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Introduction: Working Group on the Future of Systemic Disparate Treatment Law

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Wal-Mart v. Dukes opens up a third dimension to the ongoing judicial enfeeblement of employment discrimination law. The first dimension is deep-seated hostility to disparate impact analysis and, more generally, to any theory of liability that defines wrongful “discrimination” without reference to discriminatory intent.¹ Despite this celebration of disparate treatment analysis in theory, the second dimension hobbles individual disparate treatment claims in practice by forcing them through a harrowing evidentiary gauntlet to prove discriminatory intent.² The systemic disparate treatment theory had provided the great hope both for overcoming these evidentiary challenges and also for recapturing some of disparate impact’s structural orientation. Now *Wal-Mart*³ threatens to turn that avenue into a dead end, in part by extending to Title VII this Court’s general hostility to the class action device.

Although *Wal-Mart* formally is a case about class certification, the procedural analysis takes shape in the shadow of the substantive theory of liability. Surprisingly, the lower court case law leading up to *Wal-Mart* was remarkably inarticulate about that substantive theory: what exactly would the class, if certified, ultimately have to prove to establish liability? The Working Group on the Future of Systemic Disparate Treatment Law came together to address that question and get a head start on thinking about the

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1. See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Troupe v. May Dep’t Stores*, 20 F.3d 734 (7th Cir. 1994).

2. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004).

3. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

post-*Wal-Mart* landscape. Organized principally by Tristin Green, with myself in a supporting role, the authors represented in this Symposium, who also include Melissa Hart, Michael Selmi, and Richard Ford, exchanged drafts and met to discuss them at a daylong session in March 2011. The University of San Francisco generously supported the project. The four contributions published here represent the outcome, after significant revision to account for the Court's June 2011 *Wal-Mart* decision.

At root, the challenge for systemic disparate treatment doctrine is to synthesize its "systemic" and its "disparate treatment" characters. The systemic dimension captures the theory's difference from run-of-the-mill individual disparate treatment claims and its peculiar suitability to litigation on a class basis. Yet the disparate treatment dimension captures a kinship with precisely those individual claims, which many take as discrimination *simpliciter*.⁴

To see the difficulty, consider two different ways to link systemic disparate treatment to individual disparate treatment. I will call them "connective disparate treatment" and "dispersed disparate treatment." Both are superficially plausible interpretations of the Court's oft-quoted statement that liability attaches when disparate treatment "was the Company's standard operating procedure—the regular rather than the unusual practice."⁵

Individual disparate treatment generally occurs when an employee's protected group membership makes a difference to an employer's decision-making with respect to that employee. One way to give this definition a systemic character is to shift upward the level of decision-making to which it refers. This is connective disparate treatment: employees' protected group membership makes a difference to the employer's company-wide decision-making about organizational practices, including how to make individual employment decisions. Those company-wide practices connect the individual employment decisions to each other, and disparate treatment occurs in this connective tissue itself. At the extreme is what Green labels the "policy-required" approach, in which upper management promulgates—formally or informally—a directive that lower-level managers take race or gender into account when making particular decisions.⁶ Subtler versions of connective disparate treatment would include adoption of a facially neutral rule because of its differential effects across protected classes, or what Michael Selmi identifies in the *Novartis* litigation as a corporate culture that

4. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); Noah D. Zatz, *Managing the Macaw: Third-Part Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1374, 1383 n.4 (2009).

5. *Teamsters*, 431 U.S. at 336 (1977).

6. Tristin K. Green, *The Future of Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011).

affirmatively endorses and encourages stereotyping.⁷ Such subtleties would incorporate into connective disparate treatment the more expansive conceptions of “discriminatory intent” that have become familiar in the individual disparate treatment context.

The crucial feature of connective disparate treatment is that it finds “disparate treatment” in employer conduct above the level of individual employment decisions. On this view, statistical evidence reveals the existence of covert connective disparate treatment by eliminating alternate explanations for population-level disparities. This process is roughly analogous to the familiar burden-shifting structure of individual disparate treatment claims: the *prima facie* case, articulation of legitimate nondiscriminatory reasons, and their disproof as “pretext.”⁸ Connective disparate treatment harms individual workers, including by causing individual disparate treatment, but these harms are the *consequence* of systemic disparate treatment, not the cause of action itself. Operating at this level of what connects individual decisions together, a connective disparate treatment claim would easily satisfy the Rule 23(a) commonality requirement by identifying “a companywide discriminatory pay and promotion policy.”⁹

The question *Wal-Mart* poses is whether there is anything more to systemic disparate treatment than connective disparate treatment. If not, then the theory still lives on, but in a very small space. One cause of this confinement is that—as Ford, Green, and Selmi all note in different ways—class certification aside, the statistical evidence that the Supreme Court once accepted as sufficient to establish systemic disparate treatment may no longer remain so.¹⁰ That is because statistical evidence of disparate outcomes, including the use of regression analysis to exclude nondiscriminatory explanations of the disparities, at best bring us to a point like the one the Court faced for individual disparate treatment claims in *Hicks*.¹¹ There, Justice Scalia held that the combination of a *prima facie* case of discrimination and the negation of the employer’s articulated nondiscriminatory reasons did not mandate an inference of disparate

7. Michael Selmi, *Theorizing Systemic Disparate Treatment Law After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 505-506 (2011).

8. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

9. *Wal-Mart*, 131 S. Ct. at 2556.

10. Richard Ford, *Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 513 (2011); Green, *supra* note 6; Selmi, *supra* note 7.

11. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). In practice, disputes over statistical evidence tend to focus on whether it is powerful enough to eliminate nondiscriminatory explanations. See, e.g., *Bazemore v. Friday*, 478 U.S. 385 (1986); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008).

treatment. Moreover, in *Reeves*, the Court later made clear that, in some cases, such an inference might even be impermissible without more specific evidence of intent.¹² Extending this structure by analogy to systemic disparate treatment (if it is interpreted as connective disparate treatment only), plaintiffs would be well advised to follow Selmi's advice and offer direct evidence of a discriminatory companywide policy and culture, rather than attempting simply to show connective disparate treatment by elimination.¹³ The Court's pre-*Wal-Mart* canonical systemic disparate treatment opinions, however, specifically affirmed that statistical evidence alone could establish liability.¹⁴

This mismatch between Supreme Court precedent and a connective disparate treatment theory implies, doctrinally, that there must be something more to systemic disparate treatment. This is not simply a question of evidentiary stringency, but instead a question of what the evidence is supposed to prove. As Green, Hart, and Ford persuasively rehearse, what statistical evidence can establish—by the requisite preponderance, no certainty required—is that large numbers of the employer's individual employment decisions—in *Wal-Mart*, about pay and promotion—are being influenced by the gender or race of the individuals about whom these decisions are being made.¹⁵ As Green puts it, this evidence establishes “widespread disparate treatment within the organization.”¹⁶ Most importantly, as Ford explains in detail, by aggregating across an entire organization, statistical evidence overcomes the evidentiary uncertainty that afflicts individual disparate treatment cases and renders them such an imperfect vehicle for rooting out discrimination.¹⁷ Thus, statistical evidence can establish that numerous episodes of individual disparate treatment are dispersed throughout the organization's decisionmaking: dispersed disparate treatment.

If including *dispersed* disparate treatment, not just *connective* disparate treatment, within *systemic* disparate treatment provides consistency with precedent and a grounding in individual disparate treatment analysis, what is the problem? There are two, both derivative of conceptualizing systemic disparate treatment as merely a method of proving that individual disparate treatment occurs regularly within the employer's workforce.

The first problem with dispersed disparate treatment animates the *Wal-Mart* majority's analysis of commonality under Rule 23(a). Justice Scalia

12. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

13. Selmi, *supra* note 7.

14. *Bazemore*, 478 U.S. 385 (1986); *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299 (1977).

15. Green, *supra* note 6; Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455 (2011); Ford, *supra* note 10.

16. Green, *supra* note 6 at 413.

17. Ford, *supra* note 10.

reasoned, I think sensibly, that a factual issue provides commonality where “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”¹⁸ Connective disparate treatment easily satisfies this requirement because each class member’s claim—“I was subjected to companywide practices adopted or maintained for illegal reasons”—relies on the same connective practice of disparate treatment. The same is not true for dispersed disparate treatment because, as Justice Scalia noted, on that theory “respondents wish to sue about literally millions of employment decisions at once.”¹⁹ To be sure, the class shares a body of evidence, and that evidence proves that many, many individual instances of disparate treatment occurred. Yet that proof does relatively little to advance any one class member’s claim²⁰ because it does not help determine *which individual decisions* were instances of the widespread phenomenon.

Hart’s contribution focuses on the second problem with a dispersed disparate treatment theory: remedies.²¹ If systemic disparate treatment is conceptualized as simply a vehicle for aggregating individual disparate treatment claims, then Justice Scalia may be right to characterize the *Wal-Mart* case as involving “claims for *individualized* relief (like the backpay at issue here)” that seem intrinsically ill-suited to class resolution.²² Hart makes a persuasive case that the difficulties do not prejudice *defendants*—who have little reason to care about anything other than aggregate liability—but still leave questions of fairness as to allocation of damages within the class.²³ Even here, statistical modeling of relief may be the lesser of two evils, given that no relief at all is the realistic alternative, but there remains a fundamental tension between the class mode of litigation and a conceptual grounding in individual disparate treatment.

What systemic disparate treatment theory needs is an account that grounds employer liability in firm-level conduct—the connective tissue—, not simply in dispersed individual disparate treatment, and does so without relying exclusively on the extreme case of connective *disparate treatment*. Such a theory would stand apart from disparate impact because of the widespread individual disparate treatment that the traditional statistical evidence establishes, but the employer would still be held liable for firm-level practices, not simply for the aggregation of those individual violations. Ford gestures in this direction by suggesting “a duty of care to

18. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

19. *Id.* at 2552.

20. *See* *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004).

21. Hart, *supra* note 15.

22. *Wal-Mart*, 131 S. Ct. at 2557 (emphasis in original).

23. Hart, *supra* note 15.

avoid discrimination” as the glue connecting individual instances of disparate treatment and exemplified by “Wal-Mart’s failure to prevent discrimination by its agents.”²⁴ Nonetheless, his analysis relies heavily on the virtues of statistical aggregation of individual episodes and on employers’ well-established strict vicarious liability for managers’ disparate treatment in individual tangible employment actions.²⁵

Green’s contribution goes the furthest toward this idea of equating the “systemic” with firm-level conduct, and of doing so without requiring that this firm-level conduct itself be characterized by discriminatory intent.²⁶ She does so by insisting on a richer account of how individual employment decisions are situated within larger organizational processes.²⁷ In particular, she rejects the “failure to prevent” interpretation of the *Wal-Mart* plaintiffs’ case as missing the ways in which the firm actively *produces* managers’ authority and the entire structure and context of their decision-making.²⁸ Justice Scalia characterized the plaintiffs’ disparate treatment theory as resting on Walmart’s “refusal to cabin its managers’ authority,” language implying that these managers acquired their authority from someone other than the employer itself.²⁹ Note how the dissent, by contrast, speaks of Walmart “delegating to supervisors large discretion.”³⁰ At root, Green utilizes organizational theory to attack the tendency to map the connective versus dispersed disparate treatment distinction onto an active versus passive characterization of firm-level behavior.³¹

Although she might resist this terminology, Green essentially argues that employers should be held strictly liable for structuring workplaces in a way that produces widespread individual disparate treatment.³² Thus, the traditional statistical evidence establishes systemic disparate treatment liability not simply because it proves dispersed disparate treatment, but because it proves (a sufficient likelihood of) the existence of organizational practices producing that widespread disparate treatment; those practices connect together what might otherwise seem like dispersed, discrete individual decisions. The employer is directly liable for these connective practices, not simply vicariously liable for the resulting widespread individual disparate treatment. Yet for Green, it is unnecessary to identify “the precise practices, cultures, and policies that produce widespread

24. Ford, *supra* note 10 at 522, 529.

25. Ford, *supra* note 10.

26. Green, *supra* note 6.

27. *Id.*

28. *Id.*

29. *Wal-Mart*, 131 S. Ct. at 2564.

30. *Id.*

31. Green, *supra* note 6.

32. *Id.*

disparate treatment within the defendant organization.”³³ No specific identification is required because widespread disparate treatment itself implies that those practices, cultures, and policies exist and—this is the nub—because it does not matter *why* they exist. Those practices, cultures, and policies need not have been adopted and maintained *because of* their race and gendered effects, nor need they have resulted even from taking insufficient care to avoid widespread disparate treatment. In other words, neither connective disparate treatment nor even “negligent discrimination” is necessary. Thus, connective disparate treatment, negligent failure to prevent widespread disparate treatment, and Green’s “context” theory all contemplate direct liability for firm-level conduct, but they vary in how much they demand from that conduct and how they understand the relationship between firm-level conduct and widespread individual disparate treatment.³⁴

The difficult and important question going forward is how to justify employer liability based on firm-level conduct that falls short of connective disparate treatment yet results in widespread individual disparate treatment. Notwithstanding their structural impulses, Ford’s and Green’s contributions both display some hesitation to ground employer responsibility in firm-level conduct. Ford openly characterizes his approach as a shift away from “moral wrongdoing” and toward a more technocratic program of “social justice.”³⁵ Puzzlingly, Ford concedes that morally wrongful discrimination consists exclusively of acting with animus or bias, a category even narrower than disparate treatment because the latter includes so-called “rational” discrimination based on customer preferences or the like.³⁶ Even his most ambitious proposal refers to a “duty to prevent discrimination,” a locution implying that violating this duty is not itself “discrimination” and is derivative of the true discrimination of individual disparate treatment.³⁷ Similarly, Green consistently seeks refuge in the fact that a firm liable for systemic disparate treatment is “producing disparate treatment within its organization.”³⁸ Again, the normative consensus against individual disparate treatment anchors her argument.³⁹ She offers no account of the wrongfulness of firm-level behavior beyond bare causation-in-fact. Indeed, elsewhere Green cites her insistence on grounding her approach in disparate

33. *Id.* at 446.

34. Green, *supra* note 6.

35. Ford, *supra* note 10 at 518-19, 521; Cf. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1080 (2006) (discussing civil rights strategy analogous to public health policy emphasizing prevention).

36. Ford, *supra* note 10 at 521, 525.

37. *Id.* at 522.

38. Green, *supra* note 6 at 443.

39. *Id.* at 441-445.

treatment (at the individual level) as an advantage over others, like my own, that more readily characterize conduct as “discriminatory” without reducing that discriminatory character to disparate treatment.⁴⁰

Wal-Mart casts doubt on the dispersed disparate treatment interpretation of systemic disparate treatment. One way forward is to embrace the narrow connective disparate treatment alternative and make the most of it, much the way that stereotyping and implicit bias theory attempt to make the most of individual disparate treatment theory. That is Selmi’s approach, more or less.⁴¹ The more expansive strategies accept the focus on firm-level connective conduct but would not require a showing that discriminatory intent infects that connective conduct itself. Green’s approach takes the courts’ veneration of disparate treatment at face value but expands the scope of prohibited firm-level conduct by tethering it to the widespread disparate treatment that results. What Ford suggests, and what I have explored at length elsewhere⁴², is that we should explore new possibilities for shifting employment discrimination law off its foundations in individual disparate treatment or, more subtly, amplifying the different foundations on which it has rested all along.

One promising feature of the post-*Wal-Mart* landscape is the prospect that the next wave of systemic disparate treatment case law might be driven by “pattern or practice” cases brought by Equal Employment Opportunity Commission and Department of Justice attorneys who are litigating more aggressively under Obama appointees. The absence of a class certification requirement not only removes a procedural hurdle but also facilitates conceptualizing the litigation as more than a device for aggregating individual claims. That different posture offers the best hope for nurturing new approaches that can break free from the limitations of the connective disparate treatment and dispersed disparate treatment paradigms. I can imagine no better place to start than the contributions to this Symposium.

40. Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851, 874, 899-900 (2007).

41. Selmi, *supra* note 7.

42. Zatz, *supra* note 4.