Notes

Monetary Damages and the (b)(2) Class Action: A Closer Look at *Wal-Mart v. Dukes*[*]

Introduction

Last term the Supreme Court decided the highly controversial case of *Wal-Mart v. Dukes*.[1] The case represented the largest employment discrimination class action in recent U.S. history[2] and involved a class of female employees suing Wal-Mart for alleged gender discrimination in its hiring and promotion practices.[3] The Supreme Court faced two issues related to class certification: first, whether the plaintiff class fulfilled the threshold requirements of Rule 23(a),[4] and second, the circumstances, if any, under which a plaintiff class could recover monetary damages in a Rule 23(b)(2) class action.[5] This Note focuses on the latter issue.

The advisory committee's note to Rule 23(b)(2) indicates that the subdivision is not meant to apply to cases where the final relief sought "relates exclusively or predominantly to money damages."[6] Much of the existing legal scholarship on the issue of monetary damages in (b)(2) class actions tends to focus on competing interpretations of this "predominance" language in the advisory committee's note.[7] This Note argues that such

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* I would like to thank Professor Robert Bone for his invaluable advice and guidance throughout the writing and editing process. Learning from and working with him was and continues to be a pleasure and incredible honor. I would also like to thank my family for their continued support of me throughout all of my academic endeavors. Finally, I am grateful to my colleagues on the *Texas Law Review*—particularly, the Volume 90 Notes Editors and Daniel Clemons—for their excellent editing efforts on this Note.

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

2. Linda S. Mullenix, *Attention Female Workers: Will* Wal-Mart *Roll Back the Largest Employment Discrimination Class Action Ever?*, 38 PREVIEW U.S. SUP. CT. CAS. 249, 249 (2011).

3. *Dukes*, 131 S. Ct. at 2547.

4. *Id.* at 2550.

5. *Id.* at 2557.

6. FED. R. CIV. P. 23 advisory committee's note (1966 Amendment).

7. *See, e.g.*, Jeffrey H. Dasteel & Ronda McKaig, *What's Money Got to Do with It?: How Subjective, Ad Hoc Standards for Permitting Money Damages in Rule 23(b)(2) Injunctive Relief Classes Undermine Rule 23's Analytical Framework*, 80 TUL. L. REV. 1881, 1883 (2006) ("This Article questions the use of the subjective, ad hoc predominance standard to permit nonincidental damages to be included in a Rule 23(b)(2) class and concludes that the subjective, ad hoc standard destroys the analytical framework of Rule 23."); Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 408 (2005) ("[I]t is imperative that the predomination approach—taken by the majority of circuits that have ruled on [the issue of certifying a 23(b)(2) class seeking monetary damages]—be abandoned in favor of the more equitable ad hoc balancing approach . . . ."); Linda S. Mullenix, *Nine Lives: The Punitive Damages Class*, 58 U. KAN. L. REV. 845, 860–61 (2010) (discussing the predomination approach as it relates to classes seeking punitive damages).

scholarship is misconceived because it overlooks the normative policies that underlie Rule 23(b)(2). Accordingly, this Note analyzes the damages question in (b)(2) class actions by first identifying the policies that inform the Rule and then by considering whether particular damage remedies are appropriate provided that they comport with the relative weight given to each of these policies.

Part I begins by examining the procedural requirements of Rule 23 and then briefly reviews the Supreme Court's recent decision as well as existing case law and scholarship on the issue of monetary damages in (b)(2) class actions. Part II identifies the competing policies at stake in (b)(2) class actions—the right to individual participation and the need for remedial efficacy—and contrasts them with the competing policies that underlie (b)(3) class actions. Part III considers whether particular damage remedies are appropriate in (b)(2) class actions in light of these competing policies. Part IV concludes.

I. Rule 23 and the Supreme Court's Decision

Rule 23 of the Federal Rules of Civil Procedure governs the adjudication of class action lawsuits.[8] For a class to be certified under Rule 23, it must first satisfy the threshold requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.[9] In addition, it must fit within one of the pigeonholes in Rule 23(b).[10]

The first threshold requirement of Rule 23(a) is numerosity, which requires that the class be so numerous as to make joinder of all of its members impracticable.[11] The second requirement is commonality, which requires the existence of questions of law and fact common to the entire class.[12] The third requirement is that the claims or defenses of the representative parties be "typical" of the claims or defenses of the class.[13] Finally, the Rule addresses adequacy of representation and requires the representative parties to "fairly and adequately protect the interests of the class."[14]

In addition to satisfying the threshold requirements of Rule 23(a), the proposed plaintiff class must also meet the requirements for one of the Rule 23(b) provisions. Courts have historically certified employment discrimination class actions under Rule 23(b)(2) or Rule 23(b)(3).[15] Class certification under Rule 23(b)(2) has typically been reserved for cases where declaratory

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8. FED. R. CIV. P. 23.
9. FED. R. CIV. P. 23(a).
10. *See infra* notes 15–22 and accompanying text.
11. FED. R. CIV. P. 23(a)(1).
12. FED. R. CIV. P. 23(a)(2).
13. FED. R. CIV. P. 23(a)(3).
14. FED. R. CIV. P. 23(a)(4).
15. Mullenix, *supra* note 2, at 251.

or injunctive relief is the primary remedy being sought.[16] That being said, various courts have authorized monetary damages in (b)(2) class actions where monetary relief is not the exclusive or predominant remedy being sought.[17] The (b)(2) class action is known as the mandatory class action because it binds class members to the final judgment and does not provide them with notice or opt-out rights.[18] The (b)(3) class, also known as the damage class action,[19] can be certified provided that a court finds that (1) common questions of law and fact predominate (predominance), and (2) the class action is superior to other methods for adjudicating the controversy (superiority).[20] Moreover, unlike Rule 23(b)(2), Rule 23(b)(3) provides class members with notice and opt-out rights.[21] Since Rule 23(b)(3) is more restrictive than Rule 23(b)(2), plaintiffs often choose to seek certification under the latter provision.[22]

In reaching its decision in *Dukes*, the Supreme Court reversed the Ninth Circuit's ruling in favor of the plaintiffs, by holding that (1) the plaintiffs could not fulfill Rule 23's commonality requirement, and (2) individualized monetary claims, like backpay, could not be certified under Rule 23(b)(2).[23] Specifically, Justice Scalia, writing for the majority, noted with respect to the issue of monetary damages in (b)(2) class actions (which is the subject of this Note) that the Rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[24] Although the Court declined to engage the broader question of whether Rule 23(b)(2) can ever authorize the class certification of monetary claims at all, it noted that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay"; therefore, backpay was not a permissible remedy under Rule 23(b)(2).[25] The broader question of the extent to which any monetary claims can be authorized under this provision of the Rule will be examined here in further detail.

16. FED. R. CIV. P. 23 advisory committee's note (1966 Amendment).

17. *See, e.g.*, Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003) ("[I]n order to permit certification under [Rule 23(b)(2)], the claim for monetary damages must be secondary to the primary claim for injunctive or declaratory relief." (citing Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986))); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (rejecting a bright-line rule that would bar all claims for monetary damages under 23(b)(2) and instead adopting an ad hoc approach).

18. *See* Mullenix, *supra* note 2, at 251 ("The Rule 23(b)(2) class is for declaratory or injunctive relief, and it is mandatory and does not permit class members to opt-out.").

19. *Id.*

20. FED. R. CIV. P. 23(b)(3).

21. FED. R. CIV. P. 23(c)(2)(B).

22. Mullenix, *supra* note 2, at 251.

23. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556–57 (2011).

24. *Id.* at 2557.

25. *Id.* at 2560.

A. Existing Case Law

Both Wal-Mart and the plaintiffs relied on the advisory committee note's language in advancing their respective positions. The note states in relevant part, "The subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[26] Courts have offered starkly differing interpretations of this language, specifically as to the meaning of the word *predominantly*. The two most prominent cases reflecting this split are *Allison v. Citgo Petroleum Corp.*[27] and *Robinson v. Metro-North Commuter Railroad*.[28]

In *Allison*, the Fifth Circuit adopted a restrictive approach to interpreting the language of the advisory committee's note. In that case, a number of African-American employees and prospective employees of the Citgo Petroleum Corporation brought a class action lawsuit alleging race-based employment discrimination in a number of areas, including in hiring and in promotion decisions.[29] Plaintiffs sought class certification, requesting injunctive relief as well as compensatory and punitive damages.[30] The Fifth Circuit relied on the language of the advisory committee's note in reaching its decision.[31] The court interpreted the note's language to mean that "monetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief."[32] The court then defined *incidental damages* as "damages that flow directly from liability to the class *as a whole*."[33] Thus, while the Fifth Circuit in *Allison* authorized monetary damages in (b)(2) class actions, it limited the circumstances under which this could happen to those involving damages "in the nature of a group remedy" and excluded those involving "complex individualized determinations."[34] Since *Allison*, the Third, Seventh, and Eleventh Circuits have adopted the Fifth Circuit's incidental-damages approach.[35]

The Second Circuit in *Robinson* adopted a much less restrictive interpretation. *Robinson* involved a class action brought by a number of present and former African-American employees of the Metro-North Commuter Railroad who alleged employment discrimination with respect to

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26. FED. R. CIV. P. 23 advisory committee's note (1966 Amendment).
27. 151 F.3d 402 (5th Cir. 1998).
28. 267 F.3d 147 (2d Cir. 2001).
29. *Allison*, 151 F.3d at 407.
30. *Id.*
31. *Id.* at 411.
32. *Id.* at 415 (emphasis added).
33. *Id.* (citing FED. R. CIV. P. 23(b)(2)).
34. *Id.*
35. Barabin v. Aramark Corp., No. 02-8057, 2003 WL 355417, at *1 (3d Cir. Jan. 24, 2003) (citing James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001)); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999) (citing *Allison*, 151 F.3d at 411–16); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001) (citing *Allison*, 151 F.3d at 411).

promotion and discipline in violation of Title VII of the Civil Rights Act.[36] The plaintiffs sought injunctive relief for all members of the class along with compensatory damages for class members alleging individual acts of discrimination.[37]

In reaching its decision, the Second Circuit declined to adopt the incidental-damages test set forth by the Fifth Circuit in *Allison*.[38] Instead, it adopted a more pragmatic approach, which required district courts to "'consider[] the evidence presented at a class certification hearing and the arguments of counsel,' and then assess whether (b)(2) certification is appropriate in light of 'the relative importance of the remedies sought, given all of the facts and circumstances of the case.'"[39] Specifically, the Second Circuit indicated that district courts should permit (b)(2) certification if: "(1) 'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,' and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."[40]

The Ninth Circuit, in *Molski v. Gleich*,[41] also refused to adopt the Fifth Circuit's incidental-damages test. In relevant part, the Ninth Circuit noted, as the Second Circuit did in *Robinson*, that the "adoption of a bright-line rule distinguishing between incidental and nonincidental damages for the purposes of determining predominance would nullify the discretion vested in the district courts through Rule 23."[42] Instead of adopting a bright-line rule, then, the Ninth Circuit in *Molski* looked to "the specific facts and circumstances of each case" and then assessed whether certification was appropriate in light of those circumstances.[43]

B. Existing Legal Scholarship

I begin by reviewing the pre-*Allison* literature on monetary damages in mandatory class actions. David Rosenberg, in his article *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, argues that "bureaucratic justice"—a mode of decision making that focuses on the aggregation of interests of affected individuals in pursuit of collective benefits[44]—provides better opportunities for achieving individual justice than

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36. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001).

37. *Id.*

38. *Id.* at 164.

39. *Id.* (alteration in original) (quoting Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530, 536 (S.D. Ohio 1999)).

40. *Id.* (alteration in original) (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)).

41. 318 F.3d 937 (9th Cir. 2003).

42. *Id.* at 950.

43. *Id.*

44. *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 562 (1987) ("[B]ureaucratic justice . . . legitimates the aggregation and averaging of circumstances and interests of affected individuals in pursuit of the collective benefits

private, disaggregative processes.[45] Rosenberg also suggests that rights-based objections to the bureaucratic-justice model lack merit because they problematically equate individual trial outcomes with individual justice.[46] Building on Rosenberg's thesis, David Shapiro argues that the class action should be viewed as an "entity" for determining the nature of the lawsuit and its component parts, instead of as an "aggregation" of individuals.[47] He concludes that "the notion of the class as an entity should prevail over more individually oriented notions of aggregate litigation," even though "substantial institutional problems remain when it comes to implementation."[48] Finally, Robert Bone, in his review of Steve Yeazell's book *From Medieval Group Litigation to the Modern Class Action*, considers why notice and opt-out rights are provided in (b)(3) class actions but not (b)(2) suits.[49] Bone proposes that we can make sense of Rule 23's notice and opt-out requirements if we "assume[] that the Advisory Committee approached the res judicata problem in a way that shared much in common with the personal–impersonal dichotomy that dominated late nineteenth and early twentieth century representative suit law."[50] The Committee may have been sensitive to the "homogeneity" of the class in deciding whether to provide notice and opt-out rights because the case for notice was stronger when the "solidarity of the class" was called into question.[51] Bone suggests that when Committee members contemplated homogeneity, they were most certainly thinking about "whether the adjudication focused on the impersonal class as an aggregate or on class members as individuals."[52] He argues that the language of Rule 23(b)(2) assumes that if the party opposing the class "deals with the class as an impersonal status rather than with class members as individuals," then the remedy must target that impersonal class and not individual class members.[53] By contrast, he indicates that the remedial focus of the (b)(3) class action is on adjudicating the individual entitlements of class members.[54] Since the (b)(3) judgment has res judicata effect on all

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from process efficiency, outcome consistency, and the maximum production of substantive goods.").

45. *Id.* at 567.

46. *Id.*

47. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).

48. *Id.* at 917–18.

49. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 294–98 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)).

50. *Id.* at 296.

51. *Id.* at 296–97 (internal quotation marks omitted).

52. *Id.* at 297.

53. *Id.* at 298.

54. *Id.*

class members, "the opt-out right limits the res judicata impact by giving absentees a choice whether or not to be bound."[55]

The legal scholarship on this issue following *Allison* and *Robinson* has mostly focused on critically evaluating the two different approaches taken by the circuit courts. For instance, Suzette Malveaux has argued that the restrictive formulation laid out by the Fifth Circuit in *Allison* "threatens to undermine the enforcement of civil rights."[56] Specifically, she argues that the incidental-damages test makes it much more difficult for plaintiffs seeking such damages to get a class certified under Rule 23(b)(2) and that the heightened standard for class certification under Rule 23(b)(2) forces plaintiffs to seek certification under Rule 23(b)(3), which imposes greater costs and burdens on them.[57] Conversely, Jeffrey Dasteel and Ronda McKaig applaud the incidental-damages standard from *Allison* because it ensures that unmanageable individualized damages issues do not become part of Rule 23(b)(2) classes.[58] They argue that the more pragmatic approach laid out by the Second Circuit in *Robinson* undermines the analytical framework of Rule 23.[59]

The more recent literature focusing on *Dukes* also discusses the viability of obtaining monetary damages in (b)(2) class actions. Linda Mullenix briefly considers the viability of a Rule 23(b)(2) punitive-damage class in her article *Nine Lives: The Punitive Damage Class*.[60] She predicts that the approach of "shoe-horning" the punitive-damage class action into the Rule 23(b)(2) provision is unlikely to be well received by the Supreme Court, given the Court's political leanings.[61] Mark Perry and Rachel Brass note that plaintiffs alleging employment discrimination have "made aggressive use of Rule 23(b)(2)."[62] They argue, however, that proponents of an expansive reading of Rule 23(b)(2) have failed to heed the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*,[63] which, if applied to (b)(2) class actions, strongly suggests that employment discrimination cases like *Dukes*—where significant compensatory and punitive damages are sought in addition to injunctive relief—cannot be certified under Rule 23(b)(2).[64] Thus, employment discrimination actions like *Dukes*, according to Perry and Brass, must be

55. *Id.*
56. Malveaux, *supra* note 7, at 407.
57. *Id.*
58. Dasteel & McKaig, *supra* note 7, at 1883.
59. *Id.* at 1900–02.
60. *See generally* Mullenix, *supra* note 7.
61. *Id.* at 886–87.
62. Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681, 681 (2010).
63. 527 U.S. 815 (1999).
64. Perry & Brass, *supra* note 62, at 700–04.

certified under Rule 23(b)(3), where defendants and absent class members are afforded greater protections.[65]

The existing literature on the issue of damages in mandatory class actions, though valuable, is largely underdeveloped. An effective analysis of the issue must first examine the normative policies that inform Rule 23(b)(2) and then determine whether particular damage remedies comport with the weight attached to those respective policies.

II. The Competing Normative Policies

The most fundamental debate among class action scholars is between advocates of individual autonomy in litigation, on the one hand, and proponents of collective justice, on the other.[66] Those in the former camp tend to argue for notice and opt-out rights in most class action lawsuits where damages are being sought by the plaintiff class.[67] The proponents of collective justice, however, are less concerned with providing notice and opt-out rights to litigants, except where explicitly required (in Rule 23(b)(3) class actions).[68] While many scholars understand these two policies as being in contradistinction to one another,[69] others, like David Rosenberg, argue that

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65. *Id.* at 703.

66. Shapiro, *supra* note 47, at 916. Those who lean on the individual-autonomy side of the debate include Richard Epstein and Roger Transgrud. *See* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 3–4 (1990) (criticizing a proposal to modify the mandatory-consolidation rules in light of the low threshold for forced consolidation it foists on plaintiffs); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69–70 (criticizing the common practice of cutting procedural and substantive corners to expedite mass tort litigation); *see also* Patricia Anne Solomon, Note, *Are Mandatory Class Actions Unconstitutional?*, 72 NOTRE DAME L. REV. 1627, 1629 (1997) (arguing that mandatory class actions are unconstitutional because they violate an individual's due process right to choose an individual remedy rather than collective action). Those who are on the side of the collective-justice approach include Jack Weinstein, Robert Bone, Bruce Hay, and David Rosenberg. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995) (providing various mass tort case studies and making recommendations to courts that attempt to balance considerations of efficiency and cost for a class of plaintiffs against the need for individually effective remedies); Bone, *supra* note 49, at 294 (noting that class members have the same goals for the suit, making notice and opt-out requirements for 23(b)(3) actions superfluous); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 480–81 (1997) (proposing that although class actions often settle for too little, the solution to this problem is not to curtail the use of the class action altogether but rather to adjust class counsels' incentives to settle); Rosenberg, *supra* note 44, at 586–93 (contending that the economic benefits of class action suits outweigh fairness concerns, especially when the concern for individual autonomy threatens the economic feasibility of pursuing a class action in the first place).

67. *See* Shapiro, *supra* note 47, at 918 ("Under this view, . . . the individual retains his own counsel, retains the right to leave the group before, during, and after the litigation, and can insist on playing a significant role in the operations of the group so long as he chooses to remain a part of that group.").

68. *Id.* at 937–38.

69. *See, e.g.*, Bone, *supra* note 49, at 215 ("The premise of adjudicative representation—that persons can do the litigating work for one another—seems at odds with a belief that individual litigants ought to control their own lawsuits."); Shapiro, *supra* note 47, at 918–19 (contrasting the

this understanding actually presents a false dichotomy and that collective justice (what he calls "bureaucratic justice") actually achieves individual autonomy objectives.[70]

This part argues that these two policies are necessarily distinct and that they are implicated to varying degrees depending on the kind of class action lawsuit being brought. In (b)(2) class actions, where the remedy being sought is ordinarily group injunctive relief, less emphasis is placed on the right to individual participation. By contrast, in (b)(3) class actions, where individual damages are the primary relief sought by the class, litigant autonomy is implicated to a much greater extent. Complications arise when, as in *Dukes*, the plaintiff class seeks certification under Rule 23(b)(2) but also seeks sizeable damages in addition to group-wide injunctive relief. This complication will be explored in further detail in Part III.

Before examining the normative policies that underlie (b)(2) class actions, it is useful to know a bit about the history and purpose behind Rule 23(b)(2). The language of the advisory committee's note to Rule 23(b)(2) is particularly helpful in understanding these matters. First, the note clarifies that the drafters of Rule 23 intended for the (b)(2) provision to "reach situations where a party has taken action or refused to take action with respect to a class" and, as such, where injunctive or declaratory relief is appropriate.[71] The note expands on this notion by stating that the subdivision does not apply to "cases in which the appropriate final relief relates exclusively or predominantly to money damages."[72] As noted earlier, this language has served as the tipping point for the debate over the extent to which monetary damages can ever be authorized in (b)(2) class actions.[73]

The advisory committee's note also suggests that civil rights cases were at the forefront of the Committee's mind when it drafted this particular subdivision.[74] The note lists a number of civil rights cases that are illustrative of the class-wide discrimination that the (b)(2) subdivision was designed to remedy.[75] That being said, the note also indicates that (b)(2) is not limited

"aggregation" model, where litigants simply aggregate their preexisting rights with no corresponding sacrifice or binding agreement, with the "entity" model, where the class action lawsuit itself is the autonomous party binding the individual plaintiffs).

70. *See* Rosenberg, *supra* note 44, at 567 (arguing that bureaucratic justice can provide better individual outcomes by more efficiently dealing with the problems of mass tort litigation).

71. FED. R. CIV. P. 23 advisory committee's note (1966 Amendment).

72. *Id.*

73. *See supra* Part I.

74. *See* FED. R. CIV. P. 23 advisory committee's note (1966 Amendment) ("Illustrative [of the types of classes that might fall under (b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

75. *Id.*

to civil rights cases and goes on to list a number of alternative instances in which a class action could be brought successfully under Rule 23(b)(2).[76]

The advisory committee's note evinces a clear intent on the part of the drafters to fashion group remedies under Rule 23(b)(2). The drafters did not intend for the (b)(2) subdivision to provide individual remedies for individual plaintiffs; rather, it was designed to provide a remedy to an entire plaintiff class that could root out a complex legal wrong at its source. This point is aptly demonstrated by the example of school desegregation in the South. In *Potts v. Flax*,[77] one of the civil rights cases listed in the advisory committee's note, the Fifth Circuit held that the suit brought on behalf of all African-American children in Fort Worth, Texas, was in fact a class action.[78] The defendant school-board officials argued that even if the decree granting desegregation relief applied to some individual plaintiffs, it could not be applied to all similarly situated plaintiffs.[79] However, the court disagreed, explaining that "the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school" but rather to obliterate a "policy of system-wide racial discrimination."[80] This case reveals that courts sought to desegregate schools in order to root out a complex wrong—namely, racial discrimination—at its source. Rather than providing individual remedies for individual plaintiffs (e.g., allowing an African-American plaintiff to attend an all-white school), courts fashioned impersonal group remedies designed to benefit African-Americans as a group by terminating racially discriminatory segregation practices.

The advisory committee's note illuminates the tension between the competing normative polices that inform Rule 23(b)(2). In what follows in this part, I describe these two policies—individual participation and remedial efficacy—in more detail and then contrast them with the competing policies underlying (b)(3) class actions. In particular, I explain why remedial efficacy weighs more heavily in (b)(2) class actions than in (b)(3) class actions. In (b)(3) class actions, the need for remedial efficacy takes a back seat to the more important goal of achieving judicial-economy gains.

A. Individual Participation

The fundamental basis for individual participation is the value we place on every plaintiff being entitled to her personal day in court. The procedural rules that govern our system of adjudication are designed to embrace this

76. *Id.* (suggesting that 23(b)(2) could encompass actions by "a numerous class of purchasers, say retailers of a given description, against a seller alleged to have [overcharged] that class" or by "a numerous group of purchasers or licensees [of a patent] . . . to test the legality of [a] 'tying' condition" that required them to "also purchase or obtain licenses to use an ancillary unpatented machine").

77. 313 F.2d 284 (5th Cir. 1963).

78. *Id.* at 289.

79. *Id.* at 288.

80. *Id.* at 288–89.

participatory norm.[81] Before delving into the way individual participation functions in the class action context, it is helpful to distinguish between two competing theories of procedural rights. The first is an outcome-based approach. Under this instrumentalist approach, an individual's right to participate is privileged only if that form of participation "is likely to further a judge's ability to make good law."[82] Many class action scholars only approach an individual's participation right from an outcome-based perspective.[83] Those who do tend to ignore a more process-based approach to procedural rights. Under such an approach, scholars, relying on Kantian principles, argue that the right to participate is required in order to respect the dignity of those bound by a decision.[84] Others have argued that the right to participate is essential to the legitimacy of adjudication as a source of binding judgments, just as participation is essential to the legitimacy of legislation.[85] Distinguishing between these two approaches is helpful because it informs our analysis with respect to authorizing particular damage remedies under the various pigeonholes of Rule 23.[86]

In class actions, the participatory safeguards take the form of notice and opt-out rights. This right to individual participation, however, must be balanced against the need for remedial efficacy. Striking such a balance is especially important in (b)(2) class actions, where the interests of individual class members take a back seat to the interests of the class as a whole. The issue here is the extent to which this participation norm is implicated by (b)(2) class actions.

I commence this analysis by reiterating one of the most important features of Rule 23(b)(2)—that it facilitates a class-wide remedy designed to root out a complex wrong at its source. The *Dukes* case might help illustrate the importance of this feature. The plaintiffs' complaint in *Dukes* alleged gender discrimination by Wal-Mart in its hiring and promotion practices.[87]

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81. *See* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1014 (2010) ("There is no question that . . . participation rights in particular figure prominently in current modes of justification for rules and practices."). Examples include pleading standards and summary judgment standards. *See id.* at 1011–12 ("[S]ome critics object to stricter pleading standards on the ground that strict standards impede the *right* of access to court . . . .").

82. *Id.* at 1025.

83. *See, e.g.*, Rosenberg, *supra* note 44, at 567 ("[There are] important intersections in the mass tort context where the ends of individual justice are better served by collective, rather than disaggregative, processes."); Shapiro, *supra* note 47, at 919 ("[I]n the situations in which class action treatment is warranted, the individual who is a member of the class . . . must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome. Of course, even this entity model does not deny the class member the opportunity to seek private advice, or to contribute in some way to the progress of the litigation, but it severely limits such aspects of individual autonomy as the range of choice to move in or out of the class or to be represented before the court by counsel entirely of one's own selection.").

84. Bone, *supra* note 81, at 1027 & n.62.

85. *E.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275–77 (2004).

86. *See supra* notes 15–22 and accompanying text.

87. *See supra* note 3 and accompanying text.

On its face, the complaint resembled a paradigmatic (b)(2) class action because it functionally asked the court to put an end to an alleged company-wide gender discrimination policy. If a district court were to find in favor of the plaintiff class on the substantive merits, it would be likely to issue an injunction against Wal-Mart barring all discriminatory practices. It is unlikely that a court would issue an injunction that barred discriminatory practices against Betty Dukes in particular or against one of the other named plaintiffs. Rather, the remedy would take the form of an injunction that eliminated all discriminatory practices, thereby benefiting all female employees at Wal-Mart. Since the lawsuit focuses on the group, it is reasonable to treat participation as a group right instead of an individual right.

But what happens when the injunctive relief sought by plaintiffs is at odds with the interests of individual class members? Derrick Bell develops this idea in his famous essay *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*.[88] He argues that the interests of many African-Americans in the South were at odds with the interests of NAACP lawyers who were litigating their cases.[89] Specifically, Bell suggests that African-Americans would have been better off if the NAACP lawyers had worked to rigorously enforce the "equal" portion of the notorious "separate but equal" doctrine of *Plessy v. Ferguson*[90] rather than the *Brown v. Board of Education*[91] approach of pursuing integrationist policies aimed at achieving racial balance.[92] Bell's essay underscores the lawyer's obligation to represent his clients in class actions where injunctive relief is the final form of relief sought by the plaintiff class.[93]

While Bell's essay offers an insightful critique of the class action mechanism, it also presents an opportunity to distinguish between a plaintiff's rights and a plaintiff's preferences. The conflicting interests Bell describes refer to the conflicting *preferences* of individual litigants represented in a class action lawsuit. These preferences are distinguishable from (procedural) *rights*, which inhere from our body of procedural law. In the desegregation litigation discussed above, individual class members had conflicting preferences, not conflicting rights.

David Marcus further explores the relationship between procedural rights and remedial choice in the context of desegregation.[94] He suggests

88. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

89. *Id.* at 471–72, 512.

90. 163 U.S. 537 (1896).

91. 347 U.S. 483 (1954).

92. Bell, *supra* note 88, at 487–88.

93. *See* Bell, *supra* note 88, at 512 ("[S]ome civil rights lawyers . . . are making decisions . . . that should be determined by their clients . . . .").

94. *See generally* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

that the modern class action does not "account[] for conflicting interests coherently [or] comprehensively."[95] While Rule 23(b)(3), according to Marcus, has "elegantly" avoided the dilemma of conflicting preferences by providing absent class members with notice and opt-out rights, Rule 23(b)(2) has not done the same.[96] When class members in (b)(2) suits have conflicting preferences with respect to a remedy, the adequacy-of-representation requirement is implicated.[97] Marcus ultimately concludes that "[a] single threshold for the adequacy of representation requirement presumes a unified basis for Rule 23 that does not fit its original design."[98]

Marcus, however, fails to draw the distinction between an outcome-based approach to individual participation and one that is more process-based. From an outcome-based perspective, accounting for conflicting preferences is less significant if doing so does not further a judge's ability to make good law. That being said, from a process-based perspective, taking into account conflicting preferences might be more important in order to preserve the legitimacy of the process and the dignity of those bound by the decision. The focus on remedial efficacy, however, trumps any process-based participatory concerns. Accounting for conflicting preferences (presumably through notice and opt-out rights) would stunt a court's ability to fashion a remedy designed to root out a complex wrong at its source and thereby benefit a group of claimants.

The recent amendments to Rule 23 also signal an attempt to deal with the problem of conflicting preferences among class members. In 2003, Rule 23 was amended to give courts the discretionary power to give all class members notice so that class members would have an opportunity to object to representation.[99] This additional procedural safeguard tempers problems associated with class members having disparate interests and downplays the importance of individual participation in (b)(2) suits.

B. Remedial Efficacy

The basis for remedial efficacy lies in providing the most effective remedy possible. In class actions, remedial efficacy serves the goal of rooting out at its source wrongful conduct that produces actionable harms to individual litigants. As such, in (b)(2) class actions, individuals are freed from discriminatory practices indirectly as a consequence of eliminating those discriminatory practices at their sources. In addition to serving this primary goal, the (b)(2) class action also achieves judicial-economy gains, albeit differently from (b)(3) class actions. Whereas in (b)(3) suits individual claims are adjudicated collectively, in (b)(2) suits that is not the case at all.

95. *Id.* at 712.
96. *Id.* at 712–13.
97. FED. R. CIV. P. 23(a)(4); Marcus, *supra* note 94, at 713.
98. Marcus, *supra* note 94, at 714.
99. FED. R. CIV. P. 23(c)(2); FED. R. CIV. P. 23 advisory committee's note (2003 Amendment).

In (b)(2) class actions, judicial-economy gains are achieved by transforming individual suits into a unitary group legal challenge. If plaintiffs are successful in bringing this challenge, the source of discrimination is addressed prospectively, and individuals suffering from discriminatory treatment are thereby relieved from suing individually for prospective relief.

The collective remedy tends to be implicated to a greater degree in (b)(2) class actions because the remedies are typically aimed at a group rather than at individual plaintiffs. Since declaratory and injunctive relief are both essentially "group" remedies, it makes more sense to place a larger premium on the normative policy that is rooted in providing the most effective remedy and a smaller premium on one that embraces individual participation. Therefore, putting the issue of damages aside once again, the need for remedial efficacy is enhanced in Rule 23(b)(2) class actions, through which claimants primarily seek injunctive or declaratory relief.

C. Rule 23(b)(3)

It is useful as a heuristic device to compare the policies that underlie (b)(2) class actions with the policies that underlie (b)(3) class actions. Such a comparison allows for a more complete understanding of the circumstances in which we might value individual participation to a greater extent. Rule 23(b)(3) imposes two additional requirements—predominance and superiority—on those seeking certification under the subdivision.[100] Rule 23 also requires courts to provide notice and opt-out rights to (b)(3) class members.[101] Provided that class claimants are able to fulfill the predominance and superiority requirements, they are free to seek damages as the only form of relief. These requirements represent the essential differences between Rule 23(b)(3) and Rule 23(b)(2).

Remedial efficacy tends not to be the centerpiece of (b)(3) class actions, where damages, rather than injunctive or declaratory relief, are the primary remedy being sought. When damages are the primary form of relief being sought by the class, a greater emphasis is placed on the right to individual participation. In contrast to injunctive relief, damages tend to be more individualized in nature because they typically compensate individual claimants for individual harms they suffered.[102] The notice and opt-out rights afforded to all (b)(3) class members reflect the premium we place on individual participation in (b)(3) class actions. When damages are being sought, it is imperative that class members be given notice and opt-out rights to ensure that they have the ability to re-litigate their individual damage claims in a separate legal forum. This stands in contrast to (b)(2) class actions, where the remedy most commonly sought—injunctive relief—is directed primarily

100. *See supra* note 20 and accompanying text.

101. *See supra* note 21 and accompanying text.

102. Of course, this depends on the type of damages being sought, but I will explore this issue in more detail in the next part.

at a group, not at an individual. Thus, it seems apt to provide these kinds of procedural safeguards when the remedy being sought is individualized as opposed to when it is directed primarily toward a group.

As opposed to (b)(2) class actions, the primary function of (b)(3) class actions is to achieve judicial-economy gains by adjudicating individual suits collectively. While (b)(2) class actions also achieve judicial-economy gains (as described above), the primary goal of (b)(2) class actions lies in providing the most effective remedy possible. In (b)(3) class actions, where the plaintiff seeks damages, the focus is on adjudicating similar disputes with overlapping issues. In (b)(2) class actions, where declaratory or injunctive relief is primarily sought, the primary purpose is to design a remedy that roots out a complex wrong at its source. As such, the need for notice and opt-out provisions in (b)(2) class actions is less significant than in (b)(3) class actions, where the remedy is aimed at compensating individuals for injuries they suffered.

III. Damage Remedies in (b)(2) Class Actions

Thus far, the analysis paints a fairly neat picture with respect to the class action device. The two normative policies at stake in a (b)(2) class action are the right to individual participation and the need for remedial efficacy.[103] In (b)(2) class actions, where the primary relief sought is declaratory or injunctive, remedial efficacy is privileged to a greater degree than individual participation because declaratory and injunctive relief are both group remedies. Conversely, in (b)(3) class actions, where the primary relief sought takes the form of monetary damages, individual participation is privileged to a greater extent than remedial efficacy because damages tend to be individualized in nature. As such, the (b)(3) subdivision provides notice and opt-out rights for all class members as a way of protecting individual claimants and embracing individual participation.

Once damages enter the (b)(2) scene, however, the picture becomes murkier. The policy balance articulated above is disrupted when (b)(2) claimants seek damages in addition to the injunctive and declaratory relief that Rule 23(b)(2) typically provides. This is precisely the issue that the courts have confronted in *Allison* and *Robinson*, and one that the Supreme Court recently addressed in *Dukes*.

The issue of (b)(2) damages raises a number of interesting analytical questions, some of which I attempt to answer in this Note. First and foremost, what is the effect of allowing class members to seek damages under Rule 23(b)(2)? Does allowing plaintiffs to seek damages comport with the normative policies that underlie the Rule? If doing so tends to embrace individual participation more so than when injunctive relief was primarily sought, should we provide (b)(2) class members with notice and opt-out

103. *See supra* Part II.

rights, like we do under Rule 23(b)(3)? But then, what would be the difference between a (b)(2) class action and a (b)(3) class action? After all, if plaintiffs can seek damages under Rule 23(b)(2), are they not more likely to seek certification under this subdivision since certification under Rule 23(b)(3) requires fulfilling the predominance and superiority requirements? Finally, how should we decide whether to allow plaintiffs to seek damages; does it make sense to adopt one of the tests articulated by the circuit courts or is there a better method?

Scholars who support the approach taken by the *Allison* court have argued that allowing plaintiffs to seek damages under Rule 23(b)(2) (beyond what the incidental-damages test permits) effectively serves as an end run around the Rule 23(b)(3) requirements of predominance and superiority; specifically, they argue that if plaintiffs' attorneys have the option of certifying a class under Rule 23(b)(2) or Rule 23(b)(3), they will often select the former option because it obviates the need to fulfill the predominance and superiority requirements of Rule 23(b)(3).[104] The result is problematic in two respects: first, it exposes defendants to tremendous potential liability without requiring the putative class to fulfill the (b)(3) threshold requirements; second, it compromises the interests of class members at the cost of satiating plaintiffs' attorneys because class members are no longer afforded notice and opt-out rights.

In the ensuing subparts, I address a number of these concerns. I argue that the most logical approach to analyzing the issue of monetary damages in mandatory class actions is to ask if allowing damages comports with the normative policies that inform the Rule. I attempt to make this determination in the context of plaintiffs seeking backpay, compensatory damages, and punitive damages.[105] Since each of the three damage remedies have different purposes, each should be analyzed in accordance with the individual purposes it is meant to serve.

A. Backpay

Backpay is one form of damages commonly sought by plaintiffs. It is determined by calculating the difference between what an employee was paid and what he or she should have been paid.[106] There is very little debate in the courts and even among legal scholars over whether class members can seek backpay under Rule 23(b)(2). Courts have traditionally authorized backpay

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104. *E.g.*, Mullenix, *supra* note 2, at 251.

105. Of course, the three categories are not mutually exclusive. Plaintiffs can seek one, two, or all three. This, however, does not affect my analysis.

106. *See* BLACK'S LAW DICTIONARY 158–59 (9th ed. 2009) (defining *backpay* as "[t]he wages or salary that an employee should have received but did not because of an employer's unlawful action in setting or paying the wages or salary").

because it has been viewed as secondary to injunctive relief typically being sought by (b)(2) class members.[107]

Authorizing backpay comports with the relative weight given to the normative policies underlying (b)(2) class actions. Much like declaratory or injunctive relief, backpay is fundamentally a group remedy. It is aimed at uniformly compensating all class members for what they should have been paid in the absence of the challenged discriminatory policy. Since it tends not to require individualized determinations, backpay does not implicate the right to individual participation in such a way as to upset the balance of the competing policies that inform (b)(2) class actions.

The *Dukes* case, however, questions whether backpay is in fact a group remedy. Wal-Mart argued that because backpay awards are discretionary, courts must exercise discretion and conduct an individual analysis with respect to each plaintiff's claim.[108] As it would take a trier of fact years to conduct additional proceedings for each plaintiff's claim, backpay was not "incidental" to the injunctive relief being sought.[109] Finally, Wal-Mart argued that per Title VII and the Due Process Clause, it had a right to litigate each of the plaintiffs' backpay claims.[110]

The Supreme Court's holding, which disallowed backpay, is problematic for two reasons. First, as the plaintiffs correctly argued, backpay does not qualify as "monetary damages" but rather constitutes an equitable remedy under Title VII.[111] As such, backpay is distinguishable from both compensatory and punitive damages, which are both understood to be forms of compensatory relief under Title VII. Second, as the Supreme Court noted in *Albemarle Paper Co. v. Moody*,[112] backpay is critical to Title VII's make-whole remedial scheme.[113] Injunctive relief by itself will not deter employers from engaging in arguably discriminatory practices, but the threat of backpay would make deterrence more effective.[114]

The answer is much less clear with respect to Wal-Mart's claim that it is entitled to present individual defenses for each of the backpay claims according to Title VII. To deny Wal-Mart such a right, as the district court did, would be to strip away a fundamental right that it has been conferred by

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107. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) ("We construe[] (b)(2) to permit monetary relief when it [is] an equitable remedy, and the defendant's conduct ma[kes] equitable remedies appropriate. Back pay, of course, ha[s] long been recognized as an equitable remedy under Title VII." (citations omitted)).

108. Brief for Petitioner at 53–55, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277).

109. *Id.* at 55; *see also supra* notes 31–33 and accompanying text.

110. Brief for Petitioner, *supra* note 108, at 42–43.

111. Brief for Respondents at 57, *Dukes*, 131 S. Ct. 2541 (No. 10-277) (citing 42 U.S.C. §§ 1981a(b)(2), 2000e-5(g)).

112. 422 U.S. 405 (1975).

113. *Id.* at 419–21.

114. *Id.* at 417–18.

statute. That being said, it is also important to consider the impracticality of allowing Wal-Mart to exercise this right under these circumstances. Doing so would undermine the paramount goal of remedial efficacy at the cost of privileging Wal-Mart's individual right to participation. If we believe that allowing Wal-Mart to litigate individual defenses would result in better outcomes, then perhaps it makes more sense to afford them such a right. However, if this right is being preserved purely on process-based grounds (i.e., to maintain dignity, legitimacy, etc.), then it makes more sense to forego Wal-Mart's statutory right in lieu of fashioning a more effective group remedy.

In sum, backpay fits the remedial focus of (b)(2) class actions because it effectively serves as a counterpart to the injunctive relief typically aimed at rooting out a complex wrong at its source. Because backpay is essentially a group remedy as it is classified as equitable per Title VII, and because allowing Wal-Mart to exercise its statutory right per Title VII would not necessarily result in a better outcome, the Court incorrectly decided the backpay issue in *Dukes*.

B. Compensatory Damages

In addition to backpay, plaintiffs also often seek compensatory damages, which are intended to cover actual injury or economic loss.[115] The plaintiffs in *Dukes* did not seek compensatory damages. Courts are much less uniform on how they treat compensatory-damage relief under Rule 23(b)(2). Courts that tend to follow the Fifth Circuit's approach in *Allison* typically disallow compensatory damages,[116] whereas courts that tend to follow the Second Circuit's more liberal ad hoc approach in *Robinson* are more amenable to allowing compensatory damages in (b)(2) class actions.[117] The focus of this split is on the "predominance" language in the advisory committee's note to Rule 23.

If, instead of relying on the language of the advisory committee's note, we focus on the normative policies underlying the Rule, the analytical framework is different. First, we must ask how compensatory damages should be characterized—that is to say, do compensatory damages tend to be

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115. *See* BLACK'S LAW DICTIONARY 445 (9th ed. 2009) (defining *compensatory damages* as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered").

116. *See, e.g.*, Barabin v. Aramark Corp., No. 02-8057, 2003 WL 355417, at *1–3 (3d Cir. Jan. 24, 2003) (denying class certification under 23(b)(2) after finding that the compensatory and punitive damages requested by the class were not incidental to the injunctive relief sought); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001) (holding that a district court abused its discretion by not excluding individual compensatory damages claims from class treatment where the class was certified under 23(b)(2)); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999) (holding that non-incidental compensatory damages cannot be sought in a (b)(2) class because of the lack of notice and an opportunity to opt out).

117. *See, e.g.*, Molski v. Gleich, 318 F.3d 937, 949–50 (9th Cir. 2003) (rejecting the Fifth Circuit's bright-line dichotomy of incidental and non-incidental money damages in favor of a looser, more fact-intensive approach to determining predominance).

more individual in nature or are they more like a group remedy? Compensatory damages are in fact more individualized. They attempt to make *individual* plaintiffs whole for *individual* wrongs perpetrated against them. If we accept that compensatory damages are inherently individual in nature, then allowing plaintiffs to seek compensatory damages in (b)(2) actions would implicate the right to individual participation to a greater degree.

Then, one might ask, how can we remedy this balancing problem? One solution might be to afford (b)(2) plaintiffs who seek compensatory damages notice and opt-out rights. Notice and opt-out rights are problematic, however, because affording (b)(2) plaintiffs such procedural protections would frustrate the purpose behind Rule 23(b)(3). Allowing for notice and opt-out rights in (b)(2) class actions would essentially serve as an end run around the predominance and superiority requirements of the (b)(3) subdivision.[118] Consequently, defendants would be exposed to potentially tremendous liability without plaintiffs even fulfilling the threshold requirements of Rule 23(b)(3).

Perhaps, then, it makes less sense to allow plaintiffs to pursue compensatory damages in a (b)(2) class action. To the extent that the compensatory damages being sought are individual in nature, it makes more sense to require plaintiffs to pursue those damages under Rule 23(b)(3), where plaintiffs have to meet the requirements of predominance and superiority, and plaintiffs are afforded both notice and opt-out rights. If, however, the compensatory damages sought by plaintiffs focus on the group, then perhaps such relief should be permitted under Rule 23(b)(2).

It is important to note that the approach I propose is significantly different from the one taken by most circuit courts. Rather than attempting to define *predominance* in the context of the advisory committee's note, we should direct our attention to the remedial focus of the damages being sought. If the damages tend to single out individual plaintiffs for individual wrongs perpetrated against them, then it makes more sense to disallow those compensatory damages under Rule 23(b)(2). Conversely, if the damages sought are designed to remedy a wrong committed against a group, then those damages should be permitted under Rule 23(b)(2).

C. Punitive Damages

Whether punitive damages can be authorized under Rule 23(b)(2) is perhaps the most controversial issue. Punitive damages are different from compensatory damages in that their purpose is to punish a particular individual or entity.[119] In *Dukes*, the plaintiffs sought punitive damages in addition

118. *See supra* note 104 and accompanying text.

119. *See* BLACK'S LAW DICTIONARY 448 (9th ed. 2009) (defining *punitive damages* as "[d]amages awarded in addition to actual damages when the defendant acted with recklessness,

to traditional backpay.[120] In its brief, Wal-Mart pointed out that no court of appeals had ever authorized punitive damages in a Rule 23(b)(2) class action and that if the Supreme Court were to authorize punitive damages in this case, it would be straying from precedent.[121] The plaintiffs disputed this contention but then reminded the Court that the Ninth Circuit remanded the issue of whether punitive damages could be sought under Rule 23(b)(2) down to the district court and that, therefore, the Supreme Court did not need to confront the issue.[122] For this reason, the Supreme Court did not reach this important issue in *Dukes*.

We might ask why courts have historically been so averse to awarding punitive damages in (b)(2) class actions. We can only speculate, but one might assume that this is because punitive damages are typically awarded *in addition to* compensatory damages.[123] If courts are reluctant to allow plaintiffs to pursue compensatory damages under Rule 23(b)(2), one might surmise that punitive damages would then surely be outside the realm of possibility. I find this logic to be unsound.

If instead we look back to the normative policies underlying the Rule, we find that the punitive-damage remedy actually comports with that policy balance. Punitive damages are more like a group remedy than an individual one; their purpose is to deter wrongful behavior by said entities or similar entities.[124] Moreover, their focus is not on compensating the individual for any harm done to him or her—that purpose is served by compensatory damages.[125]

Thus, if we conclude that the focus of punitive damages is on punishing the entity who perpetrated the wrong as opposed to compensating individuals who were wronged by the entity, then we reach a different result than the courts. Since punitive damages do not implicate the individual-participation norm, the relative weight it is afforded in (b)(2) class actions remains the same. As such, it makes more sense for courts to allow plaintiffs to seek punitive damages under Rule 23(b)(2). In fact, it makes more sense for courts to allow plaintiffs to seek punitive damages than to allow them to seek compensatory damages.

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malice, or deceit; specif[ically], damages assessed by way of penalizing the wrongdoer or making an example to others”).

120. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011).

121. Brief for Petitioner, *supra* note 108, at 55–56.

122. Brief for Respondents, *supra* note 111, at 64.

123. *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 241–43 (2009) (defining punitive damages as “extra-compensatory” damages and explaining that such extra-compensatory damages “best calibrated in reference to a defendant’s likelihood of evading payment of full compensatory damages”).

124. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”).

125. *See id.* § 903 (“‘Compensatory damages’ are damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.”).

IV. Conclusion

The debate over whether to allow monetary damages in Rule 23(b)(2) class actions has been contentious, to say the least. In this Note, I have attempted to reassess the way we normally think about damages in class action lawsuits. Instead of focusing on interpreting the language of the advisory committee's note, as most courts have, I first identified the normative policies that underlie (b)(2) class actions. Those two policies are the right to individual participation and the need for remedial efficacy. I then showed how these two policies are weighed depending on the particular subdivision of Rule 23. Specifically, I contrasted the relative weight they are afforded in (b)(2) class actions with the weight they are given in (b)(3) class actions. While individual participation is implicated to a greater degree in (b)(3) class actions, that is not the case in (b)(2) class actions, where the need for remedial efficacy is of primary importance.

I then asked whether allowing for certain damage remedies under Rule 23(b)(2) comports with the relative weight afforded to the normative policies underlying the Rule. I concluded that while it might be problematic for courts to authorize compensatory damages in (b)(2) class actions, courts should be more willing to authorize backpay and punitive damages. While compensatory damages are more individualized by nature, punitive damages and backpay are both inherently group remedies. They are aimed less at compensating individual plaintiffs and more at deterring defendants' wrongful behavior.

—Neil K. Gehlawat