Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes

Richard Thompson Ford

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38NW6X

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INTRODUCTION

Since the late 1970s, plaintiffs who have brought claims based on Title VII and other anti-discrimination laws have focused their litigation on individualized claims. As a result of the emphasis on individual injuries, as opposed to collective injuries, employer liability for discriminatory practices have revolved around notions of moral culpability and emotional narratives that put a face on the victim. Social justice lawyers and scholars on the left have embraced this individual justice model. However, I argue that in order to put social justice truly at the center of anti-discrimination law, this model of individualized justice should be abandoned in favor of a collective justice orientation. The decision in Wal-Mart v. Dukes only underscores the need to shift our primary focus from individual harms to collective harms.¹

This article begins with a brief overview of Dukes and the history of the individual injuries perspective as well as its problems. I then discuss the objections to a collective justice model, highlighting the concerns over evidence and moral culpability. Ultimately, I conclude that a focus on collective justice requires us to look to hard statistical data to demonstrate

¹ George E. Osborne Professor of Law, Stanford Law School.
the existence of systemic social problems instead of building cases around dramatic narratives with identifiable victims. Finally, I offer several suggestions on how to establish liability for discrimination based around a collective justice perspective.

I.

"ROUGH JUSTICE" AND THE PROBLEM WITH THE INDIVIDUAL INJURIES VIEW

Betty Dukes worked for Walmart in Pittsburgh, California, a working class city about thirty miles east of San Francisco. She had been on the job for seven years and sought promotions that, she claims, went to less qualified men. Dukes claimed that women were routinely assigned to stereotypically feminine departments such as baby clothing and excluded from masculine departments such as hardware. According to Dukes, openings for managerial positions were never announced and filled by men before she could apply. In 2001, Dukes, along with six other women, sued Walmart in a class action lawsuit filed on behalf of every woman who worked for Walmart since 1998—roughly 1.5 million women.

Betty Dukes and her co-plaintiffs claimed that Walmart systematically discriminated against women in pay and promotions. They pointed out that almost three-fourths of Walmart's hourly wage sales employees are women; by contrast, only about a third of its managers are. They argued that Walmart's executives in Bentonville, Arkansas, set the tone for all of the 3,400 stores in the United States—the same tone of traditional Southern chauvinism and contempt for civil rights laws that Sam Walton exhibited in the 1960s.

Not surprisingly, Walmart denied all of this. "We don't have policies and practices in place that promote discrimination of any kind," Walmart spokesman Bill Wirtz insisted.2 Walmart and its supporters pointed out that the Dukes plaintiffs could not point to any specific company-wide policy or practice—instead, they cited isolated and "widely divergent" anecdotes and a vague hypothesis of a monolithic corporate culture to conjure up the specter of a common pattern of discrimination. According to one observer, the plaintiffs' claims amounted to little more than "accusations by women that supervisors, including female supervisors, made disparaging remarks about women workers—something entirely possible in a company of more

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2. Reed Abelson, 6 Women Sue Wal-Mart, Charging Job and Promotion Bias, N.Y. TIMES, June 20, 2001, at C1.
than one million employees... there is nothing in this collection of anecdotes that amounts to a company-wide pattern of discrimination."⁴

Judge Alex Kozinski made this point with characteristic aplomb in his dissent to the Ninth Circuit's affirmation of class certification:

"The half-million members of the majority's approved class held a multitude of jobs... in 3,400 stores, sprinkled across fifty states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment... They have little in common but their sex and this lawsuit."⁵

The core of the plaintiffs' discrimination case was statistical. Walmart draws most of its managers from its hourly wage employees, of which seventy-two percent are women. But at the time the lawsuit was filed, only one-third of Walmart's managers were women, and, according to the plaintiffs:

"even this figure overstates the proportion of female managers [because it... includes traditionally ‘female’ positions, such as assistant managers... the lowest level of managers...]. Women comprise less than 10% of all Store Managers and approximately 4% of all District Managers."

By contrast, "among [Walmart's] 20 top competitors, women comprise over 56% of management... In fact, female representation among managers at Wal-Mart is at a substantially lower level today than [it was] among Wal-Mart's competitors in 1975."⁶

Are these statistics enough to establish a firm-wide pattern of discrimination? In the classic pattern and practice case, the plaintiff does not have to point to a corporate policy that joins all of the individual cases of discrimination—it is enough to show, using statistics, that such a pattern exists. The employer as an entity is responsible for the decisions of its managers—even if each manager exercises his own independent judgment, he still acts on behalf of the employer whenever he hires, fires, promotes, or disciplines an employee. A plaintiff will prevail if she can show—using a combination of statistics and a sample of representative cases—that an employer discriminated repeatedly. That is what the Dukes plaintiffs hoped to show at trial.

But while statistics might tell us that a lot of women have been discriminated against, they cannot specify which ones. Judge Easterbrook, of the Seventh Circuit, explained this problem in a race discrimination case:

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⁶ Id.
Suppose 1,000 employees apply for 100 promotions; 150 of the workers are black and 850 are white. If all are equally qualified and the employer ignores race, then 85 white workers and 15 black workers will be promoted, plus or minus some variation that can be chalked up to chance. Suppose only 10 black workers are promoted. Is that the result of discrimination of chance? Econometric analysis may suggest the answer . . . but it cannot reveal with certainty whether any given person suffered . . . [Suppose that] but for discrimination 15 [black employees] would have been promoted . . . Which would have received the other 5 promotions? The statistical analysis does not tell us—and in civil litigation, where the plaintiff's burden is to show more likely than not that he was harmed by a legal wrong, data of this kind will not get a worker over that threshold.7

A lot of unexplained decisions that harm women suggest a pattern of discrimination. But any single unexplained decision that goes against an individual woman might be due to chance. It is not practical for the court to hear evidence about 1.5 million cases. Accordingly, the district court's trial plan called for any damages awarded to be determined for the entire class and then apportioned to the individual women according to a mathematical formula. As some of the judges who opposed class certification at earlier stages of the litigation dissented, this would have guaranteed that women with strong claims would effectively have to share their damages with those who have weak claims. For individuals, the class action model offers only rough justice.

But rough justice is better than no justice at all. Even when we can be fairly sure a given employer discriminated, it is possible that few or no individuals would be able to make out a case of individual discrimination. The Dukes suit, with its heavy reliance on statistics, was an attempt to bring employment discrimination law into the twenty-first century. In today's job market, collective claims make more sense than ever before. Walmart has gained notoriety because it exhibits all of the defining features of the contemporary service sector employer in exaggerated form—it has a large low-wage workforce, high turnover, and a decentralized management structure, and evaluates its employees based on highly subjective criteria.

These features—especially high turnover, decentralization, and subjective evaluation—make it hard to apply the individual civil rights model that has developed since the 1970s. The main method of proving individual discrimination was established back in 1973, in the context of manufacturing jobs that required objective skills and formal certifications.8 Percy Green was a black employee of the St. Louis McDonnell Douglas factory who was laid off from his job and sued when McDonnell Douglas rejected his application a year later after it starting hiring again. Green

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insisted that McDonnell Douglas rejected him because of his race; McDonnell Douglas claimed it rejected him because an earlier protest he organized disrupted the company's factory. The Supreme Court in *McDonnell Douglas v. Green* held that if a plaintiff shows that (1) he is a member of a group likely to be the target of prejudice, (2) he applied for and was qualified for the job, (3) the employer rejected him, and (4) the employer continued to seek applications for the position, he has made out a *prima facie* case of discriminatory intent. At that point the employer must offer a non-discriminatory reason for rejecting the plaintiff. Finally, the plaintiff can try to convince the judge or jury that the defendant's reason is really a pretext for discrimination. If he does, he wins his lawsuit; if not, he loses.

This method worked fairly well in a manufacturing context, like *McDonnell Douglas*. Employees needed objective skills, such as formal training or certification, to use specific types of equipment, and employers typically were indifferent between employees with the requisite skills. When McDonnell Douglas refused to hire Green, it raised the suspicion that its reasons were unusual. But notice how anachronistic the *McDonnell Douglas* approach is in today's service sector labor market. Consider the second factor of the *prima facie* case—the plaintiff applied for and was qualified for the job. Today, many jobs are filled by word of mouth or through informal internal promotion processes. The Walmart plaintiffs complained that women were not mentored and groomed for upper management positions, so they were not prepared when the better jobs opened up, and sometimes openings were not even announced. What does it mean, then, to "apply" for a management position at Walmart? And the qualifications for many service sector jobs are hard to define. The Walmart promotions process was left almost entirely up to local managers, who said they considered factors such as "teamwork," "ethics," "integrity," and "the ability to get along with others" in their decisions. Getting a promotion at Walmart—as in many service sector jobs—is not a simple matter of being "qualified"—it requires being the best of a large group of aspirants, based on "soft-skills" such as demeanor, poise, and personality. It is easy for bias and stereotypes to hide in the fog of subjectivity such evaluations entail—a manager who thinks women should not be in charge might claim a female candidate lacks "team spirit," or his opinion of a female candidate's people skills might be influenced by his stereotyped views of appropriate feminine demeanor.

What can the failed Walmart litigation tell us about the future of employment discrimination law? The obvious lesson is that the future looks dim for employees bringing claims of discrimination against their

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9. *Id.* at 802.
employers. But Walmart is just the last in a long line of Supreme Court opinions that have eroded anti-discrimination law. Since the late 1970s, anti-discrimination law has evolved in an unfortunate direction to emphasize individual justice at the expense of social justice. In order to put social justice back at the center of anti-discrimination law, we must not only challenge the centrality of the individual justice model—we should be ready to suspend it entirely.

Why is discrimination on the bases prohibited in Title VII and the other federal civil rights laws considered an individual injury? Obviously an adverse employment action is bad for the individual who suffers it, but it is not typically a legal injury. In an employment-at-will regime—the common law default and the default under the law of most American states—adverse employment decisions are not legally injurious. Why are the listed types of discrimination more objectionable than the myriad of other bad or questionable bases for employment decisions? It is tempting to insist that discrimination on the basis of race, sex, religion, and other prohibited considerations is somehow morally reprehensible in a way that other unjustified forms of discrimination are not. It is certainly true that racism, sexism, and anti-Semitism, for example, are morally reprehensible attitudes. But such bigoted attitudes do not always underlie discrimination. The easy example of this is the employer who discriminates because of a reasonable belief that his customers are bigoted. In fact, because most employers are corporate entities—which, if they have attitudes at all, can reflect them only through their policies—employers per se, as opposed to individual managers, rarely have morally repellant attitudes. Moreover, if it were really Congress's intent to punish attitudes or beliefs, then the Constitutional status of the law is questionable on First Amendment grounds.

Perhaps the unlawful forms of discrimination are worse than other forms of irrational or unjustified discrimination because they are uniquely injurious to the individual who is subject to that discrimination. Although an individual may feel hurt for being fired because the boss thinks she has an annoying voice or an irritating verbal tick, it is inherently demeaning and dehumanizing to be fired because of, say, race. Or is it? Being treated badly because of race is especially demeaning and emotionally traumatizing, but that is because of a social context in which racial hierarchy, race-based slurs and insults, and racially motivated assaults are prevalent and widespread. An individual who is aware of that social context vicariously experiences something of the brunt of the collective history of racial insults, slurs, and attacks with each racial insult he experiences. Here it is not the case that unlawful forms of discrimination are inherently more injurious than those that are not unlawful—instead, they are more injurious because of a social context in which a lot of injuries on the same basis regularly take place.
There are other arguments as to why the prohibited forms of discrimination are worse than other types of irrational discrimination, but most of them—and all of the most convincing—refer in some way to a social context in which the type of discrimination in question is especially prevalent. Hence, the individual injuries prohibited by anti-discrimination laws are really, in essence, collective injuries. It follows that collective harms should be our primary target and collective remedies our primary aspiration. After all, if we could reduce the overall number of race or sex based “injuries” so that they are no more prevalent than the vast number of unwelcome decisions made for idiosyncratic reasons, the individual injury would no longer be uniquely injurious—instead, it would be no more injurious to the individual than the types of adverse actions typical of an employment-at-will regime.

As long as race and sex discrimination are widespread, an adverse decision based on race or sex will be both an individual and a social injustice. But if the injuries were not unusually widespread, the corresponding stigma and vicarious emotional injury would fade away. This should be the goal—not the impossible dream of eliminating every individual case of what is now actionable discrimination. Prohibiting individual discrimination is a means to the end of social or collective justice.

Viewed from this perspective, the “rough justice” of the proposed Walmart trial plan does not look so bad. In fact, it looks exactly like what anti-discrimination law would produce at its best.

II. OBJECTIONS TO A COLLECTIVE JUSTICE ORIENTATION

A. Evidence

It is a common intuition that the individual case is somehow inherently stronger than a collective case like Wal-Mart. While we can tell a story about an individual case, it is hard to tell a story about a collective case. It seems that we can be certain when a specific case of discrimination occurs, but widespread collective injustices are hard to distinguish from disparate outcomes caused by group differences in competence, diligence, or interest. This intuition underlies the idea in Wal-Mart that we need something more than statistical evidence of a pattern and practice of discrimination. We need individual anecdotes and a narrative of centralized misconduct—a policy or at least a pervasive and especially poisonous “corporate culture”—that caused the pattern. It is well known in the field of cognitive psychology that people find narratives with villains and victims more compelling than accounts of more impersonal forces. But this is a cognitive bias that the law ought to correct. The intuition that collective cases are
inherently weaker than individual ones is based on a mistaken understanding of the way the law works in both types of cases. In fact, the statistical evidence in a systemic disparate treatment case like *Wal-Mart* can be more powerful than the evidence offered in an individual case.

In theory, systemic disparate treatment is just an aggregation of individual cases of disparate treatment. The method of proof differs but the injuries are the same. Direct evidence of discriminatory intent is exceedingly rare. Most individual cases are proven by indirect or circumstantial evidence. Typically, a plaintiff asserts that the challenged employment action was not justified and invites the fact-finder to infer a discriminatory motive from the lack of other plausible motives. The defendant then seeks to establish a non-discriminatory motive. If there is no plausible non-discriminatory motive for the challenged action, the fact-finder may infer discriminatory intent. So “intentional discrimination,” in practice, is little more than an absence of other plausible explanations for a challenged employment decision. Of course, once we have inferred discrimination from this indirect evidence, it is usually easy to tell a story where the decision-maker was a bigot or chauvinist. Sometimes there is some additional evidence to bolster this interpretation. But the absence of a plausible non-discriminatory reason for the decision is sufficient in and of itself to support a judgment for the plaintiff.

A pattern and practice or systemic disparate treatment case involves a lot of challenged decisions. Rather than try each one individually, we use statistical analysis to ask whether the pattern can be explained without reference to the race or sex of the employees. There is ample opportunity for the defendant to show that a statistical disparity is actually caused by something other than discriminatory employment decision. For instance, the defendant can introduce evidence that women are less qualified or less interested in the positions in question. And that evidence need not be quantitative—if hard data is unavailable, the defendant can introduce qualitative social science to support its alternative explanation. Ultimately, the question is whether we can infer discrimination from the absence of other plausible explanations for the statistical disparity.

Just as in the individual disparate treatment case, “discrimination” is, in practice, the absence of other plausible explanations. The only difference is that it is harder to tell a compelling story after the fact because we do not have a specific decision-maker to villianize and an employee who he has victimized. Individual anecdotes do not make up for this narrative deficiency because they do not correspond to the legal verdict. As in *Wal-Mart*, we have stories that show individual injuries but no individual story that can explain the pattern. The sociological evidence of a corporate culture that is “vulnerable” to bias might fill the narrative gap, but it is too speculative and opportunistic. As Professor Michael Selmi notes, it does
not inspire confidence that the sociologists in question are hired guns who offer the same canned analysis in every case.10

This leaves us with the statistical evidence. Of course that can be and often is manipulated too, but good statistical analysis can distinguish real evidence from spin. And here the large number of claims—a flaw if one insists on a narrative—becomes a virtue: the larger the sample size, the smaller the potential for chance to affect the analysis. Properly analyzed statistical evidence is at least as probative a form of circumstantial evidence of discrimination as most of the evidence routinely accepted in individual cases. If we do not intuitively think of it as so, that is because we are suffering from a cognitive bias that leads us to favor dramatic stories over hard facts.

B. Moralism

A focus on collective justice requires us to resist the natural impulse to prefer dramatic narratives to hard evidence and to respond to identifiable victims with a face more than to systemic social problems. Not coincidentally, it also requires us to suspend the moralism that has long been a central part of civil rights thinking. It is typical to think of civil rights violations as examples of moral culpability—the paradigms of the vicious segregationist, the male chauvinist pig, and the lecherous sexual predator all involve clear moral wrongdoing. But most of today’s social injustices do not involve moral wrongdoing; they involve carelessness and nonfeasance. Thankfully, Title VII does not make moral culpability an element of a cause of action, but unfortunately, many judges and legal commentators have effectively made moral culpability the sine qua non of actionable discrimination. A covert moralism was central to the outcome in Wal-Mart. The plaintiffs in Wal-Mart had a hard time establishing that Walmart as an entity was culpable for whatever discrimination took place in its stores. Walmart made a convincing case that the discrimination was the fault of individual store managers and not central management. Legally, this should not matter—Walmart is vicariously liable for the discriminatory acts of anyone it gives authority over employment decisions. A pattern and practice case is simply an aggregation of the individual cases—if Walmart is responsible for each case individually, it is responsible for all of them in aggregate. The rest is simply a question of proof, and the statistical evidence of a pattern of discrimination in Walmart was potentially at least as compelling as the indirect evidence of discrimination in many successful individual cases.

Class certification does raise distinct complexities—what joins the hundreds of thousands of injuries suffered at thousands of locations under thousands of different managers? But there is a straightforward answer to this question. The common element is Walmart’s failure to prevent discrimination by its agents. There may be no explicit policy—in this day and age there almost never is—but there is a failure to discharge a statutory duty to prevent discrimination. Walmart is free to adopt any approach to coordinating its supervisors it chooses, but it must prevent them from discriminating. Its failure to do so is unlawful, and it is the same failure in each case, whether there are ten cases or 1.5 million.

Judge Ikuta’s notion that systemic disparate treatment liability requires a policy is mistaken—nonfeasance is sufficient because the legal injury is an employment action that occurs because of sex. Even at the individual level, there is usually nothing like a “policy” of discrimination. Suppose a store manager set for himself a “policy” of evenhandedness and non-discrimination. He nevertheless harbors sexist attitudes—perhaps subconsciously—and they influence his decisions. A disappointed woman sues for discrimination and demonstrates, using the standard McDonnell Douglas deductive method of proof, that she was a victim of discrimination. She shows she was the most qualified candidate for promotion measured objectively, the employer’s proffered non-discriminatory reasons do not seem plausible, and the fact-finder concludes that it is more likely than not that the decision was made because of sex. The employer is liable although no one in a decision-making capacity implemented a discriminatory policy—not even an implicit one. The employer is liable because it—meaning, in this case, the specific manager in question—allowed an employment decision to be made because of sex. Suppose the manager were to say, “I really tried not to make the decision because of sex, but I thought it was important to consider factors other than the objective record. I believe things like poise, demeanor, team spirit, and a can-do attitude are important. Even though I knew there was a risk that sexism would cloud my subjective judgments, I thought that on balance, it was worth the risk.” Here we could say the manager, despite his best efforts and good intentions, did not try hard enough to prevent discrimination.

Notice that we do not really need a theory of unconscious bias to reach the correct result. As a formal matter, the fact-finder is entitled to infer discrimination from the lack of a plausible explanation for the challenged employment decision. The possibility that the manager acted from unconscious motivations is simply a speculation that provides a narrative to undergird the formal conclusion. The manager could also have had conscious sexist attitudes that he tried but failed to correct. Either way, the employer is clearly liable.
Walmart as an entity is in an analogous relationship to its store managers as the individual manager is to his own unconscious mind. The question here is not one of malfeasance but rather one of lack of care. Given the conflict between its statutory obligation to prevent employment discrimination and its decentralized management structure and subjective employment criteria, Walmart chose the latter. That does not mean anyone in Walmart upper management is necessarily sexist or that there is an unusually severe “sexist culture” at Walmart—it simply means that Walmart adopted policies that allowed sex discrimination to flourish.

Professor Tristin Green notes that much of the academic and judicial literature worries about imposing Title VII liability on an employer that “merely permits biases acquired outside the of workplace to influence employment decisions.” But that is all most employers that violate Title VII do. Again, it is useful to compare an individual disparate treatment case. Suppose a sexist manager discriminates against women. The manager acquired his sexist attitudes outside the workplace—from family, friends, pornography, reality television shows, and the like. Should this absolve the employer of liability? Now let us consider a systemic disparate treatment case. It is 1967 in Birmingham, Alabama. Managers who have acquired their racial biases outside the workplace—from the racist culture of the Jim Crow South—discriminate against blacks. Does this defeat a Title VII claim by black workers as a class? Title VII makes employers responsible for ensuring that biases acquired outside the workplace do not affect employment decisions. If sexism is pervasive in society, that is the reason for employers to take special care to ensure that sexism does not infect employment decisions—not an excuse to do nothing. Were it otherwise, Title VII would perversely allow employers to mirror the biases most pervasive in society.

Accordingly, I must disagree with Professor Selmi, who writes that “passively facilitating discrimination will not rise to the level of unlawful discrimination.” It most certainly does. If a manager with the power to make employment decisions discriminates on the basis of sex, that discrimination is attributable to the employer, even if central management did nothing more than “passively facilitate” it. Indeed, most cases of individual discrimination do not involve discrimination by upper management or a company policy that encourages discriminatory conduct—they involve discrimination by lower managers which is attributed to the employer as an entity. I agree with Professor Selmi that “there has to be some agency, an active agent, in order to establish discrimination,” but

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12. Selmi, supra 10, at 503.
there is of course an agent in the Wal-Mart case. Indeed, there are many agents—the store and regional individual managers who discriminated. Perhaps Professor Selmi means that discrimination requires that we specifically identify an individual agent, rather than identify a host of agents through statistical analysis. But why? Why is it not enough to know that a host of agents, all of whom Walmart is responsible for, discriminated?

I suspect that the pervasive skepticism about any purely statistical case—no matter how powerful the statistical evidence—and the insistence on stories, narratives, and culpability at the upper management level reflects a pervasive moralism that is typical of civil rights thinking among both liberals and conservatives. Liberals want to condemn discrimination as morally repugnant, while conservatives insist that if it is not morally repugnant, it cannot be actionable discrimination. The centrality of moral culpability is the key to Walmart’s objection to class certification. Without a corporate policy that encouraged discrimination, it is not fair to attribute the moral culpability of individual Walmart managers to Walmart as an entity.

Of course, Walmart does not claim it is not liable for the discrimination of its managers—it only claims that it should not face a class action joining the claims. But its argument relies on a distinction between the actions of the store managers and the actions of the corporate entity. Traditional agency principles would exclude such a distinction—the principle is vicariously liable for the acts of the agent within the scope of the agency relationship. But the distinction makes sense if one is focused on moral culpability. The various individual instances of sex discrimination do not share any morally culpable act in common—each involves different managers acting for different reasons in different circumstances. Even though Walmart is legally responsible for all of them, it does not make sense to litigate them together if the morally culpable act is the crux of the legal violation. The plaintiffs tried to get around this problem by suggesting that a common corporate culture hatched and promulgated at Walmart’s Bentonville headquarters was responsible for the pattern of discrimination. But this argument holds water only if Walmart is a lot worse than its competitors—if its corporate culture is not merely sexist in the mundane way that much of society is sexist, but is unusually sexist. One might argue that managerial acquiescence in an unusually sexist culture is the morally culpable act that joins all of the individual cases of sex discrimination. But it is hard to argue that passive acquiescence in a culture that reflects society as a whole is morally culpable—this would seem to make the employers responsible for societal biases.

13. See id.
This explains why the plaintiffs contrasted Walmart to its competitors. The contrast is not legally relevant—after all, even if Walmart were no worse than its competitors, it is still responsible for whatever discrimination occurred. Nor does the contrast to competitors in and of itself help to establish that the various claims have anything in common.

The mistake here is assuming that Title VII liability hinges on moral culpability. The responsible entity—the employer—is in most cases incapable of moral culpability. The employer is at worst careless or indifferent to the discrimination of its agents. This is why I disagree with Professor Selmi’s assertion that “passively facilitating discrimination will not rise to the level of unlawful discrimination.” In the absence of a formal policy of discrimination—something no employer today has—passively facilitating discrimination is all an employer as an entity ever does. Passively facilitating the discrimination of agents that act on behalf of the employer is the very definition of a Title VII violation.

To drive the point against moralism home, consider three currently well-established principles that impose Title VII liability in the complete absence of any plausible moral culpability on the part of upper management: discrimination in order to pander to customer preferences, non quid pro quo sex harassment or harassment by co-workers without decision-making authority, and disparate impact discrimination.

The employer who discriminates to satisfy the preference of bigoted customers is not morally culpable—instead it is simply making a rational and expedient business decision based on societal norms that are beyond its control. Take the now classic case of an armored car company that correctly believes that its customers will not trust female guards to safeguard their money because of prevailing gender stereotypes. Suppose rather than having an explicit policy of discrimination, the employer simply allows its managers to hire guards based on a combination of objective qualifications and subjective ones including “ability to inspire confidence in potential customers.” The result is that in some cases, less qualified but especially tough-looking or large men get the job over more qualified but soft or skinny men, and it means that a lot of less qualified men get jobs over better qualified women. Is the statistical case sufficient to establish liability? If it is not, then customer preferences have effectively justified discrimination.

Sex harassment law holds the employer liable for harassment even when the employer has strict policies against it and upper management actively discourages it. The employer is liable for so called “quid pro quo harassment” because the supervisor is using his position as an agent of the employer to harass the employee. The employer is also vicariously liable
for other forms of on-the-job harassment if it does not have a complaint and remediation procedure in place that would inspire confidence in a reasonable victim. Again, the employer is not morally culpable because some its managers harass female employees—indeed, given today’s gender norms, some harassment is inevitable in any large organization. But the employer has what amounts to an affirmative duty to prevent or remedy harassment, whether by decision-makers or by other employees or even third parties who are aided in their harassment by the employment status of the victim.

The problem of vicarious liability in the sex harassment context can help to illuminate Title VII liability more generally. The attribution of the morally culpable act—invidious discrimination or harassment—to the employer as an entity always involves a breach of some sort of duty of care. Except in the exceedingly rare case of a formal discriminatory policy, the employer as an entity never discriminates itself—instead it allows its agent to discriminate. A corporation cannot act with or avoid discriminatory motivations because it does not have motivations—a corporation acts only through its policies. Accordingly Title VII prohibits actions taken “because of” a forbidden criteria—regardless of intent. Hence, if a manager makes an employment decision because of race or sex, the employer is liable for unlawful race or sex discrimination. In a sense, then, Title VII effectively imposes an affirmative duty of care to prevent discrimination.

Disparate impact liability places a duty of care on employers to avoid employment criteria that disadvantage protected groups and are not job related because such criteria cause employment decisions to be made because of the prohibited considerations. Today it is typical to think of disparate treatment as the defining Title VII infraction and to think of disparate impact as its less worthy stepbrother—a sort of bastard of the law. Much of the reason for this is that disparate treatment seems more culpable than disparate impact—the former seems to involve conscious malfeasance while the latter involves, at worst, negligence. But for the vast majority of Title VII defendants that are corporations, it is not clear that so-called intentional discrimination is really intentional at all. The corporation does not intend to discriminate—it winds up discriminating inadvertently because it failed to adequately control one of its agents. From the perspective of the employer, this is closer to negligence than to an intentional act. Similarly, an employer who adopts a policy that screens out a disproportionate number of women or minority group members and is not justified does nothing wrong intentionally—instead, it is negligent. Both disparate treatment and disparate impact involve a failure to discharge a statutory duty to avoid discrimination—neither necessarily involves any intentional act or moral culpability on the part of the employer.
A hypothetical may help to illustrate the point. Employer One has some bigots or sexists in management and these prejudiced managers discriminate—classic disparate treatment. The managers are able to discriminate with impunity because the employer allows decentralized decision-making and subjective employment criteria such that the discrimination is almost impossible to prevent and very hard to detect. There is no policy encouraging discrimination—in fact, there are many policies discouraging it, but those policies are ineffectual given the elusive nature of the discrimination.

Employer Two uses a standardized test that screens out all of the black candidates for promotion. The management did not mean to discriminate, but they used the test knowing that it might have a disparate impact and that there were effective alternatives available. They did this either because the test was cheap or to placate a powerful labor union that wanted a supposedly objective measurement for promotions.

Employer Two is no less culpable than Employer One. Both used a policy that led to a discriminatory outcome for reasons of cost or expediency. If we do not want them to do so, we need a legal regime that makes the expected cost of discrimination greater than the cost of changing policies. Moral culpability has nothing to do with the decision-making in either hypothetical—looking at the problem through a moral lens only confuses the issue.

Professor Melissa Hart raises concerns that the trial plan was unsatisfactory because the proposed remedial phase “would not have answered the question of which specific women were victims of that discrimination.” Although Professor Hart thinks Judge Ikuta was wrong to insist that a policy encouraging discrimination is required to sustain a pattern and practice suit, she seems to agree with Judge Ikuta that reference to some policy, or lack thereof, is required. For Professor Hart, if liability does not hinge on a specific policy taken by the employer, it does hinge on a policy or set of policies not taken. Decisions by upper level management seem sufficient to qualify as decisions that implicate the entity as a whole, but decisions by regional or store managers do not.

There seem to be at least two ideas underlying this view. One focuses on culpability: the entity-as-entity is not culpable for passively facilitating discrimination. We should reject this idea—Title VII liability does not and should not require moral culpability. The second reason involves incentives—without some account of what the entity-as-entity has done wrong, Title VII cannot encourage employers to avoid systemic

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16. Id. at 475.
discrimination. In order to provide appropriate incentives, employment
discrimination law should suggest what an employer must do or avoid
doing to avoid liability.

This is a valid concern—indeed, in a world in which overt
discrimination is exceedingly rare, encouraging firm-wide policies that
prevent discrimination is probably Title VII’s most important function. But
we can provide appropriate incentives without adding to the plaintiff’s
burden to establish liability. The employer as an entity is vicariously liable
for any and all discriminatory employment decisions and statistical proof of
a pattern of discriminatory decisions can be sufficient, provided the
statistical proof is compelling. However, a showing that an employer has
made a conscientious effort to prevent discrimination might serve as an
affirmative defense to liability. To raise this defense, the employer, at a
minimum, should be required to show that it followed the best practices in
the industry to correct the vulnerability of its employment procedures to
sexism. If the law is to provide appropriate incentives, conscientious
employers must be rewarded. An employer that has done all it can to
prevent discrimination should not be subject to liability.

Such an affirmative defense could also be extended to individual
disparate treatment cases as well. Provided the standard for the affirmative
defense is sufficiently rigorous, making it available in all cases would only
enhance the incentive goals of Title VII. Of course, some individual
victims of discrimination would not be compensated, but if the broad social
goals of Title VII are fulfilled, these victims should be no worse off than
anyone who suffered an adverse employment action for a generic “bad”
reason.

CONCLUSION

Moral culpability may seem to be central to the very idea of a civil
rights violation. But it should not be. The focus on culpability—like the
focus on individual victimization—misunderstands the statute and
undermines the social justice objectives underlying it. Accordingly, several
commitments that have been central to the left’s interpretation of civil rights
questions since at least the 1980s should be reversed. First, we need to
abandon the idea that civil rights violations involve morally culpable
perpetrators who deserve condemnation. Instead, we should replace it with
the idea that violations often involve an inadvertent failure to satisfy a legal
duty—this is the central point of David Benjamin Oppenheimer’s excellent
article “Negligent Discrimination.” Second, we should overturn the focus
on the victim’s perspective that has been a priority of the left since Alan
David Freeman’s famous 1978 article “Legitimizing Racial Discrimination

Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine,\textsuperscript{18} and replace it with a focus on the perpetrator’s perspective. In particular, the law should impose a duty that the responsible entity—typically a corporation—can fulfill. That cannot be a duty to refrain from morally culpable action, because corporations do not have a consciousness capable of moral culpability. Instead, it is a duty of care to avoid discrimination.

Holding an employer liable for all of the discrimination of its agents gives the employer an incentive to take appropriate measures to prevent discrimination, such as overseeing or reviewing employment decisions to ensure they are not made for unlawful reasons or removing bigoted managers from decision-making positions. Hence the law gives the employer discretion to choose how to eliminate discrimination but also gives it incentives to do so effectively. The pattern and practice case is an especially good way to provide employers with appropriate incentives to exercise due care—an employer that allows its agents to make employment decisions because of sex has failed to meet its statutory obligations and should be held liable for every instance of discrimination we can be reasonably sure has occurred. The specific instances may be local and diffused throughout a large enterprise, but the failure is a failure of the corporation as a whole. Finally, once moralism is taken out of the analysis, compensation of individual victims is secondary—this is why the Walmart trial plan, which left individual compensation to a secondary phase of the proceedings, was appropriate. The primary goal of Title VII should be to deter discrimination so that in the future there will be fewer injuries to compensate.

\textsuperscript{18} 62 MINN. L. REV. 1049 (1978).