Good Causes and Bad Science

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Dukes v. Wal-Mart provides the Supreme Court the opportunity to resolve the tension perceived by some lower courts between *Eisen* and *Falcon* with respect to the level of scrutiny to be applied to evidence offered on class certification.[1] Because contested expert testimony was integral to the certification decision in *Dukes*,[2] the case also provides the Court the opportunity to address how expert evidence in particular should be scrutinized at the class certification stage.[3] My goal in this Essay is to explain why this subsidiary issue merits the Court's attention and why the Court should reject the superficial review of expert evidence conducted by the district court

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1. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Dukes v. Wal-Mart, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc).

2. *See Dukes*, 603 F.3d at 601 (discussing class certification); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145 (N.D. Cal. 2004) (same).

3. The trend among circuit courts appears to be to embrace *Falcon*'s "rigorous scrutiny" principle and to apply an unqualified Federal Rule of Evidence 702 to expert opinions offered on class certification. Nevertheless, differences remain among the circuits on both issues, and these issues separated the appellate majority and dissent in *Dukes*. *See* 603 F.3d at 633–34 (Ikuta, J., dissenting) (discussing the *Falcon* issue); *id*. at 638–40 (discussing the *Daubert* issue). Wal-Mart included the expert evidence issue in its certiorari petition. *See* Petition for Writ of Certiorari at 24–26, Dukes v. Wal-Mart Stores, Inc., No. 10-277 (U.S. filed Aug. 25, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/08/Wal-Mart-petition-8-25-10.pdf.
Inexplicably, the district court and majority in the Ninth Circuit stated that Wal-Mart challenged only the weight and persuasiveness of the opinions of the plaintiffs' social science expert and not their reliability, relevance, and thus admissibility. *See Dukes*, 603 F.3d at 602; Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 192 (N.D. Cal. 2004). Wal-Mart's *Daubert* motion explicitly challenged the reliability and relevance of the opinions of the plaintiffs' social science expert, emphasizing the lack of fit between the research that the expert cited and the opinions he offered in the case, his lack of a scientific method for bridging the gap between the cited research and the case, and his use of a lower level of rigor in his court work. *See* Defendant Wal-Mart Stores, Inc.'s Daubert Motion to Strike Declaration, Opinion, and Testimony of Plaintiffs Expert William T. Bielby, Ph.D., 2003 WL 24689917, at *5–6 (N.D. Cal. June 12, 2003).

and accepted by the Ninth Circuit majority in *Dukes*. Lawsuits targeting systemic discrimination serve important social functions, but we should not turn a blind eye to bad science just because it is being used to advance good causes.

I. WHERE THINGS STAND

Because so few certified class actions ever go to trial, deferring full *Daubert* scrutiny of expert opinions and a resolution of the battle of the experts to the trial phase of a class case—as the district court did in *Dukes*[4]—encourages parties to submit unreliable and over-reaching expert evidence in support of or in opposition to class certification. We have witnessed this phenomenon in the Title VII domain, where social science experts have become key players in class litigation and where, as I argue below, their reports often exceed the boundaries of proper expert opinion.

In "second generation" pattern or practice cases under Title VII, plaintiffs typically claim that a company discriminated indirectly by granting managers excessive discretion in personnel matters, thereby permitting pervasive prejudices and stereotypes toward women, minorities, or older workers.[5] Plaintiffs often claim as well that the company created a culture in which success required acting in stereotypically white male or youthful ways, further encouraging bias in managerial decisions and discouraging women, minorities, and older workers from seeking advancement in the company. Another common claim is that company officers put in place only cosmetic equal opportunity measures while intentionally disregarding the negative effects that its selection, performance appraisal, or

4. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. at 144 n.5 ("Rather than resolving the 'battle of the experts,' and without conclusively ruling on admissibility, the Court's role at the class certification stage is to determine whether the expert evidence adds probative value to plaintiffs' claims."); Dukes v. Wal-Mart, Inc., 222 F.R.D. at 191 ("[I]t is clear to the Court that a lower *Daubert* standard should be employed at this [class certification] stage of the proceedings") (citations omitted).

5. Plaintiffs similarly attack the practice of using subjective personnel evaluations, claiming that subjectivity, like discretion, is a pipeline for bias into managers' decisions. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–74 (2001) (contrasting "first generation" and "second generation" discrimination claims); *see also* Third Amended Complaint ¶ 29, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (putting forward plaintiffs' theory of discrimination), *available at* http://www.impactfund.org/documents/cat_95-100/Third_Amended_Complaint.pdf (last visited Sept. 30, 2010).

compensation policies were having on female, minority, and older workers.[6]

The primary evidence in support of second generation pattern or practice claims is typically found in the reports of a statistical expert and a social science expert.[7] The statistical report will provide evidence of a pattern of discrimination in hiring, pay, or promotion outcomes, and the report of the social science expert will tie together the disparate pieces of evidence found in plaintiff declarations, 30(b)(6) depositions, and case documents to support the plaintiffs' theory of the case. The latter report provides a social-science-inspired narrative that explains how race, gender, age, or some other protected-category status, combined with company policies, led to the statistical disparities. Because the leading social science expert in Title VII cases submitted a report for the plaintiffs in *Dukes*, and

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6. For instance, the complaint in the recent gender discrimination case against Novartis added the CEO of Novartis Pharma AG, Thomas Ebeling, as an individual defendant on an aiding-and-abetting theory because he allegedly allowed a discriminatory culture and policies to persist:

> 39. Upon information and belief, Ebeling knew of and could have prevented and/or alleviated the gender discrimination, pregnancy discrimination, sexual harassment, hostile work environment and retaliation directed against Class Representatives and the proposed class described in this amended complaint.
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> 40. On a Novartis internal web page, Ebeling publicly stated that "We [Novartis] simply don't have as many women or minorities in high levels of management as we could or should." (http://www.pharma.novartis.intra/news/ask_ebeling/answers/2003-12-17_diversity).
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> 41. Upon information and belief, Ebeling has aided and abetted the discrimination that is prevalent in the divisions, districts, regions, territories, areas, markets and offices of the Corporate Defendants and has failed to rectify the discriminatory policies, procedures and practices.
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> 42. Upon information and belief, Ebeling aided and abetted the discriminatory conduct against Novartis' female employees by allowing and encouraging a climate of abuse, harassment and hostility.
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> 43. Upon information and belief, gender discrimination permeates the corporate culture of Novartis AG and its Swiss-based headquarters and its European subsidiaries. Ebeling, in his role as Head of worldwide Pharmaceuticals Division, has sanctioned and nurtured this environment.
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> 44. Although he professes to support a work place free from discrimination, Ebeling has approved policies, procedures and practices that have permitted the Corporate Defendants to engage in gender discrimination, pregnancy discrimination, sexual harassment, hostile work environment, retaliation and other forms of discrimination against Class Representatives and the proposed class.

Fourth Amended Class Action Complaint at 10–11, Velez v. Novartis Corp., No. 04-09194 (S.D.N.Y. Mar. 10, 2006).

7. *See* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 41 (2009) ("Social framework testimony has become a central element of many employment discrimination disputes over the past two decades. In these cases, a plaintiff or plaintiffs typically will put forward a social psychologist or expert in organizational behavior to testify about the widespread incidence of stereotyping and bias, and to identify within the challenged workplace those policies that tend to permit or to discourage operation of such bias.") (footnote omitted).

because this report is similar to those filed in many Title VII class actions, it is useful to examine the *Dukes* report in some detail to understand what is happening in these cases.

Following the typical pattern, at class certification the *Dukes* plaintiffs submitted expert statistical evidence showing that female employees were faring worse in the aggregate than male employees, and a report by a social science expert identified a common source of this discrimination across all Wal-Mart facilities. The report of the social science expert, Dr. William Bielby, summarized research on gender bias, organizational culture, and anti-discrimination measures and applied this research to the case. Based on his interpretation of the facts in the discovery materials that he reviewed, Dr. Bielby opined that Wal-Mart had a strong and uniform corporate culture that influenced how personnel decisions were made and that Wal-Mart's personnel and accountability systems were unduly subjective and discretionary. He concluded that "[d]iscretionary and subjective elements of Wal-Mart's personnel system and inadequate oversight and ineffective anti-discrimination efforts contribute to disparities between men and women in their compensation and career trajectories at the company."[8]

To arrive at this conclusion and his underlying opinions, Dr. Bielby used a method that has come to be known as "social framework analysis":

> My method is to look at distinctive features of the firm's policies and practices and to evaluate them against what social science research shows to be factors that create and sustain bias and those that minimize bias. In litigation contexts, this method of analysis is known as "social framework analysis."[9]

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8. Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs' Motion for Class Certification ¶ 63, Dukes v. Wal-Mart Stores, Inc., 2003 WL 24571701 (N.D. Cal. Apr. 21, 2003), *available at* http://www.walmartclass.com/staticdata/reports/r3.html. Dr. Bielby offered "findings" directly relevant to the commonality element at class certification:

> Centralized coordination, reinforced by a strong organizational culture, creates and sustains uniformity in personnel policy and practice throughout the organizational units of Wal-Mart. Subjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias. Finally, I have concluded that there are significant deficiencies in the company's policies and practices for identifying and eliminating barriers to equal employment opportunity at Wal-Mart.

Id. ¶ 10. The plaintiffs' class certification motion relied heavily on Dr. Bielby's findings to establish a common discriminatory practice and the commonality element for certification purposes. *See* Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities at 7, 10, 12, 17, 21, 22, 23, 36, 37, 42, Dukes v. Wal-Mart Stores, Inc., No. 01-2252 (N.D. Cal. 2003) (relying on opinions of Dr. Bielby), *available at* http://www.impactfund.org/documents/cat_95-100/Class_Cert_Motion.pdf.

9. Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs' Motion for Class Certification, *supra* note 8, ¶ 8. As authority for this method, Dr. Bielby cited the textbook *Social*

In other words, Dr. Bielby read discovery materials from the case looking for evidence that, in his judgment, indicated whether uniform biased practices were present at Wal-Mart. Given that the deposition testimony and exhibits that he relied on were the product of questioning and selection by advocates for the plaintiffs, and given that he reviewed the record using an entirely subjective analytical method after knowing the plaintiffs' statistical evidence of disparities,[10] it is not surprising that Dr. Bielby reached conclusions supporting the plaintiffs' class claims.

Science in Law by John Monahan and Laurens Walker. *Id.* ¶ 8 n.1. In fact, until recently, Dr. Bielby regularly cited Monahan and Walker as authority for his method, but Monahan and Walker have never endorsed "social framework analysis" or argued that it is an acceptable methodology. Rather, they have described what they call "social framework" evidence, which, in their view, should involve an expert summarizing reliable propositions of general social science that might help the fact finder evaluate the evidence in a particular case. *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW (7th ed. 2010). Monahan and Walker have recently made clear that they do not endorse the method employed by Dr. Bielby and other experts who link general social science to the facts of a particular case through a subjective review of the litigation record (i.e., by use of "social framework analysis"). *See* John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*,*"* 94 VA. L. REV. 1715, 1742–48 (2008) (discussing problems with Dr. Bielby's opinions in *Dukes*); John Monahan et al., *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307, 311–14 (2009) (discussing problems in additional expert reports). The phrase "social framework analysis" was actually coined by psychologists and expert witnesses Susan Fiske and Eugene Borgida as an extension of Walker and Monahan's "social frameworks" concept. *See* Susan T. Fiske & Eugene Borgida, S*ocial Framework Analysis as Expert Testimony in Sexual Harassment Suits*, *in* SEXUAL HARASSMENT IN THE WORKPLACE: PROCEEDINGS OF NEW YORK UNIVERSITY 51ST ANNUAL CONFERENCE ON LABOR 575, 575–77 (Samuel Estreicher ed., 1999). As Monahan, Walker and I have discussed previously and as I discuss further here, in our view case-specific opinions based on Fiske and Borgida's "social framework analysis" method violate basic rules of expert evidence and are scientifically unreliable. *See* Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," supra*, at 1746 n.84 (discussing the shortcomings of the Fiske and Borgida approach); Monahan et al., *The Limits of Social Frameworks*, *supra*, at 311–19. We do not favor a categorical ban on case-specific opinions by experts, but we do agree with the drafters of the 2000 amendment to Rule 702 that "[i]f the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably." FED. R. EVID. 702 advisory committee's note to 2000 amend.

10. The statistical evidence in the case was itself subject to considerable dispute with regard to the proper unit of analysis. The plaintiffs argued for an aggregated-data approach that ignored store-by-store variation in male-female outcomes. The defendant argued that a store-by-store analysis was appropriate given largely local control over personnel matters. Not surprisingly, the aggregate-level analysis supported the plaintiffs' theory of the case (i.e., there were statistically significant differences between male and female outcomes when the data was aggregated across stores), while the facility-level analysis supported the defendant's theory of the case (i.e., data from many stores showed no statistically significant differences in male-female outcomes, which was consistent with Wal-Mart's claim that there was not a common discriminatory policy affecting the class). Dr. Bielby has written about how facility-level data showing no statistical disparities between male and female employees could be consistent with his subjectivity-leads-to-discrimination hypothesis, raising the unanswered question whether any pattern of data could not be assimilated to his framework. *See generally* William T. Bielby &

Standard scientific procedures exist for gathering reliable, representative data and reaching descriptive conclusions of the kind Dr. Bielby offered with respect to corporate culture, uniformity of personnel practices, and effectiveness of debiasing and diversity measures—Dr. Bielby did not follow those procedures, however. Standard scientific procedures exist for collecting and analyzing archival records to reach sound conclusions about the contents of those records and their relation to social scientific hypotheses and theory—Dr. Bielby did not follow those procedures. Standard scientific procedures exist for assembling a body of scientific research and providing a fair and reliable narrative review of this literature—Dr. Bielby also did not follow those procedures.[11] Standard scientific procedures exist for drawing causal inferences—Dr. Bielby did not follow those procedures either, despite having opined that Wal-Mart's personnel policies contributed to discrimination against female employees. As Dr. Bielby himself said at a recent deposition in another case, "social framework analysis is a legal term and not a scientific term. . . . Issues of causality in the social sciences have a

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Pamela Coukos, *"Statistical Dueling" with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions*, 56 EMORY L.J. 1563 (2007).

11. This important point about the literature reviews contained in "social framework" reports has received little attention: just as a researcher should not selectively ignore case-specific data that does not fit his preferred theory, a researcher should not ignore findings that contradict or qualify his preferred view of the research literature and should not ignore limitations on the research. Dr. Bielby's *Dukes* report purports to summarize massive bodies of research on intergroup bias, discrimination, personnel systems, accountability systems, organizational culture, and diversity management—fields of research that each consume books and courses—in just a few pages, with very little detail about the actual results, how they were obtained, and how the research settings compare to the various Wal-Mart settings. Complications are not found in his report, as Dr. Bielby assures the court that the research speaks clearly and robustly to the problem at hand without giving any actual details or citations in support of the following claim:

> The relevant research has applied multiple methodologies in a variety of contexts, including experiments in controlled laboratory settings; ethnographies and case studies in "real world" organizations both large and small, public and private, and in a range of industries; surveys done with representative samples of workers and employers; and historical studies based on archival materials from the United States and abroad. Thus, the scientific evidence about gender bias, stereotypes, and the structure and dynamics of gender inequality in organizations that I rely upon has substantial external validity and provides a sound basis for analyzing the policies and practices of Wal-Mart.

Declaration of William T. Bielby, *supra* note 8, ¶ 8. To suggest as Dr. Bielby does that social scientists have come up with clear, simple, and consistent findings about what factors lead to discrimination, that the presence and effects of these factors are easy to determine for any organization, and that substantial disputes about the generalizability of results have been resolved is, in my opinion, an exercise in science fiction.

long and rich methodological tradition that has nothing to do with social framework analysis."[12]

Dr. Bielby is correct: social framework analysis is a method used only in litigation. Research methods texts do not teach data-gathering and analytical techniques akin to social framework analysis, and I am not aware of any peer-reviewed research within any of the experts' fields in which the researcher used methods and data comparable to those used in these cases to make the kinds of descriptive and causal claims offered in these cases. Of course, it is not surprising that social scientists are wary of using litigation "facts" as data[13] and that social framework analysis is a method eschewed in scientific research because personal judgment is the only means of analysis in social framework analysis. Science seeks to avoid, not embrace, private methods that require faith in the researcher's good intentions and ability to avoid contamination due to motivational and cognitive biases and social pressures. The burden is on proponents of social framework analysis to come forward with empirical evidence of its reliability.

Dr. Bielby is the leading "social framework analyst" in Title VII cases, but he is not alone. Below I provide examples of summary opinions from other social framework analysts' reports to demonstrate that these experts do not simply claim that a defendant's personnel systems are "vulnerable" to bias or offer to educate fact finders about research on prejudice and stereotypes; these experts opine that there were common policies and practices within an organization and that these policies and practices harmed the class.[14]

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12. Partial Testimony of William T. Bielby, Ph.D. at 4, Equal Emp't Opportunity Comm'n v. Wal-Mart Stores, Inc., 2008 WL 6858762 (E.D. Ky. Jan. 15, 2008).

13. *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY 111 (1999) ("Litigation involves strategic efforts by competing parties to depict the facts in a way that support their legal theory. . . . Social scientists thus must be wary of what litigation produces . . . . The credibility, accuracy, and comprehensiveness of documents and testimony must be evaluated by the researcher, and uncertainties about its probative value should be noted."). The district court in *Dukes* barred Wal-Mart's statistical expert from relying on declarations from managers in response to a survey prepared by defense counsel that the court found to be biased by its presentation and the litigation context. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 197–98 (N.D. Cal. 2004). However, the court did not apply a similar analysis to Dr. Bielby's reliance on litigation materials.

14. Readers of Professors Hart and Secunda's article on social framework experts in Title VII cases may have been left with the impression that these experts provide more limited opinions than is often the case. For instance, they wrote that the testimony of these experts was "being offered not to prove discrimination in a particular case or cases—that determination is one the fact finder will make in light of all of the evidence—but to offer a backdrop of information about how the phenomenon of stereotyping operates so that the fact finder can assess the specific case in light of that information." Hart & Secunda, *supra* note 7, at 52. For a further reply on

From Dr. Barbara Reskin's report for the plaintiffs in *Puffer v. Allstate*:

> Allstate Protection . . . has a uniform culture of paternalism across the company. The fact that almost all of Allstate Protection's (AP's) top leaders are male reflects and heightens the impact of this culture. Its policies and practices with respect to assessing, compensating, developing, transferring, and promoting personnel in salary grades 63 and above are uniform nationwide . . . . The primary causes of the systematic gender disparities at Allstate Protection are its use of discretion in personnel decisions affecting managers at grade 63 and higher and its failure to check the biases that discretion permits—especially ingroup favoritism and sex stereotyping—through a system of monitoring and accountability.[15]

From Dr. Susan Fiske's report for the plaintiffs in *Butler v. Home Depot*:

> (I) Gender stereotyping plays a major role in Home Depot's hiring, placement, and promotion patterns. (II) Much of this stereotyping is automatic and not fully conscious at the individual level, (III) but it is convenient for individual decision-makers, so they do not examine it. (IV) Organizations can control these effects of stereotyping, through proper information and proper motivation, (V) and organizations can reduce bias by how they structure themselves, but Home Depot does not take adequate steps to control these biased individual practices.[16]

From Dr. Eugene Borgida's report for the plaintiff in *EEOC v. Bloomberg*:

> In summary, the stereotypes about employees who are mothers and/or pregnant more likely than not influenced the perceptions, evaluations, and decisions about them at Bloomberg. The cultural and organizational context at Bloomberg more likely than not activated the gender stereotype about mothers as less competent and as less agentic and less committed to their careers. Given the subjectivity, discretion, and lack of accountability in the Bloomberg decision making process, stereotypic perceptions more likely than not influenced employment decisions about employees who are mothers and/or pregnant.[17]

From Professor Deborah Rhode's report for the plaintiffs in *Velez v. Novartis*:

> I was asked for an assessment of whether the record demonstrated patterns that research on gender bias in the workplace has revealed to constitute significant barriers to equal employment opportunity for women.
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> My conclusion is that the record demonstrates extensive evidence of the major forms of bias against women in the workplace: overt prejudice and unconscious stereotypes

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this point, *see* Monahan et al., *The Limits of Social Framework Evidence*, *supra* note 9, at 311–19.

15. Expert Report of Barbara F. Reskin ¶¶ 2.1, 2.4, Puffer v. Allstate Ins. Co., 2008 WL 2782551 (N.D. Ill. Mar. 5, 2008).

16. Report of Professor Susan T. Fiske on Behavior of Plaintffs at 2, Butler v. Home Depot, Inc., No. 94-4335 (N.D. Cal. Aug. 29, 1997) (on file with Vanderbilt Law Review).

17. Expert Report of Eugene Borgida, Ph.D., at 16–17, Equal Emp't Opportunity Comm'n v. Bloomberg L.P., 2009 WL 6499190 (S.D.N.Y. Dec. 9, 2009). Because this systemic discrimination case was brought by the EEOC, it was not subject to Federal Rule of Civil Procedure 23. *See* Gen. Tel. Co. v . Equal Emp't Opportunity Comm'n, 446 U.S. 318, 333–34 (1980).

> concerning women, pregnant women, and working mothers; sexual harassment; in-group favoritism in mentoring and networking opportunities; failure to accommodate family responsibilities as required by statute; unequal access to promotions, awards, and leadership opportunities; ineffective responses by Human Resources personnel to claims of gender bias; and lack of effective programs and policies to monitor gender equity.[18]

The basis for the opinions in these examples was not an empirical study of the company and its managers' decisions or a statistical analysis of company records. The causal analyses, assessments of the prevalence of practices, and necessary credibility assessments called for by these opinions were all performed without the aid of scientific tools. The basis for these opinions was simply the expert's subjective or intuitive judgment after reading a portion of the discovery materials.[19]

Sometimes social framework experts do not go as far in making specific causation claims. Sometimes they do speak in terms of a company's practices being "vulnerable" to bias without claiming there actually was bias (though this was not the case in *Dukes*; as noted above, Dr. Bielby did link the statistical disparities to allegedly uniform corporate practices). Some courts find these "vulnerability" opinions more acceptable,[20] while other courts find such testimony too vague to be helpful.[21] But this distinction between opinions that

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18. Expert Report of Deborah L. Rhode at 2, Velez v. Novartis Pharm. Corp., No. 04-09194 (S.D.N.Y. Feb. 25, 2010) (on file with Vanderbilt Law Review).

19. One of the ironies of these cases is that the experts use subjective judgment to indict the subjective judgment of managers. The experts would probably point to their experience and education as guides to good judgment in such matters, but many companies' managers would likely do the same with respect to their judgment in personnel matters if given the chance to do so in cases involving individual class members.

20. *See, e.g.*, Rulings on Motions in Limine at 22, Velez v. Novartis Pharm. Corp., 2010 U.S. Dist. LEXIS 95010, at *22 (S.D.N.Y. Feb. 25, 2010) ("Note that Dr. Martin was not retained to assess whether there actually WAS bias in human resources decisions at Novartis—only to say whether the performance evaluation system was 'vulnerable' to bias in decision-making. Dr. Martin's credentials and experience, and his familiarity with the professional literature relevant to his charge, make him eminently qualified to express an opinion about whether Novartis' decision-making system was 'vulnerable to bias.' It will be for other witnesses to establish, if they can, that there was bias present at Novartis—bias that a fundamentally flawed performance assessment structure could fail to restrain.").

21. *See, e.g.*, Opinion & Order at 6, Equal Emp't Opportunity Comm'n v. Wal-Mart, Inc., 2010 U.S. Dist. LEXIS 13192, at *10 (E.D. Ky. Feb. 16, 2010) ("The burden . . . is on the plaintiff to prove that intentional discrimination occurred at this particular distribution center, not just that gender stereotyping or intentional discrimination is prevalent in the world. Dr. Bielby does not opine on whether intentional discrimination occurred at the distribution center."); Cooper v. S. Co., 205 F.R.D. 596, 611 (N.D. Ga. 2001) ("Essentially, Dr. Murphy's report is a summary of Plaintiffs' evidence which is used in support of their motion for class certification, together with his own opinion of what impact these Defendant policies, or lack of policies, might have had on African-Americans. As such, it has no usefulness as an expert report."); *id.* at 611 n.24 ("For the same reason, Dr. Sims' rejoinder to Dr. Murphy's report is of little assistance in determining the

describe policies as "vulnerable to bias" versus "actually biased" misses the crucial point at the class certification stage: experts make unreliable descriptive claims that are used to establish commonality, such as claims about the uniformity of culture and practices and about the uniformity of actual or likely bias across disparate locations that the experts have not systematically studied in any detail. Plaintiffs at the class certification stage need experts willing to say that there are common organizational practices exposing the class members to a common risk, and that is what Dr. Bielby and the other social framework experts have been providing without a reliable basis for doing so. Whether the common practices identified by experts actually caused disparate outcomes will be the issue at summary judgment or at a trial that is unlikely to ever occur.

How common is testimony based on social framework analysis? To my knowledge, no study has compiled data to answer that question, but I can say that the examples above come from only a handful of the many reports based on social framework analysis that I have reviewed. In every report submitted in a class action that I have reviewed, the expert offered case-specific opinions on common practices supposedly contributing to or likely to contribute to disparities in treatment of employees or applicants. As of 2004, Dr. Bielby alone had testified in more than fifty cases,[22] offering case-specific opinions similar to those he offered in *Dukes* in many of those cases.

Social framework analysis is not a guarantee of success at class certification. Courts have excluded the opinions of some of these experts,[23] but courts have also accepted these opinions a number of

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facts or in determining whether Defendants support a pattern and practice of discrimination or have invalid policies which have a disparate impact on African-American employees. Also, neither Dr. Murphy nor Dr. Sims is an expert on Defendants' businesses. They both make wide-ranging assertions and conclusions based entirely on a set of documents provided for their review. Both point out what "could happen" under Defendants' policies.").

22. *See* Justin Scheck, *Expert Witness Helps Launch Employment Law Industry*, THE RECORDER, Oct. 28, 2004, at 1, *available at* http://www.law.com/jsp/PubArticle.jsp?id=900005417471.

23. For instance, the courts excluded the opinions of Dr. Borgida and Professor Rhode in the two cases mentioned above. *See* Memorandum & Order at 38, 40 & 41, EEOC v. Bloomberg L.P., 2010 U.S. Dist. LEXIS 92511, at *45, 48–49 (S.D.N.Y. Aug. 31, 2010) (stating, among other reasons for excluding Dr. Borgida's opinions, that "he relied on insufficient facts and data," "the opinions in [his] report are supported by what appears to be a 'because I said so' explanation," and "Dr. Borgida engaged in credibility determinations, crediting testimony that supported his position while rejecting testimony that contradicted his opinion"); Rulings on Motions in Limine at 28, Velez v. Novartis Pharm. Corp., 2010 U.S. Dist. LEXIS 95010, at *28–29 (S.D.N.Y. Feb. 25, 2010) ("Having read Professor Rhode's report from start to finish, I categorically reject plaintiffs' counsel's claim that what Professor Rhode will 'explain' to the jury is something that a jury needs expert assistance to understand. Her 'findings' are nothing more than a summary of

times. It is no accident that Dr. Bielby is the leading social framework analyst given his track record of success in the courts. If *Dukes* is allowed to stand and there is no other relevant change in the legal landscape, then we should expect to see even greater use of social framework analysis.

II. WHERE THINGS SHOULD GO

Four groups could influence the future of social framework analysis in class actions. First, plaintiffs and their counsel could stop using social framework analysts, but that is unlikely to occur so long as courts allow the use of social framework analysis. Reports based on social framework analysis provide an economical way to distill and package the plaintiffs' evidence in support of certification, and this narrative comes with the imprimatur of an expert.

Second, experts could and should refrain from using unscientific methods such as social framework analysis, but self-regulation is probably not a viable solution. Many, if not all, of the experts using social framework analysis probably believe that social science research has something valuable to say about discrimination and that they can wisely extrapolate from the general research to the case at hand. Some may even feel a duty to make research socially relevant through expert testimony. Whatever their reasons, noble or otherwise, a group of experts, led by Dr. Bielby, has been willing to say things in their expert reports that they have never said in their academic writings based on the kinds of data and methods used in these cases—things that they would almost certainly not be permitted to say in reputable journals within their fields using the kinds of data and methods used in these cases. I see no reason to think that past behavior will not be a good predictor of future behavior when we look to the experts themselves for a solution.

Third, defendants bear some responsibility for where things stand, for they have been inconsistent in their attacks on social framework analysis. For instance, the expert testimony of Dr. Susan Fiske in the *Price Waterhouse* case is often cited as the first example of social framework testimony in a discrimination case and is sometimes cited as if Dr. Fiske's testimony or method were approved by the Supreme Court. In fact, Price Waterhouse did not challenge Dr.

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plaintiffs' ultimate arguments, delivered by someone whose stellar credentials and career achievements are calculated to cause a jury to give her extra credence. Professor Rhode's proposed testimony is not evidence, it is argument; and it will not be delivered from the witness stand.").

Fiske's testimony at trial, thereby waiving appellate review.[24] The prior use of social framework analysis, even if unchallenged, is treated as vindication by the experts and plaintiffs' counsel. We know from the forensics domain that sometimes the strongest argument in favor of admissibility is not that a method is reliable but that several prior courts admitted the expert evidence for some reason.[25] In recent years, defendants seem to have stepped up their attacks on social-framework-analysis-based opinions with some success, suggesting that courts have not made up their minds on the acceptability of social framework analysis.

If we cannot expect plaintiffs or experts to change the current state of affairs, and given that defendants can only challenge the experts' practices, we must look to the courts for stricter regulation of the experts. A good first step would be for the Supreme Court to rule that full *Daubert* review applies at the class certification stage. The

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24. *See*, *e.g.,* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 191–92 (N.D. Cal. 2004) ("As discussed in the Class Certification Order, Dr. Bielby conducted a 'social framework analysis' by combining an extensive review of documents and deposition testimony regarding Wal-Mart's culture and practices with his knowledge of the professional research and literature in the field. This is an acceptable social science methodology.") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36, 255 (1989) and FED. R. EVID. 702).

The positive citation to Dr. Fiske's testimony in the *Price Waterhouse* case by some courts and defenders of social framework analysis is odd for multiple reasons. First, the Supreme Court issued no majority opinion in *Price Waterhouse*, *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989), and Dr. Fiske's testimony did not provide a unifying rationale among the different opinions for purposes of *Marks* analysis, *see* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds") (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Indeed, none of the individual opinions in *Price Waterhouse* endorsed Dr. Fiske's method. Second, *Price Waterhouse* pre-dates the *Daubert* line of cases. Third, the plurality opinion authored by Justice Brennan notes that the defendant failed to object to the plaintiff expert's testimony at trial and that its appellate argument opposing her testimony "comes too late." *Price Waterhouse*, 490 U.S. at 255. Moreover, Justice Brennan's opinion never expressly endorsed Dr. Fiske's methods or conclusions but rather stated that "we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake," going on to say that it took no expertise in psychology to see the statements at issue in this case were stereotypic. *See id*. at 256. Fourth, Justices White and O'Connor concurred in the judgment but did not join the plurality's opinion, with both writing separate opinions in which neither endorsed the expert's opinions or method, *see id*. at 258–79, and with Justice O'Connor writing that the expert's testimony would not alone be sufficient to shift the burden of persuasion to a defendant, *see id.* at 277. Finally, the dissent's opinion, authored by Justice Kennedy, noted that the Court was constrained by the defendant's failure to object to the plaintiff's expert testimony and stated that "[t]oday's opinions cannot be read as requiring factfinders to credit testimony based on [the expert's] type of analysis." *Id*. at 294 n.5.

25. The scrutiny applied to Dr. Bielby's opinions by the district court in *Dukes* appears to have been influenced by prior acceptance of testimony by Dr. Bielby. *See* Dukes v. Wal-Mart, Inc., 222 F.R.D. at 192 ("Dr. Bielby's testimony on sex stereotyping also has been admitted in prior cases in this district.") (citation omitted).

Dukes district court is not alone in ruling that full *Daubert* review does not apply to class proceedings, on grounds that such scrutiny would violate *Eisen*'s "no merits inquiry" principle.[26] Had these courts applied *Daubert* without qualification, some of the unreliable opinions might have been excluded.

The argument for full *Daubert* application at the class certification stage is straightforward. The Federal Rules of Evidence apply at any proceeding not specifically excluded from the scope of the rules, and class proceedings are not specifically excluded.[27] Furthermore, the premise behind Rule 702 that only reliable expert evidence merits consideration by a factfinder admits no exceptions based on the perceived difficulty of using reliable methods or the complexity of a case.

The Court should go further, however, and rule that social framework analysis is not a reliable method.[28] This guidance is needed because courts purporting to apply an unqualified *Daubert* standard have sometimes allowed opinions based on social framework analysis. A variety of reasons seem to account for such rulings. Courts sometimes suggest that "soft science" of the kind offered by social framework experts should not be held to overly rigorous or definitive standards under *Daubert*. In fact, precisely because social science is soft, it is subject to much greater error and manipulation in its extension to novel settings, particularly where those applications are done through subjective judgments about a disputed set of facts. Courts sometimes appear influenced by the prior acceptance of social framework analysis, as mentioned above, or by the experts' self-serving statements about the acceptability of the method. When confronted with such self-serving statements, courts should require

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26. For an excellent discussion of how courts have treated *Daubert* at the class certification stage, see L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1065–79 (2004).

27. FED. R. EVID. 101, 1101.

28. To be clear, the argument is against "social framework analysis" and not the use of reliable social science research to provide background information that the court has determined will help the factfinder (the latter use of general social science research is what Monahan and Walker have consistently referred to as "social framework" evidence). *See, e.g.*, Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," supra* note 9, at 1738–39; *see also* FED. R. EVID. 702 advisory committee's note to 2000 amend. ("[I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.").

the expert to come forward with work conducted in her field of expertise that involved the same methods and types of data used by the expert in the case at hand. If she cannot do so, then her opinions based on that method should not be allowed absent other empirical evidence supporting the reliability of the novel method she proposes to use.

Barring social framework analysis would reduce the amount of bad science that courts have to confront, and it might lead to an increase in the amount of good science offered at the class certification stage. Reliable case-specific opinions can be formed by social science experts, even in the midst of litigation.[29] But why have an expert conduct a scientifically reliable study with transparent methods that can be examined and attacked when one could instead just have an expert read some depositions and case documents and issue broad opinions with no underlying measurements or tests to be examined and attacked?

CONCLUSION

Imposing full *Daubert* scrutiny on expert evidence offered at the class certification stage and requiring that experts use scientifically reliable methods to formulate their opinions about whether an organization had a common practice that exposed class members to the same harm will, at least in the short run, make it more difficult for plaintiffs to meet class certification requirements. However, lowering the standards for expert evidence offered at class certification to address plaintiff-side concerns about court access would be unwise, as it would likely lead to the proliferation of unreliable expert evidence offered by both plaintiffs and defendants. If the Court permits the practices of the plaintiffs' social science experts in Title VII class actions to continue, then we can expect a switch in defense strategy from attacking the admissibility of the evidence to offering defense experts who employ the same method but reach opposite conclusions.[30] If that happens, those willing to accept bad

29. *See generally* Gregory Mitchell et al., *Beyond Context: Social Facts as Case-Specific Evidence*, EMORY L.J. (forthcoming 2011) (on file with Vanderbilt Law Review). As we discuss in this paper, reliable case-specific opinions by experts are actually quite common, including opinions by statisticians and economists in Title VII cases who use reliable statistical methods to analyze case-specific personnel data.

30. As Richard Nagareda discussed in his Roundtable essay, so long as at least one circuit remains an outlier on class certification procedures important to plaintiff counsel, class litigation is likely to migrate to that circuit to take advantage of those deviant procedures. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC (2010)

science to advance what they see as good causes should be prepared to give up their objections to bad science in service of what they see as bad causes.

(manuscript at 6–7). Thus, inaction on this issue may amount to the adoption of a lowered evidentiary standard for many class certification rulings.