THE PERSISTENCE AND UNCERTAIN FUTURE OF THE PUBLIC INTEREST CLASS ACTION

by
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Cases against government defendants for large-scale injunctive relief often turn on the class certification decision. From the modern class action's early days until 2011, these "public interest class actions" enjoyed marked success in the federal courts. This procedural favor seemed to lapse when the U.S. Supreme Court decided Wal-Mart Stores, Inc. v. Dukes. *The decision tightened the requirements that govern class certification in public interest cases. In* Wal-Mart*'s immediate wake, several courts of appeals vacated certified classes in important structural reform lawsuits. This litigation seemed to face a tough road ahead.*

But the public interest class action has persisted. In this symposium contribution, I report quantitative and qualitative findings from my analysis of every reported decision on class certification in a federal public interest case from June 21, 2011 to March 31, 2020. About 75% of district court decisions favor plaintiffs, and appellate judges continue to vote for plaintiffs at a high rate. I use a typology of public interest class actions to explain the reasons for Wal-Mart*'s modest impact. The case has proven irrelevant to two of the public interest class actions' three major types.* Wal-Mart *has changed litigation practice in the third, a type involving structural reform lawsuits challenging systemic government maladministration. The decision has forced litigants and courts to clarify the nature of the substantive rights at stake with more precision. These efforts have prompted a "group rights" jurisprudence to crystallize. Courts have come to understand that the substantive law in these cases protects plaintiffs not as individuals but as undifferentiated group members. As such, this law is not just amenable to class-wide adjudication. It requires class action procedure for its vindication.*

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The persistence of the public interest class action does not depend on how procedural law evolves going forward. It depends on whether federal judges continue to recognize group rights in bodies of law protecting prisoners, children in foster care, people with disabilities, and other vulnerable populations. As my findings of disparities in judges' willingness to support class certification suggest, ideology will likely determine this future course.

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INTRODUCTION

The modern class action originated in lawsuits against government defendants for injunctive relief.[1] Decades ago, these "public interest class actions," as I call them, attracted criticism from policymakers uncomfortable with structural reform litigation.[2] As time passed, the use of Rule 23 of the Federal Rules of Civil Procedure in

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[1] David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 696 (2011).

[2] *E.g.*, David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785, 1817–20 (2018) [hereinafter Marcus, *History Part II*].

public interest litigation became noncontroversial, especially compared to its deployment in litigation for large monetary recoveries.[3] Public interest class actions proceeded pursuant to a stable regime of doctrinal governance that attracted little attention from courts or commentators.[4]

This quiet ended on June 20, 2011, the day the U.S. Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*.[5] The *Wal-Mart* class that the Court decertified sought significant monetary remedies,[6] but the case nonetheless proceeded pursuant to the sections of Rule 23 typically reserved for injunctive relief cases.[7] The Court identified the public interest class action as an exemplar for Rule 23's proper use.[8] But nothing in the Court's restrictive interpretations of Rule 23's commonality and injunctive relief provisions suggested that they be limited to cases like *Wal-Mart.* Government defendants quickly seized on the decision in their defense of reform litigation.[9] Federal courts soon began to treat this "watershed" decision as a mandate for greater scrutiny of public interest classes.[10] In *Wal-Mart*'s immediate wake, government defendants successfully appealed class certification orders in several important cases.[11]

When I published an article on public interest class actions several years ago,[12] this turmoil led me to speculate about the "uncertain, potentially hostile doctrinal

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[3] In *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994), Edward Becker, a leading judicial authority on class actions, labeled a district court's refusal to certify a large class of children in the care of Philadelphia's Department of Human Services challenging an array of customs and practices—but no uniform policies—an abuse of discretion. *Id.* at 65. Westlaw reports that 15 articles on class actions cited *Baby Neal* in its first decade. By contrast, more than 15 articles cited Judge Becker's opinion in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), within its first year.

[4] The first edition of the leading casebook on class action litigation, published in 2009, does not include a single excerpt from an opinion rendered in a class action against a government defendant for injunctive relief in its section on Rule 23(b)(2). RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 196–224 (2009).

[5] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[6] *Id.* at 342.

[7] *Id.* at 360–65.

[8] *Id.* at 361.

[9] David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 792–93 (2016) [hereinafter Marcus, *Public Interest*].

[10] Alonso *ex rel.* I.A. v. Sch. Bd. of Collier Cty., No. 2:16-cv-379-FtM-38MRM, 2018 WL 5304813, at *11 (M.D. Fla. Aug. 8, 2018); *see also* S.S. v. City of Springfield, 318 F.R.D. 210, 223 (D. Mass. 2016); Taylor v. Zucker, No. 14-CV-05317 (CM), 2015 WL 4560739, at *7 (S.D.N.Y. July 27, 2015).

[11] Marcus, *Public Interest*, *supra* note 9, at 793.

[12] *Id.*

terrain" that plaintiffs encountered when they sued government defendants for injunctive relief.[13] Nearly a decade has passed since *Wal-Mart*. Has class certification indeed become a significant obstacle for plaintiffs seeking to protect themselves from government harm? To answer this question and update my earlier analysis, I have reviewed every reported decision involving class certification issued by the federal courts in cases for injunctive relief brought against government defendants from June 21, 2011 to March 31, 2020. This judicial corpus, consisting of about 400 decisions, yields several lessons.

Most importantly, *Wal-Mart* has not derailed public interest litigation in any evident way. After describing the public interest class action in Part I, I report results of my simple empirical investigation in Part II. In brief, about 75% of reported decisions involving contested class certification motions favor plaintiffs.[14] Overall, the public interest class action's doctrinal health remains robust. The decision has

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[13] *Id.* at 781.

[14] My database includes all reported decisions in Bloomberg Law, Westlaw, and Lexis on motions contesting class certification in cases where the putative class had counsel, from June 21, 2011, until March 28, 2020. These motions include motions for class certification, motions for reconsideration of class certification decisions, motions to vacate certified classes, and motions to dismiss class action allegations in complaints. When plaintiffs won these motions, I coded them "plaintiff-friendly." When a court ruled partially in favor of the plaintiffs, I coded it "plaintiff-friendly" unless the decision excluded claims of any significance from class certification. I excluded cases with a *pro se* class representative because courts rarely grant class certification when the putative class lacks counsel. I also excluded cases when plaintiffs moved for certification under Rules 23(b)(2) and (b)(3). My database does not include unreported decisions on class certification in the federal courts. My data, then, are necessarily incomplete. *Cf.* David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214–17 (2013) (describing problems with the extrapolation of empirical findings about civil procedure from results of Westlaw and Lexis searches). They do not indicate either the exact number of class certification decisions or the exact percentage of plaintiff successes since June 20, 2011. The unreported decisions have no precedential or persuasive significance, however, and thus they contribute little to nothing to an understanding of the public interest class action's overall doctrinal health. Moreover, there is no reason to think that unreported decisions tend to skew against plaintiff-friendly decisions. To the contrary: if federal judges believed that *Wal-Mart* changes certification standards for public interest class actions, they presumably would have been more likely to issue reported decisions when denying class certification. *Cf. id.* at 1215 (suggesting that district judges would have been more likely to issue a published decision granting a motion to dismiss after the Supreme Court tightened the pleading standard). Thus, while my reported figures are not exact, they are either representative of the entire universe of class certification decisions in public interest class actions, or they likely understate courts' continued willingness to certify these classes after *Wal-Mart*. Finally, my data, while imperfect, at least create a presumption against any facile claim that *Wal-Mart* has significantly limited the public interest class action. *Cf.* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 n.11 (1999) (commenting on the value of even limited empirical investigations). All data are compiled in a spreadsheet on file with the *Lewis & Clark Law Review* and with the author. Any reader interested in these data may contact the author for a copy of the spreadsheet.

had its only real significance for cases challenging customs, practices, and patterns of conduct that add up to the systemic maladministration of government agencies or programs. Class certification motions in these cases now require more significant litigation investments by plaintiffs. Similarly, when district courts grant these motions, they now must provide more careful, detailed analyses for their decisions to survive appellate scrutiny.

Otherwise, what has changed are not adjustments to class action doctrine per se. Rather, as I argue in Part III, the "rigorous analysis" *Wal-Mart* demands when courts certify classes has prompted judges to clarify more precisely the contours of the underlying substantive law that licenses systemic challenges to government maladministration.[15] Their efforts reveal a "group rights" jurisprudence lurking in several substantive areas, a phenomenon I had begun to document when I wrote my earlier article.[16] The type of cases that seem most vulnerable to retrenchment after *Wal-Mart* have continued to succeed because the substantive law they implicate treats people not as distinct individuals but as undifferentiated members of groups suffering from a government-created risk of harm. *Wal-Mart*'s major doctrinal effects, then, involve the clarification of the substantive law.

Part IV argues for what class certification ought to become in light of these findings. *Wal-Mart* has turned class certification into a poorly-regulated merits inquiry. Rule 23 now forces plaintiffs to show that the substantive law creates group-wide protection against the sort of risk of harm they allege. Plaintiffs must also provide sufficient evidence to establish that the risk in fact exists for the group they seek to protect. Class certification has thus become a full-fledged merits inquiry in the type of class action most vulnerable to retrenchment after *Wal-Mart*. The process should return to what it was before *Wal-Mart*—a quick check to determine that the plaintiffs plead claims that the underlying substantive law recognizes as common.

I also speculate on what might happen to the public interest class action in Part IV. Consistent with other scholarship, my survey of post-*Wal-Mart* decision-making suggests an ideological imbalance in judges' willingness to certify classes. Initially, *Wal-Mart*'s implications for public interest litigation got worked out during a time when the federal bench tilted leftward, a fact that likely explains, at least partially, its persistence. Since January 2017, the federal judiciary has taken a rightward turn. This shifting composition, if it continues, may well change the trajectory of the public interest class action. If it alters class certification's course, the engine of legal evolution will not be procedural doctrine. Rather, judges will have to decide which groups merit protection against systemic government harm. The contours of the substantive law, not *Wal-Mart* or Rule 23, will determine this future.

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[15] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

[16] Marcus, *Public Interest*, *supra* note 9, at 811–14.

I. THE CHARACTERISTICS OF THE PUBLIC INTEREST CLASS ACTION

In this Part, I define what I mean by the public interest class action. I also describe a taxonomy of this litigation, building on what *Wal-Mart* identified as its key conceptual underpinnings.

A. *The Public Interest Class Action Distinguished*

The modern class action has lived parallel lives. One life's story centers on large sums of money and the pressures they put on litigation behavior. Over the decades since 1966, "dilemmas" created by the vindication of the rights of a diffuse public by profit-seeking lawyers have spurred extensive doctrinal development and copious academic commentary.[17]

The class action's use in public interest litigation stands as a life apart. Certainly this is so doctrinally. The two key requirements for the certification of an injunctive relief class, Rule 23(a)(2)'s commonality threshold and Rule 23(b)(2), have no formal or effective relevance in money damages cases.[18] But the separation between the two lives goes beyond doctrine and includes larger currents in the class action zeitgeist. In the 1970s, when a less distinct boundary divided public interest and for-profit class litigation,[19] class actions for injunctive relief against government defendants attracted some critical attention.[20] To judge by a dearth of academic commentary since then, these cases fell almost completely off policymakers', lawmakers', and scholars' agendas, even as the class action more generally remained a subject of obsessive concern.[21] By the 1990s, "civil rights cases" for injunctive relief became the

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[17] *Cf.* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 4 (2000) (noting that, while "critics" in the 1970s focused on civil rights class actions, "[m]ore recently, critical attention has shifted to . . . suits for 'money damages'").

[18] Money damages cases proceed pursuant to Rule 23(b)(3). *Wal-Mart*, 564 U.S. at 362. Commonality has little real significance in these cases, because Rule 23(b)(3) doesn't just require the existence of common questions of law or fact but their "predominance." Sullivan v. DB Invs., Inc., 667 F.3d 273, 297 (3d Cir. 2011) ("Parallel with Rule 23(a)(2)'s commonality element . . . Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate . . . ."); *In re* Ins. Broker Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009) ("[W]e consider the Rule 23(a) commonality requirement to be incorporated into the more stringent Rule 23(b)(3) predominance requirement . . . .").

[19] In the late 1960s and 1970s, for instance, a couple of nonprofit organizations filed most employment discrimination class actions. Marcus, *History Part II*, *supra* note 2, at 1798 & n.86. By the 1990s, for-profit plaintiffs' lawyers had moved into this field. *Id.* at 1800–01.

[20] Marcus, *History Part II*, *supra* note 2, at 1805–10.

[21] Marcus, *Public Interest*, *supra* note 9, at 781.

unproblematic foil for the difficulties that for-profit class litigation posed.[22]

What sets the public interest class action apart boils down to money. The absence of direct financial consequences of litigation for the lawyers who bring these cases and for the defendants whom they sue accounts for the doctrinal and policy favor this litigation has historically enjoyed. A wellness check on the class action's public interest life thus needs to isolate litigation that has proceeded without the potentially distorting effects of financial incentive from the federal courts' broader engagement with the class action.[23] My definition of the public interest class action does so by including only cases brought for injunctive relief against government defendants.[24]

"Public interest" refers to the category of lawyers who bring these cases. While the term has no settled definition,[25] I use it here to exclude cases selected for litigation by profit-seeking plaintiffs lawyers.[26] These lawyers surely bring litigation in

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[22] *E.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

[23] For a similar intuition, see Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 845–46 (2016).

[24] While imperfect, the term works better than suggested alternatives. The "government defendant class action" embraces too much, as a category defined by these terms would include cases for damages. *E.g.*, Adair v. Town of Cicero, No. 18 C 3526, 2019 WL 2866708, at *2 (N.D. Ill. July 3, 2019); Smith v. City of Chicago, No. 15-cv-03467, 2019 WL 2287988, at *1 n.2 (N.D. Ill. May 29, 2019); Hill v. City of N.Y., No. 13-CV-6147(PKC)(JO), 2019 WL 1900503, at *3 (E.D.N.Y. Apr. 29, 2019); Healey v. Jefferson Cty. Ky. Louisville Metro Gov't, No. 3:17-cv-71-DJH, 2018 WL 1542142, at *1 (W.D. Ky. Mar. 29, 2018); Shuford v. Conway, 326 F.R.D. 321, 326 (N.D. Ga. 2018); Pund v. City of Bedford, 339 F. Supp. 3d 701, 708 (N.D. Ohio 2018). These cases implicate the same law that applies in money damages class actions more generally, and thus no distinctive doctrinal regime governs them. The "injunctive relief class action" likewise sweeps too broadly, as it includes cases brought by profit-seeking plaintiffs' lawyers against private defendants for whom injunctions can have significant and direct financial repercussions. *E.g.*, Medical Society of N.Y. v. United Health Grp. Inc., 332 F.R.D. 138 (S.D.N.Y. 2019); Carlson v. Northrop Grumman Corp., No. 13-cv-02635, 2019 WL 5101502, at *8 (N.D. Ill. Oct. 11, 2019); Potter v. Blue Cross Blue Shield of Mich., 10 F. Supp. 3d 737 (E.D. Mich. 2014). The "systemic reform class action" is too narrow. Class action litigation against government defendants for injunctive relief routinely seeks to preserve the status quo against policy innovation. The "public law class action" has the virtue of a rich intellectual tradition behind the descriptor's use, but the term does not necessarily cordon off injunctive relief litigation against government defendants from the broad sweep of class actions generally. *E.g.*, Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 28–36 (1982) (discussing small claims class actions under Rule 23(b)(3)).

[25] ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 8–22 (2013).

[26] Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209 n.8 (1976) (identifying "the criterion of case selection" as "the distinctive element" in identifying a "law reform practice," and excluding cases where "the market" is "the principal, though not necessarily exclusive, determinant of docket priorities" from the category).

the public interest,[27] some of them undoubtedly identify as public interest litigators,[28] and for some, case selection may depend only secondarily on a lawsuit's financial return. But profit-seeking litigation, which mostly but not exclusively includes cases for money damages,[29] raises various policy concerns that have motivated several strands of class action doctrine.[30] A definition of the public interest class action that does not exclude cases for monetary recovery fails to separate out a distinctive regime of doctrinal governance that has evolved for cases litigated by lawyers funded by sources not directly pegged to recoveries in specific cases. The need to control for financial determinants of litigation behavior also explains my decision to limit the public interest class action category to cases against government defendants.[31] Taxpayer-funded government defendants do not experience risk and internalize costs of litigation the same way private defendants do.[32]

Some rudimentary statistics suggest that the public interest class action as I have defined it indeed has led a separate life from other class actions. In a study of a sample of federal question class actions filed between 2003 and 2007, the Federal Judicial Center reported that the federal district courts granted 33.6% of contested class certification motions.[33] The sample includes cases against government defendants for injunctive relief, so presumably the figure for motions in money damages cases is even lower. By contrast, district courts ruled in plaintiffs' favor in about 75% of the contested motions in my dataset.[34] Given that courts decided these motions after *Wal-Mart* supposedly tightened the relevant class certification requirements, this finding likely understates the distinctive historical favor in which the federal courts have held the public interest class action.[35]

My category is surely underinclusive. Lawyers who by any definition can legitimately claim the public interest mantle litigate cases for monetary recoveries.[36] But

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[27] *See generally* William B. Rubenstein, *On What a "Private Attorney General" Is – and Why It Matters*, 57 VAND. L. REV. 2129 (2004).

[28] *E.g.*, CHEN & CUMMINGS, *supra* note 25, at 181–200 (discussing for-profit "public interest" law firms and the litigation they bring).

[29] Profit-seeking plaintiffs' lawyers bring cases for injunctive and declaratory relief against health insurance plans, pension plans, and the like under ERISA and earn fees from its fee-shifting provision. *E.g.*, *Potter*, 10 F. Supp. 3d at 737.

[30] *E.g.*, Carroll, *supra* note 23, at 863–75.

[31] *Cf. id.* at 875–76 (expressing concern how "courts and lawmakers have imposed a series of significant, across-the-board restrictions on class actions" of all types based on policy concerns specific to money damages cases).

[32] *E.g.*, Marcus, *Public Interest*, *supra* note 9, at 829–30.

[33] Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315, 346–47 (2011).

[34] *See infra* Table I.

[35] On the historical favor, see Marcus, *Public Interest*, *supra* note 9, at 785–89.

[36] Public Justice, which litigates consumers' rights cases among others, is one example. *See*

an expanded category that includes these cases cannot control for the effect of doctrine developed in money damages cases more generally on class certification tendencies. An assessment of the public interest class action's current doctrinal health would get muddled. Likewise, public interest litigators bring injunctive relief cases against private defendants.[37] But these defendants may internalize the costs of equitable remedies as if they were money damages, affecting their litigation behavior and potentially their choices regarding which class certification motions to contest. An expanded sample to include this litigation could also confound a measure of what happens in cases against government defendants, probably the largest share of injunctive relief cases that public interest litigators bring.

B. Types of the Public Interest Class Action

The public interest class action as a distinctive category has several types. Commentary that ignores its heterogeneity risks obscuring what has and has not changed for this litigation since *Wal-Mart*. I introduced the following typology in my earlier article to enable more analytical precision in an assessment of this litigation's health.[38]

I took the traits that distinguish one type from another from what *Wal-Mart* identified as the core determinants of a class certification decision. Commonality, the first determinant, assesses the degree to which class members' claims pose common questions of law or fact that generate common answers apt to drive the resolution of all class members' claims.[39] This consideration involves "claim interdependence," or the degree to which the adjudication of one class member's claim effectively decides other class members' claims. Rule 23(b)(2), the second determinant, tests the "indivisibility" of the remedy that the plaintiffs seek.[40] "Remedial indivisibility," then, assesses the degree to which a case can yield a single class-wide injunction.

I devised some admittedly cumbersome terminology to model the public interest class action's three types. A "central agency" is what it sounds like—the entity within a government that sets relevant policy and determines its overall administra-

What We Do: Consumers' Rights, PUB. JUST., https://www.publicjustice.net/what-we-do/consumers-rights/ (last visited May 5, 2020). The Impact Fund, which litigates employment discrimination cases, is another. *See About Impact Fund Cases*, IMPACT FUND, https://www.impactfund.org/cases-1 (last visited May 5, 2020).

[37] *E.g.*, Jackie Wattles, *Target Settles Suit over Asking Job Applicants About Criminal Records*, CNN (Apr. 5, 2018), https://money.cnn.com/2018/04/05/news/companies/target-settlement-hiring-discrimination/index.html.

[38] Marcus, *Public Interest*, *supra* note 9, at 799–805.

[39] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

[40] *Id.* at 360.

tion. "Bureaucratic intermediaries" are agency personnel who interact with "regulatory beneficiaries" or "regulatory targets," the people who experience harm and become class members. Differences in the relationships among central agencies, bureaucratic intermediaries, and regulatory targets or beneficiaries determine the varying degrees of claim interdependence and remedial indivisibility that characterize each type.

1. Type I Cases

Type I cases involve necessarily interdependent claims and necessarily indivisible remedies. These traits result from two phenomena. First, the central agency crafts a policy or makes a decision that bureaucratic intermediaries administer uniformly without alteration. Second, bureaucratic intermediaries cannot possibly differentiate among regulatory targets or beneficiaries as they carry out the central agency's directive.

An example illustrates.[41] A prison's warden, the central agency actor, decides to set the air conditioning during summer months to turn on only when the temperature in the prison's buildings exceeds 90 degrees. The corrections officers in charge of each building, the bureaucratic intermediaries, set thermostats accordingly. The prisoners, the regulatory targets who endure the policy, necessarily experience it in an undifferentiated way.[42] A corrections officer cannot possibly enforce the policy prisoner-by-prisoner; the temperature in the building is the same for all. A necessarily interdependent claim based on the risk of harm that inmates endure results. The court cannot possibly adjudicate the lawfulness of one class member's Eighth Amendment claim for unlawful conditions of confinement without effectively deciding the merits of all class members' claims. Nothing of factual or legal significance distinguishes one prisoner's interaction with bureaucratic intermediaries from another's. Likewise, the remedy—"maintain cooler temperatures"—is necessarily indivisible. If a court issues the injunction to benefit one regulatory beneficiary, it necessarily benefits all.

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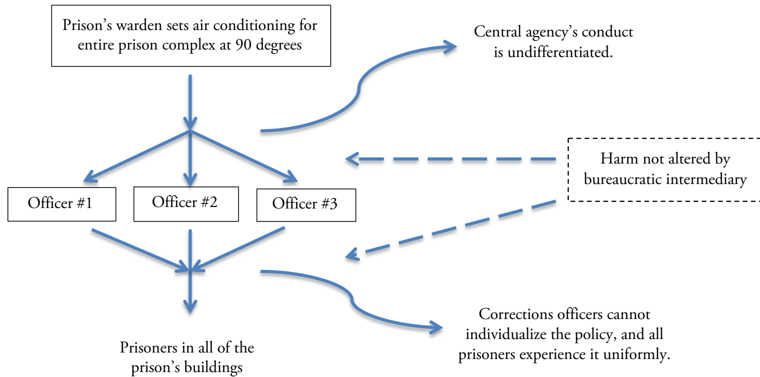
[41] This example is loosely based on *Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017).

[42] The district court in *Yates* concluded that even the youngest and healthiest inmates in a Texas prison without air conditioning suffered a "risk of serious harm" that exceeded a "constitutionally permissible level" when indoor temperatures "consistently exceed[ed] 90 degrees." *Id.* at 358, 363. For purposes of determining the defendant's liability, differences in vulnerabilities among prisoners were irrelevant. *Id.* at 363.

Figure 1. Type 1: Necessarily Interdependent Claim, Necessarily Indivisible Remedy



2. *Type II Cases*

A Type II case also involves necessarily interdependent claims but only plausibly indivisible remedies. The latter feature results from the capacity of bureaucratic intermediaries to differentiate among regulatory targets or beneficiaries. As with a Type I case, a central agency adopts a policy that bureaucratic intermediaries administer uniformly. All targets or beneficiaries who experience the policy's administration experience it identically. If the policy is unlawful as to one, it is unlawful as to all, making claims necessarily interdependent. But the nature of the policy enables bureaucratic intermediaries to individualize its administration. Remedies are thus plausibly indivisible. A court could enjoin the policy's administration to benefit a single target or beneficiary, while leaving the policy undisturbed for all others.

A recent example of a Type II case comes from litigation at the intersection of immigration and abortion policy.[43] In 2017, the Federal Office of Refugee Resettlement—the central actor in this instance—adopted a policy that amounted to a blanket refusal to provide abortion services to immigrant juveniles in its shelters.[44] ORR officials, the bureaucratic intermediaries, administered the policy without alteration by forwarding all requests for abortions to the ORR's director, who uniformly denied them.[45] The adjudication of one juvenile's claim challenging the blanket abortion ban would effectively resolve it for all others due to the claims' factual and legal identity. But the bureaucratic intermediaries could differentiate among juveniles as they administered the policy. A court could therefore enjoin the policy's administration and allow a single juvenile to access abortion services without necessarily giving access to all juveniles.[46]

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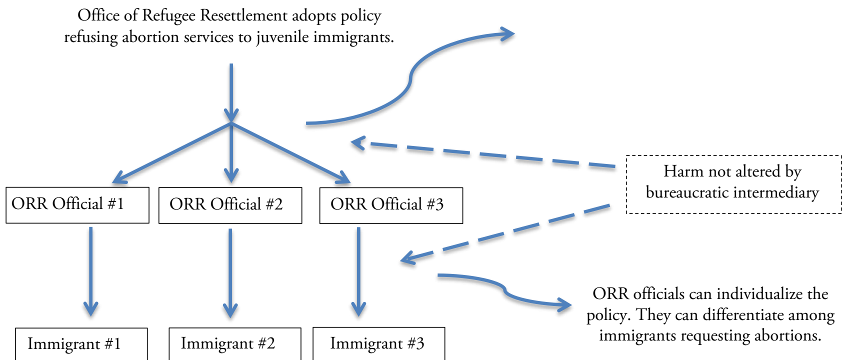
[43] J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019).

[44] *Id.* at 1303.

[45] *Id.*

[46] *Cf.* Gayle v. Warden, Monmouth Cty. Corr. Inst., 838 F.3d 297, 311 (3d Cir. 2016) (discussing the possibility and consequences of an individualized remedy under these

Figure 2. Type II: Necessarily Interdependent Claim, Plausibly Indivisible Remedy



3. *Type III Cases*

A Type III case involves plausibly interdependent claims and plausibly indivisible remedies. This litigation tends to challenge a mix of customs, practices, and deliberate indifference. Plaintiffs allege that the central agency manages a program in systemically deficient ways. But, as this maladministration gets filtered through different bureaucratic intermediaries, it manifests itself in different ways. Regulatory targets or beneficiaries experience the common maladministration differently.

Foster care reform litigation, an important if comparatively understudied form of Type III litigation,[47] exemplifies these features. A child welfare agency at the center of policy administration mismanages the state's foster care system in a variety of ways that reflect deliberate indifference to children's safety.[48] This common deficiency inflicts different sorts of harms on class members. One overworked caseworker, a bureaucratic intermediary, ignores warning signs and places a child, the regulatory beneficiary, in a home where she is at risk of sexual assault. Deficiencies in medical screening policies mean that a negligent caseworker, a second bureaucratic intermediary, fails to monitor a different child's mental health adequately. A custom of disregard for sibling placements leads a third caseworker to place a brother and sister in different homes.

These children have plausibly interdependent claims. A court cannot proceed

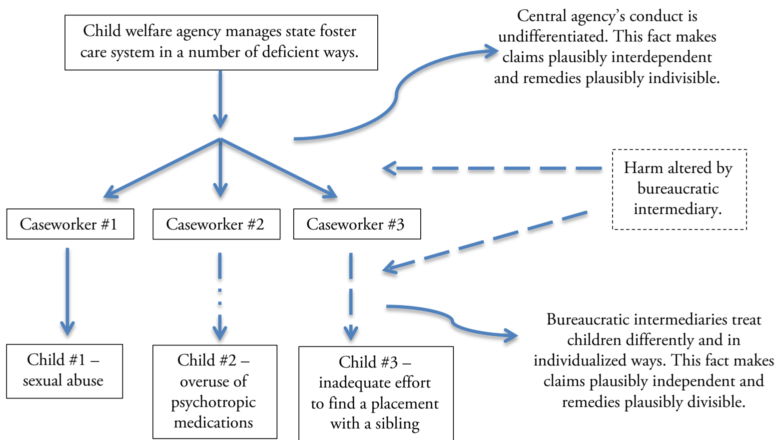
circumstances).

[47] Class actions challenging prison conditions are also Type III cases and have attracted much more scholarly attention. *E.g.*, Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 550 (2006). For a study of child welfare reform litigation and a bibliography referencing the limited relevant literature, see Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 523 (2009).

[48] For examples, see B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 964 (9th Cir. 2019); M.D. v. Perry, 294 F.R.D. 7, 19 (S.D. Tex. 2013).

child-by-child to determine whether the central agency is liable for systemwide deliberate indifference, as a systemic challenge attacks the entirety of the central agency's conduct. But each child theoretically could sue individually and challenge just the conduct of the bureaucratic intermediary that injures her. Litigated in these terms, a claim is independent. A court could adjudicate one caseworker's shortcomings and the harm they cause a child without necessarily deciding the next caseworker's deficiencies and their injurious effects. Likewise, remedies are either indivisible or divisible, depending on whether they target the central agency's wholesale policy maladministration or bureaucratic intermediaries' discrete failings. A court cannot order systemic changes to the central agency without benefiting all class members. But a court can order a caseworker to take better care of her charge without addressing other harms suffered by other children.

Figure 3. Type III: Plausibly Interdependent Claim, Plausibly Indivisible Remedy



II. THE LIMITS OF *WAL-MART*'S IMPACT

My typology helps clarify the extent to which *Wal-Mart* has impacted the public interest class action. *Wal-Mart*, a number of courts have insisted, "changed the landscape" for public interest litigation.[49] These sorts of assertions exaggerate *Wal-Mart*'s effect on injunctive relief litigation against government defendants. Courts continue to certify public interest classes at a robust clip. At least in part, this post-

[49] DL v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013); *see also* Alonso *ex rel.* I.A. v. Sch. Bd. of Collier Cty., No. 2:16-cv-379-FtM-38MRM, 2018 WL 5304813, at *11 (M.D. Fla. Aug. 8, 2018) (referring to *Wal-Mart* as a "watershed case"); Taylor v. Zucker, No. 14-CV-05317 (CM), 2015 WL 4560739, at *7 (S.D.N.Y. July 27, 2015) (describing the proposed class as "paradigmatic" of those certified before *Wal-Mart* but insisting that it is no longer an appropriate one after *Wal-Mart*); Aguilar v. ICE, No. 07-Civ. 8224(KBF), 2012 WL 1344417, at *3 (S.D.N.Y. Apr. 16, 2012) (describing *Wal-Mart* as a turning point in Rule 23(b)(2) litigation).

Wal-Mart practice reflects a simple fact. *Wal-Mart* has no significance for Type I or II cases, a sizeable share of the overall public interest class action corpus.

A. Wal-Mart*'s Doctrinal Contributions*

Wal-Mart made two principal adjustments to class action doctrine that have proven germane for public interest cases. First, the decision raised Rule 23(a)(2)'s commonality threshold.[50] Before *Wal-Mart*, plaintiffs could pose questions at a "high level of abstraction" and still show that "there are questions of law or fact common to the class."[51] Little more than "did the defendant violate the class members rights?" sufficed.[52] *Wal-Mart* rejected this practice. Class members' claims satisfy commonality only if they "*depend* upon a common contention . . . of such a nature that it is capable of classwide resolution."[53] "Depend" has real bite: the "determination of" this contention's "truth or falsity" must "resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke."[54] Moreover, plaintiffs cannot simply allege that a qualifying common question exists.[55] *Wal-Mart* requires them to "prove" that their proposed class "*in fact*" meets the commonality threshold. Plaintiffs must show how they can "bridge" the "conceptual gap" between each class member's individual experience with the defendant and the defendant's general conduct, an obligation that can require evidence.[56] A court can only certify a class after it does a "rigorous analysis" to make sure that this is the case.[57]

Wal-Mart's second contribution involves Rule 23(b)(2) and the sort of remedy it requires the proposed class to seek. The provision requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[58] *Wal-Mart* construes this text to apply "only when a single injunction . . . would provide relief to each member of the class."[59] Rule

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[50] A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013).

[51] FED. R. CIV. P. 23(a)(2); Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997).

[52] *E.g.*, *Marisol*, 126 F.3d at 377 (holding that "whether each child has a legal entitlement to the services of which that child is being deprived" and "whether defendants systematically have failed to provide these legally mandated services" are questions that satisfied commonality); Marcus, *Public Interest*, *supra* note 9, at 786–87.

[53] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (emphasis added).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 353.

[57] *Id.* at 351.

[58] FED. R. CIV. P. 23(b)(2).

[59] *Wal-Mart*, 564 U.S. at 360.

23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction."[60] As interpreted, this "indivisib[ility]" has come to imply a finality requirement.[61] If the proposed class seeks a remedy that contemplates individualized administration for class members after its issuance, it fails the Rule 23(b)(2) test.[62]

B. The Public Interest Class Action by the Numbers

Wal-Mart was not a public interest class action, at least as I have defined the category. The plaintiffs sought back pay in addition to injunctive relief, and they sued a private defendant.[63] Nonetheless, the decision appeared to have immediate, possibly profound significance for public interest litigation. With *Wal-Mart*'s influence plain, the first three circuits to review the certification of public interest classes after *Wal-Mart* issued decertification orders.[64] *Wal-Mart*'s initial reception prompted my concern that the decision would lead to significant retrenchment for the public interest class action.

But a hard pro-defendant turn in the doctrinal regulation of the public interest class action has not materialized. Since the last of the three initial cases, the federal circuits have decided 22 additional appeals involving the propriety of class certification. Plaintiffs have won 17 of these cases,[65] for an overall post-*Wal-Mart* record of

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[60] *Id.*

[61] *See* Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 499 (7th Cir. 2012) (explaining the finality requirement).

[62] *Id.*

[63] Only by dint of an unusual path dependency, dating back to the class action's early days, did *Wal-Mart* proceed pursuant to Rule 23(b)(2) and not (b)(3). *See* David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953-1980*, 90 WASH. U. L. REV. 587, 640 (2013) (describing this history).

[64] DL v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013) (insisting that *Wal-Mart* "changed the landscape"); M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839 (5th Cir. 2012) (decertifying a foster care reform class but noting that "the district court's analysis may have been a reasonable application of pre-*Wal-Mart* precedent"); *Jamie S.*, 668 F.3d at 498 (relying on *Wal-Mart* for a commonality analysis).

[65] For post-*Wal-Mart* decisions either affirming class certification or reversing a decision denying or vacating class certification, see Brown v. D.C., 928 F.3d 1070 (D.C. Cir. 2019); J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019); B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957 (9th Cir. 2019); Postawko v. Mo. Dep't of Corr., 910 F.3d 1030 (8th Cir. 2018); M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018); Fowler v. Guerin, 899 F.3d 1112 (9th Cir. 2018); Lacy v. Cook Cty., 897 F.3d 847 (7th Cir. 2018); Yates v. Collier, 868 F.3d 354 (5th Cir. 2017); DL v. District of Columbia, 860 F.3d 713 (D.C. Cir. 2017); Driver v. Marion Cty. Sheriff, 859 F.3d 489 (7th Cir. 2017); Barry v. Lyon, 834 F.3d 707 (6th Cir. 2016); Cole v. City of Memphis, 839 F.3d 530 (6th Cir. 2016); Gayle v. Warden, Monmouth Cty. Corr. Inst., 838 F.3d 297 (3d Cir. 2016); Richardson v. Bledsoe, 829 F.3d 273 (3d Cir. 2016); *In re* D.C., 792 F.3d 96 (D.C. Cir. 2015); Shelton v. Bledsoe, 775 F.3d 554 (3d Cir. 2015); Parsons v. Ryan, 754 F.3d 657 (9th Cir.

17-8.[66] Of the five more recent losses, several have little significance for Rule 23's general administration in public interest class actions. One produced an unpublished decision;[67] a second resulted from a specific class action bar in the Immigration and Nationality Act, not a crabbed administration of Rule 23;[68] and a third affirmed a district court's decision to decertify a class after a trial revealed insufficient evidence of class-wide harm.[69]

This supermajority of plaintiff victories compares favorably to the class action's overall treatment in the federal courts of appeals. Reviewing circuit opinions on class certification from 1967-2017, Steve Burbank and Sean Farhang found that federal appellate judges voted for class certification 43% of the time.[70] In public interest cases since *Wal-Mart*, federal appellate judges have cast 69% of relevant votes in favor of class certification.[71] The numbers are too small to make claims about judicial behavior with any statistical rigor. But the tally rebuts any facile claim of a hard

2014). For decisions vacating class certification decisions, see Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019); Parent/Professional Advocacy League v. City of Springfield, 934 F.3d 13 (1st Cir. 2019); Hamama v. Adducci, 912 F.3d 869 (6th Cir. 2018); Ward v. Hellerstedt, 753 F. App'x 236 (5th Cir. 2018); Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 554 (7th Cir. 2016); DL v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013) (insisting that *Wal-Mart* "changed the landscape"); M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839 (5th Cir. 2012) (decertifying a foster care reform class but noting that "the district court's analysis may have been a reasonable application of pre-*Wal-Mart* precedent"); Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481 (7th Cir. 2012).

[66] During the nine years before *Wal-Mart*, the courts of appeals rendered four plaintiff-friendly class certification decisions in public interest cases and five defendant-friendly ones. The plaintiff-friendly decisions include Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010); DG v. Devaughn, 594 F.3d 1188 (10th Cir. 2010); Gilman v. Schwarzenegger, 382 F. App'x 544 (9th Cir. 2010); and New Directions Treatment Servs. v. City of Reading, 490 F.3d 293 (3d Cir. 2007). The defendant friendly decisions are Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009); Shook v. Bd. of Cty. Comm'rs, 543 F.3d 597 (10th Cir. 2008); Rahman v. Chertoff, 530 F.3d 622 (7th Cir. 2008); Elizabeth M. v. Montenez, 458 F.3d 779 (8th Cir. 2006); and Bell v. City of Dallas, 81 F. App'x 490 (5th Cir. 2003). This 4-5 record makes the 17-8 post-*Wal-Mart* record seem even more plaintiff friendly. But it cannot function as a useful baseline. If doctrine was particularly favorable to public interest class actions before *Wal-Mart*, then presumably defendants only appealed especially questionable class certification decisions. The favorable post-*Wal-Mart* record likely reflects less demanding case screening by defendants, as they perceived doctrine tilting in their direction and thus warranting more appeals.

[67] *Ward*, 753 F. App'x at 236.

[68] *Hamama*, 912 F.3d at 880.

[69] *Phillips*, 828 F.3d. at 560.

[70] Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. (forthcoming 2020) (manuscript at 6, 25).

[71] Circuit judges have cast 71 votes in the 25 panel decisions rendered on class certification since *Wal-Mart*. Four of these cases included non-circuit judges sitting by designation. *See* Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019); B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957 (9th Cir. 2019); Fowler v. Guerin, 899 F.3d 1112 (9th Cir. 2018); Gayle v. Warden, Monmouth Cty.

turn toward retrenchment in post-*Wal-Mart* precedent.

The record at the district court level also favors plaintiffs. Table I assembles the results from my effort to gather and code every reported class certification decision rendered by district courts since *Wal-Mart*.[72] The lack of a pre-2011 baseline renders these results less illuminating, as they cannot show whether practice has changed since *Wal-Mart*. But at the least, this pattern dispels any facile suggestion that *Wal-Mart* has erected anything approaching an impregnable barrier to class certification in public interest litigation.[73] The rate at which district courts issue plaintiff-friendly reported decisions does not vary significantly with circuit boundaries. Plaintiff-friendly results post-*Wal-Mart* do not result from the outsized significance of an idiosyncratically favorable appellate decision for courts within a circuit but rather reflect a broader state of affairs.

Table I. Reported District Court Decisions on Class Certification, June 21, 2011–March 31, 2020

Circuit Membership	Plaintiff-Friendly Decisions	Defendant-Friendly Decisions
First	80% (8 decisions)	20% (2 decisions)
Second	81.4% (35 decisions)	18.6% (8 decisions)
Third	80.95% (17 decisions)	19.05% (4 decisions)
Fourth	75% (9 decisions)	25% (3 decisions)
Fifth	71.43% (15 decisions)	28.57% (6 decisions)
Sixth	77.78% (21 decisions)	22.22% (6 decisions)
Seventh	65.85% (27 decisions)	34.15% (14 decisions)

Corr. Inst., 838 F.3d 297 (3d Cir. 2016). I did not include these four votes in my tally. I also did not include votes on the failed en banc call in *Parsons v. Ryan*, 784 F.3d 571 (9th Cir. 2015). Thus, my tally includes the 49 votes circuit judges have cast in favor of class certification and their 22 votes against in panel decisions.

[72] These data include magistrate judge decisions in cases referred to magistrate judges under 28 U.S.C. § 636. They include district judge decisions accepting or rejecting magistrate judge referrals and recommendations, but not the referrals or recommendations themselves.

[73] One objection to using reported decisions as a gauge of the health of the public interest class action is that the dataset does not account for the class actions that have gone unfiled due to litigators' sense that tightened certification requirements will make their efforts unlikely to succeed. *Cf.* Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2275 (2012) (suggesting that heightened pleading standards may have a version of this effect on plaintiffs' selection of cases to file). As I discuss below, *Wal-Mart*'s most significant effect on the public interest class action has not included a dramatic decline in courts' willingness to certify cases, but rather increased evidentiary burdens that plaintiffs in Type III cases shoulder at the class certification stage. Because plaintiffs shoulder these burdens at summary judgment and trial, *Wal-Mart* has basically moved up in time the moment at which plaintiffs must make evidentiary showings and has not affected the overall evidentiary obligations a case creates for them. *See infra* Part IV.A. *Wal-Mart* should not have had a dramatic impact on litigators' willingness to file cases, since *Wal-Mart* has not significantly changed the overall investment they must make.

Eighth	80% (20 decisions)	20% (5 decisions)
Ninth	78.02% (71 decisions)	21.98% (20 decisions)
Tenth	64.29% (9 decisions)	35.71% (5 decisions)
Eleventh	57.14% (12 decisions)	42.86% (9 decisions)
D.C. Circuit	90.91% (10 decisions)	9.09% (1 decision)
Total	75.37% (254 decisions)	24.63% (83 decisions)

C. Wal-Mart*'s Irrelevance*

As these numbers confirm, anxieties about significant, generalized retrenchment for the public interest class action, including mine, have thus far proven unwarranted. One reason why is straightforward. As the lower courts have digested *Wal-Mart*, they have confirmed that the changes it wrought are effectively irrelevant in Type I and Type II cases.

Claim interdependence, which Type I and II cases necessarily have, means that class members' claims only raise common questions of law and fact. Legal and factual identity among claims means that a court cannot adjudicate one class members' claim without effectively doing so for all. In the parlance of *Wal-Mart*, no "conceptual gap" exists between one class member's claim and another's that needs bridging. Rule 23(b)(2) after *Wal-Mart* requires that plaintiffs explain how all can benefit from an indivisible remedy that requires no additional individualized administration. If the defendant treats all class members uniformly, whether it can plausibly differentiate among them or not, the same remedy corrects all of their harm in one fell swoop.

The universal failure of a novel defense government defendants have spun from threads in *Wal-Mart* confirms the decision's irrelevance. This defense involves the completeness of the remedy that plaintiffs seek. As mentioned, "Rule 23(b)(2)" after *Wal-Mart* "applies only when a single injunction . . . would provide relief to each member of the class."[74] In one of the early appellate reversals plaintiffs suffered after *Wal-Mart*, the Seventh Circuit elaborated on this language to insist that a proposed remedy cannot "merely initiate a process through which highly individualized determinations of liability and remedy are made."[75] "[T]his kind of relief would be class-wide in name only," the court continued, "and it certainly would not be final," as the text of the rule requires.[76]

Type II plaintiffs routinely challenge uniform policies that deny them the opportunity to seek a benefit or vindicate a right, without actually demanding that the

[74] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

[75] Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 499 (7th Cir. 2012).

[76] *Id.*

court award each class member the benefit or vindicate each one's right.[77] The Department of Education, for instance, has flatly refused to adjudicate requests to cancel student debt based on creditor schools' misconduct. The class plaintiffs who have challenged this policy want it lifted. But they do not ask the court to order anyone's debt cancelled.[78] The Department of Homeland Security's policy of refusing to convene bond hearings for certain categories of detained immigrants has prompted a number of lawsuits. Plaintiffs want to change the policy and win an injunction entitling them to hearings. They do not seek individual bond orders.[79] An emerging line of cases challenges bail determination policies that do not account for defendants' indigency. Class members ask that the court order judges to inquire about their indigency. They do not seek specific bail amounts for each class member.[80]

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[77] In addition to the cases discussed in this paragraph, see R.F.M. v. Nielsen, 365 F. Supp. 3d 350, 359 (S.D.N.Y. 2019) (right to have Department of Homeland Security consider orders from New York family court in support of applications for special immigrant juvenile visas); Robinson v. Purkey, 326 F.R.D. 105, 127 (M.D. Tenn. 2018) (right to have indigency considered before driver's license is suspended for nonpayment of traffic debt); Thomas v. Haslam, 329 F. Supp. 3d 475, 479 (M.D. Tenn. 2018); Buffkin v. Hooks, Civ. No. 1:18CV502, 2018 WL 6271855, at *3 (M.D.N.C. Nov. 30, 2018); Nak Kim Chhoeun v. Marin, No. SACV 17-01898-CJS(GJSx), 2018 WL 6265014, at *1–3 (C.D. Cal. Aug. 14, 2018) (right of immigrants to file a motion to reopen before their orders of removal are executed); Brown v. Precythe, No. 2:17-cv-04082-NKL, 2018 WL 3118185, at *1 (W.D. Mo. June 25, 2018) (challenge to policies the state uses to determine if people convicted as juveniles can be paroled); Chimenti v. Wetzel, No. 15-3333, 2018 WL 2388665, at *1 (E.D. Pa. May 24, 2018); Stafford v. Carter, No. 17-CV-00289-JMS-MJD, 2018 WL 1140388, at *2 (S.D. Ind. Mar. 2, 2018); Hoffer v. Jones, 323 F.R.D. 694, 696–697 (N.D. Fla. 2017); Postawko v. Mo. Dep't of Corr., No. 2:16-cv-04219-NKL, 2017 WL 3185155, at *3–4 (W.D. Mo. July 26, 2017), *aff'd* 910 F.3d 1030 (8th Cir. 2018); Graham v. Parker, No. 16-CV-01954, 2017 WL 1737871, at *1 (M.D. Tenn. May 4, 2017); M.G. v. N.Y.C. Dep't of Educ., 162 F. Supp. 3d 216, 224–225 (S.D.N.Y. 2016) (challenge New York City's policies for adjudicating individualized education plans for children with autism); Sherman v. Burwell, No. 3:15-cv-01468, 2016 WL 4197575, at *1 (D. Conn. Aug. 8, 2016) (challenge to "secret policy" of having private contractor invariably deny Medicare appeals); R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (including the enhanced deterrent effect of detention on likelihood to immigrate when determining whether to detain immigrant families); Hart v. Colvin, 310 F.R.D. 427, 429 (N.D. Cal. 2015) (right to have application for disability benefits adjudicated without influence of particular physician's consultative examination); Unthaksinkun v. Porter, No. C11-0588JLR, 2011 WL 4502050, at *13 (W.D. Wash. Sept. 28, 2011) (right to adequate notice before health benefits are terminated).

[78] Sweet v. DeVos, No. C 19-03674 WHA, 2019 WL 5595171, at *7 (N.D. Cal. Oct. 30, 2019).

[79] Reid v. Donelan, No. 13-30125-PBS, 2018 WL 5269992, at *5 (D. Mass. Oct. 23, 2018); Abdi v. Duke, 323 F.R.D. 131, 141 (W.D.N.Y. 2017); Gordon v. Johnson, 300 F.R.D. 31, 36, 43 (D. Mass. 2014).

[80] Dixon v. City of St. Louis, No. 4:19-cv-0112-AGF, 2019 WL 2437026, at *5 (E.D. Mo. June 11, 2019); Booth v. Galveston Cty., No. 3:18-CV-00104, 2019 WL 1129492, at *5 (S.D. Tex. Mar. 12, 2019); Daves v. Dallas Cty., No. 3:18-CV-0154-N, 2018 WL 4537202, at *2

In this sort of case, defendants have argued against class certification on grounds that the sought-after injunction—basically, an order giving class members a fair chance to pursue the benefit or vindicate the right as individuals—is incomplete. The debtor really wants her debts cancelled, or so the argument goes, and this individualized remedy requires more than what an indivisible injunction after *Wal-Mart* can accomplish.[81] A class-wide injunction ordering immigration judges to convene bond hearings, government defendants argue, is a half-measure, not the "final" injunctive relief that *Wal-Mart* demands.[82] The actual "final" version—the determination of a bail amount discounted for indigency, for instance—cannot be indivisible, since a judge will have to set bail class member by class member.[83]

To date, these "remedial completeness" arguments have uniformly failed.[84] The substance of the plaintiffs' claim determines the boundaries of the plaintiffs' harm and by logical extension when a remedy redressing it is final and complete. The substantive law may create liability for a defendant when it denies opportunities to seek benefits or vindicate rights without requiring any determination of whether anyone is actually entitled to the benefit or the right.[85] If so, a remedy that gives plaintiffs an opportunity, by itself, is final and complete.[86] An injunction like "end the categorial refusal to adjudicate student debt cancellation petitions" is indivisible, class-wide, and final.[87]

(N.D. Tex. Sept. 20, 2018).

[81] *Sweet*, 2019 WL 5595171, at *6.

[82] *Abdi*, 323 F.R.D. at 141.

[83] *Daves*, 2018 WL 4537202, at *2.

[84] *E.g.*, O.A. v. Trump, 404 F. Supp. 3d 109, 156 (D.D.C. 2019); Booth v. Galveston Cty., No. 3:18-CV-00104, 2019 WL 1129492, at *5 (S.D. Tex. Mar. 12, 2019) (this sort of argument "misses the boat"); Nak Kim Chhoeun v. Marin, No. SACV 17-01898-CJS(GJSx), 2018 WL 6265014, at *6 (C.D. Cal. Aug. 14, 2018); M.G. v. N.Y.C. Dep't of Educ., 162 F. Supp. 3d 216, 236–37 (S.D.N.Y. 2016); Unthaksinkun v. Porter, No. C11-0588JLR, 2011 WL 4502050, at *13 (W.D. Wash. Sept. 28, 2011).

[85] *Compare* Ryan v. Burwell, No. 5:14-cv-00269, 2016 WL 158527, at *22 (D. Vt. Jan. 13, 2016) (insisting that the "failure to apply [a particular] standard [in adjudicating Medicare coverage disputes] is . . . a sufficient injury," even if "[a]pplication of that standard may make no difference to the outcome in some claims"), *with* Brito v. Barr, 395 F. Supp. 3d 135, 148 (D. Mass. 2019) (suggesting that class members who have had bond determinations adjudicated under an unlawful burden of proof policy may have to prove prejudice in order to prevail on their claims, creating a problem for forging an indivisible injunction under Rule 23(b)(2)).

[86] *Cf. O.A.*, 404 F. Supp. 3d at 157 (an argument that a remedy enjoining a blanket ban on the consideration of asylum applications fails Rule 23(b)(2)'s test "conflates Plaintiffs' challenge to the categorical bar on eligibility for asylum—which applies equally to all members of the putative class—with each putative member of the class's unique interest in seeking asylum, which is not at issue in this case").

[87] Sweet v. DeVos, No. C 19-03674 WHA, 2019 WL 5595171, at *8 (N.D. Cal. Oct. 30, 2019).

These "remedial completeness" arguments have serious legal flaws,[88] and perhaps observers should read little into their universal and appropriate futility. But governments have come up with nothing better in their efforts to leverage *Wal-Mart* in Type I and II cases.[89]

III. *WAL-MART* AND THE TYPE III CLASS ACTION

The public interest class action's overall health remains robust in large part because its docket includes many Type I and especially Type II cases. But *Wal-Mart* has indisputably impacted Type III cases, or those with plausibly interdependent claims and plausibly indivisible remedies. Of the eight classes to fail on appellate review since June 2011, six share these characteristics.[90]

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[88] Rule 23 takes the substantive law as a given. If the substantive law couches a claim in terms of the denial of a fair chance, and an injunction gives a successful plaintiff the fair chance that the substantive law demands, an interpretation of Rule 23 that requires plaintiffs in class actions to pursue a different remedy risks the abridgement of substantive rights in violation of the Rules Enabling Act. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 407–08 (2010) (describing rules as valid because "none altered the rights themselves [or] the available remedies").

[89] Governments often challenge class certification in these cases on grounds of "necessity," arguing that, because their conduct is uniform for all class members, an injunction benefiting just one individual will necessarily benefit all. *E.g.*, *M.G.*, 162 F. Supp. 3d at 243; Cromwell v. Kobach, 199 F. Supp. 3d 1292, 1313 (D. Kan. 2016); Planned Parenthood of Kansas v. Mosier, No. 16-2284-JAR-GLR, 2016 WL 3597457, at *26 (D. Kan. July 5, 2016); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 951 (W.D. Tex. 2011). If a defendant challenges class certification under Rule 23(a)(2) or (b)(2), then the argument that class members are so identical as to render class certification unnecessary makes no sense. Barfield v. Cook, No. 3:18-cv-1198 (MPS), 2019 U.S. Dist. LEXIS 131295, at *37 (D. Conn. Aug. 6, 2019); Garnett v. Zeilinger, 301 F. Supp. 3d 199, 205 (D.D.C. 2018). Moreover, the necessity defense ignores scope-of-remedy limitations, which counsel for remedies no broader than those necessary to correct the harm to the plaintiff. In a Type II case not certified as a class action, these principles should counsel in favor of an individual injunction, leaving the uniform policy in force for all others. *Id.* at 205 & n.4. Regardless, the necessity argument is an old one that long predates *Wal-Mart*. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1785.2 (3d ed. 2005). Another defense to have gained traction in some instances involves the numerosity requirement. Because *Wal-Mart* demands a "rigorous analysis" before certification, a few courts have denied certification on grounds that plaintiffs have not shown numerosity with sufficient evidence. T.R. v. Sch. Dist. of Phila., No. 15-4782, 2019 WL 1745737, at *12 (E.D. Pa. Apr. 18, 2019); Adams v. DeVos, No. 3:15-3592, 2017 WL 3633744, at *4 (S.D. W. Va. Aug. 23, 2017); P.P. v. Compton Unified Sch. Dist., No. CV 15-3726-MWF (PLAx), 2015 WL 5752770, at *9 (C.D. Cal. Sept. 29, 2015); Wright v. Calumet City, No. 14 C 10351, 2015 WL 13427810, at *2 (N.D. Ill. Sept. 25, 2015).

[90] Parent/Prof'l Advocacy League v. City of Springfield, 934 F.3d 13, 29 (1st Cir. 2019); Willis v. City of Seattle, 943 F.3d 882, 885 (9th Cir. 2019); Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 557–58 (7th Cir. 2016); DL v. District of Columbia, 713 F.3d 120, 121 (D.C. Cir. 2013); M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 848 (5th Cir. 2012); Jamie S. v.

This vulnerability to retrenchment makes sense. In a prototypical Type III case, the named plaintiff alleges that systemic maladministration of a policy regime by a central agency causes all class members' injuries. But bureaucratic intermediaries interact with class members differently. Each could litigate an independent claim with individualized evidence focused on his particular experience and demand a discrete injunction designed for him. To establish commonality, class members must tell a convincing liability story that connects the central agency's maladministration with each class member's discrete injury. A conceptual gap between one class member's experience with the agency and another's indeed exists. Class members must also demonstrate that a single injunction can benefit all of them.[91] Their different interactions with bureaucratic intermediaries and the varied manifestations of the central agency's systemic deficiencies make the effectiveness of a single remedy less intuitively obvious than in a Type I or II case.

Still, *Wal-Mart* has not pushed the Type III class action into anything close to full-on retreat. Courts have certified classes of prisoners challenging their conditions of confinement;[92] of foster children challenging their care;[93] of people with disabil-

Milwaukee Pub. Sch., 668 F.3d 481, 498 (7th Cir. 2012). The two classes to fail that arguably do not fit the Type III model were *Ward v. Hellerstedt*, 753 F.App'x 236, 246 (5th Cir. 2018), and *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018).

[91] *Cf.* Leiting-Hall v. Winterer, No. 4:14-CV-3155, 2015 WL 1470459, at *6 (D. Neb. Mar. 31, 2015) (noting that the test under Rule 23(b)(2) is whether an injunction would benefit all class members, even if some have not been harmed).

[92] Monroe v. Meeks, No. 18-cv-156, 2020 WL 1057890, at *3 (S.D. Ill. Mar. 4, 2020); Bell v. Sheriff of Henry Cty., No. 19-cv-00557, 2019 WL 2603522, at *1 (S.D. Ind. June 25, 2019); A.T. *ex rel.* Tillman v. Harder, 298 F. Supp. 3d 391, 400 (N.D.N.Y. 2018); Lewis v. Cain, 324 F.R.D. 159, 176 (M.D. La. 2018); Rasho v. Walker, No. 07-1298, 2018 WL 2392847, at *3 (C.D. Ill. May 25, 2018); McBride v. Mich. Dep't of Corr., Civ. No. 15-11222, 2017 WL 3097806, at *1 (E.D. Mich. June 30, 2017); Lippert v. Baldwin, No. 10 C 4603, 2017 WL 1545672, at *10 (N.D. Ill. Apr. 28, 2017); V.W. *ex rel.* Williams v. Conway, 236 F. Supp. 3d 554, 565 (N.D.N.Y. 2017); Braggs v. Dunn, 317 F.R.D. 634, 639 (M.D. Ala. 2016); Holmes v. Godinez, 311 F.R.D. 177, 195 (N.D. Ill. 2015); Dockery v. Fischer, 253 F. Supp. 3d 832, 839 (S.D. Miss. 2015); Hernandez v. Cty. of Monterey, 305 F.R.D. 132, 139 (N.D. Cal. 2015); Scott v. Clarke, 61 F. Supp. 3d 569, 591 (W.D. Va. 2014); Gray v. Cty. of Riverside, No. EDCV 13-00444-VAP (OPx), 2014 WL 5304915, at *2 (C.D. Cal. Sept. 2, 2014); Butler v. Suffolk Cty., 289 F.R.D. 80, 103 (E.D.N.Y. Mar. 19, 2013); Parsons v. Ryan, 289 F.R.D. 513, 521 (D. Ariz. 2013); Ind. Prot. & Advocacy Servs. Comm'n v. Ind. Dep't of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *1 (S.D. Ind. Dec. 31, 2012); Rosas v. Baca, No. CV 12-00428 DDP (SHx), 2012 WL 2061694, at *2 (C.D. Cal. June 7, 2012).

[93] B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 964 (9th Cir. 2019); M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 271 (5th Cir. 2018); Tinsley v. Faust, 411 F. Supp. 3d 462, 466 (D. Ariz. 2019).

ities challenging municipal efforts to make public spaces accessible and state practices that put them at risk of unnecessary institutionalization;[94] of criminal defendants challenging the adequacy of a public defender system;[95] of children challenging inadequacies in education programming;[96] and of homeless people challenging various customs and ordinances that prohibit the activities of basic living[97]—all in the absence of uniform class-wide policies administered without alteration.

The key to this sustained success is not a version of "narrowing from below"—of lower federal courts fashioning a less intrusive interpretation of *Wal-Mart* to blunt its impact.[98] Rather, *Wal-Mart*'s demand for "rigorous analysis" has forced lawyers and judges to articulate with more precision the contours of the substantive rights that Type III plaintiffs vindicate. These rights vest in class members as undifferentiated members of groups, not as discrete individuals. They can only be adjudicated for the group as a whole and are thus necessarily interdependent. Put simply, Type III cases involve group rights that are not just appropriate but designed for class litigation.

A. *Risk of Harm Claims*

Foster care reform litigation exemplifies Type III cases and the challenge *Wal-Mart* appears to pose. The plaintiffs allege that widespread deficiencies in the state's system result from a central agency's deliberate indifference to child safety and well-being. This systemic policy maladministration threatens all children. Whether plaintiffs are right about the agency's conduct and whether deficiencies add up to liability for the defendant are common questions that a court can only adjudicate for all class members at once. A central agency does not parcel out its systemic deliberate indifference child by child. Its conduct creates interdependent claims. Likewise, if proven, the systemic maladministration requires a systemic remedy targeting

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[94] Westchester Indep. Living Ctr., Inc. v. State Univ. of N.Y., 331 F.R.D. 279, 284 (S.D.N.Y. 2019); S.R. *ex rel.* Rosenbauer v. Pa. Dep't of Human Servs., 325 F.R.D. 103, 105 (M.D. Pa. 2018); Ball *ex rel.* Burba v. Kasich, No. 2:16-cv-00282, 2017 WL 1148358 (S.D. Ohio Mar. 27, 2017); Steward v. Janek, 315 F.R.D. 472 (W.D. Tex. 2016); O.B. v. Norwood, No. 15 C 10463, 2016 WL 2866132, at *1 (N.D. Ill. May 17, 2016); N.B. *ex rel.* v. Hamos, 26 F. Supp. 3d 756, 760 (N.D. Ill. 2014); Kenneth R. *ex rel.* Tri-County Cap, Inc. v. Hassan, 293 F.R.D. 254, 258 (D.N.H. 2013); Gray v. Golden Gate Nat'l Recreation Area, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011).

[95] Wilbur v. City of Mount Vernon, 298 F.R.D. 665, 669 (W.D. Wash. 2012).

[96] J.R. v. Oxnard Sch. Dist., No. LA CV17-04304 JAK (FFMx), 2019 WL 4438243, at *2–3 (C.D. Cal. July 30, 2019).

[97] Blake v. City of Grants Pass, No. 1:18-cv-01823-CL, 2019 U.S. Dist. LEXIS 132508, at *1–3 (D. Or. Aug. 7, 2019).

[98] *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 927–28 (2016).

the central agency's conduct. This injunction is necessarily indivisible, since the central agency cannot plausibly correct budgetary shortfalls, inadequate reporting obligations, poor training, and other such deficiencies to benefit just a single child.

But each child interacts with the central agency through his or her own caseworker, the bureaucratic intermediary. She thus experiences policy maladministration differently, a situation that makes her claim plausibly independent. For one thing, the relevant substantive law might make proof of each child's specific experience central to a determination of the defendant's liability. For another, if two children have different caseworkers, are in different placements, and enter the system with different preexisting conditions, one child's experience with sexual molestation may have nothing to do with the second's over-exposure to psychotropic drugs. If this is so, no child's claim raises a question whose answer can drive the resolution of all children's claims. Under these scenarios, each child's claim involves her discrete harm only, and it requires an individually fashioned remedy inconsistent with Rule 23(b)(2)'s insistence on indivisibility.

The amenability of a proposed Type III class to certification thus depends on the answer to a question: when can plaintiffs proceed with interdependent claims targeting and seeking a systemic remedy for central agency maladministration, and when can they only pursue independent claims limited to discrete experiences with bureaucratic intermediaries and seek individual remedies? In a couple of instances, courts have edged toward an answer that would limit class certification to necessarily interdependent claims and thereby end Type III litigation altogether. By this view, a class action cannot proceed absent a uniform policy injuring all class members the same way.[99]

The many Type III classes certified since *Wal-Mart* confirm that this view has not prevailed broadly.[100] Type III plaintiffs have successfully answered the question with a two-pronged strategy. First, plaintiffs demonstrate that the applicable substantive law creates liability for the central agency if it creates a risk of harm, without requiring proof of how the risk materializes for each class member.[101] The injury, then, is the risk itself, not how it manifests itself for particular class members.[102]

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[99] Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 498 (7th Cir. 2012); Thornhill v. Aylor, No. 3:15-CV-00024, 2016 WL 8737358, at *14 (W.D. Va. Feb. 19, 2016).

[100] *See, e.g.*, *supra* notes 92–97.

[101] *E.g.*, B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957, 968–69, 974 (9th Cir. 2019); Shelton v. Bledsoe, 775 F.3d 554, 564–65 (3d Cir. 2015); M.D. v. Perry, 294 F.R.D. 7, 19 (S.D. Tex. 2013). For examples of failures at this prong, see Darjee v. Betlach, No. CV-16-00489-TUC-RM (DTF), 2018 WL 4214438, at *8 (D. Ariz. Sept. 5, 2018); Amador v. Baca, No. CV-10-1649 SVW, 2014 WL 10044904, at *4 (C.D. Cal. Dec. 18, 2014).

[102] *E.g.*, Gray v. County of Riverside, No. EDCV 13-00444-VAP (OPx), 2014 WL 5304915, at *12 (C.D. Cal. Sept. 2, 2014) ("It is the exposure to a risk of serious harm, and not the actual medical or mental health care received, that constitutes the injury suffered by the inmates . . . ."); Parsons v. Ryan, 289 F.R.D. 513, 521 (D. Ariz. 2013) ("[T]he constitutional

These manifestations merely illustrate the risk's effects.[103] Individual class members' discrete experiences are substantively irrelevant to a determination of the defendant's liability, and thus the substantive law conceives of the risk in undifferentiated terms. Class members experience it identically. As the Ninth Circuit held in *Parsons v. Ryan*, an influential Type III prison conditions case, "every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm."[104] Whether the defendant creates an unlawful risk thus poses a question that can only be answered for all class members at once. If proven, the risk's mitigation demands a single injunction for the class as a whole.[105]

This first step requires plaintiffs to establish that the substantive law recognizes an interdependent claim for liability arising from the creation of an undifferentiated risk of harm. As they have grappled with *Wal-Mart*'s demand for increased rigor in class certification decisions, courts have recognized risk of harm liability in various bodies of substantive law, including the First Amendment, the Eighth Amendment, the Fourteenth Amendment,[106] and various statutes.[107]

The second step honors *Wal-Mart*'s insistence that plaintiffs not just pose common questions, but that they also show with evidence that these questions can in fact generate common answers in particular cases. If a central agency does not in fact create a common risk, then the various claims that some class members have, based on their interactions with bureaucratic intermediaries, are independent.[108] A Type III case always raises a "conceptual gap" problem. The differentiated treatment of class members by bureaucratic intermediaries creates the possibility that class members' claims will prove in the end to have nothing to do with each other, regardless of what the substantive law deems relevant. A child whose medical needs go unmet has a claim based on her caseworker's inattention, but absent proof of the

injury is the exposure to the risk of harm."); *M.D.*, 294 F.R.D. at 20 ("The legal injury is the risk of harm.").

[103] *E.g.*, Braggs v. Dunn, 317 F.R.D. 634, 658 n.26 (M.D. Ala. 2016).

[104] Parsons v. Ryan, 754 F.3d 657, 678 (9th Cir. 2014).

[105] *B.K.*, 922 F.3d at 971.

[106] *Id.* at 968–69 (discussing Eighth Amendment and Fourteenth Amendment risk of harm claims); K.A. v. City of New York, 18-cv-3858 (ALC), 2019 U.S. Dist. LEXIS 166870, at *17, *19–22 (S.D.N.Y. Sept. 26, 2019) (discussing Eighth Amendment and First Amendment risk of harm claims); Cain v. City of New Orleans, 327 F.R.D. 111, 123–25 (E.D. La. 2018) (Fourteenth Amendment).

[107] Tinsley v. Faust, No. CV-15-00185-PHX-ROS, 2019 WL 5103081, at *13 (D. Ariz. Oct. 11, 2019) (Medicaid Act); J.R. v. Oxnard Sch. Dist., No. LA CV17-04304 JAK (FFMx), 2019 WL 4438243, at *25 (C.D. Cal. July 30, 2019) (Individuals with Disabilities in Education Act); Kenneth R. *ex rel.* Tri-Cty. Cap, Inc. v. Hassan, 293 F.R.D. 254, 258 (D.N.H. 2013) (Americans With Disabilities Act).

[108] *E.g.*, Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 557–58 (7th Cir. 2016).

common risk, nothing connects it to another child's claim based on her caseworker's failure to find a placement she can share with a sibling.

To bridge the gap, plaintiffs have to establish that individual experiences with bureaucratic intermediaries in fact manifest the common, undifferentiated risk the central agency's conduct creates.[109] To do so, Type III plaintiffs have marshaled extensive evidence of central agency customs, practices, and policies, and their causal connections to outcomes for class members.[110] This evidence establishes the existence of an interdependent claim and thus commonality: one child's unmet medical needs and the second child's inadequate placement both exemplify the danger that the common risk poses to all class members.

Several of the reversals Type III plaintiffs have suffered in the courts of appeals since *Wal-Mart* are best understood in these terms. *M.D. v. Perry*, one of the initial post-*Wal-Mart* trio, seemed a harbinger of retrenchment when the Fifth Circuit decided it in 2012.[111] The court of appeals faulted the district court for "conduct[ing] no analysis of the elements and defenses for establishing any of the proposed class claims."[112] On remand, the district court, recertifying the class, included an extensive discussion of the contours of the underlying substantive law and a summary of the copious evidence of common risk the plaintiffs adduced.[113] Another example is a 2016 Seventh Circuit decision. The court affirmed the decertification of a class of prisoners who alleged that a prison system's practices and policies expose them to a substantial risk of serious harm to their dental health.[114] As district courts within the Seventh Circuit have appreciated, the prisoner class failed on appeal for the prosaic reason that the plaintiffs lacked sufficient evidence at the second prong of the risk of harm analysis. They failed to show that class members' experiences were manifestations of systemic misconduct and not independent instances of harm.[115]

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[109] *E.g.*, Lewis v. Cain, 324 F.R.D. 159, 169 (M.D. La. 2018); Braggs v. Dunn, 317 F.R.D. 634, 655 (M.D. Ala. 2016); Hernandez v. County of Monterey, 305 F.R.D. 132, 155–56 (N.D. Cal. 2015). For examples of Type III cases failing due to an inadequate evidentiary showing notwithstanding substantive law recognizing a risk of harm claim, see Haldane v. Hammond, No. 15-CV-1810, 2017 WL 4122545, at *3–4 (W.D. Wash. Sept. 18, 2017); Johannes v. Washington, No. 14-cv-11691, 2015 WL 5634446, at *8 (E.D. Mich. Sept. 25, 2015).

[110] For examples of these sorts of evidentiary showings, see, for example, J.S.X. *ex rel.* D.S.X. v. Foxhoven, 330 F.R.D. 197, 204 (S.D. Iowa 2019); *Tinsley*, 2019 WL 5103081, at *6–9; M.D. v. Perry, 294 F.R.D. 7, 22–25 (S.D. Tex. 2013); D.G. *ex rel.* Strickland v. Yarbrough, 278 F.R.D. 635, 639 (N.D. Okla. 2011).

[111] M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 844 (5th Cir. 2012).

[112] *Id.* at 842.

[113] *M.D.*, 294 F.R.D. at 17–21.

[114] Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 543 (7th Cir. 2016).

[115] Lippert v. Baldwin, No. 10 C 4603, 2017 WL 1545672, at *5 (N.D. Ill. Apr. 28, 2017); Williams v. Sheriff of Cook Cty., 16 C 7639, 2017 WL 878731, at *4 (N.D. Ill. Mar. 6, 2017).

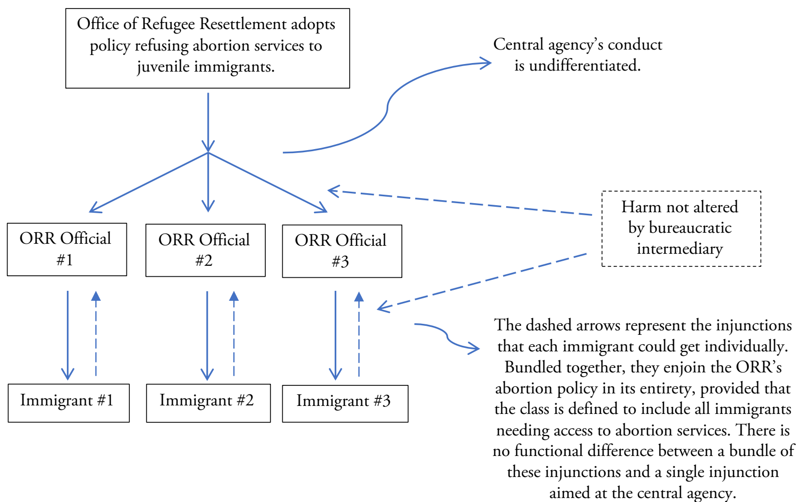
B. *Type III Cases and Group Rights*

1. *The Class Standing Problem*

Type III class actions have succeeded after *Wal-Mart* for the same reason why Type I and Type II cases have persisted. Risk of harm claims are interdependent. On the surface, only a need for an evidentiary showing distinguishes Type III cases from the other two types. When bureaucratic intermediaries administer a uniform policy without alteration, the class members' identical experiences make claim interdependence patent. When central agency maladministration, filtered through bureaucratic intermediaries, harms class members differently, claim interdependence requires evidence of a common risk.

But another difference of more jurisprudential significance lurks under the surface. This contrast concerns the nature of rights at stake in Type III cases and comes into focus as a solution to a class standing puzzle. Under traditional scope of remedy and standing principles, a plaintiff has standing to sue for a remedy no broader than what her injury requires for its correction.[116] If a Type II plaintiff were to sue on her own instead of as a class representative, she could only get an injunction broad enough to protect her.[117] What gives her standing to sue to enjoin the policy in its entirety?[118] Claim joinder through class certification provides the answer.[119] Each

Figure 4. "Bundling" of Injunctions in a Type II Case



[116] Marcus, *Public Interest*, *supra* note 9, at 809. The "nationwide injunction" phenomenon is currently putting this principle to a test.

[117] Garnett v. Zeilinger, 301 F. Supp. 3d 199, 205 & n.4 (D.D.C. 2018).

[118] Lewis v. Casey, 518 U.S. 343, 359 (1996).

[119] David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principles in Doctrinal Design*, BYU L. REV. (forthcoming 2020) (manuscript at 132).

class member has standing to sue to challenge the policy's administration against her. Class certification effectively "bundles" these claims together, giving the court license to enjoin the policy in its entirety. Whether the injunction targets all bureaucratic intermediaries or the central agency itself has no functional difference, since each bureaucratic intermediary administers the policy uniformly.

Without more, this "bundling" exercise does not solve the standing puzzle in a Type III case. The central agency's policy maladministration may create an undifferentiated risk of harm for all children in a foster care system. But a particular child, suing on her own as an individual plaintiff, would lack standing to challenge the central agency's conduct broadly. If her caseworker fails to ensure that she receives annual medical screenings, for instance, the child can sue for an injunction instructing the agency to ensure that her caseworker does so. But if she has no sibling, she lacks standing to challenge the agency's inadequate efforts to create sibling placements, to say nothing of the broad sweep of all of the agency's deficiencies.[120]

Of course, other children in the system suffer from other manifestations of the risk of harm—a lack of sibling placements, exposure to sexual molestation, and so forth. But conceiving of class certification as nothing more than the bundling of their individual claims for relief does not solve the class standing problem for two reasons. First, if a class certification motion proposes to bundle many individual claims seeking individually tailored injunctions, *Wal-Mart* requires its denial. Rule 23(b)(2) after *Wal-Mart* mandates indivisible injunctive relief, a prerequisite inconsistent with the notion of a bundle of otherwise individualized remedies.

Second, the sought-after injunction in a Type III case targets central agency maladministration, but no individual class member would have standing on her own to demand an injunction aimed exclusively at this level of the bureaucracy. If an overworked caseworker places a child in a home that exposes her to the risk of sexual assault, she could get an injunction devised to correct the caseworker's negligence. But an injunction requiring the central agency to improve across all dimensions of its activities would exceed constitutional limits in an individual action.[121] A bundle of these injunctions, even if obtainable in a class action, would address various deficiencies in bureaucratic intermediaries' behavior but go no further.

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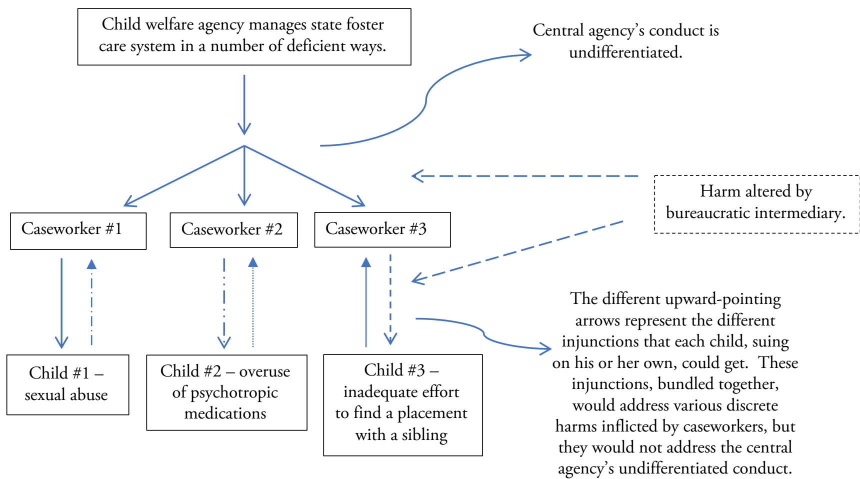
[120] *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that an individual plaintiff must show "a real and immediate threat" of suffering a particular harm in the future to have standing to sue for an injunction).

[121] *Lewis*, 518 U.S. at 358–60.

Figure 5. Individual Injunctions in a Type III Case



2. *The Group Rights Answer*

A proper understanding of the nature of the substantive rights at stake in a Type III case solves the standing puzzle it raises. Class members enjoy protection from risk of harm in their capacities as undifferentiated members of a group of regulatory beneficiaries or targets. Because the substantive law makes the details of their individual experiences with bureaucratic intermediaries irrelevant to proof of liability, the vectors of harm flowing from the central agency through these intermediaries remain identical, just as they are in a Type II case. If each class member has standing to sue for an injunction to mitigate the risk she experiences, and if the risk is identical for all class members, class certification bundles together claims such that the class can sue to remedy the entirety of the risk the central agency's maladministration creates. Moreover, because no single bureaucratic intermediary could decrease this risk on his own, the injunction necessarily must target the central agency directly.

This solution to the standing puzzle yields a crucial jurisprudential claim. Plaintiffs can litigate and remediate undifferentiated risk of harm claims only as undifferentiated group members. They possess this right by virtue of their group membership, meaning that they can only litigate these claims in class actions. Consider *Brown v. Plata*, "perhaps the most important class action of the past decade,"[122] and an important pillar supporting the Type III class action after *Wal-Mart*.[123] There, the Supreme Court affirmed an injunction requiring a reduction in California's

[122] Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23*, 74 N.Y.U. ANN. SURV. AM. L. 105, 112 (2018).

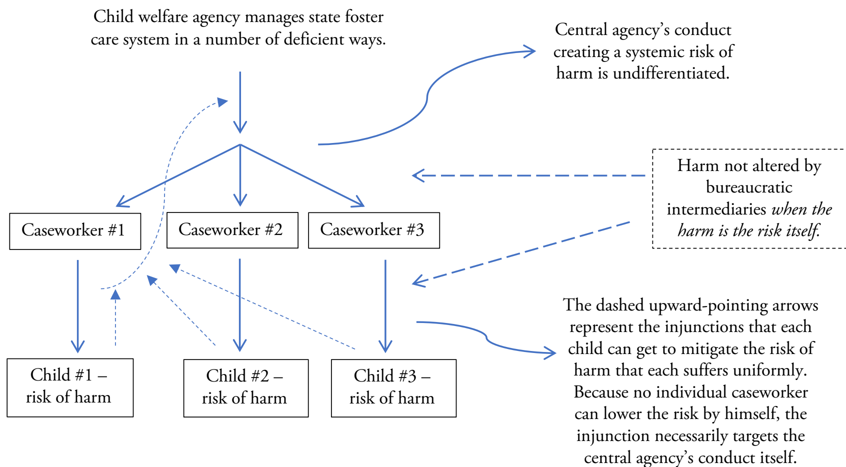
[123] *See* Parsons v. Ryan, 754 F.3d 657, 677–78 (9th Cir. 2014). In my opinion, *Parsons v. Ryan*, which relied on *Brown v. Plata*, is the most important post-*Wal-Mart* Type III decision.

prison population as a remedy for overcrowding that threatened inmate health and safety.[124] As Professor Samuel Issacharoff argues, no single inmate could possibly have claimed a right to this remedy had he sued on his own:

> Each member of the class had been duly sentenced and properly subject to incarceration, leaving aside the inevitable individual appeals and habeas proceedings that may have been pending. No prisoner could claim an individual right to release from prison as a consequence of the overcrowding. . . . Absent unitary treatment through a class action, no prisoner would have a claim as to the systemic violations caused by overcrowding, but only standing to seek legal redress for his or her individual harms.[125]

The remedy—and necessarily the claim challenging systemic violations that yielded it—only existed for the group as a whole.[126] Rights in Type III cases are *group rights*.

Figure 6. "Bundling" of Injunctions in a Type III Case Involving Group Rights



This group rights conceptualization makes sense of an otherwise confounding aspect of class action doctrine involving preclusion. From time to time, defendants in public interest class actions contest the adequacy of the named plaintiff's representation on grounds that, to fit the case into Rule 23(b)(2)'s confines, the named

[124] Brown v. Plata, 563 U.S. 493, 500–02 (2011).

[125] Issacharoff & Zimroth, *supra* note 122, at 376.

[126] Another good example is a case challenging the adequacy of a public defender system. Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1123 (W.D. Wash. 2013). No individual plaintiff could sue on grounds that his or her public defender is so overworked that the lawyer cannot render constitutionally adequate representation. The appropriate individual claim—and individual relief—would be a post-conviction appeal on ineffective assistance of counsel grounds.

plaintiff and class counsel eschew damages and other individualized relief that absent class members might pursue.[127] This argument rests on an implicit presumption that the entry of judgment will preclude class members from litigating claims arising out of the same matter that the class action involves should they attempt to do so in the future.[128] But courts have concluded that the class judgment in an injunctive relief case does not have the preclusive effect the defendants suggest.[129] This preclusion logic makes sense if class members in public interest cases litigate in a different capacity (class members *qua* group members) than they might in follow-on individual actions (class members *qua* discrete individuals).

The group rights conceptualization also defuses an otherwise obvious problem that risk of harm claims seem to pose. Prisoners differ from each other in terms of their vulnerabilities to a system's maladministration. A young, healthy prisoner incarcerated for a short time as an individual does not face the same risk that an older, ill prisoner facing a longer sentence endures as an individual. In some instances, a prison's deficiencies may be so extreme as to subject even the least vulnerable among the prisoners to unconstitutional conditions of confinement.[130] But in other instances, a prison system's failings might pose an insufficient threat to certain prisoners, considered individually, to cross a constitutional line. To a few judges, this heterogeneity precludes class certification of Type III cases on grounds of insufficient commonality.[131] Because individual prisoner characteristics matter to the defendant's liability, so the thinking goes, the question "do various policies, practices, and customs pose an unconstitutional risk of harm" cannot generate a common answer. If, however, the substantive law vests claims in prisoners as undifferentiated members of the group, individual circumstances are substantively irrelevant. Courts can assess risk and whether it creates liability for the defendant by a generic class member or aggregate measure.[132]

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[127] Sourovelis v. City of Philadelphia, 320 F.R.D. 12, 30–31 (E.D. Pa. 2017); Morrow v. Washington, 277 F.R.D. 172, 196 (E.D. Tex. 2011).

[128] *E.g.*, Giannone v. York Tape & Label, Inc., 548 F.3d 191, 193–94 (2d Cir. 2008); RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. f (AM. LAW INST. 1982).

[129] Thorpe v. District of Columbia, 303 F.R.D. 120, 150 (D.D.C. 2014); Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 991 (D. Ariz. 2011).

[130] *E.g.*, Yates v. Collier, 868 F.3d 354, 363 (5th Cir. 2017).

[131] Parsons v. Ryan, 784 F.3d 571, 577–78 (9th Cir. 2015) (Ikuta, J., dissenting from denial of rehearing en banc); Dearduff v. Washington, 330 F.R.D. 452, 464 (E.D. Mich. 2019).

[132] *E.g.*, Tinsley v. Faust, No. CV-15-00185-PHX-ROS, 2019 WL 5103081, at *14–15 (D. Ariz. Oct. 11, 2019); Braggs v. Dunn, 317 F.R.D. 634, 650 (M.D. Ala. 2016).

IV. THE FUTURE OF THE PUBLIC INTEREST CLASS ACTION

Wal-Mart has no bearing on Type I and II cases, and more rigor in the description and analysis of group rights has blunted its impact in Type III cases. The decision ought to recede in significance, and the public interest class action should continue to enjoy its life of particular judicial favor. Whether it does will not depend on procedural doctrine but on the design of substantive liability policy, particularly the evolution and persistence of group rights.

A. *What the Public Interest Class Action Should Become*

Wal-Mart has generated more heat than light in Type I and II cases, where plaintiffs need no evidence to establish commonality for their necessarily interdependent claims. But it has had a significant effect on class action practice for litigators who bring Type III cases. The second prong of the strategy for establishing commonality requires evidence that class members' disparate experiences do in fact reflect a common, undifferentiated risk of harm. This evidence often consists of voluminous documentation, government officials' deposition testimony, and expert reports,[133] and thus it can require extensive discovery. Although I lack rigorous empirical proof to this effect, my sense is that public interest litigators who bring class certification in prison conditions, foster care reform, and school disability cases move for class certification at later stages in litigation than they did before *Wal-Mart*. When they do so, they support their motions with far more evidence of systemic maladministration.[134]

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[133] *E.g.*, Dockery v. Fischer, 253 F. Supp. 3d 832, 843–52 (S.D. Miss. 2015).

[134] Consider the litigation behavior of Children's Rights, the organization behind most of the country's important foster care reform litigation. During the five years before *Wal-Mart*, it litigated five contested class certification motions. One of these motions came seven days after Children's Rights filed the case, and another one day after. Children's Rights filed the other three simultaneously with the complaint. The commonality discussions in the memoranda accompanying these motions ranged from three to five pages. Since *Wal-Mart*, Children's Rights has litigated three contested class certification motions. One it filed nearly two years after the case began and the other nine months after the case began. (Children's Rights filed the third, a renewed class certification motion, after a court of appeals reversed a grant of class certification.) The commonality discussions ranged from 9 to 45 pages. Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, M.D. v. Abbott, No. 2:11-cv-00084 (S.D. Tex. Apr. 5, 2011); Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, B. v. Patrick, No. 1:10-cv-30073 (D. Mass. Apr. 15, 2010); Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, D.G. v. Henry, No. 4:08-cv-00074 (N.D. Okla. Feb. 13, 2008); Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, M. v. Chafee, No. 1:07-cv-00241-WES-PAS (D.R.I. June 28, 2007); Motion for Class Certification and Appointment of Class Counsel, Dwayne B. v. Granholm, No. 2:06-cv-13548 (E.D. Mich. Aug. 8, 2006).

Voluminous evidence of wrongdoing coupled with arguments about substantive liability standards have turned class certification in Type III cases into merits adjudication. The following commonality and Rule 23(b)(2) discussions illustrate this merger:

- In foster care reform litigation brought in Texas, the government challenged class certification on grounds that "the class members have not been 'harmed in essentially the same way.'"[135] "Because we conclude that the State's policies with respect to caseload management, monitoring, and oversight violate plaintiffs' right to be free from a substantial risk of serious harm on a class-wide basis," the Fifth Circuit responded, "we hold that the [classes] were properly certified."[136]
- The Eighth Circuit made a preliminary merits determination to find Rule 23(b)(2) satisfied in a case challenging treatment for Hepatitis C in Missouri prisons. The plaintiffs alleged that the state deployed a uniform screening and treatment policy. If true, the Eighth Circuit noted, then the proposed class met Rule 23(b)(2)'s requirement that there exists a single injunctive remedy that could benefit the class as a whole. In other words, if a sufficient evidentiary basis existed to believe that the defendants had the illegal policy, then the district court could certify the class. This is precisely what the Eighth Circuit concluded the district court had found.[137]
- The proposed class in the New York City stop-and-frisk litigation met the commonality requirement, the district court reasoned, because "[t]he preponderance of the evidence shows that the answer to [the] question" of whether class members' unlawful stops "result from a common source" is "yes."[138]
- A class challenge to changes in Medicaid services alleged that proposed cuts placed people with disabilities at risk of institutionalization. It failed because "[p]laintiffs [did] not present[] [sufficient] evidence" of this risk, making "it . . . difficult for the Court to find that there is a systemic risk of institutionalization resulting from Defendant's policy."[139]

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[135] M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 271 (5th Cir. 2018) (citing Maldonado v. Oshsner Clinic Found., 493 F.3d 521, 524 (5th Cir. 2007)).

[136] *Id.*

[137] Postawko v. Mo. Dep't of Corr., 910 F.3d 1030, 1040 (8th Cir. 2018).

[138] Floyd v. City of New York, 283 F.R.D. 153, 164 (S.D.N.Y. 2012).

[139] Donegan v. Norwood, No. 16-cv-11178, 2017 WL 6569634, at *11 (N.D. Ill. Dec. 21, 2017).

Other examples abound.[140]

An overlap between class certification and the merits is hardly unique to Type III cases.[141] The old dictate that courts make no merits findings at the class certification stage gave way years ago.[142] But courts at the class certification stage can only make incidental merits determinations if doing so is necessary to determine if the proposed class meets Rule 23's requirements.[143] In a securities fraud class action, for example, the court must determine whether the fraud-on-the-market presumption applies at the class certification stage, even though a finding in the affirmative resolves the reliance element of the fraud claim in the plaintiffs' favor.[144] If the presumption does not apply and if all class members must prove reliance individually, then common issues do not predominate and the class fails the Rule 23(b)(3) requirement.[145] If the class action nonetheless proceeded, the trial would degenerate into an unmanageable morass of individual adjudication as class members proved reliance one-by-one—precisely the case management fiasco Rule 23 tries to avoid.

But a court does not need to decide materiality, another element of the fraud claim, at the class certification stage. The materiality of a misstatement gets judged by an objective investor standard and is thus inherently common.[146] If the class fails to prove materiality with common evidence at trial, the result is not the individual

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[140] Lippert v. Baldwin, No. 10 C 4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017); Johannes v. Washington, No. 14-cv-11691, 2015 WL 5634446, at *8 (E.D. Mich. Sept. 25, 2015); Steimel v. Minott, No. 1:13-cv-957-JMS-MJD, 2014 WL 1213390, at *17 (S.D. Ind. Mar. 24, 2014); Kenneth R. *ex rel.* Tri-Cty. Cap, Inc. v. Hassan, 293 F.R.D. 254, 267 (D.N.H. 2013) (analyzing commonality and concluding that "[s]ubstantial evidence suggests that the State's policies and practices have created a systemic deficiency in the availability of community-based mental health services, and that that deficiency is the source of the harm alleged by all class members"); *id.* ("In addition, the evidence suggests a causal connection between that systemic condition and the harm experienced by *all* class members: a serious risk of unnecessary institutionalization . . . ."); Parsons v. Ryan, 289 F.R.D. 513, 521 (D. Ariz. 2013) ("[T]he evidence here suggests that the root cause of the injuries and threats of injuries suffered by Plaintiffs is the systemic failures in the provision of health care generally."); Valdez v. City of San Jose, No. C 09-0176 CW, 2013 WL 752498, at *16 (N.D. Cal. Feb. 27, 2013) (rejecting plaintiffs' commonality argument because they "have failed to produce sufficient evidence to establish that [the defendant] followed any unconstitutional policy or practice" and specifically "ha[d] not shown that . . . training procedures resulted in widespread constitutional violations"); *id.* ("[N]or have they provided reliable evidence showing a widespread practice of unreasonable seizures . . . .").

[141] *E.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008).

[142] ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 167–72 (4th ed. 2012).

[143] Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

[144] *E.g.*, *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41–42 (2d Cir. 2006).

[145] RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 278–79 (Robert C. Clark et al. eds., 2d ed. 2013).

[146] *Amgen Inc.*, 568 U.S. at 467.

litigation morass. All the plaintiffs simply lose.[147]

The demand for evidentiary showings to bridge the conceptual gap in Type III cases is misplaced, because undifferentiated risk of harm claims involve inherently common issues. These are group claims and can only be litigated as such. If a Type III plaintiff fails to establish that the central agency's deficiencies create a risk of harm, the result is not a trial with a morass of class members proving liability based on their discrete experiences with bureaucratic intermediaries. The risk of harm claim simply loses on the merits.[148] As with materiality in securities fraud cases, courts should have no occasion to demand the sort of proof that has turned class certification into summary judgment in Type III litigation.

In one sense, the unwarranted evidentiary obligations that Type III plaintiffs now shoulder smack of harmless error. If these plaintiffs have to make these showings to prevail at summary judgment or trial, the demand that they do so at class certification simply moves the burden up in time. Indeed, the equivalence between summary judgment and class certification gives reason to think that increased rigor in Rule 23's administration after *Wal-Mart* has not affected case selection criteria. The portrait of good health that my sample of class certification decisions reflects, then, probably is not an artifact of changed litigation behavior.

But the evidentiary threshold plaintiffs must meet lacks any real justification, and it can lead to unjust results. The doctrinal regulation of evidence at the class certification stage is confusing and unsettled.[149] At summary judgment, the moving party, typically the defendant, clearly bears the initial burden; at the class certification stage, the parties' burdens are unclear.[150] The burdens that Type III plaintiffs bear post-*Wal-Mart* duplicates what they shoulder at summary judgment, creating redundant costs for resource-strapped organizations. The delay between filing and class certification may postpone settlement, needlessly prolonging litigation.

If class members allege risk of harm liability that the applicable substantive law recognizes, courts should decide certification motions on the pleadings. They used to do so routinely. They should return to this practice. *Wal-Mart* does not require otherwise.

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[147] *Id.* at 467–68.

[148] *Cf.* Smentek v. Sheriff of Cook Cty., No. 09 C 529, 2014 WL 7330792, at *8 (N.D. Ill. Dec. 22, 2014) (decertifying a class after ruling for the defendant at trial on grounds that the plaintiffs failed to adduce sufficient evidence at trial to prove that "common question of causation" existed in a prison conditions case).

[149] *E.g.*, 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 7:24 (5th ed. 2019) ("Issues arising out of the use of expert witnesses at the class certification stage have beguiled the federal courts . . . .").

[150] Shariff v. Goord, No. 05-CV-6504 CJS-JWF, 2019 WL 4918079, at *1 n.3 (W.D.N.Y. Oct. 4, 2019) (commenting on imprecision in case law on the burdens of proof at class certification).

B. *What Public Interest Class Actions Will Become*

What the public interest class actions should and will become are different questions, of course. In my earlier treatment of the topic, I read *Wal-Mart*'s initial reception in the courts of appeals to portend a restrictive turn in the doctrine. The public interest class action's persistence has proven this assessment inaccurate. One reason why this litigation has remained successful might reflect the federal judiciary's composition during the years when *Wal-Mart* initially worked its way through the lower courts.

A judge's openness to class certification correlates with political affiliation. Between 2002 and 2017, Burbank and Farhang report, Republican appointments to the courts of appeals were 14 percentage points less likely to vote for class certification than their Democratic colleagues.[151] My data reveal similar patterns in post-*Wal-Mart* decision-making.

Type of Judge	Republican Appointments		Democratic Appointments	
	Votes/Decisions in Favor of Class Certification	*Votes/Decisions Against Class Certification*	*Votes/Decisions in Favor of Class Certification*	*Votes/Decisions Against Class Certification*
Circuit	24 (61.53%)	15 (38.47%)	26 (78.79%)	7 (21.21%)
District	72 (64.86%)	39 (35.14%)	171 (79.53%)	44 (20.47%)

The Supreme Court decided *Wal-Mart* as Obama Administration appointments pushed the federal judiciary leftward. The simple fact that Democratic appointments to the federal district bench rendered far more reported class certification decisions than their Republican colleagues (215 decisions to 111) likely accounts for part of the persistence. If so, then the future of the public interest class action will depend on the federal judiciary's composition going forward.

So much for my crude politics-based prediction. As far as legal evolution is concerned, procedural doctrine should not be the driving force. As I have argued, *Wal-Mart* gives no reason to tighten the class certification standard in public interest cases. It has no significance whatsoever for Type I and II cases. The group rights at issue in Type III cases are not just appropriate fodder for aggregate litigation. They are fashioned for it.

This clarification of substantive legal contours post-*Wal-Mart* might prompt a familiar objection, that courts bent on class certification have contorted the substantive law to facilitate class certification in disregard of the Rules Enabling Act.[152] But

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[151] Burbank & Farhang, *supra* note 70 (manuscript at 25).

[152] *E.g.*, Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 855–57 (1974); Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 662 (2006).

rights always develop in the context of concrete cases, or "when the realities of litigation and civil law enforcement have evolved" such that "understanding[s] of what it means to have legal rights must necessarily change."[153] A class action can "catalyze innovation in liability policy" without Rule 23 itself abridging or enlarging rights, as Burbank and Tobias Wolff explain, provided that courts justify substantive doctrinal elaboration in substantive terms.[154] Ironically, the articulation of group rights returns the class action to its classical origins in group litigation that "involved incidents of status rather than individual claims of right."[155]

Rather, the fate of the public interest class action must turn on decisions about the scope and design of substantive rights, duties, and obligations for governments and the groups with which they interact in repeated, often systemic ways. Can rights be cast in group terms, and when should they? Do indigent criminal defendants as a group have a right to an adequately funded public defender system, or does an individual's right to counsel's effective assistance exhaust Sixth Amendment rights?[156] Does the Individuals with Disabilities in Education Act prohibit "systemic" violations redressable with structural changes to a school system,[157] or does it simply entitle each individual child to an educational plan suitable to her particular circumstances?[158] Do procedural due process rights depend on one's status as a member of a group (e.g., immigrants in detention), or do they hinge on an individual's particular needs and limitations (e.g., a particular immigrant in detention)?[159]

Answers to questions like these should turn on the extent of common-lawmaking powers in the shadow of vague constitutional or statutory text, on a realistic assessment of the efficacy of individual litigation in the face of systemic government wrongdoing, and on a clear-eyed evaluation of the promise and limits of different types of remedies when harm occurs on a wide scale. Neither *Wal-Mart* nor Rule 23 has anything to add. If the public interest class action continues to persist, it will do so because judges conclude that group rights best vindicate substantive liability policy. If its health weakens, the driving force will be the withering of these rights.

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[153] Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 75 (2010).

[154] *Id.*

[155] Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 877 (1977).

[156] *Compare* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013), *with* Luckey v. Harris, 896 F.2d 479, 480 (11th Cir. 1989) (Edmonson, J., dissenting).

[157] Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 504–05 (7th Cir. 2012) (Rovner, J., concurring).

[158] *Id.* at 498–99 (majority opinion).

[159] *Compare* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985), *and* Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 293–94 (2014), *with* Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018), *and* Abdi v. McAleenan, 405 F. Supp. 3d 467, 480–83 (W.D.N.Y. 2019).

CONCLUSION

In December 2019, the head of the Arizona Department of Child Safety petitioned for a writ of certiorari.[160] He wanted the Supreme Court to review a Ninth Circuit decision that upheld the grant of class certification in a case challenging the systemic maladministration of his state's foster care system.[161] While the case has great significance for thousands of children languishing in an allegedly broken system, the Ninth Circuit's decision is unremarkable. It is just one more instance of a court agreeing that plaintiffs in a Type III case meet Rule 23's requirements. The petitioner nonetheless insisted that the Ninth Circuit's decision "is not remotely consistent with [the commonality and Rule 23(b)(2)] requirements" after *Wal-Mart*.[162] This assertion is wrong.[163] *Wal-Mart* did not change the class certification standard for public interest class actions in meaningful ways, as the pattern of federal judicial decision-making since 2011 makes clear. If government defendants want to weaken this litigation, they will have to argue for retrenchment in the substantive law. Class action doctrine does not—and should not—offer them the vehicle to do so.

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160 Petition for Writ of Certiorari, Faust v. B.K. (2019) (No. 19-765).

161 B.K. *ex rel.* Tinsley v. Snyder, 922 F.3d 957 (9th Cir. 2019).

162 Petition for Writ of Certiorari, *supra* note 160, at 2 (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011)).

163 The Court rightly denied the petition. Faust v. B.K., No. 19-765, 2020 WL 1325853 (Mar. 23, 2020).