
Marcia L. McCormick

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol62/iss3/6

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
IMPLAUSIBLE INJURIES: WAL-MART V. DUKES AND THE FUTURE OF CLASS ACTIONS AND EMPLOYMENT DISCRIMINATION CASES

Marcia L. McCormick*

INTRODUCTION

The Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes1 has broad implications for the future of class actions, particularly when the defendant's state of mind matters to the claim or when the case involves potentially complicated questions of causation. Moreover, when the decision is combined with the Court's recent decisions regarding pleading requirements, Bell Atlantic Corp. v. Twombly2 and Ashcroft v. Iqbal,3 and judges' views on how people behave, the future of class actions seems very uncertain. The Court has invited lower court judges to consider what kinds of legal wrongs they think people are likely to engage in and to focus on what makes members of a putative class different rather than what makes them alike. That invitation will inevitably result in fewer class actions and may make it impossible to bring class actions for some types of claims.

II. RULE 23 AND WAL-MART V. DUKES

Federal Rule of Civil Procedure 23 governs class actions. It provides that a class action can be maintained if a party, or more than one, meets certain prerequisites and if the claims raised fit one of three prescribed models.4 If the parties seeking class certification fail at either step, that class cannot be certified.5

The prerequisites are laid out in rule 23(a), and require that

(1) the class [be] so numerous that joinder of all members is impracticable;

---

* Associate Professor, Saint Louis University School of Law.
2. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). In Twombly, the Court heightened the pleading standard laid out in Federal Rule of Civil Procedure 8 by requiring that a complaint set forth "enough facts to state a claim to relief that is plausible on its face," but denied that this required "heightened fact pleading of specifics." Id. at 570.
(2) there [be] questions of law or fact common to the class;
(3) the claims or defenses of the representative parties [be] typi-
cal of the claims or defenses of the class; and
(4) the representative parties [be able to] fairly and adequately
protect the interests of the class.6

These requirements have been given the shorthand of numerosity,
commonality, typicality, and adequacy.7

Once the parties meet the prerequisites, they must show that one of
the conditions set out in 23(b) is satisfied—essentially that the claim
fits into one of the listed models. The class may proceed if pursuing
the actions separately would result in varied judgments that could es-
tabl ish incompatible standards of conduct for the defendant or would
affect the interests of parties that are not part of the action.8 Altema-
trily, if the defendant acted in a way that applies generally to the
class so that injunctive or declaratory relief is appropriate, the parties
can proceed as a class.9 Finally, the class can be certified if the ques-
tions of law or fact common to class members predominate over any
questions affecting only individual members.10

A. Background

The Dukes litigation was initiated by the Impact Fund, a nonprofit
legal organization that provides support for litigation that is brought
to advance economic and social justice.11 It sought to change the
working culture at Wal-Mart,12 the country's largest private em-
ployer.13 A class claim was the only way to do so. The case began in
2001 when Betty Dukes and five other women sued Wal-Mart for sex
discrimination in pay, promotions to salaried management positions,
and job assignments.14 The plaintiffs sought to represent a class of all
women employed by Wal-Mart or who had worked for the company
since 1998 and been subjected to Wal-Mart's policies.15 The plaintiffs
presented evidence that Wal-Mart had no formal policies on promo-
tion beyond the hourly-paid department manager positions, rates of

6. FED. R. CIV. P. 23(a).
8. FED. R. CIV. P. 23(b)(1).
9. FED. R. CIV. P. 23(b)(2).
10. FED. R. CIV. P. 23(b)(3).
4, 2013).
(last visited Mar. 4, 2013).
15. Id. at 2548–49.
pay within a range, or job assignments; rather, Wal-Mart left decisions to the discretion of individual managers and provided no information to the employees on how pay, promotion, or job assignments would be determined. At the same time, the company maintained a very strong corporate culture that promoted many traditional social values, including values about gender roles, and there was evidence that gender stereotypes permeated the company at all levels. The plaintiffs alleged that this combination allowed gender stereotypes to operate and influence employment decisions, resulting in a gender pay gap across all regions in the company’s stores and at every pay level, as well as a gender gap in promotions—well over two-thirds of employees eligible for promotion were women, but only about one-third were in management. The plaintiff class sought injunctive relief related to Wal-Mart’s promotion and pay policies and also sought backpay for the class.

The district court certified the class for the pay and promotion claims, and the Ninth Circuit, with some small variations on the definition of the class, affirmed. The Ninth Circuit affirmed again sitting en banc, with five judges dissenting on the ground that, essentially, such a large putative class made the case too complex to certify.

The Supreme Court granted certiorari on two issues: (1) whether the putative class satisfied the commonality requirement of Rule 23(a)(2) and (2) whether the relief sought and the theory of the case brought the class within the limits of Rule 23(b)(2). Rule 23(b)(2) requires that “the party opposing the class ha[ve] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

16. See id. at 2553–56; see also id. at 2563–64 (Ginsburg, J., concurring in part and dissenting in part); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145–66 (N.D. Cal. 2004) (recounting and analyzing the “extensive” evidence of commonality).

17. See Dukes, 131 S. Ct. at 2563–64 (Ginsburg, J., concurring in part and dissenting in part); Dukes, 222 F.R.D. at 152–53. But see Dukes, 131 S. Ct. at 2548, 2553–56 (characterizing the claim about a strong corporate culture as a theory rather than as fact, and rejecting the other evidence as insufficient to prove that the strong culture combined with delegated, unguided discretion could lead to widespread discrimination).

18. See Dukes, 222 F.R.D. at 146, 155.

19. Id. at 173.

20. A three-judge panel issued one opinion, Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007), then withdrew it and issued another opinion, Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007).

21. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 620–23 (9th Cir. 2010) (en banc) (rejecting class certification on plaintiffs’ claims for punitive damages and removing from the class women who did not work for Wal-Mart at the time the complaint was filed).

22. See id. at 628 (Ikuta, J., dissenting); id. at 652 (Kozinski, J., dissenting).
In the Supreme Court, the plaintiffs argued that they had shown that the class met Rule 23(a)(2)'s commonality requirement by showing that members of the class were all injured by discrimination against women caused by Wal-Mart's policies and culture.\textsuperscript{23} To support their arguments, the plaintiffs provided evidence from three experts. First, a statistician analyzed pay and personnel data; documented the gender gap within stores, and across stores, regions, and positions; and demonstrated that the gap could not be caused by neutral factors.\textsuperscript{24} Second, a labor economist documented the gender gap in management at Wal-Mart compared to its competitors, and his statistical analysis demonstrated that the gender gap could not be due to chance.\textsuperscript{25} And third, a sociologist analyzed Wal-Mart's personnel practices and culture, and explained how the unfettered discretion and strong corporate culture could allow discrimination to operate.\textsuperscript{26}

In addition to the statistical and social science evidence, the plaintiffs provided anecdotal evidence of several incidents in which decisions were made on the basis of gender, or comments or actions by management revealed that gender stereotypes permeated their thinking.\textsuperscript{27} The plaintiffs also argued that because the relief they sought was primarily equitable—backpay has traditionally been considered a form of equitable rather than legal relief\textsuperscript{28}—injunctive relief prevailed over the monetary relief sought, and thus the class could be certified under Rule 23(b)(2).\textsuperscript{29}

Wal-Mart's defense disputed both the 23(a)(2) and 23(b)(2) issues. Regarding 23(a)(2)'s commonality requirement, Wal-Mart focused primarily on the admissibility and validity of expert testimony.\textsuperscript{30} Wal-Mart further argued that the class lacked commonality because not every woman in the class was affected the same way (or maybe at all) by the promotion, pay, and job assignment policies.\textsuperscript{31} The defense emphasized the complexity of the case: the sheer size of the class

\begin{footnotes}
\item[24.] See \textit{id.} at 2549, 2555.
\item[25.] See \textit{id.}
\item[26.] See \textit{id.} at 2549, 2553.
\item[27.] \textit{Id.} at 2556; \textit{id.} at 2563–64 (Ginsburg, J., concurring in part and dissenting in part).
\item[29.] \textit{Dukes}, 131 S. Ct. at 2559–61.
\item[30.] See \textit{id.} at 2549.
\end{footnotes}
(somewhere between 500,000 and 1.5 million women), the large number of stores, the different types of stores, the large number of departments, the large number of job classifications, and the number of potential nondiscriminatory reasons that could have been considered in making these decisions.\(^{32}\) Wal-Mart also argued against certification under Rule 23(b)(2), stating that because backpay was sought for the class, monetary relief predominated over injunctive relief.\(^{33}\)

The Supreme Court essentially agreed with Wal-Mart and the dissenting judges from the Ninth Circuit and reversed the certification of the class.\(^{34}\) All nine of the justices thought that certification of the class was improper under Rule 23(b)(2), holding that backpay claims of the class members qualified as monetary relief and would predominate over the injunctive relief sought.\(^{35}\) On the question of commonality under Rule 23(a)(2), the split was five-to-four along the expected ideological lines: Justice Scalia, with Justices Alito, Kennedy, Thomas, and Chief Justice Roberts were in the majority; Justices Ginsburg, Breyer, Kagan, and Sotomayor dissented.

\section*{B. Commonality}

On the Rule 23(a)(2) issue, the Court reversed the certification entirely, holding that the putative class failed to meet the commonality requirement of Rule 23(a)(2).\(^{36}\) That rule requires a party seeking class certification to prove that there are "questions of law or fact common to the class."\(^{37}\) The majority reasoned that the claims must "depend upon a common contention" that, once decided, "will resolve an issue that is central to the validity of each one of the claims in one
The majority further held that plaintiffs in a class action need "significant proof" of commonality and, because proof of commonality necessarily overlaps with proof of the merits of the plaintiffs' claim, they must also have significant proof of their claim.39

Here, the claim alleged that Wal-Mart engaged in a pattern or practice of discrimination. In the majority's view, discrimination claims require an inquiry into the reasons for particular employment decisions; in this action, the plaintiffs were essentially suing for millions of employment decisions.40 A common question required there to be some element that held together the alleged reasons for those decisions, and the majority reasoned that the plaintiffs needed significant proof that this unifying element was a general, corporate-wide policy of discrimination.41 A general policy driving the individual decisions was the only way that the majority saw to either link those decisions sufficiently as having a common cause or to hold the business entity responsible for those decisions.

The majority then found that the plaintiffs had failed to provide sufficient proof through their expert testimony and the anecdotal evidence.42 Because Wal-Mart had a written policy that prohibited discrimination, the Court found that it undermined any inference that the company had engaged in pattern or practice of discrimination.43 Moreover, other evidence of a pattern or practice of discrimination also failed to show commonality through a de facto policy.44

Although it did not cite to Twombly or Iqbal, the majority seemed to draw very heavily upon the notion of plausibility in analyzing whether the evidence demonstrated commonality.45 The majority reasoned that the expert testimony that Wal-Mart's corporate culture was vulnerable to gender bias—that it was possible—did not show that the employment decisions at issue were caused by gender bias—that it was proven true or at least probable.46 The majority further reasoned that in a company of Wal-Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common, specific direction.47

38. Id. at 2551.
39. See id. at 2551–53.
40. See Dukes, 131 S. Ct. at 2554–55; see also Fed. R. Civ. P. 23(a)(2).
41. See Dukes, 131 S. Ct. at 2553.
42. See id. at 2556–57.
43. Id. at 2554–55.
44. See id. at 2555–57.
45. Cf. id. at 2554–56.
46. See id. at 2553–54.
47. Dukes, 131 S. Ct. at 2555.
On this point, the majority's worldview and assumptions about behavior proved central to its conclusions about what was plausible. The majority reasoned that it would be difficult to prove commonality when a company's official policy was for individual decision makers to exercise their discretion, stating that "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all," even if some would select criteria that cause a disparate impact and some would use sex to decide.\textsuperscript{48} Similarly, the statistical proof of pay disparities on a regional or national level could not be used to prove that those same disparities existed equally at the store level at which the pay decisions were made.\textsuperscript{49} Additionally, the anecdotal evidence was too sparse for the size of the class.\textsuperscript{50}

The dissent disagreed with this view of the evidence. The dissent believed that the evidence showed a distinctive pattern of discriminatory decision making. The sociologist had shown how the policy of discretion, combined with the strong corporate culture and the high level of gender stereotyping, made sex discrimination possible. The statistician and the labor economist showed how this discrimination played out in a pattern of pay and promotion disparities, including at the store level.\textsuperscript{51} The anecdotal evidence gave life to the numbers by providing evidence of how individual supervisors made their decisions.\textsuperscript{52} In this way, each type of evidence built on the other to show all together how discretion could produce the promotional and pay disparities observed.

The dissent also criticized the majority for ignoring prior class action decisions and for effectively revisiting facts the district court had found. The dissent sharply criticized the majority for importing a "dissimilarities" approach from 23(b)(3) into the issue of commonality under 23(a)(2).\textsuperscript{53} The requirements of Rule 23(a) were meant to establish a threshold by articulating criteria necessary to, but not sufficient for certification.\textsuperscript{54} On the other hand, the rules in 23(b) were designed to provide the rules for sufficiency, along with procedural

\textsuperscript{48} Id. at 2554.
\textsuperscript{49} See id. at 2555-56.
\textsuperscript{50} Id. at 2556.
\textsuperscript{51} See id. at 2563–65 (Ginsburg, J., concurring in part and dissenting in part).
\textsuperscript{52} See id. at 2563–64.
\textsuperscript{53} Dukes, 131 S. Ct. at 2565–67.
\textsuperscript{54} See id. at 2566.
protections for different types of classes.\textsuperscript{55} It was this dissimilarities approach that allowed the majority to focus on what divided members of the class rather than on what united them, thereby magnifying the former to the point that they eclipsed the latter.\textsuperscript{56}

The Court's analysis in \textit{Dukes} is highly puzzling as a doctrinal matter, with regard to both the law governing class actions and the law of employment discrimination. While the Court recited rules from its prior cases that governed the task of district courts in deciding whether to certify a class, it never acknowledged its own standard of review over such a decision. This omission is a serious one. The Court noted, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."\textsuperscript{57}

This description sounds as if the party seeking certification must prove a fact, which would make the court's conclusion on that issue a finding of fact. Findings of fact are usually subject to review under the highly deferential "clearly erroneous" standard, yet the Court appears to have weighed the evidence and come to a conclusion different from that of the district court, essentially finding that the plaintiffs' description of how the class suffered a common injury was not believable—that is, not plausible.

\section*{III. What Dukes Tells Us About Plausibility}

Plausibility is currently a hot topic in civil procedure circles after the Court reframed the definition of Rule 8 to embody a plausibility standard. Before \textit{Bell Atlantic Corp. v. Twombly}, the Supreme Court had used plausibility substantively in an antitrust case when it described what a court should do when reviewing a summary judgment motion.\textsuperscript{58} When the Supreme Court issued its decision in \textit{Twombly}, it changed the general standard for evaluating the sufficiency of complaints in federal court by adding a requirement of plausibility, sparking a debate that focused on what exactly "plausible" meant in this context.\textsuperscript{59} The consensus was that it could not mean any sort of fac-

\begin{itemize}
\item \textsuperscript{55} See id.
\item \textsuperscript{56} Id. at 2565–67.
\item \textsuperscript{57} Id. at 2551 (majority opinion).
\end{itemize}
tual plausibility, that it must instead mean legal plausibility because the job of the court at the pleadings stage is to make a decision based only on the legal questions presented.\textsuperscript{60}

A complaint is supposed to be a short, plain statement of the grounds for the court’s jurisdiction; a short, plain statement of the claim showing that the pleader is entitled to relief; and a demand for relief.\textsuperscript{61} A complaint is designed to give defendants “fair notice” of the claims against them—what injury the plaintiffs have suffered and what entitles them to the relief they seek.\textsuperscript{62} A motion to dismiss for failure to state a claim, then, asks whether plaintiffs are entitled to offer evidence to support their claims, that is, whether the law would provide relief for the conduct and injury described.\textsuperscript{63} The standard is a question of the legal sufficiency of the complaint, not an assessment of whether the facts alleged are likely to be true.\textsuperscript{64}

Despite this relative clarity, in theory, that plausibility must mean legal rather than factual plausibility, when the Court applied \textit{Twombly} in \textit{Ashcroft v. Iqbal}, the allegation found implausible sounded like a question concerning facts: whether Attorney General John Ashcroft was plausibly the architect of a policy to detain Arab Muslims because of their ethnicity and religion.\textsuperscript{65} The Court found that this motive was not plausible, that the result of the detention of Arab Muslims could have been caused by the impact of a nondiscriminatory policy designed to preserve the security of the nation, and that this scenario was actually more plausible than that alleged by the plaintiff.\textsuperscript{66}

In reaching this conclusion, the Court paraphrased the holding in \textit{Twombly}, stating that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”\textsuperscript{67} The Court continued, quoting \textit{Twombly}, “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to

\textsuperscript{60} Cf. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (holding that courts must take the factual allegations in the complaint as true however “doubtful in fact” they are).

\textsuperscript{61} \textsc{Fed. R. Civ. P. 8(a); see also} Conley v. Gibson, 355 U.S. 41, 47 (1957).


\textsuperscript{64} \textit{See} Swierkiewicz, 534 U.S. at 508 n.1; \textit{see also} Neitzke v. Williams, 490 U.S. 319, 327 (1989) (“\textit{What Rule 12(b)(6) does not countenance are dismissals based on a judge’s disbelief of a complaint’s factual allegations.”)."

\textsuperscript{65} Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009).

\textsuperscript{66} \textit{Id.} at 680–82.

\textsuperscript{67} \textit{Id.} at 678 (internal quotation marks omitted) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).
In other words, the Court seemed to hold that where inferences from the facts alleged could support two different interpretations—one that would give rise to relief and one that would not—a court should accept the interpretation that would not give rise to relief if it found that such an interpretation was plausible.

Applying these rules to the complaint, the majority refused to accept the allegations in the complaint as true that Attorney General Ashcroft and FBI Director Robert Mueller knew of, condoned, and agreed to subject the plaintiff to harsh conditions of confinement solely because of his religion, race, and national origin, rather than for a legitimate penological interest; that Ashcroft was the principal architect of the policy; or that Mueller was instrumental in adopting and enforcing it.69 According to the Court, these allegations were too conclusory.70 The Court stated that the remaining allegations, "[t]aken as true . . . are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose."71 In other words, the Court did not believe the assertion of the defendant's motive in the complaint, and, because improper motive was an element of the underlying claim, the Court held that it did not have to accept that allegation as true.72

The Court distinguished between facts that are well-pleaded and those that are conclusory and thus not really facts, but something more like a conclusion about the law—a "formulaic recitation of the elements" of the underlying claim.73 But this distinction seems unsatisfactory when the Court ultimately appeared to say that it did not believe that the defendants would act the way that the plaintiffs alleged they had acted.

To be sure, part of the problem is caused by the muddled distinction between facts and law.74 For purposes of allocating decisions between juries and judges, and between trial courts and appellate courts, the legal system makes distinctions between what are questions of law and what are questions of fact.75 The distinction, though appealing and

---

68. Id. (citing Twombly, 550 U.S. at 557).
69. Id. at 680-81.
70. Id. at 681.
71. Iqbal, 556 U.S. at 681 (emphasis added).
72. Id. at 680-82.
73. Id. at 680-81.
firmly entrenched, is quite fuzzy in the details, to the point that we recognize many areas of "mixed" questions in which rules or standards are applied to underlying events. When elements of a claim are described, they are termed "ultimate facts," or facts essential to the claim or a defense, which means they are conclusions that the trier of fact must reach through consideration of both the facts most directly shown by the evidence and the inferences that may be drawn from those facts.

Thus, it seems that plausibility has a factual implication. The courts are allowed to ask whether the plaintiff's allegations are believable, which implicitly invites the judges to ask whether they believe the allegations. The decision in Dukes seems to take this notion one step further. Not only can courts consider the plausibility of inferences when evaluating a complaint for sufficiency, they can also use plausibility to reweigh the facts that support class certification. Therefore, one possible consequence of the Dukes decision is evisceration of the formerly deferential standard of review for certification decisions by district courts.

It is possible, though, that the Dukes Court would disagree that it reweighed facts found by the district court. Perhaps the majority believed that they were instead interpreting the law of employment discrimination and explaining as a matter of law what it means for an employer to engage in a pattern or practice of discrimination. Edward Brunet has contended, based on the substantive use of plausibility in Matsushita Electrical Industrial Co. v. Zenith Radio Corp., that substantive law can "limit[ ] the range of permissible inferences from ambiguous evidence." This may "empower judges with a substantive ability to fashion new norms by reconsidering factual inferences; with good reasons a judge can change a denial or grant of summary judg-

76. Id. at 1778–79.
77. See BLACK'S LAW DICTIONARY 671 (9th ed. 2009).
78. See Iqbal, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); see also Tung Yin, "I Do Not Think [Implausible] Means What You Think It Means": Iqbal v. Ashcroft and Judicial Vouching for Government Officials, 14 LEWIS & CLARK L. REV. 203, 212 (2010). See generally Suja A. Thomas, The Fallacy of Dispositive Procedure, 50 B.C. L. REV. 759 (2009). Importantly, for the motion to dismiss stage, the question about believability is asked before plaintiffs conduct discovery. A plaintiff may need facts that are "in the hands (or minds) of defendants and third parties" in order to successfully satisfy the plausibility standard, but how is the plaintiff to discover those facts? Scott Dodson, Federal Pleading and State Prenupt Discovery, 14 LEWIS & CLARK L. REV. 43, 44 (2010).
79. See Brunet, supra note 58, at 10.
ment based upon the existence of factual inferences into a new legal rule."80 In other words, the permissibility of certain facts is a question of law, not of fact.

If that is what the Court did in *Dukes*, then perhaps the decision says less about future class actions and more about employment discrimination cases and other cases that involve difficult questions of motive or causation.

IV. IMPLICATIONS FOR THE FUTURE

A. For Employment Discrimination

Clearly, *Dukes* came down to the size and complexity of both Wal-Mart's operation and the potential class. First, a majority of the Court simply did not believe that all of the class members could possibly be injured in the same way given the multitude of decision makers at issue—even for the disparate impact claim, which did not require intent. Second, a majority of the Court did not seem to believe that causation, here that the plaintiffs' sex caused them to receive lower pay and fewer promotions, can ever be proven by statistical analysis, as a matter of law. Statistical proof of causation is used not just in employment discrimination cases, but in other areas of law as well. Causation is demonstrated by sophisticated statistical analysis in medical malpractice cases,81 toxic torts,82 and antitrust cases,83 to name a few additional situations. More importantly, at least in employment discrimination cases, the *Dukes* majority did not seem to think that this type of bias can form the basis for a disparate treatment case.

Central to its reasoning is the statement by the majority that "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."84 This statement reflects a number of important assumptions. First, it shows that the majority has a particular view of how people make decisions and what influences those decisions. Second, it shows that the majority has a defini-

80. Id.
83. See generally Hanns A. Abele et al., *Proving Causation in Private Antitrust Cases*, 7 J. COMPETITION L. & ECON. 847 (2011) (discussing sophisticated statistical techniques used to prove causation in tort law related to antitrust cases).
tion of discrimination that limits liability to human actors and bases that liability on the Justices' views of the decision-making process. And finally, though couched in language of neutrality, it shows that the Justices in the *Dukes* majority fundamentally believe that their judgments about the world are more reliable than those of other judges or social scientists.

1. The Justices on Human Decision Making

The Justices seem to believe that people make decisions in a fairly rigorous, logical, and self-aware way—that people are rational actors. Rational actors recognize that they must pick some course of action from a set of potential actions, define the minimum criteria necessary for consideration of a course of action, define further criteria that would make a course of action more or less desirable based on a fixed ideal, and weigh the costs and benefits of alternatives.\(^8\) Even when people make snap judgments, common wisdom holds that decisions are caused by reasons and that the decision maker knows what those reasons are.\(^6\) To the extent that the rational actor model is envisioned by the *Dukes* majority as a description of behavior rather than an ideal for behavior—a *fact* rather than an *aspiration*—it is capable of empirical testing and, actually, has been the subject of significant empirical research in the last several decades.\(^7\)

Yet, while the *Dukes* majority might agree that facts are capable of empirical testing, it seems not to countenance the notion that the human decision making process is that kind of fact because it rejected the testimony of sociologist Dr. William Bielby. Perhaps the Justices think that decisions are caused by thoughts and, because thoughts occur in the brain of an individual and cannot be seen, individual reason


\(^6\) See *Kahneman*, supra note 85, at 4 ("You believe you know what goes on in your mind, which often consists of one conscious thought leading in an orderly way to another."); *id.* at 8 ("Social scientists in the 1970s broadly accepted two ideas about human nature. First, people are generally rational, and their thinking is normally sound. Second, emotions such as fear, affection, and hatred explain most of the occasions on which people depart from rationality."); *id.* at 9 (explaining how including the questions from studies in articles allowed readers to see flaws in their own thinking that they had not realized they fell prey to).

\(^7\) The field of cognitive psychology was created to study how people think. It was founded as a discipline by Ulric Neisser in the late 1960s. See Douglas Martin, *Ulric Neisser is Dead at 83; Reshaped Study of the Mind*, N.Y. TIMES, Feb. 25, 2012, at A20. For more information on the studies of human cognition, see *Kahneman*, supra note 85 (describing and citing hundreds of studies); *Daniel M. Wegner*, *The Illusion of Conscious Will* (2003) (explaining that the sense people have of free will is sometimes illusory); *Amos Tversky & Daniel Kahneman*, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).
is an appropriate tool to assess that process. Perhaps the Justices in the Dukes majority did not believe that the social sciences that study and test human decision making can really measure or assess that decision making because the process cannot be seen or touched. In other words, they may believe that their own introspection and reasoning is a better tool than any social science method.

While not all scientists agree on every detail, there is a remarkable amount of consensus among cognitive psychologists, those who study the mental processes of “memory, perception, learning, thinking, reasoning, language, and understanding,”88 that the rational actor model is not in fact an accurate description of how people think or make decisions. Instead, our intuitions, impressions, and decisions often take place without us knowing how they entered into our conscious experience.89 When we are confronted with a problem, the answer that comes to mind might not be the answer to the original question, like “will this person be a good worker?”; rather, it may be an answer to an easier and related question, such as “Have I seen many others like this person be good workers?”90 Cognitive psychologists have shown the way that both cognitive structures and shortcuts in reasoning influence judgment and shape intuition, “biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.”91

This research suggests that conventional wisdom about what it means to discriminate “because of” an individual’s identity characteristic may be too narrow if it limits liability to incidents of fully self-aware prejudice.92 Neither Congress nor the Supreme Court has defined discrimination, although the Court has colloquially referred to

---

88. Roy Lachman et al., Cognitive Psychology and Information Processing 6 (1979) (defining the field of cognitive psychology). According to the authors, the field is dominated by information processing study, defined . . . as the way man collects, stores, modifies, and interprets environmental information or information already stored internally. [Those who study information processing] are interested in knowing how he adds information to his permanent knowledge of the world, how he accesses it again, and how he uses his knowledge in every facet of human activity.

Id. at 7.

89. See Kahneman, supra note 85, at 4.

90. See id. at 15.


92. See 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”).
one kind of discrimination as "intentional disparate treatment."\textsuperscript{93} Moreover, the Court has never definitively required that an actor be fully self-aware of the reasons for his or her decision.\textsuperscript{94} Thus, there is room for evolution in the meaning of discrimination as the state of science regarding how people make decisions continues to advance.

Admittedly, there are some serious disputes about the state of that science, but they are predominantly between lawyers rather than experts within the scientific community. For example, Laurens Walker and John Monahan wrote an article in 1987 that described the use of social science evidence as giving fact-finders "information about the social and psychological context in which contested adjudicative facts occurred" in order to "help the [fact-finder] interpret" them.\textsuperscript{95} Other scholars have urged the courts to consider social science in assessing what constitutes discrimination.\textsuperscript{96} When Dr. Bielby and Dr. Susan Fiske sought to testify on behalf of plaintiffs in gender discrimination suits about how the decision-making structures of the defendant companies allowed decision makers to rely on sex stereotyping in making decisions,\textsuperscript{97} Professors Walker and Monahan argued that such expert evidence should not be allowed to link what is true about society generally to specific practices within an employer.\textsuperscript{98} Professors Melissa Hart and Paul Secunda challenged this change of heart by Walker and Monahan, arguing that such evidence was properly admitted and, further, that the resistance to it was an argument about what it means to discriminate.\textsuperscript{99}

The Court rejected Dr. Bielby's testimony, just as Professors Monahan and Walker urged it to do.\textsuperscript{100} In doing so, the Court did not


\textsuperscript{96} See, e.g., Symposium, \textit{Behavioral Realism}, 94 CALIF. L. REV. 945 (2006); Krieger, supra note 91, at 1161; Joan C. Williams & Nancy Segal, \textit{Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job}, 26 HARV. WOMEN'S L.J. 77, 80 (2003).


explain its position as a refinement of employment discrimination law. Yet, because it seemed to rely on a notion of plausibility and because it framed the discussion about the evidence on implicit bias as insufficiently linked to the individual decision makers at Wal-Mart, the Court's holding will likely be interpreted to limit what constitutes employment discrimination.

2. The Justices on the Law of Discrimination

I have argued elsewhere that the Supreme Court no longer appears to believe in a core principle found in the early discrimination cases—that discrimination exists frequently enough that, absent some other explanation, it is reasonable to infer that discrimination caused an employer to take an adverse employment action against an employee. Implicit bias evidence provides contextual support for the background belief necessary to those early cases. It is one step in a chain of inferences that the trier of fact must take to reach a conclusion of discrimination. It sets the stage to illustrate how people in the aggregate tend to behave when making decisions and how stereotypes play a role in those decisions. The Court implicitly rejected even that limited role, however, by rejecting Dr. Bielby's testimony.

Thus, it seems that the Court has adopted a view about what it means to discriminate that makes background facts about discrimination irrelevant to questions about employer liability. Consider the work of Professor Richard Nagareda, work that the Court relied on heavily, which described what the courts must do in applying Rule 23(b)(2) in factual terms:

Class certification is not a matter of mere pleading but, rather, of affirmative proof that the requirements stated in Rule 23 have been satisfied. The court must make a "definitive assessment" that these requirements have been met, even if that assessment entails the resolution of conflicting proof and happens to overlap with an issue—even a critical one—on the merits.

Professor Nagareda characterized the standard the district court must use as "the usual preponderance standard, not the standard for a motion to dismiss, for admissibility under Daubert, or for trial-worthiness.


as a matter for summary judgment."104 At another point in the same article, however, he described the certification question as a "mixed question of fact and law."105 Eventually, Professor Nagareda concluded that in Dukes, the issue of whether the class had common questions that predominated over individual ones was really a question of law.106 By adopting Professor Nagareda's analysis, then, the Court may have agreed that it was deciding a question of law.

The Court did not explain, however, that it was deciding what discrimination meant as a legal matter. Yet when the Court adopted Professor Nagareda's analysis, it also adopted his reasoning on the law of discrimination. Professor Nagareda was not an employment discrimination scholar, however, and his reasoning did not accurately capture the law of Title VII. He seemed to assert that any time a pattern of discrimination fell short of almost total segregation on the basis of a protected class, no inference of disparate treatment could be drawn.107 He classified the plaintiffs' theory as one of "structural" discrimination because it relied in part on evidence about implicit bias and sex stereotyping.108 He then concluded that the underlying dispute was about the definition of discrimination and thus subject to de novo review.109 This conflation of sex stereotyping and structural discrimination is simply incorrect. The law on sex stereotyping is more nuanced and more thoroughly recognized as a form of discrimination prohibited by Title VII than Professor Nagareda acknowledged.110 Moreover, his reasoning failed to consider disparate impact, the other theory of discrimination raised by the plaintiffs. Thus, the Court, at least implicitly, changed the law by rejecting a definition of discrimination that considered evidence of implicit bias.

Notably, the implicit bias evidence was not the only evidence that decision makers at Wal-Mart were engaging in a pattern and practice of discrimination. Plaintiffs also provided sophisticated evidence of a

104. Id. at 129 (citation omitted).
105. Id. at 114 (internal quotation marks omitted).
106. See id. at 159.
107. See id. at 155.
108. Id. at 158–59.
109. Nagareda, supra note 103, at 159.
gender pay gap within and across stores, regions, and positions, including proof that the gap was not caused by neutral factors. Further, the plaintiffs provided evidence that the gender promotion gap was significant compared to Wal-Mart's competitors, and that the gap could not be due to chance. Three key pieces of expert evidence existed: (1) discrimination can thrive where complete discretion is left to decision makers steeped in a common culture that contained stereotyped views of women; (2) women were systematically underpaid and this underpayment was caused by their sex; and (3) women were systematically under-promoted and that under-promotion was not caused by chance. Taking expert evidence combined with the anecdotal evidence, a rational fact-finder could conclude that the pay and promotion gaps were the result of sex-based discrimination, and that the pattern affected all women to some extent.

Going forward, the decision in *Dukes* will stand for the principle that only decisions made with the fully self-aware goal of penalizing a person because of her sex, race, or other protected status is discrimination under Title VII. Additionally, the decision will likely be used to argue that statistical regression analysis, a technique designed to test causation, cannot be used to prove whether a state of mind caused an effect.

### B. For Other Kinds of Cases

As the prior Part suggests, the greatest impact of *Dukes*, both substantively and procedurally, will undoubtedly be on class action employment discrimination cases, whether they are disparate treatment or disparate impact cases. Additionally, there will be both procedural and substantive ramifications for other kinds of cases.

In procedural terms, the dissimilarities approach, which is now a part of the Rule 23(a)(2) commonality inquiry, will prove an especially high hurdle in cases that present facts that conflict with judges' worldview. It was evident in this case, as it has been in many other employment discrimination cases at every level of court, that the majority of judges do not believe that employment discrimination occurs very often. And it was this worldview that prompted the majority to find the claims of commonality essentially implausible. For other legal wrongs that courts find unlikely to occur, like the antitrust claim in *Twombly* and the civil rights claim in *Iqbal*, the chances of framing a successful class action seem very slim.

---

Similarly, in cases that involve complex questions of causation, such as toxic torts or environmental injuries, or actions by or motives of multiple people, or in cases in which effects or injuries vary significantly among members of the putative class, plaintiffs will likely have a difficult time proceeding as a class. Each of these types of classes involves enough complexity and potential dissimilarity that they are analogous to the type of class proposed in *Dukes*.

That is not where the similarity ends, though. The *Dukes* decision suggests that a majority of justices on the Court do not believe that statistical analysis, even regression or other similarly sophisticated types of analyses that show very tight correlations and control for multiple variables, are useful in building a case. The majority employed the same form of slicing and dicing of the evidence—looking at each piece in isolation and requiring that piece alone to conclusively prove the plaintiff class's commonality—that courts often use in employment cases.\(^{112}\) In fact, the Court seemed to dismiss the statistical evidence as less valid than any other kind of evidence.\(^{113}\) As a substantive matter, suspicion of statistical evidence will prove problematic for the wide range of cases that might typically rely on it—complex financial or tax cases, antitrust cases, voting rights cases, patent infringement cases, real estate cases, and a variety of tort cases, for example. Finally, as a substantive matter, the suspicion of social science evidence will have ramifications in essentially any type of case in which liability depends upon a person's state of mind.

V. Conclusion

Although the *Dukes* decision made structural litigation, class actions of all types, and individual civil rights claims more difficult, lower courts have begun fleshing out rules that do not completely foreclose these types of cases. Litigators should take note of these trends. Generally, classes more limited in the number of members, in actors who caused the injuries, and in geographic area of injury (not

---


113. The Court has had an uneasy relationship with statistics. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that a statistical study, which showed black defendants who killed white victims were four times more likely to get the death penalty than white defendants who killed black victims, was not enough to show discrimination); Stewart J. Schwab & Steven L. Willborn, The Story of Hazelwood: Employment Discrimination by the Numbers, in EMPLOYMENT DISCRIMINATION STORIES 48, 63 (Joel Wm. Friedman ed., 2006) (describing the Court's ambivalence about statistical analysis in a pattern and practice employment discrimination case).
nationwide) are more likely to be successful.\footnote{114} This was the lesson that the attorneys who represented the plaintiff class learned from \textit{Dukes}. They filed two regional class actions to replace the initial, nationwide claim: one in the Texas region, and the other in the California region.\footnote{115}

There are additional important lessons. How the injury and its cause are framed matters greatly. The easiest case for certifying a class would be a situation in which a single wrong harms a significant number of people.\footnote{116} Thus, when the injury can be framed as caused by a single source, like municipal liability cases in which a pattern of actions might be framed in terms of an institutional entity’s policy or custom, commonality will be easier to demonstrate.\footnote{117} In such a case, the injury would be framed as the risk of a more specific injury, a risk shared equally by all members of a class subject to the actions of that institutional entity.\footnote{118}

A court may not accept that frame, however, and, especially if many members of the class were injured in different ways, may still focus on the different injuries caused by the system that is alleged to have been a policy or a practice.\footnote{119} In other words, when the injury is viewed as

\footnote{114. See, e.g., Connor B. v. Patrick, 278 F.R.D. 30, 33 (D. Mass. 2011) (refusing to decertify a class of all children in the custody of the Massachusetts State Department of Children and Families because the class was not too expansive and each class member was subject to the risk of harm identified in the complaint).


116. See, e.g., Sullivan v. DB Invs., Inc., 667 F.3d 273, 318 (3d Cir. 2011) (en banc) (refusing to decertify a class of purchasers that bought from a single wholesaler who allegedly controlled enough of the diamond market to violate antitrust laws because antitrust activities similarly injured members of the class by driving up prices); Gray v. Hearst Commc’ns., Inc., 444 Fed. App’x 698, 700-02 (4th Cir. 2011) (affirming certification when members of a class of advertisers were similarly injured by misrepresentations in uniform contracts that were used by defendant with each member of the class); Conn. Retirement Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1172 (9th Cir. 2011) (allowing a shareholder class action focused on the fraud on the market theory to proceed).


119. M.D. v. Perry, 675 F.3d 832, 841–43 (5th Cir. 2012) (holding that even though children in custody of Texas Permanent Managing Conservatorship were all subject to the alleged constitutional deficiencies within the Conservatorship, they were all injured in different ways such that at least some claims required assessing whether the conduct at issue shocked the conscience); Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 496–98 (7th Cir. 2012) (rejecting certification of a class
having been caused by multiple discrete decisions by multiple decision makers, or any other similar series of events, it will be difficult to certify a class. 120 Conversely, if the plaintiff class can prove how specific practices work together to cause a single injury, the class has a better chance of being sustained. 121 Hence, there is significant room for framing and advocacy by lawyers.

The challenge in employment discrimination cases may be significantly greater. The majority of the Court seems to have rejected not only the underlying premises of the employment discrimination cause of action, but also many of the tools that, together, might persuade a fact-finder that what has happened in an employment situation is discrimination. The idea of discrimination as disparate treatment has narrowed, the idea of discrimination as disparate impact seems to have disappeared entirely, and the method of looking at the evidence seems to have been further restricted. Numerous prior cases have been called into question, seemingly overruled without the Court's acknowledgement that it was doing so, or "stealth overruled." 122 Two examples are Swierkiewicz v. Sorema N. A., 123 which held that courts should interpret allegations of discrimination liberally, and Reeves v. Sanderson Plumbing Products, 124 which held that evidence in a discrimination case should be viewed holistically rather than each piece in isolation.

Perhaps this challenge means that it is time to change tactics and move away from litigation. 125 Advocates for change may need to de-

---

120. See, e.g., Bolden v. Walsh Constr. Co., 688 F.3d 893, 894–96 (7th Cir. 2012) (holding that discrimination that allegedly took place across multiple sites of an employer could not be certified because the injury depended on all supervisors being motivated the same way, which would be nearly impossible to prove); Bennett v. Nucor Corp., 656 F.3d 802, 813–16 (8th Cir. 2011) (holding that because different parts of a single plant had different supervision and policies, a class of about 100 black employees lacked commonality); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 987–88 (9th Cir. 2011) (reversing and remanding certification in response to Dukes, suggesting that if decisions are made in a decentralized way, a class will not be certifiable).

121. See, e.g., McReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491–92 (7th Cir. 2012) (reversing the denial of class certification when plaintiffs specifically demonstrated how a practice operated to cause a disparate impact on members of a class, which indicated that the claim was most efficiently addressed on a classwide basis).

122. See Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona), 99 GEO. L.J. 1, 5 (2010) (noting that the Court is interpreting cases so as to eviscerate their effects).


125. This is a common exhortation in my scholarship. See, e.g., Marcia L. McCormick, Decoupling Employment, 16 LEWIS & CLARK L. REV. 499 (2012) (advocating for policymakers to stop using the employment relationship to distribute social goods so that there would be less
velop new strategies to persuade the public to support change through social media, through a change in the law, or through change on the ground by demanding, as consumers and employees, that businesses conform their practices to change the way they operate in order to prevent discriminatory practices that systematically disadvantage historically disadvantaged groups. If the "Wal-Mart Effect" has transformed the American economy, just imagine the impact that the Wal-Mart Customer Effect could have.
