

EQUAL PROTECTION AND WHITE SUPREMACY

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ABSTRACT—The project of using social science to help win equal protection claims is doomed to fail if its premise is that the Supreme Court post-*McCleskey* just needs more or better evidence of racial discrimination. Everyone—including the Justices of the Court—already knows that racial discrimination is endemic in the criminal justice system. Social science does help us to understand the role of white supremacy in U.S. police and punishment practices. Social science also can help us understand how to move people to resist, and can inform our imagination of the transformation needed for equal justice under the law.

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This is an amazing panel to be on. I've learned so much from Angela's work, and in my courses I teach work by both Deb and Aya. It's really cool to be here on this panel with them. Thank you to the *Northwestern University Law Review* for inviting me, and especially thanks to Osagie both for this invitation but also for facilitating this formation of Critical Race theorists and social scientists.

I've been a part of this formation for a while now. In the words of Jay-Z¹: Allow me to reintroduce myself. My name is Professor Debbie Downer. This project is not going to work.

I'm a cynic because I'm dubious about an effort to make Critical Race Theory respectable in a way that jurisprudence and a movement about racial justice is never going to be respectable. I want to talk about how my concern is realized here in this Symposium about *McCleskey* and social science.

Critical Race Theory proves that social science won't matter to courts. My book, *Chokehold: Policing Black Men*, looks at some of the wretched features of the U.S. criminal process—inhumane prisons, mass incarceration, brutal policing—and says that those wretched features are all about black men.² African-American men are not the only subjects of those processes but we are the people that they were developed for.³ That's what I mean by “chokehold”: various actors in the criminal legal process target black men and set us up to fail.⁴

Who are the people who do this? It is like Mr. McCleskey said: All of the actors in the criminal justice system, including police, prosecutors, and lawmakers.⁵ When we complain about the police killing and beating up black people, and don't understand why those cops aren't disciplined, we don't get the problem. The problem is not bad-apple cops. The problem is that the system is working the way it is supposed to. The law is not supposed to punish those cops. The law authorizes their conduct.

¹ JAY-Z, *Public Service Announcement (Interlude)*, on THE BLACK ALBUM (Roc-A-Fella Records Nov. 14, 2003).

² PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).

³ *See id.* at 229 (“U.S. prisons are built for black men, and black men will be free, literally and figuratively, only when prisons are no more.”).

⁴ *Id.* at 6 (“The Chokehold means that what happens in places like Ferguson, Missouri, and Baltimore, Maryland—where the police routinely harass and discriminate against African Americans—is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system is *supposed* to work. . . . American cops are the enforcers of a criminal justice regime that targets black men and sets them up to fail.”).

⁵ *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (“In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application.”).

This is a strong claim that I attempt to make persuasive in my book. My description may strike some of you as too conspiratorial. My analysis is informed by Critical Race Theory. That's where social science is useful. It helps prove Critical Race Theory claims about the law. We heard a great example already from the presentations from Zach and Osagie.⁶ In the context of *McCleskey*, Critical Race Theory helps us understand why social science won't make a big difference in persuading courts about how white supremacy operates in the U.S. criminal legal process.

As an example, let's focus on one actor in the criminal legal process: the United States Supreme Court. For the last roughly fifty years, since *Terry v. Ohio*,⁷ the Supreme Court has been expanding police power with the design of controlling black men. My claim is that this is an intentional racist project by the Court. How can I prove that?

One form of proof corresponds with Mr. McCleskey's argument to the Court: knowledge of reasonably foreseeable consequences. The Court knows that when it expands the power of police and prosecutors, African-American men will bear the brunt. In *Terry*, the original stop-and-frisk case, the Court was warned that the police were going to use the tactic to humiliate African-American people. The Court did not discount this concern. Rather it expressed an odd kind of powerlessness to prevent this result.⁸

There's a pattern here. Mrs. Atwater tells the Supreme Court: I got arrested for not wearing a seatbelt. I got booked and taken to jail.⁹ And the bizarre thing about that is that, in Texas, if I am guilty of that, I can't be locked up.¹⁰ The maximum penalty is a \$50 fine.¹¹ As the Court is deciding how to resolve this case, civil rights organizations warn the Court that the police will not primarily use this power against soccer moms like Mrs. Atwater.¹² Nevertheless the Court then expands the police power.¹³

⁶ See Osagie Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465 (2018).

⁷ 392 U.S. 1 (1968).

⁸ See *id.* at 14–15 (“The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”).

⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 324 (2001).

¹⁰ See *id.* at 323.

¹¹ *Id.* (citing TEX. TRANSP. CODE ANN. § 545.413(d) (1999)).

¹² See, e.g., Brief for Am. Civ. Liberties Union et al. as Amici Curiae Supporting Petitioners at *4, *Atwater*, 532 U.S. 318 (No. 99-1408), 2000 WL 1341276 (arguing that “excessive police discretion can lead to arbitrary enforcement” which creates an “alarming” risk of racial discrimination).

¹³ See *id.* at 354 (holding that police are authorized to make custodial arrests “without balancing costs and benefits” or determining whether an arrest “was in some sense necessary”).

I want to suggest that is intentional. How can I prove this? I'm thinking about the problem of proving race motives by actors in the criminal justice system, including the Supreme Court. The idea is that the Court is using criminal procedure to do race work. I'm not the first scholar to make that claim. Michael Klarman has a famous article where he looks at criminal procedure cases from the early twentieth century in which the Court is giving more rights to accused people.¹⁴ The Court holds that people charged with capital crimes have a right to a lawyer, and that defendants have a right to a jury pool that does not exclude people on the basis of race.¹⁵

Klarman's idea is that the Supreme Court is trying to send a message to the South to make things better for African-Americans there.¹⁶ Two lessons. First, claims about race and legal actors are easier to accept when the racial project seems benign. For many people, Klarman's description of a race project by the Court designed to expand rights for African-Americans goes down easier than my claim about *Terry* and the subsequent criminal procedure cases being about the control of black men.

I'll come back to the other important lesson from Klarman in a moment. First, a few words about *McCleskey* in a different tone from others in this Symposium, because I want to talk about how much I admire *McCleskey*, and how much I adore Justice Antonin Scalia. Of course I'm being facetious. I'm involved with several other people in a project of rewriting Supreme Court cases from the perspective of Critical Race Theory. The case that I am assigned is *Terry*.¹⁷ I'm writing what *Terry* should have said. My premise is that the Court should have kept it real. It should have acknowledged that it was basically making an exception to the Fourth Amendment for black men. In my remix of the opinion, that's what I'm doing.

My role model for keeping it real about race is *McCleskey v. Kemp*. The Court is as forthright as the Supreme Court is ever going to be about establishing white supremacy. The Court says if we recognize the kind of harm of race discrimination in capital cases, well, then we will have to recognize it in other kinds of criminal cases too. And that would undermine the entire criminal justice system.¹⁸

¹⁴ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50 (2000).

¹⁵ *See id.* (first citing *Powell v. Alabama*, 287 U.S. 45 (1932); then citing *Norris v. Alabama*, 294 U.S. 587 (1935)).

¹⁶ *See id.* at 88.

¹⁷ *See* CRITICAL RACE JUDGMENTS: REWRITTEN COURT OPINIONS ON RACE AND LAW (Cambridge University Press, forthcoming 2019).

¹⁸ *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987) (“McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . .

Justice Scalia kept it even more real. He wrote a bench memo while the case was pending, and the Court was wrestling with how it should deal with the Baldus study. Scalia said, essentially, “I don’t need no stinking social science. We already know everything that the Baldus study purports.”¹⁹ But, Scalia wrote, racism is “ineradicable” from the U.S. criminal legal process, and thus, not a good reason to reverse Mr. McCleskey’s death sentence.²⁰

McCleskey is a worse case than *Plessy*, because at least *Plessy* requires formal equality.²¹ *McCleskey* is okay with a good-enough-for-black-people kind of justice. That’s how the system works. And if it’s not broke, then you can’t fix it.

And that brings us to social science. People here are interested in using social science to win equal protection claims, including in criminal justice. That project is doomed. It’s doomed if the premise is that the problem is that there is not enough evidence of discrimination or not the right kind of evidence, and if we could just get that good evidence, then the Court would be persuaded. Again, as Justice Scalia says, we already know that discrimination is endemic in the criminal justice system.²²

So, the Court makes a couple of interesting moves. One, it makes discrimination really difficult to prove. It doesn’t make it impossible to prove, just tough. So, let’s think about a couple of recent examples in which credible arguments about discrimination in criminal justice have been made: the U.S. Justice Department’s Ferguson Report²³ and *Floyd*, the stop-and-frisk case in New York.²⁴ To make the case in Ferguson, the Justice

[I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”)

¹⁹ See Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987) [hereinafter Scalia Memo] (located in Justice Powell’s *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library), <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf> [https://perma.cc/S4LZ-WQE9] (“I do not share the view, implicit in the opinion, than an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. . . . I cannot honestly say that all I need is more proof.”).

²⁰ See *id.* (“[I]t is my view that the unconscious operation of irrational sympathies and antipathies, including racial . . . is real, acknowledged in the decisions of this court, and ineradicable . . .”).

²¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of state racial segregation regimes so long as the segregated public facilities are equal in quality), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

²² See Scalia Memo, *supra* note 19.

²³ U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015) [hereinafter FERGUSON REPORT] (“Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson’s police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race.”).

²⁴ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 666–67 (S.D.N.Y. 2013) (finding that the New York Police Department’s racial profiling constituted racial discrimination in violation of the plaintiffs’ Fourth and Fourteenth Amendment rights).

Department's investigation included "100 person-days onsite in Ferguson," and review of "35,000 pages of police records as well as thousands of emails."²⁵ And it is worth noting that these findings are only allegations. They have not been proven in a court of law.

In the New York stop-and-frisk case, the federal district judge found intentional discrimination by the police. This finding required a two-month trial and was explained in a 195-page judicial opinion.²⁶ Then the city appealed. There were suggestions from the appellate court that it might overturn the verdict.²⁷ While the city's appeal was pending, a new mayor, Bill de Blasio, was elected. He had campaigned against stop and frisk, and once in office, he withdrew the appeal.

And those cases represent the gold standard for "proving" discrimination—even though the proof, in the Ferguson case, has not been formally tested in a court of law. If that is the gold standard, which is costly and labor-intensive, imagine the plight of some random black man who thinks that the police or prosecutors are treating him differently because of race. That claim is essentially dead on arrival.

The second lesson from Klarman is it turns out that rights don't make a whole lot of difference on the ground.²⁸ Though the *Norris* Court declared that criminal defendants have a right to a jury pool untainted by race discrimination, the appellant never actually got a black person on his jury.²⁹

But the process has been rendered "fair." Even if you win doctrinally, you still might lose. This is a lesson from Critical Race Theory, which emerged in part as a critique of civil rights.³⁰ Thurgood Marshall, probably the greatest civil rights lawyer of all time, worked with the NAACP Legal Defense Fund, the greatest civil rights law firm of all time, toward the crowning achievement, *Brown v. Board of Education*, in which the Court ruled that segregated schools are unconstitutional.³¹ No more Black-Only or White-Only signs on the schoolhouse doors. And now if you're a low-income Latino or African-American who goes to the average public school,

²⁵ FERGUSON REPORT, *supra* note 23, at 1.

²⁶ Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<https://perma.cc/YK2M-Y26H>].

²⁷ Among other things, the Second Circuit, *sua sponte*, removed the trial judge from the case because it questioned her neutrality.

²⁸ Klarman, *supra* note 14, at 80–82 (discussing the limited effects of *Norris v. Alabama*, 294 U.S. 587 (1935), on African-American jury service).

²⁹ *See id.* at 81.

³⁰ *See, e.g.*, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

³¹ 347 U.S. 483, 494–95 (1954).

God help you! What happened? Civil rights didn't work nearly as well as we hoped they would.

On the same day that the Department of Justice released the Ferguson Report, one of the defining cultural artifacts of our time, the Department also released the Wilson Report.³² The Wilson Report was about Darren Wilson, the police officer who killed Michael Brown in Ferguson, and why the Department wasn't prosecuting him. On one hand we get the Ferguson Report which says that the Ferguson police department is a racist organization that uses excessive force against black people. The Ferguson Report uses a lot of data and stories to demonstrate that claim. Then the Wilson Report, issued the same day, says that a member of the Ferguson Police Department, a police officer who killed an unarmed black man, didn't commit any crime.³³ The Wilson Report uses law to make its point.

Social science does help us understand the role of white supremacy in U.S. police and punishment practices. It has demonstrated, among other things, that white people generally support harsher criminal justice practices than African-Americans. One study reveals that if white people are cued that a particular policy has a disparate impact on black people, it makes white support for the policy go up.³⁴ So, if you look at the three-strikes laws, if you ask a white person about it, you get one level of support. And then you tell the white person, just so you know, this is going to have an adverse impact on African-Americans, it makes him or her support it more.³⁵ Social science reveals that dark-skin Blacks get sentenced to more time than light-skin Blacks for the same crime. This anti-black effect is so strong that even white men with Afrocentric features—broader nose or larger lips—get more punishment than a white man who doesn't have those features.³⁶

In the end, we do not need social science to prove discrimination. We need it more to help us understand how to move people to resist. I had the

³² U.S. DEP'T. OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [<https://perma.cc/4M89-ARS5>].

³³ See *id.* at 10–12.

³⁴ See Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1950–51 (2014) (“[T]he Blacker the prison population, the less willing registered voters were to take steps to reduce the severity of a law they acknowledged to be overly harsh.”).

³⁵ See *id.*

³⁶ See Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOC. 90, 111 (2016) (“The results . . . suggest a strong association between Afrocentricity and sentencing for white defendants. Whites with facial features that more closely resemble blacks are treated more harshly than other whites.”).

honor of participating in a program about my book with Michelle Alexander, author of *The New Jim Crow*.³⁷ Someone asked her if she was optimistic, and she said, not optimistic about this system and this law. But if we can transform the system, then there would be room for optimism.³⁸ What we need social science do is to help us imagine transformation.

³⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

³⁸ *Michelle Alexander and Paul Butler Talking About 'Chokehold: Policing Black Men'*, MOYERS & CO. (Oct. 16, 2017), <http://billmoyers.com/story/paul-butler-policing-black-men> [<https://perma.cc/3RTB-RB9C>] (providing video and the written transcript of this conversation, with audience questions omitted).