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Social Framework Studies Such as *Women Don't Ask* and *It Does Hurt To Ask* Show Us the Next Step Toward Achieving Gender Equality—Eliminating the Long-Term Effects of Implicit Bias—but Are Not Likely to Get Cases Past Summary Judgment

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SOCIAL FRAMEWORK STUDIES SUCH AS
WOMEN DON'T ASK AND *IT DOES HURT TO ASK*
SHOW US THE NEXT STEP TOWARD ACHIEVING
GENDER EQUALITY—ELIMINATING THE LONG-TERM
EFFECTS OF IMPLICIT BIAS—BUT ARE NOT LIKELY TO
GET CASES PAST SUMMARY JUDGMENT

ANDREA DONEFF*

[O]ur journey is not complete until our wives, our mothers, and daughters can earn a living equal to their efforts.¹

ABSTRACT

Lawyers and judges long have relied on outside evidence—usually studies or empirical research—to help them better understand the impact or meaning of the facts in certain cases. In employment cases, lawyers have used studies that show statistical variance in hiring or promotion between men and women to prove discrimination. They have used studies that talk about implicit bias, the kind of bias that we apply without even knowing we are biased, perhaps the kind of bias we apply even when we are doing our best not to be biased, to understand that comments like “You should go to charm school” indicate sex-based stereotyped thinking. But they have not successfully used (and few appear even to have attempted to use) recent studies that tie together actions over a long period of time with a seemingly unrelated adverse employment action. These connections are much less obvious than those between “charm school” and sex-based stereotyping. They require a court to look at the long term cumulative effects of bias—not an if-then analysis but an understanding of the whole employment relationship, as explained with the help of these and related studies.

This Article focuses on two studies (really one study and its related predecessor) and argues that they change the way we should look at the difficult individual disparate impact case, especially when

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1. President Barack Obama, Inaugural Address (Jan. 21, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>).

combined with other social science research. The first study shows what many people accept from experience—that women simply do not negotiate on their own behalf.² The follow up study, much more important for purposes of this Article, shows that women who do negotiate might get what they negotiated for, but end up being perceived negatively thereafter by both the men and the women they work with.³ In a case where the effects of discrimination manifest over time and cannot be tied directly to a specific employment event, convincing a judge to use the study to fill in the gaps in evidence and let a case past summary judgment could be crucial to closing the gender gap.

Unfortunately, although juries might make good use of the studies, judges who tend to grant summary judgment in discrimination cases are not likely to be persuaded that the studies, even paired with other illuminating studies, provide a sufficient “social framework” to get a case to a jury without significant and recent witness or documentary evidence.⁴ Employment lawyers will not risk the expense to hire the expert necessary to make the argument.⁵ The studies will have little impact, even though they present essential information that should cause both employers and employees to question and perhaps modify their decisions and motivations.

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5. *Id.* at 1002.

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INTRODUCTION

In their article *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, Linda Hamilton Krieger and Susan T. Fiske discuss the concept of “behavioral realism,” a theory that judges should use empirical and social evidence in their cases, but that they should recognize that the science changes over time and incorporate the changing science and should not cling to outmoded ways of thinking.⁶

In the context of antidiscrimination law, behavioral realism stands for the proposition that judicial models—of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases—should be periodically revisited and adjusted so as to remain continuous with progress in psychological science.⁷

What the studies discussed here change about the judicial model is that they make it abundantly clear that courts must step back and allow juries to see cases that require a long-term view, not just the circumstances directly surrounding the adverse employment decision. In the context of the less-than-obvious sex discrimination case, recent empirical research can and should be relied on by courts examining cases to determine whether they raise sufficient evidence to get past summary judgment. The discriminatory actions, comments, or effects do not occur at the time of the employment decision. They occur spread out over an employment experience, often seemingly unrelated to the adverse employment action that finally prompted the litigation. These studies show us how to understand that scenario.

Unfortunately, though, these studies do not “prove” that discrimination occurred in the individual case; they merely explain how it could have. Without evidence of causation between the factual evidence produced and the allegedly discriminatory motive, these studies are not likely to change the chances that a case will survive summary judgment, though perhaps they should.

A. The Weak Employment Case

As an employment lawyer, I dreaded—and rejected—the “I know it when I see it” gender discrimination cases. Those are the cases where an employee would describe the situation leading to her failure

6. *Id.* at 997.

7. *Id.* at 1001.

to be promoted, her lower salary or dead-end job placement, her slide from star employee to persona non grata, or her termination despite selling more products than the men all around her where that was really all the proof she had. How do you prove discrimination when you have one professional employee, doing a job that is similar to but not the same as the men around her, who knows she has been discriminated against but has no concrete proof—just circumstances that lead a lawyer who has experience in discrimination cases to say “yes, I see that discrimination too, but how can we prove it?”

The hardest cases of all are those where the effects of discrimination were compounded through years of working for a company—starting with the initial salary negotiation, working through years of wondering why the men got better projects, invited to the social events, and then promoted or given raises before the women. Women got some promotions, some good projects, and some raises, usually when they negotiated for or insisted on them, followed some time later either by a “layoff” where the woman was informed that her services were no longer necessary or by an end to promotions within the company and an unsatisfactory explanation.

B. The Studies

Shortly before I left practice and entered academia, I read the studies that show statistically what women have said anecdotally for years—women who are bright, capable, and marketable simply do not negotiate on their own behalf in the same numbers or to the same extent that men in comparable positions do.⁸ They do not negotiate their initial salaries; they do not negotiate raises; they do not negotiate promotions.⁹ The effects of this failure to negotiate are obvious: lower pay over the years, failure to get the best assignments, fewer promotions, etc.¹⁰

The authors of the study, known as *Women Don't Ask*, have followed it up with a book called *Ask For It*,¹¹ which offers numerous

8. Bowles, Babcock & Lai, *It Does Hurt to Ask*, *supra* note 3, at 98–100.

9. *Id.* at 1–2.

10. ANTHONY P. CARNEVALE, STEPHEN J. ROSE & BAN CHEAH, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 2 (2011), *available at* <https://georgetown.app.box.com/s/cwmx7i5li1nxd7zt7mim> (showing that women's lifetime earnings grow dramatically with education, but never get anywhere close to men's—with a professional degree, women earn approximately a million dollars less over their lifetime than men with comparable education).

11. LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT 75 (2009) [hereinafter ASK FOR IT].

tips on how women should negotiate—for example, using the argument that they are doing the best for the team, or that they were told by someone else to ask for more, or by showing how important negotiation skills are to their job.¹² In other words, the book proposes that women should negotiate as women are expected to negotiate—not just because they’re worth it or they’ve earned it, but because it would be good for the work community. Arguably this approach is both more effective and easier for women who are understandably afraid to negotiate on their own behalf.

This response to the study is disheartening. Why can’t we just negotiate like a man: “I have made the company a lot of money and deserve a raise?” Especially for women in fields that require them to be aggressive, the assertive personality works to make the company’s profits increase, but not the individual woman’s. And while women have made huge strides, the pay gap, the promotion gap, and the respect gap remain in every field, even after years of “consciousness raising,” negotiation training, and article after article about how to negotiate, including in fields like law where arguably women know they need to negotiate and men know they cannot discriminate.¹³

Ultimately, it is not women’s leadership styles that need to change but the structures and perceptions that must keep up with today’s changing times. Companies versed in negotiating complex social and financial interactions must help employees see that stereotypes, like first impressions, are mutable—and not truths cast in stone.¹⁴

12. *Id.* at 75–87. The book provides numerous guidelines throughout for women to use in bargaining.

13. See, e.g., Anne-Marie Slaughter, *Why Women Still Can't Have it All*, THE ATLANTIC, July/Aug. 2012, at 85; CHRISTIANNE CORBETT & CATHERINE HILL, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION, at vii (2012), available at <http://www.aauw.org/resource/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation/> (finding that women’s pay is less than men’s already by one year after graduation, and that about one-third of the difference cannot be accounted for by college major, occupation, or hours worked, but theorizing that discrimination and failure to negotiate might account for at least some of the gap); BARBARA M. FLOM, REPORT OF THE SEVENTH ANNUAL NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/women/nawl_2012_survey_report_final.authcheckdam.pdf (finding in large law firms, women make up fifteen percent of equity partners but just under fifty percent of associates and seventy percent of nonpartner track staff attorneys); see also *Gender Equity Task Force*, AM. BAR ASSOC., http://www.americanbar.org/groups/women/gender_equity_task_force.html (last visited Mar. 30, 2014) (discussing the ABA’s task force on gender equity and emphasis on equalizing compensation and opportunities for women, at least in the legal profession).

14. CATALYST, THE DOUBLE-BIND DILEMMA FOR WOMEN IN LEADERSHIP: DAMNED IF YOU DO, DOOMED IF YOU DON’T 2 (2007) [hereinafter THE DOUBLE-BIND DILEMMA]. This study was cited in an amicus brief by The National Partnership For Women & Families

The question remains why simply teaching women to negotiate does not close the gap. Many studies assert that a significant part of the problem is implicit bias—those biases we don't even know we have but that nonetheless affect our decisions.¹⁵ The more interesting study, then, is the follow-up study to *Women Don't Ask*, which I will refer to as *It Does Hurt to Ask*.¹⁶ That study shows that, when women *do* negotiate on their own behalf, women are perceived negatively by *both* men *and* women.¹⁷ The result of this negative perception is pretty similar to the result of the failure to negotiate: lower raises, failure to get the best assignments, fewer promotions, being asked to join fewer boards than men, and not getting the top spots in most companies.¹⁸ In the long term, though, the effects of negotiating are devastating—negative perceptions lead people not to want to work with you, not to ask you to lunch, not to consider you good or nice enough to include on projects, and eventually to decide to terminate the relationship. In other words, damned if you don't, damned if you do.¹⁹

That study was eye-opening to me. After reading the study I knew logically as well as intuitively that my clients had good reason to believe they were victims of discrimination. The study sets up a whole different way of looking at discrimination litigation. Just looking at the adverse employment action that prompted the claim and even the totality of its immediately surrounding circumstances simply cannot be enough in today's employment setting. Decisions are not made in a vacuum and must be seen in the context of the entire history of employment. Not just the other occurrences similar to the one at issue and close in time, but also the successes, the relationships, and perhaps other factors, regardless of how long ago they occurred. The "totality of the circumstances" should not mean just what happened within a month or two of the termination. It must mean the

et al.—the same group that filed an amicus brief in the Lilly Ledbetter case—in *Prowel v. Wise Business Forms*, 579 F.3d 285 (3d Cir. 2009). A quick search did not find any cases that cited this article.

15. See *infra* Part I.

16. Bowles, Babcock & Lai, *It Does Hurt to Ask*, *supra* note 3, at 99.

17. *Id.* at 84–103. Interestingly, the study showed that, while men were comfortable with men who negotiated but not women, women disapproved of *anyone* who negotiated. *Id.* at 85. A similar study was conducted by Laurie A. Rudman and Peter Glick and discussed in *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES, 743, 759 (2000). That study does not appear in court documents either, though it was referred to in several amicus briefs in the *Wal-Mart v. Dukes* case, 131 S.Ct. 2041 (2011). See briefs at 2011 WL 757411; 2011 WL 757409.

18. See studies discussed in David L. Faigman et al., *A Matter of Fit*, 59 HASTINGS L.J. 1389, 1418–22 (2008) (especially studies regarding backlash toward women in leadership roles).

19. See THE DOUBLE-BIND DILEMMA, *supra* note 14, at 5.

whole picture, framed by studies that explain what we are seeing. But is it enough to get past summary judgment?

C. Juries Should See These Studies

The studies would help juries understand that even those employers that believe they are fighting against bias are unconsciously applying biased expectations to the workplace. And that those unconscious biases might override their rational decision making, resulting in a decision they assumed was based on poor performance or failure to be one of the team but really was based on the implicit expectation that women would meet the stereotyped expectations and disappointment or dissatisfaction when they don't. It would further help juries understand that the reduction in the employer's perception does not affect employment overnight, but over time.

The difficult question is how to use this information for the everyday case—the individual who does not have statistics to back up her claim, who knows she was discriminated against but does not necessarily have strong evidence to convince a jury. And in a conservative district, where without strong evidence she likely won't even convince the judge to let her tell her story to the jury, can this social science research put the "I know it when I see it" case in a perspective that gets past summary judgment?

Can we prove in court that a particular employer discriminated because we know that part of the reason women still earn less than men, that women are not reflected in positions of power and leadership in anywhere near the numbers that men are, is our societal biases, our protective instincts, and especially our stereotyped thinking? Is the simple fact that a woman was overlooked or let go and the employer's reason "doesn't make sense" enough to let a jury decide whether the employer's decision is based on a discriminatory motive? Not an overt intent, perhaps, but an unknowingly biased decision that, once publicized and admonished, the employer will take steps to make sure will not happen again.

These studies fill in the missing link, showing that this subtle bias, applied in small ways over time, adds up to an eventual adverse action against a woman simply because she has always been a woman. Only when employers truly confront and address these implicit biases (perhaps) can we truly make progress toward closing the gaps.

The question to be answered is whether, under current discrimination law, theory meets practice. Applying Title VII theory and precedent, it seems obvious that a jury should assess whether the

anecdotal evidence of the “I know it when I see it” case, met with the social science research about implicit bias, proves a discriminatory motive. But, in a world of overcrowded dockets, judges who arguably have embraced summary judgment as a method for case management,²⁰ and perhaps even cynical juries, is it enough?

Courts allow in evidence of societal norms or beliefs in many contexts. In the typical class action discrimination suit, argued under the disparate impact theory, an expert provides statistics to show that women generally are not being hired or promoted by the defendant employer in numbers that make sense given women in similar businesses or fields. The expert testifies that the disparities are statistically significant—that they cannot occur without a cause. To the statistics reflecting that women rarely—or never—get hired for these jobs at this company the parties add stories of men being hired despite lower qualifications, or testimony by former managers who repeat quotes from senior managers that they just don’t think whatever woman worked up the nerve to apply for this traditionally male job “fits in” or “has what it takes.”

Then, a different expert provides the “social framework,” the background based on social science research. The expert can testify that numerous studies have shown that male managers hire people who look, think, and act like them—mainly men, often white men of a certain age.²¹ Alternately, the expert might testify that studies show that implicit bias might keep women out of certain types of jobs because American society perpetuates the belief that sales directors, stockbrokers, police officers, CEOs, and other aggressive careers require male employees who can meet that aggressive stereotype.²²

While undoubtedly helpful in a disparate impact case, social framework evidence may be the most useful evidence in an individual disparate treatment case where the evidence is wholly circumstantial and the discriminatory motive is not obvious. Most helpful to the individual, small-value case, this expert “framework” testimony is often not based on the expert’s own research but instead is based on the expert’s gathering and summation of studies done by others. It is

20. Hon. Mark W. Bennett, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 688 (2012–2013) (asserting that judges act more like case managers rather than trial judges now and use summary judgment as a tool to help manage their dockets).

21. Barbara J. Fick, *The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 159, 167 (1997).

22. See, e.g., studies discussed in Faigman et al., *supra* note 18, at 1412–16.

admissible under *Daubert*²³ because it is “relevant to the task at hand” and it rests “on a reliable foundation.”²⁴ Used this way, presenting expert testimony may not be prohibitively expensive.²⁵ In cases where the evidence is not strong, and where the wisdom of investing in an expert is questionable, allowing the expert to take that discussion to the next level and offer an opinion that even a case with limited specific facts, given all we now know about implicit bias, indicates a discriminatory motive.

How do you convince a court that is inclined to grant summary judgment in discrimination cases that this social framework should tip the scale toward allowing the jury to decide the sufficiency of the evidence?²⁶ I have found just one unreported case where the *It Does Hurt To Ask* study was cited by a court—in an equal pay claim regarding negotiating salaries²⁷—and only one where the *Women Don’t Ask* study was referenced in an amicus brief.²⁸ Although this lack of citation does not definitively show that courts do not allow this evidence in at trial, or that lawyers are not proffering it, the lack of reference in decisions granting or denying summary judgment seems to indicate that is the case. The question posed by this lack of use of seemingly game-changing research is whether it is a failure of civil rights theory or practice, or both.

Part I of this paper will provide a short background on social framework analysis and implicit bias or stereotyped thinking and highlight some of the relevant studies. Much has been written in the area, so I will provide only an overview, with references for those who did not enter this discussion until recently. It will then discuss Title VII and its proof requirements to get past summary judgment

23. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993).

24. *Id.* at 584–87. For a discussion of the admissibility of this evidence, see *infra* Part II.

25. Unfortunately, several recent articles have asserted that the expert’s testimony must stop there unless the expert conducts research specific to this particular employer. See discussion of Monahan, Walker & Mitchell, *Contextual Evidence*, *infra* note 34, at 1718; Faigman et al., *supra* note 18, at 1432; *infra* Part III.

26. See Bennett, *supra* note 20, at 710 (arguing that judges overuse summary judgment so much that we should eliminate it for a period of time to determine whether the system can stand trying the employment discrimination cases now eliminated without trial); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127 (2009) (asserting that courts grant summary judgment in employment discrimination cases, in whole or in part, in eighty percent of all cases, and that even the few cases that win at trial are more likely be overturned on appeal than other appeals).

27. *Dreves v. Hudson Grp. Retail*, 2013 WL 2634429 (D.Vt. June 12, 2013).

28. Brief of the National Partnership for Women & Families et al. as Amici Curiae in Support of Petitioner, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074), at 8–9.

and to the jury. Part II will discuss the uses for the expert testimony and the studies on which they base the testimony—how it is admissible under the Federal Rules of Evidence. It will also provide some review of the types of cases that have allowed this type of evidence and those that have not, and discuss how the studies relate to the theories that apply to employment discrimination cases. Part III will talk about the specific negotiation studies and their implications for the workplace, both theoretically and practically. Finally, it will talk about where and how these studies may add value to the employment discrimination discussion.

I. SOCIAL FRAMEWORK ANALYSIS—WHAT IT IS, HOW IT IS STUDIED, AND HOW IT APPLIES

Although social science research has long been used in litigation, the term “social framework” appears to have been coined by John Monahan and Laurens Walker in 1987 to refer to “the use of general conclusions from social science research in determining factual issues in a specific case.”²⁹ The idea of providing a social framework was to provide a general theory from which predictions could be made in previously unexplored circumstances.³⁰ The terms have changed and the study has expanded over the years, but the basic idea of social framework analysis is that “general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.”³¹

As will be discussed later, such frameworks have been considered by the courts in various contexts. In what might loosely be called early (and unsuccessful) civil rights litigation, the Supreme Court relied on “abundant testimony of the medical fraternity” to perpetuate the stereotype that women were frail and needed to be protected in *Muller v. Oregon*, upholding work hour limitations for women.³² Almost fifty years later, social science testimony was used in *Brown v. Board of Education*³³ to support the Court’s conclusion that separate

29. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987) [hereinafter Walker & Monahan, *Social Frameworks*].

30. *Id.* at 570 n.31.

31. *Id.* at 559.

32. *Muller v. Oregon*, 208 U.S. 412, 418–22 (1908) (differentiating *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court reversed a conviction for violation of a New York law limiting hours for bakers because it was not related to health, which the state is allowed to regulate).

33. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954), and accompanying text; see also discussion in Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 802 (2002).

is not equal.³⁴ Also oft-discussed, it was used in *Price Waterhouse v. Hopkins* to show how not promoting a female because she does not meet gender-based stereotypes creates a valid discrimination claim under Title VII of the Civil Rights Act of 1964.³⁵

Fortunately, most Americans have come a long way from the Court's misguided analysis in *Muller*. But despite consistent efforts to rid the workplace of discrimination, it persists. Seemingly innumerable studies have been done that demonstrate the continued persistence of stereotyped thinking, even in those who don't think they use stereotypes.³⁶ For example, numerous studies show that "men are typically judged as more agentic, or achievement oriented, than women, whereas women are typically judged as more communal, or interpersonally oriented than men."³⁷ Since achievement orientation is considered necessary for good leadership, men are assumed to be better leaders.³⁸ Thus, other studies show, when women act communally, which is *consistent* with gender stereotypes, they are viewed as less competent leaders, but as having effective interpersonal skills, and when women act aggressively or in other ways that are *inconsistent* with such stereotypes, they are considered as competent but not as effective interpersonally.³⁹

There are also studies that show the long-term and cumulative effects of this stereotyped thinking on the workplace. They show that

34. Monahan and Walker asserted that the testimony in *Brown* was "social authority" evidence, which is "general social science evidence presented to establish the validity of a factual assumption underlying a legal standard." Melissa Hart & Paul Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 44 (2009). Social framework testimony arguably includes social authority testimony, and *Brown* remains a sufficiently good example to warrant the hopefully minor transgression. John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of Social Framework*, 94 *VA. L. REV.* 1715, 1720–21 (2008) [hereinafter Monahan, Walker, & Mitchell, *Contextual Evidence*]; Hart & Secunda, *supra*, at 57–58 (questioning whether the distinctions between social framework and social authority make a difference if the evidence is admissible under the rules of evidence).

35. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235–37 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071, § 107, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (codified at 42 U.S.C. § 2000e-2 (2013)).

36. See John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 *RESEARCH IN ORG. BEHAV.* 39, 43 (2009) [hereinafter *Ten Studies*]; Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 19 *J. PERSONALITY & SOCIAL PSYCH.*, 17, 19 (2009) [hereinafter *Understanding the IAT*].

37. Faigman et al., *supra* note 18, at 1408 (discussing throughout the article numerous studies that demonstrate implicitly stereotypical thinking and its effects).

38. *Id.* at 1414–15.

39. *THE DOUBLE-BIND DILEMMA*, *supra* note 14, at 19–21; *see also* Faigman et al., *supra* note 18, at 1417–19 and studies cited therein.

initial negative feelings engender an unwillingness to recommend people for good work assignments.⁴⁰ Other studies show that women in positions of leadership or in roles they are not “supposed” to be in can result in even greater stereotyped thinking about their competence in that role and even backlash based on those stereotypes.⁴¹ The Babcock and Bowles studies are just a piece of the bigger picture⁴² and are supported by other studies that reach similar results.⁴³

A. How Social Frameworks Apply in Employment Cases

There are several statutes that address discrimination in employment. 42 U.S.C. § 1983 applies to government entities.⁴⁴ Title VII of the Civil Rights Act of 1964 as amended (Title VII), applies to private employers, and states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .⁴⁵

The standards courts apply to decide both Section 1983 and Title VII cases at summary judgment are the same.⁴⁶ For ease of reference, this Article will discuss Title VII, meaning to include cases under 42 U.S.C. § 1983.

The Supreme Court has provided a clear understanding of the distinction between the two types of discrimination cases under Title VII:

“[D]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other

40. Faigman et al., *supra* note 18, at 1412 (“Biased assumptions about competence, in turn, affect people’s willingness to listen to a person’s opinions, to be influenced by that person and to recommend the person for rewards. Several decades of research support this pattern of implicit gender bias in judgments of competence and the granting of influence and rewards.”).

41. *Id.* at 1413.

42. For an overview of quite a few of the many studies and what they found, see *id.* at 1408–13.

43. See studies discussed in *Understanding the IAT*, *supra* note 36, at 19–20.

44. 42 U.S.C. § 1983 (2013).

45. 42 U.S.C. § 2000e-2(a)(1) (2013).

46. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993); see also *Patterson v. McLean Credit Corp.*, 491 U.S. 164, 186 (1989).

protected characteristic]. . . Liability in a disparate-treatment case “depends on whether the protected trait . . . actually motivated the employer’s decision.” By contrast, disparate-impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” Under a disparate-impact theory of discrimination, “a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer’s subjective intent to discriminate that is required in a ‘disparate-treatment’ case.”⁴⁷

In order to establish an individual disparate treatment claim under Title VII as it was amended in 1991, a complainant must prove by a preponderance of the evidence that (1) she is a member of a group protected under Title VII, (2) she suffered an adverse employment decision, and that (3) her membership in a protected group was a motivating factor in that decision.⁴⁸ Evidence of discriminatory intent may be direct, circumstantial, or inferred from statistical evidence, and all evidence that the plaintiff presents in that regard can contribute to the inference in a cumulative manner.⁴⁹ Another way to say this is that, in making its determination, the jury looks to the “totality of the circumstances.”⁵⁰

1. Analysis Under McDonnell Douglas

The odds of getting past summary judgment are slim in a number of jurisdictions, where courts grant it, in whole or in part, in the vast majority of cases.⁵¹ In order to get past summary judgment in a Title VII case, a plaintiff must meet a pretty high burden. The basic method is set out in *McDonnell Douglas Corp. v. Green*⁵² and summarized in *Texas Department of Community Affairs v. Burdine*:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden

47. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003) (quoting *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645–46 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 105, 105 Stat. 1074–1075, 42 U.S.C. § 2000e–2(k) (1994 ed.)).

48. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94, 99 (2003).

49. *Green v. USX Corp.*, 896 F.2d 801, 807 (3d Cir. 1990), *cert. denied*, 498 U.S. 814 (1990).

50. *See, e.g., Mansfield v. Billington*, 574 F. Supp. 2d 69, 84 (D. D.C. 2008) (following *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1292 (D.C. Cir. 1998)).

51. *Clermont & Schwab*, *supra* note 26, at 127–28.

52. 411 U.S. 792, 798, 805 (1973).

shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection” . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. . . . *The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.*⁵³

In order to establish a prima facie case, the first step in the three-part *McDonnell Douglas* analysis is, for example, a failure to promote case, is for the plaintiff to show “that (1) she is a member of a protected class; (2) she applied for and was qualified for a promotion; (3) she was considered for and was denied the promotion; and (4) an individual of similar qualifications who was not a member of the protected class received the job at the time plaintiff’s request for the promotion was denied.”⁵⁴ The prima facie case in a reprimand or termination case would be similar, changing the fourth factor to require a showing that others similarly situated (called “comparators”) were not treated the same, i.e., that they participated in similar conduct but were not reprimanded as severely or were not terminated.⁵⁵

The first three prongs usually are pretty straightforward and easy to prove. The fourth prong is the one that is nearly impossible in many discrimination cases. Finding adequate comparators may be impossible in the case where the plaintiff is in a unique job, where other employees have come and gone over the years, and where there is not just one incident that makes up the evidence of discrimination or the circumstances are much more general—not significant incidents but instead small circumstances that add together to create a picture.

At the last stage of the *McDonnell Douglas* framework, a plaintiff “may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”⁵⁶ This lack of credence showing is called “pretext.” If the

53. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 805 (1973); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added) (internal citations omitted).

54. *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 240 (6th Cir. 2005).

55. *See Coleman v. Donahoe*, 667 F.3d 835, 857 (7th Cir. 2012); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710 (6th Cir. 2006).

56. *Burdine*, 450 U.S. at 256; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (“[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.”).

plaintiff can satisfy all of these burdens, she should be allowed to take this evidence to a jury and convince a jury that it is more likely than not that the employer's adverse action resulted from a discriminatory motive.

2. *The Mosaic of Circumstances Analysis*

In order to address the problem of finding comparators, courts have recognized that other approaches may be taken. One such approach is to consider all of the circumstances and see if, taken together, they present sufficient evidence of discriminatory motive to get to a jury. This is called the direct approach, or the "mosaic of circumstances" approach.⁵⁷

[T]he plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case. Rather, the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent.⁵⁸

In *Smith v. Lockheed-Martin*, quoted above, the Eleventh Circuit allowed a discrimination case to go forward where the plaintiff could not point to comparators who were "similarly situated in all relevant respects," meaning plaintiff could not meet the last prong of the *McDonnell Douglas* test.⁵⁹ On the other hand, the Court found, plaintiff pointed to circumstances that raised an inference of discrimination. For example, even though they did not meet the "comparator" requirements because comparable employees were not supervisors like the white plaintiffs, black employees who, like the white plaintiffs, also sent racially insensitive emails were disciplined, not fired.⁶⁰ In addition, Lockheed kept a spreadsheet on discipline that noted the race of the disciplined employees.⁶¹ Finally, the evidence showed a strong motive to discipline white employees more than black employees after extensive news coverage of a rampage by a white employee against black employees that had taken place several years

57. *Silverman v. Bd. of Educ.*, 637 F.3d 729, 733–34 (7th Cir. 2011) (upholding the grant of summary judgment because the court was able to dismiss each alleged incident from which a jury could infer discrimination as not reaching the threshold necessary to get past summary judgment).

58. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

59. *Id.* at 1326–27.

60. *Id.* at 1343.

61. *Id.* at 1345–46 (citing *Williams v. Lindenwood Univ.*, 288 F.3d 349, 356 (8th Cir. 2002) ("[I]njecting racial language at all into the decision-making process creates the inference that race had *something* to do with the decision-making process.")).

earlier.⁶² Taken together, the Court found that was enough to raise an issue for a jury.⁶³

A plaintiff using the “convincing mosaic” approach to prove a discrimination claim under the direct method may present any of three broad types of circumstantial evidence. The first type includes “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. . . .”⁶⁴ The second type is evidence showing that the employer “systematically treated other, similarly situated, [not members of a protected class] employees better.”⁶⁵ Finally, the third type of circumstantial evidence is evidence that the plaintiff suffered an adverse employment action and that the employer’s justification is pretextual. . . . This type of evidence is substantially the same as the evidence required to prove discrimination under the indirect method.⁶⁶

Arguably, this standard should be much easier to meet for many cases than the comparator test from *McDonnell Douglas* and should result in more cases surviving summary judgment.⁶⁷ Unfortunately, though, the vast majority of decisions applying *Lockheed-Martin* and *Silverman* continue to grant summary judgment on the finding that plaintiff has not presented a sufficient mosaic to raise a triable issue for the jury.⁶⁸

3. Plaintiff Needs Only to Show That Discrimination Was a Motivating Factor

In its 1991 amendments to Title VII, Congress clarified the language, providing that “an unlawful employment practice is established when the complaining party demonstrates that [a prohibited

62. *Id.* at 1344–45.

63. *Id.* at 1347.

64. *Silverman v. Bd. of Educ. of Chi.*, 637 F.3d 729, 734 (7th Cir. 2011) (quoting *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)).

65. *Id.* (quoting *Venturelli v. ARC Cmty. Serv., Inc.*, 350 F.3d 592, 601 (9th Cir. 2003)).

66. *Id.* at 733.

67. Suzanne B. Goldberg, *Discrimination By Comparison*, 120 YALE L.J. 728, 736–37 (2011) (arguing that requiring comparators simply does not work in the modern workplace, and specifically not where stereotyped behavior is a motivating factor).

68. *Id.* at 734–35 n.15. For example, of the almost ninety cases decided by district courts in the Seventh and Eleventh Circuits that cite to the mosaic of circumstances discussions in *Lockheed* or *Silverman*, only three denied summary judgment in full. The vast majority granted summary judgment in full, and the rest granted it in part. Westlaw search, approx. June 15, 2013.

characteristic] was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁶⁹ In other words, Congress clarified that discrimination need not be the only factor; it just needs to be one factor. In its *Desert Place v. Costa* decision, the Supreme Court clarified that discriminatory intent need not be the only reason for the employment decision; it need be only a part of the reason and put to rest any argument that a person arguing that the decision-maker’s motives were mixed (meaning both discriminatory and not) needed to show direct evidence of that motive in order to succeed under Title VII.⁷⁰

A number of scholars have argued that courts read this motivation factor as requiring proof of the employer’s intent, which essentially excludes evidence of unknowing intent or implicit bias.⁷¹ Others assert that it only appears that courts have added an intent requirement because they use the words intent and motivation interchangeably, but that courts understand that they need only find motivation.⁷² Arguably, what the courts are looking for when they assert that plaintiff must prove discriminatory intent is a causal link between an employment action and the plaintiff’s race, sex, or other protected characteristic, not a deliberately or consciously discriminatory purpose.⁷³ “When Title VII is read properly, a plaintiff should be able to show that an employer discriminated against her unknowingly, notwithstanding the employer’s absence of deceit.”⁷⁴

4. How Social Framework Evidence Can Help in Title VII Cases

Social framework evidence can and often should be a part of the totality of circumstances considered by the court and jury.

In considering the totality of the circumstances, proof of implicit bias potentially provides considerable information to the trier of fact in at least two respects. Foremost, it can assist fact finders to understand the complex realities of cognition and behavior that underlie legal notions such as “motivating factors” and “intentional discrimination.” In the simplest of cases, human motivations are complex and enigmatic. Fact finders can use all of the help they

69. 42 U.S.C. § 2000e-2(m) (2013).

70. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93–94 (2003).

71. See numerous articles cited and discussed in Katherine T. Bartlett, *Making Good On Good Intentions: The Critical Role Of Motivation In Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1922–24, n.94 (2009).

72. *Id.* at 1924–25.

73. *Id.* at 1922.

74. *Id.* at 1924.

can get. Second, evidence of implicit bias can help establish the context for evaluating the facts of the respective case. Comments or actions that might otherwise be ambiguous or seem tangential to the dispute might take on greater meaning or more resonance in light of this proof.⁷⁵

Proving that discrimination was even part of the employer's motivation can be extremely difficult, especially where employers are knowledgeable enough to have taken steps either to minimize or to hide such motives or are unaware of their implicit biases. Social framework evidence helps us understand discrimination that is not necessarily intentional, but that can and should be eliminated from the workplace.

Social framework evidence can help the judge or jury see how what the employer characterizes as gender-neutral, such as leaving decisions to managers at the local level, could allow for stereotyped decision making. And it can be helpful to understand that an individual may embrace the law's commitment to workplace equality even as he violates its commands. "In fact, to the extent that it blinds him to his own bias, the defendant's belief in egalitarian values may even be a contributing cause of his discriminatory behavior."⁷⁶

In their 1987 article, professors Laurens and Monahan proposed that this social framework research be submitted by brief or through independent research by the court, turned into something like jury instructions, and then read to the jury, much like law.⁷⁷ That theory makes some sense, as it would allow such research to be introduced in every case where it is relevant and not just in those where the parties can afford to hire experts. Unfortunately, according to the authors in a 2008 article revisiting their proposal, courts have not created such jury instructions based on social science research.⁷⁸ Instead of creating jury instructions, courts have continued to rely on experts to testify about social science research to provide a social framework.⁷⁹

II. HOW SOCIAL FRAMEWORK TESTIMONY HAS BEEN PROFFERED IN DISCRIMINATION CASES

Expert testimony has been used in discrimination cases from early on. It helps in disparate impact cases to identify statistical

75. Faigman et al., *supra* note 18, at 1399.

76. Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 5, 22 (2011) (discussing studies that show that the more convinced an individual is as to his own objectivity, the less likely he will be to attempt to moderate the effects of implicit bias on his reasoning).

77. Walker & Monahan, *Social Frameworks*, *supra* note 29, at 588.

78. Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1731.

79. *Id.*

disparities in hiring, promotion, and termination.⁸⁰ It is especially helpful in class action litigation where the connections between the groups of employees being affected or the connections between company-wide policies and individual effects might not be obvious but for the expert's testimony.⁸¹ Social framework testimony has been used in employment cases to support the decision to admit general research about sex-based stereotyped thinking.⁸²

Expert testimony is admitted under Rule 702 of the Federal Rules of Evidence if it is relevant and reliable.⁸³ To make this decision, the court looks to the test from *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, derived from Federal Rule of Evidence 104 of "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."⁸⁴

Under Rule 703:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.⁸⁵

FRE 704 removes the historical prohibition against the expert's opinion embracing the ultimate issue in the case, at least for civil cases, though courts still struggle with whether and how the expert should leave room for the jury to consider how the expert testimony applies to the facts of the particular case. The Notes after the rule state:

The abolition of the ultimate issue rule does not lower the bar so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely

80. See, e.g., *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339–40 (1977) (noting approvingly many discrimination cases that rely on statistics to prove a violation of Title VII, and cautioning that statistics can be refuted). *But see Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2555–57 (2011) (rejecting both statistical expert testimony and sociological expert testimony regarding the issue of whether a class action met the Rule 23(a)(2) requirement of commonality).

81. It did not help in *Wal-Mart v. Dukes*, where the Court rejected the expert testimony that attempted to demonstrate the connections. See discussion *infra* Part III.

82. See discussion *infra* Part II.

83. *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579, 589 (1993).

84. *Id.* at 592.

85. FED. R. EVID. 703.

tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.⁸⁶

For our purposes, while a court might exclude an expert's opinion that this particular employer did discriminate in this case, it should not exclude testimony that, based on the expert's studies and experience, these facts combined with the social science research that explains how they fit together could be found to show discrimination, at least as one of the employer's motivating factors.

The concern is not whether these studies are admissible, Walker and Monahan report,⁸⁷ but whether social framework evidence renders consequential facts "more probable or less probable," as required by the Federal Rules of Evidence.⁸⁸ Though the social framework does not provide certainty, it may provide probability.⁸⁹

It would appear, therefore, that while social frameworks can never in themselves establish with certainty the existence of any fact that is of consequence to an issue at trial, they are surely capable of providing information regarding the probability that something did or did not occur. This is all that the concept of relevance requires and all that sound policy would seem to demand.⁹⁰

Because the standard in a civil trial is a mere preponderance of the evidence,⁹¹ this framework arguably could provide sufficient evidence, when combined even with seemingly ambiguous facts, for a jury to find liability. Because a plaintiff in a discrimination case need only prove that discrimination more likely than not was *a cause* of the adverse event, probability and not certainty is sufficient. And because circumstantial evidence is considered just as persuasive as direct evidence,⁹² social framework's emphasis on understanding seemingly non-discriminatory circumstances should be key to getting to a jury.

As will be discussed in Part II, *infra*, courts often find that social framework testimony is sufficiently relevant and reliable and therefore admissible in some circumstances but not in others. Assuming a court finds the social science evidence reliable, its usefulness is

86. *Id.*

87. Walker & Monahan, *Social Frameworks*, *supra* note 29, at 572.

88. *Id.* at 587.

89. *Id.* at 575.

90. *Id.*

91. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

92. *Id.* at 100–01.

relatively obvious in a disparate impact employment discrimination case, where an expert explains what the statistics prove and how the witness testimony and the statistics fit together, as explained by social science research. The usefulness is not as obvious in a disparate treatment case, where there are no statistical studies and the plaintiff must prove that this employer intended to discriminate against this plaintiff in these particular circumstances.

Expert testimony showing how statistically there should be more women in management or that stereotyped thinking might have led to the failure to promote women throughout the company is an obvious choice. In a disparate treatment case, where Plaintiff must prove discriminatory motive, an expert can provide background for understanding how a manager can say one thing and act another way, even if he doesn't realize it. Used well, an expert can provide a framework from which a jury can analyze and determine motive. But arguably, absent actual evidence that the manager intended to discriminate (knowingly or not), even the best expert cannot get a disparate treatment case past summary judgment, at least in a conservative jurisdiction.

Even using social framework evidence, Plaintiff must still show that the biases predicted by the study actually *caused* the employment decision. Although the social science evidence can predict behavior generally, it cannot predict or "postdict" individual behavior.⁹³ In other words, the jury must still find that this manager's implicit biases caused the employment decision in question, at least in part.

This lack of statistical company-specific data leaves the typical disparate treatment case only with witness testimony and the documents the employer produces in discovery. Social science framework studies could be helpful in those cases where the personalized studies are not feasible. Just as the Supreme Court looked at studies that showed that separate is far from equal in deciding *Brown v. Board of Education*, general studies have a lot to offer a judge or jury interested in understanding why supposedly neutral employment policies still result in discriminatory employment decisions.⁹⁴

But are these studies helpful without the specific analysis that applies them to the case currently before the court on summary judgment? And is it appropriate for social scientists to opine about a specific case without doing case-specific research, instead relying on existing studies to find motive when combined with the witness testimony? The issue becomes whether and when research that has

93. Faigman et al., *supra* note 18, at 1429–31.

94. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

been done in other industries, on different but related issues, or for similar types of cases, can be introduced to help a jury understand how the documents and witness testimony in this case fits into the larger world where stereotyped thinking, biased decision making, and the “good-ole-boy” network are alive and well, even in companies that have taken steps to eliminate them. And the real question is whether a court will even find that the plaintiff has produced enough evidence to get the evidence to a jury.

A. How Courts Have Allowed Social Framework Testimony

1. Some Courts Have Allowed Social Framework Evidence in Class Actions or Actions on Behalf of Groups

Courts long have looked to societal assumptions, statistical evidence, and expert opinion to help them reach decisions. As far back as *Muller v. Oregon*,⁹⁵ the Supreme Court noted that “medical experts” believed that women are weak and need protection from the rigors of long work days.⁹⁶ The Court relied on the importance to society of women’s ability to be effective mothers to uphold as constitutional laws that restricted the number of hours women could work.⁹⁷ The Court pointed to more than ninety “reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization.”⁹⁸ Then the Court went on at length and without citation to discuss women’s dependence on men, their different body structure, and the importance of protecting women for society’s benefit (child-bearing and rearing), not just their own, to justify the protectionist legislation.⁹⁹

One of the most notable uses of general scientific studies that provided a backdrop from which the Court could make a factual

95. *Mueller v. Oregon*, 208 U.S. 412, 420–21 (1908).

96. *Id.* at 420–21. The court admitted that

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.

Id. at 420.

97. *Id.* at 421.

98. *Id.* at 420 n.1 (referred to as “the margin”).

99. *Id.* at 422. All of that research *does* make you wonder what we will figure out about the studies discussed here 100 years from now.

determination was the studies identified in the famous footnote eleven in *Brown v. Board of Education of Topeka*.¹⁰⁰ Those cited studies show the effects of separate education on the children who receive it—creating a feeling of inferiority in those who receive the allegedly separate but equal education, especially if done with the sanction of the law.¹⁰¹ The Court cited the studies in support of its holding that: “In the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”¹⁰²

The Court has followed that practice in more modern cases. For example, the Supreme Court relied on studies that show the ongoing effects of poor education on minorities to justify continuing affirmative action programs in *Grutter v. Bollinger*.¹⁰³ Some of the evidence was presented by experts regarding statistical studies of the school system at issue. The rest was presented by social science experts, offering social science framework studies, which the Court accepted to help it frame its reasoning.¹⁰⁴ There was no jury in the affirmative action cases, so it is unknown whether the Court would have allowed some or all of the studies to be presented to a jury making a factual determination.

Stender v. Lucky Stores, Inc. provides a good example of a court allowing several experts to provide evidentiary testimony in a class action disparate treatment case.¹⁰⁵ In that case, Plaintiffs argued that the Lucky Stores grocery chain discriminated against women by putting them in jobs with little chance for promotion and with lower pay, not offering them as many hours, including overtime hours, as men, and that Defendant usually ignored seniority in its promotion decisions, leaving decisions to the discretion of supervisors with little

100. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) *supplemented sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). There have been many articles written on how the Court used the studies, whether the Justices actually relied upon them, and whether they should have been used. See Mody, *supra* note 33 for an overview of the many different approaches and an argument that the Court did not, in fact, rely on the studies to reach its decision but instead used them to lend authoritative force to its own conclusion.

101. *Brown*, 347 U.S. at 494.

102. *Id.* at 495.

103. *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (citing to statistics used in the dissents in *Gratz v. Bollinger*, 539 U.S. 244, 298–301 (2003) (Ginsburg, J., dissenting) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272–74 (1995) (Ginsburg, J., dissenting)); see also *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (Thomas, J., concurring and citing numerous studies to support his argument that *Grutter v. Bollinger* should be overruled and that the Court should hold that considering “race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause”).

104. *Grutter*, 539 U.S. at 330.

105. 803 F. Supp. 259 (N.D. Cal. 1992).

guidance, further limiting women's opportunities for advancement.¹⁰⁶ The court spent a great deal of time walking through the expert testimony—two statistical experts plus two social science experts for Plaintiffs, and similar experts for Defendants. The court credited Plaintiffs' experts¹⁰⁷ and rejected Defendant's experts, ultimately finding that Plaintiffs had proffered more than sufficient evidence of discrimination—based both on the statistically significant disparities and the anecdotal testimony of sexist comments and admitted assumptions about women not wanting the “more important” jobs or more hours and choosing the jobs into which they were shepherded.¹⁰⁸

Similarly, in *Jenson v. Eveleth Taconite Co.*, the court refused to accept Plaintiff's proffered statistical evidence of discriminatory hiring, promotions, and terminations, but accepted the social science framework evidence to help it understand the testimony regarding hostile environment.¹⁰⁹ In that case, the expert suggested that the court look for “(1) rarity; (2) sexualized work environment; and (3) ambiguous criteria for evaluating employee performance” to determine whether the workplace was a sexually hostile environment.¹¹⁰ The Court stated:

Although the Court's findings and conclusions would remain the same absent Dr. Borgida's testimony, his testimony on sexual stereotyping provides a sound, credible theoretical framework that confirms the Court's conclusion that the presence of the visual materials as well as verbal and physical behaviors previously described constitute acts of sexual harassment. In addition, sexual stereotyping generally, and “priming” research specifically, provide a framework for understanding why consistent and pervasive acts of sexual harassment occur in work environments similar to Eveleth Mines.¹¹¹

But generalized conclusions, especially statistics, usually are insufficient to prove disparate treatment. In *McDonnell Douglas*, the Supreme Court remanded to the district court for a determination of whether the plaintiff proved that a particular refusal to re-hire was discriminatory.¹¹² The statistics showed that there were few minorities in the job.¹¹³ The Court cautioned that, while that evidence

106. *Id.* at 266, 298, 333.

107. *Id.* at 326, 333 (omitting one social science expert who testified regarding a job interest survey, which the court refused to accept in a disparate treatment case).

108. *Id.* at 327, 332.

109. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 880–81 (D. Minn. 1993).

110. *Id.* at 881 (footnotes omitted).

111. *Id.* at 882–83 (quoting *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991)).

112. *McDonnell Douglas v. Green*, 411 U.S. 792, 792 (1973).

113. *Id.* at 805, n.19.

was probative, it was not enough: “We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.”¹¹⁴

2. Some Courts Have Not Accepted the Proffered Expert Testimony

Courts do not necessarily reject statistical or social science research per se. Instead, they determine that the proffered evidence is inadmissible because either it is not relevant to the case at hand or it is not reliable, as required by *Daubert*.¹¹⁵ Perhaps the best known example of social science studies rejected in recent employment cases were those offered in the *Wal-Mart Stores v. Dukes* class action.¹¹⁶ Those studies were roundly rejected not only by Justice Scalia and the majority of the Supreme Court,¹¹⁷ but also by some of the expert witness’s colleagues in the social science field.¹¹⁸ In *Dukes*, the expert reviewed current social science research to provide a framework for understanding the statistical studies the plaintiffs relied on to attempt to show that the class had sufficient commonality to meet the class action requirements.¹¹⁹

The expert started by discussing the broad framework—the circumstances that allow or encourage companies to engage in stereotyped thinking.¹²⁰ Then he looked at Walmart’s policies and practices and compared them to the social science research, especially the research that shows that leaving decisions in the hands of mid-level managers leads to subjective and often stereotyped thinking and therefore discriminatory decision-making.¹²¹ Thus, the expert asserted, Walmart’s nationwide policy of giving managers broad discretion and little guidance makes the issue of discrimination common throughout Walmart.¹²²

114. *Id.*

115. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 579 (1993).

116. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011).

117. *Id.*

118. Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1747–48.

119. *Wal-Mart*, 131 S. Ct. at 2555.

120. *Id.* at 2553.

121. *Id.* at 2553–54.

122. *Id.* at 2554. *But see* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988) (recognizing that subjective decision making by itself does not raise an inference of discrimination, but stating, “If an employer’s undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply”). The Court in *Dukes* specifically stated that the finding of

That argument went straight to the issue of commonality under Federal Rule of Civil Procedure 23, the rule for deciding whether to certify a class action.¹²³ The Court could have allowed the expert's testimony to help show that if a jury found discrimination against Walmart employees, it could attribute that discrimination to Walmart and not just individual decision makers. Instead, the Supreme Court rejected the expert's testimony because, it stated:

He could not, however, “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.”¹²⁴

The expert's application of social science research to the issue of commonality, the Supreme Court said, needs more specificity.¹²⁵ In other words, the Supreme Court rejected the expert's testimony in favor of class certification because he could not show definitively that the policies caused the allegedly discriminatory employment decisions, which arguably is not what social framework testimony should do.¹²⁶

Interestingly, both the Supreme Court's reasoning and the expert's social framework testimony were rejected by the very social scientists who coined the term “social framework” because, they argued, the conclusions the expert reached with regard to the likelihood of discriminatory decisions at Walmart are best left to the jury.¹²⁷ Dr. Monahan and his colleagues disagreed with the Supreme Court's rejection of the expert's testimony because his framework testimony should have raised a jury question.¹²⁸ But they also disagreed with the expert because, they argued, his conclusions as to Walmart's hiring practices needed to be based on his own independent scientific research rather than on the statistical evidence combined with witness testimony.¹²⁹

commonality for a class action is different than the finding of an inference of discrimination and specifically did not abrogate *Watson*, though it relied on the statement in *Watson* that an employee must point to a specific employment action as discriminatory to explain why that could not be determinative in the case at hand. *Wal-Mart*, 131 S. Ct. at 2555–56.

123. FED. R. CIV. P. 23(c)(1).

124. *Wal-Mart*, 131 S. Ct. at 2553 (quoting *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D. Cal. 2004)).

125. *Id.*

126. See Hart & Secunda, *supra* note 34, at 57.

127. *Id.* at 56.

128. Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1743.

129. *Id.* at 1747.

Of course, there is some logic to the argument that an expert hired to talk in broad generalities about a framework for analysis should not also try to offer the ultimate conclusion as to whether that stereotyped thinking (explicit or implicit) caused the statistical anomaly that women aren't being hired, promoted, given opportunities, etc., in proportions that they should be.¹³⁰ But the expert's testimony was not given to prove the ultimate fact—whether discrimination definitely occurred.¹³¹ That was for the jury. Given the policies that traditionally allow for discriminatory decision making, plus witness testimony, a reasonable jury might find that Walmart discriminated. And in this case the issue was even simpler—could it be possible that the employees nationwide, employed in different jobs for different stores with different managers, experienced discrimination because of Walmart's policies, practices, or culture? In other words, is it possible that discrimination was common to the plaintiffs in the action?

Cases following *Wal-Mart* have been more careful in their analyses.¹³² They still use both statistical and social framework evidence, but they make sure to point to specific employment practices and to show how the corporate culture has created a common approach to decision-making, which has led to discrimination.¹³³ For example, in *Ellis v. Costco Wholesale Corp.*, the Ninth Circuit remanded a class certification request for more specific findings,¹³⁴ and the District Court went into great detail to show how the social framework evidence helped understand the common culture and how the lack of strong guidance for decision-making at Costco could lead to discrimination.¹³⁵

B. Social Framework Research in Individual Disparate Treatment Cases

1. Courts Have Allowed Social Framework Research in Individual Disparate Treatment Cases

The most oft-cited case allowing in social framework research in the individual disparate treatment discrimination context is *Price*

130. See Faigman et al., *supra* note 18, at 1432 (arguing that such testimony should be allowed, but that it should not go to the ultimate fact—did this employer apply bias to this set of facts?); see also Hart & Secunda, *supra* note 34, at 62–63 (arguing that experts should be allowed to proffer an opinion as to whether the policies are vulnerable to bias, but that the ultimate issue of whether this employer discriminated is for a jury).

131. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011).

132. See, e.g., *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 540 (N.D. Cal. 2012).

133. *Id.*

134. *Id.* at 493.

135. *Id.* at 520.

Waterhouse v. Hopkins.¹³⁶ In that case, the Supreme Court allowed in Dr. Susan Fiske's expert testimony that the partnership selection committee that rejected Hopkins' bid for partnership likely was influenced by gender stereotypes.¹³⁷ In *Price Waterhouse*, Hopkins was not promoted to partner in her accounting firm essentially because the partners did not find her feminine enough. She introduced testimony that partners told her that she was "macho," that she needed to attend charm school, and that "in order to improve her chances for partnership, . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"¹³⁸ Fiske did no independent analysis and merely analyzed the statements that were part of the record testimony, testifying that, in her expert opinion, these statements indicated that sex-based stereotypes affected the partnership decision.¹³⁹ Today, it would be the rare court that would not find that such evidence was sufficient to raise a question of gender discrimination for the jury.

Arguably, Fiske's testimony was not a framework at all, but rather direct testimony analyzing and opining on the specific facts of a specific case, though she did testify that she could not say whether any one particular comment was the result of stereotyping.¹⁴⁰ The Court used her testimony to bridge the gap to understand that the comments and the expectations for women, though not evidencing discriminatory animus, did demonstrate treating women differently *because* they are women, which, the Court clarified, is sufficient to incur liability under Title VII.¹⁴¹

Another case that used expert testimony particularly effectively is *Robinson v. Jacksonville Shipyards, Inc.* In that case, the court accepted the argument that stereotyped thinking led to discriminatory action.¹⁴² *Robinson* relied on *Price Waterhouse's* Dr. Susan Fiske.¹⁴³ Dr. Fiske and related experts were allowed to testify about sexual stereotypes and how they likely affected employment in a shipyard where the men were allowed to hang pornographic pictures, where there were few women in high level jobs, and where women's job

136. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

137. *Id.* at 235–36.

138. *Id.* at 235.

139. *Id.*

140. *Id.* at 236.

141. *Id.* at 237.

142. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991). Until 1991, courts decided discrimination cases; it wasn't until the amendments were passed to the Civil Rights Act in 1991 that juries heard these cases. Civil Rights Act of 1991, 42 U.S.C.A. § 1977A (West 2014).

143. *Robinson*, 760 F. Supp. at 1502.

performance was reviewed in the context of an all-male power structure where it was sufficient to say that a woman was not good at her job because she was not “affectionate.”¹⁴⁴ Having reviewed depositions and other evidence of discrimination at the shipyard, but not doing any original research into the facts of the case, Dr. Fiske went on to testify to her opinion that the conditions and many of the effects of sex stereotyping existed at the defendant’s business.¹⁴⁵

Dr. Fiske offered some interesting guidance—that stereotyped behavior is more likely to occur under the following conditions (though certainly not *only* likely to occur under these conditions): “(1) rarity; (2) priming (or category accessibility); (3) work environment structure; and (4) ambience of the work environment.”¹⁴⁶ In that case, Robinson was one of few women in the skilled craft group in which she worked.¹⁴⁷ In addition, the men pinned up photos of naked women, which Fiske testified made them view women as sex objects.¹⁴⁸ Third, the people in the power structure were men and therefore more likely to see women as the “out group” and therefore less capable.¹⁴⁹ The men were also more likely to trivialize complaints about behavior by workers in the “in group.”¹⁵⁰ Finally, she testified, the non-professional atmosphere of the workplace contributed to women being treated as sex objects.¹⁵¹

The court provided an excellent overview of how the expert testimony fit with the facts proffered by the plaintiff.¹⁵² The court applauded her testimony, stating:

Dr. Fiske’s testimony provided a sound, credible theoretical framework from which to conclude that the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviors previously described creates and contributes to a sexually hostile work environment. Moreover, this framework provides an *evidentiary basis* for concluding that a sexualized working environment is abusive to a woman because of her sex.¹⁵³

Interestingly, the court rejected the defendant’s proffered expert testimony, which relied on studies finding that simply looking at

144. *Id.* at 1502–03.

145. *Id.* at 1503.

146. *Id.*

147. *Id.* at 1491.

148. *Id.* at 1493.

149. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1504 (M.D. Fla. 1991).

150. *Id.* at 1486.

151. *Id.* at 1504.

152. *Id.* at 1486.

153. *Id.* at 1505 (emphasis added).

pornography does not promote sexual aggression in men and that women are no more than moderately offended by seeing pornographic materials.¹⁵⁴ The court reasoned that the studies were not performed in the workplace, so they were not relevant to the issue of whether viewing pornography in the workplace can be offensive.¹⁵⁵ In fact, the court found, the defendant's expert's study showed the importance of context in evaluating the response to sexually oriented materials.¹⁵⁶ In other words, social framework evidence in the right context is not only relevant, it provides an evidentiary basis, but social framework evidence not directly related to the context of the particular case is not relevant.

One issue courts face is whether to allow experts to testify to the ultimate fact—whether the company actually discriminated—or to stop their testimony at simply providing the framework.¹⁵⁷ In *Robinson*, Dr. Fiske did offer her own opinion, based not on independent investigation but on the evidence presented by the parties at trial, that the environment was indeed sexually harassing.¹⁵⁸ The court appeared grateful to have it.¹⁵⁹ Arguably it was useful because relying on an expert prevented the judge from having to worry that his or her own assumptions might affect the outcome.¹⁶⁰

The First Circuit has been generous in allowing social framework evidence, explaining that the Supreme Court was adamant in *Price Waterhouse* that evidence of bias, including unconscious bias theories, is admissible to meet a plaintiff's burden of showing that disparate treatment, explained by the theory of unfair treatment rather than discriminatory motive, still raises an issue for a jury where social science indicates the possibility of a hidden discriminatory motive.¹⁶¹ In *Tuli v. Brigham & Women's Hospital*, both the plaintiff and defendant sought to exclude the other's expert from testifying.¹⁶² The plaintiff was a neurosurgeon who was sent for

154. *Id.* at 1508.

155. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1508 (M.D. Fla. 1991).

156. *Id.*

157. Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1740 (arguing that experts should not testify to the ultimate fact of whether a particular employer discriminated without doing case-specific scientific research because of the risk that the expert's "preexisting beliefs, values, and expectations will bias the resulting opinions").

158. *Robinson*, 760 F. Supp. at 1503.

159. *Id.* at 1505.

160. *See* Krieger & Fiske, *supra* note 4, at 1002.

161. *See, e.g.*, *Thomas v. Eastman Kodak*, 183 F.3d 38, 42, 64–65 (1st Cir. 1999) (denying summary judgment where plaintiff had significant evidence of good reviews for many years and then bad reviews under a new manager, leading to her layoff, where studies showed that being the only minority member could lead to poor subjective reviews).

162. *Tuli v. Brigham & Women's Hosp.*, 592 F. Supp. 2d 208, 210 (D. Mass. 2009), *aff'd*, 656 F.3d 33 (1st Cir. 2011).

counseling as a condition of keeping her employment.¹⁶³ She asserted the peer review committee making the decision relied on statements made by a particular doctor who harbored significant sex-based stereotyped thinking.¹⁶⁴

In *Tuli*, the Massachusetts District Court allowed the plaintiff's expert to testify about the effect of sex-based stereotypes on employment decisions and that the allegations made in the case appeared to meet the criterion for sex-based decision-making.¹⁶⁵ The court reasoned that the plaintiff's expert's testimony as to indicators of stereotyped decision-making was admissible because the expert

cannot say whether a given act or word was discriminatory; he can only show the settings in which discrimination typically occurs and opine on whether the allegations in the case at bar are consistent with the observed patterns. He allows the jury to make the final decision and expressly disclaims the capacity to draw any conclusion in this particular case.¹⁶⁶

This case provides a good example of how social framework testimony can help explain the situation without trying to tell the jury what verdict to reach.

Defendant's expert, on the other hand, tried to leave nothing to the jury.¹⁶⁷ For that reason, the court did not allow defendant's expert to testify about "sham peer review."¹⁶⁸ The court reasoned that defendants' "sham peer review" expert was *only* testifying as to his opinion as to whether the plaintiff experienced discrimination, a matter best left to the jury.¹⁶⁹ The jury's verdict of \$1.62 million in compensatory damages survived appeal.¹⁷⁰ Especially because costs and attorneys fees are awarded to plaintiffs who succeed under Title VII,¹⁷¹ the expert fees were justified in this case.

Similarly, in *International Healthcare Exchange, Inc. v. Global Healthcare Exchange, LLC*, a New York District Court allowed in a sociologist's testimony regarding sex-based stereotyping and allowed the expert to testify that the circumstances described by plaintiff and limited evidence he reviewed led him to believe that "Plaintiff's

163. *Id.* at 210.

164. *Id.*

165. *Id.* at 215–16.

166. *Id.*

167. *Id.* at 213.

168. *Tuli v. Brigham & Women's Hosp.*, 592 F. Supp. 2d 208, 213 (D. Mass. 2009), *aff'd*, 656 F.3d 33 (1st Cir. 2011).

169. *Id.*

170. *Id.*

171. 42 U.S.C.A. 2000e-5(k) (West 2014).

work assignments and termination were the product of such stereotyping.”¹⁷² The court reasoned that the expert’s failure to study all aspects of the case were credibility issues for the jury, not the court.¹⁷³ Arguably, the court could have kept out the expert testimony based on a reliability argument under Rule 702 (finding that testimony cannot be reliable when it is not based on all the relevant evidence), but it left it for the jury to make that decision.¹⁷⁴

2. And Some Courts Have Not Allowed It or Have Given It Little Weight

Although statistics and other expert testimony can be very helpful in disparate impact cases, “Generalized statistics used to prove a particular intent must be scrutinized closely.”¹⁷⁵ “[S]uch general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.”¹⁷⁶

Despite numerous cases that allow experts to testify to provide background or a framework, at least one Georgia court has held that Georgia does not allow subtle bias disparate treatment claims based on subconscious cognitive stereotypes.¹⁷⁷ In *Tucker v. Georgia Department of Public Safety*, the District Court relied on *Hazen Paper Co. v. Biggins*, and *EEOC v. Joe’s Stone Crab*, for the proposition that the disparate treatment must be “deliberate” or “conscious,” even though those cases specifically held that stereotyped thinking is sufficient intent if it causes employment decisions based on an illegal category, regardless of any discriminatory animus.¹⁷⁸ In *Tucker*, the court rejected the plaintiff’s disparate treatment claim without much explanation.¹⁷⁹ Hopefully this case is simply an anomaly—a decision by a court that did not understand that social science research *is* admissible as long as it meets the evidentiary requirements.

Other courts have found that the expert testimony simply does not meet the *Daubert* standard.¹⁸⁰ In *Collier v. Bradley University*, for example, the court refused to allow an expert to testify that she

172. Int’l Healthcare Exch. v. Global Healthcare Exch., 470 F. Supp. 2d 345, 355 (S.D.N.Y. 2007).

173. *Id.*

174. *Id.*

175. *Johnson v. Bunny Bread*, 646 F.2d 1250, 1254 (8th Cir. 1981).

176. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.19 (1973).

177. *Tucker v. Ga. Dept. of Pub. Safety*, No. CV-208-33, 2009 WL 2135807, at *6 (S.D. Ga. July 15, 2009).

178. *Id.*

179. *Id.*

180. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 571, 580 (1993).

believed the employer discriminated on the basis of race based on her analysis of social science studies and the anticipated testimony.¹⁸¹ The Court followed Seventh Circuit precedent in noting that “When making these determinations, the district court functions as a gatekeeper whose role is to keep experts within their proper scope, lest apparently scientific testimony carry more weight than it deserves.”¹⁸² This “gatekeeper function” could prove the death knell of proffered expert testimony in the kinds of cases discussed here.¹⁸³

In *Collier*, the expert only read social science reports and the transcripts of likely witnesses.¹⁸⁴ She conducted no interviews and made no attempt to verify the facts presented to her.¹⁸⁵ Although the court refused to determine whether this “content analysis” could be sufficient, it found that this expert’s analysis was not.¹⁸⁶ She did not explain her methodology—she testified she simply read, analyzed, and applied them to the case at hand.¹⁸⁷ The court held that, since she had no methodology, the court could not evaluate it.¹⁸⁸

3. *Cases Where the Lawyers Have Proffered the It Does Hurt to Ask or Women Don’t Ask Studies*

At least one court has been presented with *Women Don’t Ask* study. In the *Lilly Ledbetter* case, the National Partnership for Women and Families, along with numerous other groups, together filed an amicus brief in favor of the original rule that pay decisions have a cumulative effect and that each paycheck, if based on a discriminatory decision, brings all paychecks within the limitations period.¹⁸⁹ The authors of the brief pointed to the *Women Don’t Ask* study to support the proposition that early decisions regarding pay had long-term effects, given raises based on a percentage increase (three percent of \$25,000 is less than two percent of \$30,000, and subsequent raises are cumulatively lower, resulting, according to the study, in a possible

181. *Collier v. Bradley Univ.*, 113 F. Supp. 2d 1235, 1239 (C.D. Ill. 2000).

182. *Id.* at 1243 (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000)).

183. *Collier*, 113 F. Supp. 2d at 1248.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Collier v. Bradley Univ.*, 113 F. Supp. 2d 1235, 1239, 1244 (C.D. Ill. 2000).

188. *Id.* at 1245. Arguably this expert was particularly inarticulate and non-specific. Instead of explaining that it was accepted methodology to review and assimilate other expert reports, she simply testified that she was not going to “label” the method she used. Instead of explaining that it is an acceptable scientific method to expect some testimony to be unreliable and not to quantify it, she simply assumed that some testimony was false.

189. Brief of the National Partnership for Women & Families et al. as Amici Curiae in Support of Petitioner, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074).

difference over a career of well over \$300,000).¹⁹⁰ The Supreme Court's decision did not mention the study, though Justice Ginsburg's dissent discussed many of the concepts raised by the brief.¹⁹¹

Until June of 2013, I had not found any cases where either the lawyers or the amicus authors had cited to or argued that the *It Does Hurt to Ask* study should be used as evidence or even should be used to explain the evidence. The one case that appears to have relied at all on the study is a claim under the state equivalent of the Equal Pay Act. In *Dreves v. Hudson Group (HG) Retail*, the District Court in Vermont conducted a bench trial in an equal pay and discrimination case.¹⁹² The court noted the study with regard to the equal pay claim, where the plaintiff's replacement was paid considerably more than the plaintiff had earned and the employer argued that he had negotiated for it.¹⁹³ The court pointed out that he was offered significantly more at the outset of negotiations than she had been making, so his negotiating did not show a lack of discrimination in the initial offer, and pointed in a footnote to several studies about the societal implications of women negotiating salaries.¹⁹⁴ The court did not discuss the study with regard to the employment discrimination case, ostensibly because the negotiation at issue occurred after plaintiff's termination.¹⁹⁵

Had the plaintiff in that case negotiated for raises, promotions, etc. throughout her long-term employment, it is precisely the kind of case where the study would be the most helpful. The plaintiff had very little evidence of gender discrimination. She alleged that the store she managed was understaffed and that the boss talked to her differently than the male managers and treated her differently, without concrete and obvious examples of how that treatment was gender-based.¹⁹⁶ In its analysis, the court held that she failed to make out a prima facie case, but went on to explain that, even if she had, her explanation that she made her store successful, which warranted better staffing, as the men had, was insufficient evidence because she could not prove the employer's proffered reasons for the different staffing levels (e.g., a hiring freeze) unworthy of credence.¹⁹⁷

It is not clear from the case whether the plaintiff ever sought out recognition, a raise, a promotion, or, perhaps, better staffing,

190. *Id.*

191. *Ledbetter*, 490 U.S. at 228 (Ginsburg, J., dissenting).

192. *Dreves v. Hudson Group Retail*, 211-CV-4, 2013 WL 2634429 (D. Vt. June 12, 2013).

193. *Id.* at *8.

194. *Id.* at *8, n.11.

195. *Id.* at *8.

196. *Id.* at *1.

197. *Id.* at *11.

so we are left to wonder whether those facts, combined with the Bowles study, would have been sufficient for a court that had already accepted at least the premise of the study—women face different societal pressures and results when they ask for what they deserve. Instead, the court granted summary judgment on the plaintiff's discrimination claims.¹⁹⁸

III. LAWYERS CAN USE THE STUDIES TO SHOW HOW BIAS CREATES LONG-TERM AND CUMULATIVE EFFECTS RESULTING IN DISCRIMINATORY DECISION-MAKING

The *Women Don't Ask* and the *It Does Hurt to Ask* studies are relevant as social framework evidence. Their relevance is less direct than the statistical studies that show a particular workplace lacks women in particular jobs because they require a judge or jury to understand stereotyped thinking's long term effects. That understanding simply is not obvious to the uninformed observer, which is precisely what makes them so essential. Once jurors, judges, employers, and even employees are confronted with the fact that a single significant action or series of seemingly unrelated actions can have long-term repercussions, they can understand how what does not appear on its face as a discriminatory motive may still stem from applying unconscious stereotypes to decision making. Because of these studies, in the case where discrimination built subtly over time without specific and obvious discriminatory comments or actions, the discriminatory motivation that was nearly impossible to see becomes visible.

In *Price Waterhouse*, expert Susan Fiske's testimony was found by the district court to be "icing on [the] cake" for the plaintiff, given that plaintiff provided witnesses who testified that she was told she was too "macho," needed to go to charm school, and needed to walk, talk, dress, etc. more femininely.¹⁹⁹ In other words, the plaintiff proved she was a victim of discrimination regardless of the social framework testimony. The Court, however, appreciated Fiske's testimony putting the evidence in context and explaining comments that might be less obviously sexist, including how the fact that she was the only woman in her area might make a difference, and other findings from social science research.²⁰⁰ Though it is questionable whether the expert testimony changed the Court's opinion, or had any effect at

198. *Dreves v. Hudson Group Retail*, 211-CV-4, 2013 WL 2634429, at *9 (D. Vt. June 12, 2013).

199. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

200. *Id.* at 235–36.

all, the court did allow it in and even commented on its strengths and weaknesses.²⁰¹

Why isn't using the *Women Don't Ask* and the *It Does Hurt to Ask* studies as straightforward as setting the social framework in *Price Waterhouse*? Two reasons, at least. First, it takes more steps to use the negotiation studies. The connection is not nearly so direct. And second, the goal is to use these studies in cases with facts that are not nearly as strong as the facts in *Price Waterhouse*, making summary judgment likely rather than simply possible.

A. It Takes Multiple Steps To See Discrimination When Applying These Studies

The facts of the long-term discrimination case do not simply rely on statements such as "He said I wasn't 'nice enough'" and the expert explaining that "People say that when they harbor stereotyped thinking." They are often more nuanced:

Well, first I got the job and everyone was excited. I negotiated my salary and the bosses seemed disappointed, but I got what I wanted, so I didn't worry about it. They did not mention or explain their disappointment. Then, a couple of years later, I asked for a raise and got it, but after a while I noticed that people started to avoid me. Then I didn't get the promotion I competed for but I didn't let that bother me. Shortly after, though, I started getting undesirable projects and people stopped asking me to lunch. After I asked for better projects and successfully negotiated (almost forced) my way into managing the team for a prestigious project, things really went sour. Nothing I did was good enough, and everything I did was criticized, even though the team brought in more business than some of the other teams through my aggressive marketing efforts. Six months later, I was let go and told it was because they no longer needed me.

And it is not just the facts that are complex in the negotiation case. The social science research necessary to tie the facts to the law is complex, relying on multiple studies, grounded by the *It Does Hurt to Ask* study.²⁰² Arguably, an expert who relied on the Babcock and

201. See Eugene Borgida et al., *On The Use Of Gender Stereotyping Research In Sex Discrimination Litigation*, 13 J.L. & POL'Y 613, 614 (2005) (asserting that the Court actually rejected the testimony as irrelevant based on its comment that "[n]or . . . does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism").

202. Bowles, Babcock & Lai, *It Does Hurt to Ask*, *supra* note 3, at 103.

Bowles studies would have to take a court or jury through the accumulated scientific knowledge, leading to testimony that:

- 1) Most people have stereotyped thoughts, whether we know it or not.²⁰³
- 2) Those stereotyped thoughts often affect decisions, sometimes despite our efforts and sometimes because we make no effort to control them, especially if the thoughts are subconscious or unconscious.²⁰⁴
- 3) Some of those stereotypes include women's roles versus men's, such as believing that women should be "nice" and "communal" and that women who negotiate on their own behalf aren't "nice" or "communal."²⁰⁵
- 4) When we hold stereotypes we typically think negatively of a person who does not meet the stereotype (e.g., a woman who negotiates her initial salary or who does not smile easily or who refuses to wear makeup).²⁰⁶
- 5) These negative reactions persist not just in the short term, but also in the long term.²⁰⁷
- 6) Those negative thoughts turn into long-term negative effects, which affect the possibility of being included in the friendly network of colleagues, being asked to attend social events at which bosses get to know and like subordinates, being given a challenging project which might affect your chances for promotion, and, ultimately, getting the raise or the title or the management job.²⁰⁸
- 7) In addition, the chances for women to get that promotion are slimmer because, the studies show, women are held to a stricter promotion standard than men, based on actual performance rather than potential performance.²⁰⁹
- 8) And if you try to negotiate your way onto the team or into the social life, you end up in the same place. You hit the stereotype that women who negotiate are perceived as too aggressive and not nice enough.²¹⁰
- 9) Also, studies show, women who are put in charge are often criticized for not being good team leaders because they do not exhibit the stereotyped behavior expected of them. They are not nice enough; they act too aggressively, etc.²¹¹

203. Walker & Monahan, *Social Frameworks*, *supra* note 29, at 575.

204. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117–18 (D.D.C. 1985).

205. Faigman et al., *supra* note 18, at 1408.

206. *Id.* at 1413; *see also* Bowles, Babcock & Lai, *It Does Hurt to Ask*, *supra* note 3.

207. Faigman et al., *supra* note 18, at 1415.

208. *Id.* at 1418.

209. *Id.* at 1414–17.

210. Bowles, Babcock & Lai, *It Does Hurt to Ask*, *supra* note 3, at 6–9; Faigman et al., *supra* note 18, at 1419–20.

211. Faigman et al., *supra* note 18, at 1419.

10) So, if you accumulate all the effects of implicit bias, it is not that the managers got together and decided she had to go; it's that they started to apply stereotyped thinking right from the first time she negotiated her pay or her first raise, which immediately and throughout her employment hurt her ongoing chances of success. And this finding holds whether the decision-maker is male or female, stemming from the strong negative reaction to women who negotiate.²¹²

With all this evidence, the expert would testify there is a strong possibility that the company policy of failing to set specific guidelines and not holding managers accountable for their decisions allowed the company to let the plaintiff go at least in part based on gender-based biases, conscious or not.

B. The Facts of the Long-Term Discrimination Case, Even Combined with Social Science Evidence, Provide Only a Tenuous Link to the Ultimate Employment Decision

What these studies tell us is that the incidents the plaintiff experienced very well could be related to and caused by the effects of unconscious bias; even that there is a likelihood that they are. And that is precisely the link that the jury needs to hear. Because, although a comment that a woman needs to go to charm school or acts too macho is pretty obviously based on sex-based stereotyped thinking, the relationship between negotiating and long-term negative effects is not obvious. The company liked the plaintiff enough to hire her. And she stayed with the company for many years, getting raises and good, if somewhat mixed, evaluations. And she got raises or promotions and was not terminated until she had been at the company for a number of years. All these facts militate against a finding that there is sufficient evidence of discrimination to get to a jury. The study explains a lot of things that just don't make sense otherwise.

The court in *Robinson* held that the social science framework offered by the expert “provides an *evidentiary basis* for concluding that a sexualized working environment is abusive to a woman because of her sex.”²¹³ The question is the level of evidence a woman has to be able to produce in order to be allowed to introduce social framework testimony to a jury and let the jury decide whether, more likely than not, the employer did discriminate in this instance. The

212. Bowles, Babcock & Lai, *It Does Hurt to Ask*, *supra* note 3, at 6–9.

213. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (emphasis added).

argument that this standard should not be very high comes from *Price Waterhouse*, in which the Court repeated the words of Title VII that an employer cannot make employment decisions “because of such individual’s . . . sex,”²¹⁴ and held, “We take these words to mean that gender must be *irrelevant* to employment decisions.”²¹⁵ The Court went on to hold that “Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities.”²¹⁶ Finally, the Court held that, “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”²¹⁷

Arguably, then, all a plaintiff should have to show to get past summary judgment is that a reasonable jury could find from the evidence, including the expert testimony, that sex, more likely than not, was not irrelevant to the employment decision. This standard should be especially easy to meet with expert testimony because, for every expert plaintiff offers, defendant is likely to offer an expert to say the exact opposite, creating a genuine issue of material fact. Thus, judges should be glad to allow this testimony in. Under that standard, most cases should get past summary judgment. How can a judge determine that sex was completely irrelevant when an expert in the field testifies that there is a likelihood or even a possibility that discrimination was part of the basis for the decision? Unfortunately, statistically speaking, that is not the case.²¹⁸

The problem is, even a liberal court is not going to let a case get past summary judgment without significant and specific (even if not direct) evidence of discrimination.²¹⁹ Plaintiffs have to be able to show that their qualifications were comparable to men who got promotions or raises when they did not or who were not let go when they were.²²⁰ But that is not enough. They also have to show that being passed over was *caused by* discrimination.²²¹ As even the authors who coined the phrase “Social Framework” admit, the framework studies do not prove discrimination.²²² The studies, though relevant to support and explain

214. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

215. *Id.* (emphasis added). This decision changed the standard applied by many lower courts that discriminatory motive must be the “but-for” cause of the decision. *Id.*

216. *Id.* at 242 (providing the example of conditioning employment on facially neutral tests or qualifications that have a disproportionate effect on a protected class unless those tests are required for the performance of the job).

217. *Id.* at 250.

218. See *supra* notes 26, 50, explaining that judges are highly likely to grant summary judgment in discrimination cases and to find against the plaintiff on appeal.

219. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

220. *Id.*

221. *Id.*

222. Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1719.

the evidence of discriminatory intent, may not be allowed to replace the evidence.²²³

1. Arguments for Rejecting Social Framework Testimony in Individual Disparate Treatment Cases

From a practical perspective, lawyers and judges must consider whether evidence will help or hurt their case, confuse a jury, or prejudice the fact-finder. Although from an intellectual perspective more information seems to be better, for trial purposes evidence needs to be chosen carefully and for a purpose, especially when it comes at great expense, as does expert testimony. A lawyer should consider the efficacy of the evidence she intends to present, which raises questions, discussed below.

a. The Studies Are as Likely To Prove as Not Prove Bias, Because Employees Cannot Control Their Unconscious Biases

One argument that these studies should not be allowed in is that subconscious bias evidence really cannot provide any predictability of a particular employer's decision and therefore, jury decisions based on them are as likely to be inaccurate as accurate.²²⁴ Because unconscious bias is subtle, author Amy Wax argues, it will be hard for a jury to figure out which cases really result from bias and which do not.²²⁵ Because of this problem, she asserts, "employers and firms will either be dramatically undercharged or overcharged for their misconduct, and compensation will often be paid to the wrong employees, with deserving victims receiving nothing or too little and the uninjured receiving too much."²²⁶ The argument really is that employers should not be held liable for unconscious bias at all, since we cannot really control our unconscious biases.²²⁷ The author likens subconscious discrimination to accident.²²⁸ The problem with her assumption, though, is that society requires us to pay for our accidents when we harm an

223. If *Ricci v. DeStefano*, 557 U.S. 557 (2009), can be read to indicate a Supreme Court move back to requiring proof of the decision-maker's subjective intent to discriminate, then this evidentiary standard becomes even more difficult to meet, and all evidence of biased thinking and prejudice causing unconscious bias will become irrelevant. See Rich, *supra* note 76, at 70 (arguing that Alito's dissent indicates an intent to move backwards in Title VII protections—for example, eliminating unconscious bias cases).

224. Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1134 (1999).

225. *Id.* at 1133.

226. *Id.* at 1134.

227. *Id.* at 1133.

228. *Id.* at 1145.

innocent victim. And we as a society hope that we learn from the punishment for an injury we did not intend and will be more diligent to avoid causing an accident in the future. Because the same argument applies in a discrimination context, the analogy strengthens the argument rather than weakens it.

b. Pressure to Stop Implicit Bias May Make It Worse

Author Katherine Bartlett believes that confronting and threatening people who mean well but have implicit biases makes them more resistant to change and, ultimately, prone to more stereotyping.²²⁹ Instead, she argues, we should concentrate on a positive approach so people do not become defensive or resentful about having to meet expectations.²³⁰ In addition to, or preferably in lieu of legal threats, the author believes “good intentions have their greatest comparative advantage when it comes to the more subtle forms of discriminatory behavior, and that people who have an internal commitment to non-discrimination norms will combat implicit discrimination more effectively than those motivated by traditional legal sanctions.”²³¹ The author asserts that we can effect more change by presenting well-intentioned employers with the studies that will help them confront and correct their implicit biases.²³² Of course, this approach assumes that most employers are willing and able to take on this task without any other incentive.²³³

This argument has immediate appeal—focus on the relationship and encourage the best of people. Simply based on years of litigation and mediation experience, though, I cannot shake the knowledge that part of what convinces people to change their workplace for the better, to take responsibility for the harm they may cause or have caused others, on purpose or not, is fear of liability. So while I wholeheartedly agree that employers and others should be exposed to social science research and encouraged to recognize bias and eliminate it, I must

229. Katharine T. Bartlett, *Making Good On Good Intentions: The Critical Role Of Motivation In Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1939–41 (2009) (pointing to studies that show that people often do not internalize externally imposed norms, perhaps because having too many rules trains people to follow the rules and not develop their own judgment, or because it leads people to become defensive toward the rules, or even because it angers people to think that rule-makers believe they would not otherwise meet the standards). These are all legitimate concerns and the author is wise to recognize that society must address them. She also recognizes that her approach cannot be the only approach taken, and that legal means remain necessary. *Id.* at 1903.

230. *Id.* at 1936.

231. *Id.* at 1902.

232. *Id.*

233. See William T. Bielby, *Accentuate The Positive: Are Good Intentions An Effective Way To Minimize Systemic Workplace Bias?*, 95 VA. L. REV. 117, 117 (2010).

take the cynic's approach and argue that this step is but a small piece of the puzzle, and will be more effective if the employer has incentive to accept the conclusion that its bias is showing.²³⁴ The author correctly points out, however, that the various findings about implicit bias "raise significant questions about the optimal role for law in reducing discrimination,"²³⁵ but that is a topic for another article.

c. How Will a Jury Respond to this Information?

It may be putting the cart before the horse, but a significant concern for any judge, and indeed for the plaintiff's lawyer, must be how the jury will react to the evidence she wants to introduce.²³⁶ Will the jury even understand it? Will it help or hurt? Will it make a jury more or less likely to find for a plaintiff? Should the answers to these questions matter to a court determining whether to admit this testimony?

i. Will a Jury Find Against an Employer That Is Not Aware of its Discriminatory Decisions?

Will a jury find an employer liable if it thinks the employer did not even realize that its decision was caused by implicit bias? Especially an employer that has taken steps to try to increase diversity? Could introducing evidence that the employer's discriminatory actions began as far back as plaintiff's hiring five, ten, or more years ago (perhaps prompting concerns but no formal complaints until recently) backfire against plaintiffs? Could a jury say she should have done something back then and refuse to do anything all these years later? Will a jury say it is not going to hold an employer who tried not to discriminate liable for discrimination just because its biases came into play in a decision despite the employer's efforts to combat discrimination? In other words, is introducing this testimony more likely to make the jury find for the employer than for the employee? And even if it finds the employer liable, what effect will this knowledge have on the damages the jury awards?

This concern is a legitimate one that should be considered by plaintiffs' lawyers.²³⁷ They must consider how they can convince a jury that implicit biases, which most of us hold, are as much responsible for this individual's poor treatment at the company as for society's failure

234. *Id.* (asserting that work on reducing bias needs to be aimed at organizational structures more than individual motivation).

235. *Id.* at 1920.

236. Wax, *supra* note 224, at 1219.

237. *Id.*

to reach true pay and job equity.²³⁸ Still, from a lawyer's perspective, the social science expert must at the least be proffered at the summary judgment stage.²³⁹ It should be offered to help the court recognize that what appear to be unrelated incidents could be connected.²⁴⁰ Whether they are connected should be a question for a jury.²⁴¹

But should it be a consideration for a judge in deciding whether to consider or admit such evidence? Arguably not at all. The judge's only decisions are whether the evidence is relevant, reliable, or prejudicial.²⁴² In addressing the issue of whether scientific studies might be prejudicial because juries might give them undue weight, studies quickly rejected that possibility.

It appears that aggregate "statistical" information, in actual practice, is likely to be highly *undervalued* by lay decision-makers. Numerous studies have found that when people are presented with social frameworks (often called base rates" in the research literature) and with factual information specific to the case at issue, they strongly tend to give less weight to the framework than the logic of inference suggests is due.²⁴³

In other words, the worry is not that the jury will give the studies too much weight, it is that the jury will give them not enough weight. And so the first of many hurdles to using such evidence is overcome—not such that a court should reject it as prejudicial; on the contrary, courts could let it in as harmless knowing that a jury is likely to ignore it. Even so, simply making juries, employers, and the public sitting in on or reading about the trial aware of these connections should help everyone understand and, hopefully, confront or at least be mindful of these biases next time they make a decision. Is that enough to justify the expense for a plaintiff's lawyer? Likely not in the individual case.

*ii. Will a Jury Understand the Testimony
and its Place in the Evidence?*

To expect a jury to accept the argument that, by coupling these background studies with plaintiff's meager proffered direct and circumstantial evidence, plaintiff has proved discrimination is really

238. *Id.* at 1230.

239. Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 490 (2005).

240. *Id.* at 482.

241. *Id.*

242. See *infra* discussion of whether the lack of temporal proximity between events or the tenuous connections between the events and the decision might cause a court to find the studies irrelevant, Part III.B.4.

243. Walker & Monahan, *Social Frameworks*, *supra* note 29, at 576.

asking an awful lot of a jury. But isn't that a jury's job? We do not really hesitate to argue that a judge can make these connections. Should we think so little of our juries that we should not leave it for them to accept or reject them? As with all evidence, it is for the witnesses, presented by the lawyers, to make the connections, clarify the facts, and explain how the evidence should lead to the conclusions plaintiff wishes the jury to reach.

2. These Arguments Should Not Convince a Court To Reject the Bowles and Babcock Studies in Implicit Bias Cases

Several of the arguments above leave us to wonder why lawyers should bother, especially if we chance making things worse. The answer also comes from the studies. The evidence shows that, when we call people on their biases, they recognize them and work harder to suppress them.²⁴⁴ And if people are successful in suppressing their biases long enough to hire women and minorities in numbers sufficient to change the dynamics of the workplace, the biases are likely to dissipate.²⁴⁵ Seventy years ago a significant percentage of Americans could not imagine going to school with children of a different race. Today we cannot imagine it any other way. Once many of us figured out that our biases were unfounded, there was no need for the bias. Of course, we still have a long way to go, and will continue to combat the significant effects of bias over time.

The argument that a jury will not credit or find liability based on the social science research can be overcome with a little more social science research, which can quickly and succinctly be presented to a jury by the same social science expert.²⁴⁶ First, studies have shown that individuals can, with conscious effort, suppress the effects of stereotypes on their decisions and tend to do so under specific conditions.²⁴⁷ For example, when individuals expect to be held accountable for justifying their decisions as fair and nondiscriminatory, they tend to examine the bases for their decisions and the impressions their decisions will make on others more carefully, with the result that they block the biasing effects of stereotypes on their decisions.²⁴⁸ In a world where every manager receives training on avoiding discrimination, it would be impossible to argue that an individual should not expect to be accountable for discriminatory employment decisions.²⁴⁹

244. Faigman et al., *supra* note 18, at 1427–28.

245. *Id.*; see also Lee, *supra* note 239, at 486.

246. *Id.* at 498.

247. See Bartlett, *supra* note 229, at 1902.

248. Lee, *supra* note 239, at 486; see studies cited and discussed *infra* at note 277.

249. Those many workplaces where managers *are not* held accountable for discriminatory decisions merely make this argument more relevant. A large employer that

Second, the impact of stereotypic bias on decisions is reduced to the extent that the standards for evaluating competence and making employment decisions are explicit and clear rather than ambiguous.²⁵⁰ And third, recent empirical studies have found that situations that draw attention to successful women leaders or to egalitarian social norms significantly undermine implicit gender stereotypic judgments.²⁵¹

Thus, one of the reasons we must continue to encourage the introduction of the *Women Don't Ask* and the *It Does Hurt to Ask* studies is that, especially in cases where the long term effects of the employer's actions are less than obvious, by helping employers confront and correct their decisions, we as a society will take the next step toward truly non-discriminatory employment decisions.

In particular, the studies discussed in this Article raise two important concepts that employers need to grapple with: 1) that our stereotypes are so ingrained that people who are consciously unbiased (and those who have a strong interest in promoting non-discriminatory decision making) may begin to think less highly of women simply because they asked for something they deserved; and 2) that the effects of these subconscious thoughts affect our decisions throughout the entire working relationship. We need to recognize that we cannot rid society of the persistent pay gap and equalize (or even get close to equalizing) the number of women in positions of power until we stop penalizing women for exhibiting the exact traits we believe we need in high-ranking executives—someone who can demand as well as command. The more we make these studies public, the more we make people aware of the potential that bias undermines what they believe is objective decision making.

3. Does Wal-Mart v. Dukes Make Attempting to Introduce These Studies Pointless?

Arguably, the Court's decision in *Dukes* takes us a step away from holding employers liable for their unconscious biases. By finding that, because Walmart provided little guidance and allowed individual managers to determine which employees best exemplified "the Walmart Way," there was no common approach to employment decisions, the

knows it must not discriminate should not be able to escape liability by giving full discretion to managers and not having to ensure the decisions those managers make are not discriminatory.

250. Faigman et al., *supra* note 18, at 1427–28; Report of William T. Bielby, *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D. Cal. 2004) at 31 (citing several studies that support these propositions). Thus, an employer who avoids providing guidance for hiring, termination, or promotion decisions, knowing that subjective decision-making is highly prone to discriminatory decisions is just as responsible as one who intentionally discriminates.

251. Lee, *supra* note 239, at 486.

Supreme Court arguably rejected the commonly accepted notion that subjective decision-making can and often does lead to biases—either conscious or unconscious—creeping into decisions and resulting in discrimination.²⁵²

Will the Court's holding in *Wal-Mart* make lower courts more reluctant to allow social science expert testimony into evidence where the issue is proving liability and not just commonality? Arguably, the considerations are different. First, a class action is often both a disparate impact claim and a disparate treatment claim, or just a disparate impact claim.²⁵³ The statistical evidence is necessary simply to show the impact of defendant's allegedly discriminatory employment practices.²⁵⁴ Adding social science research showing implicit bias makes the import of those statistics abundantly clear.²⁵⁵

Also, in a class action commonality decision, the court focuses on the uniformity of the facts across all the plaintiffs in the class.²⁵⁶ Arguably, the Court's decision in *Wal-Mart* is inapplicable to disparate treatment cases, where the expert's testimony is offered to show possible connections between motivation and decisions by one or a few managers and not uniform decision making across a company.

But the impact *Wal-Mart* is likely to have on the way courts treat expert testimony in disparate treatment cases will still be significant. The Court in *Wal-Mart* accepted the argument made by Monahan and others that “‘a social framework necessarily contains only general statements about reliable patterns of relations among variables . . . and goes no further.’”²⁵⁷

Based on the Federal Rules of Evidence and the constitutional division of labor between the expert and the jury, . . . general research findings cannot be linked by an expert witness to the facts of a specific case. If linkages from general research findings to a specific case are to be made, those linkages must be recognized as arguments to be made by the attorneys, rather than evidentiary proof that can be offered by expert witnesses.²⁵⁸

252. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555–56 (2011); see *Watson*, 487 U.S. 977, 990 (holding that discretionary decisions do not, by themselves, raise an inference of discrimination, but “they do suggest a lingering form of the problem that Title VII was enacted to combat”).

253. *Wal-Mart*, 131 S. Ct. at 2548.

254. *Lee*, *supra* note 239, at 493–94.

255. *Id.*

256. *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1222, 1266 (10th Cir. 2013) (citing *Wal-Mart*, 131 S. Ct. at 2554 (finding sufficient evidence of commonality to certify a class based on a specified employment practice with statistically significant)).

257. *Wal-Mart*, 131 S. Ct. at 2554 n.8 (quoting Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1747–48).

258. Monahan, Walker & Mitchell, *Contextual Evidence*, *supra* note 34, at 1718.

In other words, the authors who contributed so much to the field have now limited the usefulness of experts. Yes, expert testimony can provide background. But there is nothing in the federal rules that prohibits experts from offering opinions as to how that background information could be applied to the facts of a specific case.

Monahan criticized the expert's report because, he said it "reflects nothing more than Dr. Bielby's 'expert judgment' about how general stereotyping research applied to all managers across all of Wal-mart's stores nationwide for a multi-year class period."²⁵⁹ Faigman agreed, asserting that "Such a specific application of research evidence to one case violates the assumption of the scientific method—i.e., the notion that scientific findings describe general principles of human behavior under certain conditions but they may not apply to every individual in those conditions."²⁶⁰ Understandably, their concern is in taking the issue from the jury. In an area where the links are simply unclear without a sophisticated understanding of the wealth of social science research and how it explains the facts and events at issue, however, and in light of a rule of evidence that allows an expert to testify as to an ultimate fact, it seems a step backwards to disallow this kind of testimony. That the opinion is based on studied experience rather than on statistics does not make it irrelevant. As ever, it remains for the jury to determine whether, given all of the evidence, it accepts as more likely than not that discrimination was "not irrelevant" to the case.²⁶¹

C. Why a Court Will Not Be More Likely to Deny Summary Judgment with the Expert Testimony than Without

Despite the fact that expert testimony *is* evidence,²⁶² and despite the fact that the expert's job is to connect general evidence to the specific evidence proffered by the fact witnesses, it is not possible for the expert in the weak individual disparate treatment case to prove specific causation. Argument "based on speculation and conjecture" is insufficient to defeat summary judgment.²⁶³ The question

259. *Id.* at 1737–38.

260. Faigman et al., *supra* note 18, at 1432.

261. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

262. *See Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1502 (1991).

263. *McDonald v. Village of Winnetka*, 371 F.2d 992, 1001 (9th Cir. 2004) (refusing to find every *conceivable* inference, even in construing facts in favor of the nonmoving party under *McDonnell Douglas*; not a mosaic of circumstances case); *see also Graves v. St. Joseph Cnty. Health Dept.*, 2012 WL 4118588 (N.D. Ind. Sept. 17, 2012) (holding that even circumstantial evidence must lead directly to the conclusion that an employer was illegally motivated, without reliance on speculation).

is whether these studies raise facts and links between them from speculation and conjecture to the requisite level of evidence to get past summary judgment.

Even with the expert testimony, the plaintiff cannot prove that a discriminatory motive *caused* the adverse employment action. All the proof in the world that employers often harbor bias they are unaware of and that people perceive women negatively if those women negotiate does not prove that this particular boss harbored any particular bias or that, if s/he harbored implicit bias, the bias was in any way involved in the employment decision at issue. It just makes it possible.

Is “possible” enough to get past summary judgment? Arguably yes, because it makes discrimination “not irrelevant,”²⁶⁴ but in a conservative court still not likely—it simply is not enough to show that discrimination might have been involved. Even if, for the sake of argument, the evidence is sufficient to create a *prima facie* case of discrimination, it would not meet the third prong of the *McDonnell Douglas* test. It is not enough to show that the employer’s proffered reason is false—instead, plaintiff must show that it is false *and* that discrimination was the true reason.²⁶⁵ Background social science research would not be enough to strengthen a weak issue of fact as to whether the proffered legitimate non-discriminatory reason is untrue, especially if there is “abundant and uncontroverted independent evidence that no discrimination had occurred.”²⁶⁶ The studies cannot directly controvert the employer’s testimony that plaintiff was fired because the company did not need her or she was the least respected of the employees.

Even applying the “mosaic of circumstances” test, courts are not likely to find that a weak case based on “bits and pieces,”²⁶⁷ aided by studies, creates a triable issue of material fact. “A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents ‘a convincing mosaic of circumstantial

264. See discussion *supra* note 215.

265. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1267 (11th Cir. 2010) (holding that the fact that Cuban Americans got terminated at a high rate was too weak to raise a genuine issue of material fact without any specific evidence to back it up (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (noting that only that the proffered reasons are not true is not enough to get past summary judgment))).

266. *Rojas v. Florida*, 285 F.3d 1339, 1342–43 (11th Cir. 2002); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

267. *Silverman v. Bd. of Educ. of Chi.*, 637 F.3d 729, 734 (7th Cir. 2011) (arguing the mosaic of circumstances looks to “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn”).

evidence that would allow a jury to infer intentional discrimination by the decisionmaker.’”²⁶⁸

A case applying the mosaic of circumstances test can

be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.²⁶⁹

But to do so, plaintiff still must demonstrate “‘a real link between the bigotry and an adverse employment action.’”²⁷⁰ The circumstantial evidence “‘must point directly to a discriminatory reason for the employer’s action.’”²⁷¹

The cases where these studies provide the most insight are the cases that fall into all the categories most likely to encourage a court to grant summary judgment. For example, plaintiff might be able to point to some stray remarks that appear somewhat sexist (“you’re not nice” or “you’re too aggressive”) made throughout the employment, but not in the termination talk. Stray remarks are not sufficient to raise an inference of discrimination.²⁷²

Plaintiff might show earlier arguably discriminatory actions, such as failing to assign plaintiff to a prestigious project, that the expert could link to potentially discriminatory motive, but they would be not be temporally proximate to the adverse action.²⁷³ Without temporal proximity, a court easily could find that any evidence is insufficient to prove that the adverse action at issue was discriminatorily motivated.²⁷⁴ A gap in time between the protected activity and the adverse action weakens an inference of motive.²⁷⁵

268. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (quoting *Silverman*, 637 F. 3d at 734).

269. *Sylvester v. SOS Children’s Villages Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006).

270. *Davis v. Time Warner Cable of Se. Wis.*, 651 F.3d 664, 672 (7th Cir. 2011) (noting that stray remarks might show boorishness, but not a link between possible bigotry and the employment decision (quoting *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 762 (7th Cir. 2001))).

271. *Cerutti v. BASF Corp.*, 349 F.3d 1055, 1061 (7th Cir. 2013) (quoting *Adams v. Wal-Mart Stores*, 324 F.3d 935, 939 (7th Cir. 2003)).

272. *See Waggoner v. Garland*, 987 F.2d 1160, 1166 (5th Cir. 1993) (holding that mere stray remarks are insufficient to establish a claim); *Ezold v. Wolf*, 983 F.2d 509, 545 (3d Cir. 1992) (“Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision.”).

273. *Ezold*, 983 F.2d at 545.

274. *See, e.g., Waggoner*, 987 F.2d at 1166.

275. *Wells v. SCI Management*, 469 F.3d 697, 702 (8th Cir. 2006) (applying to a retaliation claim, where timing is most obviously at issue).

And defendant may be able to assert that the same person who hired plaintiff also fired her. “The fact that the same person hires and fires a plaintiff creates a strong presumption of nondiscrimination.”²⁷⁶ Usually this “same actor” inference applies when the hiring and firing occur within a short time frame,²⁷⁷ but this type of thinking makes it even harder to prove that a boss who hired a woman could suddenly decide, after years of successfully working with that woman, that she simply no longer meets the boss’s stereotypes and should leave.

CONCLUSION

Social science studies offer an empirical method for replacing the “common sense” or “intuitive” social science that judges rely on in discrimination cases.²⁷⁸ Unfortunately, our common sense, when subjected to empirical scrutiny, often turns out to be wrong.²⁷⁹ But law is normative, and empirical research is descriptive. Law must provide the fundamental principles upon which we base our claims. The goal is to encourage courts and legislatures to base the rules and policies that govern the application of these normative principles on empirically testable assumptions about human behavior and thinking.²⁸⁰

The two studies (and the innumerable studies that support, explain, and add to these two studies) discussed in this Article are designed to provide precisely this guidance—to help judges and juries understand that the evidence they see that appears to be sporadic, ambiguous, and loosely tied together actually meets the standards the courts have created to ensure that the norms set by Title VII are protected. Unfortunately, because the studies are simply descriptive of generalized behavior and because the evidence in the “I know it when I see it” case is almost always weak, with an unclear link between the allegedly discriminatory actions and the adverse employment decision, these important studies are not likely to change the world of employment discrimination through litigation.

276. *Fahey v. Creo Prods.*, No. 96C5709, 1998 U.S. Dist. LEXIS 12214, at *9 (N.D. Ill. 1998) (citing *Chiaramonte v. Fashion Bed Group*, 129 F.3d 391, 399 (7th Cir. 1997)); see *Krieger & Fiske*, *supra* note 4, at 1044–45 (discussing the fact that this “inference” is really a presumption, which a plaintiff must overcome with clear and convincing evidence). Of course, the point of the cases discussed in this Article is their lack of clear and convincing evidence.

277. See, e.g., *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) (“While we can imagine egregious facts from which a discharge in this context could still be proven to have been discriminatory, it is likely that the compelling nature of the inference arising from facts such as these will make cases involving this situation amenable to resolution at an early stage.”).

278. *Krieger & Fiske*, *supra* note 4, at 1006.

279. *Id.*

280. *Id.* at 1007.