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Recommended Citation
Lesley Wexler, Extralegal Whitewashes, 62 DePaul L. Rev. 817 (2013)
Available at: https://via.library.depaul.edu/law-review/vol62/iss3/11
EXTRALEGAL WHITEWASHES

Lesley Wexler*

“If you don’t like what’s being said, change the conversation.”
Don Draper

INTRODUCTION

Do class action and other high-profile lawsuits change corporate social behavior and create corporate social responsibility? While the answer is decidedly mixed, the litigation literature focuses on measures

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1. Mad Men: Blowing Smoke (AMC television broadcast Oct. 10, 2010). In the popular television show Mad Men, the advertising agency Sterling Cooper Draper Pryce was fired by its largest client, Lucky Strike. Concerned that bad press would cause other clients to jump ship, creative director Don Draper went on the offensive. Rather than acknowledge its firing or its shortcomings, Draper had the agency take out a full page advertisement in the New York Times proclaiming its concerns about smoking’s health risks and announcing that it will no longer accept cigarette companies as clients. Don Draper hoped this move would allow Sterling Cooper Draper Pryce to craft its reputation as an industry leader, and shortly thereafter the agency landed a high-profile pro-bono anti-smoking campaign.

The full transcript of the advertisement reads as follows:

Recently my advertising agency ended a long relationship with Lucky Strike cigarettes, and I’m relieved.

For over 25 years we devoted ourselves to peddling a product for which good work is irrelevant, because people can’t stop themselves from buying it. A product that never improves, that causes illness, and makes people unhappy. But there was money in it. A lot of money. In fact, our entire business depended on it. We knew it wasn’t good for us, but we couldn’t stop.

And then, when Lucky Strike moved their business elsewhere, I realized, here was my chance to be someone who could sleep at night, because I know what I’m selling doesn’t kill my customers.

So as of today, Sterling Cooper Draper Pryce will no longer take tobacco accounts. We know it’s going to be hard. If you’re interested in cigarette work, here’s a list of agencies that do it well: BBDO, Leo Burnett, McCann Erickson, Cutler Gleason & Chaough, and Benton & Bowles.

As for us, we welcome all other business because we’re certain that our best work is still ahead of us.

Sincerely, Donald F. Draper, Creative Director
Sterling Cooper Draper Pryce.


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of legal compliance. Yet compliance is only one piece of the puzzle. In addition to choosing a compliance strategy, corporate actors can also deploy extralegal behavior to respond to high-profile litigation. This extralegal behavior—action taken in the shadow of the law—deserves additional scrutiny. Many have written about how litigation or regulation, or the threat thereof, can spark self-regulation; however, self-regulation is only one tool within corporations' extralegal toolbox. This Article investigates a different extralegal response—the whitewash.

To take on this challenge of theorizing corporations' extralegal toolbox, this Article begins by briefly explaining the interaction of reputation and corporate wrongdoing. In assessing the reasons why companies care about internal and external perceptions, I look at the practice of whitewashing across various substantive areas, such as the environment and human rights. As this literature does not emphasize the role of law, I then provide a multi-element definition of an extralegal whitewash. In so doing, I spell out the necessary predicate and substantive behavior on the part of a corporate wrongdoer. I also provide some guidance for conceptualizing the causation and intent characteristics of the washing definition. As no uniform definition of "washing" yet exists, this Article offers a useful focal point to unite the disparate studies across disciplines and substantive legal areas.

In order to explore the underpinnings of a specific type of whitewash, this Article reviews Wal-Mart's response to the Wal-Mart Stores, Inc. v. Dukes class action litigation as a potential example of an extralegal whitewash. During the ten-plus years of this historic employment discrimination suit, Wal-Mart has steadfastly denied any systematic pay and promotion discrimination against its female associates and managers, and it has successfully challenged the certification of a class action suit (fails to change corporate behavior over the long-term), with Melissa Hart, The Possibility of Avoiding Discrimination: Considering Compliance and Liability, 39 CONN. L. REV. 1623 (2007) (discussing the transformative potential of sex discrimination class action lawsuits), and Rachel Tallon Pickens, Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Monolithic Class Actions, 83 U. DET. MERCY L. REV. 71 (2006) (identifying the benefits of class actions in the civil rights context).


4. As explained below, whitewashes may, but need not, include self-regulation.

5. See Reply Brief for Petitioner at 1, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277) ("Discriminatory decisions made by individual managers within such an objectively nondiscriminatory system are, by definition, aberrational and unauthorized rather than 'common' or 'typical.'").
nationwide class. In addition to its litigation strategy, the company has also attempted to restore its public image as female friendly, while simultaneously funding efforts to undercut the potential of future class action lawsuits. Feminists and workers' rights advocates have decried Wal-Mart's actions as mere "gender washing." In so doing, they suggest that Wal-Mart is engaging in diversionary behavior without adequately addressing, or even acknowledging, the underlying grievances of the Dukes plaintiffs. For those that believe Wal-Mart is a wrongdoer, the concern is that a successful gender washing would allow Wal-Mart to both avoid systematic reform of its employment practices and overcome the Dukes-induced reputational harms. For academics, regardless of its actual wrongdoing, Wal-Mart provides a useful example from which to document, explain, and theorize the practice of extralegal whitewashing.

To ground the definition of gender washing as a specific instance of a whitewash, this Article next takes a critical look at some new policies and practices undertaken by Wal-Mart in relation to hiring, promotion, and women's issues more generally. Part III documents how such policies coexist with the failure to acknowledge or remedy the alleged wrongdoing as well as the perpetuation of gender-unfriendly policies. Further, this Article seeks to identify the conditions under which the combination of these actions might constitute extralegal gender washing by Wal-Mart.

Finally, Part IV addresses the normative implications of extralegal whitewashing. If one believes an underlying grievance is legitimate, then extralegal whitewashing seems inherently problematic. Under the definition of a whitewash, the wrongdoer fails to structurally address the identified grievance. But extralegal whitewashing involves more than a wrongdoer simply ignoring, denying, or avoiding the underlying problem. Actors who engage in an extralegal whitewash seek to simultaneously prevent the imposition of requested substantive changes and, relatedly, to avoid reputational costs from litigation by appearing to be good citizens on social issues. When such extralegal whitewashing ultimately succeeds in changing the conversation, the hypocrisy may constitute an additional, though not legally cognizable, harm to the aggrieved.

Notwithstanding these very real harms, this Article identifies some conditions under which normatively desirable extralegal whitewashing is possible. This conclusion may appear counterintuitive at first blush.

7. See infra Part III.
If, however, extralegal whitewashes are compatible with externally imposed structural reform and fail to divert either courts or legislatures from acting to remedy the problem, these washes may generate positive benefits without accomplishing their intended diversion. In addition, some reformers may simply be unable to get courts, legislatures, or companies to recognize and address their grievances. If such a failure is likely even without the extralegal whitewash, then that wash may present a second-best situation in which no one is significantly worse off and some subset of other individuals or society benefit. Relatedly, some companies may lose control or have their interpretation of the problem redefined by an extralegal whitewash and thus ultimately address the underlying grievance in a manner sympathetic to the aggrieved's desired remedy. This Article concludes by noting the role law plays, not only in instigating extralegal whitewashes, but in regulating them as well. It speaks to the larger potential of, and need for, access to robust substantive law to identify and remedy certain grievances.

II. Whitewashing as an Extralegal Response

A. Corporation Reputation and Washes

Litigation and legislation can directly compel companies to change their behavior. In addition, reputation, which often operates in the shadow of the law, can also dictate new corporate behavior. Class action litigation does not occur in private; it can draw the attention of interested parties such as employees, stockholders, customers, investors, and regulators. Such litigation can tarnish a company's reputation with these parties, even if the court ultimately dismisses the suit or finds for the defendant. Companies, for good reason, are in-

12. WEBER SHANDWICK, SAFEGUARDING REPUTATION SURVEY RESULTS ISSUE 1, STRATEGIES TO RECOVER REPUTATION 1 (2007), available at http://webershandwick.com/resources/wsflashSafe_Rep_Reputation.pdf (reporting that media coverage of reputation alone has increased 108% over the past five years). While reputation is intangible, businesses view it as an important asset. Peter W. Roberts & Grahame R. Dowling, Corporate Reputation and Sustained
Increasingly concerned about managing this sort of reputation risk.\textsuperscript{13} Broadly speaking, a good reputation may help companies achieve their business goals and maintain competitiveness.\textsuperscript{14} Among their various tools, companies can use corporate social responsibility initiatives to enhance their internal and external reputations.\textsuperscript{15} Such initiatives may be particularly important to companies that fear legal interventions, such as legislation or litigation, because they can both divert attention away from a grievance and provide a counter narrative of a company’s commitment to the social issue that gave rise to the grievance.

The corporate social responsibility literature has begun investigating these diversionary tactics under the label of “green washing” in the environmental context and “blue washing” in the human rights context.\textsuperscript{16} The tactic of green washing emerged in the 1970s as an alternative to total corporate denial of environmental problems, and is now deployed to garner public, consumer, investor, and regulatory


\textsuperscript{15} C.B. Battacharya et al., \textit{Strengthening Stakeholder–Company Relationships Through Mutually Beneficial Corporate Social Responsibility Initiatives}, 85 \textsc{J. Bus. Ethics} 257, 257–58 (2009) (“[Corporate Social Responsibility] activity has been shown to have a positive effect on job seeking intent, as well as behaviors on the job like interpersonal cooperation and job-related effort.” (citation omitted)). Most customers may not care deeply about social responsibility, see Graham Page & Helen Fearn, \textit{Corporate Reputation: What Do Consumers Really Care About?}, 45 \textsc{Advertising Res.} 305, 309 (2005), but some consumers willingly pay a premium to firms with good social reputations, see Emma Boultridge & Marilyn Corrigan, \textit{Do Consumers Really Care About Corporate Responsibility?}, 4 \textsc{J. Commc’n. Mgmt.} 355, 355 (2000).

\textsuperscript{16} Not all corporate social responsibility initiatives entail whitewashing, but they are often seen as synonymous. \textit{Cf.} Ralph Hamann & Paul Kapelus, \textit{Corporate Social Responsibility in Mining in Southern Africa: Fair Accountability or Just Greenwash?}, \textit{Dev.}, Sept. 2004, at 85, 88.
Companies choose to promote their environmental initiatives in order to get "maximum accolades for minimum change." Modern-day examples of green washing include car companies that create and promote a single hybrid car amidst a much larger fleet of fuel inefficient cars while lobbying against fuel efficiency standards. Another particularly vivid example, in light of its recent deep-water drilling scandal, is British Petroleum's rebranding itself as "Beyond Petroleum" and launching an advertising campaign claiming, "We fill you up with sunshine."

In turn, this green washing discussion spawned a secondary literature about blue washing, in which companies seek the imprimatur of the United Nations (U.N.) to sanitize their global practices. While green washing is limited to those practices designed to improve a company's environmental image, blue washing allows companies to improve multiple dimensions of its corporate image by aligning with the U.N. Companies hope that association with the U.N. will provide an informal stamp of approval and a brand spillover.

Scholars and activists routinely cite the 1999 Global Compact as a particularly visible form of blue washing. The compact asks member firms to "embrace, support and enact, within their sphere of influence, a set of core values" in the areas of human rights, labor standards, the environment, and anti-corruption. The compact seeks to both have companies adopt these principles and values as part of their busi-

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17. See Jacob Vos, Actions Speak Louder than Words: Greenwashing in Corporate America, 23 NOTRE DAME J.L., ETHICS & PUB. POL'Y 673, 674 (2009).
18. Id. at 675 (internal citations omitted) (quoting Michael Brune, executive director for the Rainforest Action Network).
19. See id. at 675–76.
21. Less than 1% of British Petroleum's sales came from its solar division, and it spent approximately 600 times the amount of money to acquire an oil company than it did to acquire the solar energy company Solarex. Vos, supra note 17, at 677.
23. See sources cited supra note 22.
27. This anti-corruption goal was added later. "Businesses should work against all forms of corruption, including extortion and bribery." Transparency and Anti-Corruption, UNITED NA-
ness strategy and operations, as well as encourage "co-operation and collective problem-solving between different stakeholders." Moreover, the compact utilizes policy dialogues among concerned stakeholders; the dissemination of best practices; and the promotion of public-private partnership projects. It quite explicitly rejects a vision of itself as a regulatory instrument. Rather, the U.N. itself billed the compact "not only as a business opportunity to gain and maintain competitive advantage in market settings, but also as an important strategy for risk management."

While finding plausible examples of green and blue washing is relatively easy, no uniform definition of the practice exists. The originators of the term "green wash" left it to others to define. Scholars like William Laufer have provided a typology of various green wash strategies, whereas others dismiss this typology as too broad and instead define a wash as "the selective disclosure of positive information..."
about a company’s environmental or social performance, while withholding negative information on these dimensions." While these various definitions are helpful, none focus on the motivations for such selective disclosure. Given the initial question posed about the influence of class action lawsuits (and law more generally) on corporate behavior, a definition that more fully accounts for the role of law and the importance of wrongdoing is needed.

B. Defining Extralegal Whitewashing

Before defining extralegal washing in detail, one must first understand the context in which the practice occurs. Class actions and other high-profile litigation have the potential to generate large legal fees, damage a company’s public reputation, disrupt corporate morale, and result in expensive settlements or sanctions. Given the specter of such a suit, companies may proactively create mechanisms to bolster legal compliance and reduce the likelihood of a future viable claim. Using gender washes as an example, such measures might include: creating policies on sexual harassment; providing gender sensitivity training; crafting internal grievance procedures; and reviewing and restructuring hiring, promotion, transfer, firing, and pay policies to avoid legal violations. Companies may also undertake efforts to repeal, weaken, or prevent the legislation on which such litigation is premised. These efforts could target gender through proposed amendments to Title VII, the Pregnancy Discrimination Act, and the Ledbetter Fair Pay Act, or reach more broadly with anti-plaintiff legislation such as the Class Action Fairness Act.

Even when companies undertake such actions, they may still be presented with a legal claim to which they must then choose how to respond. Their toolbox is quite extensive. Some lawful options include denying fault (with subsequent production of evidence and expert testimony) and leveraging procedural barriers to litigation (fighting class certification, asserting a statute of limitations defense, or alleging the failure to exhaust administrative remedies). Those companies unwilling to fight it out in court may also utilize some combination of the following acts: an admission of fault, an apology, a public or private settlement, the use of particular individuals as scapegoats, and the deployment of cheap talk about its future good behavior.

34. Lyon & Maxwell, supra note 20, at 5.
35. Less savory options can include obstruction of judicial process (by hiding, destroying, or altering evidence).
Companies that lose or settle must also decide how to behave at the suit’s conclusion. One could measure such post-suit behavior on a compliance continuum. A maximally noncompliant company might flout court orders providing redress to the plaintiffs, or disregard any injunctions or terms of settlement agreements. A minimally compliant company would eschew those approaches, but instead engage in bare legal compliance with any court orders or settlement agreements. In contrast, a robustly compliant company would both address individual grievances and revamp institutional structures and practices to exceed the legally required remedy.

While the literature on class actions’ influence on corporate behavior often focuses on the legal responses to the initiation of a suit and the compliance choices faced at the conclusion of a suit, these do not exhaust the universe of possible corporate responses. What I term “extralegal washing” or “extralegal whitewashing” is an additional approach companies may use to address class action and other high-profile lawsuits. Extralegal washing is a type of a whitewash, a term that, as I noted above, has been bandied about without much intellectual precision. Thus, I want to start with the original concept of a whitewash.

When used in the pejorative sense, whitewashing refers to the practice of using low-cost calcium paint to superficially conceal or cover up a structural or substantive defect. Although the painter knows of its problems, a whitewashed wall appears flawless to the untrained eye. Thus, as a conceptual matter, a whitewash has three essential components: an underlying defect, an attempt to conceal the defect by diverting attention, and a failure to fix the underlying defect. By extension, I define extralegal washing as (1) a wrongdoer’s (2) deployment and publicity of policies and practices (3) in response to the identification of a legal grievance, (4) which does not address the

36. I want to emphasize “additional” because it bears mentioning that companies may decide to deploy gender washing along with various other strategies identified above. For instance, a company can both deny fault and engage in gender washing. Similarly, a company could choose to admit fault; engage in noncompliance with the legal or moral norm; and attempt to deflect attention with gender washing.

37. Whitewash might also be used in a non-pejorative sense. For instance, one might use whitewash as a way of sprucing up a dirty, but otherwise unflawed structure. Take, for example, the instance in which Tom Sawyer convinces his friends to pay for the privilege of whitewashing Aunt Polly’s fence. MARK TWAIN, THE ADVENTURES OF TOM SAWYER 14–15 (Univ. of Cal. Press 1980) (1875).

38. Such policies are often, but need not be, gender friendly.

39. Gender washing could also occur in response to legislation, administrative regulation, or other identification of a problem, but in this Article, I will focus on judicially instigated gender washes.
underlying concern of the aggrieved and (5) is intended to establish, maintain, burnish, or restore institutional reputation. The remainder of this Part further develops each component of this definition with a few illustrative examples.

1. **Predicate Behavior**

As I define it, an extralegal wash first requires an entity to undertake the wrongful action in question. For our purposes, one relevant type of wrongdoer is a corporate actor who engages in legally sanctionable behavior. In this context, one must be careful to decouple the factual existence of legal wrongdoing from the question of whether an actor can or will be held responsible for a legal violation. For instance, if a plaintiff waits too long to bring a suit for a discriminatory hiring practice, she may not be able to successfully sue. However, if the company’s practice was discriminatory at the time of the employment decision, the company is still a wrongdoer for the purposes of this analysis.

The whitewash concept may also include corporate actors who engage in morally sanctionable behavior. One can imagine a company violating a moral norm embodied in antidiscrimination law without actually breaking the law. Such behavior can only spawn an extralegal wash, though, if the law is invoked in some way to highlight the wrongdoing. For example, a company might engage in behavior that falls at the margin of sex discrimination, gender stereotyping, or LGBTQ discrimination. Many courts reject these claims as a form of sexual orientation bootstrapping under Title VII; but one may think a moral norm against LGBTQ discrimination has emerged and the law has simply failed to keep pace. Of course, not all actors who engage in behavior at the margins of antidiscrimination law constitute wrongdoers, and the determination of a wrongdoer can be deeply subjective. The larger point is that if the law or society deems a company’s behavior as wrong, that corporate actor has the potential to engage in a whitewash.

As shown in the chart below, one may be a wrongdoer in numerous ways—morally, legally, or both. That said, a purely legal wrongdoer

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40. Although coating a wall in cheap paint is not necessarily wrong, if one does so after creating a defect that harms someone else, painting it so others cannot detect the flaw is wrong. In this example, one could imagine the wrongdoer and the painter as separate, but so long as the wrongdoer who allowed or created the defect employed the whitewasher, that activity is sufficient for these purposes.


42. See id. at 3.
may not feel the need to undertake a wash; when an action is illegal, but is not viewed as a moral wrong, other actors may not have a strong negative response to such behavior. If people do not view the underlying grievance that serves as the basis for a lawsuit as legitimate, reputational damage to the corporate actor may likely be insubstantial. Conversely, the strongest case for a whitewash is when a corporate actor engages in both a legal and moral wrong. The law and legal proceedings provide both a hook and a baseline by which wrongness can be viewed and measured.

The behavior of corporate actors who are neither legal nor moral wrongdoers is excluded. Many companies simply did not engage in the alleged behavior. For other companies, the behavior they did engage in is neither morally nor legally sanctionable. Such companies may still choose to publicly deploy policies and practices to establish, maintain, or restore institutional reputation. That said, I exclude them as whitewashers because an attempt to address unjustified reputational fallout or an attempt to improve reputation in the absence of wrongdoing does not inherently involve the element of deception.

<table>
<thead>
<tr>
<th></th>
<th>Moral Wrong</th>
<th>No Moral Wrong</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LEGAL WRONG</strong></td>
<td>Extracted Wash Likely</td>
<td>Extracted Wash Possible (probably not needed)</td>
</tr>
<tr>
<td>Example: firing of pregnant women because of belief that pregnant women should not be in the workplace</td>
<td>Example: failing to comply with reporting requirements but satisfying substantive legal goals</td>
<td></td>
</tr>
<tr>
<td><strong>NO LEGAL WRONG</strong></td>
<td>Extracted Wash Possible</td>
<td>No Extracted Wash</td>
</tr>
<tr>
<td>Example: sex stereotyping against LGBTQ in jurisdictions that have rejected these claims</td>
<td>Example: voluntarily enacting gender-friendly company policy such as designating a breast-feeding room</td>
<td></td>
</tr>
</tbody>
</table>

2. Substantive Behavior

The second component of the extralegal whitewash definition—the deployment and publicity of policies and practices—encompasses a wide variety of activities. Broken down further by substantive area, what makes a gender wash a specific type of whitewash, for instance, is that the wrongdoing relates to gender, but the corporate behavior undertaken in response to a gender grievance may, but need not, in-
clude gender-specific policies and practices. Similarly, gender washing policies may, but need not, be employment-related or targeted at the company's workforce. Some examples of policies and practices that might fall into this category include scholarships, philanthropic donations, and emergency relief assistance. Corporate actors could easily and explicitly tie such policies and practices to gender. For instance, a corporation could offer scholarships designated for female recipients, sponsor the Susan G. Komen Race for the Cure, or provide targeted assistance to female victims of national disasters.

It is important to briefly distinguish a whitewash from cheap talk. Though the original concept of a whitewash involved cheap paint, the concept of "cheap" is relative. In this context, many extralegal whitewashes might be financially expensive, but a company may decide that undertaking such costs is "cheaper" than stoically suffering the reputation hit from litigation. In contrast, economists define cheap talk as a nonbinding and low-cost mechanism that actors use to signal information to others. For our purposes, a corporate statement that "our company cares about gender issues" can be cheap talk as it is inexpensive to issue, does not commit a company to any specific course of action, and may be designed to communicate something to an external audience. Yet, a statement may also be sincere and unrelated to any prior or perceived wrongdoing. In contrast, extralegal whitewashes have no inherent limit on either cost or commitment level. Some gender washes, such as sizable financial donations or initiatives for job training for women in other countries, can be quite expensive. In addition, cheap talk is not inherently diversionary or deceptive whereas, by definition, a gender wash is. For instance, that same corporate statement mentioned above may simply convey a desire to take future action without any diversionary or deceptive intent.

46. While this Article discusses some corporate social responsibility initiatives at length, not all corporate social responsibility initiatives are extralegal whitewashes, and not all extralegal whitewashes include corporate social responsibility initiatives.
47. Joseph Farrell & Matthew Rabin, Cheap Talk, J. Econ. Persp., Summer 1996, at 103 (describing conditions under which cheap talk can be value adding).
3. Causation Requirement

The third component—a response to the identification of a legal grievance—serves as a limiting factor by adding a causation requirement to the whitewash definition. I will provide some factors one might use to distinguish causation from mere correlation or coincidence. Because “extralegal whitewashing” is a concept, rather than a legal standard, a more relaxed method of determining causation than those deployed in lawsuits is appropriate. Thus, rather than provide a bright line, I suggest some non-exhaustive factors that might serve as strong proxies for causation.

Direct knowledge or non-self-interested indication of intent, such as internal communications documenting the cause and effect relationship, are, of course, highly probative. Internal communications that are not meant to be viewed by the public are particularly compelling because the authors have greater reasons for candor. In the absence of such “smoking guns,” one might look to proximity in time to high-stake or high-publicity, lawsuit-related activity. For instance, one might expect to see such efforts timed near a decision to certify a class, to deny a motion for summary judgment, or at the conclusion of a lawsuit.

Another relevant factor is whether the activity in question is a significant departure from previous policies in either scope, scale, or approach. If a company has a long-standing policy of making a sizable donation to a different charity each year, the announcement of the annual donation going to a gender-specific charity when the company is facing a gender lawsuit might be an attempt to gender wash, but it also might reflect a decision made prior to the suit or a mere coincidence. Relatedly, if a company has an institutional policy of making changes or new policies at regular intervals, that may also undermine a determination of gender washing. For instance, if a company engages in five-year reviews of employment practices and that review occurs during a pending lawsuit, the result of the review may or may not be influenced by the lawsuit.

It is worth cautioning that corporate actors often have numerous, overlapping reasons to adopt changes; the desire to deceive or distract need not be the company’s sole motivating factor in an extralegal whitewash. Just as one might whitewash a fence to both deceive potential buyers and please the current owner, the fact that additional benefits may accrue from washing does not render it a non-deceitful

48. While proximity can be important, one should remember that if a lawsuit is extensive enough, any corporate action will seem close in time to some portion of the suit.
or non-diversionary action. As long as such a goal is a substantial or significant motivating factor for the behavior, that is sufficient.

4. Remedial Requirement

The fourth requirement—that the company's policy does not address the underlying concern of the aggrieved—distinguishes extralegal washing from robust compliance with legal or moral norms. A company may choose to remedy an underlying grievance as a wholly voluntary matter prior to the initiation of a lawsuit, as part of a settlement, or as part of a court order. This may, but need not, include the provision of the exact remedy that the aggrieved individuals sought. As an easy example, if a plaintiff alleges that the company standards for setting pay across departments creates sex-based disparities, and the company changes those standards to eliminate the disparity, such action need not constitute a gender wash even if the company chooses different standards than those requested by the plaintiffs. If corporate behavior acknowledges the legitimacy of the aggrieved plaintiffs' complaint and takes action to remedy it, then it is not an extralegal white-wash. In contrast, if plaintiffs make the same argument about pay standards and the company responds by instituting day care facilities at the workplace, that behavior might constitute a gender wash because the change in policies fails to address the problematic pay disparity. Thus, determining whether this factor is met requires a close comparison between the plaintiffs' specific complaint and the company's subsequent behavior.

5. Reputational Intent Requirement

Lastly, a company's policies and practices must intend to establish, maintain, or restore its institutional reputation. The new policies or practices must be intended, at least in part, to garner positive attention that will divert publicity away from the underlying grievance. Thus, I suggest extralegal whitewashing is most likely to occur when litigation threatens a company's reputation. The reputation issue can arise for a variety of reasons: the litigation may garner widespread public attention; spark interest on behalf of regulators; or be revealed to a discrete but important audience, such as the company's own employees or investors.

As mentioned earlier, both companies and the media are paying increased attention to reputation and managing reputation risk. Rep-

49. See, e.g., Tonello, supra note 13, at 5.
50. Shandwick, supra note 12, at 1.
Figure 2: When Policies Can Constitute a Whitewash

<table>
<thead>
<tr>
<th>Policy that Aggrieved Requested</th>
<th>Address Aggrieved’s Concern</th>
<th>Not Address Aggrieved’s Concern</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No Wash</strong></td>
<td><strong>Example:</strong> acknowledging fault and eliminating discretion in setting pay in response to class action concerning pay discrimination</td>
<td><strong>No Wash</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Example:</strong> not acknowledging fault and eliminating discretion for supervisors on a number of issues including ability to set pay in response to class action concerning pay discrimination</td>
</tr>
<tr>
<td><strong>Different Policy than Aggrieved Requested</strong></td>
<td><strong>No Wash</strong></td>
<td><strong>Wash Possible</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Example:</strong> acknowledging fault and providing instructions to those with guidance on how to avoid discriminatory pay decisions in response to class action concerning pay discrimination</td>
<td><strong>Example:</strong> creating generous maternity leave policy in response to class action concerning pay discrimination</td>
</tr>
</tbody>
</table>

Reputation is a broad concept that encompasses varied relationships and perceptions by different audiences. Those audiences can be internal, such as employees and stockholders, or external, such as customers, suppliers, credit rating agencies, and regulators.

Unfortunately, divining the intent of a corporation can be difficult. Thus, I suggest using publicity as a proxy for intent to affect reputation. In order to satisfy the intent requirement, these new policies and practices must also be visible to a relevant audience. If a company undertakes gender-friendly policies and practices, but they are not designed to allow anyone to perceive those policies, such behavior simply does not constitute a gender wash. As described earlier, the essence of a whitewash is to conceal or divert attention from an underlying defect. Corporate actors generally do not enact low visibility policies or practices to divert or forestall other action aimed at remedying the structural grievance.51

That said, visibility merely requires perception by the relevant audience, not by all people. The audience for the gender wash might be external, internal, or both. Companies possess a variety of tools to make such policies and practices visible: advertisements, press releases, and contributions and initiatives large enough that the press will independently take notice.

51. Of course, one could imagine a corporate actor that wishes the policy and practice to be invisible, but the outcome to be visible. For instance, one might engage in sex discrimination against men to increase the number of women in a corporation, but, for obvious reasons, a company would keep quiet about such practices. Even though the company might appear to have a more diverse work force, I would not label this as a gender wash.
III. CASE STUDY: WAL-MART’S ALLEGED GENDER WASH

This Part investigates Wal-Mart’s behavior during the Dukes sex discrimination litigation to contextualize a potential gender wash. Wal-Mart makes a particularly valuable case study for several reasons. Given Wal-Mart’s status as the largest private employer in the United States, its employment practices directly affect over 1% of the American workforce. Its size, market position, and resources also allow for Wal-Mart to launch a highly visible whitewashing campaign should it choose to do so. In addition, many business management scholars and consultants laud Wal-Mart for its highly successful business model and corporate practices. Thus, one might expect other companies to borrow or emulate Wal-Mart’s strategies. Moreover, many feminists and public commentators have accused Wal-Mart of gender washing in the wake of the highly contentious Dukes litigation. Yet such criticisms often lack significant analysis of what makes such practices objectionable. This Part seeks to provide a more rigorous assessment of how Wal-Mart’s behavior might constitute an extralegal whitewash.

Before describing and assessing Wal-Mart’s alleged gender washing, however, one must first identify the grievance that serves as the predi-

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53. See Melissa Hart, Learning from Wal-Mart, 10 EMP. RTS. & EMP. POL’Y J. 355, 386 (2006). Moreover, its ongoing international expansion adds a global reach to its employment behavior.
cate condition for the whitewash. In this instance, the Dukes plaintiffs identified and raised a gender-related grievance by pursuing a sex discrimination class action lawsuit. The plaintiffs alleged that, as a class, women in hourly positions "(1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer—and wait longer for—promotions to in-store management positions than men." Plaintiffs' experts conducted a statistical analysis showing that women in hourly positions made significantly less per year than did similarly situated male employees. They also submitted evidence showing that women comprise the vast majority of the lowest paid workers and a significant majority of hourly workers, while they fill only a third of all managerial positions. The gender gap widens as one moves further up the managerial chain. The plaintiffs contended that such numbers are particularly troubling in a company with an over 70% within-store promotion policy, which is consequently drawing from a largely female labor pool.

The plaintiffs' claim has both a legal and a moral component—Wal-Mart's alleged violation of Title VII's antidiscrimination prohibitions and Wal-Mart's treatment and valuation of its female employees. This moral concern suggests that many might find the alleged behavior of Wal-Mart, and its corporate culture, problematic and worthy of substantial reform regardless of whether such behavior is found to formally violate Title VII. For the purposes of this Article, however, if an accurate rendering of the facts would lead the target audience of...
Wal-Mart's potentially gender washing behavior to believe that Wal-Mart is a wrongdoer, and therefore its behavior needs changing, that belief suffices to constitute a gender-related grievance.

It bears emphasis that the mere existence of a grievance does not equate to the existence of a wrongdoer; plaintiffs may simply be incorrect in either, or both, their legal and moral contentions. The question of whether Wal-Mart is actually a wrongdoer in terms of its employment practices is a hard one. To reach a legal answer, one must resolve complicated doctrinal, evidentiary, and statistical issues. After many years, courts are still in the midst of this morass. Reaching a moral judgment may depend on the legal answer, and even for those whom it does not, the question of whether Wal-Mart engaged in systematic bad behavior and who should be held to account for that behavior is similarly fraught with peril. One would have to decide the company's moral responsibility for a situation that might be characterized either as a few bad apples or a thoroughly rotten barrel. But to the extent that one is willing to presume that the Wal-Mart plaintiffs presented a legitimate legal or moral grievance and that Wal-Mart is a wrongdoer, this Part seeks to assess whether Wal-Mart might satisfy the other criteria for a gender wash.

A. Potential Gender Washing Policies

Wal-Mart initiated several potential gender washing policies and practices in the shadow of the *Dukes* class action litigation. This Part identifies and reviews several of the most high-profile actions, including increases in gender diversity in executive and board membership, additions to the organizational structure that focus on gender diversity, and the creation of a massive initiative to empower female workers and female owned businesses. All of the identified policies are explicitly tied to gender and seem to represent departures in either size or kind from pre-litigation practices. Yet none of these policies explicitly address the underlying complaint of the *Dukes* plaintiffs—that low-level female employees experienced widespread discrimination in pay and promotion.

1. Executive, Organizational, and Board-Level Behavior

After the initiation of the *Dukes* litigation, one major set of changes involved the gender composition of Wal-Mart's executive leadership and board membership. Although the *Dukes* litigation focused on the

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60. Such a presumption might be based on evidence presented and assessed elsewhere or engaged in simply as an intellectual exercise.
promotion of female employees, it did not allege sex discrimination in the most senior executive positions. Interestingly, though, when plaintiffs filed *Dukes* in 2000, no women served as senior officers of Wal-Mart.\textsuperscript{61} While the changes in gender composition of executive positions have been uneven,\textsuperscript{62} 2012 saw the promotion of three women to very high-level positions,\textsuperscript{63} and seven of thirty-one senior officers are now women. In addition, for the first time in Wal-Mart's history, female CEOs head Wal-Mart Canada and the associated discount retailer Sam's Club.\textsuperscript{64} The nature of these positions renders them quite visible to employees, shareholders, and the business community at large. Moreover, Wal-Mart has actively touted the promotion of these women as evidence that Wal-Mart's internal processes succeed in creating, identifying, and promoting talent.\textsuperscript{65}

In addition to these changes in high-level positions, Wal-Mart created a few organizational structures with the ostensible goal of promoting the advancement of women within the company. In 2003, three years after six plaintiffs filed *Dukes* and within months of plaintiffs filing for class action certification,\textsuperscript{66} Wal-Mart created the office of diversity.\textsuperscript{67} This office acts as a focal point for all of Wal-Mart's diversity initiatives, which range from employment practices to support.


\textsuperscript{63} Walmart Announces Senior Management Changes and Promotions, WALMART CORPORATE (Jan. 20, 2012), http://news.walmart.com/news-archive/investors/walmart-announces-senior-management-changes-promotions-1650942 (announcing the promotion of Rosalind Brewer to president and CEO of Sam’s Club, Gisel Ruiz to executive VP and COO for Wal-Mart, and Karenann Terrell to CIO as evidence that Wal-Mart’s succession and management development programs work). Notably, Rosalind Brewer was the first chairperson of the Wal-Mart President’s Council of Global Women Leaders. *Id.*


\textsuperscript{65} *Id.* at 3.


pler relations to community outreach. The office's 2010 and 2011 annual diversity and inclusion documents emphasized the number of female managers and officers. The 2011 document also boasted that Wal-Mart exceeded both the retail and Fortune 500 average with its percentages of women employed in the workforce, in executive positions, and on the board. Not surprisingly, the documents do not provide information on women's salaries, a comparison of promotion rates for women and men within the company, or any information about the gender pool from which Wal-Mart makes promotions.

Another set of new practices involves the institutionalization of groups for female mentoring and gender issues. In 2009, as Wal-Mart waited for the Ninth Circuit's en banc review of class certification, freshly minted CEO Michael Duke kicked off his appointment by creating the President's Global Council of Women Leaders. He tasked this group with helping to develop and advance women into upper level management positions within the company. The fourteen-member council, staffed with one woman from each of Wal-Mart's global markets, meets monthly to discuss issues facing females at Wal-Mart. Wal-Mart has also formed similar groups at lower levels, which include the Women's Officer Caucus and the Women's Resource Council. Groups such as Working Mother Media, Latina Style, and the National Association for Female Executives have all praised these initiatives. Yet none of these institutional groups have squarely addressed the problem of advancement at the lowest levels.

68. Id.

69. WALMART, 2010 DIVERSITY AND INCLUSION REPORT 4 (2010), available at http://www.diversityinc.com/legal-issues/our-guide-to-coverage-of-the-walmart-court-decision; 2011 DIVERSITY AND INCLUSION REPORT, supra note 64, at 5. The 2010 document does not provide a comparison to men or a number or rate of increase as compared to past years, though the 2011 document provides such evidence.

70. 2011 DIVERSITY AND INCLUSION REPORT, supra note 64, at 3.

71. See Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 613 (9th Cir. 2010) (en banc); see also Press Release, supra note 66.

72. Matthew Boyle, Wal-Mart Vows to Promote Women, BUSINESSWEEK (June 5, 2009), http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db2009065_679455.htm (noting that Duke built upon a similar informal council that he employed when he ran Wal-Mart's international operations).

73. Id.

74. Id.


76. 2011 DIVERSITY AND INCLUSION REPORT, supra note 64, at 14.

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of the associate ranks. Nor is there any public evidence that these groups consider structural constraints such as the relocation policies or the role of bias in decision making. Rather, these groups seem to be focused on increasing female mentorship, networking, and competencies.

In addition, while awaiting the Supreme Court’s decision on class certification, Wal-Mart began sponsoring the “20% by 2020 initiative.” This initiative seeks to achieve 20% female representation on corporate boards by the year 2020. The organization provides a searchable database that ranks companies as winning, very close, token membership, or zero based on their adherence to the target 20%. With three females serving as part of its fifteen-member board, Wal-Mart met its 2012 target goal and has been ranked as a “winning” company. Given two females were already serving on the board in 2000, membership did not require much change. Nor does the board set or have any direct influence over female associates’ salary, promotion, or other policies that might encourage or hinder their advancement. It probably goes without saying that the “20 by 2020” initiative has no accompanying percentage benchmarks for hourly and low-level managerial positions.

2. Global Women’s Economic Empowerment Initiative

In terms of both scope and expense, the recently launched Global Women’s Economic Empowerment Initiative is Wal-Mart’s most significant new policy. Wal-Mart announced this multibillion dollar ec-

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79. Wal-Mart is notoriously tight-lipped about its employment practices, thus such lack of evidence ought not be taken as definitive proof that Wal-Mart is not changing its ways.
80. See Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 613 (9th Cir. 2010) (en banc); see also Press Release, supra note 66.
85. On a much smaller scale, Wal-Mart also undertakes purely domestic programs to provide similar assistance locally. In 2009, along with the organization Dress for Success, Wal-Mart co-sponsored a pilot program to provide unemployed women with “professional skills, accelerate their job search and build confidence through weekly training sessions, one-on-one career coach-
onomic plan, which aspires to empower female workers and female-owned businesses, in September 2011. This announcement was made a mere three months after the Supreme Court rejected a nationwide class certification in Dukes, and during the period in which statewide classes were forming. The initiative joins Wal-Mart with some well-respected NGOs such as CARE, Vital Voices, and Count Me In. By the end of 2016, Wal-Mart aims to achieve five major goals through this initiative: (1) sourcing $20 billion from women-owned American businesses, as well as doubling its sourcing from international female suppliers; (2) providing 60,000 women working in factories with training, market access, and career opportunities; (3) helping 200,000 low-income women in America pursue higher education and learn job skills; (4) offering retail training programs to 200,000 women worldwide; and (5) increasing female and minority representation in service firms and suppliers. Wal-Mart plans on providing $100 million in grants drawn from the Wal-Mart Foundation and Wal-Mart’s international businesses to organizations that support women’s economic development. Wal-Mart claims that this initiative will help over 450,000 women globally.

The initiative both creates wholly new programs and builds on existing efforts. For instance, Wal-Mart is in the process of launching a new e-commerce site that features items made by small, female-owned businesses and female artisans. The e-commerce program
claims to provide women with "the benefit of the company’s knowledge about customers, packaging and promotions." 92 Wal-Mart is also expanding its existing Indian joint venture, 93 which seeks to provide sustainable employment opportunities to economically vulnerable women. 94 Since its launch in 2009, Bharti Wal-Mart has trained over 2,000 women, and women now comprise 18% of its workforce. 95 Such efforts should be accelerated and expanded under the new initiative. In addition, other new programs under the auspices of the global initiative include the Best Price Members Women’s Council, which hopes to address problems facing female entrepreneurs trying to work with Bharti Wal-Mart by providing training and greater access to domestic and global markets, and disseminating Wal-Mart’s best practices at supplier meets. 96 Similar efforts to meet the initiative’s ambitious goals are also underway in Central America 97 and China. 98

The Global Women’s Economic Empowerment Initiative has drawn media attention, as well as praise from the highest levels. For instance, Melanne Verveer, U.S. Ambassador at Large for Global Women’s Issues, hailed the effort as a potential “game-changer.” 99 Former Secretary of State Hillary Clinton also supported the initiative 100 by teaming up with Wal-Mart under the International Fund for

92. Id. (quoting Leslie Dach, Wal-Mart’s executive vice president of corporate affairs).
94. Bharti Wal-Mart’s ongoing projects include: implementing the Cashew Value Chain Initiative, which creates opportunities for women to improve their literacy skills and acquire training in cashew processing; four free retail training centers; training of female village farmers from whom Wal-Mart will source products; and adopting schools to improve the quality of education. Bharti Walmart Launches Women’s Economic Empowerment Initiative in India, INDIA PR WIRE (Sept. 18, 2011), http://www.indiaprwire.com/pressrelease/other/2011091597788.htm.
95. Id.
97. Walmart Launches Global Women’s Economic Empowerment Initiative, supra note 86.
98. Id.
99. Id.
Women and Grants to create small grants for women throughout Central and Latin America.101

In shaping the narrative about the Global Women’s Economic Empowerment Initiative, Wal-Mart has seemingly distanced itself from the Dukes lawsuit,102 emphasized its concern for women, and attempted to be relevant to them.103 In discussing the initiative, CEO Mike Duke commented, “Helping more women live better is a defining issue for our business and our world.”104 While the initiative includes some domestic efforts, it continues to sidestep claims that women cannot advance at Wal-Mart stores and are paid less than their male counterparts.105 The initiative also fails to train managers to be sensitive to sex discrimination or to focus on the role of pay raises and promotion.106 Instead, the initiative emphasizes the need of women to receive job training and access to markets. This initiative is self-consciously about helping women help themselves, not about ensuring the equitable treatment of female employees.

103. Walmart Aims to Help Women Live Better, supra note 89. CEO Mike Duke has been explicit in his purpose, stating, “We want women to view us as a retailer that is relevant to them and cares about them. We want them to be leading suppliers, managers and loyal customers.” Id.
104. Goudreau, supra note 102.
105. See Stephanie Clifford & Stephanie Strom, Wal-Mart to Announce Women-Friendly Plans, N.Y. TIMES (Sept. 14, 2011), http://www.nytimes.com/2011/09/14/business/wal-mart-to-announce-women-friendly-plans.html?_r=1&scp=2&sq=walmart&st=cse. AFL-CIO’s Janet Shenk says this initiative is merely a way to divert attention from the lawsuit, and believes it will not do much to empower women: “Once again, Wal-Mart is avoiding every issue that touches on how its products are produced . . . . It’s not about who owns the factory. So far as I know, there’s no evidence that factories and businesses owned by women treat their employees better or have better conditions than factories and businesses owned by men.” Id.
3. General Reputation-Enhancing Behavior

Given Wal-Mart’s various legal troubles, it is not surprising that it might feel the need to engage in reputation-enhancing activities. In the last ten years, Wal-Mart has undertaken a number of social initiatives and actions that suggest good corporate citizenship. A quick perusal of its website reveals the diversity in Wal-Mart’s social investment: a $2 billion in-kind commitment to help end hunger in the United States; a significant environmental initiative that includes intensive guidelines for its suppliers; various scholarship and education grants; initiatives with particular emphasis on minority, immigrant, and veteran recipients; and donations to local and international disaster relief with a leading role in helping those affected by Hurricane Katrina. Though the Wal-Mart Foundation is a long-standing institution, Wal-Mart tripled its domestic philanthropic giving between 2007 and 2011.

In addition, one might view the 2009 appointment of CEO Mike Duke as another overarching, reputation-enhancing move. Wal-Mart insiders suggest that Duke’s skills in talent development and his potential to improve the company’s record on diversity may have led to his edging out other competitors for the job. Duke has spoken openly about Wal-Mart’s determination to “be the best possible place for women to work,” and he is responsible for the Global Women’s Economic Empowerment Initiative, as well as many of the institutional changes described above. He has even received a “Hall of Fame” prize from a major women’s group for his diversity efforts.
B. Continued Wrongdoing

As described above, not all gender-friendly or otherwise reputation-enhancing policies constitute a gender wash; they require the company’s simultaneous failure to remedy the underlying grievance. While a full exploration of whether Wal-Mart continues to engage in sex discrimination is beyond the scope of this Article, a brief description of the underlying policies at issue is necessary. In *Dukes* and the subsequent California and Texas employment class actions, the litigants alleged that a variety of specific policies and practices were responsible for discrimination, including:

- the lack of a consistent job posting, the requirement of relocation as a condition of entry into and promotion through management, reliance on stereotypes in making pay and promotion decisions, lack of objective criteria for making promotion decisions, and lack of consistent and reliable scheduling for management level employees.\(^{116}\)

Rather than determine whether these alleged policies were and are still in place,\(^{117}\) the point of this Article is to identify what actions, if engaged in, would constitute a gender wash.

Important, Wal-Mart has never acknowledged any corporate responsibility or wrongdoing with regard to the *Dukes* litigation. But even without acknowledging wrongdoing, Wal-Mart could have changed or eliminated the underlying policies and practices that aggrieve the plaintiffs. A very preliminary investigation, however, suggests that Wal-Mart has kept at least some of these practices in place. For instance, as of late 2011, it appears that Wal-Mart was still utilizing


\(^{117}\) Moreover, Wal-Mart is notoriously tight-lipped about its employment policies. Michael J. Myers, *Wal-Mart, Shopko Cart Gathering: A Case for Smith v. City of Jackson ADEA Disparate Impact?,* 8 MARQ. ELDER’S ADVISOR 91, 91–94 (2006) (detailing internal memos directing supervisors that every position must have a physical component in order to justify hiring younger workers, which would lower health care and other costs). Without the underlying lawsuit, we might not even know that these practices existed. Wal-Mart executives dismissed the significance of a 2000 in-house audit that revealed extensive violations of labor laws. The report was sealed by the court and managers reported that upper management never pushed store managers to prevent further violations. See Steven Greenhouse, *In-House Audit Says Wal-Mart Violated Labor Laws,* N.Y. TIMES (Jan. 13, 2004), http://www.nytimes.com/2004/01/13/us/in-house-audit-says-wal-mart-violated-labor-laws.html; cf Ritu Bhatnagar, *Dukes v. Wal-Mart As a Catalyst for Social Activism,* 19 BERKELEY WOMEN’S L.J. 246, 251 (2004) (“The plaintiffs’ attorneys for *Dukes* have stated that they hope that the lawsuit . . . will also begin to penetrate other labor practices, such as comparatively low wages, the denial of overtime pay, and the prevention of collective bargaining.”).
the relocation requirement. Additionally, Wal-Mart has long had an official policy explicitly requiring the posting of jobs in stores, but the original Dukes plaintiffs alleged that nearly 80% were not posted. Whether that figure is accurate or this has improved since the filing of the lawsuit is an open question. At least some testimony during the original Dukes litigation suggests that no one was tasked with monitoring the enforcement of this policy even after the lawsuit began.

In contrast, starting in 2000, Wal-Mart asked its district managers to set diversity “goals” for the advancement of women in management. These goals were based on each manager’s subjective views on what was attainable and were not tied to any objective measures of availability or qualifications. Yet the newly filed California and Texas lawsuits allege that prior to 2004, failure to meet diversity goals had no financial or other consequence for managers, and that many store managers were unaware of the existence of any diversity goals.

All that said, Wal-Mart has increased its transparency on employment matters. For instance, shareholders have repeatedly pressed Wal-Mart to publicly disclose its Equal Employment Opportunity Report, which identifies employees by race and sex in each Equal Employment Opportunity Commission-defined job category; describes affirmative action programs; and describes programs to increase female and minority management. Public availability of such reports would allow an assessment of whether Wal-Mart is promoting a greater percentage of female associates after the Dukes litigation. Although Wal-Mart had repeatedly refused, it quietly reversed course and posted such reports to the Internet in 2006.

In addition to the alleged continued wrongdoing, Wal-Mart has also attempted to undermine class action litigation more generally. Al-
though the use of lobbying efforts to limit litigation is not in and of itself a wrong, when coupled with legally or morally noncompliant employment policies, it helps buttress the accusation of a whitewash. Most notably, Wal-Mart made sizeable donations to and served on the board of the American Legislative Exchange Council (ALEC), a corporate-funded tort reform organization. This group drafts model bills for state legislatures, including the very defendant-friendly Class Actions Improvements Act. In what was likely a response to the Dukes litigation, ALEC crafted a bill that would delay the evidence-gathering phase of a class action lawsuit until any appeals concerning the legitimacy of the class have been exhausted. In the wake of the Supreme Court’s decertification in Dukes, such a bill would prevent the plaintiffs in the California and Texas class actions from interviewing witnesses, gathering documents, or engaging in other essential preparations regarding the development of their substantive claims until the class certification issue was definitively resolved. Such a bill has been introduced in Minnesota and copycat bills in other states seem likely to follow.

C. Intent to Restore, Maintain, or Enhance Reputation

Lastly, in order to show an extralegal whitewash, one has to draw a convincing connection between the new reputation-enhancing behav-

that Wal-Mart spent $7.8 million on lobbying in 2011 on trade policy, corporate tax policy, and other employer-oriented policies).

124. Id. (noting that Wal-Mart recently left ALEC over the stand-your-ground controversy); see also Dreier & Cohen, supra note 112 (noting Wal-Mart’s departure from ALEC in May 2012 over ALEC’s “aggressive support for ‘Stand Your Ground’ laws”).


127. The revisions would make class action suits available only for those litigants who do not seek any monetary relief. It would also direct courts that plaintiffs seeking class certification must provide clear and convincing evidence that the class meets all certification requirements, with doubt resolved in favor of denying class certification, and create a rebuttable presumption in favor of certification denial. The revisions would also codify the requirement that plaintiffs have the financial burden of notifying class members. See AM. LEGISLATIVE EXCH. COUNCIL, MODEL CLASS ACTIONS IMPROVEMENTS ACT § 2(b)(2), (c)(3)–(4), (c)(7) (2000), available at http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/7882.pdf.


129. Id.

130. Id.

131. Id.
ior and the prior (and potentially ongoing) bad behavior. Even if one views Wal-Mart as a wrongdoer, why would Wal-Mart feel the need to engage in gender washing? Given the size of the Dukes class—the largest employment class action ever certified—and the amount of money at stake, the Dukes litigation generated an enormous amount of media attention. Much of this coverage painted Wal-Mart in a negative light and, in tandem with the litigation itself, may have damaged Wal-Mart with respect to its customers, employees, and stockholders, as well as with potential regulators and policymakers, both domestically and abroad.

First, the widespread belief that Wal-Mart is a sex discriminator could depress sales through consumer boycotts and loss of goodwill. I have suggested elsewhere that many Wal-Mart shoppers might be fairly insensitive on this front as they cannot afford to shop elsewhere. Even if this holds true into the future, Wal-Mart has expressed much interest in growing its customer base domestically. A bad reputation on gender issues may stall its attempts to garner well-heeled consumers as well as slow its move into urban areas.

The Dukes litigation may have also eroded Wal-Mart's vibrant corporate culture, a culture often credited for the retailer's success.

132. Because whitewashes involve an element of diversion or deception, one would not expect Wal-Mart to explicitly link their initiatives and policy changes to the lawsuit because that might be construed as an acknowledgment of a problem, even if not an admission of prior wrongdoing. Outside groups who have drawn these connections include the AFL-CIO, the United Food and Commercial Workers campaign Making Change at Wal-Mart, and NOW. Cf. Kari Lydersen, Wal-Mart and Women: Skeptics Question New Initiative, IN THESE TIMES (Sept. 19, 2011, 7:00 AM), http://www.inthesetimes.com/working/entry/11982/walmart and_women_skeptics_question_new_initiative.

133. A quick Lexis search revealed that since 2006, journalists have penned over 2,000 related stories, and numerous blogs have followed the litigation developments. At least one journalist wrote a book on the underlying complaints. See LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART (2004).


135. Anne D’Innocenzio, Again? Wal-Mart’s Rep Takes Another Beating, ASSOCIATED PRESS WIRE (May 11, 2012, 10:54 PM) (noting that reputation is more important to customers who can afford to shop elsewhere).

136. Jung, supra note 108, at 37, 70 (noting that Wal-Mart wants to expand into major cities, but concerns about labor practices is keeping its stores out).

137. When employees identify strongly with a corporation's organizational identity, they are more likely to act in the company's best interest. Ale Smidts et al., The Impact of Employee Communication and Perceived External Prestige on Organizational Identification, 44 ACAD. MGMT. J. 1051, 1051 (2001). Strong corporate culture has also been credited with revitalizing companies in decline. Cf. Charles O'Reilly, Corporations, Culture, and Commitment: Motivation and Social Control in Organizations, CAL. MGMT. REV., Summer 1989, at 9, 9-10. The Wal-Mart culture is stronger in China than perhaps anywhere in the world, and Wal-Mart has been particularly successful in China. See David J. Davies, Wal-Mao: The Discipline of Corporate Culture and Studying Success at Wal-Mart China, CHINA J., July 2007, at 1, 1-2.
Both the lawsuit and the surrounding publicity directly question the legitimacy and morality of that corporate culture by challenging Wal-Mart's vision of itself as good for workers, good for America, and good for women. Wal-Mart's idea of what constitutes "good for women" may differ significantly from the Dukes plaintiffs, but the negative press might still bruise Wal-Mart's positive self-identification.

In addition, bad corporate practices that raise the specter of regulatory and legal sanctions can depress stock price and deter investment. In particular, Wal-Mart's reputation as unfriendly to women, and to labor more generally, deters socially responsible investors. Some investors refuse to initiate a relationship, while others have divested from Wal-Mart as a result of its perceived bad behavior.

In contrast, the creation of new social initiatives, like the Global Women's Economic Empowerment Initiative, may help Wal-Mart sway socially responsible investors. For instance, one investment analyst has described Wal-Mart's initiatives as positioning it as the twenty-first century leader, whereas "for most of the [twentieth] century they acted like a [nineteenth] century company in terms of what socially was expected of them."

Lastly, Wal-Mart is aggressively trying to break into foreign markets. Yet its low price, big-box business model is an awkward fit for some of its attempted new markets, in part because of those coun-


139. For instance, Wal-Mart's Mexico corruption scandal caused its stock to plummet. D'I nnocen zio, supra note 135 ("Wal-Mart acknowledged that the bad publicity was beginning to hurt its stock. Its shares fell [20%] from early 2005 to an eight-year low of $42 two years later."); Dreier & Cohen, supra note 112 (observing that Wal-Mart's stock price fell sharply soon after the Mexico story broke).

140. Jung, supra note 108, at 36, 70–71 (noting the divestiture of socially responsible investors because of Wal-Mart's labor policies and investment managers' suggestions that Wal-Mart's reputation with its workers was part of the problem).

141. Id. at 72.

142. Much of Wal-Mart's recent growth came from its international division. In the last fiscal year, sales in the U.S. rose 1.5% and operating income rose 2.2%; meanwhile, international sales rose 15.2% and operating income rose 10.8%. Maria Kiselyova, Analysis: Cautious Wal-Mart Missing Out on Russia's Retail Boom, REUTERS, Apr. 5, 2012, http://www.reuters.com/article/2012/04105/us-walmart-russia-idUSBRE8340KT20120405; see also Whalen, supra note 90.

143. Wal-Mart was unsuccessful in its attempts to expand in South Korea and Japan, where it failed to anticipate cultural preferences, as well as the incompatibility of its distribution and sales models with high-density, urban areas. Additionally, Wal-Mart failed in Germany and may be unable to enter markets in the European Union due to high gasoline prices, as well as pro-labor and smart growth policies. Manlio Del Giudice, Wal-Mart and Cross-Cultural Approaches to Strategic Competitiveness, in CROSS-CULTURAL KNOWLEDGE MANAGEMENT: FOSTERING INNO-
tries' pro-labor cultures. Given its mixed expansion record, large social initiatives could improve its reputation and garner greater governmental and public support. Even for those markets largely indifferent to Wal-Mart's labor reputation, such initiatives continue to generate positive domestic press while simultaneously creating a ready pool of female workers and female suppliers.

Of course, a desire to establish, maintain, or restore a reputation damaged by the Dukes litigation need not be the sole motivating force for Wal-Mart's behavior to constitute an extralegal whitewash. One could imagine many other reasons why Wal-Mart might engage in such policies and practices. For example, Wal-Mart has suffered from bad press over a variety of other labor and non-labor issues; thus, at least some of its social initiatives might be part of a larger whitewash effort. In addition, Wal-Mart receives significant tax benefits from its philanthropic behavior, and it can use that behavior to leverage state and local governments on other issues. Moreover, Wal-Mart has conducted studies that identify its economic interests in using female-owned small businesses as suppliers. But for purposes of a whitewash, so long as Wal-Mart is responding to the Dukes litigation with the policies identified in this Part, it does not matter what other considerations motivate its behavior.

IV. A NORMATIVE AND DYNAMIC ASSESSMENT OF WASHING

A. Harms

Washing, in all its many forms, poses a risk of both individualized and generalized harms to society. Though others may exist, I have isolated at least four distinct harms: (1) the emotional harms arising from the failure to acknowledge wrongdoing to the aggrieved; (2) the emotional harm arising from treating individuals as fungible; (3) the avoidance of systematic correction of wrongful practices; and (4) the.

144. Cf. Kiselyova, supra note 142.
145. Jung, supra note 108, at 72 (noting that Wal-Mart's social policies are partially responsible for South Africa's approval of its relationship with Massmart).
146. Dreier & Cohen, supra note 112 (observing other bad behavior, including the recent U.S. Department of Labor order to pay $4.8 million in backpay and fines to thousands of employees who were illegally denied overtime).
147. These include a $24 million bribery scandal in Mexico that may lead to Foreign Corrupt Practices Act charges. See id.; see also Jaffe, supra note 123 (noting media attention to bribery scandal in Mexico, reports of abuses at seafood suppliers, and a 10,000 person march against Wal-Mart in Los Angeles' Chinatown).
creation of an opportunity to expand or accelerate wrongful practices. First, many aggrieved persons often desire an acknowledgement or admission of wrongdoing. For those individuals, class action lawsuits constitute more than a pursuit of monetary damages or injunctions; they are a mechanism for naming and acknowledging their harms. For those aggrieved who feel they have suffered dignitary insults, full apologies may also be particularly important. This is because a full apology from the wrongdoer serves to deny the diminishment of the aggrieved and affirms their individual value. But the act of the corporate whitewasher definitionally precludes such acknowledgements; the wrongdoer wishes to not only divert attention away from its bad behavior, but also leave its underlying ways unchanged.

In addition, a company enacting a whitewash often treats those individuals it has harmed as though they are fungible with all other people along a relevant harm axis. Similarly, a company often treats a concern of the aggrieved as fungible with any other concern they might have. For instance, in a gender wash, the corporation often provides assistance to a different group of women than those who were harmed—one might perceive Wal-Mart's gender initiatives in this light. The vast majority of its efforts are geared at either women in the company who could not have joined the class action lawsuit, or women who are not Wal-Mart employees. Importantly, those who have been injured are aware that a net gain for a group of which they are a member is not the same as redressing an individual or systematic wrong; by treating people and their concerns as fungible, wrongdoers only add insult to injury. As Ekow Yankah explained in another context, such hypocrisy communicates that the wrongdoer does not take the aggrieved persons "seriously as agents with moral claims deserving

149. A full apology includes:
expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.

ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971).


151. If a wrongdoer both provides a full apology and implements initiatives to rehabilitate its image, it is no longer engaged in a wash, as I define it.
of respect or to whom uses of power need be justified.”152 This behavior reinforces “to its direct victims their inferiority and insults them by ignoring their nature as rational agents.”153 Such substitutions of any one member of the group for another denies the “uniqueness and individuality” of those harmed.154

Moreover, effective washing allows a wrongdoer to avoid systematically correcting the underlying grievance and also to defuse any reputational damage associated with the identified wrongdoing. The kind of significant wrongdoing targeted by class action or other high-profile litigation is often, though not always, subject to social sanctioning. As explained above, a poor reputation can spur consumer boycotts, divestment by investors, a decline in worker productivity, a break in supplier relationships, and a limit on new sources of capital and access to new markets. However, reputational sanctions rely on an appreciation of and attention to the wrongdoing that successful washes are designed to preclude or overshadow. In so doing, the kind of hypocrisy a whitewash entails also “frustrates the normative claims of those victims by undermining the language in which they can press their claims and obscuring the validity of those claims to those to whom they are addressed.”155

Relatedly, some washes may even expand and accelerate the wrongdoer’s bad behavior. If a corporate whitewasher restores or enhances its reputation, it may find access to new customers, new employees, new investors, and new markets. In addition, the wash itself may entail expanding access to these various resources. To take a particularly salient hypothetical, if Wal-Mart is a wrongdoer, its new Global Women’s Economic Empowerment Initiative may globalize its alleged sex discrimination and poor labor practices. Not only would a successful wash counteract any reputational hit that drives away customers, employees, and investors, the initiative would also help open new markets and attract employees. If Wal-Mart’s washing helps garner support for new stores in foreign locations and the hiring at those stores is not accompanied by antidiscrimination efforts, Wal-Mart may simply increase its use of gender discrimination.156

152. Ekow N. Yankah, Legal Hypocrisy (forthcoming) (on file with author). In fairness, Professor Yankah is referencing a specific type of hypocrisy in which the state is using the law to act. Wal-Mart is not engaging in legal hypocrisy but many of the effects are the same.
153. Id.
155. Yankah, supra note 152.
156. In fact, women in these countries may be even more vulnerable than female employees in the United States, and thus willing to work for even more substandard wages. Wal-Mart would have the option of sorting to hire women that it thinks it can most exploit.
B. Benefits

All told, critics may too quickly dismiss the possible positive externalities generated by a wash. Just because washes, by definition, do not provide the aggrieved’s desired remedy, it does not follow that all washes lack social value. A diversionary intent need not prevent new corporate behavior from helping employees, consumers, investors, or even society at large. For example, even if one believed that the behavior described in the Wal-Mart case study was motivated largely by the desire to deflect attention away from the *Dukes* litigation, the possibility exists that Wal-Mart’s Global Women’s Economic Empowerment Initiative and internal changes might transform many individual women’s lives for the better. This Part identifies at least three potential benefits of an extralegal whitewash: (1) positive externalities arising from the diversionary behavior; (2) structural reform arising from the failure to control the extralegal whitewash; and (3) reputational harm arising from the unsuccessful implementation of an extralegal whitewash.

The assessment of when an extralegal whitewash will provide substantial or net benefits over the status quo requires a case-by-case assessment of the new policies and practices. The presence of accountability mechanisms that allow ongoing review and criticism of washes would be a good signal for commitment to future success. These accountability mechanisms may come in the form of transparent targets, goals, standards, or binding legal obligations. In addition, washes that require significant ongoing expenditures and create new institutions may also bespeak the potential for change. This is particularly likely if the new institution is staffed by outsiders who have expertise and commitment to the issue area of the wash. Similarly, the design of such “washed” institutions can also enhance the possibility of corporate social change.157

To return to our hypothesized Wal-Mart gender wash, some factors point in the direction of net positive social value. Wal-Mart is taking a leadership role in the training of women and use of female suppliers. Although many other programs have committed resources to these sorts of goals, few governments, much less corporations, have engaged this group of women with resources as extensive as those provided by Wal-Mart. Thus, even though Wal-Mart’s efforts are not different in kind, the difference in scope is meaningful. Similarly, although Wal-Mart could abandon the initiative, given the economic and political

resources it has already expended, abandonment might prove to be quite costly. Relatedly, while Wal-Mart’s initiative is voluntary, it does contain some accountability measures. Wal-Mart has pledged to spend certain amounts for various programs and set spending targets for particular markets. Corporate watchdogs can confirm whether such funds are actually disbursed.

In addition to the positive externalities, some washes may ultimately spur the company to structurally address the original grievance in a manner consistent with the original demands of the aggrieved. Regardless of a company’s intention, it cannot guarantee others’ response to or its control of a whitewash. When an extralegal whitewash entrenches or sparks sustained interactions with outside institutions and outside actors, it can create the conditions for substantial policy evolution, which may deviate from the original underlying interests of the corporations. These sustained institutional linkages foster a cross-pollination of approaches and assumptions, which may manifest themselves in new policies. Such overhauls are particularly likely when other institutions or actors have some decision-making authority and these groups share a similar perspective to the aggrieved.

Conversely, when companies engage in the sorts of whitewashes least likely to have positive social value, such behavior can actually magnify the harm to corporations, at least when corporate watchdogs effectively police them. This sort of reputational backlash is particularly likely for large companies and those engaged in aggressively visible campaigns. In other words, when companies attempt to con-

158. For instance, the fictional advertisement alluded to in this Article’s introduction helps Sterling Cooper Draper Pryce land a pro bono anti-smoking campaign, but fails to generate much paying business. As a business man explains to Don Draper, “He loves your work. They all do. But they don’t like you. I mean how could they trust you after the way you bit the hand?” Mad Men: At the Codfish Ball (AMC television broadcast Apr. 29, 2012).

159. Wexler, supra note 157, at 1742.

160. As an example of how whitewashing can lead to regulation in 2007, TerraChoice, a green marketing firm, studied six leading stores who sold over 1,000 products marketed as being green. Only one product passed the test, while the rest were “demonstrably false” or “misleading.” In response to public scrutiny, the government revised the “Guides for the Use of Environmental Marketing Claims,” and Congress increased the National Organic Program budget to $7 million. Greg Northen, Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace, 7 J. FOOD L. & POL’Y 101, 104 (2011). Although the “Green Guides” define environmental terms such as “biodegradable” and “ozone safe,” they are merely a set of voluntary guidelines. While they are not enforceable, they are given deference in litigated matters. Several states have since codified the rules into law. Id. at 111.

control their reputation through cheap talk, but their hypocrisy is visible to relevant stakeholders,\textsuperscript{162} empirical evidence demonstrates that effective policing of washing can accelerate negative social sanctions because stakeholders view the company as untrustworthy and opportunistic.\textsuperscript{163}

Lastly, it is worth noting that any of these benefits must be balanced against the likelihood of the aggrieved prevailing in the absence of an extralegal whitewash. As many have written in this volume, class certification is increasingly difficult and many barriers to success in corporate social litigation exist.

\section*{C. The Ongoing Interaction of Law and Reputation}

While extralegal washing can undermine efforts to seek individual remedies and structural changes, the corporate whitewasher’s interaction with law is dynamic. Just as companies may use extralegal whitewashes to avoid or dampen the reputational sanctions of law, the aggrieved may use law to counteract or reform extralegal washes. In fact, the possibility of washing reinforces the need for reputation-insensitive forums in which claims can be adjudicated. Although judges and juries are not perfectly insulated from reputational concerns and might be swayed by their own knowledge of the defendants’ good behavior, extralegal whitewashes generally do not change the terms of the underlying litigation itself. Corporate washes do not themselves destroy evidence or alter the law governing the original suit, though they may make future suits for those similarly situated more difficult.

Once again taking Wal-Mart and the \textit{Dukes} litigation as an example, a corporate whitewash does not much alter the potential of future litigation in this case itself. The EEOC can still pursue charges\textsuperscript{164} and

\textsuperscript{162} Id. at 231.
\textsuperscript{163} Id.
\textsuperscript{164} The EEOC can bring charges on its own volition without having to worry about class action certification because it is not bound by Rule 23. In June 2011, the EEOC began contemplating its role in this process. \textit{See Transcript of June 22, 2011 Meeting, U.S. Equal Emp. Opportunity Commission} (June 22, 2011), \textit{available at} http://www.eeoc.gov/eeoc/meetings/6-22-11/transcript.cfm. The EEOC has shown a willingness to sue Wal-Mart in the past over both individual claims and group claims. \textit{See Press Release, U.S. Equal Emp’t Opportunity Comm’n, Walmart to Pay More than $11.7 Million to Settle EEOC Sex Discrimination Suit} (Mar. 1, 2010), \textit{available at} http://www.eeoc.gov/eeoc/newsroom/release/3-1-10.cfm (announcing a suit against a distribution center for failure to hire women into a particular position); \textit{see also} \textit{Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Sues Wal-Mart for Disability Discrimination and Retaliation} (Dec. 15, 2011), \textit{available at} http://www.eeoc.gov/eeoc/newsroom/release/12-15-11c.cfm (announcing a suit over a failure to accommodate an individual with a disability and retaliation for requesting accommodation); \textit{Press Release, U.S. Equal Emp’t Opportunity Comm’n, Walmart Sued for Religious Discrimination} (Oct. 1, 2010), \textit{available at} http://www.eeoc.gov/eeoc/newsroom/release/10-1-10c.cfm (announcing a suit over a failure to discuss relig-
plaintiffs still have access to state-based class actions, such as those in Texas and California.\textsuperscript{165} In addition, over 1,900 women from the original nationwide class have filed individual suits.\textsuperscript{166} To the extent those suits may be unsuccessful, Wal-Mart's initiatives and programs in and of themselves probably do not speak to the plaintiffs' prospects.

If, however, plaintiffs win these suits, courts could both grant them individual remedies and force structural changes to Wal-Mart's employment practices. None of the alleged extralegal whitewashing affects the courts' remedial powers. Moreover, in cases of bad faith, the aggrieved may wield law to force companies to provide messages contrary to their attempted extralegal whitewash. To use a different real life Wal-Mart example, a group of deaf warehouse workers sued Wal-Mart for refusing to hire them. When Wal-Mart failed to comply with a decree ordering it to provide interpreters to these workers, the district court's contempt finding encouraged Wal-Mart to accept an amended decree that required Wal-Mart "to air a professionally produced 90-second TV ad featuring the charging parties telling their stories in American Sign Language with a voiceover."\textsuperscript{167} An even more vivid example might be the 1988 tobacco state settlement, through which tobacco companies agreed to fund the creation of the American Legacy Foundation to "produce and publish anti-smoking advertisements aimed at reducing youth tobacco usage."\textsuperscript{168} The American Legacy Foundation went on to create the notoriously anti-corporate, anti-smoking "Truth" campaign.

In addition to litigation, the aggrieved and their supporters can also pursue legislation and other forms of regulation to address their underlying concerns. Of course, the push for legislation is usually more


\textsuperscript{166} Pat Murphy, Wal-Mart Suits over Equal Pay Approach 2,000, Law. USA Wkly. Upd. June 18, 2012, at 1 (noting that 1,975 pay and promotion charges were filed with the U.S. Equal Employment Opportunity Commission by women making similar claims of sex discrimination).

\textsuperscript{167} Transcript of June 22, 2011 Meeting, supra note 167. "The ad was shown over two weeks on ABC, CBS, and NBC during the shows such as Good Morning America, The Today Show, and Meet the Press." Id.

\textsuperscript{168} Evidence suggests that the campaign succeeded in its goal of reducing youth smoking. Matthew C. Farrelly et al., Evidence of a Dose—Response Relationship Between "Truth" Antismoking Ads and Youth Smoking Prevalence, 95 Am. J. Pub. Health 425, 425 (2005). Other publicity sanctions could include confessions of knowing violation of statutes in newspapers and trade journals and conducting seminars for other companies.
sensitive to reputation and public perception than lawsuits, but even as companies pursue their extralegal whitewashes, the aggrieved can provide a different narrative to encourage legislative and regulatory change. For instance, in response to limitations on class actions for plaintiffs similarly situated to those in *Dukes*, policymakers have introduced the Equal Employment Opportunity Restoration Act (EEORA). The EEORA provides a new mechanism for workers to challenge discriminatory decision-making processes and weaken the role of an employer’s written nondiscrimination policies in litigation. Efforts for such legislative reform may be mobilized by highly visible litigation losses. Thus, even if Wal-Mart engages in an extralegal wash, the *Dukes* litigation might spur heightened support for currently proposed legislation, such as the Paycheck Fairness Act.

This legislation would help provide a structural remedy to similarly situated employees across time and space, by forcing corporations to demonstrate wage discrepancies are based on genuine business requirements.

Finally, extralegal whitewashes operate in the shadow of the law, but can themselves become targets of the law as well. In some instances, law might be deployed to challenge the extralegal whitewash itself. For example, litigants have successfully challenged corporate

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170. Deborah J. Vagins, *On the First Anniversary of Wal-Mart v. Dukes: Stand Up or Be Trampled*, HUFFINGTON POST (June 20, 2012, 12:05 PM), http://www.huffingtonpost.com/deborah-j-vagins/wal-mart-v-dukes_1612138.html. The EEORA would provide an alternative mechanism for workers to join together to enforce their rights to a discrimination-free workplace; clarify that workers can challenge the unfettered discretion of supervisors in their subjective decision-making to the same extent as other employment practices; ensure that an employers’ written nondiscrimination policies are only relevant in determining if a group action can move forward when the policies have been consistently and effectively implemented; and restore courts’ discretion to determine the correct method for assessing how victims of discrimination should be made whole.

Id.

171. For instance, a plaintiff-unfriendly decision led to the Ledbetter Fair Pay Act, which extended the statute of limitations for equal pay claims. See *Ledbetter v. GoodYear Tire & Rubber Co.*, 550 U.S. 618 (2007); see also Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

social responsibility initiatives under false advertising laws, as well as under corporate disclosure and misrepresentation laws. The Federal Trade Commission can also instigate litigation against corporate washers for material misrepresentations to consumers. Similarly, for those extralegal whitewashes aimed at employees, companies may find that aspirational but unenforced language in codes of conduct or employee handbooks open the possibility of tort or contract liability.

V. Conclusion

Law has many mechanisms to encourage corporations to engage in socially desirable behavior. This Article suggests that more attention should be paid to the sort of extralegal responses that class action and other high-profile litigation may inspire. While this Article takes a first step at defining corporate whitewashes in the litigation context, more work is needed. How will the Dukes holding implicate companies' decisions to engage in corporate washing? What insights can the empirical record bring to bear on the question of when corporate washes lead to structural reform? Will calls for increased transparency allow effective extralegal policing of corporate washes? If not, how ought the law intervene in corporate washes?

173. In Kasky v. Nike, a citizen sued Nike for misrepresentation under California's false advertising law, as conditions in their Vietnamese factories did not match the company's statements to the press and public. Claims that workers were paid double the minimum wage, received meals and health care, and were protected from sexual abuse did not match actual conditions. Kasky v. Nike, 45 P.3d 243, 248 (Cal. 2002).

174. Competitors may also sue each other for damages or injunctions under the Lanham Act if there has been a material misrepresentation that likely affected consumer choice and diverted sales from the plaintiff. Vos, supra note 17, at 691–92. The 2002 Sarbanes-Oxley Act mandates disclosure of off-sheet transactions and liabilities that may affect the current or future financial condition of a firm, which may include environmental obligations. Id. at 693.


176. Id. at 396–97.