the class size as 1.5 million).


7. Back pay was treated as equitable, and both disparate treatment and disparate impact cases were certified as 23(b)(2) classes. See, e.g., Segar v. Smith, 738 F.2d 1249, 1260, 1288-89 (D.C. Cir. 1984); Paxton v. Union Nat'l Bank, 688 F.2d 552, 566-67, 574 (8th Cir. 1982); Chisholm v. United States Postal Serv., 665 F.2d 482, 488 (4th Cir. 1981); Pettway v. Am. Cast Iron Co., 494 F.2d 211, 257 (5th Cir. 1974).


9. Although it is still very early after the decision, the results to date have been mixed. The Ninth Circuit recently vacated a class certification decision with instructions for the district court to apply a more searching analysis in a case that is quite similar to the *Wal-Mart* case. See Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011). Several district courts, however, have expressly declined to decertify class actions in the wake of the *Wal-Mart* decision. See, e.g., United States v. New York, No. 07-2067, 2011 WL 2680474 (E.D.N.Y. July 8, 2011). The attorneys representing the plaintiffs in the *Wal-Mart* litigation recently filed a new lawsuit that seeks class certification for all
Although the Wal-Mart case resolved important certification issues, its impact on the substantive law of employment discrimination is less clear. The two issues, however, are closely intertwined, not just because of the high frequency of settlement, but because the certification decision turns on the substantive evidence. Pattern and practice claims have always been primarily statistical in nature, and the statistical analysis used to prove a pattern of discrimination is also essential to establishing the propriety of class-wide treatment. The role statistics play in systemic discrimination cases has always been a bit of a mystery, a fact that was brought home to me recently at a conference I attended with mostly philosophers present. During a discussion of the Wal-Mart case, one of the philosophers asked, rather incredulously, how can statistics prove intent? Although several of us had extensive experience teaching and litigating systemic discrimination claims, we had a difficult time providing an answer, other than to point to some of the cases. As discussed shortly, the older Supreme Court pattern or practice cases were almost entirely statistical in nature, and there is enough in the case law to suggest that a pattern or practice claim can be based solely on statistics. But outside of those cases from the 1970s—a time when Jim Crow's heart was still beating—it has never been clear why statistics can prove an intent to discriminate, and certainly one message arising from the Wal-Mart case is that a majority of the Supreme Court is now skeptical of the power of statistics to prove intentional discrimination. Indeed, I would suggest that one implicit message from the Wal-Mart case is that the older cases no longer fit contemporary claims of discrimination and we need to develop better, less statistically-dependent, models to establish classwide claims of intentional discrimination.

One reason for the Court's skepticism is that statistics can easily prove too much. Pattern or practice claims typically begin by identifying a statistical underrepresentation in the employer's workforce and the underlying question is whether discrimination is responsible for the underrepresentation. The statistics are designed to prove that the imbalance is unlikely to be the product of chance, but the statistics themselves do not prove much beyond that. As we have moved away from the overt exclusions present in the seventies, the underlying presumption that discrimination is responsible for the workforce imbalance has receded, and today something more than statistical proof is required. The question I want to address in this essay is what "more" should plaintiffs have to demonstrate—what, in addition to the statistical analysis must plaintiffs

stores in California, which the attorneys claim is the first in what may be many such lawsuits. See Paul Elias, Walmart Bias Suit 1st in 'Armada' Plaintiffs Say, BOSTON GLOBE, Oct. 28, 2011, at B6.

prove to establish an intent to discriminate. Although the law remains unsettled, it now appears that plaintiffs must demonstrate that the employer's actions—actions for which the employer is blameworthy—caused the imbalance or underrepresentation, a determination that will typically require proof beyond statistics, no matter how powerful the statistical analysis might be. Whereas at one time statistics were used to establish race or gender as the most likely cause of the workplace disparities, today plaintiffs must establish a coherent narrative to institute discrimination as the most likely cause. I will use the Wal-Mart case as a vehicle for exploring the contemporary demands of the pattern or practice claim.

This essay will begin by exploring the origins and development of the pattern or practice cause of action as a way of demonstrating how it is that the Supreme Court permitted statistics to prove a pattern or practice claim, and then I will seek to position the Wal-Mart sex discrimination case in the context of that development. In particular, I will contend that it is no longer acceptable to rely on statistics without providing a context to establish a pattern or practice claim; rather, it is incumbent upon plaintiffs to explain the story the statistical presentation is telling, and this will require a coherent narrative that is tied to the employer's actions and will avoid focusing on generic claims along the lines of subjective decision-making can lead to discrimination. In the modern era, the emphasis has to be on the employer's own blameworthiness, something that goes beyond the reliance on statistics.

II. THE ORIGINS OF THE DISPARATE TREATMENT CAUSE OF ACTION

A. The Early Years.

When Title VII began to be enforced in the late 1960s and early 1970s, many of the cases were relatively easy to prove and it made little difference whether a case was pursued under a disparate impact or a pattern or practice disparate treatment theory. The remedies for the different causes of action were the same, and the proof was also largely the same. Both causes of action involved an initial stage of proof that relied on statistics, and in both instances, the statistical proof proceeded in largely the same manner.

To establish either a disparate treatment or disparate impact cause of action using statistics, a plaintiff must demonstrate a statistically significant disparity in the employer's workforce, relying on the appropriate
If the case involves an employer’s failure to hire, the plaintiff will typically measure the hiring statistics of the relevant protected group of employees against the applicant base to establish what is known as the applicant flow rate. For example, if twenty-five percent of the applicants were African American, then the working hypothesis would be that twenty-five percent of the expected hires would also be African American. Those expected hires are then measured against the actual hires to identify any statistical disparity in the process. In a failure to promote case, the promotion of eligible or qualified members of the workforce will typically be the benchmark used to analyze expected promotion rates of the relevant protected group. Determining whether the observed disparity is meaningful is measured in standard deviations. Borrowing from the social sciences, a disparity that is more than two standard deviations from what one would expect is defined as significant. In the context of discrimination claims, that disparity will generally be attributed to discrimination since the function of the standard deviation analysis is to rule out chance fluctuations.

This statistical proof is well known, but the causal attribution is less well understood, and this is where an important distinction between pattern or practice claims and disparate impact claims arises. Although the statistical proof is generally identical between the two theories, in a disparate treatment pattern or practice claim, the statistics are used to prove intent, whereas under the disparate impact theory, no intent is required and the statistics are used to establish that an employer’s practice has an adverse effect on a protected group. Here we see the primary difference between the two theories—in a disparate impact case, the plaintiff is challenging a particular practice, most commonly a written test, and is effectively arguing that the use of the test is unjustified in light of the demonstrated adverse impact. A pattern and practice case, on the other hand, focuses more directly on bottom line numbers with the statistical analysis eliminating nondiscriminatory reasons for the observed disparities. A discussion of the pertinent cases will help illustrate the contrast between the two theories.

In the famous disparate impact case of *Griggs v. Duke Power Co.*, the employer administered two written tests on which African Americans fared much worse than their white counterparts. Because of that adverse

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11. What follows is a standard discussion of the role of statistics in the class action context. See DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES & MATERIALS ON EQUALITY IN THE WORKPLACE 305-08 (8th Ed. 2010).

12. There is one difference between the two standards that is not necessarily relevant here. Under established disparate impact law, a plaintiff may be able to demonstrate a significant disparate impact by relying on what is known as the 80% rule. In the context of a written test, if the plaintiffs’ group performs at a rate that is 80% or lower than the majority group, a court may find disparate impact has been established. This is an older test that today is only used when the disparity is so stark to mute any dispute between the parties. See Ricci v. DeStefano, 129 S. Ct. 2658, 2678 (2009) (citations omitted).

impact, the employer was called upon to justify its test, to demonstrate that the examination provided relevant and valuable information in a way a different test or practice with less adverse impact could not do. Importantly, a disparate impact cause of action is not so much concerned with why the test had an adverse impact but instead focuses on why the employer is using the test.

The contrast with the pattern or practice claim is telling. Here we can look to the seminal case of Teamsters v. United States, where the government sued an employer and union over the lack of African-American and Latino line drivers. Although a significant number of African Americans and Latinos worked for the company, very few were line drivers (long-distance drivers), which were the most lucrative jobs, and, in fact, the minority employees were almost all confined to the worst positions. The observed disparity for the line driver position was statistically significant but rather than identify the practice that caused the disparity, as would be required in a disparate impact case, the statistical showing shifted the burden to the employer to explain why the observed pattern was not the product of discrimination. The employer might have suggested that African Americans did not want to be drivers, or perhaps that they did not have the requisite drivers’ licenses, were worse drivers or perhaps there offer some other reason. But without some explanation from the employer, the statistics created a presumption that there was a pattern of discrimination against African Americans and Latinos in its hiring process that discrimination was “the standard operating procedure,” to borrow the talismanic phrase of the case. At the time the Teamsters case was decided, there was no requirement that the plaintiffs identify the vehicle of discrimination, and indeed, in the Teamsters case there was no significant discussion regarding what had caused the disparity, it was simply attributed broadly to the employment process.

15. Id. at 337. Approximately 9% of the employer’s workforce was comprised of African-American and Latinos, but less than 1% served as line drivers. Id. Approximately 78% of the Latino workers and 83% of the African American workers “held the lower paying city operations and serviceman jobs . . .” compared to only 39% of the white employees. Id. In a closer case, a plaintiff might have focused on a broader labor pool, rather than looking to the employer’s workforce, assuming discrimination may have affected the original hiring decisions.
16. Id. at 336.
17. As the plaintiff in the case, the United States made broad allegations of discrimination it’s the defendants’ “refusal to recruit, hire, transfer, or promote minority group members . . .” Id. at 335. Neither of the published lower court decisions in Teamsters identified any specific practice but also allowed broad challenge to the hiring, transfer and promotional process. See United States v. Int'l Bhd. of Teamsters, 517 F.2d 299 (5th Cir. 1975); United States v. T.I.M.E.-D.C., Inc., 6 Fair Emp. Prac. Cas. 690 (1972).
The other case decided at the same time involved a modestly more sophisticated analysis although, like Teamsters, it relied almost entirely on statistics. In *Hazelwood School District v. United States*, the government sued a suburban school district for its lack of African-American teachers.\(^{18}\) The dispute in *Hazelwood* involved how to determine the magnitude of the racial disparity.\(^{19}\) The parties agreed that the school district employed very few African-American teachers and had only hired its first African-American teacher shortly before the suit was filed.\(^{20}\) The ultimate statistical question was how many African-American teachers the school district would have hired had it been using a non-discriminatory process.\(^{21}\) In this particular instance, looking to the number of applicants seemed inadequate since it appeared many African Americans had failed to apply because of the futility of doing so.\(^{22}\) So, the question became how to identify the appropriate measure for determining whether the disparity in the hiring process was statistically significant.\(^{23}\) Importantly, there was no focus on the specifics of the hiring process or what part of that process might have contributed to the lack of African-American teachers, and there also appeared to be no meaningful testimony from individuals.\(^{24}\) Rather, the focus was entirely on the bottom-line numbers, the racial imbalance in the workforce.\(^{25}\) In the end, the Supreme Court did not define what the appropriate measure should be and instead clarified that statistics could be sufficient to establish a pattern or practice of discrimination, and further emphasized that the statistical analysis had to take into account necessary qualifications, in this instance focusing on the number of qualified African-

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19. *Id.*
21. *See id.* at 312.
22. *See id.* at 309-13 (discussing the distinction between statistical comparisons using African American hiring data pre-Civil Rights Act and post-Civil Rights Act).
23. Several measures, not relevant to my discussion, were explored. One possible measure was to compare the suburban jurisdiction with the City of St. Louis, which had a higher population of African Americans and had also initiated an aggressive recruiting drive that had resulted in a workforce in which about 15% of teachers were African American. *Id.* at 310-11. Although Hazelwood was just outside St. Louis, there was a question of whether African Americans who lived in St. Louis would want to make the commute, and also whether St. Louis may have been capturing the market for African-American teachers. *Id.* at 305-08. Another possibility was to look at the number of African-American teachers who lived within the county, or who worked for the county, though this latter figure could easily mask the very discrimination plaintiffs sought to prove. *Id.* at 305. This is an issue that arose with some frequency in the early cases. Using the county figures made little sense in the context of the case since the plaintiffs were arguing that the school district, likely the largest employers of teachers in its county, had discriminated against African Americans.
24. The Supreme Court briefly outlined the hiring process where there were applications, interviews and broad discretion vested in school principals to make the ultimate decision. *Id.* at 302-03.
25. *Id.* at 305-08.
American teachers for the Hazelwood school district, however that was ultimately determined.\(^2\)

It is worth emphasizing that both of these cases relied almost entirely on statistics to prove intent. Although in both cases the plaintiffs presented testimony regarding individuals who had been discriminated against, in neither case was the individual testimony essential, or even relevant, to establishing a pattern of discrimination. In *Hazelwood*, there was no discussion at all about applicants who might have been denied jobs, and in the *Teamsters* case, while it was noted that forty individuals had testified about discrimination, no details were provided about that testimony and it was clear that the statistics were doing most of the work.\(^2\)\(^7\) Importantly, both defendants also had long and acknowledged histories of discrimination, and it was that history that allowed the courts to draw an inference of discrimination based on the statistical analysis.\(^2\)\(^8\) The same could be said of the *Griggs* case, but what took that case out of the realm of intent was that the tests were not implemented, according to the Court, with an intent to discriminate against African Americans. Yet, and this is the true curiosity of the pattern and practice claim, no practice was identified in either *Teamsters* or *Hazelwood*; both cases challenged the entire employment process, and in both cases it was the significant racial imbalance in the workforces that bespoke discrimination.

Knowing that statistics can prove an intent to discriminate in the context of a pattern or practice claim does not fully explain why courts have equated strong statistical proof with intent. Part of the answer lies in social history: when the pattern or practice cases first arose in the 1970s, it was relatively easy to draw inferences of discrimination based on statistics, even relatively crude statistics as were offered in *Teamsters* and *Hazelwood*. In these early cases, there was not much of a need to explain the source of the statistical disparity given that employers routinely discriminated against African Americans and women prior to the passage of the 1964 Act, and

\(^{26}\) *Id.* at 307-08 ("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.") (citation omitted).

\(^{27}\) See *Teamsters* v. United States, 431 U.S. 324, 339 (1977) (discussing how individual testimony "brought the cold numbers convincingly to life" without discussing the substance of the testimony). In the *Hazelwood* case, the United States alleged that 55 individuals had been discriminated against 25 of whom testified at trial and the Court of Appeals sustained 16 of the challenges. See *Hazelwood* Sch. Dist. v. United States, 534 F.2d 805, 814-19 (8th Cir. 1976). The testimony relating to individuals primarily went to who was entitled to relief rather than whether there had been a pattern or practice of discrimination. See *id.* at 814 ("We hold that the following [16] applicants established a prima facie case of discrimination which was not rebutted by Hazelwood and that they are entitled to specific relief . . .").

\(^{28}\) *Teamsters*, 431 U.S. at 337 (noting that all of the African American line drivers "had been hired after the litigation commenced."); *Hazelwood*, 433 U.S. at 305 n.7 (discussing history of discrimination in *Hazelwood*).
those habits appeared to die quite slowly. This was true for all three of the cases discussed so far: Griggs, Teamsters and Hazelwood involved employers with explicit discriminatory practices prior to the effective date of Title VII.29

But routine employer discrimination only partly explains these early cases. It was not just the companies' own history of discrimination that allowed for an inference of discrimination but it was also the prevalence of discrimination at the time. Indeed, the social conditions influenced the Supreme Court's jurisprudence in a variety of areas, including jury selection and housing discrimination, and this was a time—short-lived as it turned out—when the Court was crafting standards for proving discrimination that were generally supportive of broad definitions of discrimination.30 As was explained in the often ignored case of Furnco v. Waters, the prima facie case of discrimination created a presumption of discrimination because it eliminated common reasons for employment decisions (like qualifications and the lack of a job) while highlighting the role race or gender frequently played in decisions.31 The same was true in the pattern or practice cases where the stark patterns of underrepresentation created a presumption that discrimination was the most likely cause such that the workforce composition was, to borrow a phrase from an early discrimination case, "unexplainable on grounds other than race."32 At this

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30. During the same Term that the Court decided Teamsters and Hazelwood, it also addressed discrimination in grand jury summons, a case that is best known for its footnotes discussing the meaning of statistical significance. See Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977). In Castaneda, a criminal defendant challenged the composition of the grand jury because while nearly 80% of the county population was Hispanic, only 39% of those summoned for grand jury service were Hispanic. Id. at 495. This stark pattern was sufficient to establish discrimination, particularly since the County government failed to explain any other reason for the disparity. Again, in the same year, the Court addressed the means for proving discrimination in a housing-related decision, emphasizing how various practices can prove an intent to discriminate. See Village of Arlington Hts. v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). The main exception to this generally positive treatment arose in the context of education desegregation, where by the end of the 1970s, the Court had moved away from its emphasis on integrating schools to more of a focus on local control. Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding busing plan for North Carolina desegregation) with Milliken v. Bradley, 418 U.S. 717 (1974) (invalidating interdistrict busing plan in the Metropolitan Detroit area). One reason for the discrepancy might be that the education cases began in earnest in the 1950s whereas most of the other discrimination issues, including employment, matured in the seventies. For an interesting discussion of the role discrimination issues played in the seventies, see DANIEL T. RODGERS, AGE OF FRACTURE 111-138 (2011).

31. 438 U.S. 567, 577 (1978) ("[W]e are willing to presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.").

juncture, at least with respect to race, courts required little more than proof of meaningful statistical disparities.\textsuperscript{33}

As should be apparent, the concept of intent that underlies the pattern or practice claim is quite different from typical definitions of intent. In a pattern or practice claim, at least in these first generation cases, there was no agent or explicit policy at issue, but rather intent was reflected in the identified pattern that was attributable to the institution as a whole. This proof structure worked reasonably well in the 1970s and through much of the 1980s but once we moved farther away from the era of plain and open exclusionary policies, it has become less clear, at least to the courts, that discrimination provides the best explanation for the observed disparities. Importantly, while social conditions have surely changed, the theory underlying the pattern or practice cause of action has not, and indeed, the mid-1970s cases of \textit{Teamsters} and \textit{Hazelwood} remain surprisingly relevant today. Those cases, however, were of a particular era, and neither offered sophisticated statistical analyses or an extended discussion for the rationale that underlies statistical proof of intent.\textsuperscript{34} And, for reasons discussed in the next section, drawing inferences when the case involves gender discrimination requires a deeper explanation.

\textbf{B. Gender and the Pattern or Practice Cases}

Many of the early pattern and practice cases involved issues of race discrimination, whereas the early gender cases often involved explicit gender policies some of which were analyzed under the bona fide occupational qualification ("BFOQ") affirmative defense. The first gender case to arrive in the Supreme Court involved an explicit policy prohibiting employment for women with pre-school age children, while shortly thereafter there was a challenge to an employer's policy of refusing to hire

\textsuperscript{33} This is how these early cases were widely interpreted at the time. See Julia Lamber, Barbara Reskin & Terry Dworkin, \textit{The Relevance of Statistics to Prove Discrimination: A Typology}, 34 \textit{HASTINGS L.J.} 553, 571 (1983) ("When plaintiffs are unable to identify, in what way defendants use race or gender impermissibly, they may rely on statistical evidence of disproportionality to infer a causal relationship between the discretionary decision."). See also Chisholm v. U.S. Postal Serv., 665 F.2d 482, 495 (4th Cir. 1981) (holding postal service liable for racial discrimination based on disparity between promotions and workforce); DeMedina v. Reinhardt, 686 F.2d 997 (D.C. Cir. 1982) (permitting inference of discrimination based on statistics).

\textsuperscript{34} For an excellent discussion of the existing case law, including skepticism on the continuing relevance of the \textit{Teamsters} case see Marc Rosenblum, \textit{On the Evolution of Analytical Proof, Statistics, and the Use of Experts in EEO Litigation}, in \textit{STATISTICAL SCIENCE IN THE COURTROOM} 161, 190 (J. Gastwirth ed. 2000) (noting that "[t]he most critical case in the evaluation of EEO statistical proof is not \textit{Teamsters} or \textit{Hazelwood}, but \textit{Wards Cove}").
women as correctional officers. There were also several challenges to pension policies that specifically treated women differently in their contributions or payouts. These cases highlight an important difference between race and gender. The question in these gender cases was whether an employer's policy could be justified under a rigorous test of necessity; in other words, could an employer exclude women from working as correctional officers in a male prison, or to take another well-known example, could an employer only hire women as flight attendants? In the context of race, no such question is permissible because the law does not recognize distinctions between whites and African Americans in the way that it does for gender.

The BFOQ cases have always been a small subset of the gender discrimination class actions. A related and more frequent claim involves what might be termed "lack of interest" cases, pattern or practice claims based on clear underrepresentation in the workplace with the employer seeking to explain the disparities based on women's lack of interest in the jobs. Here we find another clear distinction with the race cases—there is rarely any basis for claiming that African Americans are uninterested in jobs. Returning to the Teamsters case, while there was some theoretical possibility that African Americans were not interested in being long-distance drivers, that assumption would be quite tenuous and a court would likely have no trouble drawing an inference of discrimination based solely on the absence of African Americans in those positions. But the same is not true when the focus is on women—the absence of women as truck drivers would not lead to the conclusion that discrimination was the underlying cause. Truck driving is a traditionally male job for which women may simply have been uninterested for reasons independent of the employer's


36. See, e.g., City of Los Angeles Dep't. of Water & Power. v. Manhart, 435 U.S. 702 (1978) (invalidating requirement that women make higher pension contributions because of their longer expected lifespan).

37. As noted previously, the Supreme Court answered the first question affirmatively in a case involving male prisons in Alabama that were, in the Court's language, "peculiarly inhospitable [for] human beings of whatever sex." See Dothard, 433 U.S. at 334. Since then, there have been a number of successful challenges to policies that restrict women to women's prisons. See, e.g., Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980) (affirming the district court's holding that employment practices which prevented women from obtaining promotions as correctional officers resulted in sex discrimination prohibited by Title VII); Griffin v. Michigan Dep't of Corr., 654 F. Supp. 690 (E.D. Mich. 1982) (holding that there was no BFOQ for sex discrimination in employment and promotional policies at an all-male prison). One of the more well known BFOQ cases is the district court decision invalidating Southwest Airlines' policy of only hiring women as flight attendants. See Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981).

38. Race is not included within the statutory BFOQ affirmative defense. See 42 U.S.C. § 2000-e(2)(c)(1)
actions.\textsuperscript{39} Or, to take another example on which there was considerable litigation in the 1970s, lawsuits alleging gender discrimination in fire departments had to determine what the appropriate goal or benchmark should be as it seemed unlikely that women would have the same level of interest in firefighting as men.\textsuperscript{40} In the context of race, there again would be no reason to think that African Americans had different interests than whites in firefighting.\textsuperscript{41}

The best known of the "lack of interest" cases involved Sears and its commissioned sales positions.\textsuperscript{42} This was an early case, originally filed in the 1970s, that has drawn a substantial amount of critical attention but also demonstrates how gender cases demand a deeper theoretical understanding in the pattern or practice context.\textsuperscript{43} At Sears, most of the commission jobs—which paid substantially more than the non-commission jobs—were held by men, and the Equal Employment Opportunity Commission (E.E.O.C.) sued alleging that the company was discriminating against women in those job assignments.\textsuperscript{44} Had this been a race case, the lack of

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\item See, e.g., Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (holding that a fire department entrance examination was not job related and had disparate impact on female applicants). A number of other cases were filed around the same time. See Brunet v. City of Columbus, 642 F. Supp. 1214 (S.D. Ohio 1986) (holding that Defendants had failed to demonstrate job-relatedness of a physical examination which had adverse impact on women), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); Evans v. City of Evanston, No. 84-2718, 1985 WL 4118 (N.D. Ill. Nov. 20, 1985) (granting motion for class action certification).
\item EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).
\item The literature discussing the Sears case is extensive, for a sampling see Joan C. Williams, \textit{Deconstructing Gender}, 87 MICH. L. REV. 797, 815-19 (1989) (critiquing the Sears case's creation of a legal presumption that women fit gender stereotypes); Deborah L. Rhode, \textit{The "No-Problem" Problem: Feminist Challenges and Cultural Change}, 100 YALE L.J. 1731, 1769-71 (1991) (criticizing the Sears court for generalizing about women's gender roles and assuming that an employer's discrimination is either responsible for all gender disparities in the workplace or none at all). Most of the commentary has been critical of the court's decision but for a recent defense of the case see Jonah Gelbach, Jonathan Klick & Lesley Wexler, \textit{Passive Discrimination: When Does It Make Sense to Pay too Little?} 76 U. CHI. L. REV. 797, 839-41 (2009). Some of the literature involves the role of expert witnesses, as a feminist historian testified on behalf of Sears and drew considerable criticism for her role. See Ruth Milkman, \textit{Women's History & the Sears Case}, FEMINIST STUDIES, INC. (1986), available at http://www.jstor.org/stable/3177974.
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African Americans in the commissioned sales jobs would have created an inference of discrimination, but when it came to women, such an inference was not so readily drawn. As the defendants contended, maybe women were not interested in the commissioned jobs, maybe they did not like the pressure or the hours, the uncertainty of pay, or maybe they did not have the knowledge necessary to sell the big-ticket items.\textsuperscript{45} This is not to suggest that any of these explanations were true, only that they could be plausibly asserted, in part because they played on existing stereotypes of women as homemakers or marginal secondary earners. Because the defense plays on stereotypes, one might expect that it would be easy to refute, but that has not proved to be the case.\textsuperscript{46} Indeed, Sears ultimately prevailed in its case with a lengthy District Court decision that largely accepted the defense.\textsuperscript{47}

To state that the cases play on stereotypes may be a bit misleading, depending on how one defines stereotypes. It is the case, and certainly was at the time of the Sears litigation, that we find women in different positions and occupations than men; indeed the segregated nature of the workplace is one of the most stubborn facts of the labor market, and one that the class action cases seek to challenge.\textsuperscript{48} At the same time, one question these cases raise is who should be responsible for these patterns, patterns that often manifest themselves in gender segregated workforces? I would suggest that there is not an easy answer to that question. Although this is not the place for a lengthy discussion, let me note that the segregated nature of the workplace is the product of a complex web of factors, many of which have to do with our social culture that carves out separate gender spheres, and continues to do so, for men and women. There is also the issue of choice, though it can be difficult to define choice amidst the other factors, and there remains a substantial amount of employer discrimination in the labor market. No single cause is responsible, and it is not clear that an employer should be charged with intentional discrimination when it ends up mimicking our social culture through its employment practices.\textsuperscript{49}

\textsuperscript{45} Id. at 319-22.


\textsuperscript{47} See Sears, 628 F. Supp. at 1264 (N.D. Ill. 1986).


\textsuperscript{49} Some (increasingly liberals as well as conservatives) would undoubtedly add biology to the list of causes but I remain skeptical that biology plays a significant role, particularly biology
employers, for example, be required to challenge the existing social structures? Should employers be required to encourage women to be firefighters, or major league umpires?\textsuperscript{30} Or to take an area on which I have written, should employers be required to accommodate the childcare needs of women who are unable to obtain an equitable distribution of care with the child’s father?\textsuperscript{31}

These are undeniably difficult issues, and my own sense is that employers should be held responsible for their own actions rather than for failing to address inequalities that result from broader social norms. By the same measure, employers should not be permitted to make assumptions about women’s interests, and they should be held liable when their decisions are based on assumptions rather than evidence. I should also add that many of the class action gender discrimination cases that have arisen over the years have lent themselves to statistical proof, as no great leap, or even a baby step, was required to draw the necessary inference of discrimination.\textsuperscript{32} This was true in the many cases involving the exclusion of women from stockbroker positions or similarly the cases involving insurance brokers.\textsuperscript{33} In both cases, women were concentrated in lesser jobs even while they were working demanding hours—this was certainly true in the brokerage cases where women worked as assistants, a position that was less lucrative but seen as a potential stepping stone to broker positions, and there was no reason to think they were uninterested in the higher paying jobs.\textsuperscript{34} In some of the cases, there was evidence that women were not given lucrative or new accounts or training opportunities, thus limiting their future

\textsuperscript{30} Id. (discussing sex discrimination suits against brokerage firms). See also LOUISE MARIE ROTH, SELLING WOMEN SHORT: GENDER & MONEY ON WALL STREET (2006).

\textsuperscript{31} See infra note 67.

\textsuperscript{32} There was a large number of cases filed in the 1990s, particularly in the securities industry, and most of the cases followed a typical format where the plaintiffs demonstrated that women were largely excluded from jobs as brokers. I have discussed some of these cases in detail in Michael Selmi, Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms, 9 EMP. RTS. & EMP. POL’Y J. 1, 6-12 (2005).

\textsuperscript{33} See CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE (2010).
at the companies. Similarly, in many of the early grocery store cases, company officials made explicit statements regarding how women belonged in the home or that men needed higher salaries to support families. It is also worth noting that most of the cases discussed above were not strictly statistical in nature, but they involved a narrative of discrimination that typically involved sexist attitudes that ran throughout the organization, which allowed courts to connect the statistical disparities with the employer's own discriminatory actions.

C. The Wal-Mart Class Action

Against this background, the Wal-Mart case pushed the boundaries of the pattern or practice claim, if for no other reason than the case arrived in the Supreme Court two decades after the earlier pattern and practice cases. Even though the Wal-Mart case arose in the context of class certification, it allowed the Supreme Court to confront some of the lurking issues regarding what it means to prove intentional discrimination on a classwide basis. Walmart had long been seen as a target of opportunity—the largest private employer in the world with a history of old-world and sexist attitudes. Like many of the cases that had come before, plaintiffs likely could have based their case on a “visual” survey by simply walking into stores and plotting out the gender of the managers compared to the gender of the hourly employees. The statistics were fairly stark—nearly two-thirds of the hourly employees but fewer than a third of the managers were women. The plaintiffs were also able to establish that women took significantly longer to be promoted than men, and even when promoted, were typically concentrated in the lowest managerial level.

56. See Williams, supra note 43 at 818, n.71.
58. Several of the cases filed against grocery store chains involved what were deemed “visual inspections” where an investigator would walk into stores and write down the gender of the managers who were displayed in photographs at the front of the stores. See Selmi, supra note 53, at 18.
59. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2563 (2011) (Ginsburg, J., dissenting) (“Women fill 70 percent of the hourly jobs in the retailer's stores but make up 'only 33 percent of management employees.'”) (citation omitted).
60. The District Court decision certifying the class has the most extensive factual findings. For example, the Court noted that there were many more women Assistant Managers (36% of such managers were women) compared to Store Managers (14% were women). See Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 146 (N.D. Cal. 2004). The court also concluded, "On average, it took
The plaintiffs' statistical presentation was strong, and stronger than previous cases that had settled, including a class action with similar allegations that had been filed against Home Depot.\footnote{61}{For a discussion of the Home Depot case see Michael Selmi, The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects, 81 TEX. L. REV. 1249, 1281-89 (2003).} There was also little question that, under \textit{Teamsters} and \textit{Hazelwood}, the statistical showing alone might have sufficed to establish intentional discrimination.\footnote{62}{See supra Part II.A.} But the continuing vitality of those earlier cases had not been tested in twenty years and there had never been a case of this size before. In the context of the earlier cases, the question for the Court became whether discrimination was the best explanation for the observed statistical disparities. This issue was clouded by the fact that the case arose in the class certification context but, as noted previously, the merits blend together with the certification question, and in this case the primary issue was whether the plaintiffs had alleged a common practice of discrimination across the company so as to justify classwide treatment.\footnote{63}{In its decision, the Supreme Court noted the interrelationship between the merits and the issue of commonality: "In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination." \textit{Wal-Mart}, 131 S.Ct. at 2552 (footnote and italics omitted).}

Here the size of the case became problematic for two independent but related reasons. The plaintiffs brought a nationwide class action, but they were not challenging any particular practice or policy, instead they were claiming that Walmart's subjective hiring practices had led to the observed gender patterns.\footnote{64}{See \textit{id.} at 2552 ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy of allowing discretion' by local supervisors over employment matters.").} Yet, those subjective practices occurred primarily at the store level where managers were given broad discretion to hire, promote and pay their employees. Just how much discretion local managers were afforded was disputed but the plaintiffs found themselves in a difficult position of trying to aggregate on a national level what looked like millions of local decisions. In essence, the plaintiffs argued that the company had a uniform policy of local subjective decision-making, a position that seemed inherently contradictory and one that the conservative members of the Supreme Court found decidedly unpersuasive.\footnote{65}{The majority of the Court dismissed the plaintiffs' argument by noting that Walmart's policy of providing discretion to local managers "is a policy against having uniform employment practices." \textit{Id.} at 2554 (emphasis original).} Even the District Court that
had certified the class acknowledged that the plaintiffs' argument was problematic. 66

The other problem with the sheer size of the case had to do with a basic statistical principle, namely that it is much easier to find a statistically significant relationship the larger the sample size, and conversely, more difficult to identify a relationship the smaller the sample size. 67 There are various statistical techniques that take into account sample size, but it is still the case that finding statistically significant relationships amongst a million or more employees is not particularly difficult. Thus, the desire to cast the case as a nationwide class action appeared to be driven by statistical principles rather than the company's decision-making. But there was a danger to this strategy because without something more than the statistics, it appeared that any large employer with a statistically imbalanced workforce would be subject to liability for intentional discrimination, or at a minimum would be required to defend a large class action claim. And because so many of the cases settle, a court might view that circumstance as tantamount to a decision of liability.

This does not mean that the statistical relationship was spurious. In fact, a good argument can be made that the relationship was more meaningful because of the greater number of observations. 68 But it makes one wonder, which was true of much of the way the case unfolded, because it was never clear why the plaintiffs sought to sue at the national level when the decisions were made at the local level. Plaintiffs argued that Walmart had a strong and centralized corporate culture but it never adequately linked that corporate culture to local decision-making. 69 Although the plaintiffs

66. See Dukes, 222 F.R.D. at 152 ("The Court recognizes that there is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control."). The District Court went on to explain:

"To clarify, the evidence indicates that in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system. These subjective decisions, are not, however, made totally in isolation. Rather, the company maintains centralized corporate policies that provide some constraint on the degree of managerial discretion over in-store personnel decisions. The evidence suggests that the company relies also on its strongly imbued culture to guide managers in the exercise of their discretion." Id. at 152-53.

The connection between the corporate policies and the local decisions was largely overlooked in the Supreme Court and was the kind of issue the plaintiffs should have been afforded an opportunity to develop at trial.


68. This was the point made in an amicus brief filed by a group of labor economists and statisticians. See Brief of Amici Curiae, Labor Economists and Statisticians in Support of Respondents, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-0277), 2011 WL 719643 (discussing the difference in sample sizes used by the parties).

69. The District Court opinion discussed the company's "uniform culture" that involved training, daily meetings, and corporate oversight of operations. See Dukes, 222 F.R.D. at 151. But the plaintiffs
had difficulty defending its decision to aggregate at the national level, the defendant’s tactic was even more extreme, as they argued that the proper means of analysis was at the department level, the smallest unit of analysis possible and one that had very little logical support other than that it made statistical significance virtually impossible to identify. This short discussion highlights one of the main problems with the case: neither party presented a compelling justification for its approach, and in fact, both relied on tried and true methods that had a distinctly generic quality to them.

This was also true of the so-called “social framework” evidence that the plaintiffs offered to explain why the observed disparities should be seen as the product of discrimination. The term “social framework” is a legal rather than sociological concept and involves highlighting academic literature to explain the nature of contemporary discrimination. In this case, the social framework focused on how excessive subjectivity often serves as a vehicle for discrimination. When left unchecked, subjectivity typically incorporates stereotypical beliefs, which in turn can entrench gender segregation within a workplace, a phenomenon that is well established within the social sciences and expert testimony is offered to report the social scientific findings.

The social framework evidence ultimately proved unhelpful, in large part because it was too generic in nature with too little connection to Walmart’s actual practices. In fact, plaintiffs had been using the same argument, with the same expert, for many years, and the social framework evidence was ultimately unable to fill in the void left by the statistics. In the Wal-Mart case, the plaintiffs’ expert was Dr. William Bielby, who over the last two decades has moved from case to case relying on the same

were unable to establish how the culture led to discriminatory decisions at the local level. The social framework evidence, offered by plaintiffs’ expert William Bielby, was designed to make this link, an issue discussed shortly.

70. See Dukes, 222 F.R.D. at 156 (“Defendant’s statistical expert, Dr. Haworth, rejected Dr. Drogin’s focus at the regional level and conducted her regression analyses at the store sub-unit level.”)


72. The emphasis on gender stereotyping is closely connected to what is now often referred to, particularly in the legal literature, as implicit bias. See, e.g., Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. REV. 465 (2010).
methodology and argument, namely that observed gender disparities are the product of gender stereotyping. His analysis, however, was primarily a generic lecture on the ways subjectivity can lead to discrimination that had little to say about how Walmart's system of local discretion had led to the underrepresentation of women in the managerial ranks. In his testimony, Dr. Bielby generally references the subjective nature of the promotion process, typically mentioning that the employer uses a "tap on the shoulder" system rather than relying on formal job posting, as was true with Walmart, and talks about the perceptions of the proper role of women. But Dr. Bielby's testimony has rarely changed over the last two decades and has less resonance today.

To give an example of how the argument has stagnated, we can take a quick look at the Lucky Stores case that was originally filed in the 1980s. The case against Lucky Stores was part of a series of cases filed against the grocery industry for segregated job assignments and promotional policies, and it was the only one of the cases to proceed to judgment on liability. In most grocery stores, women were concentrated at the cash registers and in the least desirable departments, while men dominated the more traditional and lucrative departments, such as meat and produce, that typically led to promotions. In fact, most of the claims made by the Wal-Mart plaintiffs originated in the grocery store cases, where the plaintiffs challenged the lack of posting for jobs, criticized the "tap on the shoulder" promotional system, and argued that the stores were operated based on a stereotypical view of the role of women, which saw them primarily as secondary earners. Dr. Bielby testified in the case involving Lucky's stores, and his testimony mirrored the affidavit he later filed in the Wal-Mart case. In his testimony that was delivered in the late 1980s, Professor Bielby attributed the job patterns at Lucky's stores to gender stereotyping: "Stereotypical perceptions sustain sex discrimination in higher level jobs, as individual women are evaluated according to Store Managers' perceptions of women.


76. See Selmi, supra note 51, at 16-17.

77. See id. at 13 (noting that "men dominate the meat and produce departments, while women tend to be concentrated in the bakery and delicatessen departments.").

78. See id. at 12-14 (discussing grocery store litigation).
as a group rather than as individuals." His testimony, as summarized by the District Court, also noted that subjective decision-making is more prone to the influence of stereotyping:

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

This conclusion could have been lifted directly from the Wal-Mart class certification material, or any of the many cases in which a pattern of sex segregation has been observed. Indeed, the primary problem with this testimony is that it is almost entirely generic and lacks any clear reference to the particular employment practices of Lucky Stores. It feels, in other words, like something is missing.

Not only was Dr. Bielby’s testimony generic in nature but it was inconclusive as well, which is generally consistent with the way social framework evidence is presented. In the Wal-Mart case, Dr. Bielby could only conclude that the defendant’s system was “vulnerable to gender bias,” and he was unable to quantify just how vulnerable the system was. In what can only be described as brilliantly framed deposition testimony by the defendant, Dr. Bielby could only state that the likelihood that discrimination influenced the decision-making process was somewhere

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80. Id. at 303.
81. More than a decade later, in the Wal-Mart case, Dr. Bielby’s affidavit stated:

“A large body of social science research demonstrates that stereotypes are especially likely to influence personnel decisions when they are based on informal, arbitrary, and subjective factors. In such settings, stereotypes can bias assessments of a woman’s qualifications, contributions, and advancement potential, because perceptions are shaped by stereotypical beliefs about women generally, not by the actual skills and accomplishments of the person as an individual. In decision-making contexts characterized by arbitrary and subjective criteria and substantial decision-maker discretion, individuals tend to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.” Declaration of William T. Bielby, Ph.D in Support of Plaintiffs’ Motion for Class Certification, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. 01-2252), 2003 WL 2451701, at *19-20.
82. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2553 (2011) (citation omitted). As the majority of the Court noted, “[W]e can safely disregard what [Dr. Bielby] has to say. It is worlds away from ‘significant proof’ that Wal-Mart operated under a ‘general policy of discrimination.’” Id. at 2554.
between 5% and 95%.83 Here Dr. Bielby was simply being careful and acting consistent with the standards of his discipline,84 but his testimony was of minimal value: no employer, indeed no entity, can be held liable for a system that is vulnerable to discrimination, just as no employer should be held liable solely based on a statistical imbalance in their workforce. After all, Title VII makes it impermissible to discriminate not impermissible to have a system that might lead to discrimination. Along the same lines, it seems insufficient to suggest that a statistical imbalance is invariably the product of subjective decision-making or the lack of formal job posting. There is little question that subjective decision-making—the presence of discretion—can lead to gendered job patterns, but it cannot be the case that the presence of subjectivity or discretion, in combination with a statistical showing, is per se proof of discrimination.85 That conclusion is simply too far reaching, and something contemporary law is not likely to accept, although Dr. Bielby’s testimony arguably presented just such a possibility since his testimony was focused on the ills of subjectivity rather than the ills of Walmart’s practices.

Similar to the plaintiffs’ experts’ presentation, the defendant’s main expert, Joan Haworth, offered testimony that was equally rote and of equally limited value. Dr. Haworth has been testifying for defendants in class action discrimination cases dating back to the 1980s.86 As the founder of ERS Group, it is no surprise that she is a professional expert witness but her methodology has raised serious concerns. Going as far back as the Sears litigation mentioned earlier, Dr. Haworth has relied on a statistical strategy of divide and conquer—no matter the circumstance it seems that she finds a way to disaggregate the data into smaller units that diminish the likelihood of identifying a statistically significant relationship.87 In the

83. Wal-Mart, 131 S. Ct. at 2553; see also Deposition of William T. Bielby, Wal-Mart, 131 S. Ct. 2541 (No. 10-0277), 2003 WL 245708, at *88 (“So it could be five percent that are made at the conscious level, 50 percent, 75 percent, 95 percent?”).
84. See Brief of Amici Curiae Am. Sociological Ass’n & Law & Soc’y Ass’n, supra note 71 at 13-14 (“Dr. Bielby’s unwillingness to draw causal inferences is consistent with sociologists’ prudent reluctance to assert causality in the absence of appropriate methodological safeguards.”).
85. The Supreme Court noted this proposition many years ago. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (“It is true, to be sure, that an employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.”). At one time, it was fairly common for courts to make a connection between subjective decision-making and discrimination. See, e.g., Bell v. Bolger, 708 F.2d 1312, 1319-20 (8th Cir. 1983) (“subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse”); Bauer v. Bailar, 647 F.2d 1037, 1046 (10th Cir. 1981) (noting that although subjective decision making is not wrongful per se “obviously subjective decision making provides an opportunity for unlawful discrimination”).
86. A list of the cases with written decisions that she has testified in is included in infra note 89.
87. See, e.g., EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 334 (7th Cir. 1988) (criticizing Dr. Haworth’s adjustment for “product lines,” which had the effect of overreducing expected female promotions). Dr. Haworth also conducted “cohort analyses” on the wage claims, which compare
Wal-Mart litigation, Dr. Haworth’s tactic was to evaluate the company’s practices not on a nationwide or regional level, or even on a store level but at the department level within stores. There is some possibility this was a correct procedure but it was certainly not a new strategy—Dr. Haworth made a very similar argument in the Sears litigation, and in virtually every published case in which she has testified. Moreover, at least from the published opinions, it seems that Dr. Haworth has never identified discrimination within any employment setting.

Dr. Haworth has done battle with Dr. Bielby on many occasions, including the Lucky Stores case where her testimony again sounds all too familiar. Consistent with the notion that defendants want smaller samples, Dr. Haworth sought to analyze fewer applications than the parties had agreed to. She disregarded “applications that were for jobs other than those at issue in the litigation,” even though that included applications for “any job,” more than half of which came from women. By discarding those applications, Dr. Haworth substantially reduced the statistical pool, making it again more difficult to find statistical significance. In addition, much like her testimony in the Sears case, and later in the Wal-Mart litigation, Dr. Haworth testified that women have different preferences than men which may have led to the different assignments, hours and pay.

individuals on very specific criteria and has the tendency to mask significant relationships because the comparisons are among very small grouping. Id. at 351.

88. See Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 608 (9th Cir. 2010) (“Wal-Mart’s own research was not conducted at the individual store level. Dr. Joan Haworth, Wal-Mart’s expert, did not conduct a store-by-store analysis; instead she reviewed data at the sub-store level by comparing departments to analyze the pay differential between male and female hourly employees.”). Given that it rejected the plaintiffs’ statistical analysis, the Supreme Court never addressed the legitimacy of defendant’s statistical presentation.


90. For examples of cases where Dr. Haworth has testified, see supra note 89.


92. The initial database included 28,000 applications and the parties stipulated to a sample, though Dr. Haworth ultimately reduced that sample by nearly a quarter. “The sample which Dr. Haworth obtained contained about 24% fewer applications than was prescribed in the original sample plan.” Id. at 311.

93. Id. at 312. The Court ultimately found that Dr. Haworth’s data and conclusions were unreliable. Id. at 329.

94. Id. at 313-14.
As is evident, a significant problem with the Wal-Mart class action was that it was a template cause of action—the arguments made by both sides in the Wal-Mart litigation had been advanced for at least the previous twenty years, typically by the same set of experts, one set of whom always sees discrimination while the other never does. This strikes me as a terrible way to establish the presence of discrimination. It may seem unfair to criticize the expert testimony in this fashion; after all, no one expects experts to be neutral and the experts involved in these cases are likely no different than the hundreds or even thousands of experts who testify in similar cases. At the same time, this returns us to what I stated at the outset of this essay: that the pattern or practice cause of action is under-theorized, particularly in the context of gender. The pattern of these cases has become so mechanical that we are left with little more than a normative judgment regarding what best explains the segregated nature of the workplace—stereotypical thinking in the form of subjective and ambiguous criteria, as the plaintiffs allege, or different preferences of men and women, as the defendants urge. Without something more than the statistics, one is left to choose between these options and how one chooses will likely turn on ideology and preexisting views rather than on any factual presentation. The social framework testimony, which is primarily a well-crafted lecture on the nature of contemporary discrimination, is not likely to fill the gaps and almost certainly has its greatest force among those who are already inclined to see discrimination as the cause of the noted disparities.

In addition to the statistics and social framework evidence, the plaintiffs offered some anecdotal evidence but here the size of the case proved insurmountable. There was some evidence that managers at training sessions referred to women as “little Janie Qs”, and there were also sporadic comments regarding the need for men to support a family, but these comments did not seem compelling or necessarily indicative of a companywide policy. In a company as large as Walmart, isolated statements of just about any sort can likely be found, and these comments fell closer to what are typically defined as “stray remarks” than a pattern of

95. Our current system of mixing expert testimony with our adversarial system has been the subject of extensive criticism. For a sampling, see Jennifer L. Mnookin, What the Law to Do? Expert Evidence, Partisanship, & Epistemic Competence, 73 BROOKLYN L. REV. 1009, 1020-28 (2008) (critiquing partisanship of expert witnesses); Jeffrey L. Harrison, Reconceptualizing the Eye Witness: Social Costs, Current Controls and Proposed Responses, 18 YALE J. ON REGULATION 253, 256 (2001) (“Expert witness testimony is characterized by distrust and cynicism from judges, juries and lawyers.”). See also Christopher Tarver Robertson, Blind Expertise, 85 NYU L. REV. 174 (2010) (proposing a blind procedure for experts that seeks to replicate scientific studies).

96. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2564 (Ginsburg, J., dissenting).

97. Id. (“One manager told an employee that ‘[m]en are here to make a career and women aren’t.’”).
discrimination. The plaintiffs also offered more than one hundred affidavits from the plaintiff class alleging various forms of discrimination but here again the size of the case overwhelmed the evidence. One hundred anecdotes adds little to a nationwide claim involving a million or more women, and can support neither a finding of classwide discrimination nor a common practice unless there is some clear theme or consistency to the claims, which there was not. But it is also not clear how many anecdotes may have mattered, given that the anecdotal evidence is always of marginal significance in a pattern or practice claim.

Although in this essay I have been critical of the claim the plaintiffs put forth, I still believe the case should have been certified as the plaintiffs had sufficiently established a common theme, primarily based on the statistical data, that warranted classwide treatment. The Court effectively merged the merits inquiry with the certification decision, which, if followed closely by lower courts, could lead to making broad allegations of classwide discrimination extremely difficult to pursue. Unless the plaintiffs proffered stronger evidence at trial—and it should be emphasized that discovery had been put on hold during the nearly ten years the certification issue was pending—they likely would have lost their case but the claims they raised were precisely the kind of claims that require class action treatment. It certainly would have been infeasible and inefficient to try thousands of individual claims, and the whole point of the statistical evidence, as discussed in the next section, is to identify patterns that individual cases will not capture.

III. DEFINING DISCRIMINATION IN A PATTERN OR PRACTICE CASE

One reason why the disparate impact theory works conceptually is that there is the equivalent of a statutory definition of discrimination. Under the disparate impact theory, discrimination is defined as an employment practice that causes an adverse effect upon a protected group that is not

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98. The "stray remarks" doctrine arises from the Supreme Court decision in Price Waterhouse and now means remarks that while potentially suggestive of discrimination do not rise to the level of direct evidence. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Avery et al., supra note 11, at 144-145.

99. See Wal-Mart, 131 S.Ct. at 2556. The Court noted that in the Teamsters' case plaintiffs offered testimony for "roughly one [out] of every eight members of the class" while in Wal-Mart it was "about 1 for every 12,500 class members." Id. The Court also noted that half of the affidavits were from six states, and fourteen states had no representation among the affidavits. This only goes to show the irrelevance of anecdotal evidence—it presumably would have made no difference if all the states were represented, or if the affidavits were distributed evenly across regions, unless the anecdotes demonstrated some consistent companywide policy, which is the role of the statistical evidence.
justified by the needs of the business.\textsuperscript{100} There is, however, no equivalent statutory definition for the pattern or practice claim, other than the loose definition derived from the Teamsters case that the plaintiff must establish that discrimination is "the standard operating procedure."\textsuperscript{101} But that phrase does not move the debate forward because it does not tell us when an employer's standard operating procedure is discriminatory. The pattern or practice cause of action has escaped scrutiny for the last twenty years, but now that it is under scrutiny, we need a better understanding of what discrimination means when a pattern or practice claim is alleged.

We can initially attempt to define discrimination in the negative, by what it is not, or more accurately by what contemporary courts are not likely to accept as the equivalent of discrimination. Foremost, discrimination is not a statistical imbalance in the workforce. This may be less true of some issues than others: gender segregated job assignments are more likely to give rise to an inference of discrimination than promotional positions because the latter turns more on qualifications, seniority and interests than the former.\textsuperscript{102} A plaintiff, however, will almost always have to do more than establish a statistical imbalance, as it will also have to demonstrate that the cause of that imbalance is discrimination. Statistics will be the starting point but they will rarely be the ending point.

The caveat mentioned above—what a court is likely to accept—proves important here because, as discussed previously, under a strict reading of the Teamsters and Hazelwood cases, a statistical imbalance is sufficient to establish a claim, at least for unskilled jobs. Although there was some emphasis placed on the importance of individual testimony, the Teamsters case actually involved little more than a statistical imbalance, given that there was no testimony about applications or the qualified applicant pool. In Hazelwood, the Court emphasized the importance of looking at the qualified pool, which requires taking into account minimum requirements, in the particular case teaching credentials. However, once the particular qualifications are controlled for, a statistical imbalance can be sufficient to demand an explanation from the employer.\textsuperscript{103} Although neither case has been overruled or even modified by the Wal-Mart case, their force has clearly eroded, and today it would be a mistake to rely on those first generation cases to establish second, or third, generation discrimination.

\begin{itemize}
\item \textsuperscript{100} See 42 U.S.C. § 2000e-2(1)(A).
\item \textsuperscript{101} Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).
\item \textsuperscript{102} This is one way to distinguish Home Depot and the grocery store cases since those cases primarily involved initial job assignments as opposed to the promotional positions at issue in Wal-Mart. See, e.g., EEOC v. Home Depot, U.S.A., Inc., No. 06-1950, 2008 WL 2744969 (D. Colo. July 11, 2008); Wal-Mart, 131 S. Ct. 2541.
\item \textsuperscript{103} Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 300 (noting that "once a prima facie case has been established by statistical work-force disparities" the employer has an opportunity to demonstrate that the disparities are the product of lawful forces).
\end{itemize}
Indeed, in its more recent constitutional and statutory cases, the Supreme Court has repeatedly cautioned against the possibility of holding employers liable solely for a statistical imbalance in its workforce. The Teamsters and Hazelwood cases are best seen as products of their era.

This is why many, like Judge Ikuta of the Ninth Circuit and the late scholar Richard Nagareda, seek a policy or practice as proof of discrimination, although a formal policy is not required and if there was one it should be adjudicated under other causes of action. An informal policy, on the other hand, is really what is at issue, and establishing a pattern or practice of discrimination will require some specific showing of the influence of gender (or race) on the particular defendant. That may sound obvious or even tautological but what I mean to suggest is the statistical showing can only do so much of the work, and the social framework evidence, without a specific tie to the defendant, fails to add a meaningful narrative. Rather, there has to be some agency, an active agent, in order to establish discrimination; passively facilitating discrimination will not rise to the level of unlawful discrimination. Indeed, holding employers liable in such situations would come close to requiring employers to implement some form of affirmative action, something no court is likely to require. Instead, an employer should be held liable for its own acts of discrimination, whether those acts are traced to particular employees or broader cultural norms within the firm.

This is, after all, what distinguishes discrimination from a program that is designed to enhance diversity or change the direction of a company, what might be defined as affirmative action but could also involve outreach or

104. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."). A similar sentiment has guided case law in the context of contract set-asides and voting rights. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989); Shaw v. Reno, 509 U.S. 630, 647 (1993). The Court has expressed a similar concern in the context of the disparate impact theory. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989) ("The Court of Appeals' theory... would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the... members of his work force."")


106. If an employer had an explicit policy that was discriminatory on its face, it would be defended under the bona fide occupational qualification defense. And, if there was a neutral practice that had a disparate effect, that would be adjudicated under the disparate impact theory.

107. Here, I part company with the position articulated by Professor Green. See Tristin K. Green The Future of Systemic Disparate Treatment Law, 32 BERKELEY J. EMP. & LAB. L. 395, 446-47 ("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.").
other programs designed to identify prospects or candidates. Many employers have consciously sought a diverse workforce independent of a lawsuit, and in those circumstances, a statistical imbalance may be sufficient motivation to alter their employment practices. But what a company does for its own interests and under compulsion of litigation are often two very different things and there are reasons to keep company interests and anti-discrimination policies separate. Indeed, there are many reasons to prefer that companies take voluntary action to address their perceived deficiencies, and if we move the discrimination bar in a way that discourages such action we may end up in the worst of all worlds—one where employers are reluctant to act for fear of drawing legal attention and one where prevailing through litigation is perilously difficult. In other words, employers should not be held liable solely because they are aware of imbalances in their workforce because to do so would simply create a disincentive for employers to evaluate their workforces.

The question remains how plaintiffs can prove the often-elusive discrimination that can produce, or contribute to, a gendered workplace. Since I have already discussed what is not sufficient to create the predicates of discrimination, let me also add here what is not necessary for a finding of discrimination. Certainly no formal or explicit policy is necessary, nor should it be necessary to identify specific statements or actions that directly led to a segregated workplace, and formal antidiscrimination policies, common and innocuous today, should have no evidentiary force. What is necessary is some story that puts discrimination squarely on the table as the most likely explanation for the observed disparities—this was the role of statistics in Teamsters and Hazelwood and the proof structure for individual cases established in McDonnell Douglas, but thirty years later, the statistics have a substantially more limited meaning. Let me offer an example of a

108. The Supreme Court has held, in the context of gender, that employers are permitted to act to address a statistical imbalance in its workforce, but no court has held that an employer must take steps to address an imbalance. See, e.g., Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616 (1987); Maitland v. Univ. of Minn., 155 F.3d 1013 (8th Cir. 1998).

109. Dr. Bielby’s expert report reads more like the report of a management consultant than an expert who is seeking to identify discrimination. His report begins by detailing Walmart’s hiring and promotion structure, and then moves to a discussion of how subjective decision-making can lead to discriminatory results, or how it is “vulnerable” to discrimination. See Declaration of William T. Bielby, Ph.D in Support of Plaintiffs’ Motion for Class Certification, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. 01-2252), 2003 WL 2451701. There is nothing in the report regarding how Walmart’s policies had led to discrimination, and the last third of the report focuses on the relative weakness of the company’s diversity efforts. See id. Walmart’s diversity efforts can hardly be evidence of discrimination since it did not appear that the company was under any obligation to implement diversity programs.

110. At the oral argument, and in its briefs, Walmart sought to emphasize its stated non-discrimination policy. While the Supreme Court acknowledged the policy in its decision, it did not rely on its existence for any determination. See Wal-Mart, 131 S. Ct. at 2554.
recent case that provided just such a story, one that went beyond generic lessons on stereotyping to emphasize broad cultural norms.

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

By emphasizing the individual stories in the Novartis litigation, I do not mean to place any importance on anecdotal evidence that traces its pattern and practice origins to the Teamsters case. What was significant about the Novartis litigation is that the plaintiffs were able to weave together a coherent narrative about corporate culture through a collection of individual stories with similar themes that demonstrated how sexist attitudes had reached the top echelon of management and thus could be seen as creating a companywide policy. That narrative was then bolstered by the statistical presentation, rather than having the statistical presentation do all of the work.

113. See Ann Woolner, supra note 112.
114. After a $250 million jury verdict, most of which came in the form of punitive damages, the parties later settled for more than $150 million. Larry Neumeister, Novartis to Pay Up to $152.5M in Bias Award, DETROIT FREE PRESS, July 15, 2010, at B.5.
Something similar occurred in the series of cases that were filed against the securities firms in the 1980s and 1990s, where the boorish daily behavior by male stockbrokers evinced a hostility to women that supported the claims of pay and assignment discrimination. Given the historic all-male nature of the securities industry, and the macho behavior evident in the contemporary workplaces, it was not difficult to attribute women’s lower pay and segregated job assignments to discriminatory treatment. Indeed, in this situation no social framework evidence was necessary as the workplace effectively spoke for itself, playing the role statistics had played in the early cases.

This is not to suggest that it should always be necessary to have specific evidence of harassment to succeed on a pattern or practice claim—what might be seen as a form of “pattern or practice plus” borrowing from the much (and properly) maligned pretext plus theory. But it is to suggest that plaintiffs should do more than provide a generic claim of discrimination in the argument that subjective decisionmaking is a vehicle for stereotyping and thus explains the observed gender disparities. Plaintiffs need to craft a story, a narrative, that explains how stereotyping has, in fact, affected the defendants’ workplace. This does not have to be in the form of a written policy or practice, or overt statements by management, and just as it is important to move beyond generic claims it is also important to move beyond a sense that discrimination is manifested only in explicit policies or statements. The desire for such explicit statements and policies is largely attributable to our societal failure to conceive of discrimination in a broader context, our failure to understand the way in which contemporary discrimination operates. Against this backdrop, the plaintiffs’ task is to explain the contours of contemporary discrimination but explain it in ways a jury, or a judge, is likely to accept.

This was the intent of the social framework evidence but its generic nature, at least as implicated in the employment discrimination cases, has rendered the evidence far less convincing than it should be. The problem

116. See Selmi, supra note 53, at 6-19; LOUISE MARIE ROTH, supra note 54.
117. Id.
118. The concept of “pretext-plus” is that a plaintiff in an individual case must offer evidence beyond pretext in order to prevail on a discrimination claim. See Catherine J. Lancot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases, 43 HASTINGS L.J. 57 (1991). The theory was put to rest by the Supreme Court, which has stated quite definitively that proof of pretext can suffice as proof of discrimination. See Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 134 (2000).
120. In what appears to be a very similar case to the one filed against Costco, Dr. Bielby was replaced by the eminent sociologist Barbara Reskin, but it appears that her testimony largely mimics what Dr. Bielby has been offering. See Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Cal. 2010) (certifying the class).
with such testimony is that it condemns all subjective decision making, and
would apply to virtually any employer that relies on subjective assessments
as part of its employment practices, as most employers do in one form or
another.\footnote{This was an issue that clearly concerned the Supreme Court in the Wal-Mart litigation, as it noted that delegating discretion to low-level managers “is also a very common and presumptively reasonable way of doing business.” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011).} Contrast the testimony that was introduced in Novartis, where
the presence of stereotyping could be seen in the employers’ actions over
time, or in the well-known Price Waterhouse case where the expert witness
testified about the company’s actual practices and explained why those
practices should be seen as influenced by gender stereotypes.\footnote{Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In Price Waterhouse, social psychologist Susan Fiske testified that certain writings and statements of male partners were likely the product of gender stereotyping, which is quite different from the more generic evidence offered in many of the class action gender discrimination cases that focus on the connection generally between subjective decision making and stereotyping.}

With this in mind, plaintiffs should do what many plaintiffs are already
doing: explain not just how a system is vulnerable to discrimination but
how discrimination has influenced the employment process. In many
circumstances, one could begin with the defendants’ preferred defense in
gender discrimination cases, namely that women lack interest in promotions
or different job assignments. Assuming that defense is not based on
meaningful empirical data, it is likely the product of stereotypical
thinking.\footnote{As one court noted, an employer’s unfounded assertion that plaintiffs lacked interest in the job is likely the product of a “stereotypical attitude” that supports a finding of discrimination. See Loyd v. Phillips Bros., Inc., 25 F.3d 518, 524 (7th Cir. 1994). Courts have often required employers to offer some credible evidence to support a lack of interest defense. See, e.g., EEOC v. Gen. Tel. Co. of Nw., Inc., 885 F.2d 575, 582 (9th Cir. 1989), cert. denied, 488 U.S. 950 (1990); Catlett v. Mo. Highway & Transp. Comm., 828 F.2d 1260, 1266 (8th Cir. 1987) (noting that employer failed to introduce any evidence to support its lack of interest defense, cert. denied, 485 U.S. 1021 (1988)).} Similar arguments about women’s availability that are not
supported by anything other than management’s perceptions should also
support the stereotyping inference. Those arguments can be developed
through depositions and often documents, and the social framework kind of
evidence might be used to interpret those statements and documents, much
like was done in Price Waterhouse. In the Wal-Mart case, the plaintiffs
might have looked to the oversight of the regional managers to see if they
might have been influencing or imposing gender disparities at the local
level. Perhaps they were more likely to approve male managers rather than
female, or subjected pay increases for female employees to closer scrutiny,
provided managerial bonuses in a way that may have privileged male
managers or rewarded managers for promoting men. Given the way the
case proceeded, this is pure speculation and I only mean to suggest that it is
important for the plaintiffs to tie the statistical disparities to actual
employment actions rather than the less well-defined institutional structure.
In addition to telling a story about the company, plaintiffs might seek to tell a story through the data by explaining the patterns that are evident in the data. Currently, most plaintiffs, and this was true in the Wal-Mart case, are content to rely on statistically significant differences as proof of discrimination without much additional explanation, but as noted previously, an inference of discrimination no longer flows so readily from the data. Instead, plaintiffs need to provide meaning to the observed patterns. For example, a statistical pattern might simply be an efficient means of aggregating individual decisions. Under this view, each individual discriminatory decision could be identified but doing so would be time consuming and patterns might be elusive. As a quick example, the employer may have made one hundred promotions, and sixty of them were discriminatory in that a lesser-qualified man received the promotion over a more qualified woman. If this were the case, it should be possible to identify the sixty individuals, and the remedial phase would become particularly important because it is there that the victims of the discriminatory practices would be identified.\(^{124}\)

This, however, is a very limited view of the pattern or practice claim, and the data might be capturing a different kind of discriminatory pattern. Rather than aggregating individual claims, the data might be elucidating a more subtle kind of discrimination. The aggregated statistics might reflect patterns that would not be evident by focusing on the individual cases. For example, on promotions claims the statistical pattern might reflect that women must have stronger qualifications than men in order to be promoted, even if in individual cases women were sometimes losing out to very, or more, qualified men.\(^{125}\) What the statistics might suggest is that if the female candidate had been a man, her qualifications may have been evaluated differently. It might also be that all close cases go to men, again even if in specific cases it might be difficult to identify a particular woman who was the victim of discrimination. Yet, if all ties are going to men, that should be an indication that the process itself is discriminatory.

This latter view of a subtler pattern of discrimination is consistent with the presentations by plaintiffs' experts, particularly those who rely on regression analyses. The primary point of a regression analysis is to measure the importance of variables that are relevant to the underlying

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124. In the original Teamsters case, the Supreme Court created two stages of pattern or practice litigation. The first stage involves establishing liability and the second stage involves identifying the victims of discrimination and awarding appropriate relief. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361-63 (discussing stage two of litigation).

125. See, e.g., D. James Greiner, Causal Inference in Civil Rights Litigation, 122 HARV. L. REV. 533, 555 (2008) (discussing situation where “the defendant firm is valuing years of education less for women than for men” which he goes no to note “might support an inference of gender discrimination”). Professor Greiner's article discusses different ways in which regressions can be helpful in proving discrimination, with a particular focus on salary discrimination.
decisions, and the significance of the variables cannot be readily identified by focusing solely on isolated or individual cases. Looking at a variable that is often relevant in employment disputes; a woman may need more experience or seniority to be considered for a promotion than a man, or a man’s experience might be weighted more heavily. A regression analysis is designed to measure these variables and does not look at head-to-head matchups but seeks, instead, to divine a pattern amidst the data.

It should be apparent that there can be a disconnect with the use of regression analyses to prove a pattern or practice claim. In many contexts, it will be difficult to identify specific victims; rather, the data will demonstrate statistically significant disadvantages that women face in the process that might be modified by various forms of injunctive relief. However, to the extent that courts emphasize the need to identify specific victims and specific agents of discrimination, a regression analysis may appear to be inadequate. At the same time, this is precisely the kind of discrimination that can only be challenged through a pattern or practice claim, and it is certainly the kind of discrimination that pervades contemporary workplaces. For that reason, it is critical that plaintiffs explain what their statistical presentation demonstrates, and avoid the generic claims that rely on statistical significance and gender stereotyping.

The ability to present a case in this manner will work better in some contexts than in others. A regression analysis has its greatest force in analyzing salary disparities since there are often agreed upon relevant factors that play a role in salary determinations, and those factors can often be isolated through the regression.\(^{126}\) Hiring claims can be assessed in a similar manner, at least for large employers where individuals are not competing directly for each position. In contrast, a regression analysis may have its least persuasive force in a promotion context since courts tend to conceptualize promotions as involving specific decisions that should be analyzed in isolation.

As a result, it is imperative that plaintiffs explain the meaning of the regression in a descriptive fashion—what it is that the regression demonstrates rather than simply emphasizing the variables that have been controlled for and the statistically significant results. It may not be easy to explain the nature of the statistical pattern but, in the context of the Walmart claim, this might have been one way to explain what otherwise might

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\(^{126}\) Although regression analyses have become commonplace in pattern or practice claims, they appear in judicial decisions primarily in the context of salary discrimination claims, where it is possible to identify particular factors that are relevant to salary determinations. See, e.g., Rudebusch v. Hughes, 313 F.3d 506 (9th Cir. 2002); Ottaviani v. State Univ. of N.Y., at New Paltz, 875 F.2d 365 (2d Cir. 1989); Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir. 1988); Penk v. Or. State Bd. of Higher Educ., 816 F.2d 458 (9th Cir. 1987).
appear to be anomalous: why at the store level there were frequently no statistically significant disparities.

I think it is also important to tie the discriminatory patterns to actual actors or to provide concrete examples of discriminatory patterns because there is a clear danger in moving towards a structural, or agent-less, theory of discrimination. By removing the agency, we also remove the blameworthy component of an intentional discrimination claim, moving the claim more towards a negligence theory, a standard that appears inconsistent with the requirement of intent.\textsuperscript{127} I also think that such a robust definition of intentional discrimination—where employers would largely be required to address statistical imbalances—asks too much of most courts, and certainly of the Supreme Court. The sociological evidence marshaled in the briefs filed in the \textit{Wal-Mart} case and in the work of many legal scholars, including Professor Tristin Green,\textsuperscript{128} offers a complex and, I believe, accurate description of the source of continuing gender disparities in the workplace but I fear that most courts would be unlikely to see that material as evidence of discrimination.\textsuperscript{129} Such a theory is likely better suited, at least at this point in time, for consultants or those firms that desire to eradicate gender disparities and discrimination from their workplace. But it likely goes beyond our current social norms regarding gender discrimination, and while the Supreme Court in the past has been ahead of our society on issues of discrimination, the current Court arguably lags behind broader social norms.

\section*{IV. CONCLUSION}

The pattern or practice claim operated under the legal radar for thirty years, a situation that was shattered with the Supreme Court’s \textit{Wal-Mart} decision. Although that decision is likely to make nationwide class actions far more difficult to certify, most class actions proceed on a more localized level, where the substantive issues discussed in this essay will continue to

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{127} In an influential article with a long-shelf life David Oppenheimer proposed just such a standard, though part of his argument was based on the way negligence had crept into employment discrimination doctrine. See David B. Oppenheimer, \textit{Negligent Discrimination}, 141 U. PA. L. REV. 899 (1993).
\item\textsuperscript{128} Professor Green has been at the forefront of emphasizing the structural nature of contemporary discrimination. See, e.g., Tristin K. Green, \textit{Work Culture, & Discrimination}, 93 CAL. L. REV. 623 (2005); Tristin K. Green, \textit{Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory}, 38 HARV. C.R.-C.L. L. REV. 91 (2003).
\item\textsuperscript{129} For a critique of the emphasis on structural discrimination see Samuel R. Bagenstos, \textit{The Structural Turn and the Limits of Antidiscrimination Law}, 94 CAL. L. REV. 1, 45 (2006) (“Courts are hostile to disparate impact law for precisely the same reason that they hesitate to read disparate treatment doctrine as embracing implicit bias—because actions taken without a conscious intent to discriminate do not fit the paradigm of a fault-based understanding of ‘discrimination.’”).
\end{enumerate}
\end{footnotesize}
be both relevant and important to develop. Pattern or practice claims depend on a coherent narrative to explain why the statistical imbalance in the workforce should be defined as the product of discrimination, and that narrative must be tied both to the particular employer and the actions of that employer. Today, thirty years after the pattern or practice cases were originally decided, more, not less, is required of plaintiffs to establish discrimination, even while there remains so much discrimination to eradicate.