

WHAT CAN *BROWN* DO FOR YOU?: ADDRESSING  
*MCCLESKEY V. KEMP* AS A FLAWED  
STANDARD FOR MEASURING THE  
CONSTITUTIONALLY SIGNIFICANT RISK OF  
RACE BIAS

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**ABSTRACT**—This Essay asserts that in *McCleskey v. Kemp*, the Supreme Court created a problematic standard for the evidence of race bias necessary to uphold an equal protection claim under the Fourteenth Amendment of the U.S. Constitution. First, the Court’s opinion reinforced the cramped understanding that constitutional claims require evidence of not only disparate impact but also discriminatory purpose, producing significant negative consequences for the operation of the U.S. criminal justice system. Second, the Court rejected the Baldus study’s findings of statistically significant correlations between the races of the perpetrators and victims and the imposition of the death penalty within Georgia criminal courts as insufficient proof of discriminatory intent, overlooking unconscious and structural racism. Third, Justice Lewis Powell’s approach to causation in *McCleskey* would have rendered almost any social science study incapable of proving the existence of race bias to his satisfaction, creating an unduly high bar for proving intent.

Furthermore, this Essay contrasts the Court’s use of the Baldus data in *McCleskey* with its use of social science data in other cases. For example, in oral arguments for a recent gerrymandering case, *Gill v. Whitford*, Chief Justice John Roberts summarily rejected the utility of applying empirical findings. In *Brown v. Board of Education*, by contrast, the Court positively endorsed studies on the harms of racial segregation that were less robust than the Baldus data. In response to uneven uses of empirical data in these cases, this Essay suggests approaches courts might develop to distinguish between stronger and weaker empirical evidence, including an update of how appellate courts review research introduced under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standard. In the wake of decisions such as *McCleskey*, and the troubled history of considerations of race within social science research, this Essay also articulates the unique challenges that must be confronted when courts consider data on racial impact.

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*[I]f you’re the intelligent man on the street and the Court issues a decision, and let’s say, the Democrats win, and that person will say: Well, why did the Democrats win? And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes. And the intelligent man on the street is going to say that’s a bunch of baloney.*

—Chief Justice John Roberts<sup>†</sup>

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<sup>†</sup> Transcript of Oral Argument at 37–38, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161).

## INTRODUCTION

As Chief Justice John Roberts's above quotation—which derives from the oral argument for *Gill v. Whitford*, a political gerrymandering case heard during the Supreme Court's fall 2017 term—suggests, at least some distinguished members of the nation's highest court are deeply skeptical of social science evidence. In fact, later in the argument, the Chief Justice further cautioned against courts attempting to make decisions based on “sociological gobbledygook.”<sup>1</sup> Beyond Roberts's expressed belief in *Gill* that political science data can be unfathomable to the common person and thus should not be relied on by the Court, there have been numerous instances of the Court more generally applying inconsistent approaches to social science research. This has especially been the case when the Court has considered social science data on racial impact. On this, the thirty-year anniversary of *McCleskey v. Kemp*,<sup>2</sup> we suggest that the Court's decision in that case stands out for a number of problematic reasons, but namely as a case where social science evidence elucidating the meaning of race in America was woefully ill-considered.

The majority opinion in *McCleskey* made two very disturbing assertions about social science data. First, the Court claimed the Baldus studies introduced by McCleskey, a black man sentenced to death for the killing of a white police officer, failed to prove a sufficient causal link between race and the imposition of the death penalty in Georgia.<sup>3</sup> Second, the Court maintained the data did not “demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”<sup>4</sup> The Justice Lewis Powell-led opinion reached these conclusions despite data in the studies confirming that a black person who killed a white person in Georgia was treated very differently,<sup>5</sup> receiving the death penalty 22% of the time, as

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<sup>1</sup> *Id.* at 40. Eduardo Bonilla-Silva, the president of the American Sociological Association, has written an open letter in response to Chief Justice Roberts's comments. See Letter from Eduardo Bonilla-Silva, President, Am. Sociological Ass'n, to John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S. (Oct. 10, 2017), <http://www.asanet.org/news-events/asa-news/asa-president-eduardo-bonilla-silva-responds-chief-justice-john-roberts> [<https://perma.cc/S9G5-AYJV>] (“In an era when facts are often dismissed as ‘fake news,’ we are particularly concerned about a person of your stature suggesting to the public that scientific measurement is not valid or reliable and that expertise should not be trusted. What you call ‘gobbledygook’ is rigorous and empirical.”).

<sup>2</sup> 481 U.S. 279 (1987).

<sup>3</sup> *Id.* at 312 (“At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.”).

<sup>4</sup> *Id.* at 313.

<sup>5</sup> See David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707–10 (1983) (“In other words, our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing

opposed to the 1% of black defendants who received the death penalty when their victims were black.<sup>6</sup> Powell’s claims about the Baldus data reflect an incommensurate approach for courts considering empirical research on race. For example, he seems to suggest that he would have been influenced by empirical data more persuasively evincing causation. Specifically, Powell stated: “Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions.”<sup>7</sup> In determining, however, that *McCleskey* involved no constitutional violation, he ignored the relative strength of the multiple regressions in the Baldus research—which are by definition probabilistic measures<sup>8</sup>—and the reality that social science studies very rarely expound on causation in a manner that could support absolute certainty.<sup>9</sup>

This Essay claims the *McCleskey* Court demonstrated a cramped understanding of both equal protection doctrine and the value of social science evidence. First, we propose that the *McCleskey* majority opinion problematically expanded the antidiscrimination standard articulated in earlier cases by adhering to a rigid “because of” requirement for establishing

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homicide cases. Georgia juries appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases . . .”).

<sup>6</sup> See DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 190 (1990); John C. Bolger, *Keynote Address—McCleskey v. Kemp: Field Notes from 1977–1991*, 112 NW. U. L. REV. 1637 (2018) (describing the Baldus discovery of these data in 1982 and that “racial factors were indeed still playing an important role in Georgia’s capital sentencing system”).

<sup>7</sup> *McCleskey*, 481 U.S. at 308. Justice Powell was not wrong to question the strength of correlative data generally. See ROBERT M. LIEBERT & LYNN LANGENBACH LIEBERT, SCIENCE AND BEHAVIOR: AN INTRODUCTION TO METHODS OF PSYCHOLOGICAL RESEARCH 85 (4th ed. 1995) (“When a psychologist observes a naturally occurring correlation between two variables, *X* and *Y*, it is often tempting to assume that the relationship is causal in nature . . . This assumption is unsound.”). Justice Powell, however, fails to comment upon whether the research design and methods used to test multiple variables in the Baldus data met social science standards for supporting a causal inference. This may have been the case because it was the implications of the study rather than the methods that concerned Justice Powell. See Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 12 (2012) (noting that when a clerk’s memo criticized the district court’s attack on the Baldus study methods, rather than supporting or questioning the substance of the attack, Justice Powell asked, “What if one accepts the study as reflecting sound statistical analysis? Would this require that no blacks be sentenced to death where victim was white?”).

<sup>8</sup> Julian Reiss, *Causation in the Social Sciences: Evidence, Inference, and Purpose*, 39 PHIL. SOC. SCI. 20, 24 (2009).

<sup>9</sup> Margaret Mooney Marini & Burton Singer, *Causality in the Social Sciences*, 18 SOC. METHODOLOGY 347, 348 (1988) (noting, in part, that in social science research “causal relationships are always identified against the background of some causal field, and specification of the field is critical to interpretation of an observed relationship”).

intent to discriminate in a specific case.<sup>10</sup> The Court’s *Washington v. Davis* opinion in 1976 first explicated that a Fourteenth Amendment Equal Protection Clause claim required both disparate racial impact and a discriminatory purpose.<sup>11</sup> In 1979, *Personnel Administrator of Massachusetts v. Feeney* clarified that, in order to prove the discriminatory purpose of some state legislation, one would need to prove the state selected the course of action “because of,” not merely “in spite of,” its adverse effects upon a protected group.<sup>12</sup> The *McCleskey* majority recommitted to these standards but did so despite the Court’s willingness to authorize complaints based solely on disparate impact in other areas of the law<sup>13</sup> and the availability of social science data that revealed racial inequality in death sentencing in Georgia. To our minds, the racial impact data in *McCleskey* demonstrated the fallacy of overly weighing intent in discrimination cases and the limits of the discriminatory purpose requirement more generally.

Second, we suggest that, at times, the Court’s approach to considering racial impact data has been quite uneven. In other cases, the Court has been much more open to social scientific considerations of race, even with data that were less robust than the findings of the Baldus studies. As an example of the unevenness of the Court’s approach to racial data, we look to the Court’s consideration of social science evidence in *Brown v. Board of*

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<sup>10</sup> See generally *Washington v. Davis*, 426 U.S. 229 (1976); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979). The *McCleskey* Court also considered the Baldus data as justification for the Eighth Amendment challenge. See 481 U.S. at 299–314. Though one of us has done so elsewhere, see Mario L. Barnes, *McCleskey v. Kemp*, in *CRITICAL RACE JUDGMENTS* (Devon Carbado et al. eds., forthcoming 2018), we do not substantially address the arguments pertaining to Eighth Amendment doctrine in this Essay.

<sup>11</sup> *Davis*, 426 U.S. at 239 (“But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

<sup>12</sup> 442 U.S. at 279. In *McCleskey*, Justice Powell applied the rule from *Feeney* and determined, “[t]here was no evidence . . . that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.” 481 U.S. at 298.

<sup>13</sup> 481 U.S. at 293–94 (discussing how death penalty jury deliberation differs from Title VII employment and *Batson* jury-strike cases—cases where the Court had previously accepted multiple regression analysis and impact data, respectively, to determine the existence of unconstitutional discrimination).

*Education*.<sup>14</sup> In *Brown*, in perhaps one of the most famous<sup>15</sup> (or infamous<sup>16</sup>) footnotes in Fourteenth Amendment jurisprudence, the Court referenced social science data attesting to the negative psychological effects of segregation on African-American children.<sup>17</sup> The Court, however, cited to studies without presenting the findings or interrogating the strength of the methodologies employed. This fact takes on greater relevance when one considers that numerous critics have challenged the findings of those studies over the years.<sup>18</sup> Ironically, then, what some consider to be weaker data on the impact of race was welcomed by the Court in *Brown*, while significantly more robust studies evaluating race in capital sentencing (alongside numerous other factors) were rejected in *McCleskey*. *Brown*, however, was not an ideal example of how the Court should consider social science data.<sup>19</sup> Dr. Kenneth Clark, a researcher who testified in the trial court in *Brown* and conducted doll studies that were cited in footnote 11, for example, claimed the Court ignored two of his important findings that racism was uniquely an American institution and that Whites were also negatively affected by segregation.<sup>20</sup> Nevertheless, we argue that despite the imperfect manner in which the social science evidence was treated in *Brown*, the outcome of the

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<sup>14</sup> 347 U.S. 483 (1954).

<sup>15</sup> The Court refers to the social science evidence in footnote 11 of the opinion. *Id.* at 494 n.11. In the years immediately following the issuance of the *Brown* opinion, footnote 11 gained notoriety. See Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 38 (1959); Allan Ides, *Tangled Up in Brown*, 47 HOW. L.J. 3, 9 (2003). Of course, one can debate such claims, but footnote 4 in *United States v. Carolene Products Co.*, which included language that suggested government decisions affecting “discrete and insular minorities” require more searching judicial review, is arguably more well-known. 304 U.S. 144, 152 n.4 (1938).

<sup>16</sup> Some of the criticism of *Brown*’s footnote 11 has been terribly unflattering. See Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 294 (2005).

<sup>17</sup> MARTHA MINOW, IN *BROWN*’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 140–41 (2010).

<sup>18</sup> See, e.g., ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 70 (3d ed. 2005); ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 14–16 (1996); A. James Gregor, *The Law, Social Science, and School Segregation: An Assessment*, in *DE FACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY* 99, 101–04 (Oliver Schroeder, Jr. & David T. Smith eds., 1963); Michael G. Proulx, *Professor Revisits Clark Doll Tests*, HARVARD CRIMSON (Dec. 1, 2011), <http://www.thecrimson.com/article/2011/12/1/clark-dolls-research-media> [<https://perma.cc/6L42-FAR8>] (discussing the meaning of the studies with Harvard African-American Studies Professor Robin Bernstein and reporting her opinion that “the choices made by the subjects of the Clark doll tests was not necessarily an indication of black self-hatred. Instead, it was a cultural choice between two different toys—one that was to be loved and one that was to be physically harassed, as exemplified in performance and popular media”).

<sup>19</sup> See *infra* notes 144–153 and accompanying text.

<sup>20</sup> *Brown at 60: The Doll Test*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/brown-at-60-the-doll-test> [<https://perma.cc/AP3J-7G88>].

decision appropriately addressed the harm—namely, racial segregation—and its societal consequences. This was not the case in *McCleskey*.

The disparate approaches to social science data across cases such as *Brown*, *McCleskey*, and *Gill*, reflect that the Court is in need of guidance on both evaluating social science data more generally and on the special considerations that may be necessary when assessing race data. This Essay proceeds in four parts. In Part I, we consider the shortcomings of the Court’s approach to intent in *McCleskey* and its implications for equal protection doctrine. In particular, we argue that the Court’s dismissal of data finding an association between juror decision-making and disparate racial impact in criminal sentences paved the way for the rise of the Court’s current post-racial reality<sup>21</sup>—a contemporary moment where a majority of the Justices rarely assume that racial outcomes are tied to racial animus.<sup>22</sup> In Part II, we specifically point out how the *McCleskey* Court underestimates the robustness of the social science data presented in the case. In Part III, we highlight the Court’s history of inconsistently considering social scientific studies of race, in part by looking to the Court’s analysis in the *Brown v. Board of Education* case.

In Part IV, we suggest that in light of the Court’s peculiar dismissal of social science data in cases like *McCleskey*, it would be advisable for appellate courts to apply more regularized standards when considering social science data. These standards, however, would need to be mindful of the knotty history surrounding how scientific studies have considered race<sup>23</sup> and

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<sup>21</sup> On the Court’s current commitment to post-racial reasoning in its equality jurisprudence, see Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1620–21 (2009), and see generally Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010) and Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043 (2016). This latter article builds on foundational work on the Court’s race jurisprudence that was first articulated not long after *McCleskey* was decided. See Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990).

<sup>22</sup> This perceived disassociation between racial animus and outcomes has been effectively theorized by both legal scholars and social scientists. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 2, 16 (4th ed. 2014) (articulating “color-blind racism,” as being tied to a new racial order that arose in the 1960s and in which “social practices and mechanisms to reproduce racial privilege acquired a new, subtle, and apparently nonracial character”); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1027 (2010) (decrying “post-racial racism,” a term describing how societal racial disadvantage persists even though many within society disavow harboring racist views).

<sup>23</sup> See generally BOB CARTER, *REALISM AND RACISM: CONCEPTS OF RACE IN SOCIOLOGICAL RESEARCH* 2 (2000) (“Race concepts within sociology are an especially fruitful field of inquiry . . . but more importantly, the employment of race concepts within social theories vividly illustrates the pitfalls that follow from an under-theorized notion of science.”); SEAN ELIAS & JOE R. FEAGIN, *RACIAL THEORIES IN SOCIAL SCIENCE: A SYSTEMIC RACISM CRITIQUE* (2016); DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST*

best contemporary practices for capturing the complicated nature of race as a research study variable. As part of this assessment, we consider work by a number of sociolegal scholars who have recently advocated for a subfield that merges conceptualizations of race from critical studies with social science methods.<sup>24</sup> Given the possibilities presented across various disciplines and involving myriad types of methods, it would make little sense to argue for an adoption of a one-size-fits-all approach to considering social science research data. Rather, our goal is to begin a discussion about how appellate courts should interpret the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>25</sup> Presently, that case is seen as requiring trial judges to perform a gatekeeping function by ensuring that expert witness testimony rests on a reliable foundation and is relevant to the scientific issue at hand. There needs to be, however, a greater emphasis placed on formulating evidentiary standards for appellate courts to consistently apply when reviewing cases with social science data, especially where that research bears on disparate racial impact.

#### I. THE IMPLICATIONS TO EQUAL PROTECTION DOCTRINE OF THE HOLDING IN *MCCLESKEY*

There are at least three harms that have resulted from the Court's holding in *McCleskey*. First, the Court further instantiated the misguided approach to discriminatory intent for constitutional equal protection claims that it first articulated in *Washington v. Davis*.<sup>26</sup> Second, this construction of an intent requirement has overly focused on individual animus, to the

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CENTURY (2011); TUKUFU ZUBERI & EDUARDO BONILLA-SILVA, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (2008).

<sup>24</sup> See, e.g., Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Method*, 2016 WIS. L. REV. 443; Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014); Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in BLACKWELL COMPANION TO LAW AND SOCIETY 453 (A. Sarat ed., 2004) [hereinafter Gómez, *A Tale of Two Genres*]; Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC'Y REV. 221 (2012) [hereinafter Gómez, *Looking for Race*]; Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013).

<sup>25</sup> 509 U.S. 579 (1993) (where the Court set the standard for the admissibility of scientific evidence under Federal Rule of Evidence 702). To be clear, we are not the first scholars to raise concerns about the rule from *Daubert* and its effects on the admissibility of research. See Teresa S. Renaker, *Evidentiary Legerdemain: Deciding When Daubert Should Apply to Social Science Evidence*, 84 CALIF. L. REV. 1657 (1996) (noting it is not readily apparent when *Daubert* will be seen as controlling evidence rooted in social science); A. Leah Vickers, *Daubert, Critique and Interpretation: What Empirical Studies Tell Us About the Application of Daubert*, 40 U.S.F. L. REV. 109 (2005) (offering an overview of criticisms of the case and raising questions of related the effects of judicial deference and desires for efficiency).

<sup>26</sup> See *supra* note 11.



detriment of exploring other relevant concepts such as the operation of unconscious bias and structural or systemic forms of racism. Finally, the standard for discerning intent that developed after *McCleskey*—one that does not create consequences for systems that fail to take corrective action though they are aware of racial harm—has made it increasingly difficult to prevail when raising constitutional discrimination claims.

*A. The Misguided Requirement of Proof of Discriminatory Intent*

The Supreme Court's decisions over the last forty years requiring proof of discriminatory purpose in order to demonstrate an equal protection violation, including in *McCleskey v. Kemp*,<sup>27</sup> have dramatically lessened the ability of claimants to use the Constitution to create a more just society.<sup>28</sup> These decisions are terribly misguided and the Court has compounded the problem by adopting a standard for proving intent that is very difficult to meet.

Whether discrimination can be proven by showing the disparate impact of a governmental action is crucial to determining the reach of the Equal Protection Clause. Undoubtedly, there are many instances where a significant discriminatory impact can be shown but there is insufficient evidence of a discriminatory purpose.<sup>29</sup> Without proof of such a purpose, however, the current law provides that the government need not offer a racially neutral explanation for these unequal effects and, indeed, generally must do no more than satisfy a rational basis test.<sup>30</sup> To prove a violation of the Equal Protection Clause—or at least to shift the burden to the government to prove a non-race explanation for its action—requires a showing of discriminatory intent.<sup>31</sup>

What is wrong with the Court's requirement of proof of discriminatory purpose? First, it misunderstands the purpose of the Constitution's guarantee of equal protection. The Equal Protection Clause should protect against the discriminatory results of government actions and

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<sup>27</sup> 481 U.S. 279 (1987).

<sup>28</sup> For other cases requiring proof of discriminatory intent to show a racial classification, see, for example, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Washington v. Davis*, 426 U.S. 229 (1976). See also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080–83 (2011).

<sup>29</sup> See text accompanying notes 58–84 (discussing this in the areas of crack-cocaine sentencing, the death penalty, and schools).

<sup>30</sup> Barnes & Chemerinsky, *supra* note 28, at 1081–82.

<sup>31</sup> The Supreme Court has said that if there is proof that a decision is “motivated in part by a racially discriminatory purpose,” the burden shifts to the government to prove that “the same decision would have resulted even had the impermissible purpose not been considered.” *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21. (1977).

not just against the discriminatory motivations of government actors. In other words, the government should not be able to act in a manner that harms racial minorities, regardless of why it took the action.

In *Washington v. Davis*, the Court, in maintaining a requirement for proof of discriminatory intent, said that the purpose of the Equal Protection Clause “is the prevention of official conduct discriminating on the basis of race.”<sup>32</sup> But the Court has never justified this premise that the focus of an equal protection analysis should be the government’s motives and not the effects of its actions. Quite to the contrary, equal protection should be concerned with, and measured by, outcomes as well as intentions.<sup>33</sup> Courts should ask whether the government’s action is creating inequalities on the basis of race (or other protected classifications). If so, at the very least, the government should have to offer a sufficient nondiscriminatory explanation for its actions. As Professor Laurence Tribe has articulated, the Equal Protection Clause was not designed to regulate impure thoughts and motivations. Rather, its goal is to “guarantee a full measure of human dignity for all” by ensuring protection for individuals who may also be harmed “when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.”<sup>34</sup>

### *B. Overlooking Unconscious Bias and Structural Racism*

A second issue with the Court’s requirement for proof of a discriminatory purpose in *McCleskey* is that it ignores the reality of unconscious bias. In today’s society, a discriminatory motivation will rarely, if ever, be expressed and benign purposes can typically be articulated for

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<sup>32</sup> 426 U.S. at 239.

<sup>33</sup> At times, the Court has subscribed to this philosophy, especially for certain statutory claims. *See, e.g.,* Bazemore v. Friday, 478 U.S. 385 (1986) (pattern or practice wage discrimination case, which relied upon multiple regression data); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (Court using statistical data on hiring of teachers to support a pattern or practice discrimination case where not all claimants could prove explicit or intentional discrimination in individual cases). Most recently, within the statutory context, the Court decided that disparate impact claims available under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act were also available under the Fair Housing Act. *See* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015). The Court in *Washington v. Davis*, by contrast, flatly rejected this approach for constitutional claims. 426 U.S. at 238–39 (“As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer’s possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.” (citation omitted)).

<sup>34</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1516–19 (2d ed. 1988).

most laws.<sup>35</sup> Therefore, many laws with both a discriminatory purpose and effect will be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose. Scholars such as Professor Charles Lawrence argue that this is especially true because racism is often unconscious and such “unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy.”<sup>36</sup>

Since the Court decided *Washington v. Davis* in 1976, which held that proof of discriminatory intent is required for an equal protection violation, a large body of psychological literature has documented the reality of implicit bias and explained its significance for the legal system.<sup>37</sup> The science of implicit bias shows that “actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”<sup>38</sup> While implicit bias may affect us all, research in this area has shown that Whites may have biases at an unconscious level that are often out of step with the egalitarian values that many espouse<sup>39</sup> and may influence their decision-making processes in ways of which they are completely unaware.<sup>40</sup>

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<sup>35</sup> See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

<sup>36</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987). Professor Lawrence’s research on unconscious bias and discriminatory intent was actually referenced by one of the dissents in *McCleskey*. See 481 U.S. at 332–33 (Brennan, J., dissenting); see also Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 36–40 (1991) (contending the Court has been obsessed with status race rules that treated black inferiority as a legal fact and formal race rules that gave primacy to questions of neutrality irrespective of racial segregation, rather than historical understandings of race which accept racial subordination within this country as a truism).

<sup>37</sup> See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508 (2005) (describing implicit bias as follows: “[t]he point here is not merely that certain mental processes will execute automatically; rather, it is that those implicit mental processes may draw on racial meanings that, upon conscious consideration, we would expressly disavow. It is as if some ‘Trojan Horse’ virus had hijacked a portion of our brain”); see also Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001); Annika L. Jones, Comment, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221 (2017).

<sup>38</sup> Greenwald & Krieger, *supra* note 37, at 946.

<sup>39</sup> This particular phenomenon of a disconnect between our stated values and conduct regarding race has been described as “aversive racism.” Samuel L. Gaertner & John. F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (John. F. Dovidio & Samuel L. Gaertner eds., 1986) (describing aversive racism as resulting from white people espousing positive outward attitudes regarding racial equality but whose beliefs about Blacks are informed by cultural and cognitive forces); see also MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 69 (2013).

<sup>40</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–88 (1995) (discussing the notion that people categorize information as they receive it as part of the central premise of social cognition theory).

A crucial problem with requiring proof of discriminatory intent is that it focuses solely on what is expressed; it often completely ignores these unconscious biases. Professor Lawrence has explained as follows:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker’s beliefs, desires, and wishes.<sup>41</sup>

Thus, the requirement of a discriminatory purpose in order to prove the existence of an equal protection violation fails to account for the reality of implicit bias. As Professors Christine Jolls and Cass Sunstein explained: “Ordinary antidiscrimination law will often face grave difficulties in ferreting out implicit bias even when this bias produces unequal treatment.”<sup>42</sup>

Implicit bias research creates a basis for believing that laws with a racially disparate impact do not necessarily result from coincidence but rather reflect unstated—and perhaps unrealized—discriminatory intentions. Implicit bias alone, however, does not explain the complications associated with an intent requirement. In addition to implicit bias, legal and social science researchers have commented on other social cognition phenomena connected to motivation and behavior such as in-group favoritism,<sup>43</sup>

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<sup>41</sup> Lawrence, *supra* note 36, at 322 (citation omitted).

<sup>42</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 976 (2006).

<sup>43</sup> See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1322–27 (1998); Naoki Masuda & Feng Fu, *Evolutionary Models of In-Group Favoritism*, 7 F1000PRIME REP. 27 (2015) (describing in-group favoritism as a tendency of group members to “cooperate more with others in the same group than with those in different groups” and discussing the evolutionary origins of the behavior).

confirmation bias,<sup>44</sup> stereotype threat,<sup>45</sup> heuristics,<sup>46</sup> moral credentialing,<sup>47</sup> and of course, covert (conscious) bias.<sup>48</sup> Moreover, rather than making decisions based on race itself, in a number contexts, people make decisions based on proxies—traits closely associated or aligned with race.<sup>49</sup> Courts, however, have not consistently found using such proxies to be a violation of antidiscrimination statutes.<sup>50</sup> All of these concepts help to further explain

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<sup>44</sup> Phoebe C. Ellsworth, *Legal Reasoning and Scientific Reasoning*, 63 ALA. L. REV. 895, 904 (2012) (“Confirmation bias is the tendency to seek, believe, and remember information that agrees with what we already think.”).

<sup>45</sup> Claude M. Steele, *The Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 203–04 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (“[S]tereotype threat [] is a situational threat—a threat in the air—that, in general form, can affect the members of any group about whom a negative stereotype exists . . . .”); Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2238 (2017) (“In addition to the copious literature focusing on implicit bias, legal academics have begun to explore how ‘stereotype threat,’ the concern about confirming a negative stereotype about one’s group, can undermine performance on cognitively challenging tasks.”).

<sup>46</sup> See 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. REV. ONLINE 1, 16 (2018) (“Cognitive biases and heuristics function as mental filters and shortcuts that help humans quickly and effortlessly process, interpret, and manage information.”); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012) (using the term *suspicion heuristic* to explain “how normal psychological processes that operate below the level of conscious awareness can lead to systematic errors in judgments of criminality”).

<sup>47</sup> Daniel A. Effron et al., *Endorsing Obama Licenses Favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCH. 590, 590 (2009) (reporting results of studies finding that “establishing oneself psychologically as unprejudiced may make people feel more comfortable expressing views that could be interpreted as prejudiced”); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CALIF. L. REV. 1, 7 (2016) (pointing out doctrines within employment law which reward employers accused of discrimination for earlier decisions that were favorable to workers of color in a manner that “reinforces the psychological effect of this moral credential and, in turn, increases the likelihood that the moral licensing that follows will result in discrimination”).

<sup>48</sup> See Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1054 (2009) (arguing that the overemphasis on conscious bias in antidiscrimination law obscures both the operation of covert bias and the ends of racial justice).

<sup>49</sup> See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (2000) (noting that discrimination often takes place not based on status identity alone, but based on whether one “performs” one’s social identity consistent with stereotypical expectations); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1161 (2004); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as Black,” and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1283–84 (using empirical studies annotating employment decisions based on “black-sounding names” on resumes to argue that Title VII should borrow from the Americans with Disabilities Act to include a “regarded as” claim where racial status is misperceived due to the use of proxies for race).

<sup>50</sup> Such issues have routinely arisen around grooming codes, where courts have rejected proxy claims for typically race-neutral policies that disproportionately affect people of color. See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030–35 (11th Cir. 2016) (rejecting “race as culture” arguments

why purposeful discrimination as a standard fails to capture much of the social behavior around race and decision-making. Put another way, all of these phenomena reflect that in a society with a long history of discrimination, perhaps, there can be a presumption that many laws with a discriminatory impact likely were motivated by a present but unacknowledged discriminatory purpose.<sup>51</sup>

### C. *Proving Discrimination After McCleskey*

A third issue with the majority decision in *McCleskey* is that the Court compounded the problem of its cramped approach to equal protection by adopting a definition of “intent” that makes this requirement very difficult to prove. The Court has made it clear that showing a discriminatory purpose requires proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. In *Personnel Administrator of Massachusetts v. Feeney*, the Court declared: “‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>52</sup>

*Feeney* involved a challenge to a Massachusetts law that gave preference in hiring for state jobs to veterans. At the time of the litigation, over 98% of the veterans in the state were male and only 1.8% were female.<sup>53</sup> The result was a substantial discriminatory effect against women in hiring for state jobs. Nonetheless, the Supreme Court held that the Massachusetts law did not violate the Equal Protection Clause because the law creating a preference for veterans was facially gender-neutral and there was not proof that the state’s purpose in adopting the law was to disadvantage women.<sup>54</sup>

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and finding no race discrimination under Title VII, where a black woman was fired after refusing to change her “locked” hairstyle); *Eatman v. UPS*, 194 F. Supp. 2d 256, 266 (S.D.N.Y. 2002) (finding no basis for a disparate impact claim for a race-neutral grooming code, where based on the policy, seventeen of the eighteen affected workers were black); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 234 (S.D.N.Y. 1981) (finding no availability of a racial discrimination claim where a race-neutral workplace policy prohibited all-braided hairstyles); see also D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 987–88 (2017).

<sup>51</sup> See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 1000 (1989). Again, this is the essential claim of Neil Gotanda’s theory of “historical race.” See Gotanda, *supra* note 36, at 39–40.

<sup>52</sup> 44 U.S. 256, 279 (1979) (citations omitted).

<sup>53</sup> *Id.* at 270.

<sup>54</sup> *Id.* at 280–81. *Feeney* makes it clear that proving a gender classification is identical to proving a racial classification. See *id.* at 272–73.

The Court essentially rejected the tort definition of intent as acting with knowledge of foreseeable consequences and instead adopted a criminal law definition of intent meaning the desire to cause those results.<sup>55</sup> The Justices, however, seemed to ignore the companion criminal law concept of willful blindness, which permits the inference of intent where plaintiffs technically can claim no actual knowledge of a circumstance because they were not willing to inquire into the circumstance, though reasonable persons would have been moved to do so.<sup>56</sup> Professor Larry Simon argues that:

[A] showing of significant disproportionate disadvantage to a racial minority group, *without more*, gives rise to an inference that the action may have been taken or at least maintained or continued with knowledge that such groups would be relatively disadvantaged . . . . [I]t raises a possibility sufficient to oblige the government to come forward with a credible explanation showing that the action was (or would have been) taken quite apart from prejudice.<sup>57</sup>

But the Supreme Court has not taken this approach and instead has required proof that the government desired the discriminatory consequences. This makes the requirement for proof of a discriminatory purpose even more onerous and difficult to meet.

In almost every area of law, the requirement for proof of discriminatory intent has frustrated the ability to use the Equal Protection Clause to remedy race discrimination. Consider a few examples. For instance, it is well documented that criminal sentences for crack cocaine possession and trafficking were for many years as much as 100 times greater than those for powder cocaine, even though it is the same drug.<sup>58</sup> This had a huge racially discriminatory impact. As the Sentencing Project explained:

Approximately 2/3 of crack users are white or Hispanic, yet the vast majority of persons convicted of possession in federal courts in 1994 were African American, according to the [U.S Sentencing Commission]. Defendants

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<sup>55</sup> According to Professor Reva Siegel, the standard of intent adopted by the Court in *Feeney* is tantamount to the “malice” standard used for murder offenses in criminal law. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997).

<sup>56</sup> See Barnes, *supra* note 10 (rewriting the *McCleskey* majority opinion and its approach to intent, in part, based on a theory of willful blindness).

<sup>57</sup> Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1111 (1978).

<sup>58</sup> For a critique of the disparity between sentences for powder and crack cocaine, see, for example, DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 92–93 (2007); Jim Sidanius et al., *Hierarchical Group Relations, Institutional Terror and the Dynamics of the Criminal Justice System*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE*, *supra* note 45, at 140–44; and Mario L. Barnes, *Foreword: Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. IRVINE L. REV. 711, 723–24 (2016).

convicted of crack possession in 1994 were 84.5% black, 10.3% white, and 5.2% Hispanic. Trafficking offenders were 4.1% white, 88.3% black, and 7.1% Hispanic. Powder cocaine offenders were more racially mixed. Defendants convicted of simple possession of cocaine powder were 58% white, 26.7% black, and 15% Hispanic. The powder trafficking offenders were 32% white, 27.4% black, and 39.3% Hispanic. The result of the combined difference in sentencing laws and racial disparity is that black men and women are serving longer prison sentences than white men and women.<sup>59</sup>

In California, for example, the racial disparities in cocaine-related sentences are quite apparent. People of color account for over 98% of those sent to California state prisons for possession of crack cocaine for sale.<sup>60</sup> From 2005 to 2010, Blacks accounted for 77.4% of state prison commitments for crack possession for sale, although they made up just 6.6% of the state's population.<sup>61</sup> Latinos account for 18.1% of those convicted of crack-cocaine offenses, while Whites account for just 1.8% of those convicted.<sup>62</sup> By contrast, those convicted for powder-cocaine offenses are overwhelmingly white.

Yet efforts to challenge this disparity as violating equal protection failed because the courts said that there was not proof of a discriminatory intent for the sentencing disparity.<sup>63</sup> As a result, the law had an enormously discriminatory effect—many more African-Americans were sent to prison—but the courts provided no remedy. As Professor David Sklansky noted, “The federal crack penalties provide a paradigmatic case of unconscious racism.”<sup>64</sup> Congress lessened, though did not eliminate, this disparity with the Fair Sentencing Act of 2010, which reduced the statutory penalties for crack-cocaine offenses to produce an eighteen-to-one crack-to-powder drug

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<sup>59</sup> SENTENCING PROJECT, CRACK COCAINE SENTENCING POLICY: UNJUSTIFIED AND UNREASONABLE 2, <https://www.prisonpolicy.org/scans/sp/1003.pdf> [<https://perma.cc/YMD6-7DEP>].

<sup>60</sup> Press Release, ACLU of N. Cal., Governor Signs Historic California Fair Sentencing Act (Sept. 28, 2014), <https://www.aclunc.org/news/governor-signs-historic-california-fair-sentencing-act> [<https://perma.cc/8BUE-SHPC>] (discussing Governor Jerry Brown's signing of the California Fair Sentencing Act (SB 1010)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.*, *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (reversing the district court's conclusion that the disparity between crack and powder cocaine violated equal protection); *see also* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1284 (1995) (explaining why the disparity between crack and powder cocaine sentencing could not be challenged under equal protection: “Federal appellate courts have uniformly rejected these challenges, based on a largely mechanical application of the equal protection rules developed by the Supreme Court”).

<sup>64</sup> Sklansky, *supra* note 63, at 1308.



quantity ratio and eliminated the mandatory minimum sentence for simple possession of crack cocaine.<sup>65</sup>

Another example of the barrier created by requiring proof of discriminatory intent is in the area of the death penalty. This, of course, was the focus of *McCleskey v. Kemp*, where the Supreme Court held that proof of discriminatory impact in the administration of the death penalty was insufficient to show an equal protection violation.<sup>66</sup> As we explicate more completely below, statistical evidence powerfully demonstrated racial inequality in the imposition of capital punishment in Georgia.<sup>67</sup> The key results of the Baldus studies highlighted in the *McCleskey* majority opinion were: The death penalty was imposed in 22% of the cases involving black defendants and white victims; in 8% of the cases involving white defendants and white victims; in 1% of the cases involving black defendants and black victims; and in 3% of the cases involving white defendants and black victims.<sup>68</sup> There were also differences in prosecutorial discretion, with Professor David Baldus finding that “prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.”<sup>69</sup> After adjusting for many other variables, Baldus concluded that “defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.”<sup>70</sup> How, then, the Court failed to see this evidence as giving “rise to an inference of discriminatory purpose” became what Professor Reva Siegel has described within this Symposium as the “\$64,000 question.”<sup>71</sup>

The Supreme Court answered that question by determining that for the defendant to demonstrate an equal protection violation, he “must prove that the decision-makers in *his* case acted with discriminatory purpose.”<sup>72</sup> Because the defendant could not prove that the prosecutor or jury in his case was biased, no equal protection violation existed. Moreover, the Court stated

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<sup>65</sup> For the updated statute, see Barnes, *supra* note 58, at 723–24 & n.58 (citing Fair Sentencing Act of 2010, 21 U.S.C. § 841 (2012)).

<sup>66</sup> *McCleskey v. Kemp*, 481 U.S. 279, 279–80 (1987).

<sup>67</sup> See *infra* notes 90–103 and accompanying text.

<sup>68</sup> 481 U.S. at 286.

<sup>69</sup> *Id.* at 287.

<sup>70</sup> *Id.*

<sup>71</sup> Reva 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, 1274 (2018).

<sup>72</sup> *McCleskey*, 481 U.S. at 292.

that to challenge the law authorizing capital punishment, the defendant “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”<sup>73</sup> In reaching this ruling, which was inconsistent with how such impact data had been analyzed in other contexts, the Court effectively “erect[ed] a firewall between the criminal justice setting and those cases where the Court had accepted statistical evidence as raising inferences about discriminatory bias . . . .”<sup>74</sup> Racial disparities in imposing the death penalty are well-documented. As Matt Ford noted:

The national death-row population is roughly 42 percent black, while the U.S. population overall is only 13.6 percent black, according to the latest census . . . . Some individual states are worse. In Louisiana, the most carceral state in the Union, blacks are roughly one-third of the population but more than two-thirds of the state’s death-row inmates.<sup>75</sup>

Undoubtedly, these statistics reflect the (often unconscious) biases of prosecutors, as to when to seek the death penalty, or juries, as to when to impose it. But the requirement for proof of a discriminatory intent makes it impossible to challenge these grave sentencing disparities on equal protection grounds.<sup>76</sup>

One more example of the barrier created by requiring proof of discriminatory purpose is in the area of school segregation. There was obviously no difficulty in proving discrimination in states that by law had required separation of the races in education. But in Northern school systems, where segregated schools were not the product of state laws but residential segregation, the issue arose as to what had to be proved in order to demonstrate an equal protection violation and justify a federal court remedy.

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<sup>73</sup> *Id.* at 298.

<sup>74</sup> Siegel, *supra* note 71, at 8.

<sup>75</sup> Matt Ford, *Racism and the Execution Chamber*, ATLANTIC (June 23, 2014), <https://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081> [<https://perma.cc/EDF3-TQQQ>]. For additional data on race and the death penalty, see *NAACP Death Penalty Fact Sheet*, NAACP (Jan. 17, 2017), [http://www.naacp.org/latest/naacp-death-penalty-fact-sheet/#\\_edn1](http://www.naacp.org/latest/naacp-death-penalty-fact-sheet/#_edn1) [<https://perma.cc/8TFT-ZVCR>], noting racial disparities in federal and state administrations of the death penalty and citing research for Delaware, Florida, and North Carolina).

<sup>76</sup> This type of result should not be surprising, given that even where actual animus is demonstrated by a juror, it can be very difficult to overturn jury decisions. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (finding that multiple juror affidavits claiming that another juror made comments premised upon negative racial stereotypes in describing the defendant’s potential guilt was sufficient to overcome a Sixth Amendment rule strongly favoring nonimpeachment of final jury decisions).

The Supreme Court addressed this issue in *Keyes v. School District No. 1, Denver, Colorado*.<sup>77</sup> The Supreme Court recognized that it was not a case where schools were segregated by statute, but the Court said,

[n]evertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.<sup>78</sup>

Nonetheless, the Court held that absent laws requiring school segregation, plaintiffs must prove intentional segregative acts affecting a substantial part of the school system.<sup>79</sup>

The Court drew a distinction between de jure segregation, which existed throughout the South, and de facto segregation, which existed in the North.<sup>80</sup> The latter constitutes a constitutional violation only if there is proof of discriminatory purpose.<sup>81</sup> This approach is consistent with the Supreme Court cases holding that when laws are facially neutral, proof of a discriminatory impact alone is not sufficient to show an equal protection violation; there also must be proof of a discriminatory purpose.<sup>82</sup> But requiring proof of discriminatory purpose also created a substantial obstacle to desegregation in Northern school systems where residential segregation—which was a product of a myriad of discriminatory policies—caused school segregation.

Thus, proof of racial separation in schools, alone, is not sufficient to establish an equal protection violation or to provide a basis for federal court remedies. As is true in other areas of equal protection law, there must be either proof of laws that mandated segregation or evidence of intentional acts

<sup>77</sup> 413 U.S. 189 (1973).

<sup>78</sup> *Id.* at 201.

<sup>79</sup> *Id.* at 189.

<sup>80</sup> *Id.* at 193, 195–96, 205. De jure segregation requires no additional intent inquiry because it is understood to be “a current condition of segregation resulting from intentional state action.” *Id.* at 205.

<sup>81</sup> *Id.* at 198 (noting, with regard to de facto segregation, “[p]etitioners apparently concede for the purposes of this case that in the case of a school system like Denver’s, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action”).

<sup>82</sup> *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”); *Akins v. Texas*, 325 U.S. 398, 403–04 (1945) (“A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.”).

to segregate the schools.<sup>83</sup> This created an enormous obstacle to the courts' ability to remedy school segregation in Northern cities.<sup>84</sup>

We choose these three examples—cocaine sentencing, the death penalty, and education—because they are areas where there are no statutes allowing recovery based on a disparate impact theory and thus there are enormous effects of the Supreme Court's requirement for proof of discriminatory purpose. Indeed, the areas where there are statutes that allow for proof of discrimination by a showing of disparate impact—Title VII for employment discrimination,<sup>85</sup> the Fair Housing Act,<sup>86</sup> and the Voting Rights Act Amendments of 1982<sup>87</sup>—demonstrate the great benefit of assessing liability without the requirement of discriminatory intent. Rather than embracing the availability of such a remedy for constitutional claims, the Court continues to support a concept of intent that would require victims of racial discrimination to interrogate the mental state of the *very* governmental actor believed to be engaged in bias, rather than allowing for the possibility that intent can be considered “as a historical and sociological inquiry into the legitimacy of the challenged government action.”<sup>88</sup> The Court's current approach not only fails to resolve the disconnect between statutory and constitutional disparate impact claims, but it also undermines equal protection of the laws, especially for vulnerable populations, and ensures the continued instantiation of discrimination within antidiscrimination law.<sup>89</sup>

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<sup>83</sup> For a criticism of the Court's approach, see Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 584 (1965) (“[I]n every case of racially imbalanced schools sufficient responsibility can be ascribed to government to satisfy the requirement that stems from the equal protection clause's proscription of unequal treatment by government.”), and Strauss, *supra* note 51, at 962 (criticizing the Court's focus on discriminatory intent because both “overt and covert racial classifications” can have “insulting, stigmatizing, or subordinating effects”).

<sup>84</sup> See *supra* notes 77–79 and accompanying text.

<sup>85</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–31 (1971) (finding that Title VII, which prohibits employment discrimination based on race, sex, or religion, allows liability based on proof of disparate impact).

<sup>86</sup> See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518–22 (2015) (explaining how the Fair Housing Act allows liability based on disparate impact).

<sup>87</sup> These were enacted to overrule the Supreme Court's decision in *Mobile v. Bolden*, in which the Court found that electoral practices contested under the statute must have been maintained or adopted with discriminatory intent. 446 U.S. 55, 87 (1980); see also *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986) (noting that the purpose of the 1982 Amendments to the Voting Rights Act was to reject *Mobile*).

<sup>88</sup> Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1797 (2012).

<sup>89</sup> For a discussion of how the Court's antidiscrimination jurisprudence legitimates discrimination, see, for example, Barnes, *supra* note 21, at 2047 (“Applying Professor Freeman's method of assessing key antidiscrimination cases in voting, education, and employment within a modern context, this Article identifies the contemporary manner in which post-race discourses are used to legitimize discrimination.”), and Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1057–81 (1978) (reviewing Supreme Court antidiscrimination cases from 1954 to 1974 and finding that in these cases, the Court betrayed the

## II. THE COURT'S CONSIDERATION OF SOCIAL SCIENCE DATA IN *MCCLESKEY*

David Baldus and his research team actually conducted multiple empirical studies of the death penalty in Georgia.<sup>90</sup> Though one can argue about how the majority assessed the research data presented in the case, the Baldus studies were clearly central to the Court's analysis in *McCleskey*. In their examination of capital sentencing cases in Georgia,<sup>91</sup> the researchers "calculated the predicted likelihood that the defendant would receive a death sentence for each case by using a multiple regression analysis."<sup>92</sup> Germane to the claims of Warren McCleskey, the researchers described their method of discerning the role of race in death penalty sentencing: "The regression analyses used to produce the predicted likelihood of a death sentence also included variables for the race of the victim and the race of the defendant.

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ends of equality by valorizing colorblind approaches, overly focusing on violations instead of remedies, and emphasizing perpetrator behavior rather than the conditions of victims).

<sup>90</sup> See BALDUS ET AL., *supra* note 6, at 44–46 (explaining the Charging and Sentencing Study was partially funded by the National Association for the Advancement of Colored People and designed to assess the extent to which impermissible factors such as race affected the Georgia criminal justice process from indictment to sentencing); David C. Baldus et al., *supra* note 5, at 661 (describing a comparative sentencing study for Georgia death penalty cases). Baldus's research was not the first time empirical evidence had been introduced in courts to argue the impact race on death penalty sentencing. See, e.g., SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 100 (1989) (explaining a study using FBI Supplemental Homicide Reports to evaluate death penalty in eight states from 1976 to 1980); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 AM. ACAD. POL. & SOC. SCI. 119, 126–33 (1973) (describing a study on racial discrimination in death penalty sentences for race in the South from 1945 to 1965).

<sup>91</sup> For the comparative review of death sentences in Georgia, the researchers looked at separate data sets of cases. See Baldus et al., *supra* note 5. First, they considered 113 murder cases decided before September 29, 1972 (when *Furman v. Georgia*, 408 U.S. 238 (1972), was decided) where the death penalty was imposed in 20 cases. *Id.* at 680. The second set of data was for 594 post-*Furman* murder defendants who received 203 penalty trials with 113 death sentences being imposed. *Id.* Lastly, 68 of the post-*Furman* cases were used to compare excessive sentences across cases in a manner designed to mimic the Georgia Supreme Court's process of review. *Id.* at 683. For the Charging and Sentencing Study, the researchers looked at death-sentencing rates for all murder and voluntary manslaughter cases in Georgia (2484). BALDUS ET AL., *supra* note 6, at 314–15.

<sup>92</sup> Baldus et al., *supra* note 5, at 689. The researchers claimed that multiple regression analysis was preferred due to the sample size of relevant cases. BALDUS ET AL., *supra* note 6, at 314–16 (1990) (noting they first attempted to use cross-tabular techniques to control for variables, but with 501 cases, "the limits of a fine-grained cross-tabular analysis are quickly reached"). The researchers also paired two methods—salient factors method and main determinants method—to assess the death penalty. The saliency measure was designed to assess the features of the case most likely to have affected the sentencing decision. Baldus et al., *supra* note 5, at 681–83 (describing how salient factors were used to assess which cases were most similar and then compute the rates of death-penalty sentencing). The main determinants method identified similarities in factual characteristics that affected jury determinations. *Id.* at 684.

This was done to increase the validity of the weight assigned to each legitimate aggravating and mitigating factor underlying the index.”<sup>93</sup>

In one of their studies, the researchers found that a relatively small number of cases sentenced defendants to death and that the presence of aggravating factors most influenced discretionary decisions by the prosecutors and juries.<sup>94</sup> The studies confirmed that the death penalty was handed down less often in cases with black victims,<sup>95</sup> and this was so even when there were more aggravating factors.<sup>96</sup> With regard to this finding the researchers claimed:

This disparity is particularly apparent when prosecutors are deciding whether to seek a death sentence, and its effect persists after one adjusts for the aggravation level of different cases. In other words, our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases.<sup>97</sup>

The disparity based on the race of the victim was also tied to aggravating factors in the cases, with race-of-victim effects being largest in the more aggravated cases.<sup>98</sup>

In the Baldus Charging and Sentencing Study—which provided the data most considered in *McCleskey*<sup>99</sup>—for over 2000 Georgia murder and manslaughter cases, the researchers analyzed 230 potentially aggravating,

<sup>93</sup> Baldus et al., *supra* note 5, at 689 n.98. Regarding *McCleskey*’s case in particular the researchers claimed, “The centerpiece of race-of-victim evidence was the partial-regression coefficient for the race-of-victim variable estimated in a logistic-regression analysis after controlling for a core model of thirty-nine legitimate variables.” BALDUS ET AL., *supra* note 6, at 316–17 (“The linear-regression coefficient estimated for the race-of-victim variable, after adjustment for the 39 core background variables, was .08, significant at the .001 level.”).

<sup>94</sup> See Baldus et al., *supra* note 5, at 698. Aggravating factors vary by jurisdiction but have been generally described as follows:

In order to use the death penalty, states must have “genuinely narrowed” the class of people eligible for death to the so-called “worst of the worst.” To do this (in a strategy blessed by the U.S. Supreme Court in its *Gregg* and *Jurek* cases), juries must find certain “aggravating factors” that ostensibly prove that *this* crime and *this* criminal were among the offenders most deserving of death.

Chad Flanders, *Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the Hidalgo Cert. Petition*, 51 U.C. DAVIS L. REV. ONLINE 49, 50 (2017) (citations omitted). In Warren *McCleskey*’s case, the aggravating factors under the Georgia statute were that “the murder was committed during the course of an armed robbery, § 17-10-30(b)(2); and the murder was committed upon a peace officer engaged in the performance of his duties, § 17-10-30(b)(8).” *McCleskey v. Kemp*, 481 U.S. 279, 285 (1987).

<sup>95</sup> Baldus et al., *supra* note 5, at 709 (stating that the rate for Blacks was 15 of 246 (.06) versus 85 of 345 (.24) for Whites).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 709–10 (citation omitted).

<sup>98</sup> *Id.* at 710.

<sup>99</sup> 481 U.S. at 298–99.

mitigating, or evidentiary factors.<sup>100</sup> Based on a regression analysis involving the thirty-nine most significant factors, the researchers compiled data that indicated “the death-sentencing rate for the white-victim cases is 8.3 times (.11/.0133) higher than the rate for black-victim cases.”<sup>101</sup> For these cases, however, they also considered the effects of the race of the defendant. In cases involving black defendants and white victims, the death penalty was imposed at a .21 rate (50/233) while the rate for cases with white defendants and black victims was .02 (2/60).<sup>102</sup> Starting with this raw data of racial disparities, the researchers “developed a series of multivariate analyses to estimate statewide race-of-defendant and race-of-victim effects after adjustment for a variety of legitimate nonracial background factors.”<sup>103</sup> They found that even after controlling for hundreds of legitimate other factors, the effect of the race of the victim and the race of the defendant had a significant effect on the probability that the defendant would receive the death penalty. The bottom line of the multivariate analysis in the Baldus studies was that for a review of over 2000 homicide cases in Georgia, defendants killing Whites were 4.3 times more likely to have the death penalty imposed than those killing Blacks. This disparity could not be explained on nonracial grounds by either the 230 variables originally considered or the smaller subset of 39 particularly pertinent variables that were later considered.<sup>104</sup>

Though the Court did not find the Baldus data to be sufficient evidence of constitutional violations in the administration of Georgia’s death penalty,<sup>105</sup> others have found it very persuasive. For example, supporters of the studies have given great credence to the comprehensiveness of the research.<sup>106</sup> Based on the quality of the studies, a number of commentators have surmised that it is impossible to view the Baldus data as anything other

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<sup>100</sup> *Id.* at 287.

<sup>101</sup> BALDUS ET AL., *supra* note 6, at 314 (citation omitted).

<sup>102</sup> *Id.* at 315 (explaining that the rate for a white defendant with a white victim was .08 (58/748) and for a black defendant with a black victim it was .01 (18/1443)).

<sup>103</sup> *Id.* at 314. Aggravation also produced curious results for these findings. *See id.* at 315 (“Among the less aggravated cases, in which the death-sentencing rates are quite low, the race-of-victim effects are also quite modest. But among the more aggravated cases, which show .16 and .27 death-sentencing rates, the race-of-victim disparities are 13 and 25 percentage points, respectively.”).

<sup>104</sup> *See* NINA M. MOORE, THE POLITICAL ROOTS OF RACIAL TRACKING IN AMERICAN CRIMINAL JUSTICE 71 (2015).

<sup>105</sup> 481 U.S. at 308.

<sup>106</sup> *See, e.g.,* Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1275–76 (1985) (describing the research as “the most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that is likely to be developed in the foreseeable future”); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1236 (2013) (describing the Baldus studies at the time as “the most complex and thorough study of its kind”).

than strong evidence that the consideration of race influenced the operation of Georgia's death penalty.<sup>107</sup> Some commentators, however, have noted that the data in Baldus's studies, which did not specifically implicate the type of process failings the Court previously identified as unconstitutional in *Furman v. Georgia*,<sup>108</sup> were by their very nature not of a type that could have resulted in a finding of unconstitutionality.<sup>109</sup>

Others took issue with the studies' methods. A number of scholars problematized Baldus's use of regression models. For example, Baldus's effort was criticized as follows: "To be fair to the researchers, extracting reliable data on the many factors that go into a capital sentencing decision from the case files is a huge task, perhaps an impossible one. But we are concerned with the quality of the product, not the quality of the effort."<sup>110</sup> Importantly, the Baldus team acknowledged the limits of their research method, stating:

Regression analysis is subject to a variety of weaknesses, one being that it can only estimate for any given factual characteristic the average impact in all cases. It cannot identify the specific factors that most influenced the jury in any particular death sentence case under review. On the other hand, we do suggest that understanding the factors that are generally important to juries may assist a court in trying to identify the most important factors in any individual case.<sup>111</sup>

At least one critic of the Baldus studies, however, not only surmised that statistical models are inappropriate and ineffective for measuring discrimination in capital sentencing decisions, but also that the dataset in the Charging and Sentencing Study was flawed.<sup>112</sup>

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<sup>107</sup> See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1398–400 (1988) (explaining why the district court in *McCleskey* was "clearly erroneous" in rejecting the Baldus study).

<sup>108</sup> 408 U.S. 238 (1972) (holding the imposition of the death penalty in these cases violated the Eighth Amendment because of the arbitrary manner in which it was imposed).

<sup>109</sup> Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 1010–11 (2015).

<sup>110</sup> Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 153 (2012).

<sup>111</sup> Baldus et al., *supra* note 5, at 689. The Baldus team also included a description of the following danger with regression analysis:

The principal problem with the regression-based approaches is the circularity inherent in using factors identified as the most predictive of the observed results as the basis for testing the system's consistency. The tendency of multiple regression analyses to generate a unique overfitted solution with respect to a particular set of decisions compounds this problem. The result is that matches based upon factors identified in this way tend to exaggerate the degree of consistency within the system undergoing analysis.

*Id.* at 695.

<sup>112</sup> Joseph L. Katz, Warren McCleskey v. Ralph Kemp: *Is the Death Penalty in Georgia Racially Biased?*, in *CAPITAL PUNISHMENT: A BALANCED EXAMINATION* 400 (Ewan J. Mandery ed., 2005)



Though the Supreme Court rejected the Baldus studies' data as evincing a significant risk that race impermissibly affected Georgia's administration of the death penalty or that there was purposeful discrimination in McCleskey's case, Justice Powell did not note any particular weaknesses with regard to how the data was collected or assessed.<sup>113</sup> Rather, he criticized the Baldus studies on a basis that all empirical studies could be criticized: the data failed to prove to an absolute certainty a causal link between race and the imposition of the death penalty. Justice Powell thus seemed to require that the statistical model provide proof of a "but for" relationship or "counterfactual dependence" between racial consideration and death,<sup>114</sup> rather than allowing for a broader concept of causation to govern the analysis.<sup>115</sup> For example, his statement forecloses the possibility that the deliberation process could be captured by "redundant causation," where a number of potential causes compete in bringing about an effect.<sup>116</sup> Further,

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(challenging the coding of questionnaires used in the Baldus research and noting that over 100 questionnaire items were unknown for a significant number of cases in the dataset). Picking up on arguments advanced by Joseph Katz, another researcher claimed there were potential explanations other than bias for the racial variance observed in the Baldus studies. See ALFRED B. HEILBRUN, JR., CRIMINAL DANGEROUSNESS AND THE RISK OF VIOLENCE 123–26 (1996) (discussing Katz's claim that black defendant/white victim cases involve fewer mitigating circumstances and introducing research that cases with white victims involved more aggravating factors and that Blacks who killed Whites were more dangerous).

<sup>113</sup> The disengagement with the studies increased at each level of review. As one scholar noted:

The district court took on the study directly and held that it is so flawed that it proves nothing. The court of appeals retreated, but only halfway: it assumed that the study was valid but rejected it on the inexplicable empirical ground that the magnitude of discrimination shown was constitutionally insufficient. The Supreme Court eliminated all empirical issues entirely by deciding that this type of evidence cannot in principle establish a violation of the Constitution.

Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1906, 1915 (2012).

<sup>114</sup> Reiss, *supra* note 8, at 22; see also Marini & Singer, *supra* note 9, at 350 ("An important implication of our analysis is that subject-matter considerations play a critical role in identifying the evidence needed to support a causal inference and, therefore, must play a critical role in designing research to obtain that evidence.").

<sup>115</sup> The exploration of causal relationships is at the core of social science research. See JOHN M. NEALE & ROBERT M. LIEBERT, SCIENCE AND BEHAVIOR: AN INTRODUCTION TO METHODS OF RESEARCH 11 (2d ed. 1980) ("The critical problem for social science research is always one of determining the relationship among well-specified variables."). As the following passage suggests, however, the nature of causal links can be myriad and complex:

The search for causal relationships in nature is rarely straightforward. For one thing, there are a number of different types of causal relationships. Moreover, these different types can operate in various combinations to influence a given phenomenon . . . [F]our broad types of causal relationships can be identified: necessary and sufficient relationships, necessary but not sufficient relationships, sufficient but not necessary relationships, and contributory relationships.

LIEBERT & LIEBERT, *supra* note 7, at 88.

<sup>116</sup> Reiss, *supra* note 8, at 22. In other words, Justice Powell not only saw causation in *McCleskey* through a lens that was deterministic, his views required the Baldus data to do a great deal of work because his theory of causation and the social sciences was fairly unitary, rather than open to exploring a "plurality of causal assumptions." John Gerring, *Causation: A Unified Framework for the Social Sciences*, 17 J.

he reduced the data's value to an assessment of whether it proved the existence of an unacceptable risk of racial prejudice influencing capital sentencing decision-making.<sup>117</sup>

Justice Powell then went on to champion the importance of preserving discretion for jurors and to suggest the unexplained racial correlations would not be regarded as invidious.<sup>118</sup> In conclusion, the Court held that Baldus's data had not proven the existence of a "constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."<sup>119</sup> The majority reached its decision without significantly engaging with the robustness of the data in the Baldus studies<sup>120</sup> or articulating the nature of the data that could have sustained a causal inference between race and the imposition of the death penalty.<sup>121</sup> Other than to describe the data as incapable of proving juror motivation in McCleskey's individual case, the real concerns in the opinion centered on what it would mean for the Court to accept such evidence as proof of discrimination.

The *McCleskey* Court also rejected the dissent's framing of the type of racial impact data that should trigger strict scrutiny analysis under the Fourteenth Amendment. Justice William Brennan's dissenting opinion—which Justice Thurgood Marshall, Justice John Paul Stevens, and Justice

THEORETICAL POL. 163, 163 (2005) ("The plural vision of causation has a long lineage. Aristotle divided the subject into four, quite different, types: formal causes (that into which an effect is made, thus contributing to its essence), material causes (the matter out of which an effect is fashioned), efficient causes (the motive force which made an effect), and final causes (the purpose for which an effect was produced).").

<sup>117</sup> *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987). This framing essentially questions whether the causal relationship between racial bias and capital sentencing is "necessary and sufficient" rather than sufficient but not necessary (e.g., bias is one of many causes) or contributory. See LIEBERT & LIEBERT, *supra* note 7, at 88.

<sup>118</sup> *Id.* at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey's* case acted with discriminatory purpose.").

<sup>119</sup> *Id.* at 313. The Court also expressed concern that racially correlative data of the type considered in the context of the death penalty would also likely exist at other junctures in the criminal justice system and that the arguments in the case were better suited to be addressed by legislative bodies. *Id.* at 319.

<sup>120</sup> Justice Powell did indicate that since studies provided that any number of other considerations could sway juror deliberations, including a defendant's attractiveness, studies such as Baldus's offered "no limiting principle to the type of challenge brought by *McCleskey*." *Id.* at 318. Justice Powell also extensively cited to the district court's criticisms of the Baldus study, without endorsing them. *Id.* at 287–89.

<sup>121</sup> See, e.g., Siegel, *supra* note 71, at 1276 ("After rejecting the Baldus study as insufficient proof of discriminatory purpose in *McCleskey's* case, the Court seemed wholly uninterested in inviting other plaintiffs to explore what the 'statistically valid' Baldus study or other statistical evidence might show about the risk of racial bias in capital sentencing or the criminal justice system more generally." (footnote omitted)).

Harry Blackmun also joined—began with a description of a hypothetical conversation between McCleskey and his counsel, where the defendant asks whether he will be sentenced to die. Given the data that a black person that killed a white person in Georgia was most likely to be sentenced to death, the dissenting Justices surmised that McCleskey could not help but figure out during the conversation that race would play a role in whether he “lived or died.”<sup>122</sup> The dissent, then, criticized the majority for failing to see the systemic consequences of race casting such “a large shadow on the capital sentencing process.”<sup>123</sup> They made this claim even though Baldus admitted that his study at best helped to establish “a likelihood that a particular factor entered into some decisions . . . .”<sup>124</sup> The dissent, however, could have pressed further by asking an important question the majority failed to consider: If racial animus does not explain the persistent racial effects arising in Baldus’s statistical models, What does?

The tension in *McCleskey* over what types of social science data should be regarded as rigorous enough to support a finding that the case involves an unconstitutional discriminatory purpose remains a relevant matter for inquiry. This is especially the case in criminal proceedings, where studies conducted after *McCleskey* continue to routinely find racial disparities in punishment adjudication.<sup>125</sup> To be certain, measuring the effects of race within a study that employs multiple regression analysis can present challenges.<sup>126</sup> The assessments the Court does provide regarding the meaning of the racial impact data and causal inference, however, are unsatisfying. In

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<sup>122</sup> *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting).

<sup>123</sup> *Id.* at 321–22.

<sup>124</sup> *Id.* at 322 (internal quotation marks omitted). The dissent claimed absolute causality was not needed because the controlling decision in *Furman* only concerned itself with a risk that the sentence being imposed based on arbitrary factors. *Id.*

<sup>125</sup> See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006); Shatz & Dalton, *supra* note 106, at 1246 (“Since *McCleskey*, there have been numerous empirical studies focused on racial disparities in death-charging and death-sentencing, and virtually all found significant racial disparities in death-charging, death-sentencing, or both.”); Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012).

<sup>126</sup> See JACK NIEMONEN, RACE, CLASS, AND THE STATE IN CONTEMPORARY SOCIOLOGY: THE WILLIAM JULIUS WILSON DEBATES 72–75 (2002); Tyler J. VanderWeele & Whitney R. Robinson, *On the Causal Interpretation of Race in Regressions Adjusting for Confounding and Mediating Variables*, 25 EPIDEMIOLOGY 473 (2014); PAUL W. HOLLAND, EDUC. TESTING SERV., RR-03-03 CAUSATION AND RACE 3 (2003), <http://onlinelibrary.wiley.com/doi/10.1002/j.2333-8504.2003.tb01895.x/pdf> [<https://perma.cc/MN73-8ANB>] (“R[ace] is not a causal variable and for this reason [race] effects, per se, do not have any direct causal interpretation. It is also clear, however, that a [race] variable can play some type of important role in causal studies and that more clarity as to what this role is will help us understand concepts like ‘discrimination’ and ‘bias’ in ways that make fruitful use of causal ideas.”).

Part III below, we look at the *Brown v. Board of Education* decision and its consideration of social science evidence to demonstrate how the Court, at times, has accepted much less robust data as supporting the existence of unconstitutional racial discrimination. In Part IV, we discuss the pitfalls of the approaches to social science data utilized in *Brown* and *McCleskey* and articulate some questions and analyses that could improve the Court's consideration of empirical social science data moving forward.

### III. THE COURT'S CONSIDERATION OF SOCIAL SCIENCE DATA IN *BROWN*

The Court has rarely looked to social science data to assess the risk that race is operating impermissibly within decision-making processes of death penalty juries.<sup>127</sup> Much of that hesitancy has centered on the fact that empirical studies, even ones that demonstrate a statistically significant effect of racial considerations, are rarely suitable for supporting claims of an absolute causal connection between race and a sentencing outcome. The irony of the Baldus studies, as suggested above, is that the regression method did, in fact, suggest that race of the victim was a significant variable in explaining how some juries decided who was sentenced to death in Georgia.<sup>128</sup> Although the *McCleskey* majority rejected the studies as proof of impermissible race discrimination under the Fourteenth Amendment, the Court has not always been so demanding in its assessment of what type of social science data pertaining to race are rigorous enough to support equal protection claims.

A number of scholars believe the doll studies conducted by psychologists Kenneth and Mamie Clark were vital to the Court's decision in *Brown*,<sup>129</sup> which upended the "separate but equal" standard that had been

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<sup>127</sup> See Baldus et al., *supra* note 125, at 1729 (“[A]lthough the Court was aware of empirical studies suggesting racially discriminatory patterns, especially in southern states, it has demonstrated a persistent reluctance to confront the race question directly. In a number of capital cases between 1962 and 1986, the Court either declined requests to hear issues of racial discrimination by denying certiorari or resolved the case on other grounds.”). The Court has also not been hesitant to declare some racial impact data to be incapable of supporting the finding of race conscious governmental actions. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618–19 (2013) (claiming, in an opinion authored by Chief Justice Roberts, that Congress had overlooked evidence of racial progress and impermissibly used outdated data of racial disadvantage to justify continuing preclearance practices for voting regulation changes in nine states).

<sup>128</sup> Baldus et al., *supra* note 125, at 1693–94; see also HERBERT I. WEISBERG, BIAS AND CAUSATION: MODELS AND JUDGMENT FOR VALID COMPARISONS 11–14 (2010).

<sup>129</sup> See, e.g., HERBERT HILL & JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION: A STUDY OF SOCIAL AND LEGAL CHANGE IN AMERICAN LIFE 121 (1955); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998); Rachel F. Moran, *What Counts As Knowledge?: A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC'Y REV. 515, 523 (2010) (advancing “[a] new role for social science evidence is perhaps *Brown*'s most lasting contribution, a legal innovation on a par with its iconic status, regardless of whether the case achieved lasting gains in school desegregation”).

in place since the Court's decision in *Plessy v. Ferguson*.<sup>130</sup> In the Clark studies, 253 black children between the ages of three and seven years old were provided black and white dolls and asked such questions as which doll was nice, looked nice or bad, had a nice color, and was more desirable to play with.<sup>131</sup> They were also asked which doll looked like them.<sup>132</sup> The majority of children associated negative qualities with black dolls and positive qualities with white ones. These results were interpreted to mean that segregation led to feelings of inferiority or poor self-esteem.<sup>133</sup> The Court referred to the Clark data when it claimed the harms of segregation are “amply supported by modern authority.”<sup>134</sup> Though the Court cited to research by the Clarks and others in a footnote,<sup>135</sup> Chief Justice Earl Warren wrote that the decision was premised upon “intangible considerations” related to segregation.<sup>136</sup> Some scholars have argued, however, that the research was critical to supporting the Court's claims regarding the harms of

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<sup>130</sup> 163 U.S. 537 (1896). The phrase “separate but equal” was never actually used in the *Plessy* majority opinion. The phrase, however, captures the Court's belief that separate seating created no stigma for Blacks. According to the majority:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Id.* at 551.

<sup>131</sup> See Kenneth B. Clark, *The Effect of Prejudice and Discrimination on Personality Development*, in MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (1950); Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947).

<sup>132</sup> Clark & Clark, *supra* note 131.

<sup>133</sup> See Neil G. Williams, *Brown v. Board of Education Fifty Years Later: What Makes for Greatness in a Legal Opinion?*, 36 LOY. U. CHI. L.J. 177, 182 (2004) (noting that, based on the responses of the children in the studies, “Kenneth Clark reasoned that the self-image of black children was being negatively impacted by segregation in the South”).

<sup>134</sup> *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954). Kenneth Clark also testified about the doll studies during the district court case in *Brown*.

<sup>135</sup> *Id.* at 494 n.11 (listing the following studies: “K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944)”). For brief descriptions of the studies referenced in footnote 11 in *Brown*, see Sanjay Mody, Note, *Brown Footnote 11 in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 802 n.33 (2002).

<sup>136</sup> *Brown*, 347 U.S. at 493. The term “intangible considerations” was also implicated by language earlier mentioned in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (noting that universities are marked by “qualities which are incapable of objective measurement but which make for greatness”).

segregation.<sup>137</sup> This assertion has, however, been contested. As one scholar noted, “Critics advanced two broad attacks against footnote 11. First, a technical critique focuses on the quality of the research cited in footnote 11. Second, a theoretical critique questions the extent to which footnote 11 influenced the outcome in *Brown*.”<sup>138</sup>

Nevertheless, the *Brown* Court ultimately concluded, that with regard to segregated black school children, “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”<sup>139</sup>—a statement that is consistent with Kenneth Clark’s findings.<sup>140</sup> As one scholar has surmised on the significance of the Court’s finding, “The Fourteenth Amendment may permit racial separation but it does not permit racial subordination or racial stigmatization.”<sup>141</sup>

In *Brown*, though it is unclear whether the Justices themselves were aware of scholarly criticisms of the doll studies during the pendency of the case,<sup>142</sup> Chief Justice Warren—like Justice Powell in *McCleskey*—did not

<sup>137</sup> See, e.g., Moran, *supra* note 129. At least one commentator has identified a broader relationship between the research in *Brown* and the larger impact of social science data on constitutional jurisprudence. Heise, *supra* note 16, at 297 (“Although no direct evidence exists to support (or refute) this assertion, indirect evidence abounds to support the claim that footnote 11 empiricized the equal educational opportunity doctrine.”).

<sup>138</sup> Heise, *supra* note 16, at 294.

<sup>139</sup> *Brown*, 347 U.S. at 494. One way the Court could have decided the case without relying upon the doll studies at all would have been to focus on the purpose rather than effect of segregation. See Charles R. Lawrence III, “One More River to Cross”—Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 51 (Derrick Bell ed., 1980) (noting that “segregation American-style . . . has only one purpose: to create and maintain a permanent lower class or subcaste defined as race”).

<sup>140</sup> Even critics of the doll studies who cannot state that the Court relied on the evidence see connections between the Clarks’ conclusions and the Court’s reasoning in *Brown*. See Ernest van den Haag, *Social Science Testimony in the Desegregation Cases – A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 70 (1960) (“Though more vague and less crude, the Court’s reasoning [in *Brown*] strikes me as having something in common with Professor Clark’s conclusions even though not relying on his evidence.”).

<sup>141</sup> BROOKS, *supra* note 18, at 11–12. Tying segregation to feelings of racial inferiority was part of the game plan of social scientists who testified at the trial stage of *Brown*. See *id.* at 13. The Court’s use of the doll studies also had an effect beyond the *Brown* case. See, e.g., Gwen Bergner, *Black Children, White Preference: Brown v. Board, the Doll Tests, and the Politics of Self-Esteem*, 61 AM. Q. 299, 301 (2009) (noting the *Brown* opinion’s use of the studies “create[d] a juggernaut for the racial preference paradigm—while simultaneously reinforcing social psychology’s centrality to U.S. public policy”).

<sup>142</sup> John Davis, counsel for the State of South Carolina, did criticize the doll studies. See William J. Rich, *Betrayal of the Children with Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 CORNELL L. REV. 419, 420 (2005). Though the reasoning was not necessarily based upon the soundness of the studies, at least two Justices were skeptical of relying upon them. *Ides*, *supra* note 15, at 12–13.

seem particularly interested in engaging a discussion of the studies' methods or results. Rather, the doll studies were briefly cited among a group of studies, none of which were extensively commented upon. The studies were treated as evidence of something for which no scientific proof was needed—an understanding that racial segregation infers a message of inferiority and damages the self-esteem of racial minorities.<sup>143</sup> Considered in another way, one can think of the Court as regarding these studies as credible but not dispositive on the question of why segregation is harmful. For reasons such as this, a number of scholars have argued that the social science data was of limited use to the Court in *Brown*.<sup>144</sup> By contrast, for them, “*Brown* vindicates our political, ethical, and moral ideals. It does not rest on the tenuous base of the sociological statement . . . that segregation produces injury to the psyche of Negro youth.”<sup>145</sup>

Since the *Brown* decision, many law and social science commentators have been critical of the Clarks' methodology and findings.<sup>146</sup> For example, Sara Lightfoot commented that the doll experiments did not describe the “natural behaviors and perceptions of children but rather their responses to a contrived experimental task” and failed to inquire into the motivations for

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<sup>143</sup> See Ides, *supra* note 15, at 12–13, at (noting that the doll studies would have been a “dangerously fragile” foundation upon which to base the *Brown* decision and that the social science research was treated as “see also” information); van den Haag, *supra* note 140, at 69 (1960) (“[N]o one will ever know to what extent the Court’s common sense view that Negroes are humiliated and frustrated by segregation was reinforced by Professor Clark’s pseudo-scientific ‘proof.’”). Again, this particular understanding of racial hierarchy as obviously subordinating is most consistent with Neil Gotanda’s theory of “historical race.” See Gotanda, *supra* note 36, at 39.

<sup>144</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 39 YALE L.J. 421, 428 (1960) (addressing the question of whether segregation constituted unconstitutional segregation, he posited “that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid”); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 160 (1955) (noting that while the Court “graciously” mentioned the social science evidence in a footnote, that “the Court was not disposed in the least to go farther or base its determination on the expert testimony”); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003).

<sup>145</sup> Ovid C. Lewis, *Parry and Riposte to Gregor’s “The Law, Social Science, and School Segregation: An Assessment,”* in DE FACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY 115, 131 (Oliver Schroeder, Jr. & David T. Smith eds., 1965). The author acknowledges, however, the studies had been generally believed to be proof of the harm of segregation. *Id.* at 131 & n.93.

<sup>146</sup> See John Hart Ely, *If at First You Don’t Succeed, Ignore the Question Next Time?: Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT 215, 217 n.9 (1998) (describing multiple critiques of the studies’ methods and findings). Critics began to respond to the use of the Clark studies in *Brown* in the years immediately after the decision was handed down. See, e.g., Cahn, *supra* note 144; van den Haag, *supra* note 140. But see Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist’s Role*, 5 VILL. L. REV. 224 (1959) (defending the role of social scientists in the desegregation cases). For a positive gloss on the doll studies, see Robert Carter, *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 22 J. NEGRO EDUC. 68 (1953) (positively describing the content of the doll studies referenced in *Brown*).

the children's choices.<sup>147</sup> Other critics note that the studies failed to evaluate the benefits of integration,<sup>148</sup> lacked a necessary control group,<sup>149</sup> and failed "in isolating the critical variable" that connected self-hatred to school segregation "per se."<sup>150</sup> A number of critics have also commented on the studies' claims regarding segregation being severely undermined by the finding that children from the North who attended integrated schools were more likely to associate blackness with negative attributes.<sup>151</sup> Recently, scholars from law and other disciplines have complained, more generally, about the studies' claims regarding self-esteem/black inferiority<sup>152</sup> and identity formation.<sup>153</sup>

Though claims attacking the methods in the Clark studies are now prevalent, it is not clear that such criticisms would have altered Chief Justice Warren's opinion in the case had they been available then. This is because the consideration of the social science research in *Brown* teaches us something that is confirmed in the Court's review of the data in *McCleskey*—that how the Court interprets racial data may be controlled, in part, by judicial

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<sup>147</sup> Sara Lawrence Lightfoot, *Families as Educators: The Forgotten People of Brown*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION, *supra* note 139, at 5–6.

<sup>148</sup> See van den Haag, *supra* note 140, at 71 ("Curiously, social scientists, with rare exceptions, are not very interested in investigating the effects on Negro children of going to school with hostile whites . . . . The Court's view that 'segregation with the sanction of law' is humiliating is doubtlessly true under the historical circumstances. But the implication that such segregation is *more* humiliating than congregation by legal compulsion is a *non sequitur* . . .").

<sup>149</sup> Heise, *supra* note 16, at 294 (citation omitted). The study also only considered segregation's effects on Blacks. See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, J. AM. HIST. 92, 96 (2004) ("The Court's measure of segregation's psychological costs counted its apparent effect on black children without grappling with the way segregation also shaped the personality development of whites.").

<sup>150</sup> Gregor, *supra* note 18, at 101.

<sup>151</sup> See *id.* at 105; Ely, *supra* note 146, at 217 n.9; Heise, *supra* note 16, at 295; van den Haag, *supra* note 140, at 76–77.

<sup>152</sup> Legal scholar Roy L. Brooks has commented on the backlash toward the studies' treatment of black inferiority:

Whether it is conservatives like Justice Clarence Thomas, who faults *Brown* and its progeny for creating "a jurisprudence based upon a theory of black inferiority," or liberals like Alex Johnson, who flat out states that "*Brown* was a mistake," many African Americans who came of age in the 1960s and 1970s have come to reject *Brown*'s assumption regarding African-American identity.

BROOKS, *supra* note 18, at 17 (citation omitted); see also Proulx, *supra* note 18.

<sup>153</sup> English Professor Gwen Bergner's literary commentary is representative of the identity formation critique:

The doll test discourse not only reflects shifting racial politics but also configures notions of racial identity. Though researchers purport only to measure the psychic effects of systemic racial discrimination, they actually construct an essentialist view of racial identity, whereby black children must choose black dolls to demonstrate "accurate" racial preference. Thus the logic of the doll test discourse is consistent across time even if the results are not: white preference behavior indicates that African American children idealize whiteness, denigrate blackness, and therefore disavow their racial identity.

Bergner, *supra* note 141, at 301.



presuppositions about the meaning of behaviors. That such judicial presuppositions and preferences may displace ostensibly neutral and dispassionate decision-making should not be surprising given the social science research on judicial decision-making, motivated reasoning, and cognition.<sup>154</sup> This claim about judicial decision-making is similar to theories advanced by legal realists.<sup>155</sup> Scholars, however, have problematized the realist account as an oversimplification that “overly privileges a judge’s conscious and deliberate intent . . . [and] discounts the degree to which automatic and unconscious mental processes—biases and heuristics—can impact judicial decisionmaking.”<sup>156</sup> In *Brown*, it is clear that Chief Justice Warren believed that racial segregation negatively affected life outcomes for African-Americans. The social science data, though unconfirmed, may have merely been referenced as evidence that generally confirmed Chief Justice Warren’s beliefs.<sup>157</sup> Similarly, in a world where preserving the discretion of juries and the viability of the criminal justice system were of paramount concern to Justice Powell, the seemingly robust data in *McCleskey* was regrettably deemed insufficient to convince the Court that racial effects were tied to impermissible racial animus.

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<sup>154</sup> See, e.g., Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers’ Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 34, 50 (1999) (reporting on study that found that judges’ sociopolitical attitudes about the specific social issue in question affect their judgments about the admissibility of social science research); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 308 (2013) (explaining psychological theory of motivated cognition and exploring its application to judges); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 863 (2015) (describing how judges rely on their intuitive, emotion reactions without subjecting them to scrutiny to produce rational choices); see also Feingold & Carter, *supra* note 46, at 14 (arguing that motivated reasoning interacts with other cognitive phenomena, which requires mindfulness of how “common biases and heuristics on the one hand, and socially salient stereotypes on the other . . . will predictably and systematically operate as justifiers that facilitate prejudice in the form of judicial deference to evidence that reinforces and perpetuates racial hierarchy in America”).

<sup>155</sup> On the approach to judicial decision-making espoused by legal realists old and new, see Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 338–39 (providing an overview of how the “New Legal Realism” movement is using social science to advance legal research), and Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267–68 (1997) (discussing the realist claim that the political and moral leanings of judges influence legal outcomes). Importantly, some new legal realists have explicitly identified the relevance of empirical studies to charting the space between law on the books and law in action. See, e.g., Bryant Garth & Elizabeth Mertz, *Introduction: New Legal Realism at Ten Years and Beyond*, 6 U.C. IRVINE L. REV. 121, 123 (2016) (emphasizing empirical methods and perspectives to inform the study of law as a “key aspect” of New Legal Realism).

<sup>156</sup> See Feingold & Carter, *supra* note 46, at 10.

<sup>157</sup> See Moran, *supra* note 129, at 524 (noting that some scholars have concluded that Chief Justice Warren’s use of social science was “mere window dressing, a way to justify a decision that the justices would have reached in any event”).

That motivated reasoning may help to explain how social science data was used in *McCleskey* is ironic but not unforeseeable given the *Brown* Court's treatment of such data. Neither *Brown* nor its progeny of cases considering social science data specifically articulated a coherent standard for considering such data. This may have been so for at least two reasons. First, because there was no real discussion of the doll experiments or any of the studies listed in footnote 11, the *Brown* Court signaled there was no requirement for engaged analysis. Second, to the extent the *Brown* opinion was seen as ushering in a requirement for lower court judges to consider research studies—at least in the context of civil rights cases—many of them were not familiar with evaluating expert evidence of this kind.<sup>158</sup> A general failing of *Brown*, then, was that it did not lay the groundwork for courts to develop a more regularized approach to considering empirical data. With regard to racial impact data in particular, the Court also overlooked unique challenges that could arise related to research design in this domain, as well as the fraught social and political sensitivities surrounding the subject. These two points are considered in the next Part.

#### IV. EXPLICATING SOCIAL SCIENCE DATA AND THE MEANING OF RACE IN THE COURTS

As Professor Mark Yudof, former Chancellor of the University Texas system and President of the University of California system,<sup>159</sup> has noted:

It is difficult to make systematic observations about the reliance of courts on social science research; the uses to which the evidence is put depend, in part, on its nature. Since *Brown*, my impression is that, with few notable exceptions, there has been a marked decline in the willingness of the Supreme Court to embrace social science evidence as the basis for constitutional decisions. To be sure, the Court occasionally makes reference to social science research, but primarily on factual matters.<sup>160</sup>

In light of Yudof's above analysis, it appears that the Supreme Court's limited use of the social science evidence in its *Brown* opinion, in effect, foreshadowed its misapprehensions about such research that surfaced in

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<sup>158</sup> *Id.* at 523 (noting that *Brown* has been described as involving a situation where “courts and judges were thrust into ‘relatively unfamiliar intellectual terrain’ that revealed their limitations in dealing with expert evidence” (quoting Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1312 (2002))).

<sup>159</sup> See RODNEY A. SMOLLA, *THE CONSTITUTION GOES TO COLLEGE: FIVE CONSTITUTIONAL IDEAS THAT HAVE SHAPED THE AMERICAN UNIVERSITY* 15 (2011).

<sup>160</sup> Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978).

*McCleskey*.<sup>161</sup> Unfortunately, as a result of both the *Brown* and *McCleskey* opinions, it is difficult to discern how much and what kinds of racial impact data are needed to support constitutional complaints. This is so, in part, because the Court inconsistently evaluates empirical data on race and its impact,<sup>162</sup> and at times, its decision-making appears to be largely animated by matters external to the data.<sup>163</sup> Moreover, even if the courts were inclined to develop better standards for reviewing social science data, they would need to be mindful of how their assessments, including of race-related data, may turn on pre-commitments or “pre-understandings” that are often associated with stereotypes.<sup>164</sup> And while courts may make lay claims about concepts such as causation that they believe to be neutral or objective in nature, even determinations of this kind are somewhat controlled by experience and expectations.<sup>165</sup> Given that a majority of the current Supreme Court Justices have neither displayed a great interest in a principled interrogation of race and disadvantage nor the importance of incorporating empirical data within judicial analysis, it is doubtful that federal courts could be convinced to forgo some of the flexibility they now enjoy in addressing such matters. Should, however, the day arrive where the attitudes of a majority of the Justices change, below we suggest questions and

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<sup>161</sup> See Moran, *supra* note 129, at 524 (“Other critics go even further . . . contending that there never was a golden age of law and social science after *Brown*, which in turn collapsed with the *McCleskey* decision.”).

<sup>162</sup> The following description is instructive:

In fact, most of the [trial court’s] criticisms of Professor Baldus’s research are unfair and inaccurate, and many of the statements about statistics are simply false, as I have discussed at length elsewhere. But there is little reason to pay attention to the district court opinion. Its rationale and conclusions were all but ignored by the Eleventh Circuit on appeal and by the Supreme Court in its review of the Eleventh Circuit.

Gross, *supra* note 113, at 1913. The appellate court, however, still determined that “[v]iewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system.” *McCleskey v. Kemp*, 753 F.2d 877, 899 (11th Cir. 1985).

<sup>163</sup> See *supra* note 154 (discussing judicial motivated reasoning). At bottom, however, our claim is that is hard to make a successful normative argument about data consideration within cases because some courts may often behave opportunistically. This is essentially a legal realist position. See *supra* notes 155, 160.

<sup>164</sup> Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847 (1994) (defining pre-understanding as the tendency of courts to make decisions about what is going on in a case by simply assessing the identities of the parties involved); Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 974 (2006) (describing that within courts, “a series of inferences related to negative connotations about class, race, and gender can cause formal, doctrinal narratives to erase personal identity and substitute an alternate construction of a legal subject”).

<sup>165</sup> See Marini & Singer, *supra* note 9, at 379 (“Causal inference occurs not only through the ‘bottom-up’ process of forming hypotheses on the basis of empirical observation but also through the ‘top-down’ process of relating what is observed empirically to an existing body of relevant knowledge, including knowledge of the world gained through previous experience with similar empirical relations.”).

considerations that could lead to more useful deliberations around social science data and racial impact.

### A. Appellate Review of Research Data

As Chief Justice Roberts's quotation that begins this Essay suggests, there does not appear to be an overriding sense on the Court that social science data should be given deference. And while there are cases that have used some sophisticated datasets,<sup>166</sup> the Court has not embraced a set of best practices for how to evaluate the use of such data. This is true despite the fact that the Court has recognized that there are situations in which scientific expertise is required. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court established a rule for guiding trial courts in their assessments of the admissibility of expert opinions under Rule of Evidence 702.<sup>167</sup> The *Daubert* case itself involved the scientific validity of a plaintiff's study offered to prove that the anti-nausea drug in question in the case caused birth defects.<sup>168</sup> There, the Court held that it was incumbent upon trial judges confronted with such science-based questions to make sure that the "expert's testimony both rests on a reliable foundation and is relevant to the task at hand."<sup>169</sup> *Daubert* was decided after the *Brown* and *McCleskey* cases.<sup>170</sup> Part of what cases like *Brown*, *McCleskey*, and now *Gill* demonstrate, however, is that courts need to develop more nuanced standards for evaluating and admitting social science research data in order to effectively treat social science as a science.<sup>171</sup>

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<sup>166</sup> There are some research areas, such as Law and Economics, where judges appear comfortable applying underlying theories and methods. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983) (exploring law and economics applied to justice, ancient legal institutions, privacy and reputation, and racial discrimination); Adam Chodorow, *Economic Analysis in Judicial Decision Making - An Assessment Based on Judge Posner's Tax Decisions*, 25 VA. TAX REV. 67, 68-69 (2005) (describing judges who use economic analysis to varying degrees to resolve the issues before them as jurists). There are also certain areas of law, such as antitrust, where courts have routinely analyzed economic data. See Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 18-20 (2016) (describing quantitative and qualitative economic models important to analyzing competition cases). Finally, as we have previously stated here, prior to *McCleskey*, multiple regression analysis had been used within the context of Title VII and other antidiscrimination cases. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); Barbara A. Norris, *Multiple Regression Analysis in Title VII Cases: A Structural Approach to Attacks of "Missing Factors" and "Pre-Act Discrimination,"* 49 LAW & CONTEMP. PROBS. 64 (1986).

<sup>167</sup> 509 U.S. 579 (1993).

<sup>168</sup> *Id.* at 582.

<sup>169</sup> *Id.* at 597.

<sup>170</sup> Prior to the decision in *Daubert*, the standard from *Frye v. United States* was often used to assess the admission of expert testimony. 293 F. 1013 (D.C. Cir. 1923). In the *Brown* case, many critics took issue with the testimony provided by Kenneth Clark in the lower court. See *supra* notes 18, 140.

<sup>171</sup> Professors John Monahan and Laurens Walker have previously called for improving standards for considering social science data in courts. See, e.g., John Monahan & Laurens Walker, *Judicial Use of*

*Daubert* essentially controls the admission of expert testimony at the trial level. Both the *Brown* and *McCleskey* cases included such testimony. In federal court, however, decisions made by judges at the trial level are typically assigned to one of three classifications with an accompanying designation for appellate review: “questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion).”<sup>172</sup> Admissibility of expert testimony and data may implicate more than one of these classifications.<sup>173</sup> As such, some trial court decisions on whether evidence should be admitted as scientifically valid, may be reviewed *de novo* (anew) by appellate courts, including the Supreme Court. The three distinct judicial approaches the district court, appeals court, and Supreme Court took toward the Baldus data in *McCleskey*<sup>174</sup> are instructive on this point but also evince the peculiar and

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*Social Science Behavior*, 15 LAW & HUM. BEHAV. 571 (1991) (proposing steps that courts should undertake when reviewing empirical data of human behavior); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988). We clearly agree with other scholars who believe that much of the research conducted within the social sciences, including complex datasets such as those produced in the Baldus studies, should be covered by the rule in *Daubert*. See, e.g., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:31 (David L. Faigman et al. eds., 2017) (arguing that under Rule 702, “social science does not differ substantially from forensic science”). This is not a universally held view. See *id.* (“[D]espite the free use of the science label, the general perception is that social science is soft and non-threatening.” (citation omitted)); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702.5 (4th ed. 1996) (noting “there is no obvious clear demarcation between scientific knowledge and technical and other specialized knowledge”); Renaker, *supra* 25 at 1673–80 (attempting to distinguish between the scientific-knowledge testimony to which the *Daubert* rule applies and specialized-knowledge testimony, to which it does not). A more detailed explanation of appropriate subject matter for the *Daubert* inquiry from one state provides as follows:

Finally, the trial court must determine whether the expert is testifying about the right thing, that is, a subject matter amenable to expert opinion. An appropriate “subject matter” has been characterized as one in which scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A matter generally qualifies where it is “not within the range of ordinary training or intelligence,” is “too complex to be really grasped by the average mind,” or is sufficiently beyond common experience.

Robert L. Sterup, *Into the Twilight Zone: Admissibility of Scientific Expert Testimony in Montana After Daubert*, 58 MONT. L. REV. 465, 469 (1997) (citation omitted).

<sup>172</sup> *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (internal quotation marks omitted) (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

<sup>173</sup> The type of appellate review turns on the nature of the trial court’s actions. For example, a trial court’s decision on whether a preliminary hearing is warranted as part of its gatekeeping function is likely reviewed under an abuse of discretion standard. See MODERN SCIENTIFIC EVIDENCE, *supra* note 171, at 29. The same standard would be applied to trial court evaluations of the qualifications of experts. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137–38 (1977); MODERN SCIENTIFIC EVIDENCE, *supra* note 171, at 49. Whether the trial court has effectively fulfilled the gatekeeping function, however, may be reviewed *de novo*. *Id.* at 32 (citing *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000)).

<sup>174</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 288–89 (1987); *supra* notes 113, 162. Describing the assessment of the Baldus studies in the lower courts, Justice Powell noted,

the [trial] court found that the methodology of the Baldus study was flawed in several respects. Because of these defects, the court held that the Baldus study “fail[ed] to contribute anything of

inconsistent manner in which these reviews may be conducted. Moreover, appellate courts are currently under no obligation to comment on whether they believe the lower courts' assessments are consistent with any field-specific standards for evaluating methods or results.<sup>175</sup>

One way to address the anomaly of courts failing to reveal precisely how social science data is considered would be to develop more specific guidance or guidelines for appellate courts evaluating the sufficiency of the scientific record in the lower courts. In certain areas of the law, courts have, at times, used technical advisors and special masters to educate courts on particularly complex matters.<sup>176</sup> There is no information on whether courts would be open to broadly applying such an approach in cases involving social science studies. Another option would be for federal courts to develop an analytical research arm, similar to the Congressional Research Service or Government Accounting Office. Doing so, however, would not negate the need to create substantive standards for the review of empirical data.

At a bare minimum, appellate courts need to be open to conducting inquiries useful for the enterprise of more carefully reviewing lower court assessments of research data. Though inquiries under the *Daubert* standard typically relate to assessing novel science, admissibility may turn on the qualifications of the expert introducing the testimony.<sup>177</sup> Courts applying the *Daubert* standard, however, formally consider four factors—testability/falsifiability, error rate, peer review, and general acceptance—in determining the validity of proffered scientific evidence.<sup>178</sup> It should be incumbent upon appellate courts, however, to ensure that lower courts more thoroughly interrogate the soundness of methods and research results prior to adopting or discarding a study's findings. The types of questions appellate courts would expect to see explicated below might include the following

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value" to McCleskey's claim . . . The Court of Appeals for the Eleventh Circuit, sitting en banc, carefully reviewed the District Court's decision on McCleskey's claim. It assumed the validity of the study itself and addressed the merits of McCleskey's Eighth and Fourteenth Amendment claims. *McCleskey*, 481 U.S. at 288–89 (footnote and citation omitted). The Supreme Court did not critique the merits of the study but found the results "insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." *Id.* at 297.

<sup>175</sup> Rather, under *Daubert*, the primary requirement is that trial judges "demonstrate on the record—a sufficient appreciation of the scientific method to make a preliminary assessment." MODERN SCIENTIFIC EVIDENCE, *supra* note 171, at 32–33.

<sup>176</sup> See, e.g., Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 287; Neil A. Smith, *Complex Patent Suits: The Use of Special Masters for Claim Construction*, 2 LANDSLIDE 36 (2009).

<sup>177</sup> MODERN SCIENTIFIC EVIDENCE, *supra* note 171 at 44 (indicating that trial courts may rely on expert qualifications alone to justify admissibility of testimony, but citing cases that find such a decision to be an abuse of discretion).

<sup>178</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993). This list is not meant to be exhaustive. See, e.g., *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

nonexhaustive list: What was the purpose of the study? For what purpose has the introducing party offered the findings to the court? What experts, if any, have been consulted in the creation of the study? What are the methods employed? Are there generally accepted standards within a relevant field for interpreting these methods? How should one evaluate reliability (reproducibility), viability,<sup>179</sup> and the strength of the findings of the study? Are there confidence limits? Have others within relevant disciplinary communities assessed the results? Does the data tend to confirm how a rule should be applied or a fact of consequence that should be considered by a court? Have other studies of this kind confirmed similar findings? Are there complicating variables, such as race, which implicate additional matters for consideration? The suggested number of inquiries, their precise wording, and the constitution of the judicial, legislative, or academic body responsible for their development are all matters requiring significant discussion and debate that are beyond the scope of this Essay. The Court's analysis in *Brown* and *McCleskey*, as well as the comments made during the oral argument for the *Gill* case, however, confirm that a meaningful intervention of this kind is long overdue.

Drawing specific attention to how appellate courts address the review of social scientific data should result in fewer cases where courts fail to identify particular strengths and weaknesses of some study or speak in incommensurate terms about the research across the trial and appellate decisions. It would also prevent a lower court from outright refusing to consider social science data for fear that it is too complicated. Should guidelines governing the appellate review of the admission of social science

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<sup>179</sup> The courts' queries should extend to both internal viability ("whether the methods and analyses employed were sound enough to justify the inferences drawn by the researcher") and external viability ("whether the inferences drawn from the study can be applied to groups beyond those actually studied"). SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 68–69 (John Monahan & Laurens Walker eds., 9th ed.). The *Daubert* case itself set out the viability inquiry as a key function of the trial court. 509 U.S. at 594–95 (noting that the judge's role in applying Rule 702 was to assess "scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission"). As the following passage provides, discerning viability within this context, however, can be quite difficult:

The *Daubert* Court's ruling that scientific validity constitutes a preliminary fact under Rule 702, while not surprising as a general evidentiary matter, generated a second issue that is largely unique to scientific evidence: What is the proper focus of the validity assessment to be made by judges? In ordinary evidentiary contexts, the preliminary facts judges must find when applying evidentiary rules are plainly defined and unique to the respective case . . . . In contrast, the preliminary fact at issue in *Daubert* was whether the methods and principles of years of scientific research and numerous published studies support expert testimony that Bendectin is a teratogen that causes birth defects when ingested by people like the plaintiff's mother. This is not a straightforward factual inquiry or one that arises only in the case at hand.

David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859, 869 (2016).

evidence be adopted, a helpful outcome would likely be that trial courts would also improve their decision-making in such cases, as they would have a better understanding of the types of analysis that are likely to be upheld during appellate review. While there is certainly a need for better standards for courts considering the import of research data, we next consider special concerns a court would need to address when such studies advance findings regarding race and other social identity categories.

### B. *Special Considerations for Racial Impact Data*

The Roberts Court has not been particularly progressive in its approach to state considerations of racial classifications, regardless of whether such classifications have been bolstered by empirical data or not. In only a handful of cases in the last several years has the Court been willing to either sanction invidious race-based practices<sup>180</sup> or to uphold race-conscious benefits programs.<sup>181</sup> Rather, in its recent cases, the Court has either employed conceptions of racial discrimination that have moved away from previous understandings of race-based harm<sup>182</sup> or it has largely ignored the significance of historical contexts when considering racial impact data.<sup>183</sup>

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<sup>180</sup> See Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (providing that proof of explicit racial bias can be sufficient to overcome a preference for finality regarding jury decisions); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (approving the use of disparate impact claims in the fair housing context).

<sup>181</sup> See Fisher v. Texas, 136 S. Ct. 2198 (2016) (upholding the race-conscious admissions plan of the University of Texas Law School).

<sup>182</sup> See Ricci v. DeStefano, 557 U.S. 557 (2009) (finding that when a governmental entity takes actions to avoid a disparate impact claim by workers of color, it may create a discriminatory intent claim for others); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (finding that attempts by schools to manage diversity through assignment plans in primary and secondary school was impermissible “racial balancing” rather than a tool to combat the legacy of segregation).

<sup>183</sup> Perhaps the most obvious recent example of the Court ignoring history is in Chief Justice Roberts’s majority opinion in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In that case, Roberts declared that the racial data were outdated and that historical disadvantages in voter activity have been overcome. He did so, however, despite claims by scholars that “[a]n overwhelming amount of social scientific evidence demonstrates that current conditions in jurisdictions covered by Section 4 are consistent with past conditions.” Pantea Javidan, *Legal Post-Racialism as an Instrument of Racial Compromise in Shelby County v. Holder*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 127, 129 (2015). Roberts also deployed an essentialist lens in his racial progress narrative for elected black officials. This is the case because most of the political success he pointed to pertains to black men and he completely overlooked intersectional analyses suggesting differential results for black women. See Barnes, *supra* note 21, at 2081 & n.196. For an overview of the important literatures on anti-essentialism and intersectionality, respectively, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (identifying essentialism as a fallacy arising when one believes an “essence” marks membership within a particular social group and results in that group being perceived as necessarily representative of the interests of constituent subgroups), and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (describing a theory of intersectionality premised upon an interconnection between social identity



Given the Court's present disposition with regard to considerations of race, having a majority of Justices pay special attention to how social science studies define, measure, and assess the concept is likely to be a challenge. The result in racial impact cases such as *McCleskey*, however, indicates that is exactly the reorienting that is needed. One important problem, then, is that merely regularizing how courts consider social science data, including studies addressing race as a variable, will not guarantee better outcomes.

In addition to gaining the tools to more carefully consider research data, courts must also question the ways in which these underlying studies address race. Historically, empirical studies have not always been particularly sensitive to racial dynamics. First, some studies have, at times, studied race in an abusive and immoral manner.<sup>184</sup> Second, even studies where methods are not abusive may suffer from insensitivities in design and analysis that result in inaccurate assessments of racial effects<sup>185</sup> or “somewhat carelessly incorporate[] race into their research by treating it as a readily measurable, dichotomous (black/white) variable that affects law at various points.”<sup>186</sup> Finally, at least within sociolegal research, where studies have not been typically influenced by critical perspectives on identity, race has not always been seen as either a factor germane to some research study or worthy of study as a separate topic.<sup>187</sup> Given that some social science studies have often failed to account meaningfully for how race has been operationalized, improving how courts assess empirical data may not necessarily ensure that courts become appropriately sensitive to racial impact data. There is also the problem that the use of social science data in *Brown* reveals: adopting more rigorous standards for research on race may lead to studies—the findings of which progressive courts might facially agree with—being rejected. Hence, before we can move forward with better educating courts on race and social

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categories such as gender, race, and class, where the categories create overlapping and reinforcing systems of subordination).

<sup>184</sup> One need only reference the infamous Tuskegee experiments to see such an example. See JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993); DeNeen L. Brown, ‘*You’ve Got Bad Blood*’: *The Horror of the Tuskegee Syphilis Experiment*, WASH. POST (May 16, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/05/16/youve-got-bad-blood-the-horror-of-the-tuskegee-syphilis-experiment> [<https://perma.cc/6JQ3-9TF8>] (describing study where 399 black men were part of a study for which the government “[n]ever obtained informed consent from the men and never told the men with syphilis that they were not being treated but were simply being watched until they died”). There are, of course, other examples of the exploitation of race in the medical sciences. See ROBERTS, *supra* note 23; REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010); L. Song Richardson, *When Human Experimentation Is Criminal*, 99 J. CRIM. L. & CRIMINOLOGY 89 (2009).

<sup>185</sup> See CARTER *supra* note 23; ELIAS & FEAGIN, *supra* note 23; ZUBERI & BONILLA-SILVA, *supra* note 23.

<sup>186</sup> Gómez, *Looking for Race*, *supra* note 24, at 229 (internal quotation marks omitted).

<sup>187</sup> Gómez, *A Tale of Two Genres*, *supra* note 24; Obasogie, *supra* note 24.

science, there needs to be a larger commitment to ensuring the proper consideration of race within social science.

In recent years, a group of scholars from law and other disciplines has been annually convening to create a project or subfield that encourages empirical researchers to be more mindful of critical theories, and critical scholars to incorporate social science research into their work. The project and scholarship it has produced are referred to as empirical methods and Critical Race Theory (eCRT).<sup>188</sup> Though the formation is young and fluid, scholars associated with this enterprise have done excellent work within various research areas,<sup>189</sup> including criminal justice studies.<sup>190</sup> Recently, for example, Temple University sociologist Nicole Gonzalez Van Cleve published *Crook County*, an illuminating ethnographic study of the racialized forms of injustice taking place within the Chicago criminal justice system.<sup>191</sup> Additional representative work has been published by Georgetown Law Professor Paul Butler. In his exceptional new book, *Chokehold*,<sup>192</sup> Professor Butler uses empirical data to interrogate raced and gendered police violence more broadly. Currently, the most significant contribution of eCRT has been in the production of excellent work of this kind. The need for courts to be better educated on the meaning of race within social science research, however, presents an opportunity for eCRT to expand beyond its current functionality. Filling this gap might also encourage more of the work of

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<sup>188</sup> On the emergence of the eCRT project and the work that has been produced, see Obasogie, *supra* note 24; Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953 (2015); and Barnes, *supra* note 24, at 448–54. For a more thorough discussion of critical race theory and social science, see Carbado and Roithmayr, *supra* note 24, and CRITICAL RACE REALISM, INTERSECTIONS OF PSYCHOLOGY, RACE AND LAW (Gregory Parks et al. eds., 2008).

<sup>189</sup> See, e.g., Tonya L. Brito et al., “*I Do for My Kids*”: *Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027 (2015) (an ongoing research project looking at how issues of race, gender, and class shape child support enforcement and contempt proceedings); Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575 (using archival research to perform empirical analysis of historical racial violence).

<sup>190</sup> Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015); Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541; Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179 (2015); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013).

<sup>191</sup> NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

<sup>192</sup> PAUL BUTLER, *CHOCKEhold: POLICING BLACK MEN* (2017). There are also scholars that are not formally affiliated with eCRT who have also carefully considered race within empirical studies of police stops and the collateral consequences of punishment. See, e.g., CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014) (analyzing 2000 police stops in the Kansas City metro area, using both quantitative and qualitative methods, and measuring the effect of race as an independent variable and in interaction with numerous other variables).

eCRT, which is often separately produced by scholars from either law or social science disciplines, to be collaboratively conducted by representatives from various disciplines.<sup>193</sup>

One role for the evolving eCRT project would be to create and maintain a repository for studies that consider race in robust and complex ways. These studies, then, could serve as exemplars for courts considering racial impact data. Another role would be for eCRT scholars to be included among the stakeholders consulted for creating the previously discussed guidelines for appellate courts to review lower court admissions of social science research. Finally, regardless of whether either of the previous options is available, eCRT scholars could be a resource for routinely filing amicus briefs in cases where the Court is likely to confront racial impact data. Based on *McCleskey* and many of the cases that have followed it, there are few reasons to believe that the current Court will be open to any of these options. This does not mean, however, that these goals should be abandoned. First, the Supreme Court's approach to certain types of claims and evidence will shift over time with the changing composition of that body. Also, for many years, critical scholars have understood that to achieve any goal tied to racial justice, at times, one must be prepared to accept "satisfaction in the struggle itself."<sup>194</sup> In other words, even if there is a lack of immediate progress, it is necessary to invest in the change one hopes will eventually come to pass.

#### CONCLUSION

Three years after he retired from the U.S. Supreme Court, Justice Powell identified *McCleskey* as the case he should have decided differently while he was on the Court.<sup>195</sup> His change of heart, however, had nothing to do with revisiting the strength of the data contained in the Baldus studies. Rather, he simply decided that the death penalty should be eradicated altogether.<sup>196</sup> *McCleskey*, we have argued, was wrongly decided, but for reasons beyond those affecting Justice Powell's change of heart. The Baldus studies confirmed for the death penalty in Georgia something many scholars (and Justice Powell) believe about the U.S. criminal justice system overall: At every critical juncture within that system, race matters in determining outcomes. Had the *McCleskey* Court been predisposed to an understanding of the operation of racial disadvantage that was adopted by the Court in *Brown*, it is almost certain that the Baldus data would have been sufficient

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<sup>193</sup> For a discussion of the varying forms of eCRT scholarship, see Barnes, *supra* note 24, at 545–63.

<sup>194</sup> See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 98 (1992).

<sup>195</sup> Gross, *supra* 113, at 1918.

<sup>196</sup> *Id.* at 1919.

to support the finding of a violation of the Equal Protection Clause. It is also true that had Justice Powell privileged justice over preserving discretion within a biased but presumptively necessary criminal justice system, the last thirty years could have been spent addressing rather than lamenting the seamless overlaps between race, crime, and punishment that remain in this country. Here, however, we have attempted to lay the groundwork for options to improve current judicial assessments of social science research in general, and racial impact data more specifically. The Court's post-race societal sentiments being what they are today,<sup>197</sup> it would be folly to expect courts to embrace a different understanding of the connection between race and societal disadvantage in the near term. Still, we should continue to create tools that will assist courts in thinking about social science data and the meaning of race in new and more sophisticated ways, understanding that this task may seem Sisyphean until the day comes when more Justices see statistically significant evidence of racial impact data as sufficient to sustain a constitutional equal protection claim.

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<sup>197</sup> See *supra* notes 21–22.