

Introduction

EQUAL PROTECTION AND THE SOCIAL SCIENCES THIRTY YEARS AFTER *MCCLESKEY V. KEMP*

Destiny Peery & Osagie K. Obasogie

AUTHORS—Destiny Peery, Associate Professor, Northwestern University Pritzker School of Law. Osagie K. Obasogie, Haas Distinguished Chair and Professor of Bioethics, Joint Medical Program and School of Public Health, University of California, Berkeley.

When legal scholars and advocates think about the intersection of law and social science, particularly in the areas of equal protection and civil rights, many think of *Brown v. Board of Education*.¹ *Brown* is often considered the most prominent and influential use of social science evidence in a legal decision. The Supreme Court directly cited multiple social science research articles in the now (in)famous² footnote,³ briefly validating researchers and the social science evidence they presented as relevant to judicial decision-making and general jurisprudence. But any hope generated by *Brown*'s recognition of this evidence was subsequently dashed.⁴ The debate about the relevance of social science evidence in the courtroom has waged on in cases involving both constitutional and statutory law, often fought out in highly contentious cases where the social science findings demonstrating gender bias in the workplace or racial bias in the criminal justice system run into hurdles when applied to specific plaintiffs or defendants in particular cases—a tension both exemplified and exacerbated by the Supreme Court's handling of the social science evidence of racial bias

¹ 347 U.S. 483 (1954).

² See, e.g., Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 864, 867–69 (2008).

³ *Brown*, 347 U.S. at 494 n.11.

⁴ It was arguably immediately dashed given, in particular, the backlash and critical takedown of the Clark study cited to in footnote 11. Kenneth Clark responded to the backlash, defending the general use of social science in law by comparing it to the use of social science in other arenas, such as government and industry, where there would be little backlash to its use. See Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224, 224–25 (1959).

in the application of the death penalty at the center of *McCleskey v. Kemp*.⁵ In recognition of the thirtieth anniversary of the *McCleskey* decision, the *Northwestern University Law Review* and an esteemed group of scholars, attorneys, and judges gathered to discuss the legacy of the Supreme Court's treatment of social science in that case in order to examine the future of law's relationship with social science evidence. This Symposium Issue collects their words and contemplates this legacy.

This Symposium was spearheaded by a collective of scholars working at the intersection of Critical Race Theory (CRT) and empirical studies in the social sciences, known as the empirical Critical Race Theory (eCRT) working group.⁶ They first came together in 2010 after recognizing an opportunity to build a new generation of scholarship at the intersection of race and the law that combines traditional critical race perspectives and social science methods. CRT has offered remarkable insights into the way that law and society construct race and racial ideologies as well as the oppressive power of the seemingly objective language of law. CRT has offered doctrinal critiques, first-person narratives, and other theoretical deconstructions that expose the law as a racialized tool of power.⁷ Yet, even CRT has struggled to blend a critical legal perspective with social science methodologies and concepts. The eCRT working group comprises race and identity scholars—some traditional CRT legal scholars, some social scientists, some who are both—who take an approach to studying race and the law that embraces the theoretical insights of CRT and the measurement tools offered by social science methods. By bringing these fields together, eCRT tries to leverage the descriptive power of the social sciences and the theoretical and normative clarity of CRT to offer a new vision for race scholarship and legal practice.

Much work remains to be done to reconcile the relationship between social science and law, as evinced on the small scale through tensions highlighted in the creation of eCRT and on the large scale through developments in equal protection and statutory doctrines over the last several decades. That continued negotiation is occurring in the shadow of *McCleskey*, as well as in Title VII cases like *Price Waterhouse v. Hopkins*,⁸ decided around the same time as *McCleskey*, and more recent cases like *Wal-*

⁵ 481 U.S. 279 (1987).

⁶ For more on the history of eCRT relative to CRT, see Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013).

⁷ See, e.g. Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xii (Kimberlé Crenshaw et al. eds., 1995); OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2014).

⁸ 490 U.S. 228 (1989).

Mart Stores, Inc. v. Dukes.⁹ While notions of disparate impact are cognizable under Title VII (unlike equal protection claims) and courts are open to the use of social science evidence for support, these employment law cases, and many more lesser-known decisions, reveal the struggle to apply empirical evidence in the courtroom and raise questions about the relevance of all social science data. *McCleskey* is largely known as a critical death penalty case that drew attention to the scope of the Equal Protection Clause. But it was the Court's treatment of the social science evidence about racial disparities in the death penalty sentencing that has arguably had the farthest reaching consequences, both for death penalty litigation and reform and for other cases involving claims of unconstitutional bias. *McCleskey* had profound implications for how courts understand the role of social science for demonstrating racial discrimination that violates equal protection.

In *McCleskey*, David Baldus, Charles Pulaski, and George Woodworth presented compelling statistical evidence (the Baldus study)¹⁰ to support Warren McCleskey's claims that Georgia's capital sentencing regime violated equal protection due to racial bias. The Baldus study offered the Supreme Court evidence that race and racism play a significant role in determining who receives the death penalty in Georgia. In social science and reform circles, this study laid the groundwork for increased awareness of racial disparities in the death penalty, as well as reform efforts such as Kentucky and North Carolina's Racial Justice Acts,¹¹ laws meant to allow consideration of the type of evidence presented in the Baldus study to inform claims of racial bias in capital sentencing.

How then did the *McCleskey* Supreme Court weigh the social science evidence in their decision? Despite their acknowledgement of the study's sophisticated methodology,¹² they concluded that social science evidence such as the Baldus study was largely irrelevant to the question of equal protection because it did not demonstrate *intentional discrimination* against the particular plaintiff in front of them: Warren McCleskey.¹³ They added that plaintiffs in equal protection cases must identify a discriminatory purpose such that the defendant acted "because of, not merely in spite of" some form of racial animosity,¹⁴ a doubling down on the intent requirement

⁹ 564 U.S. 338 (2011).

¹⁰ David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

¹¹ For a discussion of both Racial Justice Acts, see Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn't*, 2011 MICH. ST. L. REV. 463 (2011).

¹² 481 U.S. 279, 286, 327, 337, 341.

¹³ *Id.* at 292–93.

¹⁴ *Id.* at 298 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

for proving discrimination established in *Washington v. Davis*.¹⁵ This had the effect of reifying a narrow conception of discrimination that focused primarily on intentional bad actors with specific discriminatory intent that caused the discrimination in question. But it also rendered social science evidence of systemic and widespread racial disparities virtually meaningless in equal protection cases, particularly in cases where the court is faced with an individual plaintiff or defendant but the social science can only provide evidence of wider spread phenomena or effects in the aggregate.

In Title VII cases like *Price Waterhouse v. Hopkins*,¹⁶ decided only two years after *McCleskey*, the Court was clearly influenced by the expert testimony on gender stereotypes. The Supreme Court decided the case for the plaintiff and accepted a new legal theory of sex discrimination that explicitly incorporated gender stereotypes as a basis for legally cognizable sex discrimination. But even in that case, where the Court appeared more open to social science evidence than when equal protection claims were presented, the Court dismissed the social science evidence they clearly engaged with as simply “icing on [the] cake.”¹⁷ Thus, *McCleskey* showed a Court that was reluctant to engage the social science evidence because, in part, the Justices could not understand how it translated to the constitutional question before them. And even when social science evidence may apply to cases raising statutory issues, courts are often unsure of what weight or credit, if any, to assign it. Instead, they often view the social science as, at best, confirming the courts’ intuitions about the world, making it commonsense “icing on the cake” rather than fundamentally helpful to the factfinders.¹⁸

If we jump to the 2011 Title VII decision in *Wal-Mart Stores, Inc. v. Dukes*,¹⁹ where the Supreme Court denied class certification of 1.5 million women employed at Walmart, we see persistence in courts’ reluctance to use social science evidence to frame and understand the social contexts of discrimination cases. Laurens Walker and John Monahan named this particular use of social science evidence “social framework” testimony.²⁰ The social science expert in *Dukes* described his expertise as social

¹⁵ 426 U.S. 229 (1976). For a comprehensive assessment of the intent doctrine’s evolution, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

¹⁶ 490 U.S. 228 (1989).

¹⁷ *Id.* at 256.

¹⁸ *Id.* (dismissing Susan Fiske, the social science expert, as not offering anything that requires “special training to discern”).

¹⁹ 564 U.S. 338 (2011).

²⁰ Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

framework analysis,²¹ and he offered his opinion, based largely on the social science theories of stereotyping and bias, that Walmart had a company culture that was vulnerable to gender bias and discrimination. The Supreme Court rejected his testimony completely, concluding that because he could not answer the ultimate question of how often stereotypes or bias might have played a role in producing the alleged discrimination at the center of the case, the Court could “safely disregard” his opinion.²² Because social framework testimony provides context for factfinders to understand broad phenomena such as implicit bias or stereotyping, rather than answer questions of causation or other inquiries specific to the particular cases at hand, courts continue to argue that they cannot generalize from the aggregate effects demonstrated by social science evidence to even a large class of plaintiffs, as in *Dukes*.

This core tension across constitutional and statutory spaces—between evidence of aggregate effects and general phenomena that social science offers and the particular application of evidence to individual cases—is hashed out at every level of the courts, but likely most often at the district court level. There, we see similar outcomes as the Supreme Court cases discussed above. For example, in a Title VII race discrimination case decided this year in the Northern District of Illinois, the home district of the *Northwestern University Law Review*, a judge who resisted dismissing social science evidence on implicit bias and stereotyping outright praised the evidence as “fascinating” and “powerful” yet ultimately found the social science nondeterminative for answering the question of whether discrimination occurred.²³ Mirroring, in many ways, the response of the *McCleskey* Court, lower courts often deem even persuasive social science evidence simply not relevant to the case at hand.

The fact that courts, legal advocates, and social scientists continue to struggle over the tension between what courts believe social science can do and what they would like social science to offer means that the door is not completely closed to building a stronger relationship between law and social science. On the other hand, the door is barely open. Legal advocates, amenable judges, and social scientists alike will have to continue fighting to convince courts that social science research is a powerful tool to ensure equal protection and civil rights while providing valuable information to factfinders about the social phenomena that produce the discrimination and disparities at the center of these cases.

²¹ 564 U.S. at 354.

²² *Id.*

²³ *Martin v. F.E. Moran, Inc. Fire Prot. of N. Ill.*, No. 13 C 3526, 2018 WL 1565597 (N.D. Ill. Mar. 30, 2018).

This Symposium Issue proceeds in multiple parts. First, Reva Siegel's opening remarks lay the historical foundation for understanding how *McCleskey* and its doctrinal progeny miss the mark on discriminatory purpose.²⁴ By locating *McCleskey* in the context of cases coming out of the Burger and Rehnquist Supreme Courts that restricted proof of discriminatory purpose to invidious discriminatory intent, we begin to understand the treatment of statistical evidence that speaks more to patterns of disparity rather than causal intent.

The first set of papers address questions of *McCleskey*'s legacy and paths to overcoming the resistance to using social science evidence in a variety of legal contexts. Mario Barnes and Erwin Chemerinsky discuss the relationship between *McCleskey* and other major equal protection cases, demonstrating that the Court has treated social science evidence in uneven ways.²⁵ They argue that the standards for evidence to show discrimination, paired with inconsistencies in the courts' treatments of social science evidence, require a new approach for evaluating and applying social science data on racial impacts in the courts. Aya Gruber argues that Justice Lewis Powell's "fear of too much justice"²⁶ in *McCleskey* was driven more by his fear of leniency than by an aversion to addressing racial disparities.²⁷ Ifeoma Ajunwa and Angela Onwuachi-Willig discuss how the use of racial impact statements that mandate the consideration of statistical evidence of racial impacts when enacting legislation could lead to reduced labor discrimination against the formerly incarcerated, demonstrating the power of considering the very types of evidence that *McCleskey* rejected.²⁸ Michele Goodwin draws attention to how gender discrimination informs lawmaking and judicial decision-making in cases and legislation involving women's reproductive rights in the United States and abroad.²⁹ Like Gruber, Goodwin looks behind the curtain to highlight the ways that legal decisions are often about more than meets the eye. Jonathan Feingold and Evelyn Carter argue that the Supreme Court has not been as reluctant to use social science

²⁴ Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—And Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).

²⁵ Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You? Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293 (2018).

²⁶ 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

²⁷ Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018).

²⁸ Ifeoma Ajunwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385 (2018).

²⁹ Michele Goodwin, *Challenging the Rhetorical Gag and TRAP: Reproductive Capacities, Rights, and the Helms Amendment*, 112 NW. U. L. REV. 1417 (2018).

evidence as some have argued, but that motivated reasoning causes them to rely on it in some cases but not others.³⁰

Next, Paul Butler offers his remarks on the legacy of *McCleskey* and the impossible standards set for demonstrating racial discrimination.³¹ He worries that the project of bringing social science to bear on questions of equal protection and racial discrimination is doomed to fail if the takeaway from discussions of *McCleskey* is that social science just needs to provide more or better evidence of racial bias and discrimination in order to be persuasive. Instead, he argues, a willingness to confront white supremacy is needed.

The second set of papers give examples of social science research that has been conducted to address questions of racial justice, including evidence of the racially disparate impacts of doctrinal and policy changes. Osagie Obasogie and Zachary Newman study how a doctrinal change by the Supreme Court in cases involving claims of excessive police force fundamentally changed the legal rhetoric around these claims in a way that undermined the use of social science evidence of group-based and structural racial disparities.³² Bernadette Atuahene studies how property tax policy in Michigan disproportionately affected black homeowners, raising questions about the legality of the policies under the Fair Housing Act.³³ Russell Robinson and David Frost return us to judicial “fear[s] of too much justice,”³⁴ showing how the same fears motivating restraint in the application of social science evidence by the courts on matters of race have similarly led to restraint and narrow decisions in cases involving sexual orientation.³⁵ Kyneshawau Hurd and Victoria Plaut discuss how legal actors have used social science selectively to craft arguments about affirmative action that emphasize the benefits for majority groups rather than relying on the evidence of the impacts of discrimination and costs of lack of diversity for historically excluded groups.³⁶ They then present a study that shows the

³⁰ Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court’s Use of Social Science*, 112 NW. U. L. REV. 1689 (2018).

³¹ Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457 (2018).

³² Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465 (2018).

³³ Bernadette Atuahene, “*Our Taxes Are Too Damn High*”: *Institutional Racism, Property Tax Assessments, and the Fair Housing Act*, 112 NW. U. L. REV. 1501 (2018).

³⁴ *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

³⁵ Russell K. Robinson & David M. Frost, “*Playing It Safe*” with Empirical Evidence: *Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality*, 112 NW. U. L. REV. 1565 (2018).

³⁶ Kyneshawau Hurd & Victoria C. Plaut, *Diversity Entitlement: Does Diversity-Benefits Ideology Undermine Inclusion?*, 112 NW. U. L. REV. 1605 (2018).

consequences of this strategic policy framing, namely that majority groups prefer policies that center the benefits of policies on them rather than marginalized groups.

Finally, we close this Symposium Issue with the keynote address by Jack Boger, who argued *McCleskey* before the Supreme Court.³⁷ In his remarks, he reflects on the momentum toward judicial acknowledgement of racial disparities in capital sentencing that built during the 1960s. He discusses how signals from the Warren Court encouraged the NAACP Legal Defense and Educational Fund to gather empirical evidence of racial discrimination in capital sentencing and to develop constitutional responses to those racial disparities. Unfortunately, a shift in makeup of the Supreme Court in 1969 and the aftermath of *Furman v. Georgia*³⁸ in 1972, where the Court expressed concerns about the capricious and arbitrary application of the death penalty, soon dashed hopes of an easy path to addressing racial disparities in death sentences through the use of social science evidence in the courtroom. The Court came to believe that states' revisions to their capital punishment statutes sufficiently addressed the concerns expressed in *Furman*. Even though Warren McCleskey offered the Court compelling evidence to the contrary, the Court ultimately decided against him. Boger leaves us with a call to action, encouraging social scientists and legal scholars to continue their pursuit of evidence of patterns of racial discrimination that remain widespread in the criminal justice system and beyond. We echo this call.

³⁷ John Charles Boger, *McCleskey v. Kemp: Field Notes from 1977–1991*, 112 NW. U. L. REV. 1637 (2018).

³⁸ 408 U.S. 238 (1972).