
PANEL V: PROVING DISCRIMINATION

ON EMPLOYMENT DISCRIMINATION AND POLICE MISCONDUCT: TITLE VII AND THE MIRAGE OF THE “*MONELL* ANALOGUE”

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INTRODUCTION

The Civil Rights Act is at a pivotal point at fifty. Title VII in particular faces something of an early- to mid-life crisis, and one of the principal struggles during this time of crisis is over the contours of systemic discrimination law. Organizations have largely shed their banners refusing to hire blacks and women, but in some organizations the employment success of members of protected groups continues to be dampened by biased employment decisions. We as a society must decide whether and when these organizations will be held liable under Title VII. The issue is one of policy, though the courts rarely

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frame it as such. Instead, they are incrementally moving systemic discrimination law in new directions. In this Article, I examine one such incremental move.

At oral argument in *Wal-Mart Stores, Inc. v. Dukes*,¹ Justice Kennedy proposed a “*Monell* analogue” for systemic discrimination claims under Title VII of the Civil Rights Act.² His proposal followed on a similar suggestion made by Chief Justice Roberts,³ and even Justices Ginsburg and Breyer asked questions that might be construed along these lines.⁴ Glimmers of the analogue also surface in the Supreme Court’s majority opinion in the case.⁵ Why are the Justices drawn to this analogy? And, more importantly, is it apt? Using police misconduct⁶ as a specific contextual lens, this Article, part of the Boston University Law Review Symposium, *The Civil Rights Act at Fifty: Past, Present, and Future*, probes the similarities and differences between patterns and practices of misconduct litigated under Title VII of the Civil Rights Act (discrimination in employment) and patterns and practices of misconduct litigated under § 14141 (excessive force and other misconduct by police officers) governed by the law of *Monell*. I argue that the “*Monell* analogue” is a mistake, and I show why. It turns out that there are similarities between police misconduct carried out in police departments and discrimination carried out in work organizations, but the differences in the laws are greater than the similarities in the problems. And even the similarities in the problems drive home why Title VII law should not look more like *Monell*.

I. THE *MONELL* ANALOGUE

A. *The Backdrop: The Law of Monell*

For many years, local governments could not be sued by individuals for constitutional violations because governments were not considered “persons”

¹ 131 S. Ct. 2541 (2011).

² Transcript of Oral Argument at 5, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277). *See infra* notes 33-37 and accompanying text.

³ *Id.* at 4-5.

⁴ *See id.* at 36 (“Justice Breyer: -- [G]iven the facts about what people say and how they behave, many of which central management knew, and given the results [based on statistics] which central management knew or should have known, should central management under the law have withdrawn some of the subjective discretion in order to stop these results?”); *id.* at 6-7 (“Justice Ginsburg: . . . The company gets reports month after month showing that women are disproportionately passed over for promotion, and there is a pay gap between men and women doing the same job. It happens not once, but twice. Isn’t there some responsibility on the company to say, is gender discrimination at work, and if it is, isn’t there an obligation to stop it?”).

⁵ *See Wal-Mart*, 131 S. Ct. at 2552-56; *infra* text accompanying notes 38-44.

⁶ I use police misconduct in the form of brutality or excessive force and neglect in particular because these are the types of misconduct cases that I expect are most likely to be considered analogous to employment discrimination and to trigger thoughts of *Monell*.

under section 1983, the federal statute that provides a private right of action for such violations.⁷ In 1978, in *Monell v. New York City Department of Social Services*,⁸ the Supreme Court reversed position, holding that local governments could indeed be sued for damages as well as for injunctive and declaratory relief.⁹ But, said the Court in *Monell*, a government body will not be held liable under a theory of respondeat superior for the constitutional violations of individual actors.¹⁰ Instead, to obtain governmental entity liability a plaintiff must prove that the individual actor(s) at issue acted pursuant to an unconstitutional policy or informal “custom” of the government.¹¹ A plaintiff might do this directly with proof of bias or other mal-intent on the part of high-level decision-makers who adopted an unconstitutional government policy, or indirectly “by showing a series of bad acts and inviting the court to infer from them that the policy-making level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned . . . the misconduct of subordinate officers.”¹²

In 1989, in *City of Canton v. Harris*,¹³ the Court expanded *Monell* to apply to cases of “failure to train.”¹⁴ The Court unanimously held that “the inadequacy of police training may serve as the basis for § 1983 liability,” specifically “where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”¹⁵ In a separate opinion, concurring in part and dissenting in part, Justice O’Connor elaborated. She explained that a plaintiff can meet the standard of deliberate indifference with a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of policymakers, whose deliberate indifference is evidenced by their failure to correct once the need for training became obvious.¹⁶ Alternatively, a plaintiff could meet the standard where there is “a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face.”¹⁷ Presenting “the constitutional limitations . . . on the use of deadly force by police officers” as an example,

⁷ See 42 U.S.C. § 1983 (2012); *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961).

⁸ 436 U.S. 658 (1978).

⁹ *Id.* at 663, 690.

¹⁰ *Id.* at 691.

¹¹ *Id.* at 690-91.

¹² *Johnson v. Dossey*, 515 F.3d 778, 782 (7th Cir. 2008) (quoting *Woodward v. Corr. Med. Servs.*, 368 F.3d 917, 927 (7th Cir. 2004)); see also *Monell*, 436 U.S. at 694 (“[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”).

¹³ 489 U.S. 378 (1989).

¹⁴ *Id.* at 387.

¹⁵ *Id.* at 388.

¹⁶ See *id.* at 397 (O’Connor, J., concurring in part and dissenting in part).

¹⁷ *Id.* at 396.

Justice O'Connor explained that "[t]he constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue."¹⁸ This idea of deliberate indifference has since extended to cases involving departmental failure to supervise or to discipline—cases in which plaintiffs usually use the prior method of proof, showing a pattern of unconstitutional conduct and failure on the part of the governmental agency to correct the conduct.¹⁹

There is one more piece to this law of *Monell*. Although the Court in *Monell* did allow plaintiffs to obtain damages and injunctive and declaratory relief, in a series of subsequent cases the Court restricted plaintiffs' ability to obtain generalized injunctive relief, the kind of relief that requires governments to change their policies and practices. Most famously, in *City of Los Angeles v. Lyons*,²⁰ the Court overturned a preliminary injunction restricting the Los Angeles Police Department ("LAPD") from employing a chokehold maneuver that carried a high risk of injury or death except in cases where the officer was threatened with death or serious injury.²¹ The overturned injunction also mandated "[a]n improved training program and regular reporting and recordkeeping" regarding the use of chokeholds.²² The Court held that neither the plaintiff's previous experience with the chokehold nor the continued existence of a departmental policy authorizing its use constituted sufficient threat of future harm to confer standing on the plaintiff for the requested equitable relief.²³ Because few plaintiffs could meet the requirements to obtain equitable relief set forth in *Lyons*,²⁴ generalized injunctive relief was rendered largely unavailable.²⁵ When the U.S. Attorney General tried to fill the gap, seeking to obtain generalized injunctive relief when private plaintiffs could not, the Third Circuit rejected that claim as well.²⁶

¹⁸ *Id.*

¹⁹ See generally Craig G. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. SOC. JUST. 251, 255-59 (2008) (describing cases involving allegations of failure to discipline).

²⁰ 461 U.S. 95 (1983).

²¹ *Id.* at 99-100, 105.

²² *Id.* at 99-100.

²³ *Id.* at 105.

²⁴ *Id.* at 105-06 (holding that, in order to secure standing for his claim to equitable relief, plaintiff "had . . . to allege that he would have another encounter with the police [and assert] either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such a manner").

²⁵ There were some cases in which courts found standing for individual plaintiffs even after *Lyons*. See, e.g., *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 506-08 (9th Cir. 1993) (involving 75 alleged incidents within a six-by-seven-block area).

²⁶ *United States v. City of Phila.*, 644 F.2d 187, 190-201 (3d Cir. 1980).

In the early 1990s, however, after several high-profile police brutality cases, including the Rodney King beating in Los Angeles, Congress proposed legislation to provide the government and private plaintiffs with standing to obtain generalized injunctive relief.²⁷ Congress passed section 14141 of the Violent Crime Control and Law Enforcement Act in 1994.²⁸ Section 14141 specifically authorizes the Department of Justice (“DOJ”) (but not private plaintiffs) to institute suits for declaratory and injunctive relief against police departments engaged in a “pattern or practice” of conduct that deprives persons of constitutional rights.²⁹ The idea was to give the DOJ the power to bring suits and obtain injunctive relief that would change police practices and reduce police brutality.³⁰

So far it appears that section 14141 cases brought by the DOJ will have to meet the same *Monell* requirements as cases brought by private individuals under section 1983.³¹ This means that the DOJ and private plaintiffs alike must prove an act or failure to act on the part of the governmental entity resulted in specific constitutional violations and its act or failure to act was at least the product of deliberate indifference, if not of formal policy. One way in which plaintiffs have tried to do this is by presenting incident statistics, statistics showing a series of complaints of police brutality within a city.³²

²⁷ See generally Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3207-15 (2014) (describing proposed legislation before and after the Rodney King incident); Marshall Miller, Note, *Police Brutality*, 17 *YALE L. & POL’Y REV.* 149, 161-64 (1998) (describing the legislative background to section 14141).

²⁸ 42 U.S.C. §14141 (2012).

²⁹ *Id.*

³⁰ See Rushin, *supra* note 27, at 3215; Miller, *supra* note 27, at 163-64.

³¹ See, e.g., *United States v. City of Columbus*, No. 2:99-CV-1097, 2000 U.S. Dist. LEXIS 11327, at *26 (S.D. Ohio Aug. 3, 2000) (rejecting the DOJ’s argument that section 14141 should be construed to permit respondeat superior liability against the government and reasoning that Congress passed section 14141 in order to supplement section 1983 without imposing a “new standard of conduct on law enforcement”); H.R. REP. NO. 102-242, pt. 1, at 135, 138 (judiciary committee bill report to predecessor to section 14141) (explaining the provision as intending to “authorize the United States Attorney General to obtain civil injunctive relief against governmental authorities that engage in patterns or practices of unconstitutional or unlawful conduct by law enforcement officers” and describing the provision as a response to the Commission Report in the Rodney King beating incident that found that the conduct of the offending officers “was well known to police department management, who condoned the behavior through a pattern of lax supervision and inadequate investigation of complaints”). There has been very little litigation of the meaning of “pattern or practice” under section 14141; rather, section 14141 cases have generally been resolved without litigation. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 *STAN. L. REV.* 1, 13-19 (2009) (describing DOJ enforcement of section 14141); Rushin, *supra* note 27, at 3227. For an argument that section 14141 should not follow the same requirements as *Monell*, see Miller, *supra* note 27, at 166-69.

³² Some courts in section 1983 cases have been reluctant to accept these statistics as

B. Monell *in* Wal-Mart

Both at oral argument and in the majority opinion in *Wal-Mart Stores, Inc. v. Dukes*, the Justices relied on concepts from the law of *Monell*. For example, at oral argument:

Chief Justice Roberts:

I suppose if corporate headquarters had learned that the subjective decisionmaking or the delegation of decisionmaking to the field was resulting in several discriminatory practices or a pattern of discrimination—in other words, the decentralized process was leading to discrimination—then I suppose . . . that could be attributed to the policy adopted by . . . headquarters?³³

And again:

[S]o, they've got thousands of stores, and . . . every week they get a report from another store saying that . . . there's an allegation of gender discrimination. At some point, can't they conclude that it is their policy of decentralized decisionmaking that is causing or permitting that discrimination to take place?³⁴

Justice Kennedy:

The Chief Justice's question reminds me somewhat of our rule in *Monell* under 1983: A city is not liable for . . . a constitutional violation unless it has a policy. Would you think that we could use that as an analogue to determine whether or not there is a common question here?³⁵

And again:

Suppose, following the *Monell* analogue . . . there's a showing of deliberate indifference to the violation. Would that be a policy?³⁶

evidence of a pattern or practice of police brutality or deliberate indifference on the part of a department. *See, e.g.*, *Bryant v. Whalen*, 759 F. Supp. 410, 422-24 (N.D. Ill. 1991) (granting the city summary judgment and holding that statistics showing low percentage of sustained complaints and repeated prior complaints against the defendant officers were insufficient without additional evidence that the complaints had merit). Other courts have been more receptive, particularly when the statistics are presented together with additional evidence about a city's complaint processes. *See, e.g.*, *Beck v. City of Pittsburgh*, 89 F.3d 966, 974-76 (3d Cir. 1996) (reversing a grant of summary judgment in favor of the city on the ground that statistical analyses together with evidence of individual complaints and lack of a system for tracking complaints was sufficient evidence of deliberate indifference). For more discussion about use of statistics in police misconduct cases, see *infra* notes 82-87 and accompanying text.

³³ Transcript of Oral Argument at 4, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

³⁴ *Id.* at 4-5.

³⁵ *Id.* at 5.

³⁶ *Id.* at 6.

Later, Justice Kennedy:

Help me, if you can, with this. Let's . . . suppose that experts' testimony, sociologists and so forth, establish that in the industry generally and in retail industry generally, women still are discriminated against by a mathematical factor of X. You have a company that has a very specific policy against discrimination, and you look at . . . the way their employees . . . are treated, and you find a disparity by that same mathematical factor X, does that give you a cause of action? . . . [E]ven if you could not show deliberate indifference?³⁷

Glimmers of *Monell* also appear in the majority opinion in *Wal-Mart*.³⁸ The Justices in the majority emphasized the need for plaintiffs to point to a "policy" of discrimination.³⁹ They insisted that the key for class certification was proof that individual supervisors acted in common ways and with common biases, pursuant to organizational policy, whether formal or informal.⁴⁰ This framing mirrors the law of *Monell* both by requiring proof of policy and by requiring proof that that policy resulted in specific violations, here discrimination by supervisors in decisions about pay and promotions.⁴¹

The Court's treatment of the plaintiffs' evidence in *Wal-Mart* was consistent with this view. The Court found the statistical evidence wanting because the analyses could not prove that supervisors were acting on similar biases when "almost all of them will claim to have been applying some sex-neutral, performance-based criteria."⁴² Similarly, the expert testimony was unhelpful, said the Court, because the expert could not say "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."⁴³ The Court also insisted that the anecdotal evidence the plaintiffs presented was insufficient to support an "inference that all the individual, discretionary personnel decisions are discriminatory."⁴⁴ This reasoning in particular is very similar to the Court's reasoning in *Rizzo v.*

³⁷ *Id.* at 39-40.

³⁸ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reversing certification of a nationwide class of plaintiffs alleging sex-based discrimination against the national retail chain).

³⁹ *Id.* at 2553 (describing a method of establishing commonality among plaintiffs requiring "significant proof" that Wal-Mart "operated under a general policy of discrimination" (internal quotations omitted)).

⁴⁰ *See id.* at 2552 (explaining that, in the Court's view, plaintiffs "wish to sue about literally millions of employment decisions at once"); *id.* at 2553-55 (requiring proof of a general policy of discrimination and stating that "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction").

⁴¹ *Id.* at 2550-54.

⁴² *Id.* at 2555.

⁴³ *Id.* at 2553 (quoting *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004)).

⁴⁴ *Id.* at 2556.

Goode,⁴⁵ an early decision involving police misconduct and holding that the plaintiff did not have standing to sue for generalized injunctive relief.⁴⁶ The *Rizzo* Court downplayed the number of incidents of excessive force as only “some 20 in all—occurring at large in a city of three million inhabitants, with 7,500 policemen,”⁴⁷ just as the *Wal-Mart* majority downplayed the plaintiffs’ anecdotal testimony of individual instances of discrimination as being insufficient in comparison to the size of the class and the Wal-Mart workforce.⁴⁸

Although glimmers of *Monell* surface in the majority opinion in *Wal-Mart*, it is possible, nonetheless, that the Justices’ reach for a *Monell* analogue is limited to class certification. Indeed, on the issue of the shape of the substantive law after *Wal-Mart*, I have argued elsewhere that a close reading of the majority opinion suggests the Court is inclined toward a standard for employer liability for systemic discrimination that would require proof that high-level decision makers within an organization adopted a policy of discrimination.⁴⁹ A *Monell* analogue would arguably impose a slightly lesser standard than this policy-required view because it would permit a finding of policy based on informal custom or deliberate indifference.⁵⁰ In this Article, I make no predictions about which of the two standards will win the day on the substantive law. Rather, I seek simply to show why reaching for a *Monell* analogue rests on mistaken assumptions about the similarities between employment discrimination and police misconduct and to show that reliance on such an analogue would be a mistake.

⁴⁵ 423 U.S. 362 (1976).

⁴⁶ *Id.* at 378-81.

⁴⁷ *Id.* at 373.

⁴⁸ *Wal-Mart*, 131 S. Ct. at 2556 (“Here . . . respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart’s 3,400 stores.”). This kind of reasoning also surfaced in employment discrimination cases prior to *Wal-Mart*. See, e.g., *King v. Gen. Elec. Co.*, 960 F.2d 617, 624, 627 (7th Cir. 1992) (understanding the law to require “significant individual testimony to support statistical evidence” in order to find a pattern or practice of discrimination and holding six or seven individual incidents too “meager” in comparison to the forty alleged in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-38 (1977), and twenty in *Chisholm v. United States Postal Service*, 665 F.2d 482, 495 (4th Cir. 1981)).

⁴⁹ See Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011).

⁵⁰ See *supra* part I.A. The difference between the two may be quite slight in practice. See, e.g., *Wilson v. City of Chi.*, 6 F.3d 1233, 1240 (7th Cir. 1993) (explaining that entity liability under a failure-to-train theory requires a showing that “an abusive practice has actually been condoned” and stating that plaintiffs might have prevailed if the police supervisor “had thrown the complaints into his wastepaper basket or had told the office of investigations to pay no attention to them”).

C. *The Mirage*

We should expect the *Monell* analogue to be appealing to those who would prefer that employer liability under Title VII be narrowly limited. Under *Monell*, the entity, e.g., Wal-Mart, would be liable only if the plaintiff could show that it had a policy of discrimination or at least had acted with deliberate indifference in the face of the knowledge that the company's subjective decision-making policy "was leading to discrimination."⁵¹ But there are several other reasons why judges and legal commentators thinking about the law of employment discrimination might be drawn to the *Monell* analogue, apart from sheer hostility to employment discrimination laws. These reasons range from the narrative framing of a case like *Wal-Mart* so that it looks like one of police misconduct to the broader legal emphasis in modern employment discrimination law on internal complaint processes and the use of statistics to establish entity liability.

1. The Story of Discrimination in Cases Like *Wal-Mart*

As the Court framed it, *Wal-Mart* looked a lot like a police misconduct case involving failure to train or failure to supervise/discipline.⁵² Take the facts of *City of Canton v. Harris*, the case in which the Court accepted deliberate indifference as a means of establishing municipal liability for police misconduct. In April 1978, Geraldine Harris was arrested by officers of the Canton Police Department.⁵³ Despite signs that she was suffering from a medical condition, no medical attention was summoned for her.⁵⁴ She was eventually taken to a hospital, where she was diagnosed as suffering from severe emotional ailments.⁵⁵ The applicable theory of liability under section 1983, as explained by the District Court, was that:

[T]he City of Canton had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners . . . [and] that the vesting of such *carte blanche* authority with the police supervisor without adequate training to recognize when medical treatment is needed was grossly negligent or so reckless that future police misconduct was almost inevitable or

⁵¹ See *supra* note 33 and accompanying text.

⁵² *Wal-Mart* is one of many cases in which plaintiffs have sought to establish employer liability through systemic discrimination theories. See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 151-54 (2003); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 682-87 (2003) (describing cases).

⁵³ *City of Canton v. Harris*, 489 U.S. 378, 380-81 (1989).

⁵⁴ *Id.* at 381.

⁵⁵ *Id.*

substantially certain to result.⁵⁶

Cases involving police brutality and excessive force share a similar focus; they emphasize individual incidents and describe organizational influence largely in terms of providing “*carte blanche* authority” to officers and not taking citizen complaints seriously when they arise, including failing to discipline officers who have acted with excessive force.⁵⁷

Now take the prevailing story of *Wal-Mart*: supervisors were provided with unguided discretion by Wal-Mart policy, and those supervisors made biased decisions against women in exercising their discretion in pay and promotion decisions. As the Court describes it, plaintiffs “allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women.”⁵⁸ Put more concretely, the Court explained their theory as one of “a strong and uniform ‘corporate culture’ permit[ting] bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers.”⁵⁹ This is a story that emphasizes supervisors making biased pay and promotion decisions within a subjective system adopted and maintained by Wal-Mart.⁶⁰ Wal-Mart is seen at most to have simply allowed this bias to operate, much as a police department might allow its officers to monitor prisoners or use guns without adequate training or allow its officers to use excessive force without discipline.

2. The Rise in Emphasis on Complaints

The law of employment discrimination under Title VII has also shifted in recent years to emphasize internal complaints and employer response to those complaints. In the hostile work environment area in the late 1990s, the Court created an affirmative defense for employers that turns on whether the employer “exercised reasonable care to prevent and correct promptly any . . .

⁵⁶ *Id.* at 382 (quoting district court).

⁵⁷ *See, e.g.,* Padilla v. City of Chi., No. 06 C 5462, 2011 WL 3651273, at *1, *4 (N.D. Ill. Aug. 18, 2011) (granting plaintiffs’ request for discovery of “summary data” regarding complaints of police misconduct to be used to “establish that [the] City’s alleged failure to train and discipline its police officers and track misconduct reports constitutes ‘a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom and usage with the force of law’” (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988))).

⁵⁸ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

⁵⁹ *Id.* at 2548.

⁶⁰ Plaintiffs’ framing is similar, though they place more emphasis on policies and culture than the Court suggests. The Brief for Respondents to the Supreme Court, for example, points first to Wal-Mart’s “highly subjective” pay and promotion policies, linking those policies to discrimination by noting that women “have borne the brunt of these subjective policies” through decisions by managers exercising their discretion. Brief for Respondents at 1-2, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277).

harassing behavior” and whether “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁶¹ Complaint processes have proliferated within organizations since then, making complaints and response to complaints a central feature of organizational measures taken to reduce discrimination.⁶² This rising emphasis on victim complaints in employment discrimination law makes employment discrimination law look more like the law of *Monell*, where complaints and department response to complaints have long taken center stage.

3. The Use of Statistics

Statistics are also often used in pattern or practice employment discrimination cases. As I will explain below, the kinds of statistics—the precise statistical analyses and also the way that statistics are used—are significantly different in employment discrimination cases under Title VII and police misconduct cases under section 14141. However, the mere fact that “statistics” are used in proving liability under each law seems to signal to courts and commentators alike that the laws themselves might be analogous. In addition, Title VII and section 14141 both include the term “pattern or practice,” which may add to an assumption of similarity in proof, including reliance on statistics.⁶³

II. ASSESSING THE *MONELL* ANALOGUE

The pattern or practice laws of section 14141 and Title VII are alike in two broad respects: both were developed as means of reducing problematic human moments, police brutality in the case of one and biased employment decisions in the other; and both carry the potential to recognize the influence of institutional culture on the occurrence of those problematic human moments.

⁶¹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Courts applying this law have focused narrowly on victim complaints of harassment and employer response to those complaints. Recently, the Supreme Court left open whether it would expect similar victim complaints in a non-harassment case. *See Staub v. Proctor Hosp.* 131 S. Ct. 1186, 1194 n.4 (2011) (“We also observe that Staub took advantage of Proctor’s grievance process, and we express no view as to whether Proctor would have an affirmative defense if he did not.”).

⁶² There is reason to believe that the rise of complaint processes within organizations came well before the Court’s endorsement of them in *Ellerth*. *See* FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 93-94 (2009) (documenting the rise in nonunion grievance procedures between 1956 and 1986); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999) (tracing the use of internal grievance procedures as a Title VII compliance mechanism from professional personnel networks to organizations to legal acceptance).

⁶³ *See* Futterman et al., *supra* note 19, at 259 (stating that “statistical analysis is not as prevalent in police misconduct litigation as it is in other areas of the law, such as employment discrimination, trademark infringement and antitrust” without acknowledging that the statistics used in these different contexts can vary substantially).

But the laws themselves differ substantially in what must be proved. This difference makes the *Monell* analogue inapt, but even the similarities that they do share in the nature of the problem and the need for structural and cultural solutions show that to draw on *Monell* to develop Title VII pattern or practice law would be a mistake.

A. *Seeing Through the Mirage*

The text of Title VII makes Title VII law different from the law of *Monell*. Title VII, for example, has always imposed liability on employers for the discrimination carried out by their agents.⁶⁴ In this section, however, I show how differences beyond the mere fact of employer liability for the acts of its agents make the *Monell* analogue inapt.

1. Difference in the Legal Wrong to Be Proved

The legal wrong of police brutality occurs in specific, identifiable moments. It is not always reported, nor is it always accurately identified by either the victims or the police officers as a moment of excessive force or neglect, but the measure of whether a problem of police brutality exists within a department is always made by looking at the moments of excessive use of force by individual officers. *Monell* requires, therefore, that the agency policy or custom have caused a specific violation of an individual's constitutional right.⁶⁵ Section 14141 provides the DOJ with authority to sue and obtain injunctive relief for patterns or practices of constitutional violations, but this means only that if the DOJ can show that use of excessive force (amounting to constitutional violation) was the regular rather than the unusual or isolated practice within a particular police force, then it can obtain an injunction ordering the department to change its practices in ways that are likely to reduce the frequency of those violations. The constitutional violations remain at all times the central focus of inquiry even as the remedies under section 14141 are broadened to include practices, cultures, and systems of the agency, usually under a failure to train, supervise, or discipline theory.

This focus on individual constitutional violations is seen throughout litigation involving police misconduct. As insiders describe one high-profile case in Chicago:

Our investigation revealed that these five officers were well-known to public housing residents on the South Side of Chicago for their physical brutality, their casual acts of cruelty and their overt racism. We heard multiple first-hand reports of their years-long reign of terror and racial abuse of African Americans in public housing communities. These stories

⁶⁴ See 42 U.S.C. § 2000e(b) (2012) (defining the term “employer” to include agents).

⁶⁵ See *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (reading *Monell* as requiring a “direct causal link between a municipal policy or custom and the alleged constitutional deprivation”).

included the lining up a group of young Black men and kicking them in their testicles, ordering African American men to strike Black women at the threat of arrest, strip-searching African American women and ridiculing their bodies, planting illegal drugs on innocent people and stealing money from and protecting drug dealers.⁶⁶

The same emphasis on specific incidents involving constitutional violations can be seen in the cases referred to in the legislative history of section 14141.⁶⁷ One case involved four incidents within a nine month period of police officers using excessive force during routine traffic stops.⁶⁸ The Ninth Circuit Court of Appeals sustained a jury verdict finding the county liable under section 1983 based on the county's "failure to adequately train its officers in the constitutional limits of the use of force."⁶⁹ The court described the county's training program as "woefully inadequate, if it can be said to have existed at all,"⁷⁰ and yet the plaintiff did not have standing to seek injunctive relief that would order change in the training program.⁷¹ Another case involved the deadly strangling of a young man by police officers.⁷² The officers had been "involved in several prior incidents involving use of excessive force" without being disciplined.⁷³ The Judiciary Committee Report to the predecessor bill to section 14141 referred to both of these cases as examples of why passage of legislation empowering the government or private plaintiffs to seek generalized injunctive relief was necessary.⁷⁴

This is not to say that police misconduct is simply a matter of a few "bad apples" isolated from the larger context in which they work. As I will discuss in more detail in section B, it makes sense to consider the larger institutional sources of police misconduct, including institutional sources that involve culture and not merely discipline of individual actors. Nonetheless, *Monell* cases under the law today are always focused on identified moments of misconduct that amount to constitutional violations.

⁶⁶ Futterman et al., *supra* note 19, at 253-54. The authors of the article worked together with a team of University of Chicago Law School students to represent a plaintiff in, as they put it, "her constitutional challenge of the City of Chicago's practices for supervising and controlling its rogue police officers." *Id.* at 251 n.*.

⁶⁷ See H.R. REP. No. 102-242, pt. I, at 138-39 (1991).

⁶⁸ *Id.*; see also *Davis v. Mason County*, 927 F.2d 1473, 1477-79 (9th Cir. 1991).

⁶⁹ *Davis*, 927 F.2d at 1489.

⁷⁰ *Id.* at 1482.

⁷¹ See *id.* at 1479 (describing the relief awarded plaintiffs, which did not include equitable relief); H.R. REP. No. 102-242, pt. I, at 139 ("[W]hile the lack of training was established and was found to rise to the level of a constitutional violation, the courts were powerless to correct it.").

⁷² H.R. REP. No. 102-242, pt. I, at 139.

⁷³ *Id.* at 139 (discussing *Swann v. Goldsboro*, No. 90 58 CIV 5 D (E.D.N.C. 1990)).

⁷⁴ *Id.* at 138. For general discussion of this legislative history and these two cases, see Miller, *supra* note 27, at 167-69.

Discrimination in employment, in contrast, is a matter of Title VII concern largely because of the effect of biased decisions on employment outcomes, the success of employees in work. This statutory focus on employment effects is reflected in the adverse employment action requirement for individual disparate treatment claims,⁷⁵ and also in the hostile work environment law requirement that harassment be severe or pervasive so as to alter the terms and conditions of employment.⁷⁶ Like with police misconduct and section 14141, the goal of Title VII pattern or practice liability is to address incidents of bias in employment decisions. But unlike with police misconduct and section 14141, pattern or practice liability under Title VII does not (and should not) require that each individual incident involving bias amount to a statutory violation. Bias operating within a work organization is problematic under Title VII because it can result in disparate outcomes in employment based on group status (e.g., lower pay and promotion rates for women than for men), even if a particular biased decision would not be actionable as an individualized claim. The legal wrong of employment discrimination, in other words, includes widespread discrimination within a work organization that results in disparities in pay and promotions or other adverse employment actions, even if each incident of discrimination would not be independently actionable.

It might help here to consider a few examples.

Police misconduct: Police Officer X engages in physically rough behavior during arrests, but not sufficiently rough behavior to amount to a violation of Arrestee Y's constitutional rights. The municipality will not be liable under *Monell* in a claim brought by Arrestee Y, even if the agency is deliberately indifferent to the rights of its citizens by failing to adequately train, supervise, or discipline Officer X. Similarly, the municipality will not be liable in a section 14141 case brought by the DOJ for a "pattern or practice" of constitutional violations unless some number of constitutional violations has occurred.

Employment discrimination: Worker X acts with bias in writing an evaluation of Worker Y's job performance. The evaluation is not considered an adverse employment action, so that even if Worker Y is aware that Worker X acted with bias and can prove that the evaluation was biased, she will not succeed on her individual claim of discrimination. But Employer might still be liable for a "pattern or practice" of discrimination if Worker Y (or the EEOC) can prove that biased decisions were widespread within Employer's decision-making system resulting in lower pay for women than men.

⁷⁵ See, e.g., *Minor v. Centocor, Inc.*, 457 F.3d 632 (7th Cir. 2006) (acknowledging the lower courts' common reliance on an "adverse employment action" requirement and explaining the requirement in terms of whether the employment decision at issue results in a "material difference in the terms and conditions of employment").

⁷⁶ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

As these examples illustrate, employment discrimination is sometimes best (or only) identified by looking at employment outcomes (e.g., rates of promotion and pay) in the aggregate and at possible causes of those outcomes. Individualized discrimination (even the decision by a supervisor about pay, a decision that would amount to an adverse employment action) can be difficult to identify. We do not always speak our biases, even when we are aware of them, and this means that it is often difficult for victims of discrimination to know whether they have suffered discrimination in any specific decision. I may receive a lower pay increase than I would like, but that doesn't mean I know that it is a discriminatory pay raise. Or someone (a manager, supervisor, or even a co-worker under a 360-degree evaluation system) might evaluate me as less competent because I am a working mother. I am unlikely to know that this evaluation was biased (indeed, my evaluator may not be aware of his or her bias), but the biased decision still may affect my pay later when it is taken into account in pay decisions.⁷⁷

Indeed, the framing of *Wal-Mart* by the Court made that case seem more like *City of Canton* than it really was. *Canton* was about prison workers neglecting signs of mental illness.⁷⁸ From the Court's perspective, *Wal-Mart* was about supervisors making biased decisions not to promote women or to pay them less.⁷⁹ Analogy to police brutality (or neglect), then, would lead us to expect that plaintiffs in *Wal-Mart* would have provided evidence of many incidents of individually actionable discrimination by supervisors (like with police brutality—many reported incidents of police brutality or neglect). But this account is not the only one, or the likely one. Another way to see *Wal-Mart* is as a case about bias infecting employment decisions throughout Wal-Mart, at multiple levels of the company, not specifically or exclusively about supervisors and managers acting on their biases in pay and promotion decisions.⁸⁰

Understanding the story of discrimination in *Wal-Mart* in this way, as biases operating at many levels within Wal-Mart—fueled by a culture of stereotypes against women and a highly subjective decision making system, among other organizational influences—and resulting in disparate pay and promotion outcomes for women and men, also shifts our expectations of the evidence presented by the plaintiffs. The plaintiffs' evidence, consisting of statistical

⁷⁷ Police misconduct, similarly, may be better identified through a method that does not rely on individual complaints of excessive force, but as of yet the law of *Monell* (and section 14141) has not systematically identified other proxies for misconduct. See Harmon, *supra* note 31, at 27-32 (calling for development of “indirect evidence-based proxies for . . . misconduct” to allow the DOJ to identify the “worst” departments).

⁷⁸ See *City of Canton v. Harris*, 489 U.S. 378, 381-82 (1988).

⁷⁹ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554-56 (2011).

⁸⁰ See *id.* at 2547-48 (“The basic theory . . . is that a strong and uniform ‘corporate culture’ permits bias against women to infect . . . the discretionary decisionmaking of each one of Wal-Mart’s . . . managers—thereby making every woman at the company the victim of one common discriminatory practice.”).

analyses, testimony of pervasive stereotyping, expert testimony about the decision-making system, and testimony of individual incidents of discrimination, makes a lot more sense through this lens. It is difficult to know from the evidence presented whether bias entered at the precise moment of any particular supervisor's decision on pay or promotion (except where there was evidence as to specific instances) or whether the disparities built from earlier biased judgments and evaluations by a manager, supervisor, or even a co-worker who influenced the supervisor's decision making. What we can know (or at least might be able to infer from the evidence) is that bias was infecting employment decisions at Wal-Mart and resulting in lower pay and fewer promotions for women than for men.⁸¹

2. Difference in Proving the Legal Wrong: The Relevance of Complaints and Use of Statistics

Despite common use of the term "statistics" in both types of cases, the statistical analysis presented in an employment discrimination case like *Wal-Mart* is starkly different from that presented in a typical police misconduct case under *Monell*.

In *Monell* litigation involving police brutality, the statistics presented usually consist of what we might call incident statistics. Sometimes the statistics merely give the number of complaints filed against a particular officer or in a particular police force.⁸² In other cases, the statistics will present the percentage of relevant complaints sustained within the department or against a particular officer.⁸³ Even the more sophisticated statistical presentations in section 1983 cases still focus closely on complaints about officer abuse and the department's investigations of and decisions with respect to those complaints.⁸⁴ In one case, for example, the plaintiff's experts used a data set from the Chicago Police Department to calculate the discipline rates for complaints involving abuse of civilians and also the "sustained rates," the percentage of cases where the Chicago Police Department found that sufficient

⁸¹ See *id.* at 2547-48, 2553-56 (describing the plaintiffs' evidence). This would require an inference of internal causation. See Green, *supra* note 49, at 444-47 (describing the role of statistics and expert testimony).

⁸² See, e.g., *Fiacco v. Rensselaer*, 783 F.2d 319, 323 (2d Cir. 1986) (describing evidence as "consist[ing] principally of notices of claims that had been filed against the City alleging police brutality," including testimony relating to those claims and the handling thereof). See generally G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 750-60 (1999) (describing evidence typically used in failure-to-discipline cases).

⁸³ See, e.g., *Woods v. Clay*, No. 01 C 6618, 2005 U.S. Dist. LEXIS 343, at *56-61 (N.D. Ill. Jan. 10, 2005).

⁸⁴ See, e.g., *Padilla v. City of Chi.*, No. 06 C 5462, 2011 WL 3651273, *2, *4 (N.D. Ill. Aug. 18, 2011) (holding that plaintiffs were entitled to department-wide discovery to obtain "summary data" regarding complaints of police misconduct and discipline).

evidence existed to believe that the charged abuse occurred.⁸⁵ The experts then compared Chicago's rates to other major metropolitan police departments in the United States, showing that Chicago had sustained rates that were much lower than the average rate for excessive force complaints in major metropolitan police departments nationwide.⁸⁶ Finally, they compared the Chicago Police Department rates to those of departments the DOJ found to have engaged in a pattern or practice of excessive force, showing that "Chicago's internal brutality and disciplinary data were substantially worse than cities where the Department of Justice had already concluded there were serious problems."⁸⁷

In employment discrimination cases, in contrast, the statistical analysis focuses not on complaints and employer response to complaints, but on employment outcomes, such as pay and promotion.⁸⁸ Statistical analysis in employment discrimination cases relies on probability theory, as embraced by the Supreme Court in *International Brotherhood of Teamsters v. United States*.⁸⁹ Taking into account relevant variables such as years of experience and education, statistical analyses like those undertaken in *Wal-Mart* can determine whether a particular outcome is likely due to chance. And from there, when the outcome is not likely to be due to chance or other legitimate factors considered in the statistical analysis, the Court has instructed that a factfinder can draw inferences about whether the outcome is likely explained by bias or discrimination operating within the organization, or whether it is instead attributable to some other unidentified variable or to a cause outside of the organization.⁹⁰ The additional evidence presented by plaintiffs in a case like *Wal-Mart*, evidence of pervasive stereotypes in the work culture, of a personnel system that is particularly "vulnerable to bias," and testimony of individual instances of discrimination, does not establish "that all managers would exercise their discretion in a common way," as a majority of the Court expected.⁹¹ Rather, it supports an inference that bias operating within the organization is the best explanation for the observed disparity in pay and promotion between men and women at Wal-Mart.

Nor should employment discrimination law turn to incident statistics,

⁸⁵ See Futterman et al., *supra* note 19, at 259-79 (describing statistics gathered and statistical analyses conducted for a case against the City of Chicago).

⁸⁶ *Id.* at 271. They also analyzed the sustained rates over time, showing a drop in sustained rates over the relevant years. *Id.* at 267-70.

⁸⁷ *Id.* at 272.

⁸⁸ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011) (briefly describing statistical evidence analyzing pay and promotion rates of women and men presented by plaintiffs).

⁸⁹ 431 U.S. 324, 339-40 (1977); see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-13 (1977).

⁹⁰ See *Hazelwood*, 433 U.S. at 307.

⁹¹ *Wal-Mart*, 131 U.S. at 2554-57.

focusing on complaints and employer response to complaints, when it can instead identify widespread discrimination through the use of statistical analyses focused on employment outcomes, like pay and promotions. As I explained above, Title VII is concerned with discrimination that results in disparities in success outcomes even when the discrimination cannot be isolated to or actionable in specific instances. Statistics about success outcomes, together with other evidence about the culture and systems and experiences of employees within the organization, can reveal whether bias is likely operating to the detriment of women and minorities within a particular organization. It would be a mistake to turn Title VII from a statute that addresses discrimination, subtle or otherwise, at all levels of work organizations into a statute that merely monitors employer response to employee complaints about discrimination.

B. *The Role of Context: Similarity in Solutions?*

For several decades now, scholars and advocates in the area of police misconduct have called for greater attention to the role of organizations in producing brutality and incidents of excessive force. In her influential 2004 article, *Organizational Culture and Police Misconduct*, Professor Barbara Armacost argued that reform efforts in police departments “have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct.”⁹² Similarly, the Christopher Commission, a civilian group that investigated the LAPD after the Rodney King beating in the early 1990s, emphasized not just the conduct of the officers involved in the beating but also the fact that a number of officers were standing around during the beating, including several who were responsible for training new officers.⁹³ According to the report, the LAPD operational strategy, training, and heavy emphasis on high citation and arrest statistics as a measure of success created risk of a “siege (‘we/they’) mentality” between officers and their communities.⁹⁴

There has also been some progress in legal regulation of police misconduct toward acknowledging organizational sources of wrongdoing, including structural and cultural influences. The passage of section 14141 represents one such success. Under that section, after all, the DOJ can obtain generalized injunctive relief requiring broadly framed change from the top of the

⁹² Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455 (2004). *See also* Rushin, *supra* note 27, at 3215 (“Structural police reform implicitly assumes that systemic police misconduct is an organizational, rather than an individual officer, problem.”).

⁹³ INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 5-8 (1991) [hereinafter INDEP. COMM’N REPORT] (describing the Rodney King beating and gathering of officers at the scene).

⁹⁴ *Id.* at 98-99 (1991). *See generally* Armacost, *supra* note 92, at 495-98 (describing some of the organizationally focused findings of the Christopher Commission).

department down rather than merely from the level of individual officer misconduct up.⁹⁵ Consent decrees obtained through section 14141 investigations have accordingly included requirements for organizational change.⁹⁶

Nonetheless, solutions to police misconduct even at the organizational level have tended to focus on controlling individuals, particularly on training and better monitoring. Solutions revolve around addressing individuals' propensity to use excessive force by instituting systems for complaint, monitoring, and discipline, and by altering cultures of discipline and brutality through training and individualized accountability.⁹⁷ Experts recommend hiring psychologically stable officers, providing extensive training in use of force, and implementing an early intervention system ("EIS") (often referred to as an "early warning system"), a computerized database that tracks individual officer performance on misconduct indicators, such as citizen complaints, uses of force, arrests, traffic stops, etc.⁹⁸ The EIS in particular is an accountability tool that is aimed at allowing the department to "identify an officer's specific performance problem (e.g., use of force, rudeness, special problem in dealing with young men or people of color), and its sources (personal family problems, substance abuse), and select an intervention related to the identified problem."⁹⁹ Consent decrees in section 14141 cases brought by the DOJ include these kinds of measures.¹⁰⁰

Although similar reforms may reduce certain types of employment discrimination, such as individualized, targeted harassment, research suggests that reforms focused narrowly on individuals, even reforms that include change

⁹⁵ See *supra* note 28.

⁹⁶ See, e.g., Armacost, *supra* note 92, at 529-30 (describing some consent decrees requiring departments to put in place a computerized data collection and retrieval system); Rushin, *supra* note 27, at 3216-28 (describing DOJ section 14141 activity).

⁹⁷ See, e.g., INDEP. COMM'N REPORT, *supra* note 93, at iii-iv (describing the problem as principally one of "failure to control" a "significant number of officers in the LAPD who repetitively use excessive force").

⁹⁸ See Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 77-78 (2012).

⁹⁹ *Id.* As another commentator describes:

Experts largely agree about the reforms departments should undertake to prevent misconduct. The best departments hire psychologically stable and physically capable officers. They require substantial initial and ongoing training. They provide clear, specific policies and practice, and tailor training and equipment accordingly. They maintain effective mechanisms for reporting, investigating, and responding to legal and policy violations by officers, including retraining, counseling, disciplining, or firing officers when necessary. And they usually have an early-warning system that identifies potentially misconduct-prone officers so that the department can intervene proactively.

Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 795 (2012).

¹⁰⁰ See Armacost, *supra* note 92, at 528-30 (describing consent decrees); Harmon, *supra* note 31, at 13-19 (briefly describing DOJ process, investigations, and outcomes); Rushin, *supra* note 27, at 3216-28 (same).

at the organizational level (e.g., implementing complaint systems and diversity or bias training programs), are not likely to reduce the more common types of day-to-day discrimination that can result in disparate outcomes such as lower pay or fewer promotions for women and minorities than for white men. Research consistently shows that employment discrimination today is often not the product of conscious biases easily controlled by individuals.¹⁰¹ Rather, minimizing employment discrimination is likely to require attention to and change in the organizational context in which employees interact at work. Accountability and training can be important mechanisms to reducing discrimination within organizations,¹⁰² but solutions must go beyond these measures to include altering work cultures and relational contexts that may not be expressly gendered or racial but that nonetheless facilitate bias in day-to-day interactions and result in disparities in success outcomes.¹⁰³

Police brutality and employment discrimination unquestionably share a need for organizational solutions. Neither is principally a problem of isolated bad actors. But the organizational solutions identified in the police misconduct area do not carry over easily to address employment discrimination. Moreover, even within the area of police misconduct, some scholars have called for more inquiry into how departmental culture can affect officer behavior in ways that result in confrontational situations.¹⁰⁴ What, for example, led to the recent

¹⁰¹ See, e.g., Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994). See generally Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 847, 858-60 (2007) (describing some of the research showing the limitations of self-correction).

¹⁰² See Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 229-30 (1985) (finding that accountability may reduce biased outcomes). Research also shows that accountability at the organizational level may be important to reducing inequality in employment. See Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 602-04 (2006). The evidence on whether diversity training works to reduce bias is mixed. See *id.*; Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 385-91 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

¹⁰³ See Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1445-54 (2008).

¹⁰⁴ See Armacost, *supra* note 92, at 456 (“What this explanation fails to consider, however, is how the officer came to be in that particular situation in the first place and whether there is anything to be learned by examining the organizational norms and policies that framed his judgment.”). Some scholars have also pointed out that reward systems and quantification of police work that values arrest and citation over other measures of “good police work” can contribute to high levels of police brutality. *Id.* at 519-20; see also JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 241-50 (1993) (defining “good police work”). But these insights seem not to have translated into organizational reform recommendations or requirements. See *supra* notes 96-100 and accompanying text (describing requirements of consent decrees).

confrontation between white officer Darren Wilson and black, unarmed teen Michael Brown in Ferguson, Missouri? What role did the Ferguson Police Department—or the city government more broadly¹⁰⁵—play in the creation of that deadly conflict, regardless of whether excessive force was used in the moment of struggle? These are questions not easily addressed under a *Monell* regulatory framework that emphasizes acts of individuals at a precise moment in time. It is possible that *Monell*, with its emphasis on individual instances of wrongdoing and departmental response to complaint, is hindering reform of police departments in contravention of the overarching goal of reducing police misconduct. But this would mean only that *Monell* is inapt for regulating police misconduct; not that it is apt for regulating employment discrimination.

CONCLUSION

In answer to Justice Kennedy's question about whether *Monell* would be a good analogue, this Article presents a resounding "no." It would be a mistake to draw on *Monell* to develop systemic discrimination law under Title VII. The Essay also shows how our understanding of the human problems that laws are designed to address can sometimes drive the law in new and wrong directions. The plaintiffs' case in *Wal-Mart* only looks like a case of police misconduct if we confine the moment of bias that employment discrimination law cares about to specific supervisor decisions. This is neither an accurate account of how bias operates to the disadvantage of women and minorities within organizations nor an accurate portrayal of the law's reach.

Entirely apart from *Monell*, of course, the Justices' drive to require proof of an organizational policy or deliberate indifference on the part of the organization before holding the organization liable may be driven by other concerns. It may be driven by a concern that without something like a deliberate indifference standard organizations will be liable when an observed disparity within their organization is no worse than the disparity that is observed in the rest of their industry, or the nation.¹⁰⁶ Or it may be driven by a concern that organizations will be liable when they have done all that they can to reduce biased decisions within their walls.¹⁰⁷ These concerns get at the

¹⁰⁵ See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), available at http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf, archived at <http://perma.cc/P42U-56H8> (identifying the city's focus on generating revenue over public safety as contributing to a pattern of unconstitutional policing).

¹⁰⁶ See, e.g., Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 155 (2009) (expressing this concern). Cf. Green, *supra* note 49, 412-14 (discussing implications of the policy-required view that emerges from this concern).

¹⁰⁷ See Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 513, 528 (2011); Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1623 (2007). For discussion of what a "best practices" defense like Professor

policy issue that the Court, and we as a society, must take on directly. I believe that these particular concerns are overblown and do not warrant a drastic change to systemic discrimination law, but they are part of what should be a forthright debate about the contours of systemic discrimination law in light of the goals of Title VII and the Civil Rights Act as a whole.

Ford proposes would ask of social science, see Tristin K. Green, *"It's Not You, It's Me": Assessing an Emerging Relationship Between Law and Social Science*, 46 CONN. L. REV. 287, 301-02 (2013).