Intuition and Science in the Race Jurisprudence of Justice Blackmun

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Introduction

In the field of race, Justice Harry A. Blackmun is known, first and foremost, for his separate opinion in *Regents of the University of California v. Bakke*.[1] That opinion, written after "earnest and . . . 'prayerful' consideration,"[2] is Justice Blackmun's most eloquent statement on issues of race:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us. . . . I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it be successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy.[3]

While color-blindness is the right principle for the ideal world, he said, we live in the real world. "The sooner we get down the road toward

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1. 438 U.S. 265 (1978).

2. May 1, 1978, memorandum to the Conference, Library of Congress, Papers of Thurgood Marshal, Opinion Files, *Bakke*, Container 204 Folder 1 (hereinafter cited as Blackmun *Bakke* Memo), at 1, reprinted in BERNARD SCHWARTZ, BEHIND *Bakke*: Affirmative Action and the Supreme Court app. at 248 (1988).

3. *Bakke*, 438 U.S. at 402, 407 (Blackmun, J., concurring).

accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene."[4]

Similarly ringing language can be found in two of Justice Blackmun's race opinions eleven years later, from a Term well-known for its conservative race decisions. In a separate dissenting opinion in *City of Richmond v. J. A. Croson Co.*,[5] the case in which the Court first announced that affirmative action programs would be subject to strict scrutiny, Justice Blackmun decried the result:

> I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. . . . So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights – a fulfillment that would make this Nation very special.[6]

And, again, in *Wards Cove Packing Co. v. Atonio*,[7] a Title VII case redefining the core elements of the disparate impact proof structure, Justice Blackmun used strong language in response to the Court's upholding of the "plantation economy" of an Alaskan cannery: "One wonders whether the majority still believes that race discrimination – or, more accurately, race discrimination against nonwhites – is a problem in our society, or even remembers that it ever was."[8]

Are these ringing calls for racial justice the core of Justice Blackmun's race jurisprudence? Certainly they are significant contributions to the national debate on race. If stirring rhetoric defines the core of Justice Blackmun's race jurisprudence, however, one must conclude that his engagement with issues of race was sporadic and uneven—for no such declarations issued from Justice Blackmun's pen in the years before *Bakke* and between *Bakke* and *Croson*. He did not speak often in the urgent voice with which he is most associated in the field of race. For that reason, some scholars with whom I have discussed

4. *Id.* at 407 (Blackmun, J., concurring).

5. 488 U.S. 469 (1989).

6. *Id.* at 561-62 (Blackmun, J., dissenting).

7. 490 U.S. 642 (1989).

8. *Id.* at 662 (Blackmun, J., dissenting).

the question of Justice Blackmun's race jurisprudence have questioned whether he had one.

Surely one element of a race jurisprudence is the cultivation of a unique voice, one that can awaken and teach the nation. But that is only one part – not even the most important part – of a race jurisprudence. To fully appreciate both Justice Blackmun's struggle to develop a race jurisprudence and the contributions those efforts made to the Court's work in that field, one must look to the other, more workaday, elements of the adjudication of race cases.

What does it mean for a judge or justice to have a race jurisprudence? In general, one can identify six elements of a race jurisprudence, of which voice is only one. The first, and perhaps the most important, ingredient of a race jurisprudence is its scope. What is a race case? There is a core group of cases that all would recognize as race cases – namely, cases dealing with intentional discrimination against African-Americans or members of other groups we customarily identify as "racially" distinct. Outside of that core, how does a justice know a race case when he or she sees it? Take, for instance, our rights discourse. We identify core rights and then, not without controversy, circle them with broad penumbra or protect them through doctrines of overbreadth. Or think in Talmudic terms. So that the biblical commandments are not violated, the Talmud builds "fences" around them. These fences prohibit conduct which approaches or resembles actions prohibited by biblical law, in order to diminish the risk that core prohibitions will be violated. In these terms, one key characteristic of a justice's race jurisprudence is the breadth of the protective ring around the core. What of cases involving facially neutral government decisions that are racially suspect, because of either their context or their effects? What about discrimination against groups that are not defined as racially distinct, but are nonetheless stigmatized? Are alienage cases, or cases involving Native American rights, race cases? What about areas of sociolegal practice that do not directly pertain to race but have become racialized in practice? Does the justice see the death penalty – or issues of criminal justice in general – as sufficiently racialized to warrant special concern?

Another marker of a race jurisprudence is its sense of time. Where does the justice place the present day in the timeline of the transition from slavery to racial equality? Are we far enough from the period of *de jure* discrimination so that its effects are no longer pervasive? What is an acceptable rate of progress in achieving racial equal-

ity? Do the answers to these questions differ for different areas of social life, such as education, political participation, or employment?

A race jurisprudence is also defined by its degree of focus. Whatever the breadth of the categorical race case, and however close to racism's historical source and far from finding a solution we may be, the fight to end racism is but one goal and obligation of the courts. The courts are also charged, for example, with preserving principles of federalism and separation of powers. A justice's race jurisprudence will be more or less aggressive depending upon the extent to which the desire to remedy race discrimination (however broadly defined) is permitted to outweigh other countervailing constitutional values.

In addition, a race jurisprudence requires a sense of method. Can society trust judges to know racism when they see it? If not, how can they be taught to see it? The Supreme Court has developed proof structures that aim to move the detection of racism from *gestalt* to something more closely approximating quantitative social science. A justice's level of adherence to these proof structures, and his or her acceptance of their results when proof structures and *gestalt* point in different directions, is another central characteristic of the justice's race jurisprudence.

Another key element of a race jurisprudence is its transparency, meaning the degree to which it openly manifests doubt. The task of unraveling a long history of official and private racism in the United States is inevitably a difficult one. Close judgments must be made, with sweeping constitutional consequences. Opinions can be written to obscure the difficulties of the task and the closeness of the cases, or they can be written to make the struggle transparent. Justices differ widely on this dimension – and the entire tone of a race jurisprudence can turn on the choices made in this domain.

For our purposes, then a race jurisprudence is not only about voice, but is also, and more fundamentally, about scope, time, focus, method, and transparency. When one looks at the development of Justice Blackmun's race jurisprudence over time, the most central issue is the issue of *method.* The opinions for which Justice Blackmun is best known are full of a *gestalt* understanding of how race and racism do their work in American society. But if one looks back to Justice Blackmun's years on the United States Court of Appeals for the Eighth Circuit and his opinions in the Supreme Court across a range of issues and across the span of years, one sees that his intuitions did not always register the presence of race, and – more important – that he did not always trust his own intuitions to lead him to the right an-

swer. One finds that Justice Blackmun put considerable energy and faith, in the middle years of his career on the Court, into the formulation and use of formal proof structures and statistical methodologies as methods for revealing the presence of race to those with less-than-reliable intuitive capacities. Only when those methods seemed to him to have failed did the urgent voice of *Bakke* reemerge.

I. A Cautious Start: Two Starting Points in the Eighth Circuit

Justice Blackmun often spoke with pride about his time on the United States Court of Appeals for the Eighth Circuit. In particular, it meant a great deal to him that the Eighth was a "North-South circuit." Stretching from Minnesota to Arkansas, the Eighth Circuit brought its northern judges into direct contact with two issues they did not have occasion to encounter in their own state: the issues of race and the death penalty.

An account of Judge Blackmun's Eight Circuit race jurisprudence must surely include *Jones v. Alfred H. Mayer*[9] – a Missouri case in which he was reversed by the Supreme Court.[10] The issue in the case was whether the Civil Rights Act of 1866, codified at 24 U.S.C. section 1982 bars all race discrimination in the private sale of real estate. Judge Blackmun was scholarly and energetic in exploring a number of approaches that might lead to a judgment for the plaintiff, but in the end concluded that too much Supreme Court precedent made it impossible for "an inferior tribunal"[11] such as his own to take the lead. He made clear, however, that he would welcome being proven wrong. "It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind" by following one of the pathways he had so carefully laid out.[12]

A case like *Jones v. Alfred H. Mayer* surely reflects on a judge's race jurisprudence, in that a judge whose jurisprudence was more sharply focused on race might have been willing to read prior Supreme Court cases with less deference in order to reach a progressive result. Nonetheless, even judges who are deeply concerned with race discrimination have to pick their battles. In the mid-1960's, the Supreme Court was showing no reluctance to take the lead on civil rights issues – meaning that lower court judges who felt bound by

9. 379 F.2d 33 (1967).
10. Jones v. Mayer, 392 U.S. 409 (1968) (with Justices Harlan and White dissenting).
11. *Jones*, 379 F.2d at 45.
12. *Id.* at 44.

Supreme Court precedent had every reason to believe that the Court would set things right. Furthermore, Congress was also active in the field in this period. Judge Blackmun's opinion appeals to Congress to enact fair housing legislation,[13] and it did so in 1968.[14] Justice Harlan argued in dissent in the Supreme Court that the newly-enacted fair housing provisions of the Civil Rights Act of 1968 were far better suited to deal with discrimination in housing sales than was section 1982. "The political process now having taken hold again in this very field, I am at a loss to understand why the Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitate and insecure strides."[15] With the real possibility of such legislation in the background, a racially-aware lower-court judge need not be faulted for staying his hand.

A far better sense of Judge Blackmun's developing race jurisprudence can be gained from looking at cases in which he had more decisional freedom. Discussion of two such cases follows.

1. School Desegregation: Smith v. Board of Education *(1966)*

As is well known, *Brown v. Board of Education*[16] brought in its wake decades of litigation dealing with school desegregation and its aftershocks. *Smith v. Board of Education of Morrilton School District No. 32*[17] involved the implications of school desegregation for the black teachers who had staffed the separate-but-not-equal black schools of the *de jure* segregation era. A favored mechanism for implementing desegregation was the school-choice plan, in which students and their families could choose either the formerly all-white schools or the formerly all-black schools. In school systems like Morrilton's, where the physical plant and general resources of the all-black schools were inferior to those of the all-white schools,[18] it was reasonable to expect that the result of school-choice would be that the vast majority of children would choose the previously all-white schools, and that the all-black schools would lose their enrollments. Without a commitment by school districts massively to reallocate resources, or

13. *See id.* at 45 ("Relief for the plaintiff lies, we think, in fair housing legislation which will be tempered by the policy and exemption considerations which enter into thoughtfully considered statutes.").

14. *See* Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73. I make no causal claim here.

15. *Jones*, 392 U.S. at 478.

16. 347 U.S. 483 (1954).

17. 365 F.2d 770 (8th Cir. 1966).

18. *See id.* at 779. *Cf. Brown*, 347 U.S. at 492 (discussing school districts in which equalization of resources was underway).

absent white opposition to integration vehement enough to make the white schools an impossible choice for black students, the previously white schools were the preferable places to be. What was to happen to the black teachers when the black schools lost their enrollment?

The Morrilton School District in Arkansas presented this problem to the Eighth Circuit in a particularly interesting form. The District had a facially neutral rule that if a school was closed or consolidated for any reason and the teachers in the closed school could not be absorbed into the remaining schools without displacing other teachers, the teachers in the closed school would be fired.[19] The district court found that the rule had been consistently and neutrally applied in eleven occasions in the past, and held that the firing of the black teachers pursuant to the rule did not violate their rights under the Equal Protection Clause.[20] To hold otherwise, the district court held, would "give Negro teachers a stability of tenure not possessed by white teachers."[21]

Judge Blackmun, writing for a unanimous court, obviously felt strongly that this result could not stand. Neutral though the rule might be, this clearly to him was a case about race. He observed that the District had done nothing to respond to *Brown* for a decade; thus, the patterns of teacher assignment that existed in the District were the direct result of continuing unlawful discrimination.[22] He argued that in adopting a school choice plan, the District must have understood that the black schools would be abandoned.[23] Indeed, the Superintendent acknowledged in his testimony that the plant of the black high school was "not a type plant that the Board or I would like our children to attend school in"[24] and that its teaching staff "did not approach the level of the white slate."[25] What this meant, Judge Blackmun held, was that "the [black] teachers did indeed owe their dismissals in a very real sense to improper racial considerations."[26] Thus, even though the teacher dismissals – and the choice plan – were not shown to be racially motivated, and even though the general policy was recognized not to be unreasonable, the dismissals could not stand so long as race was at the root of the situation on the ground.

19. *See Smith,* 365 F.2d at 778.
20. *See id.* at 779.
21. *Id.* at 775 (discussing the district court's holding).
22. *See id.* at 779.
23. *See id.*
24. *Id.*
25. *Id.*
26. *Id.* at 780.

This decision, while morally compelling, took a measure of legal creativity. The school district surely could have anticipated that white children would not choose the formerly black schools. However, it was not so certain that the black community would embrace integration *en masse*, given the obvious and open hostility of the white administration towards integration for the previous decade. Perhaps a considerable number of black parents had hoped, instead, that desegregation would lead to an improvement in the resources allocated to the previously black schools. Even more significantly, it was not merely the abandonment of the black schools that created the conditions for the discharge of the black teachers. It was also necessary that the white schools be able to accommodate the newly-entering black students without any increase in staff. Nowhere does the court claim that this was readily predictable. Finally, it was not clear that the black teachers would have been entitled to positions in the newly integrated schools if some other method of resolving the shortage of positions had been fashioned. At least some would have been entitled to positions under a seniority system. But would the use of seniority as the decisional criterion have been constitutionally required? What if the criterion had been academic qualifications or some other measure of teacher quality? The Superintendent's testimony that the black teaching staff was not of the same level as white teaching staff – a fact known generally to be the case because of the pervasive inferiority of the educational opportunities offered to blacks in the South – was noted by the court in showing the racialized nature of the discharges, but was ignored when it came to the question of remedy.[27] Judge Blackmun was correct that "teaching is an art" and that teacher quality is hard to assess from the sidelines.[28] Yet it could not be denied that, taken as a whole, the black staff was at a lower level of professional development than the white staff because that fact, too, was part of the racial history of the South.

The creativity of Judge Blackmun's opinion – and the work that it did to reach the morally correct result – lay in his willingness simultaneously to pay attention to the operation of race when necessary to remedy racism and to ignore the operation of race when doing so

27. *See id.* at 781-82. The court ably explained why it rejected a number of other justifications for not offering vacancies to black teachers – like the fact that white teachers would do a better job of relating to the problems white students faced in an integrating school system – but did not take on the question of the fact that a black candidate "may be considered inferior because he attended a poorly regarded Negro college . . . or because he fails to pass an objective qualification test." *Id.* at 782.

28. *Id.* at 781.

would stand in the way of that remedy. We see in *Smith* an aggressively liberal race jurisprudence in nascent form. Where Judge Blackmun determined that the period of rampant and *de jure* discrimination had not yet faded into the past and that the dispute concerned a social program as important as education, he manifested a willingness to keep his focus on the problem of race and to compromise the government's ability to enforce racially-neutral and otherwise reasonable policies. His method was intuitive. While there was some testimony suggesting that the school district knew the burdens that would befall the black faculty, that testimony was only compelling in the context of Judge Blackmun's background understanding of how race operated in the South. And the opinion was written to permit no doubt: there was no suggestion that the case was a difficult one, as it seems to me it was on the legal (if surely not on the moral) level.

2. *Death Penalty:* Maxwell v. Bishop *(1968)*

Maxwell v. Bishop[29] concerned race and the death penalty, and was, in a sense, a precursor to the Court's 1987 decision in *McCleskey v. Kemp*.[30] Compared to *Smith v. Board of Education*, *Maxwell* shows a judge less focused on race, and less willing to bridge the evidentiary gaps in favor of black rights-seekers and against state and local governments.

William Maxwell was a black defendant who was sentenced to death by the state of Arkansas for raping a white woman.[31] In a strategy that prefigured the use of the Baldus study in *McCleskey*,[32] the NAACP Legal Defense Fund utilized a study showing racial disparities in the use of the death sentence for rape cases. The study surveyed twelve southern states, and included a sample of Arkansas counties that comprised just under a majority of the population of the state. The study found that, compared to other rape defendants, blacks convicted of raping white women were disproportionately sentenced to death. The State of Arkansas presented no evidence in opposition to the study, but used cross-examination to raise doubts about its probity. The court, with Judge Blackmun writing, shared those doubts and affirmed the district court's rejection of the claim of racial bias.[33]

29. 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).
30. 481 U.S. 279 (1987), *discussed infra* at text accompanying notes 112-28.
31. *See Maxwell*, 398 F.2d 138.
32. 481 U.S. at 279-320 (majority opinion), 345-65 (Blackmun, J., dissenting).
33. *See Maxwell*, 398 U.S. at 266.

In language preshadowing his dissent in *Furman v. Georgia*,[34] Judge Blackmun observed that this was an extremely difficult case on a personal level:

> [T]he decisional process in a case of this kind [is] particularly excruciating for the author of this opinion, who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.[35]

The situation worsens when a judge who is uncomfortable with the death penalty must face race discrimination in its application. If the Equal Protection Clause is allegedly violated by a state's death penalty practice, is the presumption against judicial involvement reversed? Or is state discretion so important that the need to preserve it serves as a check against aggressive use of new Equal Protection theories where the death penalty is concerned? What if the discriminatory use of the death penalty is known to have been a part of standard legal practice in the "Jim Crow" South? These questions of scope ("Is the death penalty about race?"), focus ("How heavily do we weigh the state's interest in its death penalty?"), and time ("Do we presume continuity or discontinuity with the Jim Crow past?") were the questions underlying Maxwell's case.

In principle, Judge Blackmun was not opposed to the use of statistical evidence to prove discrimination. As a former mathematician,[36] he paid particularly close attention to the study's methodology and found it lacking in important respects. The Arkansas data covered a period of more than twenty years. This earned the observation that "improper state practice of the past does not automatically invalidate a procedure of the present."[37] The Arkansas data were limited to counties with large black populations, clustered in the southeastern part of the state, while Garland County, where Maxwell was tried and sentenced, is in the predominantly white northwestern part of the state. Judge Blackmun was not prepared to assume the same patterns applied to these different areas, particularly because Maxwell's case was the only rape case in which the death penalty had been imposed

34. 408 U.S. 238 (1972) (Blackmun, J., dissenting) ("Cases such as these provide for me an excruciating agony of the spirit.") *Furman* is discussed at length in Malcolm Stewart's contribution to this symposium. *See* Malcom L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L. Q.

35. *Furman*, 408 U.S. at 266 (Blackmun, J., dissenting).

36. Justice Blackmun majored in mathematics at Harvard.

37. *Maxwell*, 398 F.2d at 148.

in Garland County. It was suggested that blacks in general were adversely affected by defense counsel's unwillingness to claim that a white woman had consented to sex with the defendant, but Maxwell's own case involved violent assault and, as a result, consent was not reasonably at issue. The NAACP also argued that the broad statistical pattern was due in part to petit jury discrimination, but there was no evidence of such discrimination in Maxwell's case. In light of these and other flaws in the study and in its application to Maxwell's case, Judge Blackmun concluded that "we are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice."[38]

Why did the inadequacies of the study in *Maxwell* mean that the defendant had failed to make even a prima facie case of discrimination? As *Smith v. Board of Education* suggests, much of the South operated for a decade or more in flagrant disregard of *Brown*. Why, then, was it presumed that things had changed in the South in the field of criminal justice in general or of the death penalty in particular? Why was it presumed that the rape of a white woman by a black man would receive categorically gentler treatment by prosecutors and juries in the white northwest of the state than in the black southeast? Recall that the state put on no evidence at all in the face of the study. Were the inferences suggested by the study so weak as to be effectively countered by silence? Even though sophisticated in mathematics, was Judge Blackmun unaware of how difficult it would be to present statistically significant results if samples were required to be limited to recent years and to counties with few blacks?

Perhaps Judge Blackmun's response to the survey's inadequacies were based in part on the problems the case presented for equal protection theory and method. Judge Blackmun asked NAACP attorney Tony Amsterdam whether, if the statistical evidence were accepted and the death penalty held unconstitutional for black defendants who rape white women, it would still be constitutional for the state to sentence white rape defendants to death.[39] Amsterdam responded that it would be – but that "once the negro situation was remedied the white situation 'would take care of itself.'"[40] Amsterdam implicitly suggested that the state would quickly abandon the use of the death penalty in rape cases once it could no longer be used against blacks who

38. *Id.* at 147.
39. *See id.* at 148.
40. *Id.*

rape white women. Judge Blackmun was not prepared to accept this theory – stating that "the legal logic and rightness of this totally escapes us."[41] He wanted *the law* to impose *formal* equality. "We are not inclined to accept as constitutional doctrine an abstraction which provides equality only through assumed and hoped-for day-to-day practicalities. It is the law, not probabilities or possibilities, which must afford equal protection."[42]

Here again, he might have gone the other way. Was there anything more peculiar here as a matter of equal protection theory than was presented in *Smith*? Judge Blackmun's decision in *Smith* was predicated on an understanding that true equality sometimes required deviating from facially equal treatment, and that decisions in race cases could be proper even if they invalidated a rule only as applied to a black plaintiff class. Why was he not prepared to apply the same approach to the death penalty? Perhaps he was bending over backward not to let his own uneasiness about the death penalty influence his decision. For whatever reason, Judge Blackmun did not allow his intuitions about race in the South to dictate the result in *Maxwell.*

3. *Lessons from the Eighth Circuit Cases*

Taken together, *Smith* and *Maxwell* show a judge deep in the process of staking out the judicial role in the transition to a post-Jim-Crow South. In education, Judge Blackmun showed a sense of urgency fueled by his own sense of the centrality of education to black progress, as well as by the South's decade-long and well-known refusal to abide by *Brown.* There, Judge Blackmun took a leadership role in making sure that the dismantling of desegregation did not work its own injustice on the black community. Elsewhere, as manifested in his treatment of the death penalty, Judge Blackmun seemed inclined to give the South a chance to prove itself. Judge Blackmun had learned how to see race in unexpected places, but he was not always inclined to do so.

II. An Early "Hard Case" at the Supreme Court: *Palmer v. Thompson* (1971)

One of the earliest race cases Justice Blackmun encountered in his time on the Supreme Court was *Palmer v. Thompson,*[43] the famous Fourteenth Amendment case in which the city of Jackson, Mississippi

41. *Id.*
42. *Id.*
43. 403 U.S. 217 (1971).

closed its public swimming pools in the face of a desegregation order. Blacks filed a class action to challenge the closure.[44] The district court and court of appeals denied relief to the plaintiffs, and the Supreme Court eventually affirmed by a 5-4 vote, with six opinions.[45] Justice Blackmun admitted to the Conference before casting his vote that he found the case "one of the most troublesome ones of the 1970 Term,"[46] and he began his concurring opinion with the words "[c]ases such as this are 'hard' cases for there is much to be said on each side."[47] He was right that while "[i]n isolation this litigation may not be of great importance" (since, after all, blacks had many greater needs than swimming pools), it would prove to "have significant implications."[48] The case became a classic illustration of the failure of the Court to see racism at work in public decisionmaking.[49]

To Justice Black, writing for the Court, the case was straightforward. The city of Jackson was under no constitutional obligation to provide public swimming pools. The decision to close the pools adversely affected blacks and whites equally, for neither group could thereafter use them. Justice Black would not consider the plaintiff class' argument that the decision to close the pools was motivated by the city's desire to avoid integration. "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[50] So long as the pools were closed "to black and white alike," there was no discrimination.[51] The city was not obligated to operate pools, and it was free to close them "for any reason, sound or unsound."[52]

Three of the dissenting justices – White , Brennan, and Marshall – also saw the case as straightforward.[53] Their method placed race at the core of the decision. First was the consideration of time. The city of Jackson had long ignored *Brown*. It had hardly begun its move away from *de jure* segregation and its actions were therefore suspect.

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44. *See id.*

45. *See id.* at 218 (for a roadmap of the opinions in the case).

46. Library of Congress, Thurgood Marshall Papers, Opinion Files, Container 70 Folder 1, Memorandum, Feb. 12, 1971.

47. *Palmer*, 403 U.S. at 228 (Blackmun, J., concurring).

48. *Id.* at 228-29 (Blackmun, J., concurring).

49. *See* Charles Lawrence, *The Ego, The Id, and Equal Protection*, 39 STAN. L. REV. 317 (1987).

50. *Palmer*, 403 U.S. at 224.

51. *Id.* at 226.

52. *Id.* at 227.

53. *See id.* at 240 (White, J., joined by Brennan, J., and Marshall, J., dissenting). (Justice Douglas also dissented.)

The city's seemingly neutral economic reason was not really neutral. The operating losses the city predicted were obviously attributable to the expected unwillingness of whites in the city to use integrated pools. For the dissenters, private racism ceased to be private when it was allowed to shape public decision making. Furthermore, the dissenters' method stressed the cultural meaning of the government's actions, by asking whether the decision was likely to stigmatize the black community. The dissenters argued that the barring of integrated swimming pools – a setting in which blacks and whites come into far more intimate contact than in other public facilities – was a public endorsement of whites' belief in the inferiority and the polluting nature of the black body. As Justice White put it, "[c]losing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying."[54] In the face of what the dissenters perceived as blatant racism of the city's decision, they were willing to impose on the city the economic costs of operating integrated pools which would likely be underutilized by the white majority and thus make no economic sense to run. This result is what a single-minded focus on race required.

Justice Blackmun explained to the Conference that he found the case "troublesome," though "perhaps it should not be troublesome, but I seem to see persuasive arguments on each side."[55] He eventually followed his initial inclination to affirm, an inclination that was based on the following:

> I am particularly impressed by the fact that Jackson did quickly integrate its other facilities, and I am disturbed by the concession made by counsel, in answer to my inquiry at oral argument, that if we reverse, the city will be 'locked in' and can never close its pools for economic reasons even of the highest gravity.[56]

While awaiting the dissent, Justice Blackmun consulted with Justice Black as to whether affirming the power of Jackson to close its pools was consistent with the Court's holding, in *Orleans Parish School Board v. Bush*,[57] that the State of Louisiana could not constitutionally close all public schools ordered to be integrated.[58] Justice Black responded that *Bush* left open the possibility that a state or municipality

54. *Id.* at 241 (White, J., dissenting). *See also id.* at 272 (Marshall, J., dissenting).

55. Library of Congress, Thurgood Marshall Papers, Opinion Files, Container 70 File 1, Blackmun Memorandum to Justice Black, Feb. 12, 1971.

56. *Palmer*, 403 U.S. at 241 (White, J., dissenting).

57. 365 U.S. 569 (1961).

58. *See* Library of Congress, Thurgood Marshall Papers, Container 70 File 1, Black Memorandum to Justice Blackmun, Feb. 16, 1971.

could constitutionally decide "for any reason, good or bad" to get out of the business of taxing its citizens to provide public schools.[59] By implication, a municipality could certainly get out of the swimming pool business for economic reasons, whatever the cause of the economic hardship might be.

Justice Blackmun eventually joined Justice Black's opinion in *Palmer*, but also filed an opinion of his own.[60] He began by charting out the different methods used by Justices Black and White, who were divided on the issue of whether unconstitutionality could be based on legislative motive rather than upon effects. He did not explain why he joined Justice Black's opinion on that issue. Instead, he set forth that he "remained impressed" with a number of factors.[61] He noted that swimming pools were the only public facilities that the city decided to close, and that the city integrated all of the others – albeit as a result of court orders.[62] The pools were not part of the educational system.[63] They were, instead, a "luxury," a service of the "nice-to-have but not essential variety."[64] The pools were operating on a deficit and the city thought they would continue to do so. In light of the economic rationality of the city's decision, he wrote, it would require "speculation" to agree with the dissenters that one could see in the city's closure of the pools "an official expression of inferiority toward black citizens."[65] Finally, he stated that it was "disturbing" to lock the city into operating pools "for an indefinite time in the future," merely because the pools of Jackson had been segregated at some prior time.[66] He concluded that in light of all these factors, "this is neither the time nor the occasion to be punitive toward Jackson for its past constitutional sins of segregation."[67]

Justice Blackmun's opinion in *Palmer* reveals some of the characteristics of his developing race jurisprudence. As to scope, he in essence refused to recognize *Palmer* as a race case, although it was a close question for him. As to time, he was not prepared to view Jackson's history of segregation as the basis for finding a present-day discriminatory animus. It was enough that Jackson had begun to comply

59. *Id.*
60. *See Palmer*, 403 U.S. at 228 (Blackmun, J., concurring).
61. *Id.* at 229 (Blackmun, J., concurring). The use of the word "remained" underscoring that he had struggled with the case.
62. *See id.* (Blackmun, J., concurring).
63. *See id.* (Blackmun, J., concurring).
64. *Id.* (Blackmun, J., concurring).
65. *Id.* (Blackmun, J., concurring).
66. *Id.* at 230 (Blackmun, J., concurring).
67. *Id.* (Blackmun, J., concurring).

with desegregation orders in 1962; its former segregatory practices were "past constitutional sins" that ought no longer to be punished.[68] At the very least, the fact that this case involved a luxury and not a necessary public service like education, made the case the wrong "occasion" to punish the city. Justice Blackmun's focus was not single-mindedly on the problem of race. Countervailing concerns of the city's economic solvency and its freedom to set its own fiscal priorities figured strongly into the decision. He did not take a clear stand on the methodological question of legislative intent. He did, however, reject the cultural approach the dissenters took to finding racism behind seemingly neutral government actions – at least where, as in *Palmer*, there were no specific facts in the record supporting the finding of stigmatization. He was not prepared to trust intuition when it came to ferreting out discriminatory meanings.

On all of these questions, Justice Blackmun's approach was transparent. He admitted that this case might mean more than met the eye. He acknowledged that there were strong countervailing arguments that pointed to the racial nature of the city's policy. His struggle was clear, and gave reason to think that he would be looking carefully at the facts in subsequent cases to see if they could sway him to be more like the judge who decided *Smith* and less like the judge who decided *Maxwell.*

III. Attention to Method: *Castaneda v. Partida*

Castaneda v. Partida[69] in which Justice Blackmun wrote for the majority, was a pioneering case in the use of statistical methods to prove discrimination. That is how students of Title VII know the case. In it, Justice Blackmun set forth in a long footnote the statistical method of proving discrimination that has become standard in the field.[70] What is less well known to Title VII scholars is the context of the decision, which was a political setting that prefigured *City of Richmond v. J. A. Croson Co.*[71]

Castaneda involved a claim of grand jury discrimination against Mexican-Americans in Texas, a state that used a "key-man" system in which jury commissioners select grand jurors.[72] The Court had previously held the key-man system facially constitutional but "susceptible

68. *Id.* (Blackmun, J., concurring).
69. 430 U.S. 482 (1977).
70. *See id.* at 496-97 n.17.
71. 488 U.S. 469 (1989).
72. *Id.* at 484.

to abuse as applied."[73] *Castaneda* arose in Hidalgo County, a Mexican-American majority county in which Mexican-Americans had a "governing majority."[74] A majority of the judges (including the judge who selected the jury commissioners and presided over the defendant's trial), a majority of the elected officials, and a majority of the jury commissioners were Mexican-American. The Court granted certiorari in the case to "consider whether the existence of a 'governing majority' in itself can rebut a prima facie case of discrimination in grand jury selection."[75] The statistical portion of the opinion goes to the preliminary question of whether a prima facie case had been made out in the first place.[76]

What was one to make of the fact that Mexican-Americans in Hidalgo County – unlike blacks in the South – were a majority presence not merely in county population but in county governance, including governance of the grand jury selection process? What weight was one to give to the finding of the federal district court judge, who was also Mexican-American, that both in general and in the circumstances of Hidalgo County, Mexican-Americans were not likely to discriminate against other Mexican-Americans because of their race?[77] Could intuition be trusted to provide an answer here, or, as was the case for Justice Blackmun in *Palmer*, would the use of intuition be regarded as merely "speculative"?

Justice Powell argued in dissent that much of the Court's Fourteenth Amendment jurisprudence was based on the premise that "individuals are more likely to discriminate in favor of, than against, those who share their own identifiable attributes."[78] Otherwise, he asked, why would we worry about the adverse effects on a criminal defendant of a jury (grand or otherwise) from which members of his own race were excluded?[79] Justice Marshall attacked Justice Powell's approach to the "governing majority" question:

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73. *Castaneda*, 430 U.S. at 497.

74. Partida v. Castaneda, 384 F. Supp. 79 (1974).

75. *Castaneda*, 430 U.S. at 492.

76. *See id.* at 482.

77. Or, as he put it, "If people in charge can choose whom they want, it is unlikely they will discriminate against themselves." *Id.* at 515 (Powell, J., dissenting) (quoting opinion of Judge Garza in 384 F. Supp. 79, 90 (S.D. Tex. 1974)). Judge Garza thought that discrimination on the basis of socioeconomic class was the more likely explanation. *See Castaneda*, 430 U.S. at 492 n.11. Justice Blackmun left open the question "whether a showing of simple economic discrimination would be enough to make out a prima facie case in the absence of other evidence." *Id.*

78. *Id.* at 515 (Powell, J., dissenting).

79. *See id.* at 516 (Powell, J., dissenting).

> Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.[80]

Even were this not true, Justice Marshall argued, "[i]f history has taught us anything, it is the danger of relying on . . . stereotypes," such as the view that Mexican-Americans in power would not discriminate against other Mexican-Americans.[81]

Here Justice Powell had the better of the argument. He was obviously right that our anti-discrimination jurisprudence is permeated by the assumption (which ought not become impermissible by being labled a "stereotype") that blacks and other minorities need the opportunity to be represented by members of their own group. Is it proper to use this stereotype when doing so helps minorities (as in voting rights or jury-representation cases) but not when it hurts minorities (as in *Castaneda*)? Recall, for these purposes, Judge Blackmun's predicament in *Smith*. Could one recognize the inferiority of the teaching staffs of *de jure*-segregated black schools but deny that inferiority when it came to projecting the likely effects of school closings on black teachers in a non-discriminatory process of creating a unitary system? Also recall his approach to the use of intuition in *Maxwell* and *Palmer*. In *Maxwell*, Judge Blackmun was unwilling to fill in the gaps of a technically flawed statistical account based on the intuition that the historically-charged connection between rape, race, and the death penalty continued to operate throughout the South.[82] In *Palmer*, Judge Blackmun refused to trust the intuitions of those who saw that swimming in the same pool as blacks and golfing on the same course as blacks had sharply different resonances for whites in the desegregating South.[83] How would he handle *Castaneda's* battle of conflicting intuitions?

It is in this context that the importance of the otherwise technical and formal debate over the nature of the prima facie case in *Castaneda* becomes clear. To Justice Blackmun, Hidalgo County's political environment was to play no role in determining whether a prima

80. *Id.* at 503 (Marshall, J., concurring) (citations omitted).
81. *Id.* at 504 (Marshall, J., concurring).
82. *See* Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).
83. *See* Palmer v. Thompson, 403 U.S. 217 (1971).

facie case had been established. That question, he held, turns almost entirely on the statistical evidence – tested for significance through the statistical methods for which *Castaneda* is so well known. He explained that the proof structure he articulated is a "rule of exclusion," in which "[if] a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."[84] Only then may one ask whether reference to Mexican-Americans' "governing majority" is adequate to "rebut" the prima facie case. We have all learned with hindsight that one must be very clear about the nature of the burden which shifts upon the establishment of a prima facie case.[85] Is it a burden of *persuasion* or merely one of *production*? Justice Blackmun's opinion is not clear on this point.[86] What is clear is that he considered the statistical prima facie case to be weighty enough so that it could effectively be rebutted only by the kind of evidence missing in the case – namely, testimony by those responsible for jury selection that offered a convincing explanation of how the statistical picture could have been created by the consideration of factors other than race.[87]

Justice Powell, writing in dissent, took a different view. To Justice Powell, statistics standing alone could not make out a prima facie case. To him, previous precedent established that "underrepresentation of a population group . . . should be considered in light of 'such [other] circumstantial and direct evidence of intent as may be available,'"[88] including evidence tending to undercut the inference of intentional discrimination which the statistics might otherwise support. In Justice Powell's view, the political composition of Hidalgo County was such evidence, and was compelling.[89] Even if the "governing majority" evidence were held irrelevant at the prima facie case stage, Justice Powell argued, it was sufficient to rebut the statistical inference of discrimination.[90] "Once the State has produced evidence – either by presenting proof or by calling attention to facts subject to judicial notice – the only question is whether the evidence in the record is sufficient to

84. *Castaneda,* 430 U.S. at 494 n.13.

85. *See, e.g.,* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

86. He cites previous cases that characterized the burden as one of "proof," but thereafter says (in ambiguous terms) that the state must "rebut" the prima facie case. *Castaneda,* 430 U.S. at 494.

87. *See id.* at 500.

88. *Id.* at 513-14 (Powell, J., dissenting).

89. *See id.* at 514 (Powell, J., dissenting).

90. *Id.* at 515 (Powell, J., dissenting).

demonstrate deliberate and systematic discrimination in the jury selection process."[91]

Proof structures and burden-shifting in discrimination cases have taken much of the Court's attention in Title VII cases, for reasons and with consequences I have explored at length elsewhere.[92] Here we are exploring the issue from the perspective of Justice Blackmun's race jurisprudence, and that leads me to ask a more specific question. Why, given his prior experience in race cases, would the proof structure he defended and elaborated in *Castaneda* have been so important to him? I suspect the reason is that the proof structure he defends, with its emphasis on statistical patterns, cabins the role of intuition in discrimination cases. The problem of what one ought to presume about the likelihood of within-group discrimination, he said, "is a complex one, about which widely differing views can be held, and, as such, it would be somewhat precipitate to take judicial notice of one view over another on the basis of a record as barren as this."[93] The best one could do in these circumstances, Justice Blackmun seemed to be saying, is to put the issue aside and decide cases on less speculative inferences.

Does the statistical method Justice Blackmun embraced in *Castaneda* avoid speculative inferences about the nature of discrimination? Hardly. The "method of exclusion" he sets forth is all about speculative inferences. The "idea behind the rule of exclusion" is that "[i]f a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other [prohibited] class-related factors entered into the selection process."[94] What is it that permits the court to move from the defeat of the null hypothesis (ruling out chance as the cause of a result at some agreed-upon level of confidence) to the embrace of the hypothesis that it is *race* (or some other prohibited "class-related factor") that accounts for the result? Why, instead, should the advocate for race as the causal factor not have to prove that it is specifically race, rather than some neutral factor that correlates with race, that caused the disparity – as Judge Garza suggested was the case in *Castaneda*? I do not think that the "rule of exclusion" can be explained without recourse to an intuition that sub-

91. *Id.* at 517 (Powell, J., dissenting).

92. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks,* 93 MICH. L. REV. 2229-324 (1995).

93. *Castaneda,* 430 U.S. at 499.

94. *Id.* at 494 n.13.

jective processes are likely to be used to discriminate against legally protected groups. By using the formal proof structures set forth in *Castaneda* and similar cases, judges are freed from the need to use their own intuitions, and members of minority groups are freed from the risk that judges will intuit the world in ways adverse to their interests.

What we see in *Castaneda*, then, is a Justice Blackmun who has placed his faith in method. This method carries the hope that with (seemingly) objective proof structures to serve as a buffer between specific cases and general intuitions, justice will not turn on how well particular judges understand the nature of race and race discrimination in American culture and society. Perhaps, too, Justice Blackmun's approach in *Castaneda* stems from an unannounced sharpening of his focus on the problem of race discrimination. If we credit Justice Blackmun with the full implications of his mathematical sophistication, we must assume that he understood the ways in which the "rule of exclusion" was based upon inference and intuition. If so, then his embrace of this approach might best be understood as his expression of the view that the interests of discrimination plaintiffs matter more than those of defendants in close cases, and that doubts should therefore be resolved in plaintiffs' favor.

IV. The Affirmative Action Decisions in Context: *Regents of the University of California v. Bakke* (1978) and *United Steelworkers of America v. Weber* (1979)

The powerful language of Justice Blackmun's opinion in *Regents of the University of California v. Bakke*[95] – and, as we shall see, in his opinion in *United Steelworkers of America v. Weber*[96] – would suggest that Justice Blackmun had come fully to trust his own instincts on issues of race by the late 1970s. However, a closer look at the opinions suggest that he was still struggling, and therefore still had reason to be sensitive to the need to maintain a race jurisprudence that could handle uncertainty.

Take *Bakke* first. It is important to recognize that, for all Justice Blackmun's calls to realism, the abstract notion of color-blindness still had considerable appeal for him. Noted legal scholar Alexander Bickel had called for color-blindness in his brief to the Court, and

95. 438 U.S. 265 (1978).

96. 443 U.S. 193 (1979).

Justice Blackmun responded as follows in his memorandum to the Conference:

> Alex Bickel's elegant and shining words, of course, speak of the idealistic and have great appeal. But I say, once more, that this is not an ideal world, yet. And, of course, his position is – and I hope I offend no one, for I do not mean to do so – the "accepted" Jewish approach. It is to be noted that nearly all of the responsible Jewish organizations who have filed amicus briefs here are [on] one side of the case. They understandably want "pure" equality and are willing to take their chances with it, knowing that they have the inherent ability to excel and to live with it successfully. Centuries of persecution and adversity and discrimination have given the Jewish people this great attribute to compete successfully and this remarkable fortitude.[97]

Part of Justice Blackmun's self-proclaimed realism in *Bakke*, then, was a commitment not to hold all minority groups – and, specifically, not to hold African-Americans – to the standard set by those minorities who had been most successful in breaking into the elite professions.[98] But this passage also suggests that Justice Blackmun was not prepared to discount traditional "merit" standards. Certainly Justice Blackmun made an important argument on the anti-"meritocracy" side of the debate when he observed that it is "somewhat ironic" to be worried about racial preferences when preferences are rampant in our society,[99] ranging from admissions preferences for legacies and athletes to the public use of veterans' preferences and the progressive income tax. Nevertheless, his treatment of the Jews' success does not question its legitimacy or the legitimacy of the standards under which they succeeded. Furthermore, Justice Blackmun's unpublished comment on affirmative action and the Jews also suggests some ways in which his call to realism in *Bakke* was underspecified. What was it about the experience of African-Americans that made it unrealistic to expect them to progress without affirmative action? Could the same be said about every other group that might come under the affirmative action rubric? While it is certainly understandable that Justice Blackmun chose not to explore the Jewish issue in his published opinion, he showed through his memorandum that he was well aware that his

97. Blackmun *Bakke* Memo, *supra* note 2, at 11-12.

98. One may well disagree with Justice Blackmun's diagnosis of the reasons for Jewish success, on which general question see Deborah C. Malamud, *Is Affirmative Action Fair? The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 59 OHIO ST. L.J. 915 (1998). The point here is that Justice Blackmun, while electing the Jews a model minority, does not use their performance to set the standard by which all other minorities' needs should be judged.

99. *Bakke*, 438 U.S. at 404.

opinion would fail to silence an important set of critics of affirmative action; namely, that set of Jewish intellectuals that eventually evolved towards neoconservatism.[100] He also showed an awareness of some of the important questions *Bakke* left open.

Note, too, that in his opinion in *Bakke* Justice Blackmun placed considerable emphasis on deference to the expertise of educational institutions, suggesting that his commitment to affirmative action might depend on his willingness to trust the particular type of entity engaging in it. He states that "[p]rograms of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this."[101] One might question whether he would be willing to say the same, for example, of municipalities engaged in affirmative action in contracting or private employers engaged in hiring. In the end he was, but his *Bakke* opinion suggested that the answer was not a foregone conclusion.

Thus, for all its ringing language, Justice Blackmun's deliberations and opinion in *Bakke* do not stand as evidence of a race jurisprudence in which minorities' interests were the sole focus of attention. We still can see him engaged in personal struggle over the place of color-consciousness and over the proper role of the judiciary in monitoring expert decisionmaking. Indeed, the ringing language for which his opinion in *Bakke* is most known takes on greater significance in light of the transparency of the opinion as a whole. Part of the persuasive power of Justice Blackmun's *Bakke* opinion lies in the manner in which it provides a blueprint for those who, like him, could not endorse affirmative action without a struggle.

The question of affirmative action in private employment soon emerged in *United Steelworkers of America v. Weber*,[102] solely under the statutory rubric of Title VII of the Civil Rights Act of 1964. Here, too, Justice Blackmun wrote separately after a period of careful post-Conference deliberation.[103] Even more so than in *Bakke*, the result was an opinion transparent as to its doubts, but committed to putting the needs of minorities first.

100. *See Malamud, supra* note 98, at 916 n.4.

101. *Bakke*, 438 U.S. at 404.

102. 443 U.S. 193 (1979).

103. Justice Blackmun signaled when Justice Brennan circulated what became the majority opinion that "it is likely that I shall join your draft, but I . . . prefer to see what is written on the other side." Library of Congress, Thurgood Marshall Papers, Case Files, Container 235 Folder 5, May 8, 1979 Memorandum. He joined Justice Brennan's opinion, in the end, and also wrote an additional opinion of his own – as he did in *Bakke*.

Justice Blackmun admitted, as surely it was wise to do, that there was much to be said for the dissent's view that Title VII would never have been enacted had it been known that it would be interpreted to embrace affirmative action.[104] To Justice Blackmun, the intent of the Congress that enacted Title VII was not dispositive. Instead, he focused on "additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress," that in his view, "support the conclusion reached by the Court today."[105] Those considerations resulted from an urgent need for voluntary compliance with Title VII by employers whose past behavior might render them liable under Title VII but who were far less likely to be cooperative once they were sued. Justice Blackmun expressed a preference for limiting voluntary affirmative action to those employers who had committed an "arguable violation" of the statute,[106] but came to the reluctant conclusion that the "arguable violation" standard was not practical. Here again, practicality won out over competing considerations. And, again, Justice Blackmun was not willing to reach what he considered the "ironic" result called for by the dissent, under which Title VII would be interpreted as "'locking in' the effects of segregation for which Title VII provides no remedy."[107]

But was Justice Blackmun correct in his view that Title VII would otherwise provide no remedy for the discrimination underlying the facts of a case like *Weber*? Justice Blackmun acknowledged that Kaiser Steel, the company whose collectively-bargained affirmative action plan was at issue in the case, had imposed a past-experience requirement on new hires into the skilled trades "that arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had."[108] This meant that a conventional disparate impact lawsuit *could* have been brought and possibly won. Surely it would have been possible to use Title VII to sue the Steelworkers union local that was continuing to discriminate against minorities in union membership and apprenticeship training. There were, to be sure, limits to what could be done about the continuing effects of past discrimination under Title VII. For example, Title VII would not permit a lawsuit against the company and the union for failing to fire whites and hire blacks or for continuing to use a seniority system that subjected new

104. *See Weber*, 443 U.S. at 212-13 (Blackmun, J., concurring).
105. *Id.* at 209 (Blackmun, J., concurring).
106. *Id.* at 211 (Blackmun, J., concurring).
107. *Id.* at 215 (Blackmun, J., concurring).
108. *Id.* at 210 (Blackmun, J., concurring).

hires to risks of layoff.[109] These limits were not caused by legislative sloppiness. The statute was controversial, and did not include every provision its most liberal supporters would have wanted. The stated aim of the statute was *prospectively* to eliminate discrimination in employment,[110] and it provided methods for achieving its goals: mediation by the EEOC and, if mediation failed, litigation. There was no irony at all in saying that the statute deprived employers of the option of using affirmative action to avoid the embarrassment of a lawsuit. *Weber* was far from being an easy case.

The step Justice Blackmun took in *Weber* is thus just as significant as was *Bakke* for the development of his race jurisprudence. The fact that he decided the case as he did demonstrates the depth of his commitment to bringing about racial equality on the ground as quickly as possible. Nonetheless, the opinion reveals a justice who was not entirely comfortable with the step being taken, and who did not hesitate to voice his wish that practical realities would permit a more cautious approach.

Taken together, *Bakke* and *Weber* show that Justice Blackmun had taken a decisive step in turning his focus to the needs of minorities. However, one still senses struggle in these opinions; countervailing voices still speak and demand to be heard. Just because he took the stands he did in these early and important affirmative action cases does not mean that the issue of race had become easy or clear for him.

V. Race and the Death Penalty Revisited: *McCleskey v. Kemp* (1987)

In the years between his Eighth Circuit opinion in *Maxwell v. Bishop*[111] and the Court's important decision in *McCleskey v. Kemp*,[112] Justice Blackmun did not dwell in print on the racial dimension of the use of the death penalty. His account of his "excruciating agony of the spirit"[113] in enforcing the death penalty in *Furman v. Georgia* did not discuss the issue of race. Yet, as we have seen, Judge Blackmun in *Maxwell* was open to the development of superior statis-

109. *See* Teamsters v. United States, 431 U.S. 324, 339 (1977).

110. *See Weber*, 443 U.S. at 203-07.

111. 398 F.2d 138 (8th Cir. 1968).

112. 481 U.S. 279 (1987).

113. Furman v. Georgia, 408 U.S. 238, 405 (1972)(Blackmun, J., concurring). For discussion, see Stewart, *supra* note 34.

tical evidence of the racial nature of death penalty enforcement.[114] In *McCleskey*, he was satisfied with the statistical evidence developed by the Baldus study. The Court's failure to accept the Baldus study was a turning point for Justice Blackmun's death penalty jurisprudence. *McCleskey* also has an independent and important place in Justice Blackmun's race jurisprudence.

If one is looking for ringing language on the nature and subtlety of race discrimination in criminal law enforcement in the South in *McCleskey*, one must look to Justice *Brennan's* opinion.[115] What one finds in Justice Blackmun's opinion, instead, is a far more technical treatment of the proof structure for using statistics to prove intentional discrimination as set forth in his earlier opinion in *Castaneda.* Justice Blackmun's *McCleskey* dissent marks the beginnings of his realization that proof structures and statistical methods *cannot* be counted upon to convince those who do not intuitively sense the presence of race discrimination.

It was obvious in *McCleskey* that the state lacked the Baldus group's sophistication in the use of statistical methods. The state won despite having done little to respond to McCleskey's statistics. The case turned, in part, on the question of burdens of proof. It is one thing, in an employment discrimination case such as *Bazemore v. Friday*[116] (discussed by Justice Blackmun in a key passage in *McCleskey*[117]), for a court to conclude that the party opposing a statistical showing of discrimination based on multiple regression or other complex statistics bears a substantial burden in seeking to rebut them. But the Court was obviously not prepared to impose the same burden of statistical sophistication on the state in death penalty cases.[118]

Even setting the question of burdens of proof aside, it is hard to guarantee the outcome of battles over statistics. Just as Judge Blackmun had rejected old evidence or evidence from distant counties in *Maxwell*, the majority in *McCleskey* had precedent for insisting that the statistical evidence be more closely particularized to cases like McCleskey's, or that there be non-statistical evidence in the record to

114. *Maxwell*, 398 F.2d at 148.

115. There was an obvious division of labor between Justices Brennan and Blackmun in the writing of dissents in *McCleskey*. Justice Brennan focused on the Eighth Amendment and Justice Blackmun on the Fourteenth. I would doubt, however, that the division of labor included a prior agreement as to the division of rhetoric.

116. 478 U.S. 385, 403-04 n.14 (1986).

117. 481 U.S. at 361.

118. Such was the case in *Maxwell* and *Furman* in which Justice Blackmun was wary of unduly interfering with state discretion to impose the death penalty.

suggest the precise mechanism through which discrimination operated in McCleskey's case. Early on in the life of statistically-based cases under Title VII, the Supreme Court acknowledged that statistics alone make a poor prima facie case, that anecdotal evidence of particularized instances of discrimination is necessary to bring the cold numbers convincingly to life.[119] Statistics complex enough to capture the multi-stage, multi-state process of death penalty enforcement become so technical that bringing them to life requires something more than reiteration of the theory behind the "rule of exclusion."[120] The problem is that something other than evidence is needed to bring life to technical statistical cases. In the end, judges inevitably must use their own systems of background beliefs to determine whether the story that race accounts for the differences makes sense. It is there that the issues Justice Brennan raised in *McCleskey*—the question of whether we see the modern South as continuous with the South of slavery and Jim Crow—become so crucial. They are no less so in a jurisprudence dominated by the formality of proof structures and statistics. That insight, we shall see, came to dominate Justice Blackmun's race jurisprudence in the years after *McCleskey*.

One final issue should be noted before moving from *McCleskey*. One of the issues that surely shaped Justice Powell's approach to *McCleskey* was an unwillingness to suspend the operation of otherwise constitutional legal institutions until that infinitely receding day in the future when the problem of racism would finally be solved. Even when justices can be convinced to see race, they cannot always be convinced to act upon what they see when doing so casts doubts on the legitimacy of our system of justice. But was *McCleskey* such a case? On this issue, Justice Blackmun joined Justice Stevens in a moderating stance.[121] In their view, the pattern of race discrimination revealed by the Baldus study did not require suspending the operation of the death penalty in its entirety. The problem could be solved, they contended, by restricting the death penalty to the most egregious cases – because racial disparities in its use were minimal in such cases.[122] *McCleskey* may well be a case in which passionate rhetoric (as found here in Justice Brennan's opinion) stood in the way of a workable compromise. Passion is not always a virtue in the jurisprudence of race.

119. Teamsters v. United States, 431 U.S. 324, 343-56 (1977).

120. *McCleskey*, 481 U.S. at 351-53.

121. *See id.* at 365-66 (Blackmun, J., dissenting); *id.* at 366 (Blackmun, J., joining the dissenting opinion of Stevens, J.).

122. *See id.* at 365 (Blackmun, J., dissenting); *id.* at 366-67 (Stevens, J., dissenting).

VI. The Battle Over Civil Rights in the October Terms of 1987 and 1988

If Justice Blackmun's faith in the ability of formal proof structures to persuade the unpersuaded was shaken in *McCleskey*, his very sense of the solidity of the proof structures themselves was tested in *Watson v. Fort Worth Bank & Trust*[123] and shattered in *Wards Cove Packing Co. v. Atonio*.[124]

1. Watson v. Fort Worth Bank & Trust *(1988)*

The issue upon which certiorari was granted in *Watson* was narrow, and, narrowly speaking, the Court was unanimous in its resolution. The question was whether the disparate impact proof structure developed in *Griggs v. Duke Power Co.*,[125] a case involving objective job requirements such as paper-and-pencil tests and high school diplomas, was available in cases challenging subjective hiring practices. All eight members of the Court who participated in the decision agreed that it was. In explaining their reasoning, four justices (led by Justice O'Connor) set forth an understanding of the Title VII proof structures that differed markedly from the liberal orthodoxy on the subject, provoking a dissent from Justice Blackmun.

Every element of the disparate impact proof structure was controverted in the *Watson* opinions. Essentially the proof structure works as follows. First, the plaintiff makes out a prima facie case by establishing the existence of a statistical disparity in the effects of a challenged hiring practice. Once the prima facie case is established, an evidentiary burden shifts to the defendant who must then demonstrate the "business necessity" or "job relatedness" of the challenged practice. To Justice O'Connor and those for whom she wrote, the shifted burden was a burden of production. To Justice Blackmun and his contingent, it was a burden of persuasion. For Justice O'Connor's group, the recurring phrase "business necessity" did not require a showing of "necessity" at all, but something more akin to a showing of rationality. For Justice Blackmun's group, the standard was far closer to necessity.

Upon these distinctions rested what many – including Justice Blackmun – had previously thought to be the difference between the

123. 487 U.S. 977 (1988).
124. 490 U.S. 642 (1989).
125. 401 U.S. 424 (1971).

disparate impact and disparate treatment causes of action under Title VII. He explained:

> The prima facie case of disparate impact established by a showing of a significant statistical disparity is notably different [from the prima facie case in a disparate treatment case]. Unlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity. Once an employment practice is shown to have discriminatory consequences, an employer can escape liability only if it persuades the court that the selection process producing the disparity has "a manifest relationship to the employment in question." *The plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified.*[126]

But why has the plaintiff who makes out a prima facie case proven an *improper* effect? In a country in which discrimination in the social goods antecedent to professional success (for example, education) is still rampant, it should come as no surprise that employers' neutral selection criteria will have disparate racial impacts. Why is it not the case that the disparate racial impact only earns the label "improper" once it becomes clear that the use of the criterion that causes the disparate impact is unjustified?

Other elements of the *Griggs* proof structure were also controverted in *Watson*. Generally, the dispute throughout was about where the risk of uncertainty should lie in disparate impact cases. If the burden that shifts is only one of production, then more plaintiffs will lose their cases; if the standard is rationality rather than necessity, then more plaintiffs will lose their cases; if the plaintiff must pin down the precise practice that causes a racial disparity, then more plaintiffs will lose their cases. Proof structures are, *Watson* showed, manipulable by the courts that create them. The more technically and dispassionately they have been discussed in the past, the more likely it is that a subsequent Court will feel justified in reevaluating the assumptions upon which they are based – for doing so then appears merely as the continued adjustment of a machine, rather than as the sign of a repudiation of past liberal values.

The *Watson* plurality was short one vote to make its vision of Title VII the law. All that threatened to come to pass in *Watson*, and more, came to pass the following term in *Wards Cove*. Between them

126. *Watson*, 487 U.S. at 1004 (Blackmun, J., concurring in part and in the judgment) (citations omitted) (second emphasis added).

came another civil rights case in the area of race jurisprudence that had been the source of Justice Blackmun's most important rhetorical contributions: affirmative action.

2. City of Richmond v. Croson *(1989)*

In *City of Richmond v. Croson*,[127] the Court applied strict scrutiny to Richmond, Virginia's program of race-based affirmative action in public contracting. The task of drafting the primary dissent, in which Justices Brennan and Blackmun also joined, was assigned to Justice Marshall. Marshall's opinion both took on the specifics of the Richmond plan and spoke more sweepingly:

> It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. . . . Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is . . . . When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place.[128]

However, as is so often the case in long opinions, these kernels were buried amidst necessary but rhetorically less satisfying treatments of the specific facts and equal protection issues presented by the case. Here, Justice Blackmun was unwilling to let the moment pass without a clearer statement of the significance of what had happened. In an opinion joined by Justice Brennan, he wrote the language I quoted at the beginning of this Article and will quote again here:

> I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. . . . So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights – a fulfillment that would make this Nation very special.[129]

127. 488 U.S. 469 (1989).

128. *Id.* at 528, 544, 546 (Marshall, J., dissenting).

129. *Id.* at 561-62 (Blackmun, J., dissenting).

There is an important difference between Justice Blackmun's opinion in *Croson* and his opinions in *Bakke* and *Weber*. The earlier opinions attested to struggle; they aimed to make clear why someone who took countervailing values seriously had come out in favor of affirmative action. In *Croson*, one must remember that the City of Richmond had once been the bastion of the Confederacy, but was now a majority-black jurisdiction with a majority-black city council. Once that change had taken place, could reasonable minds differ as to whether full economic equality could be attained without affirmative action? And could reasonable minds also differ on whether a majority-black legislature was entitled to deference in implementing programs that favored blacks?

The answer, I think, lies not in the facts or posture of *Croson* but in the mood of the Court in that embattled Term. *Watson* had come at the very end of the previous term, and heralded danger. One senses from the rhetoric of Justice Blackmun's opinion in *Croson* that he thought it important to stand witness to the magnitude of the shift that was taking place. The Court had abandoned years of experimentation with racial remedies and had reverted to color-blindness, despite the fact that the time of "maturity" Justice Blackmun said in *Bakke* would come someday had not yet arrived. The answer to that reversal of spirit could not come from technical discussions of proof structures or detailed accounts of the facts of cases. So Justice Blackmun made a move into what I would call a prophetic mode: a rhetoric calling upon the past and the future to stand witness to the momentous errors being committed in the present.

3. Wards Cove Packing Co. v. Atonio

In *Wards Cove*,[130] the Court revisited the issues upon which it split in *Watson*, and the plurality gained its fifth vote. The facts of the case sounded very different depending upon how one chose to tell them.

Told one way, the story of the case was one of a modern plantation in the Alaska fishery – indeed, Justices Stevens and Blackmun both called it such in their dissents.[131] As Justice Blackmun put it, the company had a preference for hiring Asian workers for the worst jobs in the cannery and keeping them there. Through a variety of practices, such as the refusal to take job applications on site and the operation of segregated dorms and eating facilities, the company kept its

130. 490 U.S. 642 (1989).

131. *See id.* at 662 (Blackmun, J., dissenting); *id.* at 663-64 n.4 (Stevens, J., dissenting).

upper-level jobs white and its lower-level jobs Asian. In so doing, the company continued a long tradition in the cannery business. In fact, the machine used for gutting fish was called the "Iron Chink" in memory of the flesh-and-blood Chinese who used to do the job and now manned the machines.[132] Discrimination was pervasive at Wards Cove, and to fail to use the disparate impact approach to stop it was unconscionable.

Told another way, the story of the case was very different. The plaintiffs had failed to prove intentional discrimination in the lower courts, and did not appeal that loss to the Supreme Court. There were thus no live allegations of intentional discrimination in the case. As Justice White maintained for the majority, this meant that the "plantation economy" claim was spurious;[133] plantations, after all, operated on intentional discrimination and Wards Cove, at least for purposes of the litigation at its present stage, did not. Instead, the plaintiffs were claiming that each and every practice about which they had failed to prove intentional discrimination was part of a vague multi-component process that selected Asians for the worst jobs and barred their progress.[134] The plaintiffs had failed to demonstrate with any specificity the discriminatory impact of each of these practices.[135] Without such a demonstration, the case was not properly a disparate impact case at all.

In accepting Justice Brennan's invitation to write the dissenting opinion in the case, Justice Stevens accepted but acknowledged to Justice Brennan that "my views may be closer to the majority than yours."[136] The result was a dissenting opinion that laid out the ways in which the majority had misstated and misapplied the disparate impact proof structure, and made the case for why the company should lose if the structure were correctly applied. To Justice Blackmun, the opinion was perhaps too dispassionate to serve as a marker for the significance of what had happened. It was the kind of opinion Justice Blackmun might have written the year before: it was technically careful and relied on the history of the proof structures to make its case. This time, however, just as he had in *Croson*, Justice Blackmun shifted to a sharper rhetoric: "One wonders whether the majority still believes that race discrimination – or, more accurately, race discrimina-

132. Antonio v. Wards Cove Packing Co., 10 F.3d 1485, 1503 (1993).
133. *Wards Cove*, 490 U.S. at 650.
134. *See id.* at 657.
135. *See id.*
136. Library of Congress, Thurgood Marshall Papers, Opinions Files, Container 474 Folder 1 (Jan. 19, 1989 Memo).

tion against nonwhites – is a problem in our society, or even remembers that it ever was."[137]

The problem, in *Wards Cove* as in *Croson*, is that cases are not merely symbols. They are also conjunctures of factual records and legal doctrines. Disparate impact theory, with its emphasis on particular practices and their disparate effects, had been originally designed for clearly identified and quantifiable job hurdles. At the time of *Griggs*, one would hardly have expected that the disparate impact cause of action would be relied upon in a case like *Wards Cove*. True, one of the reasons why the Court had created the disparate impact cause of action was because intentional discrimination was difficult to prove. Nevertheless, that does not mean that every discrimination case that could be won as an intentional discrimination case should also be winnable as a disparate impact case. Rhetoric aside, *Wards Cove* was a weak set of facts for the application of disparate impact doctrine. Certainly *Watson* had opened the door to the use of disparate impact doctrine to challenge a wider range of employment practices, but it had not expressly invited the use of the doctrine to challenge an employer's entire mode of recruiting and managing its labor force. Furthermore, many of the challenged practices were not in fact "facially neutral" at all, making it all the more awkward to use disparate impact theory to challenge them. Had *Wards Cove* come out the other way, it would have become difficult if not impossible to detect the distinction between disparate treatment and disparate impact cases. Once one puts one's faith in a set of distinct proof structures, each with its own rules, one must live by them—and sometimes even die by them.

VII. Revisiting the Death Penalty: *Callins v. Collins*

As the end of his time on the Court approached, Justice Blackmun announced in *Callins v. Collins*[138] that he had become a death penalty abolitionist. One of the reasons he offered was the unsolved problem of race. "The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. . . [W]e may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system."[139] Recall that at the time of *McCleskey*, Justice Blackmun was not prepared to go this far. His view in *McCles-*

137. *Wards Cove*, 490 U.S. at 662.
138. 510 U.S. 1141, 1143 (1994).
139. *Id.* at 1153-54.

key was that the death penalty could stand in the most egregious capital murder cases, because those cases did not show a pattern of racial disparity. But his moderating stance is absent in *Callins*. There is every reason to believe that Justice Blackmun's intervening experience with the instability of proof structures in the Title VII cases had robbed him of his prior faith that fair proof structures and rigorous statistical methods could lead even the most race-insensitive judges to fair results. With that faith gone, the problem of race became but one more reason to switch to abolitionism.

Conclusion

Let us conclude by applying the theme of Justice Blackmun's opinion in *Callins*, the inevitable link between discretion and arbitrariness, to the general problem of race jurisprudence. What we have seen in Justice Blackmun's race jurisprudence is an oscillation between intuition and science. Just as a death penalty jurisprudence without discretion cannot speak in a human voice, a race jurisprudence without room for intuition and historical narrative cannot bring the cold numbers convincingly to life. Just as a death penalty jurisprudence with too much discretion cannot assure system-wide fairness, a race jurisprudence with no formal backbone depends too much on the good fortune of finding a judge whose experiences foster intuitive understandings of race and racism. The dilemmas are the same in both fields.

There is, however, one crucial difference. By taking the abolitionist stance, Justice Blackmun could declare that "[f]rom this day forward, I no longer shall tinker with the machinery of death."[140] But there is no way Justice Blackmun, or any other justice, could ever free himself of the obligation to tinker with the machinery of race.

That machinery, as we have seen, requires a constant adjustment of one's judgment of the scope of race jurisprudence. It requires frequent review of where we stand on the time line of the remediation of race discrimination. It requires decisions about when it is appropriate to focus solely on the need to remedy race discrimination and when other institutional needs must take precedence. It requires the willingness to explore methods of proof and to cabin them when they take on an unwieldy life of their own. And it requires the entirely human choice of whether leadership requires one to admit doubt or to hide it. Justice Blackmun never achieved a uniform stance on all of these

140. *Id.* at 1145.

questions, but uniformity is not necessarily virtue where race jurisprudence is concerned. Nor is virtue necessarily to be found in heightened rhetoric. Where virtue lies, instead, is in deep moral seriousness about the problem, guarded optimism in the search for answers, and a willingness to let go of yesterday's solutions as they reveal their limits. These are the efforts that engaged Justice Blackmun's race jurisprudence. We have learned much from him.