The Curse of Bigness and the Optimal Size of Class Actions

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INTRODUCTION

How big is too big when it comes to class-action lawsuits? When does the size of the class magnify the manageability concerns to such a degree that sustaining a class action becomes intolerable? These are the central questions in the *Dukes v. Wal-Mart*[1] sex discrimination class action.

The title of this Essay is derived from a book called *Other People's Money* written by the future Justice Brandeis in 1914.[2] In the chapter entitled "A Curse of Bigness," Brandeis argued that corporate consolidation ultimately leads to failure of the corporation. As in Brandeis's time, the optimal size for companies—both from the perspective of the firm and of society—is again being debated. There is a strong analogue between the debate about size in the business context and in the class-action context. In the class-action context, Brandeis's "curse of bigness" operates in two conflicting ways. On the one hand, size is a curse for large defendants because they present an attractive target, and because a lawsuit this large is a genuine threat.[3] On the other hand, size is a curse for plaintiffs who must defend against the argument that there ought to be a limit to how big a class action can get.

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1. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010).

2. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY (1914). The full text of the chapter is available at http://www.law.louisville.edu/library/collections/brandeis/node/199.

3. *Cf.* Orly Lobel, *Big-Box Benefits: The Targeting Of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1688–94 (2006) (discussing ways in which Wal-Mart has been targeted because of its size).

Are some classes so big that they *must* fail? Some argue that there is so much at stake for the plaintiffs and the defendants that the class ought not to be certified. If courts refuse to certify classes based on size, either formally or by more stringent application of procedural requirements, then big class actions will fail. Or perhaps big class actions must fall apart because of their own weight; such a large group of plaintiffs can never be sufficiently homogenous to sustain class treatment. On the flip side, are some class actions "too big to fail?" The slogan might mean that the class must be certified because the alternative is that the defendant who has broken the law on a large scale will be more likely to avoid legal responsibility for the full extent of its wrongdoing.

Many opponents of the decision to certify the *Dukes* class present their arguments as a function of size. The dissenting opinion in the Ninth Circuit begins: "No court has ever certified a class like this one, until now."[4] It then describes the class as consisting of 1.5 million class members as of 2001 (that estimate has since been reduced).[5] In its petition for certiorari, Wal-Mart calls the case the "largest employment class action in history."[6] Amicus briefs in support of petitioner refer to this class action as a "behemoth,"[7] "massive,"[8] and "enorm[ous]."[9] One brief increases the estimated number of class members to as many as 3 million,[10] although neither plaintiff nor defendant seems to claim anything close to this number. Concerns about size reflect a problem presented in every class action: the tension between the tradition of individualized justice and the collective nature of the procedure.

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4. 603 F.3d at 629 (Ikuta, J., dissenting).

5. *Id*.

6. *See* Petition for Writ of Certiorari, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Aug. 25, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/08/Wal-Mart-petition-8-25-10.pdf.

7. Brief of Intel Corporation as Amicus Curiae in Support of Petitioner at 4, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3740521, at *4.

8. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3740524, at *3; Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner, at 3, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3806573, at *3.

9. Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 3, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3806575, at *3 (describing the "enormity of the class in this case").

10. See Brief Amicus Curiae of the California Employment Law Council in Support of Petitioner at 9, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3806577, at *9.

The statements about the size of this class action appeal to an intuition that the court's ability to provide individualized justice is inversely proportional to the size of the class action. Of course this is not the case. The relevant inquiry is whether the class is too heterogeneous to support collective treatment, regardless of the number of plaintiffs the class encompasses. The main legal issue presented by Wal-Mart is one of individualization—particularly that it has a right to present rebuttal evidence regarding its reasons for employment decisions with respect to every member of the class. Because such an individualized inquiry would be impossibly time consuming, the class action would not be sustainable. A related concern, one that Wal-Mart does not raise, looks at this problem from plaintiffs' point of view; it will be difficult to allocate any aggregate damages fairly among plaintiffs if some individual cases are stronger than others.

It is important to separate one's reaction to *Dukes v. Wal-Mart* from the doctrinal issues presented in that litigation, issues present in any discrimination class action. For some, this suit serves as a stand-in for concerns about unbridled corporate misconduct. For others, it is a paradigm of blackmail through litigation. It is tempting to make *Dukes* into a special case based on these intuitions. But any law made here will be applicable to every discrimination class action and perhaps to other types of class actions as well.

On the other hand, the issues present in this case are special because Wal-Mart is a special company. Wal-Mart is the largest private employer in the United States, employing nearly as many workers domestically as the U.S. government.[11] Wal-Mart is also famous for its scorched-earth litigation strategy. Recent news reports that Wal-Mart spent over a million dollars litigating a $7,000 fine are emblematic of this reputation.[12] Wal-Mart has substantial resources to litigate cases as a defendant and a plaintiff. These facts do not merely set the context of the *Dukes* class action. They are highly relevant to the legal question of whether the class action is superior to other

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11. *See* The Fortune Global 500 List of Biggest Employers, FORTUNE, July 26, 2010, *available at* http://money.cnn.com/magazines/fortune/global500/2010/screener.html?query=00001employers/index.html (last visited Oct. 11, 2010). Wal-Mart employs over 1.4 million people while the United States government, excluding the Post Office, employs 2 million. *Corporate Facts: Walmart by the Numbers*, WAL-MART, http://walmartstores.com/download/2230.pdf (last visited Oct. 11, 2010); *Career Guide to Industries, 2010–11 Edition*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oco/cg/cgs041.htm (last visited Oct. 11, 2010).

12. Steven Greenhouse, *Wal-Mart Fighting $7,000 Fine in Trampling Case*, N.Y. TIMES, July 7, 2010, at B1.

methods of litigation, as well as to concerns about litigation financing and collective action problems that provide the rationale for the class action device. Who will have the stomach and the resources to sue Wal-Mart if this class action fails? I imagine Wal-Mart hopes that very few will. In this sense, the *Dukes* case goes to the heart of the aspirations and limitations of the class-action device.

I. INDIVIDUALIZATION AND SIZE

Wal-Mart's individualization argument is really an argument about size and manageability. Whether or not the court ultimately approves the plaintiff class's theory that Wal-Mart's policy (or the policy not to have a policy) gives rise to a claim for discrimination,[13] Wal-Mart argues that it still has a right to rebut each and every individual plaintiff's claim under Title VII and the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*.[14] If the Supreme Court were to interpret Title VII and *Teamsters* in this way, it would be very difficult to sustain pattern-and-practice class actions. This is because the requirement of holding individual hearings for each and every plaintiff will take too long and is so burdensome on the court that the class action becomes unmanageable. Each individual hearing could become a mini-trial. In a class action of as few as 300 workers, if the court conducted one individual hearing per day, five days a week, the hearings would take sixty weeks.

Courts have resolved this problem using probabilistic evidence. Probabilistic evidence is already part of Title VII doctrine by operation of the presumption of discrimination once the existence of a discriminatory policy has been established. Legal presumptions are a

13. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 612 (9th Cir. 2010) (stating that the common question is "whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) . . . .").

14. Petition for Writ of Certiorari at 6, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Aug. 25, 2010), 2010 WL 3355820, at *6. The petition references *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and section 706(g) of Title VII. The latter states that "[n]o order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of [section 704(a)]." Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g).

way of introducing statistical evidence by converting a question of fact into a question of law.[15] In *Teamsters* the Supreme Court explained

> [The previous holding] that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. [. . .] Although the prima facie case [does] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it [does] create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice change[s] the position of the employer to that of a proved wrongdoer. Finally, the employer [is] in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records [are] the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process.[16]

Under *Teamsters*, both the burdens of production and persuasion rest with the defendant with respect to the question of why any class member who applied for a promotion was turned down.[17] In *Teamsters* the Supreme Court applied this burden-shifting across all the locations of that national company, as the plaintiffs seek to do in *Dukes*. *Teamsters* does, however, require that each nonapplicant plaintiff bear the burden of demonstrating that she would have applied for a promotion.[18]

In *Dukes* the employer has, at least according to the plaintiffs, deliberately avoided creating the kind of record that the presumption was intended to elicit. There are good reasons for Wal-Mart to continue to argue that it ought to be allowed to present evidence that it does not have and is unlikely to get. The first and foremost of these is that if Wal-Mart has a right to present rebuttal evidence in every case, and yet holding such hearings in a single court for this many plaintiffs is impossible, then the class action is impossible to maintain because it cannot be managed by the court. If Wal-Mart has no rebuttal evidence, it benefits greatly from a decision to decertify the class based on the right to individualized hearings. But even if Wal-Mart does have such evidence (and a right to individual hearings

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15. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 309–10 (1977) (discussing use of statistical methods); Alexandra Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 599 (2008) (discussing probabilistic analysis).

16. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977) (citations omitted).

17. *Id.* at 362.

18. *Id.* at 364 ("Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly.").

exists), it is unlikely that a rational actor would go through the expense of taking advantage of a right to individualized hearings for every class member. It is therefore in Wal-Mart's interest to insist on a right of which it does not intend to take advantage.

II. MANAGING INDIVIDUAL ISSUES FAIRLY FOR BOTH SIDES THROUGH SAMPLING

Is there a way to manage the individualization issue rather than jettisoning the class action entirely? Two methods are consistent with class treatment: pure aggregate determination of damages and bellwether trials.

First, the court could use the defendant's employment records to determine back-pay damages on a class-wide basis without holding individual hearings. This is what the district court proposed in *Dukes*.[19] In a number of cases, courts have permitted evidence to be presented as to the aggregate liability of the defendant and allowed that amount to be allocated among the plaintiffs. [20]

The task of the court would be to estimate how many women would have been paid more and/or promoted absent the discriminatory policy. The difference between what women would have been paid absent the discriminatory policy and what they were actually paid would constitute the sum that Wal-Mart ought to pay under the law (if and only if it is found liable, of course).[21] The next question the court would have to face would be how to allocate this amount among the women. To the extent that some women will have stronger cases than

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19. *See Dukes*, 603 F.3d at 624 n.49.

20. *E.g.*, Dougherty v. Barry, 869 F.2d 605, 614–15 (D.C. Cir. 1989) (ordering compensation for two available slots be allocated among eight plaintiffs, as it was not possible to predict which two plaintiffs would have been promoted); Domingo v. New England Fish Co., 727 F.2d 1429, 1444–46 (9th Cir. 1984) ("Nefco's lack of objective hiring criteria and use of word-of-mouth recruitment directed at particular ethnic groups makes it difficult to determine precisely which of the claimants would have been given a better job absent discrimination, but it is clear that many should have. In such a situation, class-wide relief is appropriate."); Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506, 518–22 (8th Cir. 1980) (holding that pro rata allocation of class-wide back-pay award was appropriate where it was difficult to identify individual persons discriminated against but plaintiffs had proven class-wide discrimination); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 261 (5th Cir. 1974). For a more recent case taking a similar approach, see *Albright v. City of New Orleans*, 208 F. Supp. 2d 634, 637–38 (E.D. La. 2002).

21. *Dukes*, 603 F.3d at 624 n.49. As the Ninth Circuit explained, in Stage I of the proceeding the court would hold a trial to determine whether "Wal-Mart engaged in a pattern and practice of discrimination against the class via its company-wide employment policies and that the pattern or practice 'was undertaken maliciously or recklessly in the face of a perceived risk that defendant's actions would violate federal law.' " *Id.* In Stage II—the remedy phase—the court would fashion injunctive relief and calculate and distribute the back-pay award. *Id.*

others, this raises significant fairness issues for the plaintiffs, but creates no unfairness to Wal-Mart.

There is a way in which the pro rata approach is not worse, and may actually be *better* for Wal-Mart than individualized hearings. To the extent that Wal-Mart did not retain records of the reasons for employment decisions and it bears the burden of proving an individual is not entitled to relief, its aggregate liability could be greater if it retains the right to rebut each individual claim if the court adopts an individualized approach rather than capping the back pay award and apportioning it pro rata among the plaintiff class. This is because any one of the women who applied *could have been* promoted, and if all these individual hearings were held, Wal-Mart might find itself liable for all rather than some of the aggregated back-pay awards.

A second option is for the court to hold a series of informational bellwether hearings to determine whether Wal-Mart can in fact present useful, credible evidence regarding individual cases. The best way for the court to do this is to begin by selecting a random sample of plaintiffs from among the class members. The court would then hold hearings in each of these sample cases. For the operation of this technique, it is critical that the sample be random, rather than chosen by the parties, so that the court can be assured that the sample is not biased. It is also imperative that the sample size be based on the variability within the class or relevant subclasses.[22]

The results of those hearings could be used for two purposes. First, the hearings would reveal whether Wal-Mart was actually able to introduce credible, admissible rebuttal evidence as to individual employment decisions. Second, the results of the hearings would inform the determination of overall back-pay damages to the class. To the extent that Wal-Mart was able to rebut claims of discrimination, the calculation of the total damages against Wal-Mart would be adjusted to reflect the likelihood that there were non-discriminatory reasons for the pay discrepancy or failure to promote in the other cases. In other words, the results of the sample hearings could be

22. *See* Alexandra D. Lahav, Rough Justice 24–29 (Aug. 9, 2010), *available at* http://ssrn.com/abstract=1562677 (discussing optimal methods for sampling in litigation). There is much more to say about the necessary conditions for rigorous sampling but insufficient room here. *See also* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 650–51 (1993) (discussing the challenges to sampling procedures, particularly on process grounds); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992) (presenting utilitarian arguments in favor of sampling to resolve mass tort cases); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 546 (1998) (presenting efficiency arguments in favor of statistical adjudication of damages).

extrapolated to the entire class. A sampling approach of this type would mean that the court need not choose between one class action and 500,000 individual suits. The court could hear rebuttal evidence, if there is any, with limited sacrifice to the manageability of the class action.

Sampling could also go some way toward solving the fairness problem that the *Dukes* class action creates for plaintiffs. Class members who have the strongest cases, that is those who would be entitled to the highest awards, may suffer if they only receive a pro rata amount which averages their substantial awards with those entitled to lesser damages. Because their expected damages would be greater than the pro rata amount, these class members would get less than their actual damages although they have a very strong case. For this reason it would be useful to determine what the actual variation is among class members. To the extent that there is employment data that memorializes objective characteristics relevant to recovery, such as certain job classifications that experienced more discrimination than others, for example, this data should be used to account for some variation among plaintiffs and pay them accordingly.

Furthermore, sampling may be even fairer to plaintiffs than individual litigation.[23] This is because there are unexplained variations in outcome in individual litigation. Similarly situated plaintiffs may obtain different findings of liability and different awards in individual litigation, depending on the quality of their lawyer and other factors that are not legally relevant. A class action has a comparative advantage for plaintiffs because it assures that similarly situated plaintiffs will in fact be treated equally. Comparing in-class variation with systemic variation is difficult because systemic variability is hard to measure. We know that outcomes of individual cases vary, but we often do not know *why* this is so, and conducting empirical studies on the question is time consuming and costly. It is nevertheless important to compare the class action with the real alternative system, rather than an ideal of accurate individual outcomes.

Courts have used informal sampling techniques to resolve mass tort cases, but have tended to be somewhat lax in their methodology.[24] Often courts will allow defendants and plaintiffs to pick the test cases. This results in a biased sample which needs to be discounted accordingly. Judges will sometimes pick the number of cases that they

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23. I develop this idea further for the tort context in *Rough Justice*, *supra* note 22.

24. For a more thorough discussion and critique of the use of informational bellwether trials, see *id*. at 14–18.

will hear for no apparent reason and without articulating the justification for choosing that number of cases. The better approach is to survey the class initially to determine the heterogeneity of the class members, then use that data to determine the appropriate sample size and hold hearings on that number of cases. A similar method was proposed in the World Trade Center Disaster Site Litigation.[25]

Only one court has used such a sampling procedure in a class action. The fact that sampling has only been successfully implemented in one class action is somewhat perplexing, since the procedure is probably best used in the class action context where the universe of claimants is well defined. In *Hilao v. Marcos*, a human rights class action against the estate of Philippine dictator Ferdinand Marcos, the Ninth Circuit approved of a sampling procedure in which a special master traveled to the Philippines, conducted depositions, and reviewed documents of a sample of plaintiffs.[26] The special master made preliminary liability and damages findings with respect to each plaintiff in the sample group and suggested a method for extrapolating those findings to the rest of the class. These findings were then presented to the jury, which issued the ultimate verdict and award.

Is *Hilao* a unique case? Perhaps. It was a human rights class action, brought under the Alien Tort Claims Act and alleging terrible atrocities. But the particular facts of *Hilao* do not logically lead to the conclusion that the innovative procedure used there ought not to be repeated. The *Dukes* class action also has its unique qualities, not least of which is the size of the defendant and the leverage that such a powerful defendant with a track record of aggressively litigating cases has against individuals in small-scale cases across the country.

No procedure can provide perfect justice. The task of the courts in cases like *Dukes* is to find an appropriate balance between liberty and equality values. Liberty values animate the push towards individualization articulated by Wal-Mart and are part of our

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25. *See In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 503–05 (S.D.N.Y. 2009).

26. Hilao v. Estate of Marcos, 103 F.3d 767, 782–87 (9th Cir. 1996). This case is discussed positively in *Dukes*, 603 F.3d at 625–29, and is described and analyzed in greater detail in Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008). The district court opinion in *Hilao* provides a good history of the case. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995). The *Hilao* case was an opt-in class action, which distinguishes it from *Dukes*. Still, I am not sure that this distinction matters for purposes of the propriety of a statistical adjudication method except with respect to plaintiffs' claims to distributive justice, which are addressed below.

litigation tradition.[27] Deterrence and equality values animate Title VII and the relevant case law, authorizing aggregate determinations of liability and damages and approving pro rata allocation of awards among plaintiffs.[28] A statistical adjudication procedure that uses a rigorous methodology provides a reasonable compromise between liberty values on one hand and deterrence and equality values on the other.

III. FEAR OF BIGNESS

The use of probabilistic evidence and statistical adjudication allows courts to resolve big cases such as *Dukes* fairly and efficiently. But certifying a big case as a class action opens the door to the argument that the large class action will threaten ruinous liability for the defendant, liability that would not exist if cases were individually decided.[29] This is, in essence, an argument that the class action is so big it *must* fail. Some have called this "blackmail," implying that plaintiffs seeking to certify big class actions act with bad intent.[30] It might be better described as a "duress" argument against class actions.[31]The duress argument is viscerally powerful and reappears repeatedly in discussions of the law of class actions. This argument could be characterized as a due process argument to the extent that the pressure to settle deprives the defendant of its day in court. The

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27. Taylor v. Sturgell, 553 U.S. 880, 892–893 (2008) (describing our "deep-rooted historic tradition that everyone should have his own day in court") (citation and internal quotations omitted).

28. *See, e.g.*, *supra* notes 19–21 and accompanying text.

29. Amicus curae briefs in support of granting review that make this argument include: Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner Wal-Mart Stores, Inc. at 2, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3806573, at *2 ("Once certified, a class can exert tremendous and unjustifiable leverage on the retailers to settle, with the resulting reputational harm."); Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner at 4, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3740526, at *4 ("The enormous hydraulic pressure on defendants to settle cases that lack merit becomes overwhelming."); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3, 5, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3740524, at *3, 5 (arguing that the class action presents "grave risks for American businesses" and repeatedly describing its estimate of the potential damages awards—which was in the billions); Brief of Intel Corporation as Amicus Curiae in Support of Petitioner at 1, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Sept. 24, 2010), 2010 WL 3740521, at *1 (describing the *Dukes* case as "bet-the-company" litigation).

30. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1388 (2003). The discussion that follows owes a great deal to Silver's thoughtful analysis.

31. *Id.*

duress argument can also be presented as an efficiency argument that unwarranted pressure to settle results in over-enforcement or over-deterrence, thereby limiting beneficial economic activity.

In order to evaluate this claim, it is necessary to articulate a precise version of the duress argument as it might play out in *Dukes v. Wal-Mart*. First, the class action will include more women than are likely to bring individual suits against Wal-Mart or even store-based or regional class actions against the company. This means that Wal-Mart's expected losses in the class action are greater than they probably would be in *seriatim* litigation. In itself, this argument is a very poor one against the class action. The class action is not a procedural device intended to approximate the outcome that would occur if cases were litigated separately. Instead, it is a procedural device intended to increase access to justice by collecting claims that would otherwise be difficult to bring individually. In other words, the class action is intended to force the defendant to account for *all* the damages it caused a group of claimants. The potential for enormous damages awards does not give the defendant a get-out-of-certification-free card. A rule against large class actions would merely encourage defendants to think big when they violate the law or fail to monitor for systemic problems. So while it is true that certifying this class will increase Wal-Mart's exposure, this is precisely the goal the class action device is intended to achieve.

A second version of the duress argument is that the class action increases the variance associated with expected outcomes to an intolerable level. This is the argument Judge Posner made in his decision to decertify the class action in *Rhone-Poulenc Rorer*,[32] a case that has received considerable attention.[33] The outcome of the class-action suit will either be a finding of class-wide liability with aggregated damages or no liability. By contrast, if a number of suits were brought by female employees across the country, presumably the outcomes would be varied, including some findings of liability and awards of damages and some judgments for the defendant. The class treatment creates one large gamble for the defendant instead of many small gambles. This one large gamble may pose a substantial threat (albeit remote) to the defendant, causing it to settle the class action where it might litigate individual cases.

This argument is stronger than the first, but it is unpersuasive for three reasons. First, this case does not involve the potential for one ruinous jury verdict. The trial plan in *Dukes v. Wal-Mart* will likely

32. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995).

33. For the best analysis of this case see Silver, *supra* note 30, at 1369–80.

have two parts. The court will determine whether Wal-Mart engaged in a pattern or practice of discrimination by not having a policy respecting wages and promotions.[34] Only if Wal-Mart loses this phase will the court consider the question of back pay. It may be that Wal-Mart is concerned about the district court getting the law wrong with respect to whether a claim for discrimination will lie when an employer's policy is not to have a policy, but the remedy for that problem is the appellate process.[35]

Furthermore, the determination of the back-pay award will not be based on the outcome of a single trial. There is no worry in a case like this one about an aberrant and ruinous verdict determining the total damages award because the total liability will be computed based on aggregated employment data. While there is some probability of error in this calculation, the nature of the calculation reduces the uncertainty for Wal-Mart with respect to aggregate liability as compared to the concern that a runaway tort verdict might raise. To the extent that Wal-Mart expects to pay less in damages in individual litigation than it would in a class action, it is for extra-legal reasons such as the quality of plaintiffs' counsel or limitations on plaintiffs' resources.

Second, there is no empirical basis for the proposition that an adverse finding in this class action will confront Wal-Mart with ruinous liability. Wal-Mart is only liable for the difference between the pay a woman would have received if she had not been discriminated against and what she actually received.[36] Many of the claimants are hourly workers whose wages would not be very high even if they were paid comparably with men. The number is likely to be large because the class is large, but the fact that Wal-Mart may have discriminated against many and racked up substantial liability cannot, in itself, be an argument against holding it to account. And even if the class action did threaten Wal-Mart with ruinous liability, that is not a reason to

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34. It might be said that the real argument here is about the theory of plaintiffs' recovery, and although it may be difficult to disaggregate the merits from the certification decision, the validity of that theory is a separate question from whether, if plaintiffs' theory is correct, defendants should still avoid collective treatment because the class is too big to certify. For a pessimistic view on the likelihood of success of plaintiffs' theory, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006).

35. This raises a very interesting issue about the nature of legal decisions and what courts ought to do to ensure uniformity in legal interpretation, albeit one beyond the scope of this short Essay.

36. This of course leaves out the plaintiffs' potential compensatory and punitive damages claims. The class definition excludes compensatory damages and the Ninth Circuit remanded the certification of the punitive damages class. Although I believe punitive damages classes make sense, that issue would not be before the Supreme Court should it grant certiorari.

refuse to certify a class action against the company. It would create a perverse incentive indeed to tell companies that as long as their misconduct is sufficiently large in scale they can avoid class treatment and very likely avoid being held to account altogether.

Third, the theory that the class action creates intolerable variance in results hinges on accepting the proposition that Wal-Mart is risk averse in litigation. There is no empirical evidence that Wal-Mart is, in fact, a risk-averse defendant generally speaking. Charles Silver points to experimental studies demonstrating that defendants are risk preferring.[37] Whether this is true of defendants generally, it does seem to be true of Wal-Mart, as demonstrated anecdotally by the company's decision to litigate several wage and hour class actions brought against it. In 2005 Wal-Mart litigated to verdict (and beyond) one such class action in California involving 116,000 class members. The result was a jury verdict of one hundred and seventy two million dollars against the company.[38] In 2006 Wal-Mart litigated a similar case in Pennsylvania involving 186,000 workers. That case resulted in a 188 million dollar liability including compensatory and statutory damages as well as attorneys' fees.[39] Thereafter, Wal-Mart settled about sixty other such suits.[40] There is other empirical evidence that Wal-Mart is a repeat player in litigation, trying to form the law in ways that benefit the company's growth.[41] In any event, a given defendant's risk aversion is an empirical question to which the answer cannot be assumed. There is no reason to think that courts are very good at determining who is risk averse, risk neutral, or risk preferring in order to adjust procedures accordingly.[42] Nor should courts attempt to use unexamined assumptions about risk aversion to alter procedural law.

Finally, even if Wal-Mart were risk averse, whether the courts should accommodate this risk aversion in interpreting procedural rules is a serious normative question. Concern about defendants' risk aversion is really another way of expressing dismay at the shift in the

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37. Silver, *supra* note 30, at 1409.

38. Lisa Alcalay Klug, *Jury Rules Wal-Mart Must Pay $172 Million Over Meal Breaks*, N.Y. TIMES, Dec. 23, 2005, at A22.

39. Steven Greenhouse & Stephanie Rosenbloom, *Wal-Mart Settles 63 Lawsuits Over Wages*, N.Y. TIMES, Dec. 23, 2008, *available at* http://www.nytimes.com/2008/12/24/business/24walmart.html?_r=1.

40. *Id*.

41. Lea S. Vandervelde, Wal-Mart as a Phenomenon in the Legal World: Matters of Scale, Scale Matters (Univ. of Iowa Legal Studies Research Paper No. 05-36, 2006), *available at* http://papers.ssrn.com/id=876985.

42. *See* Silver, *supra* note 30, at 1417–18.

balance of power that the class action effects. In individual litigation, the large corporate defendant with substantial resources facing multiple small-scale discrimination actions can wear down its opponents. In class actions, the collection of claimants either equalizes the leverage between the parties or, perhaps in some cases, shifts the balance of power to the plaintiff class. The normative question, then, is who should have leverage in litigation?[43] A defendant's allegation of duress to settle does nothing to address this question but merely assumes an answer: "the balance of power should lie with *me*." It is important not to forget that Wal-Mart itself has benefitted from the class-action device as a plaintiff. The company was the named plaintiff in an antitrust class action lawsuit against Visa and MasterCard that included (by one estimate) four million members.[44] There, Wal-Mart made arguments similar to those now being made by the plaintiffs in *Dukes*.[45]

The courts ought not to be in the business of shifting the balance of power to the defendant in all cases, nor ought judges make assumptions about defendants' risk aversion or about the ultimate financial toll that a successful class action will take on a defendant. If a defendant has acted unlawfully, the court's job is to make sure that the law is correctly applied, that the defendant is appropriately deterred from future misconduct, and that claimants are compensated. Giving defendants a free pass in big cases does not achieve any of these goals.

CONCLUSION

It is very difficult to determine how big is too big in class actions. In the end, not the number of class members but concerns about variation among them ought to drive decisions about the viability of class actions. To the extent that variations among class members can be accounted for by objective factors, statistical adjudication presents a fair solution for both defendants and plaintiffs when resolving big cases like *Dukes v. Wal-Mart*.

In considering the normative question of who should hold the balance of power in litigation, we must not forget that companies like Wal-Mart find themselves on both sides of the "v." Class actions are a fascinating topic for study for a reason illustrated by its role as defendant in *Dukes v. Wal-Mart* and plaintiff in *In re Visa*

43. *Id*.

44. *See In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001).

45. *See generally id*.

Check/MasterMoney Antitrust Litigation: The lines along which people disagree are unpredictable, and the politics of this procedural device are not clear-cut.

To return to Justice Brandeis's "curse of bigness," the curse of the class action is that the size of the suit often tracks the size of the defendant. The larger corporate entities become, and the more uniform their conduct across our nation, the more appropriate larger classes become. As an entity, Wal-Mart shares some attributes with class actions. First, Wal-Mart operates on economies of scale. Volume sales with small margins have been the key to Wal-Mart's success. This is also the case for the class action, which collects claims and lawyers to finance litigation through economies of scale. Second, both serve as "condensation symbols"—that is to say, both are targets for discussions of broader social issues.[46] Both Wal-Mart and class-action lawsuits have garnered a great deal of negative attention in the recent past. For example, Wal-Mart has become the screen against which many project generalized anxieties about the United States' transition from a manufacturing to a service economy and the status of women in the workforce. Class actions have become the locus of debate about the litigiousness of our society; the safety of our environment, food supply, and medical treatments; and the relationship between the state and federal courts.

The procedural law should not refuse to recognize the relationship between the size of the harm and the size of the remedy. To the extent that we find the size of some class actions disturbing, it is important to remember that these suits merely reflect the size of the events in the world they purport to regulate.

46. *See* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 6–9 (1964).