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JUSTICE IN NUMBERS:

STATISTICS AND THE TRANSFORMATION OF CIVIL RIGHTS IN MODERN AMERICA

Volume I

Michael F. McGovern

A DISSERTATION

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Abstract

This dissertation examines the convergence of the struggle for civil rights led by Black Americans and the precipitous rise of government quantification in the twentieth-century United States. Focusing on litigation campaigns waged by the NAACP Legal Defense Fund against employment discrimination and the death penalty, it charts the trajectory of strategies to prove racial discrimination with statistics. It argues that technical standards and social scientific theories shaped legal ideas about fairness, and that the retrenchment of antidiscrimination law was as much a struggle over knowledge as politics, doctrine, or cultural memory.

To make these claims, *Justice in Numbers* traces the "disparate impact" theory of discrimination from its emergence in the 1960s to its codification in the 1970s through the backlash against it in the 1980s. At the peak of the Civil Rights Movement, concerns about racial statistics divided activists and administrators who embraced data to hone litigation as a weapon against structural inequality. Lawyers collaborated with social scientists to mount a constitutional challenge to the death penalty rooted in racial disparities research. Their efforts turned debates on capital punishment into proxy battles over criminal justice expertise amid a rising tide of law-and-order politics. Meanwhile, statistics secured key victories in employment lawsuits. But what social science giveth, it taketh away, as disciplinary dissensus threatened to undermine disparate impact theory. By the Reagan presidency, opponents of civil rights no longer rejected quantification. Rather, they excelled at it, moving law's benchmark for discrimination even further from the structural and historical concerns that inspired the adoption of statistics in the first place.

To tell the crucial story of how quantification shaped legal strategy and colorblind politics, *Justice in Numbers* uses methods from the history of science and Black studies to analyze milestone cases, providing a new perspective on computing, race, and social power in modern America. Past efforts to mobilize computational modeling and scientific anti-racism in the courtroom have shored up pernicious standards that occlude the historical processes of racism. Scholars confronting the challenges presented by AI and machine learning to civil rights today should take heed of this history, lest it be repeated.

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Introduction

Discrimination and Data

> Although I value the Civil Rights Movement *deeply*, I have never liked the term itself. It has no music, it has no poetry. It makes one think of bureaucrats rather than of sweaty faces, eyes bright and big for *Freedom!*, marching feet. No; one thinks instead of metal filing cabinets and boring paperwork…"Civil Rights" is a term that did not evolve out of black culture, but, rather, out of American law. As such, it is a term of limitation.
>
> – Alice Walker, *In Search of Our Mothers' Gardens* (1983)[1]

> It is no accident that the move toward the almost universal quantification of social and applied disciplines was led by the United States, and succeeded most fully there. The push for rigor in the disciplines derived in part from the same distrust of unarticulated expert knowledge and the same suspicion of arbitrariness and discretion that shaped political culture so profoundly in the same period.
>
> – Theodore M. Porter, *Trust in Numbers* (1995)

Can fairness be quantified? This an old question, one that recurs throughout the history of law and science. During the European Enlightenment, attempts to apply the theory of probability to matters of witness credibility and the design of tribunals animated debates over legal reform. If a universal system of weights and measures could facilitate commerce, making unlike things commensurable, so too might moral experience be amenable to a uniform calculus.[2] In the still-early decades of the

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[1] I was pointed to this quotation by Christopher W. Schmidt, *Civil Rights in America: A History*, Cambridge Studies on Civil Rights and Civil Liberties (Cambridge: Cambridge University Press, 2020), 9.

[2] In her historical account of Enlightenment probability, Lorraine Daston emphasizes the influence of legal doctrines and theories of evidence on the 'classical' theory, which reconciled the subjective and objective versions of probability that would later diverge, respectively, into Bayesian and frequentist interpretations. Daston argues that this project derived intellectual support from associationist psychology and sensationalist epistemology, and was in line with the era's prevailing spirit of universalism: "Just as his projects for a universal language or a universal system of weights and measures promised to rationalize communication and commerce…so Condorcet and his fellow probabilists envisioned a universal dictionary of probabilities that would translate all moral experience into a common tongue." Lorraine Daston, *Classical Probability in the*

twenty-first century, efforts to implement big data and algorithmic systems throughout the private and public sectors have given rise to a global, interdisciplinary conversation among technologists and social scientists about what fairness, accountability, and transparency mean in a brave new world of data-driven decision-making.[3] In fact, the question is no longer whether we can articulate fairness in numerical terms, or even whether we *should*. Though they rarely go uncontested, measures of fairness (and its opposite) have become a part of our social world.

The jurisprudence of numbers is vast and constantly in flux, but like all things, it has a history. This dissertation considers one important episode in that history: the convergence, in the mid-twentieth century United States, of the struggle for civil rights led by Black Americans and the

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Enlightenment (Princeton, N.J.: Princeton University Press, 1988), 14, 92, 190, and especially Chapter Six, "Moralizing Mathematics." In the extensive literature on law and quantification written by statisticians and philosophers, references to this tradition are common, though there is an equally strong emphasis on the law of contracts. See, for example, Michael O. Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," *Harvard Law Review* 80, no. 2 (1966): 338–76; Ian Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas About Probability, Induction and Statistical Inference* (Cambridge: Cambridge University Press, 1975); Morris H. DeGroot, Stephen E. Fienberg, and Joseph B. Kadane, eds., *Statistics and the Law*, Wiley Series in Probability and Mathematical Statistics (New York: Wiley, 1986); James Franklin, *The Science of Conjecture: Evidence and Probability Before Pascal* (Baltimore, Md.: Johns Hopkins University Press, 2001). If the first four sentences and this footnote have made the reader nervous, fear not; the account here does not concern the nature of probability *per se*. Like Daston, I follow the push and pull between practical uses of statistics and their resonance in political and intellectual projects.

[3] The contemporary literature on "fairness, accountability, and transparency" is vast and growing, but is centered around an annual conference bearing that title organized by the Association for Computing Machinery. A major touchstone is Solon Barocas and Andrew D. Selbst, "Big Data's Disparate Impact," *California Law Review* 104, no. 3 (2016): 671–732. Other examples in this broader conversation include Ben Hutchinson and Margaret Mitchell, "50 Years of Test (Un)Fairness: Lessons for Machine Learning," November 25, 2018; Aziz Z. Huq, "Racial Equity in Algorithmic Criminal Justice," *Duke Law Journal* 68, no. 6 (2019): 1043–1134; Matthew Le Bui and Safiya Umoja Noble, "We're Missing a Moral Framework of Justice in Artificial Intelligence: On the Limits, Failings, and Ethics of Fairness," in *The Oxford Handbook of Ethics of AI*, ed. Markus D. Dubber, Frank Pasquale, and Sunit Das (Oxford University Press, 2020), 161–79; Daniel E. Ho and Alice Xiang, "Affirmative Algorithms: The Legal Grounds for Fairness as Awareness," *The University of Chicago Law Review Online* (blog), October 30, 2020, https://lawreviewblog.uchicago.edu/2020/10/30/aa-ho-xiang/; Anya E. R. Prince and Daniel Schwarcz, "Proxy Discrimination in the Age of Artificial Intelligence and Big Data," *Iowa Law Review* 105, no. 3 (March 2020): 1257–1318. For a critical take reframing some of the ideas in this discussion through scholarship in science and technology studies, see Rodrigo Ochigame, "The Long History of Algorithmic Fairness," *Phenomenal World* (blog), January 30, 2020, https://phenomenalworld.org/analysis/long-history-algorithmic-fairness.

precipitous rise of quantification in government and public administration. After the landmark civil rights legislation of the 1960s, advocates and experts believed that new measures of racial inequality could reveal entrenched biases, lay the basis for sweeping social reforms, and create a more just society. Channeling the prevailing legalism and emphasis on rights that took root in the postwar years, lawyers learned to wield statistical evidence of racial discrimination in the courtroom, and judges were cautiously receptive to it. The situation began to change during the political realignment of the 1970s. Defense experts learned the "numbers game" as courts became more conservative. Civil rights groups doubled down, investing more in research and computing, but this legal strategy failed to produce the kind of results it once had.

Along the way, quantitative frameworks helped to underwrite a narrowly technocratic approach to the problem of fairness, paving the way for decision systems based in algorithms and big data. By reckoning with past efforts to secure justice through numbers, we stand to learn much about what is at stake in our present moment.

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I begin with the unfamiliar juxtaposition of epigraphs by a Black feminist writer and a historian of science because each one offers incisive reflections on the historical changes that shaped this political reality. Taken together, they outline the stakes of this project.

Walker, author of the Pulitzer Prize-winning novel *The Color Purple*, highlighted the loss of poetry in the Civil Rights Movement's shift "from protest to politics," to borrow civil rights leader Bayard Rustin's phrase.[4] The administrative state, instantiated by "metal filing cabinets and boring paperwork," became the chief avenue through which movement leaders sought to channel unrest

[4] Bayard Rustin, "From Protest to Politics: The Future of the Civil Rights Movement," *Commentary*, February 1965.

into social change, but constantly threatened to contain it. She drew attention to what was lost when calls for "*Freedom!*" were translated into the language of rights. Writing as legal scholar Derrick Bell's "interest convergence" thesis ignited debates within the legal academy about the limits of litigation in achieving social justice—helping to start what would later be called Critical Race Theory—Walker pointed out that law "promises assurance of greater freedoms [as] it narrows the area in which people might expect to find them."[5] She underscored the irony that a broad social movement defying the bureaucracy of race that had built much of modern American governance would embrace a similar instrumentality, a bureaucracy of rights.

Where Walker highlights the constraints of bureaucracy, Porter considers how the logics of measurement it enabled shaped the broader political culture. In his classic account of quantification in public life *Trust in Numbers*, Porter argues that despite, or perhaps because of, the "overwhelming success of quantification in the social, behavioral, and medical sciences" underwritten by postwar defense spending, the 1960s and 70s saw a growing "distrust of unarticulated expert knowledge."[6] The rise of metrics was driven by "suspicion of arbitrariness and discretion" that cut in different directions along the liberal spectrum. This emphasis on rules and quantifiable benchmarks was due as much to distrust of Southern judges as concerns over the enlarged authority of executive agencies to regulate drugs, declare smoking unhealthy, or to establish environmental protection standards.[7]

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[5] Alice Walker, *In Search of Our Mothers' Gardens: Womanist Prose* (San Diego: Harcourt Brace Jovanovich, 1983), 336. In short, Bell argued that that *Brown vs. Board of Education* (1954) failed to deliver real change because it was secured by fleeting overlap between the Black freedom struggle and the Cold War agenda of upper- and middle-class whites. Derrick A. Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *The Yale Law Journal* 85, no. 4 (1976): 470–516.
See also Lani Guinier, "From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma," *The Journal of American History* 91, no. 1 (2004): 92–118.

[6] Theodore M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton, N.J.: Princeton University Press, 1995), 198.

[7] As legal historian Morton Horwitz describes it, this erosion of trust in expertise began in the immediate postwar period and led to a reversal in liberals' relationship to the administrative state. Where previously they

Moreover, "rational" policymaking was a double-edged sword: data collected through programs designed to eradicate poverty or racism could—and would—be turned against them.[8]

In the political fallout of the 1960s, experts held fast to their respective disciplines' methodological standards in the face of public scrutiny and even sought refuge in the same fortress of filing cabinets civil rights advocates built. Organized opposition to civil rights gains in education, employment, and criminal justice challenged an already fragile liberal consensus in the social sciences and abetted a shift from structural understandings of inequality toward those that resonated more deeply with the "personal frames of understanding" that had captured the public imagination.[9] Advocacy for "traditional" standards of merit and responsibility dovetailed with a

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had emphasized the autonomy of a benevolent central state, legitimated through appeals to science, the Cold War made them more concerned with restrictions of freedom and invasions of privacy: "As claims of professionalism to scientific legitimacy grew weaker, as their ability to provide objective solutions was increasingly called into question, courts reverted to traditional legalist protections against arbitrariness…After 1946, political attacks on the regulatory state and intellectual challenges to social science claims of objectivity marched hand in hand. Every triumph of proceduralism occurred at the expense of professionalism." Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), 233–34. Put in simpler terms, "social engineering"—or its counterpart in legal thought, the "sociological jurisprudence" of Roscoe Pound—had once been a badge of progressive faith but it became an epithet for government overreach. On the broader political and legal dimensions of "social engineering" see, *inter alia*, Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 719–46; John M. Jordan, *Machine-Age Ideology: Social Engineering and American Liberalism, 1911-1939* (Chapel Hill: University of North Carolina Press, 1994); Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge: Cambridge University Press, 2014); Andrew Jewett, *Science Under Fire: Challenges to Scientific Authority in Modern America* (Cambridge, Mass.: Harvard University Press, 2020). American studies scholar Daniel LaChance shrewdly observes that the even during the height of what criminologists have labeled "penal welfarism," skepticism toward social engineering was fed by perceptions of violent crime, which "increasingly impugned social science and the political climate in which it thrived by pointing out the failure of a technocratic state to prevent heinous crime." Daniel LaChance, "Executing Charles Starkweather: Lethal Punishment in an Age of Rehabilitation," *Punishment & Society* 11, no. 3 (July 1, 2009): 352.

[8] On the give-and-take between social science and social policy, see Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (Berkeley: University of California Press, 1995); Alice O'Connor, *Poverty Knowledge: Social Science, Social Policy, and the Poor in Twentieth-Century U.S. History* (Princeton, N.J.: Princeton University Press, 2001).

[9] Philippe Fontaine and Jefferson D. Pooley, "Introduction: Whose Social Problems?," in *Society on the Edge: Social Science and Public Policy in the Postwar United States*, ed. Jefferson D. Pooley and Philippe Fontaine

resurgent strain of hereditarian thought across the social sciences, one that emphasized individual behavior and biological immutability rather than social causation and rehabilitation.[10]

Though the pervasiveness of rights consciousness and the fraught status of expertise might appear unrelated, both Walker and Porter observe something important about governance during a pivotal decade in the rise of electronic information processing—or, as we know it now, modern computing. The actual application of computers in a legal setting was, at this point, a niche interest.[11] However, computing was part of the broader cultural imagination throughout this period of reform and upheaval. As information processing became pervasive throughout the business world, epitomized by the IBM System/360, Americans grew wary of the "data banks" used by the state and corporations alike to capture and shape a greater share of their lives.[12] Walker's paperwork and Porter's policy metrics are both part of this narrative because they established

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(Cambridge: Cambridge University Press, 2020), 12. See generally, Daniel T. Rodgers, *Age of Fracture* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011).

[10] Historian Julilly Kohler-Hausmann describes this preoccupation with individuals as a facet of "getting tough" in social policy: "a profound shift in *governing strategies and logics*" from rights and rehabilitation to an emphasis on individual agency that targeted deviant persons for increasingly punitive forms of civic degradation. Julilly Kohler-Hausmann, *Getting Tough: Welfare and Imprisonment in 1970s America* (Princeton, N.J.: Princeton University Press, 2017), 2. Other accounts focus on the defense of merit as an intellectual project supported by a resurgent behaviorism, e.g. Aaron Panofsky, *Misbehaving Science: Controversy and the Development of Behavior Genetics* (Chicago: University of Chicago Press, 2014); Kimberly Probolus, "'Drawn from Alice in Wonderland': Expert and Public Debates over Merit, Race, and Testing in Massachusetts Police Officer Selection, 1967–1979," *Journal of the History of the Behavioral Sciences* 54, no. 4 (2018): 237–55.

[11] "[U]sing computers…has piqued the interest or enthusiasm of a few lawyers, stirred profound apathy in many, and angered or frightened the rest." Reed Dickerson, "Some Jurisprudential Implications of Electronic Data Processing," *Law and Contemporary Problems* 28, no. 1 (1963): 53–70.

[12] Describing the computer as a "protean machine," following historian Mike Mahoney, made room in a discussion dominated by accounts focused on business strategies and engineering 'firsts' for considerations of the broader cultural politics of data. Sarah Igo's work exemplifies the latter, while Paul Ceruzzi and others have extensively documented the former. Michael S. Mahoney, *Histories of Computing*, ed. Thomas Haigh (Cambridge, Mass.: Harvard University Press, 2011); Sarah E. Igo, *The Known Citizen: A History of Privacy in Modern America* (Cambridge, Mass.: Harvard University Press, 2018); Paul E. Ceruzzi, *A History of Modern Computing*, 2nd ed. (Cambridge, Mass.: MIT Press, 2003). Though my account here is not in direct conversation with the historiography of computing, it takes many cues from it.

templates for extending computing into new domains.[13] Those filing cabinets may not contain much poetry, but for the historian of science and governance they are filled with stories that can tell us how race and rights were shaped by the "information age," and vice versa.

Taken together, Walker's concern for the limitations of civil rights and Porter's observations about the political culture that fueled the rise of quantitative criteria underscore the essential tension that this dissertation follows. Much has been written on the role of social science in the Supreme Court's decision to end legal segregation in *Brown v. Board of Education* (1954), one of the more controversial aspects decried by its critics.[14] But the use of statistical evidence in civil rights cases only accelerated in the decades that followed. This history—sprawling, complex, and still ongoing—needs telling. It concerns not only our legal institutions and their politics but changing ways of knowing and the values they underwrite. Following discrimination statistics in and out of the courtroom allows us to bear witness to the social transformations that have led to our current emphasis on "technological fixes" for fairness.[15]

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This dissertation explores the role of statistics in antidiscrimination doctrine from the Civil Rights Era through the beginnings of the Clinton administration, set against the broader backdrop of the

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[13] Jon Agar insists that historians of science ask, rather than presume, whether the introduction of electronic computing into different scientific and governmental practices led to the kind of 'unprecedented' changes claimed by its boosters. More often than not, he argues, the introduction of computers depended on practices that were themselves proto-computational. A recent volume of *Osiris* departs from this observation to highlight the long history of data practices: Jon Agar, "What Difference Did Computers Make?," *Social Studies of Science* 36, no. 6 (December 1, 2006): 869–907; Elena Aronova, Christine von Oertzen, and David Sepkoski, eds., *Data Histories*, Osiris 2nd Ser. 32 (Chicago: University of Chicago Press, 2017).

[14] On the legacy of social science in *Brown*, see Daryl Michael Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche, 1880-1996* (Chapel Hill: University of North Carolina Press, 1997); John P. Jackson Jr., *Social Scientists for Social Justice: Making the Case Against Segregation*, Critical America (New York: New York University Press, 2001).

[15] Ruha Benjamin, whose work I discuss below, refers to this as "technological benevolence." Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code* (Medford: Polity, 2019).

rise of racial administration and statistics as legal proof during Reconstruction. My narrative is anchored by the NAACP Legal Defense and Education Fund (LDF), which drove much of this transformative litigation in conjunction with other civil rights groups and government agencies. I follow their efforts across two legal domains: employment discrimination and capital punishment.

At first glance, one might expect little overlap between them. As of June 2023, capital punishment abolition has only ever succeeded at the state level. Even under the liberal Warren Court, constitutional challenges to the death penalty failed unless made on the narrowest of grounds. Title VII, on the other hand, was in many ways the centerpiece of the 1964 Civil Rights Act because it drew on equal protection ideas to extend federal authority over private employers where the Fourteenth Amendment had long been used by private actors to limit state-level reforms—a reversal so strong that one scholar has called it "reverse state action."[16] Employment advocacy both drew upon and worked within the model provided by the labor movement. Capital punishment abolition, on the other hand, had diverse sources of inspiration and support: some stretching back to the origins of criminology, others bound up in religious reform movements that galvanized a broader moral conversation about the limits of the rule of law, and yet another tied to anti-lynching activism.[17] The elite-led abolition campaign that emerged in the 1960s was inspired by liberal concerns over inequality and arguably rode the coattails of civil rights reform.

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[16] Bruce A. Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2014), 175. On the transformation of equal protection into a shield for corporations against state regulation, see, *inter alia*, Evelyn Atkinson, "Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection," *Virginia Law Review* 108, no. 3 (May 2022): 581–656.

[17] See, generally Stuart Banner, *The Death Penalty: An American History* (Cambridge, Mass.: Harvard University Press, 2002). More specific accounts of the anti-lynching and moral legacies, respectively, can be found in Crystal N. Feimster, *Southern Horrors: Women and the Politics of Rape and Lynching* (Cambridge, Mass.: Harvard University Press, 2009); Mugambi Jouet, "A Lost Chapter in Death Penalty History: Furman v. Georgia, Albert Camus, and the Normative Challenge to Capital Punishment," *American Journal of Criminal Law* 49, no. 2 (Spring 2022): 119–76.

However, I think there are a number of good reasons why following litigation across these domains can tell us something important about where the jurisprudence of numbers meets the politics of racial quantification. Both were substantial areas of investment in social science research and methodology to aid litigation, perhaps largely due to the LDF's guidance in both initiatives. The controversy surrounding social science in the *Brown* hardly deterred LDF lead counsel Jack Greenberg and his acolytes, and they continued to seek out funding and research collaborators to further their agenda. These institutional connections are clear, but so are the legal analogies. In a perverse way, charging and sentencing can be analogized to hiring and promotion decisions—this was exactly the LDF's strategy in *McCleksey v Kemp* (1987), a bold challenge to capital punishment that had reverberations throughout the criminal justice system. Focusing on statistical proof of discrimination as a historical object allows us to chart convergences and divergences between statutory and constitutional theories of equality. To be sure, there are many stories to be told about the interface between law and numbers in education, housing, and voting rights.[18] Nonetheless, considered together or apart, the domains I have chosen provide an ideal starting point for exploring how law mediates the relationship between individuals and groups through numbers.[19]

In order to tell the story of how quantification shaped legal strategy and colorblind politics, I look largely to the materials of high legal and political history through lenses furnished by the history of science and Black studies. Scholars have approached these developments from different perspectives: by focusing on the contributions of specific scientific disciplines, social movements that made selective use of these legal theories, or even by looking at the private professionals and

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[18] For a discussion of some recent developments, see below, Postlude.

[19] One could call this a legal history of *selection devices*, "standardization tools designed for making categorical decisions about individuals." Daniel Hirschman and Emily Adlin Bosk, "Standardizing Biases: Selection Devices and the Quantification of Race," *Sociology of Race and Ethnicity* 6, no. 3 (July 1, 2020): 348–64.

consultants who helped corporations and governments ward off lawsuits.[20] One might also look to how science and technology figured into the broader cultural imagination, shaping understandings of human nature at a politically volatile moment.[21] My approach draws on all of these perspectives. Following the well-trod path of antidiscrimination doctrine, I highlight where and when it has been shaped by professional politics and shifting intellectual frameworks.[22] I use materials from government and institutional archives, as well as experts' personal papers, to explore the backroom developments that shaped legal strategies. Throughout, I draw on insights from Critical Race Theory and studies of race and technology to explore how the numbers debated in the courtroom reinforced specific ways of thinking about discrimination that resonated with changing doctrine.[23]

Statistics, computing, social science—these are all facets of quantification, but also distinct domains with their own histories. Though the overlap between them is significant, collapsing them under the ideologically freighted and largely anachronistic umbrella term "information age" carries

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[20] For three examples that, respectively, take up these perspectives, see Cléo Chassonnery-Zaïgouche, "How Economists Entered the 'Numbers Game': Measuring Discrimination in the US Courtrooms, 1971–1989," *Journal of the History of Economic Thought* 42, no. 2 (June 2020): 229–59; Katherine Turk, *Equality on Trial: Gender and Rights in the Modern American Workplace* (Philadelphia: University of Pennsylvania Press, 2016); Frank Dobbin, *Inventing Equal Opportunity* (Princeton, N.J.: Princeton University Press, 2009).

[21] Examples of this narrative abound in the historiography of science, see Deborah R. Coen, *Vienna in the Age of Uncertainty: Science, Liberalism, and Private Life* (Chicago: University of Chicago Press, 2007); Jamie N. Cohen-Cole, *The Open Mind: Cold War Politics and the Sciences of Human Nature* (Chicago: University of Chicago Press, 2014); Erika Lorraine Milam, *Creatures of Cain: The Hunt for Human Nature in Cold War America* (Princeton, N.J.: Princeton University Press, 2019); and to a lesser extent Daniel LaChance, *Executing Freedom: The Cultural Life of Capital Punishment in the United States* (Chicago: University of Chicago Press, 2016).

[22] In a way, I aim to bridge the gap defined by the Mack-Goluboff debate in legal history: Risa Goluboff, "Lawyers, Law, and the New Civil Rights History," *Harvard Law Review* 126, no. 8 (2013): 2312–35; Kenneth W. Mack, "Civil Rights History: The Old and the New," *Harvard Law Review Forum* 126 (2013): 258–61.

[23] Lundy Braun, *Breathing Race into the Machine: The Surprising Career of the Spirometer from Plantation to Genetics* (Minneapolis: University of Minnesota Press, 2014); Kimberlé Williams Crenshaw, "Unmasking Colorblindness in the Law: Lessons from the Formation of Critical Race Theory," in *Seeing Race Again: Countering Colorblindness across the Disciplines*, ed. Kimberlé Williams Crenshaw et al. (University of California Press, 2019), 52–84; Jessica Eaglin, "When Critical Race Theory Enters the Law & Technology Frame," *Michigan Journal of Race and Law* 26 (January 1, 2021): 151–68.

risks that need to be acknowledged.[24] But numbers, their technical means of production, and the theories that give them meaning traveled together, providing a valuable cultural resource for legal liberals who sought to root out Jim Crow by translating the rights revolution into administration. Scholars in science and technology studies have defined *civic epistemology* as "the social and institutional practices by which political communities construct, review, validate, and deliberate politically relevant knowledge."[25] Considering legal liberalism as a civic epistemology that flourished in postwar America's nascent information age allows us to take a historical object so innocuous (and clunky-sounding) as *statistical evidence of racial discrimination* and use it as a window into broader changes in governance, values, and ways of knowing.[26] The remainder of this introduction will sketch out its contours.

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[24] As historian Ronald Kline recounts, the phrase itself did not come to prominence until the 1990s. The Cold War purchase of an "informational metaphor" that encompassed concepts from the sciences and advances in engineering, along with a utopian faith in technology as an autonomous social force, crowded out alternatives like futurist Daniel Bell's "post-industrial society." Kline suggests that this specific language was also due to some well-timed Japanese influence, and as I like to remind my students, the "Telematic Society" was once a candidate. Ronald R. Kline, *The Cybernetics Moment, or, Why We Call Our Age the Information Age* (Baltimore: Johns Hopkins University Press, 2015).

[25] Clark A. Miller, "Civic Epistemologies: Constituting Knowledge and Order in Political Communities," *Sociology Compass* 2, no. 6 (2008): 1896–1919. Quoted in William Deringer, *Calculated Values: Finance, Politics, and the Quantitative Age* (Cambridge, Mass.: Harvard University Press, 2018), 9. Though I do not rely extensively on this conceptualization in my own analysis, it is useful to introduce this nexus of issues.

[26] Originally, this dissertation aimed to focus on the place of expert witnesses from different disciplinary background in order to explore how and why such distinctions mattered. When I had to adjust my research agenda in response to the COVID-19 pandemic, this strategy no longer seemed viable, nor the most interesting one to pursue. On the history of expert witnesses, see Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge, Mass.: Harvard University Press, 2004); Lawrence Rosen, "Expert Testimony in the Social Sciences: A Historical Overview of Contemporary Issues," *Law and History Review* 38, no. 1 (February 2020): 123–42.

Civil Rights in the Information Age

On or about May 1966, civil rights lawyering changed.[27] Lawyers began to wield statistics with greater fervor in the courtroom, even when met with indifferent shrugs by presiding judges. This was not an isolated development. It happened as departments of statistics were cropping up at universities nationwide, budding historians were trading in their paleography manuals for IBM punch cards to analyze economic data and census records, and "defense intellectuals" were applying rational management techniques developed for warfare to solve problems in American cities.[28] Nor was it a radical departure from an established tradition. Not unlike the public defender, the "civil rights lawyer" as a distinct kind of practitioner sanctioned by the legal profession was of a fairly recent vintage.[29] Undeterred by the fallout from the use of social science in the *Brown* litigation

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[27] This formulation comes from Virginia Woolf, an homage to how Ian Hacking writes about the emergence of probability "around 1660." As my first two chapters bear out, there are good reasons to pay attention to the time partway into 1966. This is when EEOC attorney Sonia Pressman circulated a memo on the use of statistics in Title VII cases, signaling that the commission was thinking about its data in new ways. Michael O. Finkelstein's *Harvard Law Review* article "The Application of Statistical Decision Theory to the Jury Discrimination Cases" also appeared that year. Five years on, interest in statistical applications was such that constitutional scholar Laurence Tribe felt compelled to publish a critique of the whole approach in response to Finkelstein's latest piece in the same rag: Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," *Harvard Law Review* 84, no. 6 (1971): 1329–93. Finally, Owen Fiss points out that the nature of group-based civil rights claims was recognized by "the emergence in 1966 of a new type of class action—the b(2) action," which paved the way for some of the statistical wrangling over class membership to come: Owen M. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978), 15.

[28] Jennifer S. Light, *From Warfare to Welfare: Defense Intellectuals and Urban Problems in Cold War America* (Baltimore: Johns Hopkins University Press, 2003); Joy Rohde, *Armed with Expertise: The Militarization of American Social Research During the Cold War* (Ithaca: Cornell University Press, 2013); John Wertheimer, "Counting as a Tool of Legal History," in *Making Legal History: Essays in Honor of William E. Nelson*, ed. Daniel J. Hulsebosch and R. B. Bernstein (New York: NYU Press, 2013), 162–78; Steven Ruggles, "The Revival of Quantification: Reflections on Old New Histories," *Social Science History* 45, no. 1 (April 2021): 1–25. The postwar vision for the statistician as a kind of scientific 'generalist' can be seen in Hendrik Bode et al., "The Education of a Scientific Generalist," *Science* 109, no. 2840 (1949): 553–58.

[29] The institutionalization of both kinds of lawyering was a distinctly cold war development, see Sara Mayeux, *Free Justice: A History of the Public Defender in Twentieth-Century America*, Justice, Power, and Politics (Chapel Hill: University of North Carolina Press, 2020); Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*, New ed. (Princeton, N.J.: Princeton University Press, 2011); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass.: Harvard University Press, 2007); Kenneth W. Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (Cambridge, Mass.: Harvard University Press, 2012).

campaign, Jack Greenberg—then assistant counsel for the LDF—wrote in 1956 that the "growing number of lawsuits involving public law issues" demanded "new fact-finding techniques" to frame legal questions that bore upon the aggregate public, creating a natural affinity between social scientists and civil rights lawyers.[30] The enthusiasm for quantification then sweeping across various fields ensured the evidence furnished by those techniques would be statistical in nature.

Yet, the 1950s and 60s were hardly the first time that numbers had been pressed into the service of justice, or more specifically, the struggle against racial oppression. In pamphlets like *Southern Horrors* (1892) and *A Red Record* (1895) journalist and activist Ida B. Wells-Barnett compiled and contextualized newspaper statistics on the lynching of Black southerners.[31] She took her anti-lynching efforts to Washington in the hopes of bringing an anti-lynching bill before Congress and co-founded the National Association for the Advancement of Colored People (NAACP), which tried repeatedly to get one passed.[32] Another co-founder of the NAACP, W. E. B. Du Bois, was one of the most innovative social scientists of his day; his pioneering work *The Philadelphia Negro* (1899) and data visualizations presented at the 1900 Paris Exhibition expanded

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[30] Jack Greenberg, "Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation," *Michigan Law Review* 54, no. 7 (1956): 969–70. Most scholars pinpoint the origins of this strategy in Louis Brandeis's brief in *Muller v. Oregon* (1908), in which he presented over a hundred pages of sociological evidence compiled by his sister-in-law, Jospehine Clara Goldmark, on working conditions and women's health: Ruth Bader Ginsburg, "Lessons Learned from Louis D. Brandeis," *BrandeisNOW* (blog), January 28, 2016, https://www.brandeis.edu/now/2016/january/ginsburg-remarks.html. Greenberg's optimism telling obscures some key changes in legal theory and practice that happened in the years before *Brown*. Horwitz notes that "the idea of a substantive public interest began to confront ridicule after World War II, the function of the state came to be redefined as simply a reflection of the sum of the vectors of private conflict." Morton Horwitz, "History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130, no. 6 (June 1, 1982): 1427. Greenberg also overlooked legal realism, which some characterize by its aspiration to make law itself more like a social science, though this oversimplifies a heterogenous body of thought. See generally John Henry Schlegel, *American Legal Realism and Empirical Social Science*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 1995).

[31] See the writings collected in Ida B. Wells, *The Light of Truth: Writings of an Anti-Lynching Crusader*, ed. Mia Bay (New York: Penguin Classics, 2014).

[32] On the anti-lynching campaigns, see, *inter alia*, Feimster, *Southern Horrors*; Megan Ming Francis, *Civil Rights and the Making of the Modern American State* (Cambridge: Cambridge University Press, 2014).

the sociological toolkit to underscore the urgent problem of the color line.[33] Du Bois's disposition toward science was tested by his own encounter with the violence of lynching, which led the Massachusetts-born scholar away from the "ivory tower of statistics."[34] As editor of NAACP magazine *The Crisis*, he left behind his faith that science could alone lead to justice, even as his political views and commitments to social engineering fluctuated.[35]

While not everyone living in 1956 shared Greenberg's positivist leanings, it was clear that something had changed about the use of data in the struggle for equality. Just as the formalism of "civil rights" worked to confine the struggle for equality to the legal realm, disciplines trying to distance their intellectual pursuits from politics vested authority over the means and meanings of quantification in professional organizations. Efforts to wield statistics as legal evidence reflected changes in lawyers' own professional self-consciousness as much as methodological refinement in the social sciences. The first generation of civil rights lawyers felt torn between the imperatives to "represent the race" and legitimate themselves within a white-dominated profession, as historian

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[33] Whitney Battle-Baptiste and Britt Rusert, eds., *W.E.B. Du Bois's Data Portraits: Visualizing Black America: The Color Line at the Turn of the Twentieth Century* (New York: Princeton Architectural Press, 2018); Saidiya V. Hartman, *Wayward Lives, Beautiful Experiments: Intimate Histories of Social Upheaval* (New York: W.W. Norton & Company, 2019).

[34] W. E. B. Du Bois, *Dusk of Dawn: An Essay Toward an Autobiography of a Race Concept*, The Oxford W. E. B. Du Bois (Oxford: Oxford University Press, 2007); David Levering Lewis, *W. E. B. Du Bois: A Biography* (New York: Henry Holt and Co., 2009); Benjamin J. Murphy, "'Multiplied without Number': Lynching, Statistics, and Visualization in Ida B. Wells, Mark Twain, and W. E. B. Du Bois," *American Literature* 93, no. 2 (June 1, 2021): 195–226.

[35] In recent years, scholars in Black studies have developed a thriving critical conversation about race and data. Wells and Du Bois were early exponents of what historian Jessica Marie Johnson has called "Black digital practice," using data to "hack their way into systems" designed to oppress. Katherine McKittrick and Autumn Womack have recently taken this observation in different directions, exploring the opportunities of different media: Jessica Marie Johnson, "Markup Bodies: Black [Life] Studies and Slavery [Death] Studies at the Digital Crossroads," *Social Text* 36, no. 4 (137) (December 1, 2018): 57–79; Katherine McKittrick, *Dear Science and Other Stories* (Durham: Duke University Press, 2021); Autumn Womack, *The Matter of Black Living: The Aesthetic Experiment of Racial Data, 1880-1930* (Chicago: University of Chicago Press, 2022).

Kenneth Mack has shown.[36] Many of the new generation were, like Greenberg, white law school graduates. They came of age in postwar America, at a time when texts like Gunnar Myrdal's *An American Dilemma* shaped public discussion of "race relations": racism was a violation of the "American creed," and a bug, rather than a feature, of liberalism. Their educational experiences in the tumultuous 1960s instilled a desire for social change and provided a set of tools for realizing it.

From this standpoint, one can see the legacy of civil rights reforms during the 1960s in a different light. Legal and political histories of civil rights have emphasized the disconnect between lawyers and the people they represent.[37] The same holds for my account. As Walker suggests, the Black Power movement reactivated critiques of inequality and colonialism that stood awkwardly alongside the civil rights establishment's focus on eliminating discrimination and tested the strength of fragile coalitions. Focusing on elite lawyering and policymaking draws attention away from grassroots struggle and the diverse ways communities engaged with both the legal imperative of integration and new opportunities for recognition under federal law, pushing the politics of identity beyond a black/white binary.[38]

Rather than looking past that binary, my account of "civil rights" attends to how it was constructed, maintained, and challenged through quantitative projects that served different legal and political agendas. None other than Myrdal himself insisted that the "quantitative difference between" discrimination against Black Americans and other "'racial' minorities" was "so great that

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[36] Mack, *Representing the Race*.

[37] E.g. Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (Oxford: Oxford University Press, 2011).

[38] Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941-1978* (Oxford: Oxford University Press, 2010).

it becomes qualitative."[39] In order to account for the power and place of disparity statistics, we first need to consider their role in efforts to combat the Jim Crow legacy of anti-Black racism through law and policy that other groups—particularly the women's movement—built upon.[40] In practice, this means that I often engage with fusty approaches to constitutional history and the working worlds of elite lawyers and experts more than those of the people who shaped the meaning of law on the ground, whose radical visions were neither represented in nor fully stifled by the strictures of dominant institutions and white values. The payoff of digging through technocrats' filing cabinets will, I hope, become clear enough to justify the effort.

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This dissertation treats law as a medium of conflict. As with conventions in science, the rules of the game matter. Up to this point, I have largely collapsed the distinction between the constitutional doctrine of equal protection and the civil rights legislation of the mid-1960s.[41] Many saw these laws as a vindication of *Brown*. Fifth Circuit Judge John Minor Wisdom wrote memorably that it had the

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[39] Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Brothers, 1944), 29.

[40] Women's rights activism in the employment sphere is a crucial subtext for my own account. While the legal analogy between race and sex largely succeeded in expanding the new civil rights laws, despite the lackluster efforts of federal administrators, the movement to promote a technical standard of "comparable worth" to achieve pay equity largely foundered. On these developments, see Sara M. Evans and Barbara J. Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* (Chicago: University of Chicago Press, 1991); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (Oxford: Oxford University Press, 2001); Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (Cambridge, Mass.: Harvard University Press, 2011); Turk, *Equality on Trial*.

[41] The first piece of civil rights legislation to pass Congress since Reconstruction was the 1957 Civil Rights Act, which established a permanent Civil Rights Section in the Justice Department and provided stronger mechanisms for enforcing voting and jury service rights, but not much more. The Civil Rights Act of 1964 contained legislation barring discrimination based on race, color, religion, sex or national origin wholesale, with dedicated enforcement for public accommodations, federal programs, education, and employment, among others. 1965 saw the passage of a dedicated Voting Rights Act to strengthen piecemeal protections, and a Fair Housing Act came in 1968.

potential to "[bring] together Congress, the executive, and the judiciary" where "*courts acting alone* [had] *failed*" to end segregation.[42] But in practice, such distinctions mattered a great deal, particularly where numbers were concerned, and generated friction from the outset.[43] Building upon Wisdom, legal scholar Bruce Ackerman argues that the constitutional canon should be expanded to include "debates and decisions surrounding the landmark statutes of the era," emphasizing the importance of what he calls "government by numbers": the central feature of a "New Deal-Civil Rights regime" that leveraged technocratic expertise to hold private actors accountable for realizing egalitarian goals. Rather than a specific set of programs and policies, he describes it as an "administrative style" based in quantitative indicators and the promise of systematic data collection enabled by computers. In his view, the commitment to numbers "operated as a symbol of determination to get the job done," not of a faceless bureaucracy struggling to manage distrust.[44]

It is an understatement to say the embrace of government-by-numbers was not universally regarded as a positive outcome of legislation passed by a deeply divided Congress—the chain of events it set in motion drive the action of this project.[45] But too many bad-faith debates over affirmative action begin from the premise that this embrace of measurement was wrong from the start.[46] Former Census Bureau director Kenneth Prewitt has relied on such accounts to argue that "group-based preferences" have entrenched a "logic of statistical proportionality" in American life,

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[42] *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) at 847.

[43] Sophia Z. Lee, "A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci," *The Yale Law Journal* 123, no. 8 (2014): 2964–3000.

[44] Ackerman, *We the People*, 8, 155, 6, 14. As far as I can see, Ackerman is not familiar with *Trust in Numbers*.

[45] Learning from *Brown*, architects of the 1964 Act had hoped to *avoid* litigation as a means of enforcement. Sure enough, statistics featured in protracted, highly publicized battles over claims of employment discrimination in the coming decades.

[46] This view was most notably advocated by policy historian Hugh Davis Graham, whose prodigious yet inescapably ideological reconstruction of the legislative process behind the landmark acts suggested that a 1966 memo on statistical evidence of discrimination—foreshadowing courtroom battles to come—led the EEOC to stray from its statutory purpose of promoting equal treatment toward a dubious pursuit of equal results. Graham's historical malpractice is the subject of an extended screed in Chapter One.

politicizing Census undercounts and hampering medical research with classifications that had been used "to enslave, segregate, deny and exclude."[47] "Counting," philosopher Ian Hacking reminds us, "is hungry for categories"; government-by-numbers, it seems, could lead to nothing other than their entrenchment.[48] However, statements like this hew closer to the epistemology of Reagan's Attorney General Edwin Meese, who insisted that "[c]ounting by race is a form of racism," a sentiment that echoes loudly today.[49] Drawing shallowly on critiques of classification to blame the persistence of race on civil rights policy, they find too much irony in the fact that categories designed to oppress have been refashioned as terms of inclusion.

Though his framing is useful, Ackerman puts a technocratic gloss on conflicts over the meaning of equality that shattered coalitions and became a key front for the realignment of American politics.[50] It is true that officials leaned on the imagery of Cold War technology to describe civil rights goals, like Arthur Allen Fletcher, an assistant secretary in Nixon's Department of Labor who justified the infamous Philadelphia Plan for racial quotas in construction work by

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[47] Kenneth Prewitt, *What Is "Your" Race?: The Census and Our Flawed Efforts to Classify Americans* (Princeton, N.J.: Princeton University Press, 2013), 84, 104.

[48] Ian Hacking, "Biopower and the Avalanche of Printed Numbers," *Humanities in Society* 5, no. 3–4 (1982): 280. There is a thriving literature of critical census studies that does a much better job discussing the relationship between census categories and the broader politics of identity, including Kim M. Williams, *Mark One or More: Civil Rights in Multiracial America*, The Politics of Race and Ethnicity (Ann Arbor, Mich.: University of Michigan Press, 2006); Margo J. Anderson, *The American Census: A Social History*, 2nd ed. (New Haven: Yale University Press, 2015); Debra Thompson, *The Schematic State: Race, Transnationalism, and the Politics of the Census* (Cambridge: Cambridge University Press, 2016).

[49] Quoted in Lee, "A Revolution at War with Itself?," 2989.

[50] Such conflicts are well-documented by U.S. political historians. For examples, see Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton, N.J.: Princeton University Press, 2001); Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (Cambridge, Mass.: Harvard University Press, 2006); Jefferson Cowie and Nick Salvatore, "The Long Exception: Rethinking the Place of the New Deal in American History," *International Labor and Working-Class History*, no. 74 (2008): 3–32; Matthew D. Lassiter, "Political History beyond the Red-Blue Divide," *The Journal of American History* 98, no. 3 (2011): 760–64; Rodgers, *Age of Fracture*.

likening it to the Apollo moon landing.[51] But despite the rhetoric, they did not control the narrative around counting. Uninterested in questions about classification or the legal status of the data themselves, Ackerman does not dwell on the rise of colorblindness, nor does he spend much time discussing the *disparate impact* theory of discrimination, easily the most visible manifestation of government-by-numbers in civil rights law.[52] The Supreme Court rejected disparate impact under equal protection the first chance it was given; only its "formalist, narrow approach to state action" saved the statutory use of government by numbers.[53] The hardening of this boundary between constitutional equality and the statutory interpretation of statistical evidence became the single greatest obstacle faced by civil rights advocates hoping to break new ground, particularly in criminal justice, yet it is one they have nevertheless sought to overcome with quantitative rigor.

Political scientist Naomi Murakawa argues that the narrowing of legal definitions of discrimination from effects to intent has been a crucial step in the "unknowing" of racism in both social science and the U.S. carceral state.[54] At least some of the prestige of causal inference methods in policy discussions today, as well as criticism of them, derives from the way they mirror how current law thinks about race: a given outcome must be "caused by" race.[55] I make the case here that these developments in law and our ways of knowing are not just homologous, but related. The

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[51] MacLean, *Freedom Is Not Enough*, 97. Fletcher made the claim that he 'invented' affirmative action central to his career. Kevin Merida, "The Firm Founder of Affirmative Action: Arthur Fletcher Isn't Going to Take a Challenge to His Legacy Lying Down," *The Washington Post*, June 13, 1995.

[52] As Sophia Lee points out, Ackerman's account ends just as conflicts between government-by-numbers and colorblindness were intensifying in employment litigation: Lee, "A Revolution at War with Itself?," 2975.

[53] Lee, 2964. Ackerman *does* acknowledge that government by numbers never fully works for Equal Protection arguments but is less concerned about what these failed hopes mean for his overall thesis. His basic insight stands: "The key point is to see that government by numbers has played a fundamental role in interpreting the law, not only in implementing it." Ackerman, *We the People*, 159–60.

[54] Naomi Murakawa, "Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State," *Annual Review of Law and Social Science* 15, no. 1 (2019): 473–93.

[55] Lily Hu, "Law, Liberation, and Causal Inference," *LPE Project* (blog), February 22, 2021, https://lpeproject.org/blog/law-liberation-and-causal-inference/.

decline of disparate impact as a legal theory rooted in government-by-numbers has provided the dominant lens through which most legal scholars understand the role of statistics in civil rights law, even though they were never its exclusive province.[56] Rarely do scholars rarely scrutinize the statistics *themselves* as political and epistemic artifacts. By taking seriously the shifting meanings and methods of proving discrimination with statistics, we can see how the rise of colorblind legal norms not only vitiated disparate impact theory but shaped the very way racism was known through numbers, inside and out of the courtroom. The subtitle of this dissertation works the other way around: civil rights and the transformation of *statistics*.[57]

Instead of an "administrative style," I argue that we learn more by seeing government-by-numbers as a key facet of the civic epistemology that formed during this nascent information age, an "arena of conflict" for competing normative orders.[58] Historian Will Deringer argues that calculations held a special appeal for British politicians at the turn of the eighteenth century because

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[56] This argument has been made most forcefully by Ian Haney López and can be seen in one of the earliest prominent treatments of statistical proof of discrimination: Ian Haney-López, "Intentional Blindness," *New York University Law Review* 87, no. 6 (2012): 1779–1877; David C. Baldus and James W.L. Cole, "Quantitative Proof of Intentional Discrimination," *Evaluation Quarterly* 1, no. 1 (February 1, 1977): 53–86. There are good historical reasons for this, given the very public campaign against the theory led by Meese and others in Reagan's Department of Justice. For the final report, see Office of Legal Policy, "Report to the Attorney General: Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action" (Washington, D.C.: U.S. Government Printing Office, November 4, 1987).

[57] Generations of social scientists have critiqued the legitimating functions of their disciplines. In 1973, Joyce A. Ladner and colleagues declared "the death of white sociology," challenging assumptions of racial inferiority structuring "bourgeois" social research with an agenda for a Black sociology rooted in "definitions, concepts, and theory-building that utilize the experiences and history of Afro-Americans." Joyce A. Ladner, ed., *The Death of White Sociology* (New York: Random House, 1973), xix–xx. Others have pointed to institutions and modes of analysis rooted in assumptions about rationality that worked to naturalize liberal self-interest, especially S. M. Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (Chicago: University of Chicago Press, 2003). More recently, sociologists Eduardo Bonilla-Silva and Tukufu Zuberi have renewed the call to scrutinize how "White logic and White methods shape the production of racial knowledge." Tukufu Zuberi and Eduardo Bonilla-Silva, eds., *White Logic, White Methods: Racism and Methodology* (Lanham, M.D.: Rowman & Littlefield Publishers, 2008), 23.

[58] Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 1985, no. 4 (1985): 899–936.

of their utility as "*instruments of dispute*—tools for conducting arguments."[59] There was, debatably, less good will in circulation among the fracturing political communities of the mid-twentieth century United States where disparity statistics, more often than not, led opposing sides to talk past each other. To paraphrase sociologists Nicholas Pedriana and Robin Stryker, numbers became "symbolic resources that shape[d] political and legal conflict" over civil rights, deployed through "cultural strategies."[60] Liberals looking to strengthen civil rights laws invested in quantification to shore up an image of objectivity, while their colorblind and conservative counterparts deliberately conflated policy terms like "goals and timetables," "affirmative action," and "quotas" with statistical evidence in the courtroom to delegitimate the whole enterprise.

These strategies evolved along paths traced in this dissertation. One was the recruitment of experts by companies and administrative bodies seeking to parry discrimination lawsuits, ratcheting up expectations of certainty through an adversarial process. Another strategy was purely political: swelling the ranks of the Department of Justice and EEOC with opponents of civil rights, turning the NAACP Legal Defense Fund's greatest allies into formidable foes.[61] Yet another significant

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[59] Deringer, *Calculated Values*, xviii.

[60] Nicholas Pedriana and Robin Stryker, "Political Culture Wars 1960s Style: Equal Opportunity Employment–Affirmative Action and the Philadelphia Plan," *American Journal of Sociology* 103, no. 3 (November 1997): 636. Stryker's oeuvre is one I come back to again and again throughout my account for its detailed analysis, though it is less concerned with outcomes than the organization of expertise: Robin Stryker, Martha Scarpellino, and Mellisa Holzman, "Political Culture Wars 1990s Style: The Drum Beat of Quotas in Media Framing of the Civil Rights Act of 1991," *Research in Stratification and Social Mobility* 17 (1999); Robin Stryker, "Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies," *The Sociological Quarterly* 42, no. 1 (2001): 13–46; Robin Stryker, Danielle Docka-Filipek, and Pamela Wald, "Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science," *Law & Social Inquiry* 37, no. 4 (2012): 777–814.

[61] In a 1983 letter to the President of the Ford Foundation, LDF chief counsel Jack Greenberg underscored the urgency of grant money "particularly now, when we are encountering opposition from our greatest ally, the Federal Government." In a 1986 grant proposal to the Ford Foundation, Greenberg's successor Julius L. Chambers noted the alarming conjuncture of Department of Justice opposition and the expense of furnishing statistical evidence: "These developments have had adverse financial as well as legal consequences. Owing to the Justice Department's tactics, LDF has had to allocate resources merely to protect past legal gains. The

conflict resulted not so much from a deliberate strategy as tensions inherent in civil rights law that the statistical approach exposed. Questions of whether or not judges 'understand' social science to one side, they could always challenge the very composition of classes at stake in class action lawsuits, and thereby the statistics that plaintiffs could use show discrimination, as legal scholar Kimberlé Crenshaw's famous article responsible for introducing the term "intersectionality" into the lexicon argues.[62]

As a historian, I understand my primary job to be tracing out ramifications—following branches where they lead without losing sight of outcomes. *Justice in Numbers* attempts to account for legal quantification and its politics by highlighting the motivations and material stakes that drove it. My intervention, as I put it earlier, is to show how these efforts shored up ideas that racism was a bug, rather than a feature, of liberalism. By inuring ourselves to the failure of these efforts, we miss both the promise civil rights advocates saw in statistical proof of discrimination and the staying power of that vision.

Department frequently contests court-awarded fees, thus forcing LDF to expend additional resources in order to secure compensation. Additionally, LDF has had to assume the added expense of satisfying the more rigid standards of proof which some courts are imposing in discrimination suits. These standards require the submission of sophisticated technical data such as statistical analyses of employment or voting patterns." Ford Records, Grants L-N, Reel R6394, NAACP Legal Defense and Educational Fund, Inc. (07300118), 1972 October 01-1992 September 30. For a more extensive discussion, see Chapter Five.

[62] In the 1990s, a whole cottage literature emerged around "junk science." For more intelligent discussions, see Kim Lane Scheppele, "Cultures of Facts," *Perspectives on Politics* 1, no. 2 (2003): 363–68; Jennifer Mnookin, "Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence," *Villanova Law Review* 52, no. 4 (January 1, 2007): 763; Rachel F. Moran, "What Counts As Knowledge? A Reflection on Race, Social Science, and the Law," *Law & Society Review* 44, no. 3/4 (2010): 515–51. Crenshaw's canonical essay argued that the contradictions between three different cases regarding how Black women could be treated as a 'class' in a class action suit—and the expectation that she choose which one was decided correctly—reflected "an uncritical and disturbing acceptance of dominant ways of thinking about discrimination" that denied the experiences of Black women. She drew attention to the top-down, process-based assumptions of laws that proceeded from the paradigmatic examples of white men and women: "the wrong which antidiscrimination law addresses is the use of race or gender factors to interfere with decisions that would otherwise be fair or neutral," a line that resonates to this day. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum*, 1989, 148, 151.

Contributions and Road Map

Justice in Numbers contributes to a variety of ongoing conversations about the politics of rights, criminal justice, and the intersections between social science and social policy. Much of my analysis is guided by a toolkit cobbled together from science and technology studies and critical legal studies.[63] Exploring connections among topics usually considered separately can provide a fresh perspective on the traditional distinctions that have marked scholarship on law and technology.[64] Scholarship on civil rights and information technology has long tended to focus on individual privacy and the threats of surveillance, profiling, and harassment.[65] In fact, expanding our lens to the civic epistemology of the information age allows us to see how questions of privacy shaped dialogue about whether and how to measure fairness.[66] Moving forward, it is my aspiration to make this project speak to contemporary discussions about algorithmic (in)justice, but the immediate work is addressed to historical scholarship on the modern United States.

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[63] In particular, I draw on critiques of science and doctrine developed by Sheila Jasanoff and Jonathan Kahn: Sheila Jasanoff, "Science and the Statistical Victim: Modernizing Knowledge in Breast Implant Litigation," *Social Studies of Science* 32, no. 1 (2002): 37–69; Jonathan Kahn, *Race on the Brain: What Implicit Bias Gets Wrong About the Struggle for Racial Justice* (New York: Columbia University Press, 2018).

[64] This literature tends to focus on intellectual property, e.g. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001); Mario Biagioli and Peter Galison, eds., *Scientific Authorship: Credit and Intellectual Property in Science* (New York: Routledge, 2003); Christopher Beauchamp, *Invented by Law: Alexander Graham Bell and the Patent That Changed America* (Cambridge, Mass.: Harvard University Press, 2015).

[65] The work of communications scholar Oscar Gandy has been particularly influential in framing questions about the use of personal data and its social consequences: Oscar H. Gandy, *The Panoptic Sort: A Political Economy of Personal Information*, 2nd ed. (Oxford: Oxford University Press, 2021). For other examples of influential scholarship on networked life and civil rights, see Danielle Keats Citron, "Cyber Civil Rights," *Boston University Law Review* 89, no. 1 (2009): 61–126; Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven: Yale University Press, 2012).

[66] A recent issue of *The Black Scholar* takes up privacy's roots in whiteness, asking, "[h]ow do we mourn Black privacy's impossibility while attempting to build it—out of expressive culture, historical methods, and scholarly practices anew without attachments to ownership and authenticity?" Samantha Pinto and Shoniqua Roach, "Black Privacy," *The Black Scholar* 51, no. 1 (January 2, 2021): 1–2. I explore how civil rights leaders mobilized privacy as a resource for resisting potentially harmful data collection in Chapter One.

One of the better-studied topics in U.S. sociolegal history, employment discrimination is an area where activism, legislation, litigation, and corporate policy overlap.[67] Numbers are all over the place in this scholarship, but this dissertation is the first I know of to treat them as a primary object of inquiry. In doing so, I draw equally from accounts that employ bottom-up and top-down approaches. Scholars of law and politics have long considered the emergence of race-conscious policies under the umbrella of "affirmative action" as a puzzle, rife with ironies.[68] How did measures avoided by many civil rights leaders become a policy default? Moreover, why did affirmative action make inroads during the Nixon administration rather than under Johnson's Great Society programs that elevated poverty and unemployment—seen largely through the lens of race—to the level of national crises? In recent years, scholarly focus has expanded from policy elites to social movements, with accounts of political realignment on a national scale, the changing fortunes of labor, the centrality of the women's movement, and the evolving meaning of equal opportunity greatly enriching the narrative.[69] From these perspectives, the question becomes less why

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[67] Two works I do not engage with substantially here are worth a mention because they do a particularly nice job exploring this overlap. Focused on the "legal and institutional contradictions" that undermined postwar liberalism, Reuel Schiller's *Forging Rivals* explores how historically-contingent antipathies between labor and civil rights shaped litigation and policy in California and nationwide. Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (Cambridge: Cambridge University Press, 2015). In *Inventing Equal Opportunity*, Frank Dobbin tells the story of how civil rights law drove the professionalization of personnel management and cemented it within corporate governance. The story he tells is an important one, particularly the chapter beginning in the Reagan era, but others have told the first part better and his longitudinal quantitative studies of evolving practices are less relevant to the way I approach numbers as political artifacts. Dobbin, *Inventing Equal Opportunity*.

[68] Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (Oxford: Oxford University Press, 1990); John D. Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America*, Morality and Society (Chicago: University of Chicago Press, 1996); Pedriana and Stryker, "Political Culture Wars 1960s Style"; Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941-1972* (Princeton, N.J.: Princeton University Press, 2009); Prewitt, *What Is "Your" Race?*; Robert C. Lieberman, "Private Power and American Bureaucracy: The State, the EEOC, and Civil Rights Enforcement," in *Boundaries of the State in U.S. History*, ed. James T. Sparrow, William J. Novak, and Stephen W. Sawyer (Chicago: University of Chicago Press, 2015), 259–94.

[69] In no particular order, see MacLean, *Freedom Is Not Enough*; Dennis Deslippe, *Protesting Affirmative Action: The Struggle Over Equality After the Civil Rights Revolution* (Baltimore, MD: Johns Hopkins University Press,

something called affirmative action became politically viable and more how the different actors and arenas shaped the meaning of concepts such as *discrimination* and *equal opportunity*. Drawing both on traditional accounts of policy and newer sociolegal approaches, my project considers the process through which social statistics became part of the civil rights toolkit.[70] Their uncertain legal status and intellectual flexibility largely worked to the advantage of officials, while their association with administrative violence and mounting concerns about privacy, not to mention the political volatility of "racial balancing," required caution.[71]

Scholarship on the death penalty is no less voluminous, but it is different in character. The legal drama of capital punishment has long been a source of intriguing and compelling—even award-winning—nonfiction.[72] There are a number of Supreme Court-centered histories that discuss the intense period of activity between 1963 and 1976, a period bookended by a memo from Justice Goldberg arguing that the court could abolish capital punishment and the end of the moratorium established by the landmark ruling in *Furman v. Georgia* (1972).[73] Participant histories abound,

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2012); Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (Cambridge: Cambridge University Press, 2014); Kessler-Harris, *In Pursuit of Equity*; Mayeri, *Reasoning from Race*; Turk, *Equality on Trial*.

[70] Accounts written by lawyers are also important material for my own narrative, in particular Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick, N.J.: Rutgers University Press, 1971); Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (New York: Basic Books, 1994); Robert K. Belton, *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story*, ed. Stephen L. Wasby (Lawrence, Kansas: University Press of Kansas, 2014).

[71] Legal scholar Dean Spade's concept of administrative violence, which highlights the harms of bureaucratic categorization from a trans perspective, has inspired important critical scholarship on data practices: Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press, 2015); Anna Lauren Hoffmann, "Terms of Inclusion: Data, Discourse, Violence," *New Media & Society* 23, no. 12 (December 1, 2021): 3539–56.

[72] E.g. Norman Mailer, *The Executioner's Song* (Boston: Little, Brown, 1979); Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* (New York: Harper, 2012).

[73] Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: University of North Carolina Press, 1992); Banner, *The Death Penalty*; David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010); David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*, Landmark Law Cases & American Society (Lawrence, Kan.: University Press of

particularly those of Michael Meltsner, a former LDF lawyer whose 1973 *Cruel and Unusual* makes mundane details of legal strategy into unusually exciting reading.[74] The tale told in these pages is not a particularly original one. I myself can neither resist the narrative tug of litigators' firsthand accounts nor counterbalance it with archival nuance, locating the 'real' story in the numbers themselves.[75] What I attempt to do instead is flesh out connections between the evidence produced through litigation and the rise of a data-driven criminal justice system. To this end, I build on the work of scholars who have explored the role of capital punishment within the rise of mass incarceration, especially Michelle Alexander's *The New Jim Crow*, as well as others who consider the broader cultural work of the death penalty.[76]

Two approaches warrant further discussion. Intellectual historian Joel Isaac argues that dominant modes of explanation in science studies—the theory-practice interface and science-in-service-of-the-state—tend to misrepresent the work of social science within the overlapping spheres of "academic, political, and cultural practice." When we treat the politics of methods and the

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Kansas, 2010); Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (New York: W. W. Norton & Company, 2013); Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty* (Oxford: Oxford University Press, 2015); R. J. Maratea, *Killing with Prejudice: Institutionalized Racism in American Capital Punishment* (New Yotk: New York University Press, 2019).

[74] Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 1st ed. (New York: Random House, 1973); Michael Meltsner, *The Making of a Civil Rights Lawyer* (Charlottesville: University of Virginia Press, 2006); Barrett J. Foerster, *Race, Rape, and Injustice: Documenting and Challenging Death Penalty Cases in the Civil Rights Era* (Knoxville: University of Tennessee Press, 2012).

[75] For stellar examples of this in the history of science and bureaucracy, see M. Norton Wise, ed., *The Values of Precision* (Princeton: Princeton University Press, 1994); Geoffrey C. Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge, Mass.: MIT Press, 2002); Dan Bouk, *Democracy's Data: The Hidden Stories in the U.s. Census and How to Read Them* (New York: Farrar, Straus and Giroux, 2022).

[76] On connections between capital punishment and mass incarceration: Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America*, Cambridge Studies in Criminology (Cambridge: Cambridge University Press, 2006); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010); Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America*, Studies in Postwar American Political Development (Oxford: Oxford University Press, 2014). On the political culture of capital punishment: David Garland, Randall McGowen, and Michael Meranze, eds., *America's Death Penalty: Between Past and Present* (New York: New York University Press, 2011); LaChance, *Executing Freedom*.

political dynamics of institutions and social movements evenhandedly, the metaphor of "tangled loops" seems apt for explaining how social science and its norms become embedded in social practice.[77] Isaac's suggestion resonates with legal scholar Jessica Eaglin's account of the relationship between technology and social concepts in law. She argues that beginning in the 1970s, new sentencing technologies like risk assessments helped transform social concepts like racial justice by "[deifying] 'technical formalism'…a resistance to engagement with tools in the context of societal realities" that hollowed out the "normative basis" for limiting their reach.[78] Civil rights leaders once raised broad questions about whether technological progress could serve the ends of racial justice, but particular problem-solving approaches made technological solutions seem inevitable. Read together, Isaac and Eaglin provide an apparatus for scrutinizing how concepts of bias and fairness that emerged during debates over statistical proof of discrimination shape our current efforts to combat the proliferation of automated tools in law and social life.

Finally, foregrounding social concepts and norms in histories of technological reform—with 'technology' defined by the broad rubric of *civic epistemology in the information age* introduced earlier—allows us to grasp the underpinnings of what Black studies scholar Ruha Benjamin, building on Alexander, calls "The New Jim Code." When colorblindness assumes the veneer of technological objectivity, it becomes difficult to mount any kind of political challenge to counteract racism, whether through the courts or legislation. Not only that, Benjamin argues, automated tools make it "easier to sift, sort, and justify why tomorrow's workforce continues to be socially

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[77] Joel Isaac, "Tangled Loops: Theory, History, and the Human Sciences in Modern America," *Modern Intellectual History* 6, no. 2 (August 2009): 397–424.

[78] Jessica M. Eaglin, "Technologically Distorted Conceptions of Punishment," *Washington University Law Review* 97, no. 2 (2019): 487. See also Eaglin, "When Critical Race Theory Enters the Law & Technology Frame."

stratified.[79]" Scholars and activists have homed in on issues with algorithmic risk assessments used in pretrial detention and bail setting, arguing in public fora that the technical problems with these instruments are inherent and cannot be resolved. Still, defenders of such tools insist that, if applied judiciously, their potential to reduce systemic harm weighs in their favor.[80] Centering science and technology within the legal history of civil rights reveals that this debate is not a new one, even though it concerns newer technologies and social realities. As much as we need accounts of how these technological systems and infrastructures were built—particularly those attentive to how race and other categories of difference become embedded into their very architecture—we need to understand how the terms of this debate became an accepted part of our political and legal culture, and what was taken off the table to make space for it.[81]

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The dissertation is divided into three sections, each with an odd-numbered chapter focused on employment and an even-numbered one concerned with the death penalty. Beginning in the early 1960s, each section spans roughly a decade and is introduced by a short prologue that captures some of the tension driving developments during that particular period.

To suggest that the action in either domain began in the 1960s is to ignore the thrust of recent scholarship following these issues back to the Progressive Era or even Reconstruction.[82] The

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[79] Benjamin, *Race After Technology*, 98.

[80] See, for example, Christopher Slobogin, *Just Algorithms: Using Science to Reduce Incarceration and Inform a Jurisprudence of Risk* (Cambridge: Cambridge University Press, 2021).

[81] Here I draw influence from historian of medicine Lundy Braun's account of racialized lung measurement, which attends to the historically contingent dynamics that made the racialization of spirometry possible. Braun, *Breathing Race into the Machine*.

[82] This is the thrust of scholarship documenting a "long" and "wide" Civil Rights Movement: Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *The Journal of American History* 91, no. 4 (2005): 1233–63; Eric Arnesen, "Reconsidering the 'Long Civil Rights Movement,'" *Historically Speaking* 10, no. 2 (April 15, 2009): 31–34.

Reconstruction amendments are central to modern constitutional doctrine; modern statistics, social science, and computing emerged during the same era. Developments in psychology and criminology that are relevant here stretch back just as far. To that end, I attend to the construction of what I call Jim Crow's "information order": the data practices, methodologies, formal or legal rules, and cultural narratives that gave quantification authority under a particular racial formation.

Part One, "Racism by the Numbers: The Law and Politics of Proportions in the 1960s," explores efforts by government agencies and legal organizations to collect and standardize racial data, part of broader programs to combat Jim Crow's pernicious persistence. Racial statistics courted controversy in debates over the 1964 Civil Rights Act and death penalty abolition, often upstaging broader efforts to uproot economic inequality and criminal injustice. Efforts to use disparity statistics in the courtroom showed promise, but rarely met the established threshold of proving discriminatory intent.

Chapter One considers policy debates over the use of racial records to enforce Title VII of the 1964 U.S. Civil Rights Act. It highlights the dialogue amongst academics, activists, lawyers, and policymakers on the slippages between social statistics about 'race' and the naturalization of racism. Taking seriously skepticism—rooted in the legacies of eugenics, Jim Crow, and an exclusionary New Deal administrative state—of racial recordkeeping as federal policy, I analyze how bureaucrats, reformers, and Black activists theorized the epistemological entanglements of a data-driven approach to civil rights. Racial liberalism was premised upon only a narrow set of challenges to Jim Crow's information order, further attenuated by a narrowly legalistic rights-based approach to combatting inequality. Administrators appeared to embrace a structural approach to problems, mirroring the language of the Black Power movement, but they too often conflated the measurement of social unrest with its resolution. These efforts fed into skepticism of the federal

government's high-modern, social scientific ambitions, and set the stage for conflict over the relevance of statistics in the courtroom.

Chapter Two pivots to explain how the movement for capital punishment abolition became entangled with the politics of racial measurement. Beginning with early statistical work on discrimination in education, voting, and jury selection by the Department of Justice, it follows two different efforts by the LDF to litigate on the basis of statistical evidence and argues that the two strategies, often treated separately, formed a common thread and set the LDF toward a close embrace of social science. *Whitus v. Georgia* (1967) used probabilistic evidence to make a case of jury discrimination before the Supreme Court, while the appellate case *Maxwell v. Bishop* relied on a massive survey of rape cases in the South computed and analyzed by criminologists. Both raised constitutional claims about fairness that drew on statistical concepts, setting the stage for battles over the death penalty and employment policy during the 1970s. A kind of limit term for describing aspirations to equal representation, "proportional fairness" soon became a political epithet.

Of course, it was never just about disparity statistics. Social science was embroiled in questions of whether disparities could be attributed to 'legitimate' forces. Part Two, "Law and Social Science in an Era of Contradiction: The Long 1970s," draws its title from legal scholar Alan David Freeman's periodization of antidiscrimination law.[83] It turns to the social scientific disciplines that

[83] In a now-famous article observing these changes in motion during the late 1970s, Freeman articulated how antidiscrimination law enshrined the perspective of the perpetrator in defining a civil rights violation. This was all well and good for explicitly racist actions or utterances, but less so for combatting the subtler maintenance of inequality. He defines three periods: "the era of uncertainty, or the jurisprudence of violations" (1954-1965), "the era of contradiction, or the jurisprudence of remedy" (1965-1974), and "the era of rationalization, or the jurisprudence of cure" (1974-?). During the era of contradiction, key decisions opened up the possibility of legal doctrine that could capture the victim's perspective and level the playing field. As contradictions mounted, most visibly in the new claims of "reverse discrimination" or white underrepresentation, courts reasserted the perpetrator's perspective, leaving the promise of law as a leveling force unfulfilled. Alan David Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," *Minnesota Law Review* 62, no. 6 (1978): 1049–1120. For a critique of Freeman, see Kimberlé

helped win legal victories during the tumultuous political realignment of the 1970s. Refracted through these quantitative lenses, rights issues began to look different. Moreover, by leaning on psychology and criminology, lawyers not only opened the door to the fraught internal dynamics of these professions but also volatile issues of merit and law-and-order animating politics.

Chapter Three focuses specifically on psychological testing and the path to the first major Supreme Court victory relevant to the EEOC: *Griggs v. Duke Power Co.* (1971). Often described as the origin of the statistical battles over employment discrimination in the decades to come, the Court in *Griggs* recognized the "disparate impact" theory of discrimination under Title VII. While this is not untrue, it obscures an essential part of the story. Most commentators on disparate impact tend to overlook the role played by psychologists in shaping the doctrine: specifically, the growing fissure among experts over whether aptitude tests were inherently racist and irredeemable, or an essential tool for modern management that promoted objective, fairer standards of merit. Legal questions about compensation as a remedy, activism by Black psychologists within the profession, and bureaucratic politics in the federal government all helped to erect a boundary between Title VII and Equal Protection where civil rights advocates had hoped to build a bridge.

Chapter Four picks up with the LDF's effort to take the campaign against capital punishment beyond the racial discrimination question it raised in *Maxwell*. They drew on different lines of research and legal theories to challenge the death penalty as inherently cruel and unusual, while managing to clog up the system nationwide by circulating "Last-Aid Kits" to help collaborating lawyers file petitions. These tactics bore fruit when the Supreme Court declared all current capital statutes unconstitutional in *Furman*, but the battle had only just begun. The rise of

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Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101, no. 7 (1988): 1331–87.

law-and-order politics had fueled a nationwide popular movement to protect, restore, even expand capital punishment. An econometric study claiming to demonstrate that capital punishment deterred violent crime sent the group of abolitionist lawyers, activists, and social scientists into a frenzy. The economic model (and challenges to it) performed a way of thinking about crime that was growing in influence within policy circles, helping to reintroduce a behavioral framework that had long been discredited by criminologists. Beyond that, it ratcheted up expectations of rigor and certainty for the abolition campaign, which jettisoned an earlier framework based in statistical fairness in favor of causal methods to prove racial discrimination.

The consequences of appealing to social science for standards are the subject of Part Three. "Rationalizing Discrimination in the Information Age: The Reagan Years," traces the fate of statistical litigation in the conservative 1980s. Judges continued to raise the bar for evidence of disparate impact, shielding corporations and the criminal justice system from statistical scrutiny. In response, social scientists helped to develop more elaborate information systems and analyses. However, they could not control the narratives about numbers that thrived within a political climate hostile to civil rights and penal reform, all while incarceration and economic inequality climbed.

Chapter Five follows statistical proof of discrimination into the courtroom during the Carter and Reagan administrations—the height and nadir of the EEOC's influence and authority. As the legal victories for Title VII enforcement on the basis of numbers piled up, corporations were increasingly enlisting their own statisticians to safeguard against charge and pressing the overtaxed commission to define clearer guidelines for employers. The stage was set for a battle over just how to measure discrimination—one in which the vexed epistemologies of race, gender, and merit would collide as courts grew increasingly conservative. The *Teamsters* trilogy of Supreme Court cases in 1977 simultaneously set precedent for firmer statistical standards while dealing blows to

civil rights advocates challenging seniority systems. The following year, in response to criticism that statistical burdens of proof had stacked the decks against mid-sized businesses, the EEOC endorsed a proportional rule of thumb for gauging discrimination: the so-called "four-fifths rule." Expert witnesses from different disciplines advocated for different ways of measuring discrimination, often at odds with one another. The EEOC saw a change of leadership from Eleanor Holmes Norton to Clarence Thomas, who sought to undermine structural claims of discrimination. Reagan's Department of Justice aimed to gut disparate impact theory and the Court was ready to let it, while Congress debated legislation that would permanently enshrine the statistical approach to Title VII.

Chapter Six traces the path from the resumption of legal executions in 1977 to *McCleskey v. Kemp* a decade later. With executions resuming, the LDF reached for evidence that might persuade a Court that seemed ready to shape Equal Protection doctrine to suit the nation's retributive mood as waves of new criminal statutes were passed and victim's rights began to take priority of those accused of crimes. Declaring the death penalty for rape unconstitutional, the Court delivered the LDF a pyrrhic victory that achieved a long-sought goal while vitiating abolitionists' claims that the death penalty merely perpetuated the legacy of Jim Crow. In this context, a new focus on disparate capital sentencing based on the race of crime *victims* became salient, and the LDF won a large grant to conduct a systematic analysis of the sentencing process in Georgia, led by David C. Baldus. Following what became known as the "Baldus study" from the computer lab to the courtroom and out into the broader world, the chapter considers how an effort to overcome judicial resistance with quantitative rigor ended up encoding the norms and racialized assumptions of capital sentencing law into data. Ultimately, it led to a legal and epistemological stalemate: without challenging the statistical methods directly, the Supreme Court refused to grant *McCleskey*'s Eighth and Fourteenth Amendment claims, while a host of investigators seized upon the problem of modeling fair

punishment with divergent results. My conclusion assesses the influence statistical proof of discrimination has had on the quantitative tools that have been put into use today.

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Meditating on the archive of transatlantic slavery, replete with ledgers and tools of calculation, Black studies scholar Katherine McKittrick asks, how should scholars "ethically engage with mathematical and numerical certainties that compile, affirm, and honor bits and pieces of black death?" Ending this account with *McCleskey* presents a similar conundrum. Being critical readers of racial numbers requires that we not lose sight of their historicity.[84] Though my account does not stretch back to slavery, I see a similar dynamic at play in how historical memory of Jim Crow—the statistical realities it engendered, whether as tools of segregation or for exposing the violence of white supremacy—is wielded to either bolster or delegitimate strategies for pursuing equity. McKittrick argues that we need to honor the subjectivities and forms of resistance that thrived under these oppressive conditions rather than erase them, calling to mind Walker's articulation of "civil rights" as a term of limitation. My approach is informed by this tension. If there are liberatory uses of numbers to be found, they are not the ones I discuss here—molded by the strictures of the rights-based liberalism and common law frameworks that made Jim Crow what it was. Without losing sight of distributional consequences, the harms maintained by a systemic "unknowing" of racism, I suggest that making things better is not simply a matter of getting the math right.[85]

Bringing science and technology into the legal history of civil rights reveals that information technologies are not some exogenous force that our laws are powerless to confront. Rather, antidiscrimination doctrine and the adoption of automated decision systems, from criminal risk

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[84] Katherine McKittrick, "Mathematics Black Life," *The Black Scholar* 44, no. 2 (June 1, 2014): 18.
[85] Mimi Onuoha, "When Proof Is Not Enough," *FiveThirtyEight* (blog), July 1, 2020, https://fivethirtyeight.com/features/when-proof-is-not-enough/.

assessments to employment screening tools, are two sides of the same coin. Current reformers know that one cannot be fixed without the other.[86] But thinking historically about the contingent forces that yoked them together can, I hope, shed necessary light on the bumpy road ahead, or perhaps reveal paths not taken.

[86] In their oft-cited article, Solon Barocas and Andrew Selbst urge scholars to think symmetrically about the technicalities of big data and antidiscrimination law. They boldly claim that "[f]inding a solution to big data's disparate impact…will require a wholesale reexamination of the meanings of 'discrimination' and 'fairness'," but end up suggesting little more than caution in the use of data mining. Barocas and Selbst, "Big Data's Disparate Impact," 731–32. Ifeoma Ajunwa takes a different approach, drawing on science and technology studies as well as employment and labor law to argue that the emphasis on technical problems in accounts of algorithmic discrimination is misguided. For her, the problem is primarily a legal one. Ifeoma Ajunwa, "The Paradox of Automation as Anti-Bias Intervention," *Cardozo Law Review* 41, no. 5 (2020): 1671–1742. The approach I take, influenced by Eaglin, suggests that legal and technical problems are not easily distinguishable.

Part I

Racism by the Numbers

The Law and Politics of Proportions in the 1960s

> Recently, at Cambridge, a statistical laboratory has for the first time been established. Something of this kind is perhaps destined to become the symbol of modern justice in the place of a simple pair of scales.
>
> – David Daube, "The Scales of Justice" (1951)[1]

In March of 1931, nine young Black men were accused of raping two white women on a train and swiftly convicted by an all-white jury in Scottsboro, Alabama. Their plight quickly garnered national and even international attention.[2] In the words of historian Estelle Freedman, as the most famous rape case of the century, "Scottsboro became synonymous with racial injustice."[3] Appeals and retrials of the "Scottsboro boys" would last for over a decade. In arguing the second of two appeals before the Supreme Court, shrewd defense lawyer Samuel Leibowitz made a case for the intentional exclusion of Black jurors by paying attention to the paperwork. Officials admitted that they had used the designation "col." (short for "colored") to mark the names of Black men as they prepared

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[1] This quotation comes courtesy of Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, IL: University of Chicago Press, 1994), 28. Constable's history of the representative jury as an ideal is a major inspiration for Chapter Two.

[2] The Communist Party's International Labor Defense (ILD) offered both legal services and publicity, a move that stoked ongoing tensions between the Party and the NAACP, which also sought control over the case and took issue with the ILD's attempts to turn lynching into a class issue.

[3] Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, Mass.: Harvard University Press, 2013), 253. See also Robin D. G. Kelley, "In the Heart of the Trouble: Race, Sex, and the ILD," in *Hammer and Hoe: Alabama Communists during the Great Depression*, Twenty-Fifth Anniversary Edition (Durham, NC: University of North Carolina Press, 2015), 78–91; Rebecca N. Hill, *Men, Mobs, and Law: Anti-Lynching and Labor Defense in U.S. Radical History* (Durham: Duke University Press, 2008).

the jury roll, drawn from tax rolls, telephone directories, and polling lists. Leibowitz then consulted a handwriting expert who claimed that the names of six Black men had been added to the jury roll after panels had been chosen to give the impression of fairness, superimposed over red lines drawn as placeholders. During oral arguments, Chief Justice Hughes asked to see the books; a colleague examining them over his shoulder whispered loudly, "Why, it's plain as punch."[4] The Supreme Court overturned the conviction in *Norris v. Alabama* (1935) using the equal protection clause, reviving dormant legal doctrine from the Reconstruction era and revising what legal scholar Michael Klarman calls "the critical 'subconstitutional' rules that had previously made it nearly impossible to prove that blacks had been intentionally excluded from juries."[5]

Decisions like this certainly did not change things overnight, but they did provide a wedge, a potential legal strategy for civil rights lawyers to follow. Just a few years later, the violent ejection of Dr. George F. Porter, President of an all-Black junior college, from a Dallas courthouse spurred an investigation by the national NAACP legal department. Through the collaboration of Texas's governor, Thurgood Marshall sought out data on the number of qualified Black jurors in Dallas County. Eventually, State officials furnished a list of qualified Black jurors in Dallas County derived from voter rolls marked by "the word 'negro', 'colored', 'C', or 'Neg'. Sometimes they were enclosed in parenthesis [sic] and sometimes they were left open. Some were written with ink, some with pencil, and some with a typewriter."[6] This was enough to prompt state oversight of the county's jury selection process, beginning a long line of lawsuits.

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[4] Benno C. Jr. Schmidt, "Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia," *Texas Law Review* 61, no. 8 (1983): 1477–78.

[5] Michael J. Klarman, "Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s," *Journal of American History* 89, no. 1 (June 1, 2002): 121.

[6] They made plans to send questionnaires out in order to "show a course of conduct excluding Negroes over a period of years." Marshall's visit to Dallas was highly publicized; the governor sent a Ranger to accompany

These jury cases show how racial paperwork used to segregate and exclude could be turned back upon the officials who oversaw Jim Crow systems. Proving exclusion of jurors had long been a matter of credible testimony: officials were asked whether a Black juror had, in their memory, ever served on a jury and members of the community were asked whether they knew any Black men who were qualified. Because the composition of jury rolls came from tax records and voter registration, depending on the state, discriminatory jury selection was tied to multiple state-level administrative functions. Throughout the 1940s and 1950s, appellants began to express their claims in more statistical terms. Even the Supreme Court gave sanction to "the jury as a cross-section of the community—as the democratic ideal applied to the administration of justice."[7] Invocations of the "cross-section of the community" as a "democratic ideal" no doubt drew authority from Americans' increased acceptance of surveys and polls throughout this period described by historian Sarah Igo.[8]

This style of reasoning was pervasive. It drew further support from visions of governance transformed by new technology that captured intellectuals' imaginations. In an article tracing the history of the "scales of justice" as both a symbol and way of reasoning about the law, legal scholar David Daube pointed out that postwar developments in administrative law appeared poised to

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him. At first, Marshall was uncomfortable with his companion, but after the local police chief confronted him gun-in-hand and threatened to shoot him, he was grateful to have the security detail. The governor, about to be nominated to the federal bench, appreciated Marshall's offer not to publicize his assistance. LOC-LDF Box 97, Folder 8, "Dallas, Tex., Porter expulsion case, Correspondence, 1938-1940" and Folder 9, "Dallas, Tex., Porter expulsion case, Legal documents, 1938." This episode is recounted in Michael D. Davis and Hunter R. Clark, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* (Secaucus, NJ: Carol Publishing Group, 1992), 105–6. For the cases that followed, see Chapter Two and Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (Oxford: Oxford University Press, 1994).

[7] Roger S. Kuhn, "Jury Discrimination: The Next Phase," *Southern California Law Review* 41, no. 2 (1968): 309. The author pointed out that this standard had only been applied in racial exclusion claims regarding federal juries, while the states were typically granted more leeway.

[8] Igo shows how even Americans uncomfortable with the randomly-sampled 'view from nowhere' Gallup polls relied on were challenging not the very premise of the polling, but rather the validity of methods, "hint[ing] at the increasing hold of social scientific modes of knowing." Sarah E. Igo, *The Averaged American: Surveys, Citizens, and the Making of a Mass Public* (Cambridge, Mass.: Harvard University Press, 2007), 190.

displace a kind of "either-or" reasoning that had long been the standard. Rather than justice "between man and man," the modern, utilitarian emphasis privileged "justice among men," or individual interests attenuated for the sake of social harmony. The war had taught that otherwise intractable problems might be amenable to computation. His model: the recently installed statistical laboratory at the University of Cambridge, which along with others like it established throughout the United States at the same time, churned out a generation of professional statisticians—who just a generation earlier might not have labeled themselves as such—into government and industry posts.[9] As this way of thinking spread, it became more and more common to analogize solving social problems to balancing equations.

By the 1960s, statistical voting rights challenges had become commonplace. In *Alabama v. United States* (1962), the recently established Civil Rights Section (CRS) of the Department of Justice brought a lawsuit against the State of Alabama under the Civil Rights Act of 1957 that had ushered the Section into existence. Charging the state with discrimination for denying 54 African Americans voter registration, the CRS brought statistics on the demographics of Macon County to illustrate the disparity: although 87% of the county was Black, fewer than 10% of voting age were registered, while nearly all white voters were. The resulting Fifth Circuit opinion yielded a classic aphorism: "In the problem of racial discrimination, statistics often tell much, and Courts listen." While everyday Southern racism was indisputable to any firsthand observer, the harsh lens of statistical evidence revealed its systemic impact.[10] Judge Brown went further in applying the logic of

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[9] David Daube, "The Scales of Justice," *Juridical Review* 63, no. 2 (1951): 129. On the role of statistics in government administration, see, *inter alia*, Jon Agar, *The Government Machine: A Revolutionary History of the Computer* (Cambridge, Massachusetts; London: The MIT Press, 2003); David Alan Grier, *When Computers Were Human* (Princeton, N.J.: Princeton University Press, 2007).

[10] *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962) at 586. The Supreme Court upheld the ruling: 371 U.S. 37. The Fifth Circuit judges deciding the case cited their own earlier ruling in *United States ex rel. Goldsby*

what statisticians call *significance testing*, the idea that a deviation could be so strong that it could not possibly be the result of natural fluctuations: "these figures are reliable in their major implication that such disparity could not exist by chance alone."[11] The statistical case was bolstered by the documented intent of state officials, who revealed plainly to the trial judge that they "had neither the plan nor purpose to remedy these administrative evils."[12] An easier justification for the use of disparity statistics is difficult to imagine, but not all cases were so clear cut. By 1968, one law review lamented that "the more subtle means of discrimination which are replacing outright exclusion are far more difficult to attack by means of litigation."[13]

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The chapters in this first section document the path of racial data from a tool of racial administration that warranted judicial suspicion to a source of valuable evidence in probing discrimination. Acceptance of statistical proof of discrimination reached its height just as evidence of outright exclusion was becoming more difficult to furnish. Gradually dismantling the most visible manifestations of Jim Crow meant that administrative racism was no longer "plain as

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v. Harpole, a capital punishment appeal that reversed the conviction of a black defendant tried for murder by an all-white jury. They cited precedent from three jury cases decided similarly by the Supreme Court and pointed out "[as] Judges of a Circuit comprising six states of the deep South" that lawyers rarely raised claims of systemic discrimination against blacks. *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959) at 82, n.13: *Hernandez v. State of Texas*, 347 U.S. 475 (1954), *Reece v. State of Georgia*, 350 U.S. 85 (1955), *Eubanks v. State of Louisiana*, 356 U.S. 584 (1958). As if to anticipate the Alabama case, Judge Rives wrote of the use of statistics: "We have called the figures startling, but we do not feign surprise because we have long known that there are counties not only in Mississippi, but in the writer's own home State of Alabama, in which Negroes constitute the majority of the residents but take no part in government either as voters or as jurors." *Id.* at 78.

[11] *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962) at 586. For a discussion of how statistical hypothesis testing arose from statistics textbooks that glossed over a longstanding disagreement between two different camps, see Gerd Gigerenzer et al., *The Empire of Chance: How Probability Changed Science and Everyday Life*, Ideas in Context (Cambridge: Cambridge University Press, 1989), 90–109. Another idea in circulation was that statistics could essentially act as a proxy for multiple witnesses. See below on *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir.1970).

[12] *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962) at 589.

[13] Kuhn, "Jury Discrimination," 237.

punch." Faith in numbers and a political ideal of representativeness nonetheless continued to grow. Constitutional scholar Benno C. Schmidt argued that *Norris* "opened constitutional law in a crude way to the impact of statistics, the twentieth century's distinctive methodology of legal proof," and attributes the Court's acceptance of them as the kind of expert deference characteristic of the New Deal.[14] But during the postwar period, measures of equality became more complex. Who counted as a group? What degree of disparity was suspect? Who was responsible for remedying it? Moreover, criticisms of Jim Crow's racial administration dovetailed with an ascendant discourse of colorblindness as the meaning of *Brown v. Board of Education* was tested in the courtroom.

The years around the passage of landmark civil rights legislation thus bore witness to a growing conflict between the historical memory of Jim Crow and a set of ideas loosely grounded in a notion of proportional representation. The idea that one could "measure racism" became thinkable—not only due to the availability of statistical frameworks, but the reframing of white supremacy as discrimination on the basis of race. Chapter One describes how racial liberals confronted what I call the "Jim Crow information order" with the legal and social scientific frames at their disposal. Concerns over privacy and the government's commitments to a civil rights agenda created tensions that manifested in federal agencies as officials leaned on frames adapted from the social sciences to justify their emphasis on disparity data. A version of justice that aimed to remedy group subordination was on a collision course with more traditional, individualized conceptions.

While the first chapter considers the legal status of racial data, Chapter Two turns to the broader constitutional order that underwrote Jim Crow and the influence of statistical thinking

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[14] Schmidt, "Juries, Jurisdiction, and Race Discrimination," 1481–82. This particular framing hearkens back to Ackerman's observations about "government by numbers" during the 1960s discussed in the Introduction. On deference, see Reuel E. Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law," *Michigan Law Review* 106, no. 3 (2007): 399–441.

within criminal justice. Proportional justice was a valuable intellectual resource for those who challenged the 'legalization' of lynching in the courtroom. But its constitutional status was fraught, as early skirmishes in the LDF's campaign against capital punishment would reveal. Others saw in it an opportunity to promote reform through more uniform codes and procedures, or even the application of computers to make the law more efficient and fairer in practice—in that order.

Chapter 1

"The Crevasse Which Has No Bottom"?

Forging an Information Order for Civil Rights

"Scurrilous" was how NAACP lobbyist Clarence M. Mitchell, Jr. regarded what he heard at the White House Conference on Equal Employment Opportunity. Held in August of 1965, the conference was intended as a forum for the newly-staffed Equal Employment Opportunity Commission (EEOC) to float plans to implement Title VII of the 1964 Civil Rights Act with 600 leaders from industry, labor, and government. Mitchell took part in a panel focused on 709(c), an otherwise dry section of the Act that provisioned for data collection on the racial composition of workforces. He voiced his disbelief "that you people who come from these northern states where you are exposed to this problem would fall into the crevasse which has no bottom, of keeping racial statistics." Surveying workplaces through occasional head counts seemed innocent enough, but discussions about implementing systems to monitor job applicants grew tense. Mitchell was hardly alone in his opposition; even the volume put together to commemorate the historic meeting noted that record-keeping proposals were "vigorously challenged" throughout the day.[1]

To quell the controversy, Commissioner Samuel C. Jackson suggested to the press that while "color blindness" might have been necessary before the Act, a legal right to equal employment opportunity turned on the "necessity of being conscious of color." As of yet, however, there was no consensus on what this shift in the legal order meant for government statistics, both a

[1] Monroe W. Karmin, "A Debate Over Racial Records," *Wall Street Journal*, October 28, 1965; Graham, *The Civil Rights Era*, 199; "Report of the White House Conference on Equal Employment Opportunity: August 19, 20, 1965, Washington, D.C." (U.S. Government Printing Office, 1965), 15–17.

symbol and a system for the administration of race. The nation's problems "are technical problems, are administrative problems," President Kennedy had confidently assured an audience of policymakers earlier in the decade, not seeing the turmoil ahead.[2] In the same spirit, EEOC officials at the meeting punted to technicalities rather than addressing the substance of Mitchell's protestations, proposing an elaborate filing system that kept applicant records separate from data on race, gender, and ethnicity, linked by a numerical ID.

The process frustrated movement leaders who had fought for too long to see the commission's potential stymied. It also sat poorly with a newer generation of organizers interested in pursuing more radical visions of racial justice. As sociologist John Skrentny puts it, the EEOC had "a limited audience [of civil rights groups] for its performance, and that audience was already booing loudly."[3] In the hopes that dissensus would subside, the EEOC settled on a more straightforward survey borrowed from a predecessor, without much public input on the matter. Other agencies followed suit, and as civil rights groups came to terms with this new instrumentality, race-conscious data collection became a fixation of those who felt either left out or threatened by the new regime.

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Why were Mitchell and other key players in the passage of landmark civil rights legislation up in arms over what seemed to others like an innocent question of implementation? This chapter aims to answer this question by showing how conflicting views of the promise and peril of racial records bedeviled a novel conception of *racism* that became the dominant paradigm for understanding group subordination by the 1960s. Drawing attention to structural inequality while foreclosing a more

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[2] Quoted in Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (New York: Nation Books, 2009), 209.
[3] Skrentny, *The Ironies of Affirmative Action*, 127.

radical critique of the link between white supremacy and the legitimate operation of law, racism was the conceptual template for the EEOC's effort to forge an information system and set of norms for civil rights enforcement.

To make sense of Mitchell's aversion to racial paperwork and its broader cultural resonance, we need to look to conversations about the meaning of racial oppression and the appropriate remedies for it that took place around *Brown v. Board of Education* (1954). The decision enshrined a notion of formal equality as a keystone of civil rights that advocates sought to supplement with legislation to combat structural inequality. But the dialogue on *Brown* was also shaped by growing concerns over government surveillance and computerization that raised the stakes for retooling a regime of racial data into a kind of data-driven antiracism.

It is impossible to understand the politics of government classification in the United States without tracing the path to *Brown*, out of the Jim Crow era, and from *Brown* into the political moment of postwar liberalism. Scholars have argued that during these years, an earlier tradition of structural and anti-colonial critiques collapsed into a narrow focus on discrimination as the product of a prejudiced individual psyche.[4] Instead of referring to subjugation more generally, *racism*

[4] For various perspectives on psychology, individualism, and the shifting terrain of Black politics, see Scott, *Contempt and Pity*; Leah N. Gordon, *From Power to Prejudice: The Rise of Racial Individualism in Midcentury America* (Chicago: University of Chicago Press, 2015); and more generally Nikhil Pal Singh, *Black Is a Country: Race and the Unfinished Struggle for Democracy* (Cambridge, Mass.: Harvard University Press, 2004). Literature scholar Jay Garcia has cautioned against reducing Black intellectuals' embrace of psychology to a broad acceptance of de-radicalizing, liberal social science: Jay Garcia, *Psychology Comes to Harlem: Rethinking the Race Question in Twentieth-Century America* (Baltimore: Johns Hopkins University Press, 2012), 11–12. Black studies scholar Barnor Hesse describes this process as akin to what Timothy Mitchell has called the invention of "the economy": not simply a new name for the traditional processes of exchange studied by people calling themselves economists, but the discursive creation of "an object that had not previously existed." Barnor Hesse, "Self-Fulfilling Prophecy: The Postracial Horizon," *South Atlantic Quarterly* 110, no. 1 (January 1, 2011): 158–59.

reflected an intensification of scientific critiques of biological race concepts.[5] The language used to describe racial oppression changed in dialogue with both social scientific and legal concepts. Historian Christopher Schmidt notes that during the 1960s, "civil rights" became a designation for groups and activists who saw themselves as working outside of that rubric toward more revolutionary change.[6] A parallel realignment was also underway. Conservatives and "colorblind" liberals alike began challenging the legitimacy of racial classifications used to reallocate resources and benefits—say, admissions to law school—by invoking what they touted as the "true" spirit of *Brown*. All of this was complicated by the fact that under the new civil rights regime, different groups began vying for recognition to secure protection.[7] In short, critiques of racial recordkeeping as a mechanism of Jim Crow governance came from all sides and cut in different directions, making the work that much harder for those seeking to turn 'discrimination' into a lever for equity.

Concerns about the new technology civil rights data relied on also framed the conversation. During the 1960s, the psychologistic tendencies of rights talk framed the way Americans thought about privacy.[8] Critiques of government surveillance programs and incursions into the private realm became framed around rights, and perceptions of technological change amplified them. A growing fixation on computers and "data banks" turned individual records into "a node of public debate,

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[5] Bolstered by opposition to Nazism, such critiques focused attention on nativist and eugenic justifications for sterilization and immigration restriction while overlooking a distinctive heritage of Black oppression: Robert Bernasconi, "A Most Dangerous Error: The Boasian Myth of a Knock-Down Argument Against Racism," *Angelaki* 24, no. 2 (March 4, 2019): 93.

[6] Schmidt, *Civil Rights in America*, 84–85.

[7] Here, I build on John Skrentny's claim that "meaning entrepreneurship" by minority groups gave direction and shape to the EEOC's "administrative pragmatism." While these efforts should not be dismissed as short-sighted, they did shore up divides within political communities. John D. Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination': Designating Official Minorities for Affirmative Action in Employment," in *The Minority Rights Revolution* (Cambridge, Mass.: Harvard University Press, 2002), 85–142.

[8] Historian Sarah Igo argues that the era's emphasis on individual rights was as much a discourse of empowerment as one "rooted in Americans' worries about the weakness of their interiors in the face of a highly socialized, organized existence": Igo, *The Known Citizen*, 143.

even outrage."[9] Privacy lingered in the background of civil rights leaders' public statements about computers. Amid a perceived automation crisis, their chief concern was that Black workers were being "kept at arms [sic] length while the rest of America pressed forward into the computer era," as Roy Wilkins put it in 1967. But he also saw potential opportunity for the computer to "turn its impersonal, unprejudiced magic upon our agonizing race problem," asking whether it could not, "after digesting the facts which both whites and blacks have fogged over for so long, give us an outline of our obligations?"[10] This was exactly what the EEOC endeavored to do, but associations between computing and illegitimate incursions into privacy meant that civil rights technocrats walked a fine line.

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This chapter argues that political and administrative uses of statistics were never separable, nor did they necessarily cut in one direction. Historian Dan Bouk describes this duality as a push and pull between "data doubles" that stand in for persons and the data aggregates they enable.[11] The civil rights era, I argue, was marked by a nuanced discourse about the uses and abuses of statistics to promote racial justice. Confronting the realities of Jim Crow, maintained by racial paperwork and statistical discourses of Black inferiority, and the opportunities of being "known" by the state required nothing less. The ascendance of colorblindness gave critiques of racial statistics a conservative cast and upped the ante for defending their place in the new order. By the end of the decade, the more nuanced discourse was eclipsed by the orthodox view of newly-christened civil

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[9] Igo, 227.

[10] Roy Wilkins, "Computerize Race Problem?," *Los Angeles Times*, September 11, 1967. For an extensive discussion of Wilkins and the politics of Black computing, see Charlton D. McIlwain, *Black Software: The Internet and Racial Justice, from the Afronet to Black Lives Matter* (Oxford: Oxford University Press, 2020).

[11] Dan Bouk, "The History and Political Economy of Personal Data over the Last Two Centuries in Three Acts," *Osiris* 32, no. 1 (September 1, 2017): 85–106.

rights "experts" that dismantling discrimination could be analogized to reallocating resources—or, its weaker version, that compliance required counting.[12] But in a political climate shaped by litigation, the expertise touted as an asset would soon became a liability as critics seized upon the tension between advocacy and objectivity.

How can one characterize the morass of associations between government classification practices, conflicting ideas about rights, and the changing role of technology? Here I adopt British imperial historian C.A. Bayly's concept of an *information order*, a framework made to challenge monolithic assumptions about orientalist knowledge production in colonial British history. Bayly looked to the role that changing dynamics of state intelligence and modalities of social communication played in empire. From this viewpoint, colonial information channels were plural and partial; Indian people were active agents and British "knowledge" was fundamentally unstable, rooted as much in fear as dominance.[13] Civil rights advocates managed the balancing act of turning an information order used to suppress and exclude into one that could uplift and eradicate the same boundaries.[14] Challenges to the Jim Crow information order were key fronts in the broader reorientation of both liberal social science and legal liberalism in the postwar period.[15]

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[12] A similar claim is frequently made by affirmative action critics like Hugh Davis Graham (see below) to vindicate colorblindness as the 'true' legacy of civil rights from which agencies and activists strayed, but I mean to take it in a different direction to argue that there was something de-radicalizing about this shift.

[13] C. A Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780-1870*. (Cambridge: Cambridge University Press, 1996), 3–7. Bayly derives his concept from geographer Manuel Castells's *The Informational City*, about the role of information technology in postwar U.S. economic restructuring: "[Castells] sees the generators of knowledge, the institutions of information collection and diffusion and the discourses to which they give rise as autonomous forces for social and economic change…not reduced to the status of contingencies of late-industrial capitalism or the modern state." Bayly, 4. The irony of importing a colonial reinterpretation back to postwar America is not lost on me.

[14] Though many activists adopted an analytic of "internal colonialism" in the late 1960s, there are obvious limitations to exploring U.S. racial politics using a British imperial framework. These limitations nonetheless raise productive questions for the study of race and governance, particularly for thinking about regimes of racial terror and race scientists' efforts to determine identity in the courtroom, discussed below. On internal

Understanding what was gained, as well as what was lost, requires revising that world. This chapter begins by discussing the role of statistics and racial classification in the making of the Jim Crow state, setting up the context of postwar civil rights activism. Its second section explores how a conflict between critiques of classification and efforts to remedy structural inequality played out within what scholars of U.S. politics call racial liberalism. Grounded in the American legal tradition and political institutions, it was the establishment counterpart to what historian Anthony Q. Hazard calls postwar anti-racism: "a contested political space in which various stakeholders attempted to determine the boundaries of debates about social justice, human rights, and empire."[16] I highlight how the *epistemological* dimensions of racial liberalism mounted only a partial challenge to Jim Crow. The second half of the chapter turns to the EEOC to trace the broader ramifications of the debate over racial data and the agency's efforts to use them as a tool of enforcement. The civil rights information order was marked by unresolved tensions, with technocratic aspirations that made it an easy target for critics.

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colonialism, see Ramón A. Gutiérrez, "Internal Colonialism: An American Theory of Race," *Du Bois Review: Social Science Research on Race* 1, no. 2 (September 2004): 281–95.

[15] Nonetheless, the notion of an information order harmonizes well with sociological explanations of a "racial order" and "racial projects" that center on the realignment of identity and power during these very same years. Jennifer Hochschild, Vesla Weaver, and Traci Burch have defined a racial order as a "widely understood and accepted system of beliefs, laws, and practices that organize relationships among groups": Jennifer L. Hochschild, Vesla M. Weaver, and Traci R. Burch, *Creating a New Racial Order: How Immigration, Multiracialism, Genomics, and the Young Can Remake Race in America* (Princeton, N.J.: Princeton University Press, 2012), 9. My periodization roughly aligns with the "consensual" summary provided by these scholars: a pre-1960 racial order organized by white dominance and reinforced by federal and state governments, and a post-1960 order that saw "significant elements" of the Jim Crow order destroyed, with civil rights and immigration legislation as well as expansive social programs. Hochschild, Weaver, and Burch, 10. Michael Omi and Howard Winant agree with the same basic chronology but take a more processual approach, defining racial projects as "efforts to shape the ways in which human identities and social structures are racially signified, and the reciprocal ways that racial meaning becomes embedded in social structures." Michael Omi and Howard Winant, *Racial Formation in the United States*, 3rd ed. (New York: Routledge, 2014), 13.

[16] Hazard focuses on how scientists and political reformers responded to rising Black militarism, cultural nationalism, and charges of internal colonization in a largely international space. Here, I consider how these tensions manifested in U.S. civil rights law. Anthony Q. Hazard, *Postwar Anti-Racism: The United States, UNESCO, and "Race", 1945-1968* (New York: Palgrave Macmillan, 2012), 6, 157–63.

Jim Crow's Information Order

Political scientist Kimberley Johnson argues that "the modernization of the American state went hand-in-hand" with the establishment of Jim Crow: it "created a new role for government" to define and enforce inequality "based not only on statutory law, but on bureaucratic organization, implementation, and enforcement."[17] In addition to relying on formal classification systems and paperwork to enforce racialized citizenship, Jim Crow's maintenance of dual education and voting systems required a huge amount of administrative capacity.[18] Historian Nathan Connolly goes a step further in urging that "Jim Crow *was* liberalism." Anchoring the New Deal order that created the modern administrative state, it ensured segregation and disempowerment could persist or worsen all while "preserving the broader legitimacy of the racial state through the creative use of statistics or terminology" to gloss over violence.[19]

This section surveys the making of this information order, which laid the foundations for debates during the postwar era about the role of classification and documentation in administering

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[17] Kimberley Johnson, *Reforming Jim Crow: Southern Politics and State in the Age Before Brown* (Oxford: Oxford University Press, 2010), 7.

[18] Historians of the U.S. state have long observed that the path to modernization was uneven, to say the least. Although the federal government boasted a sizable statistical apparatus, there was far less in the way of administration to bring ordinary citizens into contact with central state authority. Building an informational state out of associational life required profound social and material changes. As historian Susan Pearson puts it, the early decades of the twentieth century witnessed a "shift in authority from families to the state and from personal, testamentary knowledge to written documents" that enabled bureaucratization and quantification. The humble birth certificate, Pearson demonstrates, only became authoritative and uncontroversial after a deliberate, decades-long campaign by anti-child labor activists that challenged existing practices, cultural assumptions, and standards of truth. Susan J. Pearson, "'Age Ought to Be a Fact': The Campaign against Child Labor and the Rise of the Birth Certificate," *Journal of American History* 101, no. 4 (March 1, 2015): 1145. Moralizing narratives about a "backwards" South masked the fact that the Jim Crow order was sanctioned and supported by both the federal government and *federalism* as a political principle: a source of its power was that the rules and terms of etiquette varied from place to place: Adolph Reed, Jr., *Class Notes: Posing as Politics and Other Thoughts on the American Scene* (New York: The New Press, 2000), 189–90.

[19] N. D. B. Connolly, "The Strange Career of American Liberalism," in *Shaped by the State: Toward a New Political History of the Twentieth Century*, ed. Brent Cebul, Lily Geismer, and Mason B. Williams (Chicago: University of Chicago Press, 2019), 65–66, 74. Connolly is specifically talking about how criminologists and philanthropic groups shifted statistical norms toward recording lynchings as "murders," see Chapter 2, below.

civil rights. These practices were bolstered by statistical discourses on race in broad circulation at the end of the nineteenth century, though not without notable challenges. Under the Jim Crow information order, the power of power of racial paperwork and statistics was protean, not absolute. New forms of documentation, like photography, flourished in a context that also saw the emergence of eugenics and scientific policing.[20] If drives toward systematization and quantification during the nineteenth century threatened to displace an older model of truth grounded in witnessing, the data they required, linked to classification and documentation, made it even more fundamental.

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Histories of scientific racism and the state have often focused on classification systems. These tools enabled both the theorization and administration of difference, even if efforts to put theories into practice tended to undermine them.[21] The eugenics movement that unfolded during the Progressive era was distinctive in its insistence on the role of the state and yielded a wave of mandatory sterilization statutes, while older laws prohibiting interracial marriage were given a new scientific gloss—two sides of the same coin.[22] At the time, it was a "badge of deficiency" to be known to

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[20] Historians of science may recognize Lorraine Daston and Peter Galison's account of a shift from "truth-to-nature" to "mechanical objectivity" as dominant epistemic virtues: Lorraine Daston and Peter Galison, *Objectivity* (New York: Zone Books, 2007). Here, I am thinking with photographer and art critic Allan Sekula, who suggests in a prescient essay on photography that proponents of scientific policing and eugenics "mapped out general parameters for the bureaucratic handling of visual documents" in order to preserve an "older, optical model of truth in a historical context in which abstract, statistical procedures seemed to offer the high road to social truth and social control": Allan Sekula, "The Body and the Archive," *October* 39 (1986): 55.

[21] In Elazar Barkan's influential account, many scientists began to reject the nativist strain of eugenics and race science during debates over immigration restriction, as "classification became hopelessly entangled with themes of ethnicity and nationality." Elazar Barkan, *The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States Between the World Wars* (Cambridge: Cambridge University Press, 1992), 3–4.

[22] Paul A. Lombardo, "The Power of Heredity and the Relevance of Eugenic History," *Genetics in Medicine* 20, no. 11 (November 2018): 1305–11. Historians have shown variation between the acceptance of eugenic legislation in the U.S. Northeast, South, and West. The upshot of this literature is that the value of racial classification schemes and eugenic projects lay not in their persuasive rigor or coherence but in the raw resources for they provided for voluntary organizations and increasingly active state authorities. See, *inter alia*, Frank Dikötter, "Race Culture: Recent Perspectives on the History of Eugenics," *The American Historical Review*

authorities at all; white middle- and upper-class citizens were the "original 'undocumented,'" Sarah Igo suggests.[23] Even as social programs expanded citizens' ability to make claims on the state, the administrative cipher of categories and markings still worked more like a one-way mirror.

Bringing law into the picture complicates the model of Progressive state power through expertise. Classification systems had their limits, and the burden of their incoherence fell upon those who attempted to pass as white in order to claim full citizenship.[24] Albion W. Tourgée, the lawyer who brought Homer A. Plessy's case against a Louisiana law mandating separate railway cars to the Supreme Court, attempted to exploit the dissensus on racial identity by arguing that the state had no competence, let alone the right, "to label one citizen as white and another as colored."[25] Nonetheless, in its infamous and lengthy ruling against Plessy, the Court insisted that "[legislation]

103, no. 2 (1998): 467–78; Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (Berkeley, Calif.: University of California Press, 2001); Michele Mitchell, *Righteous Propagation: African Americans and the Politics of Racial Destiny after Reconstruction* (Chapel Hill: University of North Carolina Press, 2004); Alexandra Minna Stern, *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America*, American Crossroads 17 (Berkeley, Calif.: University of California Press, 2005); Gregory Michael Dorr, *Segregation's Science: Eugenics and Society in Virginia* (Charlottesville: University of Virginia Press, 2008). Applying a queer studies lens, Siobhan Somerville suggests that race science and sexology were mutually underwritten by "[social] anxieties about identity" as officials more aggressively policed boundaries and bodies. Siobhan B. Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham, NC: Duke University Press, 2000), 2. In her pathbreaking work on the state and sexuality, historian Margot Canaday shows how "federal interest in homosexuality developed in tandem with the growth of the bureaucratic state," noting that this project demonstrates citizenship as a shifting "nexus of exclusion and inclusion," following political scientist Rogers Smith; "[as] the state moved to enfranchise women and dismantle Jim Crow, it was gradually working to construct a boundary in law and policy that by midcentury explicitly defined the homosexual as the anticitizen." Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, N.J.: Princeton University Press, 2009), 2, 8–9.

[23] Igo, *The Known Citizen*, 62.

[24] Legal historians Ariela Gross and Ian Haney López have shown that scientific classification schemes fared poorly in trials of racial identity that turned instead on "common sense and community understandings, often by casting ordinary people as racial experts": Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, Mass.: Harvard University Press, 2008), 10; Ian Haney-López, *White by Law: The Legal Construction of Race*, 10th anniversary ed. (NYU Press, 2006).

[25] He dramatized this by raising the threat of drastic social consequences for whites who were misclassified, "[manipulating] white supremacist logic" to bolster the legal argument: Mark Elliott, "Race, Color Blindness, and the Democratic Public: Albion W. Tourgée's Radical Principles in Plessy v. Ferguson," *The Journal of Southern History* 67, no. 2 (2001): 323.

is powerless to eradicate or to abolish distinctions based on physical differences," as legislatures drew freely on science and medicine to shore up such distinctions.[26]

Despite the elaborate taxonomies of race science, law operated largely through "a set of overlapping, binary oppositions," Barbara Welke argues: "abled/disabled, white/racialized other, man/woman—in which one side of the opposition enjoyed greater freedom in part by virtue of the other's relative unfreedom."[27] The idea of biological immutability itself, rather than the specifics of any particular scheme of difference, helped solidify the legal standard of whiteness as race plus privilege, and thereafter much of the action would center on the expansion and contraction of "nonblackness" as a condition of full citizenship.[28] When W. E. B. Du Bois insisted that the chief fact of his life had been race, he distinguished it from the "scientific race" debated by biologists and anthropologists. The Jim Crow regime *created* identity, rather than the other way around: "the black man is a person who must ride 'Jim Crow' in Georgia."[29]

Though the black/white binary would come to manifest itself through the markings on data doubles, the Jim Crow order unfolded during what was, in many ways, an age of aggregates. New tools of surveying and statistical analysis reshaped racial knowledge that previously grounded itself in hereditarian, pseudobiological, or anecdotal theories of racial difference.[30] Lobbying efforts from

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[26] Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States*, New Histories of American Law (Cambridge: Cambridge University Press, 2010), 137.
[27] Welke, 155.
[28] Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (1993): 1737–39; Nell Irvin Painter, *The History of White People* (New York: W.W. Norton & Company, 2010), 396.
[29] Du Bois, *Dusk of Dawn*, 70, 77. One observer in the 1960s echoed Du Bois's musing on the futility of race science: "Many a racist awaited breathlessly some scheme of race classification which would withstand the testing methods of science and was prepared…to pile mountains of *ad hoc* theory onto any discoveries concerning their measurable physical differences" but were just as willing to punt to psychology or culture when such differences eluded them: Thomas F. Gossett, *Race: The History of an Idea in America*, New ed., Race and American Culture. (Oxford: Oxford University Press, 1997), 82–83.
[30] Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2010), 20. This capacious phrasing comes from

industry, organized labor, and academics led to the establishment of a permanent Census Bureau in 1902. They sought more social and economic data to fuel the fire of ongoing debates about the direction of change as waves of immigration and urbanization reshaped the national fabric.[31] Tracts like German statistician and actuary Frederick Hoffman's *Race Traits and Tendencies of the American Negro*, which weaved figures about crime and disease into an argument that the race was heading toward extinction, circulated widely. Du Bois's pioneering studies of Black life in Philadelphia and throughout the South challenged Hoffman head on and were largely ignored by academics and readers. They flocked instead to accounts that confirmed beliefs about Black criminality and self-destructive tendencies, like Black journalist William Hannibal Thomas's *The American Negro*, a moralizing diatribe employing dubious methodology that was nonetheless hailed for its impartiality and sociological rigor.[32] The changing face of white supremacy was thinly disguised by data that suited the suspicious political order of the post-Reconstruction era.[33]

Governments were certainly not the only ones in the business of data, and a look at practices in the life insurance industry provides a glimpse into the workings of the Jim Crow information order. Hoffman was a hired hand: the Prudential Life Insurance Company commissioned *Race Traits* because executives hoped the resulting study would provide ammunition in the ongoing effort to restore the company's public reputation. As more Black workers joined the labor force during Reconstruction, they began taking out life insurance policies. Fearing a threat to

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Theodore M. Porter, *The Rise of Statistical Thinking, 1820-1900* (Princeton, N.J.: Princeton University Press, 1986).

[31] Alain Desrosières, *The Politics of Large Numbers: A History of Statistical Reasoning*, trans. Camille Naish (Cambridge, Mass.: Harvard University Press, 1998), 196, 192.

[32] Muhammad, *The Condemnation of Blackness*, 35–87.

[33] As Porter reminds us, the authority of quantitative methods is "not merely the consequence of a tyranny of experts, but also, and crucially, of their accommodation to a suspicious political order that reins them in." Theodore M. Porter, "On the Virtues and Disadvantage of Quantification for Democratic Life," *Studies in History and Philosophy of Science Part A* 32, no. 4 (December 2001): 746.

their profit structure, major insurers studied their tables. Deeming race a risk factor due to excess mortality among Black policyholders, companies began awarding only two-thirds of the standard benefit to their survivors. Widespread recognition of this practice led to a movement to pass antidiscrimination legislation penalizing insurers for differential premiums and rates based on color than those given to "white persons of the same age, sex, general condition of health and hope of longevity." Of course, insurers found ways to exclude Black Americans altogether: offering agents no commission on policies sold to Black clients and instructing company physicians to serve as more vigilant gatekeepers of the white risk community.[34] The antidiscrimination bills were bolstered by a broader movement to regulate the insurance industry, and this is where Hoffman's *Race Traits* came in. Industry executives, having lost one battle over their actuarial practices, could now point to what seemed like an unassailable scientific defense of leaving Black Americans, supposedly headed for extinction, out of the national risk community altogether. Southern politicians took their cues from Hoffman in their arguments for excluding them from the political body as well.[35]

The example of life insurance shows how the Jim Crow order was constituted not only in moments of abject terror and brutal violence but "through countless mundane experiences," writes Stephen Berrey, "a kind of theatrical production that depended on stages and props…remade each day with each interaction."[36] Numbers, and the forms of government documentation that made

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[34] Dan Bouk, *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual* (Chicago: University of Chicago Press, 2015), 33–35, 43–45; Benjamin Wiggins, *Calculating Race: Racial Discrimination in Risk Assessment* (Oxford: Oxford University Press, 2020), 9–21.

[35] Bouk, *How Our Days Became Numbered*, 51–52; Wiggins, *Calculating Race*, 21–28. See also Megan J Wolff, "The Myth Of The Actuary: Life Insurance And Frederick L. Hoffman's Race Traits And Tendencies Of The American Negro," *Public Health Reports* 121, no. 1 (2006): 84–91; Muhammad, *The Condemnation of Blackness*.

[36] Stephen A. Berrey, *The Jim Crow Routine: Everyday Performances of Race, Civil Rights, and Segregation in Mississippi* (Chapel Hill: University of North Carolina Press, 2015), 219; with thanks to Keith Wailoo,

them possible, were one of those props. In turn, this elaborate set of codes and rituals manifested in norms and practices of information handling. The ascent of data doubles into the economic and political firmament would cast these in a different light.

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The evolving relationship between citizens and the state after World War I gradually led to an increased emphasis on data doubles rather than their aggregation, but in the Jim Crow information order this played out in multiple, often contradictory ways.[37] Opening up bureaucratic data practices to historical investigation shows that while the demand to coordinate information at a distance with regularity drove their adoption, officials' quiet exercise of discretion was key to their normative power. When the stakes of inclusion and exclusion were high, mundane administration became an arena of conflict.

In the early decades of the twentieth century, perhaps nowhere was this clearer than in anti-miscegenation law and various challenges to it. Laws preventing intermarriage between races were quickly passed after the Civil War, many relying on a one-eighth "blood quantum" standard, became an uneven patchwork as racial categories based in the inconsistent schemes of race scientists multiplied. Historian Peggy Pascoe has shown that "although many people recognized the arbitrary nature of race classifications and some individuals succeeded in persuading courts they had been misclassified, no one succeeded in dislodging the imperative of race classification" from

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"Spectacles of Difference: The Racial Scripting of Epidemic Disparities," *Bulletin of the History of Medicine* 94, no. 4 (2020): 602–25.

[37] Trans studies scholar Dean Spade has called for greater attention to the administrative realm in order to understand the way that law structures and reproduces vulnerability for people who do not neatly fit into accepted and standardized categories: Spade, *Normal Life*.

the regulation of marriage.[38] Courtroom contests, from annulments to disputed inheritance, pitted epistemologies of racial identity against one another. Trial courts established race by reputation, or as Ariela Gross argues, performance.[39] Lawyers appealing these rulings sought to trouble classifications by bringing in "culturalist" expert witnesses who stressed the biological indeterminacy of race. While some judges entertained doubts, others were not impressed with experts' prevarication and went for easier answers.[40]

But the courtroom was only a site for contesting the biological validity of documentary race-making that had taken place prior, in marriage licensing bureaus. Various interest groups, including eugenicists, vital statisticians, or simply ardent white supremacists, converged on marriage reform and by 1931 succeeded in passing licensing laws in every state as "society's first line of defense against unwanted marriages." Thus licensing clerks, even under strict directives, were endowed with considerable control over the fates of individuals. Vital statisticians had a keen interest in turning these doubles into aggregates, and "if officials did their work well, they would…[erase] interracial couples from national marriage statistics." Numbers confirming the rarity of interracial marriage could become the "functional substitute for the rhetoric of naturality and unnaturality" behind the rise of anti-miscegenation laws.[41]

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[38] Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009), 112, 116–19. Pascoe describes the inconsistency of racial categories added to anti-miscegenation statutes (which the majority of states had) over the first part of the twentieth century. Six states—Oklahoma, Arkansas, Tennessee, Virginia, Alabama, and Georgia—adopted the "one-drop" standard that race scientists like Walter Plecker of the Virginia Bureau of Vital Statistics advocated for to maintain racial "purity." Pascoe, 140.

[39] Gross, *What Blood Won't Tell*.

[40] In 1924, the Alabama Court of Appeals rejected a mixed-race woman's claim that the state was required to trace her antecedents by citing "the impossibility clearly apparent in making such proof…the rule born of necessity should and does permit a witness…to testify that a person is a negro, or is a white person, or that he is a man, or that she is a woman": Pascoe, *What Comes Naturally*, 129.

[41] Pascoe, 133, 138–39.

The statisticians, however, did not always get everything they wanted. Virginia's first registrar of vital statistics, Walter Plecker, advocated for legislation to root out racial imposters that would impose a mandatory system of racial registration for all Virginians. This was a bridge too far. Supporters of anti-miscegenation statutes did not believe racial ambiguity among a select few justified "[forcing] the whole population…to take out passports attesting their racial composition." Though the legislature rejected this part of the 1924 Racial Purity Act, the bill passed. Plecker took it upon himself to check records against one another and correct them, and even circulate lists of suspicious families.[42]

At the federal level, the most infamous example of Jim Crow policy was without a doubt the segregation of the government itself formalized by Woodrow Wilson, practices pioneered and naturalized by Republican administrations before and after. A statement in NAACP magazine *The Crisis* by Black Republican leaders supporting Wilson's challenger in the 1916 election singled out segregation in federal employment as a chief campaign issue, homing in on the new practice of "requiring the race of the applicant to be shown by his photograph," as a mechanism that would "make impossible further appointments."[43] Once an incubator for Washington, D.C.'s ascendant upper-middle class Black community, the nation's preeminent bureaucracy instead became a symbol of organized political erasure.[44] Subsequent Republican administrations only strengthened existing

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[42] Pascoe, 140–45. The Racial Purity Act required all birth certificates to indicate whether each parent was right, subject to a strict one-drop test with a small "Pocahontas" exception so as not to upset those who claimed descent from one of Virginia's founding families.

[43] Colored Advisory Committee of the Republican National Committee, "Address to the Colored Voters," *The Crisis: A Record of the Darker Races*, November 1916.

[44] As Eric Yellin shows, although Wilson did not design specific policies, he approved of and defended his subordinates' pursuit of segregation in the name of "efficiency." Physical barriers in offices and segregated restrooms were an embarrassment, but the loss of promotional opportunities that might lead to the kind of economic mobility enjoyed by a prior generation hit skilled civil servants hardest, among them a cadre of Census clerks: Eric S. Yellin, *Racism in the Nation's Service: Government Workers and the Color Line in Woodrow Wilson's America* (Chapel Hill: University of North Carolina Press, 2013), 193. Yellin stresses the inconsistency

practices, still couched in the language of scientific management principles that harmonized with the paternalistic logic of segregation as a tool for promoting social harmony.[45]

It should be clear by now that Progressives were crazy about licenses. Reformers relied on paperwork and bureaucratic encounters to enforce projects geared toward social betterment.[46] While white Southerners were initially opposed to licensing laws, the propagandization of traffic incidents involving white people harmed or killed by Black drivers led to a successful push by reformers who brandished an image of Black dangerousness.[47] When the state of Illinois passed a licensing requirement in the late 1930s, the Chicago NAACP protested against the de facto inclusion of a question that required applicants to designate their membership in one of five racial

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of policies under Wilson, as "the patronage demands of white Democrats, the howls of white supremacists, the needs of a modernizing governmental bureaucracy, and, indeed, the desire of some managers to feel they were being fair were forged into a racial discrimination that needed years to become institutionalized": Yellin, 115. For an account of one significant bureaucrat and inventor, Shelby J. Davidson, see Rayvon Fouché, *Black Inventors in the Age of Segregation: Granville T. Woods, Lewis H. Latimer & Shelby J. Davidson*, Johns Hopkins Studies in the History of Technology (Baltimore: Johns Hopkins University Press, 2003).

[45] On segregation, scientific management, and office work, see Angel Kwolek-Folland, *Engendering Business: Men and Women in the Corporate Office, 1870-1930*, Gender Relations in the American Experience (Baltimore: Johns Hopkins University Press, 1994); David R. Roediger and Elizabeth D. Esch, *The Production of Difference: Race and the Management of Labor in U.S. History* (New York; Oxford: Oxford University Press, 2012).

[46] Another example that illustrates the complex workings of race, data, and documentation is the driver's license. Cass Adair and Daniel Albert show how the shifting social meaning of licensing and the prominence of racialized regulation emerged from a collision between traffic safety advocacy and the perceived threat of Black mobility throughout the early decades of the twentieth century. In the North, opponents of licensing saw new state requirements to carry around photographic identity as akin to creating a "rogues gallery" of drivers; licenses, Adair points out, bore an uncanny resemblance to the Bertillon cards used by the New York Police to track suspected criminals amid waves of immigration. Race and sex markers on licenses reflected a hereditarian perception that certain groups were simply unfit to drive, and Albert demonstrates that the 'Traffic Clinic' established by the city of Detroit relied on IQ tests over other risk factors like history or the label "aggressive" to determine whether or not to suspend licenses, and more than half of Black people were labeled "stupid" compared to just 20% of whites. Cassius Adair, "Licensing Citizenship: Anti-Blackness, Identification Documents, and Transgender Studies," *American Quarterly* 71, no. 2 (2019): 576; Daniel M. Albert, "Primitive Drivers: Racial Science and Citizenship in the Motor Age," *Science as Culture* 10, no. 3 (September 2001): 340–42.

[47] The license requirement yielded a new stereotype: newspapers portrayed Black applicants as too foolish to pass licensing exams, an association that had an uncanny resemblance to the use of literacy tests to prevent Black people from voting. Thus "a document that indexed criminalization [became] one that conveyed affirmative citizenship" and white dominance over the road: Adair, "Licensing Citizenship," 581–86.

groups. Questioning both the integrity and utility of the race item, leaders argued that it could serve no purpose beyond helping the state to restrict Black mobility. It was a familiar argumentative posture for the organization whose national arm had spent plenty of time challenging the necessity of racial designations to expand the federal government.

The relationship between citizen and state that drivers' licenses came to embody built on the template set by the New Deal. The Selective Service Act during World War I had made the problem of lax identification practices painfully clear, and New Deal programs sought to regularize and expand state identification. Well-heeled citizens resisted these efforts, complaining about passport requirements and opposing a universal fingerprinting program.[48] Such difficulties could be explained by the fact that, as discussed above, identification practices were associated with suspect individuals and groups. In Sarah Igo's account of American privacy, she discusses how the proposal for a universal program like Social Security turned on convincing "the most normative of Americans: white, male, able-bodied workers" that identification could be "a path to social benefits and not simply a means of social control."[49] Ironically, it was now the *exclusion* of minorities from state identification programs that helped reinforce this association. Scholars have established various ways in which the New Deal excluded Black and Mexican workers. Although recommendations for both Social Security and labor reform under the Wagner Act would have included farm and domestic labor, for instance, they were readily excluded by legislative committees dominated by a strong Southern congressional bloc.[50]

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[48] See the forthcoming dissertation by Dan Ewert on the politics of fingerprinting.

[49] Igo, *The Known Citizen*, 60–63.

[50] Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: W.W. Norton & Company, 2013), 161, 260. Katznelson goes further into the mechanism and consequences of this process in his classic account of how federal policy in the first half of the twentieth century created a kind of economic citizenship akin to "affirmative action" for white people: Ira Katznelson, *When Affirmative Action Was White: An Untold*

With these exclusions in mind, Black leaders sounded off about the racial designation on Social Security applications as just another tool for exclusion, and the NAACP unsuccessfully petitioned for its removal. Many potential applicants' chief concern was not the federal government but their employers: women worried about disclosing their age and marital status, while labor leaders feared that bosses would be able to inquire into applicants' previous jobs and potential union affiliation. Such fears were not unfounded: opportunistic employers indeed began "circulating their own official-looking forms demanding data from their employees" including nationality, religion, years of residence, and number of dependents.[51]

Despite misgivings about the discriminatory aspects of New Deal programs and employers' willingness to use them as a springboard for their own forms of registration, Social Security eventually offered real benefits.[52] Once the first checks were cut and the benefits of social security finally became tangible, some Black leaders even described it as "the hope of the Negro in America" and encouraged folks to register and keep their numbers, "evidence of your rights under this law," close at hand.[53] Still, for all of the material gains and symbolism of the New Deal, the political realities for Black Americans did not change substantially, particularly in the South. President

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History of Racial Inequality in Twentieth-Century America (New York: W.W. Norton & Company, 2005). The ambiguities around whether or not citizenship status should be a qualifier for Social Security caused a great deal of confusion, but tended toward inclusion of the European immigrants architects of the legislation had in mind and the exclusion of Black and Mexican laborers regardless of alien status. Cybelle Fox, *Three Worlds of Relief: Race, Immigration, and the American Welfare State from the Progressive Era to the New Deal* (Princeton, N.J.: Princeton University Press, 2012), 256–63.

[51] Igo, *The Known Citizen*, 71–76.

[52] Political scientist Robert Lieberman argues that Old-Age Insurance (OAI) under Social Security distributed benefits fairly to Black workers with coverage, and amendments expanding eligibility made it "the closest thing to a race-blind program the United States has ever known" by the 1960s: Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, MA: Harvard University Press, 2001), 67. Though I am in no position to evaluate Lieberman's methodology, he explains this as a "policy feedback" in which the expansion of an initially exclusionary program, administered fairly, ultimately worked to include.

[53] Igo, *The Averaged American*, 88.

Roosevelt, wary of upsetting the Southern Democrats whose votes his legislation needed, remained opposed to civil rights bills, and anti-lynching legislation continued to languish in the Senate.[54]

The New Deal enlarged the value of data doubles considerably. Civil rights lawyers made inroads by arguing that racial designations used in official paperwork furnished opportunities for discrimination.[55] Ultimately, it was a case about the regulation of filled milk, rather than a challenge to the jury selection processes of "legalized lynching" that signaled a shift in the Supreme Court's willingness to consider cases regarding discriminatory state action. In *United States v. Carolene Products* (1938), a Court that had only recently abandoned its defense of unfettered contract rights to make room in the Constitution for the expansive social and economic legislation of the New Deal signaled that it would take a more active approach to cases involving civil liberties. In particular, a famous footnote raised the possibility that legislation expressing "prejudice against discrete and insular minorities" might "call for a correspondingly more searching judicial inquiry" than ordinary challenges to due process.[56] While the ruling set the stage for the Court to hear more significant challenges to the infringement of civil rights in the years to come, it also drove a wedge into the crucial New Deal majority.[57] Should a judicial branch that had only recently allowed the federal government to expand economic and social citizenship apply a different standard to state governments? So long as a "rational basis" could be offered for a given law, many were inclined to answer in the negative.

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[54] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004), 115.
[55] See above, Part One overview.
[56] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). On the legacy of *Carolene Products*, see Jack M. Balkin, *The Cycles of Constitutional Time* (Oxford: Oxford University Press, 2020), 112.
[57] Horwitz, *The Transformation of American Law, 1870-1960*, 252–53.

Bureaucracies were in many ways the beating heart of Jim Crow. Behind overt manifestations of violence were ways of knowing and unknowing that sustained it. The rise of standard state identification practices across the North and South, regional variation notwithstanding, raised questions and prompted resistance before the benefits of being known came to outweigh their association with deviance. This is especially significant because the litigation-based model of challenging state practices through the federal courts had not yet been solidified as *the* dominant strategy for challenging racial oppression. It remained only one among many.[58] Across these formative decades, "the label civil rights conveyed remarkably little."[59] To achieve their goals, Black leaders worked with the labor movement or internally. Reformers operating within the Jim Crow bureaucracy helped shore up its legitimacy, but they eventually turned the logic of the system onto itself. State governments that tried to steer clear of federal authority relied on "quiet management" to maintain the Jim Crow order, which meant creating opportunities like leadership positions to placate leaders. The "limited fruits of Jim Crow reform would provide the ammunition to confront these contradictions" through organizations and institutions that became "the foundation on which the modern civil rights movement would build."[60]

Reform had its ambiguities. On top of the fact that officials were usually more interested in maintaining the racial status quo, its benefits and costs were not distributed evenly.[61] Those who

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[58] This view of litigation expanding at the expense of any other kind of strategy is quite common, but it is an oversimplification of the relationship between law and grassroots politics that many legal historians have explored during this period: McCann, *Rights at Work*; Mayeri, *Reasoning from Race*; Turk, *Equality on Trial*; Risa Lauren Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford: Oxford University Press, 2016).

[59] In fact, the Justice Department had originally called its Civil Rights Section the Civil *Liberties* Section, but a director worried that it sounded too radical (or was too easily confused with the ACLU) and suggested the change: Schmidt, *Civil Rights in America*, 56.

[60] Johnson, *Reforming Jim Crow*, 121, 143.

[61] In her history of interwar Detroit, Karen Miller explores similar tensions in the urban North, where "[e]lected and nonelected city officials often shared the belief that challenges to the racial status quo would

played along accrued resources for their institutions, while agitators pushing for radical change were targeted by the federal government's expanded surveillance apparatus, particularly after the series of uprisings during the "Red Summer" of 1919.[62] Labor and political historians have cautioned against allowing the elites Johnson speaks of to serve as a mouthpiece for Black struggle more generally. Most Black workers did not experience Jim Crow as a defunct democracy in need of reform, but rather "lived and struggled in a world that resembled, at least from their vantage point, a fascist or, more appropriately, a colonial situation." Opposition was often shaped out-of-sight, in households, churches, and places of leisure, and working-class people played turned public transportation—which the Black middle class had little interest in—into a site for dramatizing the lived experience of segregation as the nation turned its gaze southward.[63] White Southerners responded to the knowledge that "their own localized form of surveillance…fed into this national narrative about the South as a violent, racist place, out of step with the nation and in need of federal intervention." Officials launched their own surveillance organizations and coordinated networks of collaborators in order to "to continue the daily policing of racial performances while concealing images of violence from public view."[64] Increasingly, the need to police appearances manifested in states' record-keeping practices, making it harder for activists to dig up evidence needed to justify legal intervention.

As the remainder of this chapter traces, the tension between "quiet management" as a solution to what was called "race relations" and more visible or radical political actions would draw

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disrupt their ability to manage an orderly city and support its continued growth": Karen R. Miller, *Managing Inequality: Northern Racial Liberalism in Interwar Detroit* (New York: NYU Press, 2014), 9.

[62] Mark Ellis, "J. Edgar Hoover and the 'Red Summer' of 1919," *Journal of American Studies* 28, no. 1 (1994): 39–59, https://www.jstor.org/stable/27555783; Igo, *The Known Citizen*, 49.

[63] Robin D. G. Kelley, "'We Are Not What We Seem': Rethinking Black Working-Class Opposition in the Jim Crow South," *The Journal of American History* 80, no. 1 (1993): 82, 109–10.

[64] Berrey, *The Jim Crow Routine*, 105–6.

Black leaders onto different sides of debates over strategy. While sensitivity to data's potentially oppressive uses—abetting discriminatory bureaucracy or fueling stereotypes—remained a feature of this discourse, there was also a growing optimism about its use in targeting racism at its source. Views differed over whether the wellspring was located within the individual psyche or the social fabric itself. These competing epistemologies of inequality suggested different approaches to eradicating it.

The Epistemology of Racial Liberalism

Clarence Mitchell did not have to invent arguments about the pitfalls of racial records at the White House Conference in the summer of 1965 because he had been making them since World War II. In 1941, NAACP Executive Secretary Walter White had called the parallel between the Navy Department's policy of requiring employees to wear racial identification tags and practices in Nazi labor camps to the wartime Fair Employment Practices Committee (FEPC). Overseeing the reconversion of military personnel to civilian life as NAACP labor secretary in the late 1940s, Mitchell supported a proactive front against discriminatory layoffs but argued persistently against any plan based on quotas and the identification system they would require. Government officials "stubbornly resisted."[65] Years later, he still felt compelled to remind the room that Northern states had passed legislation barring questions about race on applications.[66]

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[65] Denton L. Watson, *Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws* (New York: Morrow, 1990), 151–52, 792n3. They won a minor victory by getting racial designations removed from overseas travel orders and paperwork for affiliated civilians. On the struggle against racial records in the U.S. military, see Morris J. MacGregor, *Integration of the Armed Forces, 1940-1965* (Washington, D.C.: Center of Military History, United States Army, 1981), 224, 380–85, 574–77. For a discussion Nazism's political resonance in the interwar United States, see Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (Oxford: Oxford University Press, 2004), 21.

[66] Anthony S. Chen, "'The Hitlerian Rule of Quotas': Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941-1945," *The Journal of American History* 92, no. 4 (2006): 1248.

Postwar racial liberalism encompassed a diverse array of strategies and intellectual frameworks to overturn Jim Crow. However, pervasive antiradicalism meant that none fully challenged the power relations undergirding its information order—the default assumption was that it was broken, rather than working as intended. Risa Goluboff describes an "antidiscrimination paradigm" that "[took] hold of the legal imagination," crowding out labor-based strategies that focused on material inequality.[67] Leah Gordon spells out a parallel in the social sciences: intellectual forces, such as "scientism, enthusiasm for quantification, behavioralism…helped to produce postwar racial liberalism's theoretical blind spots."[68]

So, while the arguments against racial records two decades on remained more or less the same, the political context was decidedly different. Common metaphors took on new meaning. Both the familiar, colloquial charges of Nazism and the radical internationalist politics of a "Black Popular Front" against fascism had yielded to a consensus view of the Holocaust "as an entity in its own right" and *the* paradigm for understanding the evils of racism.[69] This frame shift was concurrent with the wartime emergence of rights talk as the "coin of the realm" for making claims on a dramatically expanding federal government, upon which the subsequent generation eagerly cashed in.[70] While rights were not synonymous with litigation, the heyday of the Warren Court underwrote a profound faith in law as an instrument for progressive social change.[71]

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[67] Goluboff, *The Lost Promise of Civil Rights*, 14–15.

[68] Gordon, *From Power to Prejudice*, 180–81.

[69] On interwar Black politics, see Singh, *Black Is a Country*. On the narrowing of ideas about oppression and domination to "discrimination," see above, notes 4-5. After the Eichmann trial in 1961, historian Peter Novick argues, Americans began to see it "as an entity in its own right": a project of ethnic cleansing distinct from Nazism more generally, Peter Novick, *The Holocaust In American Life* (Boston: Houghton Mifflin Company, 1999), 140.

[70] James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (Oxford: Oxford University Press, 2011), 259–60.

[71] Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1998), 42–43.

One commentator captured this transformation, hinting at the irony of rights-based liberalism's association with the national security state: people who once questioned whether fair employment laws were needed *at all* now asked whether such laws did *enough*, all while the government spent "more on a single missile mis-firing at Cape Kennedy [than]…the entire Federal Equal Employment Opportunity Program."[72] Ideas about the meaning of equality were changing faster than the political will to realize them, if not the capacity. This section discusses how challenges to the Jim Crow information order that played out in the political space of postwar racial liberalism surfaced a tension between challenges to illegitimate classification and calls for economic redistribution to remedy subordination.

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Historians debate exactly what kind of "watershed" World War II was for civil rights, but there is no question that leaders leveraged its political symbolism and economic exigencies to promote their cause.[73] Black newspapers ran a "Double V" campaign, arguing that the fight for democracy abroad required a parallel home front against Jim Crow, and strategists made inroads to combat discrimination in defense industries as well as the military itself, most notably labor leader A. Philip

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[72] John Feild, "Hindsight and Foresight about FEPC," *Buffalo Law Review* 14, no. 1 (October 1, 1964): 16–21. On national security and rights-based liberalism, see Dudziak, *Cold War Civil Rights*; Katznelson, *Fear Itself*.

[73] In a "standard" legal account of the Civil Rights Movement, Michael Klarman writes that the push toward equality that intensified during the New Deal "would require the cataclysmic intervention of World War II": Klarman, *From Jim Crow to Civil Rights*, 115. Recent historiography suggests a more complex narrative. In an edited collection devoted to exploring the connection, Kevin Kruse and Stephen Tuck argue that "evidence of a widespread mobilization of the civil rights struggle during the war years is thinner than it may initially appear," and point to scholarship suggesting that "the war years changed the direction of existing protest in the early twentieth century": Kevin M. Kruse and Stephen Tuck, "Introduction: The Second World War and the Civil Rights Movement," in *Fog of War: The Second World War and the Civil Rights Movement*, ed. Kevin M. Kruse and Stephen Tuck (Oxford: Oxford University Press, 2012), 5–6. Christopher Schmidt suggests that the linguistic shift to "civil rights" came with Truman's postwar initiative to respond to white brutality in the South: "The specific and generic usages of the term were melded and civil rights became, in remarkably short order, synonymous with the growing campaign to secure equal rights for African Americans across a range of policy areas." Schmidt, *Civil Rights in America*, 54.

Randolph's threat to lead a March on Washington that prompted President Roosevelt to create the FEPC. The FEPC gave "a few important black lawyers the opportunity to come to Washington and assume and unprecedented public role," creating an agency that became "the natural starting point" for a new generation who parlayed their experience holding hearings with industry and labor leaders into careers as lobbyists and civil rights lawyers.[74]

Civil rights activism and litigation before and during World War II linked the pursuit of racial and economic justice.[75] Despite the limitations of the FEPC model, it signaled an emphasis on economic rights and provided a model for leveraging government policy to bind private actors. By the time the FEPC came around, the NAACP was already limiting its purview to industrial workers, replacing staffers invested in organizing unskilled and agricultural workers in the South with ones focused on Northern labor, like Mitchell himself. In short, though labor cases were still a priority, views "differed on what kind of labor cases the association should accept."[76] War provided a moment of opportunity to pursue a legal theory rooted in "economic discrimination." But once the dust had settled, litigating on behalf of industrial workers "no longer seemed as promising" with postwar anti-communism on the rise.[77] When Thurgood Marshall turned the LDF into its own

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[74] Mack, *Representing the Race*, 238–41. Not all appraisals of the FEPC were sanguine; Du Bois wrote in his syndicated column that in 1943 "The new role of the FEPC appears to be not to attack discrimination but to see what part of it will yield without attack": W. E. B. Du Bois, "As the Crow Flies," *New York Amsterdam News*, September 18, 1943.

[75] In two very different accounts, Risa Goluboff and Ken Mack focus on this process, with Goluboff emphasizing doctrinal currents and the opportunism of the NAACP legal department and Mack exploring the conflict between lawyers' leftist political commitments, identity, and the demands of professionalization: Goluboff, *The Lost Promise of Civil Rights*; Mack, *Representing the Race*.

[76] Goluboff, *The Lost Promise of Civil Rights*, 183–85.

[77] Goluboff, 218–19. Khalil Muhammad explains the approach of Charles S. Johnson, principal author of *The Negro in Chicago*, as countering prevailing racial conservatism by being an "active publicist for liberal environmentalism," nodding to historian Mia Bay's account of Black social scientists in the 1920s whose research, she argues, "aimed at showing the primacy of environmental factors in determining human capacity": Muhammad, *The Condemnation of Blackness*, 238; Mia Bay, *The White Image in the Black Mind: African-American Ideas about White People, 1830-1925* (Oxford: Oxford University Press, 2000), 201.

organization for tax reasons in 1939, labor slid further from the legal agenda in favor of an attack on the constitutionality of segregation writ large.

The postwar social sciences exhibited a similar trend, as the study of prejudice—with the individual as the unit of analysis—became a leading approach to "the race issue," standing apart from alternatives that focused on collectivities and made room for structural analysis.[78] Swedish economist Gunnar Myrdal's *An American Dilemma* (1944) straddled both of these approaches, but its messaging helped to decisively shift the conversation toward individualism. Myrdal wielded data documenting a political economy of racial subjugation while arguing that the fundamental problem was a crisis of democratic ideals rooted in individual beliefs and behaviors.[79] Myrdal's work was read for its emphasis on white hearts and minds over conflict and economic exploitation.

In many ways, Myrdal's account was bolder than contemporary scientific condemnations of racism as biologically incoherent.[80] He departed from the "Sumnerian mores" of social science—the idea promoted by sociologist William Graham Sumner that law was subordinate to social norms—by defending law as an agent of social change.[81] But whatever legal or political expediency it had, *An American Dilemma* was marked by a normative, individualist framing that appealed to its intended

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[78] Gordon, *From Power to Prejudice*, 28–34. One leading alternative was the Chicago school of social ecology, which historian Michael Willrich argues shaped a distinctive approach to socialized justice: Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003).

[79] On Maribel Morey's account, the massive study sponsored by the Carnegie Corporation passed over Black scholars like Du Bois, white Americans, and scholars from colonized countries for the more "objective" Swede because he fit the organization's vision for the kind of policy-relevant knowledge that would make it the definitive statement on postwar race relations: Maribel Morey, "The Making of 'An American Dilemma' (1944): The Carnegie Corporation, Gunnar Myrdal, and the Unlikely Roots of Modern Civil Rights Discourse" (Ph.D., United States -- New Jersey, Princeton University, 2013), 156. Myrdal eschewed assumptions about innate, biological difference in favor of an environmentalist approach not unlike the Chicago school, but focused less on conflict than abstract and unrealized democratic ideals. Maribel Morey argues that his emphasis on integration into the national social body can be traced back to interwar eugenics projects in Sweden, and moreover that the Carnegie Corporation's sponsorship of the project was in line with prior research it sponsored to aid British colonial administration in Africa: Morey, 223–24, 296.

[80] Bernasconi, "A Most Dangerous Error."

[81] Jackson, *Social Scientists for Social Justice*, 63.

audience of Northern racial liberals. Rooted in assumptions of Black social pathology, Myrdal's emphasis on assimilation implicitly devalued Black culture and institutions.[82] The social scientific trends that came in its wake treated discrimination and prejudice as deviations from an integrated norm in a social system that "tended toward equilibrium," suggesting that racial issues could be resolved without massive structural upheaval. *An American Dilemma* provided the template for "a postwar racial liberalism that prioritized nondiscrimination, opportunity-based egalitarianism, and education for racial understanding, in addition to legal desegregation."[83]

The link between Myrdal and the LDF's Equal Protection strategy in *Brown* is a direct one: it is right there in the decision's infamous footnote eleven, anchoring the more specific references. Tempting as it may be to insist that racial liberals saw racial issues exclusively through a Myrdalian lens, organized labor was still the leading example of how law could solidify the gains of social movements.[84] On this model, litigation might not be able to shape social mores, but it could create structures to shift the balance of power. The very same year Myrdal's tome was published, notable Supreme Court rulings shored up the faith that labor would provide the means to dismantle the legal and economic subjugation of Black Americans. *Steele v. Louisville & Nashville Railroad Co.* (1944) argued that union bargaining units, like state legislatures, were subject to the fourteenth amendment's equal protection clause. The case was argued by Charles Hamilton Houston, the NAACP's first special counsel who sought "to perfect, rather than attack, the New Deal labor

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[82] Myrdal helped to underwrite what historian Daryl Michael Scott calls the "damage hypothesis" that became crucial to the legal argument in *Brown*: Scott, *Contempt and Pity*.

[83] Gordon, *From Power to Prejudice*, 46–47, 38.

[84] Historical sociologist Anthony Chen argues that at the time, the definition of discrimination was still capacious; liberals were not hamstrung, or at least not yet, by the preoccupation with prejudice that Myrdal abetted. Even if discrimination was rooted in private conscience, it manifested in a distinct pattern of behavior that government authority could regulate. The *Washington Post* analogized civil rights laws to labor: "Nothing so effectively served to bring about the acceptance of collective bargaining in our industrial relations as the force of law," Chen, *The Fifth Freedom*, 47.

regime," while promoting more expansive ideas of equality.[85] Houston was called "the man who killed Jim Crow." Years later, an article in the *National Black Law Journal* spoke of the "curious accident of history that [*Brown*] has become the ground zero level against which civil rights progress has been measured" rather than *Steele*.[86]

Despite the intellectual and legal changes underway, movement leaders in the immediate postwar period felt integration was an insufficient description of their goals. When Truman called for desegregation of the armed forces in 1948, following a parallel order for the federal government, the language of "integration" was nowhere to be found. Leaders who had been granted authority under the FEPC and Roosevelt's Black Cabinet still had economic equality at the top of their agenda.[87] Even the NAACP did not declare a formal stance against segregation until 1951, long after the question had caused a rift between the organization and Du Bois, its intellectual leading light.[88]

While lawyers and elites sought to leverage the gains of the labor movement for the Black Freedom Struggle, other forces centered the emerging concept of 'racism' on the erroneous biological justifications for the genocide of European Jews, largely ignoring the political economy and information order of racial subjugation that thrived stateside. Scholars have documented Nazi policymakers' borrowing of U.S. laws and the refinement of ambient scientific racism during the

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[85] Citing the 1934 Railway Labor Act, the Court concluded Congress had deemed a bargaining unit akin to a legislature, with "a corresponding duty…to exercise fairly the power conferred upon it in behalf of all those for whom it acts": quoted in Lee, *The Workplace Constitution*, 32. Though the ruling fell short of Houston's ultimate aim of an equal membership requirement, he envisioned expanding the interpretation to Wagner Act (NLRA) and even state labor laws controlled by the Fourteenth Amendment. Lee, 21–22, 30.

[86] James E. Jones, Jr., "Equal Employment Opportunities: The Promises of the 60's – The Reality of the 70's," *National Black Law Journal* 2, no. 1 (1972): 10. The *Chicago Defender* saw the case as "[opening] the way for striking new powerful blows against Jim Crow in American life": quoted in Goluboff, *The Lost Promise of Civil Rights*, 216.

[87] "In fact integration was not the precise word to describe the complex social change in the armed forces demanded by civil rights leaders, and the emphasis on equality of treatment and opportunity with its portent for the next generation was particularly appropriate": MacGregor, *Integration of the Armed Forces*, 312–13.

[88] Goluboff, *The Lost Promise of Civil Rights*, 233.

Progressive era.[89] Reciprocally, liberals began viewing their own "race relations" through the lens of Nazism and the more recent horrors of World War II. The first major use of the term *racism* in a Supreme Court decision came with *Korematsu v. United States*—decided the very same day as *Steele*—when Justice Murphy dissented from the Court's justification for Japanese internment by claiming that distinctions "based on color and ancestry are utterly inconsistent with our traditions and ideals." He continued, "[t]oday is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based on the accident of race or ancestry." Despite the thrust of his dissent, its elision of history is telling.[90]

The full extent of Holocaust genocide was not broadly understood until at least a decade later, but by the end of the war Nazism, not the Jim Crow South, was fast becoming the paradigm of racism for many liberals.[91] In 1951 the Civil Rights Congress used this to their advantage in the report *We Charge Genocide*, a plea for international intervention submitted to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. As Alondra Nelson describes, "the report decried the tenuous circumstances of black life in the United States that included 'the willful creation of conditions making for premature death, poverty and disease'…[concluding] that blacks 'suffer from genocide as the result of the consistent, conscious, unified policies of every branch of government.'"[92] Though the charge of genocide would resonate in the Black Power movements of the 1960s, scholars who sought refuge from the Holocaust, most

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[89] James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton, N.J.: Princeton University Press, 2017).

[90] Bernasconi, "A Most Dangerous Error," 98. Curiously, Justice Murphy relied on similar language and reasoning to condemn discriminatory union practices in his *Steele* concurrence: "Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears," *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944) at 209.

[91] Hesse, "Self-Fulfilling Prophecy."

[92] Alondra Nelson, *Body and Soul: The Black Panther Party and the Fight Against Medical Discrimination* (Minneapolis: University of Minnesota Press, 2011), 133.

notably Hannah Arendt, continued to shape conversations about racism as a fundamentally flawed way of thinking about group difference rather than a historical inheritance embedded in political and social institutions. Arendt herself harbored deep reservations about efforts to combat Jim Crow through legislation that mandated integration. She helped repackage the "Sumnerian mores" challenged by Myrdal for a new generation.[93]

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The aftermath of war created both opportunities and obstacles for civil rights leaders. Clarence Mitchell began his career combatting discrimination in the defense industries on the FEPC and was chastened by its demise.[94] As NAACP Labor Secretary he continued the agency's work while lobbying for the establishment of a permanent one. He knew that reconversion would require a multi-pronged attack, as problems ranged from explicit quotas to 'facially neutral' practices like giving Black employees "suspiciously low efficiency ratings when reductions in force were made." Ever wary of calls for compromise, he cautioned that "in the fight for economic justice, minorities should never exchange immediate possibilities for real progress or for mere promises of future action."[95] Mitchell had long supported trade unionism as a lever of economic power and knew the limits of nondiscrimination as a strategy for advancing racial equity. As Labor Secretary, he led the NAACP's opposition to the 1947 Taft-Hartley Act, a piece of legislation passed in a wave of postwar

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[93] Arendt's infamous 1959 essay "Reflections on Little Rock" reflects just how much the concept of discrimination changed in the postwar decades. Fearing the loss of Jewish-only resorts as a result of civil rights legislation, Arendt declared her support for laws to end the practice of segregation as "discrimination enforced by law" while defending discrimination in the social realm as the right to free association or self-segregation. "[Without] discrimination of some sort," she argued, "society would simply cease to exist and very important possibilities of free association and group formation would disappear… discrimination is as indispensable a social right as equality is a political right": Hannah Arendt, "Reflections on Little Rock," *Dissent*, Winter 1959, 50–51. Inequality barely enters the picture, apart from a mention that the class system in European countries "operates socially even when its economic foundations have disappeared": Arendt, 52.

[94] Its funding was canceled by Congress as the reconversion process was getting started, and a final push to end local discrimination in the Capital Transit Company personally blocked by President Truman.

[95] "Anyone who means to be fair," he continued, "will give both": Watson, *Lion in the Lobby*, 142–51.

anti-labor sentiment that weakened the autonomy of unions the NAACP had been strategically lobbying. Though it included a nondiscrimination provision, Mitchell did not mince words, calling it "a pure unadulterated fake" that handed unions a carte blanche for exclusion and segregation.[96]

Eliminating racial designations on paperwork was a common thread among Mitchell's various endeavors. One prominent effort was the integration of the military following Truman's executive order. High-ranking officials among different branches struggled to sort out the morass of different classification schemes across their various forms, but Mitchell insisted that the whole enterprise was meaningless and led to nothing but humiliation for those subjected to scrutiny. When officials maintained that there was no way to oversee integration without statistics, he averred that racial paper trails made it easier for distant, high-ranking bureaucrats to decide who to fire.[97] Undeterred, Mitchell persuaded President Eisenhower to abandon the practice of recording the race of federal employees, and the Kennedy administration to reaffirm the ban as it dithered over its own civil rights agenda, but these practices persisted in a patchwork manner.[98]

Mitchell was not the only one protesting the expansion of government classification schemes. Opposition to adding a question on religion to the Census paved the way for the ACLU to

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[96] On Mitchell and the FEPC, see Watson, 157–59; Chen, *The Fifth Freedom*, 45–46. On Mitchell and the Taft-Hartley Act, see Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*, Princeton Studies in American Politics (Princeton, N.J.: Princeton University Press, 2008), 32; Lee, *The Workplace Constitution*, 52–54.

[97] The President still promised to reimpose a ceiling on Black hiring in the military if things got too out of hand. Despite the instability of the categories themselves, there were simply too many uses for race in military records, such that responsibility for their maintenance was transferred all the way up to the office of the Secretary of Defense: MacGregor, *Integration of the Armed Forces*, 378–85.

[98] One historian of the armed forces claims that the need to demonstrate not just integration of units but equal opportunity in professional advancement—where the numbers were painful—meant that "throughout the mid-1960s the [Department of Defense] sought to balance the conflicting demands for and against race labeling": MacGregor, 574.

revisit its policy on a designation that had long been on the schedule: "color or race."[99] While it acknowledged that accurate information about American Indians, for example, might be used to support the claims of dispossessed and historically oppressed indigenous peoples, the Union argued that overall, the question and available answers were confusing, unscientific, and could "[raise] in the minds of many of our people the specter of some threatened discrimination." This "grave objection" came midway through 1960 as enumerators were preparing to survey the population. So, the organization urged that the question be either skipped over or that the Bureau "instruct its canvassers to seek only voluntary answers."[100] The ACLU's stance was in line with exhortations by civil rights groups to remove racial designations but, invoking both scientific standards and threats of discrimination, it took a firmer stance on the matter regarding national data collection than had been voiced since debates around 'mixed race' questions in 1930.[101]

Publications and individuals quickly weighed in on the matter, arguing that the Union had erred. In responses to letters of criticism from individuals, Associate Director Alan Reitman pointed out that the Union only objected to the specific language of the question and did not think that the Census was an overall invasion of privacy. A representative from the ACLU's Philadelphia Branch defended the organization's stance against criticism from the *Philadelphia Bulletin*, doubling down on

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[99] Throughout the 1950s, the Census Bureau courted commentary from Jewish, Catholic, and Protestant leaders who were divided on the question of whether it should include a question on religion. Where Catholics saw an opportunity to be registered as a majority group, influential Jewish organizations opposed the measure, fearing a revival of antisemitism and noting parallels with ethnic registration initiatives under the Nazis. The ACLU took the latter side, and the measure was ultimately dropped: Kevin M. Schultz, "Religion as Identity in Postwar America: The Last Serious Attempt to Put a Question on Religion in the United States Census," *The Journal of American History* 93, no. 2 (2006): 359–84.

[100] "Statement of American Civil Liberties Union Concerning 1960 Census," April 6, 1960, ACLU Records, Subgroup 2, Subject Files Series, Box 1111, Folder 12, "Federal Government: ACLU Questions 1960 Census Results."

[101] Jennifer L. Hochschild and Brenna Marea Powell, "Racial Reorganization and the United States Census 1850–1930: Mulattoes, Half-Breeds, Mixed Parentage, Hindoos, and the Mexican Race," *Studies in American Political Development* 22, no. 1 (April 2008): 59–96.

accusations that the Census categories were unscientific.[102] Yet, the jury was out for social scientists critical of race concepts. Hans Zeisel, the author of an influential criticism of immigration categories, wrote the ACLU's executive director to clarify his own stance upon learning that a friend had recommended his paper in support for the Union's opposition: "I find no fault with the anthropologically clear questions in the census; on the contrary I urge that the Census schedule be adopted by the immigration authorities."[103] Immigration, of course, was another area marked by the politics of classification.[104] A 1955 NAACP report marked the association's failure to repeal the immigration bill's "colonial quota" as the year's great failure, offset by its success in *Brown*.[105]

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[102] According to him, there were only three races, "White, Negro, and Mongolian," and widely acknowledged intermixture rendered the available designations in the question moot: "The value of the statistics resulting from this particular question will be seriously vitiated because of the unscientific formulation." Spencer Coxe to Editor, *The Bulletin*, April 11, 1960, ACLU Records, Subgroup 2, Subject Files Series, Box 1111, Folder 12, "Federal Government: ACLU Questions 1960 Census Results."

[103] Hans Zeisel to Patrick Murphy Malin, May 13, 1960, ACLU Records, Subgroup 2, Subject Files Series, Box 1111, Folder 12, "Federal Government: ACLU Questions 1960 Census Results." By "anthropologically clear," Zeisel may have been referring to the simple fact that people would be able to select their own racial identification, but his article is somewhat idiosyncratic. Written within a few years of his own emigration to the United States, he proposes using spoken language as a way to measure ethnicity, perhaps unaware of the sordid history of this categorization in constructing a statistical portrait of the German Volk: Jason D. Hansen, *Mapping the Germans: Statistical Science, Cartography, and the Visualization of the German Nation, 1848-1914* (Oxford: Oxford University Press, 2015). Zeisel's main objection is that immigration statistics concealed important political realities through the assimilation of both Jews and Mexicans into "the white race," and Zeisel almost comes off as a proto-whiteness theorist: "It is difficult, indeed, to see what would prevent other 'races,' such as South Americans or Central Americans, from insisting on being included in the apparently more desirable classification, 'white'": Hans Zeisel, "The Race Question in American Immigration Statistics," *Social Research* 16, no. 2 (1949): 225.

[104] As historian Mae Ngai argues, the Immigration Act of 1924 set numerical immigration quotas based on nation rather than race, but the solidification of legal ineligibility to citizenship applied to persons of Asian descent effectively racialized their national origins, obfuscating the operation of race. Mae M. Ngai, "The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924," *The Journal of American History* 86, no. 1 (1999): 67–92.

[105] Frymer, *Black and Blue*, 42. In the immediate postwar years, Congress sought to remedy this, but the legislation designed to repeal Asian exclusion snuck in a "colonial quota" that imposed a numerical ceiling on migration from "colonies and other dependent areas," closing a loophole that permitted Black immigrants from British, Dutch, and French Caribbean colonies to enter the country using the unfilled slots of these large European empires. Sponsors of the bill "defended the colonial quota as the price of 'equality for all' and…stressed that the main goal of [the] bill was 'not to remove the barriers to immigration,' but rather…'to remove racial discrimination from the barriers,'" according to historian Jane Hong. Representative Adam

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Given the persistent tensions over government classifications, not to mention the later canonization of the case in support of colorblind ideology, it comes as something of a surprise that the question of racial designations came up in neither the litigation leading to *Brown* nor the immediate fallout from the monumental decision. The LDF's campaign against school segregation took shape after years of setting aside labor and employment cases in favor of ones more amenable to an injury-based equal protection approach. In this sense, the strategy was in line with prevailing liberal wisdom: the Jim Crow order was an illogical regime of racial separation administered through formal state practices. The success of this particular conception helped to narrow the range of future legal challenges.[106]

The vagueness of the decision and its requirements for implementation still left much up for grabs. At first, the dominant debate surrounding *Brown* turned on the legal question of whether the supposed "harm" of segregation was a sufficient basis for overturning *Plessy*. Southerners fueled the fire by lashing out with particular vitriol against the invocation of social science to buttress the decision, and they were joined by Northern legal academics who accused the Court's "nine sociologists" of "writing Gunnar Myrdal's 'social dynamics' into the Constitution."[107] Some turned the logic of harm back onto itself, adopting social scientific frameworks to claim that integration

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Clayton Powell, Jr. challenged the bill's endorsement of "equality based on discrimination" and the NAACP echoed this, mobilizing the Black press to criticize its zero-sum logic: Jane Hong, "'A Cross-Fire between Minorities': Black-Japanese Relations and the Empire Quota in the Postwar Campaign to Repeal Asian Exclusion," *Pacific Historical Review* 87, no. 4 (2018): 682–83.

[106] Goluboff, *The Lost Promise of Civil Rights*, 235–40.

[107] Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown," *Harvard Law Review* 117, no. 5 (2004): 1479, 1487–88. Here, Siegel is riffing on Justice Holmes's famed dissent in *Lochner v. New York* (1905), in which he excoriated the decision as a naked endorsement of Herbert Spencer's popular laissez-faire philosophy.

would inevitably stoke racial tensions.[108] Still, many read *Brown* through a lens that subsequent scholars have called "antisubordination": equal protection prohibited group-based status harm. But in the course of defending this principle against a chorus of constitutional conservatives and extending its reach to anti-miscegenation laws, lawyers directly challenged the state's authority to classify.[109] In order not to stir the pot any further, the Court sidestepped the question of interracial marriage, and seemed to be deciding "on a case-by-case basis whether racial classifications" and the racially exclusive government policies they underwrote "were reasonable."[110] By the time the Court addressed anti-miscegenation laws head-on in the 1960s, it leaned on arguments about suspect racial classifications, leaving harm caused by prohibitions on interracial intimacy unaddressed.

These concerns about the potential consequences of integration, steeped in anxieties about sex, surfaced in unlikely places. Labor lawsuits throughout the 1950s sought to extend *Steele*'s duty of fair representation to a prohibition on racially-exclusive union membership, the goal sought by Houston before his untimely death at the beginning of the decade. *Shelly v. Kramer* (1948) barred state enforcement of racially restrictive covenants, leading to a wave of litigation that aimed to bring the Constitution to bear on ostensibly private entities. Wary of the optics, civil rights lawyers aimed to channel white liberals' Cold War worries about "individual liberty in an era of big government, big business, and big unions" without provoking equally powerful fears that expanding state action

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[108] Siegel, 1497. As historian of science John P. Jackson shows, they were more than willing to defend the use of intelligence tests while lashing out at other kinds of social science: John P. Jackson Jr., *Science for Segregation: Race, Law, and the Case Against Brown v. Board of Education*, Critical America (New York: New York University Press, 2005). During arguments for *Brown II*, Thurgood Marshall distanced the LDF's arguments from social science altogether: "[t]he other side has not produced anything except attitudes, opinion polls, et cetera," quoted in Jackson, *Social Scientists for Social Justice*, 195.

[109] To quote Siegel's argument at length: "The understanding that anticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision or of the earliest debates it prompted," Siegel, "Equality Talk," 1474–75.

[110] Siegel, 1483–84.

would erode the boundary between public and private. Because the Court treated unions as state actors, state action seemed like a viable strategy for translating *Brown* into a bar on racially exclusive bargaining units. The membership question, however, prompted the Court to draw a line. In a case against the all-white Firemen's Brotherhood, the union defended its membership policy "on the grounds that it held social functions with its ladies' auxiliary, invoking the specter of racially threatened white womanhood that was so often deployed in segregation's defense." The Court denied review on the very same day it declined to consider a case about segregated public restrooms. Uneasiness around interracial intimacy, Sophia Lee argues, was at least as important as concern over state action in sealing union membership off from the Constitution.[111]

The membership issue remained volatile even after the 1964 Civil Rights Act gave civil rights lawyers statutory tools to chip away at it. That same year, a direct challenge to laws regulating interracial intimacy finally made it onto the Supreme Court's docket. In *McLaughlin v. Florida*, the Court ruled that a state law prohibiting the cohabitation of two unmarried people of different races and opposite sexes did not pass the "strict scrutiny" standard announced by *Carolene Products* and unsuccessfully challenged in *Korematsu*. Though the Court normally allowed states considerable leeway in justifying the reasonableness of a classification, here it reconstructed equal protection doctrine "in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." Weighing the constitutionality of anti-miscegenation laws led the Court to revise the language used to justify *Brown* ruling to focus on "the wrong of legislative classification rather than the harm of

[111] Lee, *The Workplace Constitution*, 92–96.

segregation."[112] Through this standard, the Court parried criticism that *Brown* was anchored in concerns for a desired social outcome, rather than "neutral" legal rules to control the conduct of government actors.[113]

The logic behind the *Brown* campaign fit the rubric of racial individualism, but devising actual remedies forced matters back to distributive questions. But this more limited interpretation made race-conscious redress for segregation and past discrimination appear suspect, and as anti-classification "was made to speak to these new questions, it acquired new meanings."[114] As the U.S. Commission on Civil Rights later pointed out, adopting balancing as a remedy meant it would largely be up to judges "to decide what concentration of minority pupils within a school is illegal."[115] Many were alarmed by the prospect of legal liability based on statistics alone. Policymakers could not simply shrug this off; later, the same fears would animate the discourse around employment data. Thus, debates over the legitimacy of such court-ordered desegregation plans were the crucible in which modern colorblindness discourse was forged.[116]

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[112] Siegel, "Equality Talk," 1502. Though the Court chose not to address interracial marriage head-on in *McLaughlin*, it did so a few years later in *Loving v. Virginia* (1967).

[113] On legal academics' criticism of *Brown*, see Kalman, *The Strange Career of Legal Liberalism*, 27–36.

[114] Siegel, "Equality Talk," 1506.

[115] Quoted in Siegel, 1507.

[116] Siegel's revisionist account is compelling for the historian, opening up possibilities in a case that often feels overdetermined. At the same time, challenging the narrative invoked by contemporary advocates of colorblindness leads her to uncritically defend statistics, dismissing opposition to government data collection by civil rights groups as sporadic or incoherent. Siegel sought to directly refute claims by the conservative Racial Privacy Institute to support a California ballot initiative during the early 2000s to remove all racial categories from state forms. She nods to civil rights advocates' efforts during the 1950s and early 1960s to challenge "some state practices that arbitrarily required designation of race on public records," but claims that such concerns were quickly put aside "as civil rights legislation increasingly called for racial data collection to aid enforcement." Siegel, 1741n4. Criticism of the data practices adopted by the civil rights administration came from all sides. Particularly, it silences critiques leveled at the time by the Black Power movement: voices skeptical of economic development strategies that did not radically restructure institutions and politics that isolated the cause of Black Americans from anticolonial struggles worldwide. Michael B. Katz, *The Undeserving Poor: America's Enduring Confrontation with Poverty*, 2nd ed. (Oxford: Oxford University Press, 2013), 70. As I discuss below, the EEOC even tried at times to align itself with Black Power rhetoric, but its language of

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During the 1960s, Cold War anxieties gave way to government distrust, much of which nucleated around perceptions of the information technologies that were becoming ubiquitous.[117] The launch of IBM's System/360 drove enthusiasm for mainframes in the private sector that the U.S. government sought to match by proposing its own National Data Bank to make the bureaucratic functions of the Great Society more efficient. New processing capacity fueled the ascent of quantitative frameworks in the social sciences and social policy rooted in wartime operations research.[118] Even if it never quite lived up to the fearmongering, industrial automation was a persistent source of worry for civil rights advocates, who knew that Black workers were "last hired, first fired" and therefore more vulnerable to its impact. But the enduring watchword was *privacy*, which civil libertarians championed as a substantive right while pundits fired off about intrusive Census questionnaires.[119] To many, the computer was a synecdoche for government itself, whether the association was aspirational or critical. Citizens challenged the categories applied to them and pushed back against the further encroachment of state and private surveillance, concerns that resonated in both popular and scholarly venues.

In response to mounting controversy over government racial classifications, demographer Philip M. Hauser, then President of the American Statistical Association, proposed a special panel at the Social Statistics Section of its 1962 annual meeting. Hauser gave credence to the ever-present

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militancy was ultimately closer to the Pentagon. Treating this embrace of data as inevitable or obvious obscures its distinctiveness at a moment when the political stakes were particularly high.

[117] Historian Margaret O'Mara argues that this preoccupation with the government's use and abuse of data allowed consumer surveillance in private industry to remain largely unchecked: Margaret O'Mara, "The End of Privacy Began in the 1960s," *The New York Times*, December 5, 2018, sec. Opinion, https://www.nytimes.com/2018/12/05/opinion/google-facebook-privacy.html.

[118] Light, *From Warfare to Welfare*.

[119] For more on the privacy debates, see below. For an account of privacy and constitutionalism focused on the car—the other, perhaps more widespread technological development of the era—see Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* (Cambridge, Mass.: Harvard University Press, 2019).

threat of discrimination and even pointed toward the mobilization of demographic "facts" by "extremist" groups to justify racial violence. Yet, he called a decision by New Jersey to drop race from birth and death certificates "a dangerous straw in the wind," and worried that if the trend continued, "information of this type will become increasingly scarce."[120] The resulting panel brought together an official from the Census Bureau, Henry Sheldon, with Warren M. Banner, research director of the National Urban League and Henry Lee Moon, public relations director of the NAACP. Though each had experience with social research and policy, their perspectives on the politics of numbers revealed a spectrum of difference.

Banner kicked things off with a strongly-worded talk that called the entire enterprise of racial categorization in official statistics into question. He recalled his own experience filling out a Selective Service application during the Second World War: after declaring his race as "American," the reviewer, noting his educational background, changed it to "white." For this and other reasons, Banner criticized enumerators and fieldworkers who replicated their own biases because they were not connected to the communities they studied. He argued that official statistics enshrined a black/white binary, despite the fact that other "nonwhite" groups had consistently been included on the schedule. Even after a quarter century of experience in social research, Banner failed "to see the contribution…to the general welfare by gathering 'racial' statistics which set apart one group (and in reality only one group) from the body politic."[121]

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[120] Hauser favored retaining and refining such questions he deemed essential to both "the general methodology of science" and the work of the "social engineer." "Information itself is always neutral," he insisted, and "may be used for 'harmful' purposes but it may also be used for 'beneficent' purposes." If statisticians advocated for proper methods to ensure privacy, the latter would easily outweigh the former. Philip M. Hauser, "The President's Column: On the Collection of Data Relating to Race, Religion and National Origin," *The American Statistician* 16, no. 2 (1962): 1–24.

[121] Warren M. Banner, "Statistics on Color or Race," in *Proceedings of the Social Statistics Section* (American Statistical Association, Minneapolis, 1962).

If Banner's stance reflected in part the political model of the National Urban League, the same could be said for the NAACP's Henry Lee Moon, who spoke next.[122] His paper began by noting that the NAACP had no overall position on the collection and use of racial data, citing "varying attitudes" within the organization and Black community at large. Moon drew attention to *mis*uses of statistics in service of stigma and hatemongering: the FBI's Uniform Crime Reports and Vital Statistics, both used by segregationists to rationalize racism. The NAACP opposed the collection and publication of these kinds of data that too readily "[thwarted] the drive toward an egalitarian, pluralistic society," but in no way called for the abolition of racial breakdowns on the whole. Moon advocated for an "unformulated but pragmatic position."[123]

Drawing the panel to a close, Sheldon rehearsed a fairly dry history of Census racial categories and pointed out that they have always been motivated more by public interest than demographic accuracy. He pointed out, matter-of-factly, that little about census-taking could be called "scientific." The key to the controversy over the 1960 Census, as Sheldon saw it, was that enumerators were actually instructed to *ask* about race rather than make the judgement themselves.

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[122] The author of *Balance of Power*, a 1948 investigation into Black voting rights, Moon felt that lack of data was an obstacle to portraying the magnitude of discrimination to a broad audience. In fact, in one of the book's appendices, he outlined a vision for a body like the EEOC: "A permanent Commission could perform an invaluable function by collecting data. It could also carry on technical research to improve the fact gathering methods now in use. Ultimately, this would make possible a periodic audit of the extent to which our civil rights are secure. If it did this and served as a clearing house and focus of coordination for the many private, state, and local agencies working in the civil rights field, it would be invaluable to them and to the federal government." Henry Lee Moon, *Balance of Power: The Negro Vote* (Garden City, N.Y.: Doubleday, 1948), 223.

[123] "The absence of statistical information, racially classified, does not assure the absence of color discrimination," and "may be used to conceal the color bar behind a facade of impartial color blindness." Henry Lee Moon, "Selective Racial Statistics," in *Proceedings of the Social Statistics Section* (American Statistical Association, Minneapolis, 1962).

In his eyes, the ACLU's protest was an elite and academic one. After all, available polls suggested the public's "profound indifference" to race classification.[124]

The opinions on stage in this gathering of statistical experts mapped on to a set of political identities that were still in flux. Banner's unwillingness to even countenance the utility of statistics to address historic inequities betrayed an aversion to race-conscious programs rooted in a profound pessimism and ethos of self-help. Sheldon, on the other hand, a government insider who saw nothing wrong with the lack of objectivity in Census-taking, lionized its political instrumentality as reflecting the needs of the majority. Moon advocated for a statistical consciousness that was sensitive to a set of pragmatic aims. Like Du Bois before him, he saw the extent to which figures marshalled to stigmatize and essentialize racial difference could be answered by fine-grained investigation and social engineering. The equation was a simple one, at least in principle: the government should be more interested in data about racism than about race.

Political movements continued to push in the direction taken by the state of New Jersey. The 1963 March on Washington for Jobs and Freedom brought the rhetoric of formal equality to its broadest audience yet, even though it began as an effort to secure a place for economic issues on the agenda.[125] In its wake, opposition to the use of racial designations on government forms grew so strong that Kennedy's PCEEO appointed a subcommittee to investigate how to satisfy these demands, settling on "a statistical experiment within the Department of Agriculture to discover whether employees could be identified by racial groups in a confidential manner separate from

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[124] Henry D. Sheldon, "Racial Classification in the Census," in *Proceedings of the Social Statistics Section* (American Statistical Association, Minneapolis, 1962).

[125] Judith Stein, *Running Steel, Running America: Race, Economic Policy and the Decline of Liberalism* (Chapel Hill: University of North Carolina Press, 1998), 80.

other personnel data."[126] In 1966, a Washington, D.C. statistician reported that since "removal of racial designation from forms has been a prime objective of the civil rights movement," there was "a widespread erroneous belief among Federal employees that there is an official policy…which bars racial identification of Federal employees" despite there being no blanket order or directive.[127]

Whether any one initiative succeeded was immaterial: by the end of the decade, no civil rights groups would challenge that the notion that race and ethnicity belonged on public records. Instead, it became a question of *which* groups belonged. Concerns about privacy and the pitfalls of paperwork became largely, but not entirely, the province of civil rights skeptics and obstructionists, who raised them loudly while championing the autonomy of the private sector in order to stoke opposition to the new legislation.

For all of the opportunistic and inconsistent rhetoric about classification, there were legitimate questions about implementation that civil rights groups were asking themselves. The relative share of attention to them marked a growing generational gap within civil rights leadership.[128] Moderates whose political consciousness had been forged during the Great Depression were confident in the power of an interventionist federal government to remedy social and economic problems, priming them to become ardent Cold War liberals during the communist purges of the McCarthy era. On the other hand, civil rights workers who focused their energies on the South in the late 1950s came of age during the "temporary decline of the Cold War," historian Manning Marable argues, and were alienated by the anti-communism of established organizations

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[126] MacGregor, *Integration of the Armed Forces*, 575–77.

[127] Albert Mindlin, "The Designation of Race or Color on Forms," *Public Administration Review* 26, no. 2 (1966): 110, 112.

[128] See, *inter alia*, Manning Marable, *Race, Reform and Rebellion: The Second Reconstruction in Black America, 1945-1982* (Jackson: University Press of Mississippi, 1984); Hasan Kwame Jeffries, "Black Freedom Movement," in *Keywords for African American Studies*, ed. Erica R. Edwards, Roderick A. Ferguson, and Jeffrey O. G. Ogbar (NYU Press, 2018), 22–27.

they believed had "indirectly contributed to the reaction against racial justice by failing to advance a more 'direct-action' oriented programme."[129] In broad strokes, the former saw the eradication of barriers to advancement in the North as their challenge, while the latter sought democratic solutions to upend white supremacist rule in the South.

Reprogramming the Jim Crow information order in the wake of *Brown* was a multi-front effort. But the kind of economic issues that civil rights leaders in the immediate postwar period had tried to balance with the legal assault on segregation largely fell into this chasm, and their rediscovery only came as colorblindness discourse was on the rise. Historian Judith Stein argues that "work issues remained invisible" at the apex of the movement's public visibility during the 1950s, in part because of this emphasis on political rights rather than the nitty-gritty of economic issues like the farm mechanization that had destroyed the jobs of so many Black farm workers.[130] On her account, some liberals were less concerned with the push for a permanent FEPC or mass political mobilization than addressing the threat posed by computing and automation to the Northern industrial economy. They saw race, labor, and poverty along the same spectrum of economic issues requiring economic solutions and thought that the emphasis on formal equality

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[129] Marable, *Race, Reform and Rebellion*, 63. See also Watson, *Lion in the Lobby*, 144; Manfred Berg, "Black Civil Rights and Liberal Anticommunism: The NAACP in the Early Cold War," *The Journal of American History* 94, no. 1 (2007): 75–96. Clayborne Carson captures this tension by describing how LDF head Jack Greenberg threatened to suspend its legal assistance for SNCC if the organization chose to accept help from the leftist National Lawyers Guild: Clayborne Carson, *In Struggle: SNCC and the Black Awakening of the 1960s*, New ed. (Cambridge, Mass.: Harvard University Press, 1995), 107.

[130] Stein, *Running Steel, Running America*, 38. Stein's account is brilliant but flawed. Despite claiming to trace the contingent historical processes that led to the separation of labor and civil rights issues during the 1960s, for the most part she treats them as inalterably opposed: "Title VII translated labor issues into discourses about a bias unrelated to the changing economy…with the War on Poverty, it produced new dualisms—affluence vs. poverty, suburbs vs. slum, and white vs. black—that simplified social reality and reconfigured American politics," Stein, 70. The upshot is that the implementation of the ambitious structural goals of the 1960s led policymakers (and perhaps even voters) to focus not on the rising tide lifting all boats, to indulge the Kennedyism, but the relative size of different boats as the country's economy dried up. For a subtler take on these dynamics on a smaller scale, see Schiller, *Forging Rivals*.

and education during the postwar moment had primarily worked in favor of the Black middle class rather than those shut out from the economy. Civil rights law had focused questions on the political weight of ratios and percentages, not their underlying denominators.[131]

Of course, many leaders like A. Philip Randolph were avid proponents of full employment, and by the time of the 1963 March, most movement figureheads emphasized the centrality of issues like mechanization and automation to the struggle. But now their proposals that focused attention on the economic struggles of Black folks were met head-on with challenges by liberals who leaned into anticlassification discourse. When Whitney Young called for a "Domestic Marshall Plan" of job training and programs to close the country's wealth gap in the pages of the *New York Times Magazine*, a religious magazine editor parried with a plea for "Parity, not Preference." Young spoke of boosting the gross national product and correcting the ills of a technological society through targeted investment in education, job training, and housing for Black Americans, while his adversary called such compensation "a subtle but pernicious form of racism…[requiring] that men be dealt with by society on the basis of race and color rather than on the basis of their humanity."[132] To many, anticlassification talk seemed better suited to a focus on racism *per se*, and it defined the formal statutory language of the 1964 Civil Rights Act even when structural barriers to substantive equality were front and center.

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[131] Senator Hubert Humphrey proposed an alternative bill modeled on the manpower policies of European social democrats. Rather than expanding the complaint model wholesale, these liberals hoped that moving the adjudication of equality out of the courts and into the Department of Labor would help overcome the limitations of a framework delimited by the concept of prejudice: Stein, *Running Steel, Running America*, 76–78. On the limits of litigation to create durable change at the national level, see Bell, "Serving Two Masters"; Guinier, "From Racial Liberalism to Racial Literacy."

[132] Whitney M. Young, Jr. and Kyle Haselden, "Should There Be 'Compensation' for Negroes?," *New York Times Magazine*, October 6, 1963.

At the White House conference in 1965, EEOC commissioners were working with what little authority they had been given. Proposals that it could operate as a kind of clearinghouse for employment data on protected minorities that would allow them to define the narrative and vision of employment policy seemed like a reasonable starting point. Clarence Mitchell's palpable irritation at such an idea can be understood in a number of ways. He could have simply been disappointed in what the commission was turning out to be, and he was not alone. LDF lead counsel Jack Greenberg thought that "the best way to get [Title VII] amended, is to show that it doesn't work," and planned to inundate the agency with complaints. Congress of Racial Equality (CORE) director James Farmer similarly thought there was "too much red tape…before an aggrieved person can get a remedy, he may have found another job or starved to death."[133]

Mitchell was not naïve about the importance of data in coordinating government action. Nor did he caucus with colorblind liberals who read *Brown* as a prohibition on classification. By conjuring up the legacy of clandestine discrimination, the use of a "nasty, underhanded little system for keeping track of people," he expressed doubt that a shift to open, race conscious discourse signaled, of itself, any kind of concrete commitment to enforcement. If a government run by defense experts had made a statistical worldview seem inevitable, perhaps he saw it as his duty to preserve the generational memory that classifying and counting were not innocent.[134]

Weapons of Mass Statutory Construction

Alfred Blumrosen learned this lesson the hard way. The Rutgers law professor and EEOC staffer had wandered down the hall one day in the summer of 1965 and glimpsed a "gold mine" of

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[133] Chen, *The Fifth Freedom*, 190; Skrentny, *The Ironies of Affirmative Action*, 122.

[134] Eileen Boris, "Fair Employment and the Origins of Affirmative Action in the 1940s," *NWSA Journal* 10, no. 3 (1998): 144; Watson, *Lion in the Lobby*, 148; Graham, *The Civil Rights Era*, 199. On the politics of classification more generally, see Bowker and Star, *Sorting Things Out*.

computer printouts listing corporations without a single Black employee. These reports had been gathered by the President's Committee on Equal Employment Opportunity (PCEEO), established under President Kennedy, which appeared to have no intention of acting on them. Recalling a "plush" gathering thrown by the PCEEO, he could not shake the feeling that "the government had sold out its obligations for a mess of hors d'ouevres."[135] That day, Blumrosen devised a plan for the scrappy, understaffed EEOC to make use of data on problem employers and expand it into a nationwide reporting system. When word of this initiative got out, the PCEEO chair tried to have him fired for going above his station and duplicating their efforts.[136]

The "zero list" Blumrosen saw that day was no national security secret. But given the frequent use of military and aerospace metaphors used by government officials to describe civil rights initiatives, it could easily be mistaken for one. Radar technology had allowed Britain to face the German *Luftwaffe* in World War II, Blumrosen recalled—so, too, might a "reporting system become sociological radar, directing the government energies to places of underutilization of minorities." He later realized the limitations of this analogy: where Britain had "the finest aircraft in the world in the Spitfire," Title VII fell short as a weapon against discrimination.[137] Years later, the story goes, that weapon arrived in the form of the Supreme Court's ruling in *Griggs v. Duke Power* (1971), which announced a new standard of "disparate impact" liability under Title VII. Blumrosen

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[135] Blumrosen, *Black Employment and the Law*, 68, 76.

[136] The commission was subject to compromises on both the House and Senate floor, and Democratic leadership agreed to a version of Title VII that gave it no power to issue cease-and-desist measures or sue directly. The aura of disappointment surrounding the EEOC gave way to the embarrassment of it being put together in a hurry: the 1964 Act incorporated a one-year delay to allow companies time to comply, but President Johnson waited until the last minute to make appointments.

[137] Blumrosen, *Black Employment and the Law*, 68–69, 74. Blumrosen, it should be pointed out, was of a younger generation and did not serve in the war. The use of aerospace metaphors was not uncommon among civil rights officials. Arthur Allen Fletcher, former star football player, Hanford nuclear site employee, and assistant secretary in President Nixon's Department of Labor, would justify the Philadelphia Plan for racial quotas in construction work in 1969 by likening it to the Apollo moon landing. MacLean, *Freedom Is Not Enough*, 97.

was ready with the language to canonize the decision as a turning point for civil rights law: *Griggs* "poured decisive content into a previously vacuous conception of human rights…the statutory concept of 'discrimination' in light of the social and economic facts of our society."[138] Though his military metaphors evince a preoccupation with singling out evil perpetrators, the legal scholar and erstwhile social scientist insisted on a structural approach to discrimination.

Contests over the meaning of disparity statistics profoundly shaped the political culture of the post-civil rights era, and Blumrosen's colorful reconstruction of the EEOC's early days and overall perspicacity have turned him into a mouthpiece for historians seeking to understand how and why the early EEOC embraced statistics with the gusto that it did.[139] Perhaps the most prominent source of this narrative—that the pursuit of data steered the broader civil rights agenda from a righteous goal of equal treatment toward a dubious one of equal results—is Hugh Davis Graham's *The Civil Rights Era*, a prodigious reconstruction of the legislative process behind the major acts of the 1960s, albeit one that only barely conceals its ideological project in a deluge of detail. Published in 1990 in the heat of debates over a new civil rights act that would enshrine the use of statistical evidence in statutory language and steeped in the Reagan-era rhetoric leveraged to defeat the proposal, Graham's dogged pursuit of a paper trail led him to a 1966 EEOC memo

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[138] Alfred W. Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination," *Michigan Law Review*, no. 1 (1972): 62.

[139] Through his writing, Blumrosen played an outsized part in shaping the narrative around *Griggs v. Duke Power Co.* (1971) and the disparate impact theory of discrimination, despite not having been on the case. Indeed, he garnered the perverse distinction of being labeled the theory's "architect" in a 1987 report commissioned by President Reagan's Attorney General Ed Meese that sought to undermine it as an aberration of Congress's intent for the 1964 Act. Office of Legal Policy, "Redefining Discrimination," 103. The report argued, on the whole, that that liberal lawyers had hijacked Congress's intended definition of "discrimination" to encompass "mere deviations from statistical proportionality in the allocations of rewards and burdens in American society," though the report did little more than follow Blumrosen's narrative and rebut it with quotes from affirmative action critics like the economist Thomas Sowell and appeals to constitutional scholars who doubled down on Justice Harlan's "color-blind" dissent in *Plessy v. Ferguson* (1896), e.g. Office of Legal Policy, 157.

outlining doctrinal issues around the use of statistical evidence of discrimination. Blumrosen's "sociological radar" was meant to guide administrators and inform lawsuits, not serve as evidence. The author of the memo was National Organization of Women (NOW) co-founder and EEOC attorney Sonia Pressman Fuentes. Detailing relevant barriers to the legal use of statistics in certain legal domains, Pressman suggested that prevailing doctrine supported the use of numerical disparities as "a certain quantum of evidence" in court that would throw the burden of explanation onto employers. Graham interpreted this memo as the missing link between the commission's administrative functions and the legal theory of disparate impact that would come later—an interpretation that somewhat amused Pressman herself. Conflating legal questions and treating an internal report as a synecdoche for the entire policy process, Graham constructed a neat myth in line with revisionist broadsides from the Reagan administration, one that has had considerable influence over subsequent scholarship.[140]

Approaching this story from a different perspective, this section considers the multiple meanings of employment statistics in the early years of the EEOC. As the precise meaning of *discrimination* was hammered out, matters of law remained in the foreground. Mitchell's stance against racial record keeping was already becoming heterodox in 1965. To a new generation, such objections were simply out of touch with the realities of administering and enforcing the rights

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[140] The action takes place in Graham, *The Civil Rights Era*, 244–47. For a critical review of Graham's selective use of evidence from a historian who was a part of one of the administrations in his account, see Mary Frances Berry, review of *Review of The Civil Rights Era: Origins and Development of National Policy, 1960-1972*, by Hugh Davis Graham, *The American Historical Review* 96, no. 3 (1991): 997–98. Pressman was interviewed by Sylvia Danovitch for a subsequent piece on the history of the EEOC and seemed confused by Danovitch's repeated questions about the significance of statistics, itself evidence of the political meaning that later generations have attributed to the use of numbers. Sonia Pressman Fuentes, interview with Sylvia Danovitch, December 27, 1990, Pressman Papers, Box 6, Folder 10. For a representative piece of journalism capturing the political discourse when Graham's book came out, see Steven A. Holmes, "President Vetoes Bill on Job Rights; Showdown Is Set," *The New York Times*, October 23, 1990. For an account that departs from the same premises as Graham, see Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933-1972* (Baton Rouge: Louisiana State University Press, 1997).

revolution.[141] But the politics of personal data and computerization, as well as the potential for backlash, lay just out of sight. By the 1970s, Mitchell's protestations would have a different resonance altogether. Liberals and conservatives alike began to double down on a defense of colorblindness, turning the Jim Crow information order—along with the Nazi policies it inspired—into a symbolic resource to suit their agendas.[142] Claims that government recognition of race was immoral or incoherent became potent rhetoric for delegitimating any program or remedy that designated protected minorities as beneficiaries.[143] They were bolstered, I argue, by mounting concerns over privacy and the contents of government data banks.

When the EEOC opened up shop in the mid-1960s this outcome was not inevitable, though the deck was certainly stacked. Senate compromises stripped away most of its enforcement powers, leaving it with essentially two functions beyond processing complaints: investing in research and supporting lawsuits, but not initiating them. Lacking any real authority, the commission had little choice other than to embrace the paradigmatic tools of racial liberalism, warts and all. Though the

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[141] Legal scholar Owen Fiss questioned whether such bans had made any contribution to voluntary compliance, keeping "information known or easily available to the decision-maker from the enforcement agency": Owen M. Fiss, "A Theory of Fair Employment Laws," *The University of Chicago Law Review* 38, no. 2 (1971): 266.

[142] Whitman, *Hitler's American Model*.

[143] In his account of affirmative action opposition, historian Dennis Deslippe makes a useful distinction between "labor liberalism," "colorblind liberalism," and "colorblind conservatism." Though it is important not to conflate the divergent agendas of these groups, I do not follow this rubric here, in part because of their convergent opposition to "the real or threatened use of statistics, proportionality, and quotas in affirmative action plans." Deslippe, *Protesting Affirmative Action*, 113. Deslippe ties colorblind conservatives to the defense of meritocracy, but here they quite frequently converged with liberals who nonetheless advocated for "soft" affirmative action plans. Part of the problem is that these stances often amount to little more than pure rhetoric. In its most general form, colorblind liberalism amounted to a vague, Myrdalian commitment to honoring the "American creed." At times, leading civil rights advocates adopted this language out of expediency. In the 1950s, NAACP labor director Herbert Hill, known as a staunch proponent of "hard" affirmative action, decried quotas and preferential treatment as "a sugar-coated form of segregation." Thurgood Marshall and Jack Greenberg of the NAACP LDF publicly declared their organization's opposition to numerical timetables and quotas even while arguing for some version of them in the courtroom. Deslippe, 9–10. Battle lines were clearly drawn by the time of the "reverse discrimination" lawsuits of the 1970s, but it is important not to read those back into the historical record.

1960s saw a renewed focus on structural problems and economic inequality, reformers viewed them through a narrower lens. Numbers provided both form and substance for working out the meaning of concepts like discrimination and equal opportunity, but they did not provide a formula nor determine the definition of such terms in any reductive or mechanical way. Following sociologist John Skrentny's account of the commission's "administrative pragmatism," I consider how national debates over privacy, poverty, and the limits of litigation all played a part in reconstructing Jim Crow's information order into one that suited the aims of racial liberalism, however contradictory these were.

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The strong reaction to 'preferences' in the early 1960s belied the fact that such an approach had been implemented before with little fanfare during the New Deal and in the desegregation of the federal government.[144] But as the political volatility of racial records ebbed and flowed, such calls were muted in favor of 'safer' options. After all, civil rights leaders pushing for employment protections on a national scale were forced to lobby at the executive level, where weak enforcement authority and turnover led to inconsistent results.

Though President Kennedy rode into office on the promises of a civil rights agenda, his administration did not get much further than a requirement that federally funded employers "take affirmative action" to root out discriminatory practices, without defining what that such action

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[144] Working under Interior Secretary Harold L. Ickes during the early years of the New Deal, economist Robert C. Weaver and civil rights advocate Clark Forman devised a contract clause for federally funded public housing projects stipulating that failure to pay a percentage of total payroll less than half the share of Black skilled workers in the area (per the 1930 census) would lead to a charge of discrimination that would jeopardize the contract: Anderson, *The Pursuit of Fairness*, 12. In the 1950s, James L. Houghteling of Truman's Fair Employment Board bucked the color-blind, complaint-based trend established by the FEPC and argued that Executive Order 9980 required "a systematic, persistent assembly and analysis of the facts, statistical and other, which will determine with some exactness whether, where, and to what extent discrimination is practiced, and how, and by whom": Skrentny, *The Ironies of Affirmative Action*, 116.

would look like. The signature program of the President's Committee on Equal Employment Opportunity (PCEEO) was the campaign of voluntary "Plans for Progress" agreements pursued with major defense contractors and, eventually, private employers that detailed steps to implement bespoke equal employment opportunity policies. Black leaders criticized the endeavor as a "publicity sham" of "paper-made programs tailored to the whims of one man": an entrepreneurial white Atlanta attorney recruited to the committee to add 'regional balance' who easily coopted it.[145] At the time, "affirmative action" was more of a shibboleth for Kennedy's optimistic technocrats than any kind of concrete policy or political principle.

Not all such promises were as empty, or at least did not begin that way. While civil rights protests raged throughout the South, Washington insiders debated how to reckon with the inequality produced by the postwar boom and deepened by the recent economic recession. The popularity of accounts like Michael Harrington's *The Other America* and John Kenneth Galbraith's *The Affluent Society*—digested for a mass public by journalists and longform writers—fed into a growing preoccupation with poverty, while jockeying amongst agencies to channel these new energies and funds helped set the federal government on a course toward a more comprehensive welfare policy. Competing camps defined themselves by the way they talked about "structural" issues. Civil rights leaders like Young tapped into these conversations to limn their own visions of domestic investment.[146] Johnson's nautically-inclined predecessor justified a major tax cut by insisting that "a rising tide lifts all boats," but whether growth-based policies could solve the poverty problem was the subject of much debate.[147] Kennedy's advisers leveraged the mathematical

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[145] Judson MacLaury, "President Kennedy's E.O. 10925: Seedbed of Affirmative Action," *Federal History*, no. 2 (January 2010): 42–57.
[146] O'Connor, *Poverty Knowledge*, 148.
[147] Katz, *The Undeserving Poor*, 106; O'Connor, *Poverty Knowledge*, 151.

sophistication and econometric analyses enabled by expanding computational power in order to demonstrate that aggregate growth mattered more than government job creation. The structuralist program was compromised by its bifurcation between calls for overturning the class structure and the postwar emphasis on psychology and demographics. It is not hard to imagine which won out. Distinguishing the poor as distinct from "everyone else" created a structuralist interpretation that could be "adopted by…economists and absorbed into the existing liberal growth agenda as a justification for more government spending on behalf of the poor."[148] Ultimately, this difference in emphasis resulted in poverty legislation that created the Office of Economic Opportunity, entirely separate from the civil rights bill.

At the very moment when structural inequality and civil rights went hand in hand, divergent forces kept them apart. Anticlassification talk was one of these, and it exerted a powerful influence in compromises that shaped the form and substance of the 1964 Civil Rights Act. As the cornerstone of the new legislation, debates over Title VII, barring discrimination in employment, were arguably the most heated. Along the way, "sex" was added into the list of protected designations, apparently to stoke opposition to the Act, but many feminist organizers welcomed it.[149] Southern Democrats who had long denied the existence of racial discrimination in their states were humiliated enough by public revelations of Jim Crow's horrors that they changed tactics: they now asked that 'discrimination' be defined in plain language. Title VII raised issues that were equally salient for Northern Republicans, who felt it would threaten legitimate business activity. Both groups converged around the specter of quotas and the 'racial balance' formulas of court-ordered school integration. Liberal proponents of the bill defined discrimination as the simple act of

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[148] O'Connor, *Poverty Knowledge*, 142, 151.
[149] See, *inter alia*, Kessler-Harris, *In Pursuit of Equity*.

making a distinction on the basis of forbidden criteria. Moreover, Title VII protected employers from charges of job discrimination prior to July of 1965 when it went into effect, further narrowing the notion of discrimination to exclude the accumulated consequences of past discrimination—an issue still ambiguous enough that lawyers almost immediately began to pursue it. Defending the Senate version of the bill that summer, Senator Humphrey outlined to two key amendments that clarified this decidedly non-structural definition of discrimination: one prohibiting "preferential treatment…on account of an imbalance which may exist with respect to the total number or percentage of persons"—quotas, in a word—and another requiring a showing of intentional discrimination in the courtroom.[150]

A further strategy to dilute the bill defanging the permanent FEPC, now the EEOC. While many celebrated the FEPC model that many states had relied on for nearly two decades, NAACP labor secretary Herbert Hill released a report documenting their failure in to reduce Black unemployment—now double the white rate—or boost union membership, and warned that their cease-and-desist enforcement model was "obsolete, for the rising Negro mass movement will proceed to the attack in its own way."[151] Senate minority leader Everett Dirksen, the lead architect of the compromise, wanted any national agency to be even *weaker* than the state-level FEPCs, and introduced key changes to curtail its authority. The agency that resulted had no legal authority beyond holding confidential conciliations with employers who were the subject of a complaint. Building on the template and scaffold provided by the labor movement, NAACP leaders had lobbied for an organization on par with the NLRB. Nobody got quite what they wanted. Stripped of its

[150] Quoted in Graham, *The Civil Rights Era*, 150. The two amendments were 703(j) and 706(g).
[151] Quoted in Graham, 149. For a measured defense of the FEPC model, see Chen, *The Fifth Freedom*.

powers on the Senate floor and staffed in a rush by President Johnson, the EEOC was deemed a "toothless tiger" by insiders and commentators alike.[152]

While the Johnson administration was more aggressive in its pursuit of civil rights legislation to honor the intentions cut short by the president's assassination, it was already clear to both officials and movement leaders that legal redress of discrimination was insufficient to satisfy government promises of equal opportunity, let alone movement demands for substantive equality. Yet for all of the increased interest in equity, the word *opportunity* was a sticky one with a depoliticizing aura that was a balm for the contradictions and mixed messages in circulation. In his June 4, 1965 commencement address at Howard University, Johnson famously articulated a national responsibility to secure "not just equality as a right and a theory but equality as a fact and equality as a result."[153] The bulk of his speech, however, drew from a confidential report by assistant secretary of labor Daniel Patrick Moynihan. The rumor mill around *The Negro Family: The Case for National Action* intensified in the wake of the Watts uprising that summer and its eventual leak unleashed a storm of controversy. While the report took existing government welfare and labor programs to task for their complicity in discrimination, it addressed raised such concerns by way of deeply flawed assumptions about Black domestic pathology. Myrdal's fixation on integration as the only acceptable solution to the nation's ills had provoked the ire of Black intellectuals like Du Bois and Ralph Ellison, but Moynihan's victim-blaming ran afoul of a growing emphasis on Black pride and power.[154]

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[152] Equal Employment Opportunity Commission, *The Story of the United States Equal Employment Opportunity Commission: Ensuring the Promise of Opportunity for 35 Years, 1965-2000* (Washington, D.C.: U.S. Government Printing Office, 2000).
[153] Equal Employment Opportunity Commission departmental history, Nov 01, 1968 - Nov 30, 1968, EEOC Administrative History.
[154] Katz, *The Undeserving Poor*, 17–18, 59–68.

The Moynihan Report both reflected and exacerbated existing divides. With anti-war sentiment on the rise, the credibility of Johnson's administration was fading fast. Waiting until the last minute to make appointments to the new EEOC only worsened the air of disappointment surrounding its opening day.[155] With five commissioners in place by July 2, 1965 and a budget of $2.25 million, five divisions were created for its hundred or so employees: compliance, technical assistance, research and reports, liaison, and general counsel. One of these employees was Alfred W. Blumrosen, a young law professor who had intended to spend just half of a sabbatical year helping set up the compliance division, the other writing in the Caribbean. The weight of the "most pressing domestic problem of our time" kept him on the banks of the Potomac.[156]

Before arriving in Washington, Blumrosen had turned a law school class into an *ad hoc* sociological research laboratory to study the operation of civil rights law in New Jersey, and produced a report arguing that New Jersey's individual complaint system was wholly ineffective. His report was typical of the early 1960s view of discrimination as undergirded by institutions, structures, and culture, irreducible to individual invidious acts. At the time, he believed data on the racial composition of employers' labor forces might help correct the "uninformed hunches or possibly unrepresentative experience" of judges or provide a basis for an "inference of discrimination."[157] Stumbling across the "zero lists" that day in Washington, it came to his great surprise that the government was measuring, but not acting. He became convinced that statistics could do more than correct the perception of indolent judges.

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[155] Graham, *The Civil Rights Era*, 177.
[156] Blumrosen, *Black Employment and the Law*, 55.
[157] Alfred W. Blumrosen, *Securing Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination* (Trenton: New Jersey Commission on Civil Rights, 1964), 41, 126–28.

While the origins of the EEOC's reporting system cannot be attributed to Blumrosen, it appears that ideas about its use can. Section 709(c) of the Civil Rights Act included a provision requiring employers to keep records of employees and applicants that the EEOC could request. This was not a radical departure. The PCEEO Form 40 records Blumrosen stumbled upon could be traced back to the Eisenhower administration, and the voluntary Plans for Progress program favored by government officials used ones that were virtually identical.[158] Conservatives clearly saw no threat in such efforts, but proposals for a permanent national reporting system led to fierce debates in the Senate.[159] On one occasion, Dirksen pressed others on why the bill did not specify the contents of the eventual forms after an observation by one senator that "pattern of conduct" might be used to probe the "motives of the respondent" to a form.[160] This emphasis on *patterns* was exactly what the CRS had been working toward in the voting rights arena. The Voting Rights Act that would be passed later that summer included a 'trigger rule': any violations of the fifteenth amendment or less than "50 per centum" of the state's voting age population failing to register to vote would automatically prompt federal supervision.[161] Taking an early leadership role at only the second meeting of the EEOC commissioners, Blumrosen raised his proposal to use "zero lists" as a point of departure to investigate a "pattern of discrimination" in problem companies was met with enthusiasm.[162] By the time the dust settled on both the PCEEO's attempt to oust Blumrosen and

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[158] Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination,'" 102–3.

[159] Michael I. Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: Twentieth Century Fund, 1966), 85.

[160] Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination,'" 104–5.

[161] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 at 438.

[162] The meeting reporter noted: "Mr. Blumrosen discussed the possibility of making a survey of the companies employing from l,000 to 2,000 people who do not employ any negroes. It was suggested that we could start with 15-20 test companies. Obtain information and learn of the 'pattern of discrimination' of that particular company." In fact, it was commissioner Aileen Hernandez, the only woman on the EEOC and an expert on

the White House conference, the EEOC had made clear that it would emphasize systemic approaches rather than individual ones. Its data collection requirements were meant to "in some way advance the 'pattern' approach rather than the 'complaint' approach to enforcement."[163] All that was left to do was convince the civil rights groups that this was the way to go, and given the mood regarding government collection of racial data, the EEOC would have been naïve not to expect some opposition.

What exactly that opposition was rooted in was murkier. When Commissioner Samuel Jackson spoke to Southern National Coordinating Committee's (SNCC) James Forman about the issue in September following the White House Conference, he was met with a combination of confusion and opposition. Forman stated that SNCC "had been so concerned with securing the removal of the designations from records by governmental agencies in the South and southern private employers" that he initially read Jackson's inquiry as a partial apology for the government's failure to follow through on the initiative. Though Forman insisted he could see no value in racial records and insisted that the government pursue more aggressive compliance efforts, Jackson read between the lines that the "suspicion and mistrust SNCC has for government entities" was so evident that the EEOC would have to prove itself in order to expect "respect, acceptance or cooperation from this organization."[164] Skrentny suggests that for the most part, conversation with

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state antidiscrimination practices, who recommended they go national: "Second Meeting of the Equal Employment Opportunity Commission, July 9, 1965," 5, EEOC Records, A1-41, Box 1, Folder "65-001."

[163] "Staff Proposals for Record-Keeping and Reporting Requirements to Be Adopted by the Commission Under Section 709(c) of Title VII," 3, EEOC Records, A1-41, Box 1, Folder "65-039."

[164] "I spoke with James Forman, national chairman of the Student Non-Violent Coordinating Committee (SNCC), on Friday, September 3, at 4:30 p.m. Mr. Forman had not given any previous consideration to the need for racial designations on post-employment records. He stated that his organization had been so concerned with securing the removal of the designations from records by governmental agencies in the South and southern private employers that he interpreted my inquiry as the efforts of government to justify government's failure to completely eliminate the racial designations from the records of some agencies in the South. His immediate reaction was that racial designations on record keeping offered no value to securing

the leaders of civil rights organizations about the forms was limited, and the EEOC's desire not to stir the pot any further led them to adopt Form 40 wholesale.[165]

At the public hearing on employer reporting systems held on December 16, 1965, EEOC Chairman Franklin D. Roosevelt, Jr. began his address by asserting that the "need for adequate information" was paramount, and that no diplomat, businessman, or union leader would march into a negation without assessing the broader situation—often, with the aid of statistics. The EEOC, moreover, was not alone in recommending such systems: it was "surely significant" that the McCone Commission gathered to investigate the Watts uprising in Los Angeles similarly recommended a law requiring reports from employers and unions. Roosevelt announced a maxim for the EEOC: "This Commission will be no stronger than the information upon which it acts."[166] Commissioners had been nervous about the hearing, underscoring the perceived tensions around racial records. They even prepared for an onslaught from statisticians who sought to defend the credibility of sampling procedures in place of a comprehensive system.[167]

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equal employment opportunities and that what was needed was more aggressive action by the government to gain compliance with Title VII." Samuel C. Jackson to Chairman Franklin D. Roosevelt, Jr., September 7, 1965, EEOC Records, A1-41, Box 1, Folder "65-039"

[165] Skrentny reports that "Markham and Herbert Hammerman also met with African American civil-rights leaders, including representatives of the Leadership Conference on Civil Rights and Marion Barry of the more radical Student Non-Violent Coordinating Committee. In a meeting in the EEOC office, Markham quickly convinced the dashiki-clad Barry that the form was needed": Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination,'" 107. Actually, Roosevelt met with a group of leaders on September 15th, including Barry, Mitchell, James Farmer, Whitney Young, and Bayard Rustin: "Commissioner's Meeting No. 23, September 15, 1965," 2, EEOC Records, A1-41, Box 1, Folder "65-021."

[166] "Statement of Chairman Franklin D. Roosevelt, Jr. At Public Hearing on Employer Reporting System, December 16, 1965, Equal Employment Opportunity Commission," 3, EEOC Records, A1-5, Box 1, Folder "PUBLIC HEARING ON EMPLOYER REPORTING SYSTEM - Dec. 16, 1965"

[167] The hearing was emphatically not a forum for exchange. In the commissioners meeting the day prior, EEOC Research Division Director Charles Markham emphasized that "Persons present cannot question the commissioners." Nonetheless, they were bracing themselves for a long day: though the hearing was set to start at 10:00am, they decided if by 6pm it seemed to be going on into the night, they would adjourn until the following day. They did not invite the press, with an official conceding, "Our position is one that doesn't lend

Such fears were apparently misplaced—no one appears to have been held hostage by a mob of angry statisticians. For all of the initial controversy around racial reporting, the EEO-1 was announced the following year with little fanfare. In fact, there was almost no scrutiny of the minority groups and inclusion of gender on the eventual EEO-1, partly because discussions about race had been largely confined to African Americans. Leaders from the "American Indian," "Spanish American," and "Oriental" communities that appeared on the form were never consulted.[168] The EEOC appeased Mitchell's concerns about screening out job applicants with race questions by settling on the model of a visual survey; one EEOC staffer later recalled: "it made sense for employers to identify minorities in the same way that they were discriminated against, by observation. After all, employers were not sociologists."[169] Silence over the presence of gender on the EEO-1 mirrored the general reticence to discuss how Title VII, which was largely understood as intended for Black people, applied to sex discrimination.[170] As Katherine Turk argues, by enshrining the race/sex analogy into data, the EEO-1 helped push the commission toward a conception of sex discrimination as statistically measurable sex segregation, narrowing a more capacious and flexible

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itself to glamorous coverage." "Commissioner's Meeting No. 56, December 15, 1965," 8, EEOC Records, A1-41, Box 1, Folder "65-054."

[168] Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination,'" 104–6.

[169] Skrentny, 108–9. This method had the irony of reifying the "one-drop rule" at the base of anti-miscegenation laws—anyone who looked Black was categorized as such—into records used to enforce civil rights. On miscegenation law and the power of racial records, see Peggy Pascoe, "Seeing Like a Racial State," in *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009), 131–61. As the EEOC looked to expand its surveys to apprenticeship programs (EEO-2) and unions (EEO-3) in 1967, Director of Research Charles Markham cautioned Chairman Shulman that "[visual] surveys are simply not workable in a union and apprenticeship setting" and advised that the commission drop "American Indian" and "Oriental" for these surveys altogether. Charles Markham to Stephen N. Shulman, "Proposed EEO-3 (Labor Union) Form and Instructions," January 25, 1967, EEOC Records, A1-4, Box 7, Folder "Research - EEO-3."

[170] "What's Fair?" in Kessler-Harris, *In Pursuit of Equity*, 239–89.

view of sex discrimination in the workplace into one that became sharper and easier to enforce during the 1970s.[171]

This focus on measurement represented both the promise and the pitfalls of the young commission as it tried to balance the goals of detecting trends and responding to complaints. Nonetheless, it would be a mistake to say that the early EEOC focused on workforce composition at the expense of broader issues affecting the labor market. Early research proposals spent far less time talking about the reporting system than a national job audit. One quoted words of caution from NAACP Labor Secretary Herbert Hill: "This is the age of automation and cybernetics and we must have large scale research to discover where the jobs are, where they will be, and a massive program to train the people for them." As such, one goal of the audit would be to triangulate "areas in which declining work opportunity is paralleled by a heavy load of discrimination complaints on file with EEOC…[where] patterns of discrimination are being reinforced by an overall decline in work opportunity."[172] This project was largely aspirational. But at this point the EEOC was very much concerned with a bigger "structural" picture, and there was still little mention of litigation, apart from a few conversations about referring "cases of absolute zero, gross under utilization [sic]" to the Department of Justice.[173]

Still, Title VII was a court-based solution, and there was great concern about its legal ramifications. Michael I. Sovern, Research Director concerning Legal Restraints on Racial Discrimination in Employment for the Twentieth Century Fund, recalled that some found the idea of racial reporting "abhorrent, even reminiscent of Hitler's Nuremberg Laws," but he waxed poetic

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[171] Turk, *Equality on Trial*, 15, 40. For more on how the women's movement adapted strategies used for litigating on the basis of racial discrimination, see Mayeri, *Reasoning from Race*.
[172] Charlton R. Price, "Further Development of Research and Information Services, November 1965," 5, EEOC Records, A1-41, Box 1, Folder "66-007."
[173] "Commissioner's Meeting No. 49, November 23, 1965," 3, EEOC Records, A1-41, Box 1, Folder "65-048."

about the possibility that coupling EEOC data with labor statistics could forever silence the common claim that all-white workforces could simply be explained by a lack of qualified Black workers.[174] However, he cautioned that whether or not an advanced reporting system was in place, quotas to maintain compliance were perhaps an inevitable byproduct of the new laws. Some were more sensitive to the issue than others. Already by the end of 1965, leadership in the EEOC and Department of Labor were ready to pursue action based on the zero lists, but Republican Commissioner Richard Graham intervened, proposing an apologetic letter.[175] As focus on the EEO-1 and the growing log of complaints consumed more time the following year, the zero lists seemed to fall out of the picture.

While civil rights advocates decried the compromises that weakened Title VII and planned to inundate the EEOC with complaints, labor lawyers were figuring out ways to make these statutes work. In a world of contracts and torts, responsibility and blame were enmeshed in a matrix of workplace accidents that conformed to statistical regularities.[176] Many had cut their teeth in the world of New Deal labor law where the complexity of bargaining arrangements required the balancing of competing interests in an institutional setting, rather than absolute rights.[177] Sonia Pressman (later Fuentes), a Jewish refugee from Germany, was one such employment lawyer who

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[174] Sovern, *Legal Restraints on Racial Discrimination in Employment*, 122.

[175] "Our data indicates that your employment patterns differ substantially from other companies in your area, companies engaged in the same kind of work. Our data may be in error or out of date. There may be good reasons for this different pattern. There is no quota. There is no requirement but to hire, upgrade, to discharge -- to offer compensation and privileges without respect to race, color, religion, sex or national origin. Unusual employment patterns often indicate abandoned practices of discrimination. Sometimes they indicate unknown and unwanted present practices. Please write to me. I'd like to know the reasons for your present employment patterns. And let me repeat, there may be very good reasons for this. Let me know if we can help by telling you what other companies have done to offer equal employment opportunity." Commissioner's Meeting No. 52, December 1, 1965," 3, EEOC Records, A1-41, Box 1, Folder "65-051."

[176] John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass.: Harvard University Press, 2004), 144.

[177] On discrimination and labor law, see Paul Frymer, "Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus," *American Political Science Review* 99, no. 3 (2005): 373–87.

became the first woman lawyer in the EEOC's Office of General Counsel after a stint working for the National Labor Relations Board. While helping co-found the National Organization for Women in 1966, Pressman wrote a memo on "The Use of Statistics in Title VII Cases" that reviewed existing precedent for statistical evidence in other areas of law and suggested the possibility of using disparities to furnish a *prima facie* case that would shift the burden of proof onto the employer. Pressman cited a 1957 Supreme Court case in which the government sued a railroad company for overcharging, demanding that it provide evidence of how it computed its rates.[178] Based on this, she suggested that a plaintiff in an employment discrimination case had only to supply "a certain quantum of evidence, after which the burden of…rebuttal to that which has been presented, shifts to the respondent."[179] As with the railroad company rates, this standard would require defendants to provide a rationale for disparities and practices.[180] Statistics would not constitute a violation so much as provide sufficient grounds for a response.[181]

None of this was particularly original. It was more or less the EEOC's conciliation strategy applied to the appeals process. An employer could point to the residual effects of prior discrimination in an effort to explain away remaining discrepancies, but even this defense rested on uncertain ground. While the intentional harm standard of criminal law required that *mens rea*, or a guilty mind, be proven for the accused, intent in tort law encompassed a broader range of mental

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[178] *United States v. New York, N.H. & Hartford R. Co.*, 355 U.S. 253 (1957).

[179] Sonia Pressman to Charles T. Duncan, May 31, 1966, "Use of Statistics in Title VII Proceedings," EEOC Records, A1-41, Box 1, Folder 66-040."

[180] The standard for proceedings after a plaintiff has established a *prima facie* case was only established in a later Supreme Court case involving a civil rights activist fired for political activity: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[181] As I discuss in Chapter Two, this was the procedure in the law of jury discrimination Pressman cited.

states and could even account for unfavorable outcomes.[182] What intent would look like in civil rights law was still largely unsettled, but it was never confined to explicit bigotry.

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In the end, the controversy over racial records was reignited not by awareness of a legal strategy but by federal policy changes influenced by the EEOC. First, Civil Service Commission (CSC) head John W. Macy announced that it would begin requiring agencies to keep records on the racial composition of their workforces, ending a formal "ban" on racial records put in place back in 1955—though it continued to periodically ask for visual surveys. The more conservative *Wall Street Journal* sensationalized this as a "reversal" and made sure to point out that according to informal visual surveys, the percentage of Black federal workers was 2% higher than their representation in the entire population.[183] A few months later, the Department of Labor announced that it would end its own 1962 ban, allowing racial identifications on not only employment records but applications, a change that would affect the U.S. Employment Service and state offices. "These facts will help make people free, and they will help keep some other people honest," Secretary of Labor Willard Wirtz declared. Despite their apparent understanding with the EEOC, the NAACP still publicly opposed both as "potentially dangerous."[184]

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[182] Blumrosen, "Strangers in Paradise," 71–72. E.g. "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction." William Lloyd Prosser, *Handbook of the Law of Torts*, 4th ed., Hornbook Series (St. Paul: West Publishing Co., 1971), 31.

[183] "Government to Resume Keeping Tabulations On Employes by Race: Civil Service Commission Says It Won't Result in Discrimination; NAACP Calls Move 'Dangerous,'" *Wall Street Journal*, February 25, 1966.

[184] One commentator referred to the NAACP as "maintaining a position of aloofness." Belle Granich to Equality Committee, "Re: Race Identification," March 16, 1966, ACLU Records, Subgroup 2, Subject Files, Box 1123, Folder 13. Greenberg was more equivocal: "we are reaching a point where you have to do some of these affirmative things which years ago would have been thought intolerable": Alfred Friendly, Jr., "Wirtz Drops Ban on Race Records; Change Will Mainly Affect U.S.-State Job Services," *The New York Times*, May 19, 1966. Apparently, Wirtz had announced the decision to EEOC staffers months earlier: Aileen C. Hernandez to W. Willard Wirtz, November 29th, 1965, EEOC Records, A1-41, Box 1, Folder "66-029."

Conservatives less concerned with the EEOC's survey effort latched on to these developments. Civil libertarian and staunch opponent of civil rights Sam Ervin, Jr. introduced a bill that would make it illegal for the government "[t]o require, or request, or to attempt to require or request, any employee of the United States…to disclose his race, religion, or national origin." In hearings, Macy stated the CSC's view that "the rights of minority groups to equal employment opportunity…outweigh any diminution of the right of privacy" resulting from the voluntary disclosure of race on a confidential questionnaire.[185] The bill did not make it far, but the conflict had been reignited. The potential for data-driven discrimination and abuses of privacy had been an enduring source of concern for groups like the NAACP and ACLU, but now the latter weighed whether "a shift in the civil liberties balance" favoring the expansion of state data collection was required to meet the moment.[186]

Amid the back-and-forth between civil rights groups, government agencies, and conservative members of Congress, the ACLU decided to reevaluate its prohibition on racial records adopted in 1963, "except only where rigorous justification is shown." It commissioned a report by a social scientist, Belle Granich, who argued that more systematic data collection was "mandatory" to make good on the new commitments of the federal government. Nodding to the scientific rejection of race by UNESCO—and anticipating its 1967 statement—Granich stressed its significance as a "social concept," pointing out that "[s]ocial scientists, and public health officials are expressing desperate need for access to information about medical and social characteristics related to the

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[185] Privacy and the Rights of Federal Employees: Hearings Before the Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 89th Cong., 2d Sess.; United States Commission on Civil Rights, "To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs" (Washington, D.C.: U.S. Government Printing Office, February 1973), 81.

[186] "Re: Collection and Dissemination of Race Data," December 29, 1966, ACLU Records, Subgroup 2, Subseries 1B, Box 19, Folder 4, Mailings (1966).

results of discrimination and to its elimination." In her view, the older tactic of "racial anonymity offered largely a psychological, rather than a practical usefulness," and it was out-of-step with the growing emphasis on Black pride she believed would "have a salutary effect on the whole community, Negro and White."[187]

One member of the committee appointed to review the report, Judge Dorothy Kenyon, more or less agreed with Granich's report, favoring a shift in the balance "from equality and privacy to the right to know." With the Moynihan Report in the background, many called into question how to define "harmful" research. Rather than putting the burden on data collectors to justify the social utility of their research, the results of which could not be known in advance, sufficient "evidence of discriminatory use of information" could prompt restriction of information gathering.[188] Another member of the committee, NAACP counsel Robert L. Carter, did not think it wise for the ACLU to "give its blanket approval" and expressed his skepticism in line with the organization's stance.[189] Carter insisted that a rigid standard of social utility be applied to any research involving racial data, "not usefulness in the abstract, but a real, live usefulness." Censuses of housing, workplaces, and education to gauge segregation passed the test. Birth certificates and marriage licenses did not, as

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[187] Granich to Equality Committee, "Re: Race Identification," March 16, 1966. Published in 1967, UNESCO's "Statement on race and race prejudice" pointed to the constantly evolving nature of racism, its historical character, social causes, and highlighted solutions through education, housing, and law, deemed "one of the most effective means of fighting" it. The authors did not shy away from addressing adherents of racial nationalism, another proposed solution, if only obliquely: "There are, however, some instances in certain societies in which groups, victims of racialistic practices, have themselves applied doctrines with racist implications in their struggle for freedom…a secondary phenomenon, a reaction stemming from men's search for an identity which prior racist theory and racialistic practices denied them." UNESCO, ed., *Four Statements on the Race Question* (Paris: UNESCO, 1969), 54, 52.

[188] "Re: Collection and Dissemination of Race Data," December 29, 1966.

[189] As LDF associate counsel, Carter had encouraged the use of Kenneth Clark's doll studies, and after being passed over to succeed Thurgood Marshall, he went to the NAACP.

Carter could see no scientific value therein, only potential for harm.[190] When the ACLU announced its new position at the beginning of 1968, it was clear that Carter had won.[191]

Beyond concerns about abuses of information to shore up harmful stereotypes, these debates resonated because changes were afoot regarding government and private uses of data writ large. Heightened concerns about the scope of government and corporate surveillance underscored the potential hazards of racial records. A best-seller of the day was Vance Packard's *The Naked Society*, in which the journalist linked the intrusions of advertisers and government wiretapping scandals to the Census and a Great Society initiative to create a national data center that was just getting off the ground. Packard and his readers ultimately worried more about "sinister new technologies for electronic eavesdropping, lie detection, and psychological testing" than government surveys.[192] But the Union quickly declared its opposition to the National Data Center and a proposed FBI National Crime Information Center, drawing on employment examples to criticize

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[190] Robert L. Carter, "The Collection, Dissemination, and Use of Identification by Race," n.d., ACLU Records, Subgroup 2, Subject Files, Box 1123, Folder 13. Carter was equally worried about poverty research.

[191] "[W]e believe that in times like these the use of race identification should be employed only where its need or social utility can be clearly justified, the gathering of such information kept to the most limited form, wherever possible by use of the headcount method, and its dissemination accomplished in such a manner as to protect the confidential nature of the original records." "Civil Liberties" [Part 4 of 4], 1965-1969, ACLU Records, Subgroup 2, Southern Regional Office Files, c11293.

[192] Josh Lauer, *Creditworthy: A History of Consumer Surveillance and Financial Identity in America*, Columbia Studies in the History of U.S. Capitalism (New York: Columbia University Press, 2017), 215. As Lauer points out, many seemed unbothered by the book's warnings about the growing network of credit surveillance. One reviewer saw the book as little more than a summary of issues raised by the ACLU over the course of previous years, and "more distasteful than it needs to be": John Brooks, "There's Somebody Watching You," *The New York Times*, March 15, 1964. Canny conservatives saw opportunity in Packard's critique of government surveys. In a critical review in the Yale Law Journal, professor Joseph W. Bishop noted the hypocrisy of the *National Review* editors who published one of Packard's early pieces on the topic. They did not share the author's "indignation at the really objectionable inquisitions of the House Committee on Un-American Activities," but "[regarded] the Census Bureau's relatively innocuous questions about the number of your TV sets, radios, air conditioners and children as intolerable 'bureaucratic harassment'": Joseph Bishop, "Packard: The Naked Society," *The Yale Law Journal* 74 (1964): 193–99. For more on the national data center proposals, see Dan Bouk, "The National Data Center and the Rise of the Data Double," *Historical Studies in the Natural Sciences* 48, no. 5 (November 1, 2018): 627–36; Sarah E. Igo, "Me and My Data," *Historical Studies in the Natural Sciences* 48, no. 5 (November 1, 2018): 616–26.

both. Long opposed to the rampant reliance on arrest records in employment screening, the digitization of which could only "multiply the deprivation of the civil liberties of those who are wrongly arrested," the ACLU viewed the National Data Center as "by far the more serious threat." Invoking contemporary fears about a "dossier," information accumulated through contact with "government employees of poor judgment, by private agencies, credit unions, insurance companies and businesses, it cautioned that "[o]nce an unreliable bit of information makes its way into a file it forms an indelible mark on a person's record." The ACLU decried the turn toward bureaucratic procedures like these as "[promoting] a society unresponsive to the necessities of human dignity and privacy."[193]

In this particular case, objections to such initiatives made no mention of race. The language of privacy presented an opportunity to reframe conversations about problems like arrest records as an employment barrier, sometimes dismissed as more of a 'niche' racial issue rather than a universal one. Though they did not always speak in these terms, privacy discourse harmonized with the insistence of old-guard civil rights advocates that data collection needed to be justified—good intentions could not merely be assumed. However, this rhetoric worked against the emphasis liberal technocrats placed on data as a tool to upend discrimination.

Meanwhile, opposition to the EEOC's survey efforts from the business community was growing. Beleaguered staffers nonetheless found humor in their situation. The research division initiated a "weekly wise-bottom award" for the critical letters it received about the EEO-1 survey, as

[193] "Re: proposed federal data center," August 5, 1966, ACLU Records, Subgroup 2, Subseries 1B, Box 19, Folder 6, Mailings (1966).

well as a "put down prix" for rebuttals.[194] For either a pageant or a Christmas party, staffers put their strife to song. To the tune of "Old MacDonald" they sang about the EEO-1, an ode to "Zero List Blumrosen, otherwise known as the Great Conciliator," and rewrote "Auld Lang Syne" to parody sensational views of "Race Statistics."[195] But whatever jovial mood the commission was in during 1966 would soon pass. With a revolving door of leadership and staff facing an ever-growing backlog of complaints amid budget cuts, the environment grew tense.

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Midway through 1967, a glowing profile of new Equal Employment Opportunity Commission (EEOC) Chair Stephen N. Shulman appeared in the *Wall Street Journal*. The journalist described the former General Counsel to the Air Force as a loose-cannon technocrat, "a Robert McNamara for the civil rights field." When original Chair Franklin D. Roosevelt, Jr. departed in a failed bid for governor of New York, he left the fledgling commission without leadership and a growing backlog of discrimination complaints. Rather than play catch-up, Shulman wanted to get ahead of the game by targeting entire industries, like Southern textile manufacturing. He felt that job discrimination was "too important to be left to the civil rights advocates," and promised to bring an emphasis on efficiency, automation, and systems thinking to the agency struggling to find its identity. These were ambitious goals for Shulman and his team of "whiz kids," which he recognized: "We're out to

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[194] The first letter writer to receive the distinction expressed his dismay that all of the Nazi literature available could not help him assign a race to his employees, and offered a percentage breakdown of his own "racial background, so at least you can feed something to your computers": Pressman Papers, Box 2, Folder 2.

[195] "Should race statistics be forgot And never brought to mind
Then you'll be in contempt of court, And slapped in jail and fined.
For records must be kept, my boys, They must be kept by you
Or its the rack, the hangman's noose, The turnin' of the screw.
The turnin' of the screw for you, For you who discriminate,
Or put in more affirmative terms, You gotta have the right racial rate"

kill an elephant with a fly gun," he joked, inverting the traditional saying. Even as the age of mass-produced computing systems dawned, the computer was still a hefty piece of anti-insect artillery. [196]

Shulman did not last the year, and this puff piece in a rag that usually criticized the EEOC mostly served to underscore the gap between its aspirations and reality. The commission's only computers during these early years were *human* computers who reviewed forms submitted by businesses and sent them on to other agencies with the capacity to process them, like the Census Bureau. The commission struggled to maintain the perception that it was on top of things. In 1969, fearing that delays in processing EEO-1 data would "appear as yet another example of Big Government inefficiency" to business leaders, the EEOC would even hire a private firm to help process its data.[197] Commissioners tried to match the sophistication of the Cold War science apparatus but lacked the resources to do so.[198]

Meanwhile, they had to contend with the perceptions of a business community that was bent on avoiding strengthened legislation by promoting voluntarism rather than compliance. Seeking to head off a House bill that would repeal Title VII and replace the EEOC with the strong administrative agency civil rights advocates desired, business leaders leaned on Kennedy's Plans for Progress (PfP), widely decried by civil rights leaders as a sham, as an alternative to the EEOC. They

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[196] James P. Gannon, "Uphill Bias Fight: After Faltering Start, Agency Readies Attack On Job Discrimination," *Wall Street Journal*, April 12, 1967. Erickson et al. describe McNamara as "perhaps the man most responsible for elevating the position of technocratic rationality within the US government in the 1960s." Paul Erickson et al., *How Reason Almost Lost Its Mind: The Strange Career of Cold War Rationality* (Chicago: University of Chicago Press, 2013), 100.

[197] Robert J. Samuelson, "Equal Employment Data Lags: Employers Cooperative," *The Washington Post*, May 12, 1969.

[198] Historians have shown how the institutions of cold war science scaled up and shaped knowledge in the social sciences toward quantification, dovetailing with the growth of an administrative state, e.g. David R. Jardini, "Out of the Blue Yonder: The Transfer of Systems Thinking from the Pentagon to the Great Society, 1961-1965," in *Systems, Experts, and Computers: The Systems Approach in Management and Engineering, World War II and After*, ed. Agatha C. Hughes and Thomas P. Hughes (Cambridge, Mass.: MIT Press, 2000), 311–58; Light, *From Warfare to Welfare*; Rohde, *Armed with Expertise*.

designed a publicity scheme to inform the public of its accomplishments, to provide "enough evidence that would relieve protests."[199] Through the Ford Foundation and the Advertising Council, PfP packaged its morale-boosting message in a Phil Spector record called "Things are Changing," circulated to thousands of radio stations.[200] The EEOC had computers; PfP had rock and roll.

One EEOC commissioner saw its already dim star falling, lamenting in March of 1967 to fellow commissioners that they were "not highly regarded by the civil rights organizations…and we're not considered by the President in the front rank of those that he can call upon for expert advice on civil rights."[201] Others were not quite ready to give up. Johnson's close advisor, Clifford L. Alexander, Jr. wrote to the President in May of 1967 describing PfP as a "serious political liability," and cited data documenting its ineffectiveness: many of the original 100 firms who signed on to the program had less than 3% minority employment, and that a Black white-collar worker in New York had a better chance working in a non-PfP firm. Alexander recommended that the EEOC absorb PfP; when Shulman departed the following month, Johnson named Alexander chairman.[202]

Experts also served as foot soldiers for PfP, marshaling their own facts. One Lockheed Aircraft Corporation psychologist testified to its success at the American Psychological Association's 1964 conference and in a 1966 article based on those remarks. Industrial psychologists concerned with equal opportunity, he argued, were too focused on biased tests when they could be expending their energies elsewhere, on informational campaigns and skills training—

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[199] Chen, *The Fifth Freedom*, 200, 213.

[200] Howard C. Lockwood, "Critical Problems in Achieving Equal Employment Opportunity," *Personnel Psychology* 19, no. 1 (1966): 7, 9. The song, written by Brian Wilson and Phil Spector, was culled from an early version of "Don't Hurt My Little Sister" and sung by Darlene Love's The Blossoms (later by The Supremes).

[201] Quoted in Turk, *Equality on Trial*, 33.

[202] Clifford L. Alexander, Jr. to the President, May 25, 1967, LBJ Central Files, Subject Files, Folder "HU 2-1 Employment 1/14/67 - 7/31/67"; Richard P. Nathan, *Jobs & Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training* (United States Commission on Civil Rights, 1969), 135.

or, perhaps, "make renewed efforts to measure the elusive but all important [sic] factor of motivation."[203] Increasingly, "motivation" became as much of a keyword as "discrimination," with companies frustrated by the pitch of emboldened demands from activists.

Things took a turn for the worse during the "long, hot summer" of 1967 as uprisings led by frustrated Black youth broke out across the country. President Johnson and his advisers began fixating on what they called the "hard-core unemployed"—technically defined by Wirtz as those out of work fifteen weeks or more, though the media would take this language and run with it—rather than police agitation as the source of the unrest. Martin Luther King, Jr. telegraphed Johnson in the midst of the Detroit Rebellion with a renewed call for a massive federal job creation program, on par with the New Deal's Works Progress Administration. Wirtz went on the defensive, warning of "a real danger that the wrong answers which have crept into the welfare program will be turned to in an attempt to buy our way out of the civil rights revolution." Arguing that there were thousands of unfilled spots in training programs, he put the matter succinctly: "The motivation problem is more critical today than the job development problem." In a draft telegram back to King, offering to meet him halfway, "seeing to it both that the work which is here to be done is made fully and freely available and that those who need it most do their part toward doing it."[204] At the very moment calls for economic intervention reached a fever pitch, key officials had already chosen psychological frames over structural ones.

Nonetheless, this renewed concern with unemployment and youth seems to have largely worked in the EEOC's favor. Johnson officials again raised the possibility of pursuing manpower and civil rights issues in tandem, one writing to Wirtz that the EEOC "should turn on the steam in

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[203] Lockwood, "Critical Problems in Achieving Equal Employment Opportunity," 9.
[204] Willard Wirtz, "Reply to Martin Luther King's Telegram," July 28, 1967, LBJ Central Files, Subject Files, Folder "LA 2 7/12/67 - 10/4/67."

those cities where you are concentrating your efforts and so contesting bias at the same time, and in the same places where you are training people for jobs."[205] In its public language, the EEOC had already been pursuing a more expansive definition of discrimination. Shulman argued to a group of Philadelphia businessmen that "[discrimination] is the result of a system, not the result of any one specific act," and therefore, that nondiscrimination was not merely refraining from such acts.[206] This was the same year Activist Kwame Ture and political scientist Charles V. Hamilton's *Black Power* defined *institutional racism* as "acts by the total white community against the black community" through subtle and respectable structures.[207] The extent to which a mildly conservative government bureaucracy could align itself with a militant movement that "asserted American blacks' kinship with anticolonial struggles, rejected integration as a goal, and hoped to restructure American social and economic institutions" was limited.[208] After all, the commission could barely get its act together regarding sex discrimination. But at this point, it had little to lose.

From Discrimination to Underutilization?

Reflecting on his two years at the EEOC, Blumrosen deemed its conciliation and complaint process more successful in combatting structural racism than he predicted it would be.[209] While many bemoaned the commission's inefficiency and lack of enforcement powers, he saw these limitations

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[205] Harry C. McPherson, Jr. to W. Willard Wirtz, August 10, 1967, LBJ Central Files, Subject Files, Folder "LA 2 7/12/67 - 10/4/67."
[206] Quoted in Blumrosen, *Black Employment and the Law*, 33. On perceptions of Shulman as a technocrat, see Gannon, "Uphill Bias Fight."
[207] Stokely Carmichael and Charles V. Hamilton, *Black Power: The Politics of Liberation in America* (New York: Random House, 1967), 3–4.
[208] Katz, *The Undeserving Poor*, 70.
[209] Alfred W. Blumrosen, "Report to the Office of Conciliations, 1965-1967," 2, EEOC Records, A1-4, Box 7, Folder "Report of Activities - Office of Conciliations."

as opportunities in disguise.[210] With the class action lawsuit as the keystone of the enterprise, the EEOC would develop procedures and precedent for supporting plaintiffs. The data it collected would permit individuals to speak as members of groups. Acknowledging the risk that a deluge of lawsuits might upset the delicate balance of power that secured the Civil Rights Act's passage, Blumrosen, the EEOC, and a host of legal activists looked to the courts to invigorate the campaign against job discrimination. Indeed, some consider the relative 'weakness' of the EEOC as more of a feature than a bug; it shaped equal opportunity efforts without facing intense political opposition.[211]

Nonetheless, blind spots and tensions persisted. The EEOC embodied a vision of racial liberalism that spoke the language of compensation Congress had been allergic to but remained hampered by a narrowing vision of opportunity equalization rather than concerted economic redistribution. The complaints process it embodied, with a seemingly endless backlog of claims, represented the shortcomings of civil rights administration activists had worried about. Statistics meant to secure rights also helped solidify a technocratic approach that appeared out of touch. Moreover, the rhetoric of percentages remained a verbal cudgel for centrist politicians to use against groups that spoke too loudly about endlessly deferred justice.

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The thousands of EEO-1 reports that flooded in throughout 1967 painted a bleak picture. In Chicago, Black employees held only 4.7% of white-collar and 7.1% blue collar jobs, despite forming

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[210] The EEOC was still better known for being perpetually behind on a growing number of complaints, and its most successful conciliation effort had been with the Newport News dockyard that was more or less bound to comply as it relied on government contacts and could not risk running afoul of federal rules: John Herbers, "Shipyard in South Induced To Make Up for Past Bias," *The New York Times*, April 10, 1966; Graham, *The Civil Rights Era*, 243.

[211] For an elaboration, see Lieberman, "Private Power and American Bureaucracy."

13.5% of the total labor pool.[212] Resolution by industry and geography was resource-intensive, so the commission brokered partnerships with universities to analyze the data. One study of the 1966 EEO-1 reports came from Princeton University's Section on Industrial Relations. Economist Orley Ashenfelter affirmed the value of yearly reports as a source of time series data; he appreciated that the data could pinpoint individual businesses, "a feat which cannot even be approached with any other existing body of data," but "[emphasized] that more analytical work with these data is highly desirable."[213] Ultimately, cautioned against seeing the EEO-1 reports as a radar to guide attacks. Adopting the "wholesale" approach, the commission prepared research reports targeted to different regions and industries: southern textiles and white-collar New York City were the first to surface.

Armed with charts and figures, the EEOC went on the road. In January of 1968, representatives from New York white collar industries gathered to discuss employment practices with the EEOC. Yale-trained labor economist Phyllis A. Wallace, who headed up data handling in the Research Division, presented an overview in which she highlighted pay disparities between workers at the same job level by race and gender, the freezing of women into clerical work, and the "striking" exclusion of Jews from management, all of which resulted in "a waste of human resources and a deterrent to the aspirations of disadvantaged groups that our society and economy can ill afford."[214] Most representatives of white-collar businesses who testified at the hearings were calm,

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[212] Equal Employment Opportunity Commission, "First Annual Report" (Washington, D.C.: The Commission, 1967), 31.

[213] Orley Ashenfelter, "Minority Employment Patterns, 1966: Analysis of Employer Information Report - EEO-1" (Washington, D.C.: Equal Employment Opportunity Commission, 1968), 14.

[214] Equal Employment Opportunity Commission, *Hearings Before the United States Equal Employment Opportunity Commission on Discrimination in White Collar Employment: Hearings Held in New York, N.Y. January 15-18, 1968* (Washington, D.C.: U.S. Government Printing Office, 1968), 13. Though the EEOC did not collect information on religion, without "endorsing the validity of that method," it had relied on the problematic technique of surname recognition to prepare a report on Jewish employment trends. The method was defended, however, and detractors were told to consult the Anti-Defamation League: "By the same token, we have no reason to believe that the method produces data that are grossly discrepant from the true state of

collected, and receptive.[215] A flustered officer from Doubleday stressed that for a smaller company, "with pressure on the personnel staff to produce results in minority upgrading and training, these matters become very personal matters, not just statistics."[216] The commissioners prodded him on whether he found *sales* statistics useful for business decisions—he backed down. From another angle, Bayard Rustin insisted that the EEOC work more closely with the Black press, lest they appear to be another faceless bureaucracy that stood apart from the freedom struggle.[217] As a publicity forum, the hearings reinforced the perception of the EEOC as peering, Big Brother-like, through the fiberglass walls of corporate America.

As these hearings suggest, there was confusion within the business community. The morass of policy ideas in circulation during the late 1960s were easily conflated with one another; the cacophony of concepts threatened to fracture already-fragile coalitions. When Rustin proposed a *Freedom Budget for All Americans* in 1966 along with Martin Luther King, Jr. and A. Philip Randolph, calling for a massive state-planning apparatus, guaranteed income, and full employment through public works projects, it divided the Left. While some saw in it a realization of the economic goals civil rights had left behind, others saw an endorsement of a failed system. Antiwar activists were particularly irked by its "total disregard" of the Vietnam crisis, calling it "welfarism at home and

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affairs." Equal Employment Opportunity Commission, 672. On the legacy of methods using last name identification to impute racial identity, see Ngai, "The Architecture of Race in American Immigration Law." Around the same time, Daniel Patrick Moynihan wrote that Jews would be driven out of universities if affirmative action programs were adopted. Daniel Patrick Moynihan, "The New Racialism," *The Atlantic Monthly* 22, no. 8 (August 1968): 35–40.

[215] For example, a representative for the Metropolitan Life Insurance Company, claimed that the company freely shared employment data to keep track of its own practices, seeing no need to invoke the use of racial quotas. Equal Employment Opportunity Commission, *Hearings Before the United States Equal Employment Opportunity Commission on Discrimination in White Collar Employment*, 95.

[216] Equal Employment Opportunity Commission, 407.

[217] Equal Employment Opportunity Commission, 523.

imperialism abroad."[218] Meanwhile, the Nixon administration dusted off an abandoned proposal for numerical hiring goals in federally-funded construction projects. In 1969, it announced the "revised" Philadelphia Plan, which aimed to boost minority representation across various construction trades from 1.6 percent to 19 percent by 1973. This "shrewd campaign to destabilize the Democratic Party's already-fraying New Deal coalition" pitted civil rights advocates against blue-collar workers, and the NAACP supported it despite longstanding efforts to find solutions that would not weaken collective bargaining power.[219] With Nixon's cuts to federal spending and the economic instability of the 1970s just around the corner, conflict was inevitable.

These "goals and timetables" were decried as arbitrary, a far cry from the "sociological radar" Blumrosen had proposed for the EEOC. *Underutilization* was not the language used by civil rights leaders to describe labor issues during the 1950s but attempts to align civil rights policy with manpower initiatives throughout the following decade made this language attractive to insiders. Modeling the shifting nature and demographics of the labor market seemed to require a multi-pronged approach. The RAND corporation became increasingly interested in modeling discrimination in the job market in response to changing economic circumstances, publishing a series of reports geared not toward the EEOC but the OEO.[220] Noted game theorist Thomas Schelling even tackled the problem of residential segregation by exploring "mechanisms that

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[218] Jerald Podair, "No Exit: A. Philip Randolph and the Ocean Hill–Brownsville Crisis," in *Reframing Randolph*, ed. Andrew E. Kersten and Clarence Lang, Labor, Black Freedom, and the Legacies of A. Philip Randolph (NYU Press, 2015), 252.

[219] Deslippe, *Protesting Affirmative Action*, 26–27.

[220] Importantly, these reports focused not just on job availability but income disparities: Albert Wohlstetter and Sinclair B. Coleman, "Race Differences in Income" (RAND Corporation, December 31, 1969), https://www.rand.org/pubs/reports/R0578.html; John McCall, "Racial Discrimination in the Job Market : The Role of Information and Search." (RAND Corporation, January 1, 1970), https://www.rand.org/pubs/research_memoranda/RM6162.html.

translate unorganized individual behavior into collective results."[221] Given the reputation of RAND within the historiography of the Cold War, it is easy to see such applications of military calculation to civil rights problems as sensational. But its strategies were embraced throughout the Johnson administration as it turned to cost-benefit analysis to justify government spending. RAND's significance, Ted Porter argues, "cannot be attributed to the megalomania of experts, but rather to bureaucratic conflict in a context of overwhelming public distrust."[222]

Questions about unfair treatment put in quantitative terms were amenable to a technocratic gloss that opened up space for other projects and values. Sociologist Beth Popp-Berman has argued that social policy during this time was being reshaped by an "economic style of reasoning" that prioritized efficiency over equality.[223] The EEOC certainty needed both. But demands for reform helped bring about an emphasis on measurement that could easily be channeled in other directions.

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The EEOC finally had its year in 1972, when new legislation gave it the authority to pursue its own enforcement litigation. Until that point, the commission had invested its resources in research and training programs while pursuing conciliations, struggling as ever to keep up with the backlog of complaints. After more than half a decade, it finally had the authority to use its data to 'target' companies. The legal situation appeared to be stable as well. The Seventh Circuit upheld a contracting plan for highway construction in Illinois to recruit, place, and train minority workers, declaring that the fifth amendment did not preclude the use of racial goals "to eliminate past

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[221] Thomas C. Schelling, "Models of Segregation" (RAND Corporation, January 1, 1969), https://www.rand.org/pubs/research_memoranda/RM6014.html.
[222] Porter, *Trust in Numbers*, 187–89.
[223] Elizabeth Popp Berman, *Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy* (Princeton, NJ: Princeton University Press, 2022).

discrimination."[224] But most importantly, the EEOC brokered a landmark consent decree with AT&T "to give $15-million in back pay and $23-million a year in raises to women and minority males against whom it had allegedly discriminated in job assignments, pay and promotions."[225] That an upstart agency could use its muscle on the Bell System sent a message to the nation. But it had other consequences. The ad-hoc unit that brokered the deal pioneered the targeting system that one participant predicted would become "institutional framework for all future litigation," though in the confidential post-mortem discussion, he acknowledged: "I don't know what the formula is at this point, I have lost track of it."[226]

In 1973, Fortune magazine published an article, "How 'Equal Employment Opportunity' Turned into Employment Quotas," arguing that the multiple different policies and regulations operating under the banner of affirmative action undermined the norms of merit-based hiring, inevitably leading to preferential hiring. The piece painted a vastly different picture than skeptics of the civil rights bureaucracy had envisioned in the mid-1960s. Once "a poor enfeebled thing," the EEOC was now able to pursue pattern or practice lawsuits; the AT&T agreement underscored that its "conciliators have muscles." The author noted, however, that its aspirations to "government by numbers" remained largely unfulfilled. Between dealing with a complaint backlog and processing 260,000 forms every year, there was no way for it to meticulously work through all reports this data yielded. Chairman William H. Brown III held out hope that the EEOC would "develop some computerized procedures for finding patterns of discrimination," much like the way the Internal Revenue Service conducted its tax auditing. The promise of mainframes to act like a pressure

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[224] Siegel, "Equality Talk," 1525.
[225] Eileen Shanahan, "A.T.&T. to Grant 15,000 Back Pay in Job Inequities," *The New York Times*, January 19, 1973.
[226] "AT&T debriefing, 1972 February 20," Wallace Papers, Box 1, Folder 1.

release valve for overburdened government agencies in an expanding administrative state had perhaps never been more compelling. But to those on the outside, the image resonated differently. For colorblind liberals, the threat of computers automatically sniffing out discrimination became an ideological yardstick to measure the limits of administrative authority. For conservatives, it became a convenient dogwhistle.

The real target of the Fortune article was the Nixon administration, which it took to task for the "contrast between [its] words and actions": publicly assailing quotas while endorsing goals and timetables behind closed doors. Even if these were separable in theory, the author argued, "built-in pressures" made them indistinguishable in practice. The blame rested on the shoulders of policymakers who, guided by social science that emphasized structural solutions to economic and social ills, had conflated discrimination with economic analyses of underutilization. The author was unsparing in his criticism of the AT&T conciliation. He lambasted the agreement's backpay provisions, but the real target of his ire was the goal set for sex integration of previously female clerical roles and male craft jobs, which had doubled in the final agreement. The basis for this change was not in the numbers but in politics: "in this case no one was pretending that the goals had any scientific basis." Expanding civil rights policy—especially once gender was in the mix—meant technocracy without meritocracy.[227]

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This chapter has covered a substantial amount of ground to document changing practices and politics of racial data from the Jim Crow era to the 1970s. Classification and discrimination have never been identical, nor have they been entirely separable. Legalism in the post-*Brown* era made

[227] Daniel Seligman, "How 'Equal Opportunity' Turned into Employment Quotas," *Fortune*, March 1973; Lee, *The Workplace Constitution*, 173.

challenges to the Jim Crow information order that had been frustrated in the broader political arena seem workable. At the same time, "racism" took shape as a concept, highlighting certain forms of harm and oppression at the expense of others. The tension between anticlassification and antisubordination described by legal scholars was not merely a matter of legal theory but one inherent in data's political economy, marked by the duality of "data doubles" and aggregates. Within the information age's emerging civic epistemology, these older problems took on new meanings, shaped by questions of privacy and the militaristic metaphors of Cold War science.

In particular, the final section considered how perceptions of technological change overlapped with the foundation of a new civil rights administration and shaped the nascent backlash against it. Severing the ties between merit and technological advancement had a particular ideological salience at a moment of *Future Shock*.[228] Moreover, by teasing apart the various strains of legal and administrative practice that accommodated statistics, it challenged the distinction often made by pundits seeking to delegitimate the legacy of the Great Society's embrace—however tepid—of structural solutions as an aberrant "racial proportionism" that steered civil rights advocates away from the true definition of discrimination.[229]

Scholars have criticized the EEOC's approach as overly technocratic, inspiring downstream backlash and stifling the immediate aims of social movements. By situating its efforts within a longer a history and in relation to concurrent policy changes, I have argued instead that its efforts to preserve an approach to *structural* racism, however partial, represented a genuine commitment to tackling myriad and overlapping forms of racial discrimination with a limited toolkit. Taking a

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[228] Alex Sayf Cummings, "Of Sorcerers and Thought Leaders: Marketing the Information Revolution in the 1960s," *The Sixties* 9, no. 1 (January 2, 2016): 1–25.
[229] Jack M. Balkin and Reva B. Siegel, "American Civil Rights Tradition: Anticlassification or Antisubordination?," *University of Miami Law Review* 58, no. 1 (2003): 9–34.

broader view of knowledge, law, and governance, makes it clear that the definition of discrimination was still in flux as groups pushed for greater enforcement of landmark civil rights legislation in tandem with constitutional claims.[230] The intellectual and political status of 'racial data' remained unsettled. Rather than a set of coherent intellectual or policy programs, it is more appropriate to understand these initiatives as a kind of bureaucratic pragmatism that challenged the Jim Crow information order through the lens of racial liberalism.

Data was a kind of pressure point, open to flexible interpretations underwritten by different frameworks. But exactly which frameworks one used to interpret disparities were becoming increasingly important. In Pressman's statistical memo to the EEOC, she cautioned that using statistics would become more complex "where employers are more subtle, and employ token numbers of minority group members" to block the underutilization radar: "In such instances it may be necessary to refer to publications on chance and probability."[231] The following chapter considers how the jury cases she discussed shaped a parallel conversation about fair representation in selection processes, one that helped set the course for a campaign against capital punishment grounded in arguments about its racially disparate application.

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[230] Leah N. Gordon, "Discrimination," in *Society on the Edge: Social Science and Public Policy in the Postwar United States*, ed. Jefferson D. Pooley and Philippe Fontaine (Cambridge: Cambridge University Press, 2020), 173–223.

[231] Pressman, "Use of Statistics in Title VII Proceedings," 6.

Chapter 2

The Urn and the Gallows

Making the Statistical Case Against Capital Punishment

When attorney Norman Amaker arrived at the NAACP Legal Defense Fund (LDF) headquarters in Manhattan from St. Louis on the night of August 31st, 1966, his death row client William L. Maxwell had roughly 38 hours to live. Earlier that day, the Eighth Circuit of the United States Court of Appeals had denied a request for a stay of execution. In a last-ditch move, the team called in law professor Anthony Amsterdam from the University of Pennsylvania and worked from his 2:00 A.M. arrival into the early morning on a new application to the Supreme Court before departing on an 11:00 A.M. Washington-bound shuttle flight to deliver it. Justice Byron White agreed to postpone Maxwell's execution while the team prepared a new brief, vindicating the sleep-deprived effort.[1]

This last-minute scramble to file paperwork belied months of painstaking preparation behind the first major case in the LDF's latest campaign: a direct challenge to the death penalty's constitutionality. With the aid of Amsterdam's colleague, criminologist Marvin Wolfgang, LDF lawyers coordinated a survey of capital punishment in the South during the summer of 1965 at a cost of nearly $40,000. Dispatching a team of law students to dig for case records in courthouses, they sought to test the theory "[long] suspected but never proved conclusively" that Black men charged with rape, like Maxwell, were more likely to be convicted and sentenced to death than white men. Computer analysis of the data proved costlier and slower than hoped for, and LDF

[1] "Electric Chair Is Cheated: Fund Lawyers Race Against Time To Prepare Appeal," *New Journal and Guide*, September 10, 1966.

lawyers had to get creative with their appeals while the results were finalized.[2] In late November they submitted a 70-page analysis of racial disparities in Southern rape convictions to test the novel constitutional argument that such unequal sentencing rendered capital punishment "cruel and unusual" under the Eighth Amendment. Newspapers buzzed with reports of the brief's challenge to the very constitutionality of the death penalty. Maxwell's lawyers did not dispute the charges against their client, but rather portrayed him as "one victim in a 20-year pattern" of biased sentencing. For those not swayed by appeals to justice, Amsterdam, Wolfgang, and other members of Maxwell's legal team "suggest[ed] that the situation seeds violence among southern Negroes," cashing in on simmering anxieties in the wake of President Johnson's declaration of a "war on crime."[3] Wolfgang's study was a far cry indeed from the statistics wielded by Ida B. Wells-Barnett and other antilynching activists to challenge white supremacist rule, and not merely on account of its sophistication.

At first glance, this courting of social science expertise recalls the LDF's campaign in the school segregation cases: leaning on "modern authority" to shore up a legal theory based in equal protection. As I discussed in the previous chapter, *Brown* set the terms of the legal debate around data and discrimination that sat uncomfortably with the new era of research on inequality the decision helped usher in, a tension that defined the liberal intellectual milieu of Johnson's Great Society. Here again, the "most important law firm in America" saw an opportunity to unsettle long-

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[2] "Rape Sentencing Tested: Landmark Case Looms," *St. Petersburg Times*, November 30, 1966. The computerized data analysis would cost an additional $80,000 and led the group to apply to non-profits like the Ford and Russell Sage Foundations. "A Proposal for the Establishment at the University of Pennsylvania of a Center for Studies in Criminology and Criminal Law," Russell Sage Records, Subgroup 1, Series 11, Subseries 5, Box 138, Folder "Law/Law and the Social Sciences - Wolfgang, Marvin and Amsterdam, Anthony - Establishment of Criminology Center at University of Pennsylvania, 1966-1973.

[3] On 1960s crime policy and postwar liberalism, see Vesla M. Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21, no. 2 (2007): 230–65; Murakawa, *The First Civil Right*; Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, Mass.: Harvard University Press, 2016).

established doctrine by leaning on social research in a moment of crisis. The nod to crime control was especially salient as uprisings broke out across the country (hardly restricted to the South) and government commissions tasked with solving these problems enhanced the status of criminological research. Whatever shadow Footnote Eleven had cast on judges' actual willingness to accept social scientific evidence in the courtroom, controversy over how exactly *Brown* was decided sent defenders scrambling for justifications that could be stated as general rules. An emphasis on form over substance, process over politics, had dominated legal thought as much as other post-war disciplines, and the inheritors of this toolkit had a difficult time reconciling it with their faith in courts as a tool of progressive social change.[4]

This dilemma surfaced in the LDF's own litigation efforts, though they did not see it that way at the time. Rather than relying on experts to attest to the social consequences of existing laws, the rape study turned the tools of statistics and the social survey inward, to the legal process itself, in order to argue that ostensibly neutral sentencing laws were applied so unevenly that they were inherently discriminatory. Civil rights lawyers were becoming increasingly comfortable using statistics to flush out bias in the composition of juries, often one of the few remedies available to capital defendants—the sentencing process, if a leap, was a logical one.

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This chapter considers how changes in the legal uses of statistical evidence, probability theory, and social surveys to flush out discrimination influenced criminology and liberal-anti crime policy in the 1960s, with a focus on the death penalty. Many believed that *Maxwell v. Bishop* could put an end to the American death penalty, but the strategy behind it did not emerge within a doctrinal vacuum.

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[4] For different takes on the turn toward formalism in legal thought, see Horwitz, *The Transformation of American Law, 1870-1960*, 253; Kalman, *The Strange Career of Legal Liberalism*, 41–42.

Here, I look beyond conventional accounts of the case as an early flashpoint in the LDF's eighth amendment strategy to the longer history of NAACP lawyers' procedural challenges to lynching. Though existing accounts vary in their emphasis on one or the other, I show how these developments were inseparable as the LDF's use of statistics and social science took shape under Thurgood Marshall's successor as director-counsel, Jack Greenberg.[5]

In the background of the LDF's legal battles, subtle yet profound intellectual and technological shifts were underway. "Defense intellectuals" steeped in the frameworks of Cold War military expertise applied themselves to government and matters of public interest, bringing along computers and tools for data management. Meanwhile, a new generation of social scientists sought explanations of social inequality that could match the quantitative sophistication of economists' and psychologists' individualistic theories of bias while locating causes in the fabric of society rather than the mind.[6] In a word, they understood discrimination as a *system*. Though ambitions for the application of computers to social problems were always grander than their realization, such projects provided the scaffolding for a broader embrace of quantification in law and governance, one that was different in character from the embrace of expertise in New Deal administrative agencies. Numbers and formulas were not a way to display authority and technical prowess as grounds for political autonomy. Rather, they became a check on discretion. Their history reveals how a loose set of tools used to challenge Jim Crow—with uneven results—were updated for a post-*Brown* world.

Focusing on challenges to jury selection and emerging arguments about systemic discrimination in criminal justice in tandem allows us to see a transformation in the making. At the

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[5] The classic account, written by a participant, is Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*. For an updated version focused on the internal politics of the Supreme Court, see Mandery, *A Wild Justice*.

[6] For further discussion, see above, Chapter One.

beginning of the 1960s, lawyers encountered hard limits in the use of statistics to make out a case of discrimination. By its end, statistics were a necessary—though rarely sufficient—component of the strategy. So complete was this shift that by the end of the decade a Supreme Court opinion invoked statistical measures of randomness as "long-established tests for racial discrimination" despite the fact that they had never been given explicit sanction.[7] Along the way, new social scientific discourses and legislative reforms worked in tandem to forge a kind of civil rights empiricism that different disciplines sought to claim.

These efforts helped set in motion a dynamic I follow throughout this dissertation: statistical challenges to the biased administration of justice shored up technocratic faith in rational punishment but largely failed to deliver relief for plaintiffs in a system incompletely severed from Jim Crow. Debates over thresholds of proof and standards of measurement shaped a set of ideas about fairness that outlasted the reformist energies of the Great Society.

This chapter proceeds in four parts. The first discusses how use of statistics to call attention to anti-Black violence took place during what scholars refer to as the "nadir" of race relations. From the outset, the problem was how to control narratives about crime invoked to rationalize mob violence. Activists employed strategies that used aggregates to transcend them, wary of limiting the political message, but it was tied up in the politics of uplift. Ultimately, the political effort to weaponize statistics was complicated by the rise of 'legalized' lynching, and statistical evidence funneled *through* the legal system, rather than an external challenge to its operation, reshaped

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[7] *Turner et al. v. Fouche et al.*, 396 U.S. 346 (1970) at 359. Interestingly enough, the lower court opinion that was overruled presented the disparity figures in aggregate statistics rather than percentages. As a counterpoint, legal scholar John Hart Ely argued that the Court continued to require "proof of racial motivation…[rather than] disproportion per se," and further that "The Court's attempts at quantification have been notably unenlightening" regarding the question of what amount of disproportionate impact was necessary for judicial intervention: John Hart Ely, "Legislative and Administrative Motivation in Constitutional Law," *The Yale Law Journal* 79, no. 7 (June 1970): 1260, 1316.

claims about the political meaning of racial oppression in a legalized mold. The final two sections explore aspects of this shift in the 1960s: in the law of jury discrimination, where it was implemented with mixed success, and in challenges to the death penalty, where arguments about discriminatory application of the law came up short but inspired an abolitionist campaign that shaped the production of knowledge about criminal justice in the decades to come.

Anti-Lynching and Statistical Thinking

Opponents of capital punishment in the 1960s challenged the institution of state-sanctioned murder on moral and legal grounds, but also by questioning the "common sense" that lynching—in particular, the targeted killing of Black men through accusations of interracial rape—had ever actually ended.[8] At the turn of the twentieth century, antilynching activist Ida B. Wells-Barnett leveraged the new craze for statistics to call attention to the regime of white terror that arose to suppress Black political and civic life as Reconstruction waned. In the process, she challenged the ascendant quantitative discourse linking criminality and blackness that others bought into. These efforts did not achieve their immediate goals of passing legislation to punish such extralegal violence, but they embarrassed Southern officials enough to compel reliance on trials to prevent it, turning to the death penalty in what legal scholar Michael Klarman calls "little more than a

[8] Ashraf H. A. Rushdy, *American Lynching* (New Haven: Yale University Press, 2012), 16. Naomi Murakawa has argued that celebrating Ida B. Wells-Barnett primarily as an antilynching crusader reaffirms presentist conceptions of lynching as a bygone institution, the power of which "[resided] in its unique *form*—its extralegality and its extra-lethality, both narrowly defined—rather than its *function* as terror in the service of gendered and economic white domination": Naomi Murakawa, "Ida B. Wells on Racial Criminalization," in *African American Political Thought : A Collected History*, ed. Melvin L. Rogers and Jack Turner (Chicago: University of Chicago Press, 2021), 214.

formalization of the lynching process."[9] Within the legal arena, aggregate statistics on lynching meant little in the absence of blatant error in an individual case.

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Scholars have argued that modern regimes of quantification and accounting are indebted to the transatlantic slave trade and the forms of violence rendered in service of making the bodies of enslaved persons fungible.[10] What Katherine McKittrick calls "the mathematics of the unliving" connects the slave ledger to the forms of reportage, administration, and categorization elaborated by modern states through the "the avalanche of printed numbers" during the nineteenth century, to use Ian Hacking's memorable term.[11] The very concept of racial lynching, historian Christopher Waldrep argues, was inaugurated in 1882 when the *Chicago Tribune* added racialized counts of lynching alongside a bevy of other tabulations, including "suicides, train wrecks, shipwrecks, embezzlements, murders, legal executions, and epidemics," a practice it began in 1875 with a dry register of business statistics.[12] At least as much as agricultural experiments or occupational classifications, lynching and its 'legalized' counterpart are central to the history of statistics, and vice versa.[13]

Partial though the *Tribune*'s lynching statistics may have been, they provided a point of departure for journalist Ida B. Wells-Barnett to expose the horrors of a *system*—not merely random

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[9] Michael J. Klarman, "The Racial Origins of Modern Criminal Procedure," *Michigan Law Review* 99, no. 1 (2000): 57.

[10] See, *inter alia*, Saidiya Hartman, "Venus in Two Acts," *Small Axe: A Caribbean Journal of Criticism* 12, no. 2 (June 1, 2008): 1–14; Caitlin Rosenthal, *Accounting for Slavery: Masters and Management* (Cambridge, Mass.: Harvard University Press, 2018); Murphy, "'Multiplied without Number.'"

[11] McKittrick, "Mathematics Black Life," 18–19; Hacking, "Biopower and the Avalanche of Printed Numbers."

[12] Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (Basingstoke: Palgrave Macmillan, 2002), 112–14. Waldrep cautions against reading these tabulations as anything other than "a Northern white newspaper's perception of lynching at a particular point in time."

[13] For a recent example on the history of statistics in the U.S. context, see Emmanuel Didier, *America by the Numbers: Quantification, Democracy, and the Birth of National Statistics* (Cambridge, Mass.: MIT Press, 2020).

outbursts of extralegal violence but oppression through legitimate structures. As the story goes, Wells was working as a newspaper editor in Tennessee when three of her friends, Black men who owned a successful grocery store, were lynched by a white mob intent on burning it down. Her scathing editorial in response called out "the old bare lie that Negro men rape white women" as an "excuse to get rid of negroes who were acquiring wealth and property" and argued that many such liaisons, when they did occur, were fully consensual. It led to threats on her life that banished her to the North, but she never ceased to call out lynching as a form of economic oppression. Statistics became the cornerstone of her crusade to dismantle the myth of the Black rapist.[14] Using press accounts to contextualize the figures for an audience, she both documented the rarity of actual rape charges (only 31 percent of the nearly eleven hundred instances she found) and used the singularity of horrific killings to underscore the violence so easily concealed by the banality of tabulation.[15]

The radicality of Wells's arguments rankled audiences steeped in the politics of respectability. She took criticism of "the double standard of justice that rested on the defamation and character of black women" further than her counterparts who were more willing to "[employ] a milder strategy of moral suasion in an attempt to win white allies," Estelle Freedman discusses in her history of American rape, imploring white women to confront the sexual exploitation of Black domestic servants in their households.[16] Khalil Muhammad argues that while Wells had a penchant for drumming up controversy, this marginalized her within expert discourse on race relations, in

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[14] Freedman, *Redefining Rape*, 107–8; Muhammad, *The Condemnation of Blackness*, 59.

[15] Muhammad, *The Condemnation of Blackness*, 60; Murphy, "'Multiplied without Number,'" 197; Murakawa, "Ida B. Wells on Racial Criminalization," 218.

[16] Freedman, *Redefining Rape*, 117–20. Scholars have criticized what the preoccupation with lynching in the national imagination concealed the long history of violence against Black women: "the institutionalized rape of black women has never been as powerful a symbol of black oppression as the spectacle of lynching": Hazel V. Carby, *Reconstructing Womanhood: The Emergence of the Afro-American Woman Novelist* (Oxford: Oxford University Press, 1987), 39; cited in Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity*, Justice, Power, and Politics (Chapel Hill: University of North Carolina Press, 2016), 8.

which Black writers were "more willing to traffic rhetorically in the high-value currency of black criminality so as to be taken seriously by whites." Unlike Wells, social scientists like Kelly Miller did not argue with statistics documenting excessive Black criminality but accepted their reality as a proof of extensive discrimination and deplorable social conditions rather than hereditary shortcomings.[17] Her rejection of the myth of Black criminality was thoroughgoing. Naomi Murakawa points out that Wells refused to legitimate lynching by highlighting the innocence of Black victims, unlike the policy adopted by the NAACP—the organization she helped to found—of offering legal representation only to those criminal defendants they believed to be innocent. In the end, Wells's analysis of lynching put "the white man's civilization and the white man's government…on trial," as she argued in *A Red Record*.[18]

When the NAACP began its campaign for a federal antilynching law to transfer prosecutorial power over any killing defined as a lynching from the states to the federal government, the politics of measurement also played a part. As Waldrep describes, its original definition proposed that lynching had to be endorsed by specific towns and communities— even if the thrust was to impugn the broader society, focus on the lynch mob excluded increasingly common vigilante killings ordered by elites. The NAACP, Tuskegee Institute, and the Association of Southern Women for the Prevention of Lynching (ASWPL) all had different classifications of what exactly constituted a lynching, resulting in different tallies, with the latter two focusing on stricter 'scientific' definitions than the NAACP's. When the ASWPL tried to claim the period from

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[17] Muhammad, *The Condemnation of Blackness*, 62–63.

[18] Murakawa, "Ida B. Wells on Racial Criminalization," 218–19. See also Wells, *A Red Record*, on the limits of the courts: "The entire system of the judiciary of this country is in the hands of white people. To this add the fact of the inherent prejudice against colored people, and it will be clearly seen that a white jury is certain to find a Negro prisoner guilty if there is the least evidence to warrant such a finding": Wells, *The Light of Truth*, 250.

May 1939 to 1940 as the culmination of its campaign for a 'lynch-free year' based on Tuskegee data, the NAACP called a conference to establish a standard definition, and while no true consensus was brokered, the NAACP achieved a symbolic victory: the definition of lynching would not be confined to killings carried out in open defiance of the law, and police killings would count as well.[19]

The NAACP hoped to count not only surreptitious killings but the growing phenomenon of "legal lynching." Organized as they were around racial oppression through formal means, state governments in the South hoped to avoid controversy that would invite scrutiny. The strength of Black voting power and prevalence of officeholding during Reconstruction inspired a counterrevolution waged through intensified racial violence and legislative power grabs. In a series of constitutional conventions beginning in the 1890s, Southern states devised provisions geared toward Black disfranchisement. Tying jury service to voting brought the courts under control in one fell swoop, and lawmakers certified capital statutes for rape that empowered these all-white, all-male juries to mete out death at their discretion.[20] These new governments saw the need to contain extrajudicial violence. In order for the state to stand in for the mob, however, criminal procedure had to become more responsive, more efficient. Putting judges on call to conduct swift trials and oversee executions bolstered the legitimacy of white rule locally, while helping to avert the gaze of

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[19] Waldrep, *The Many Faces of Judge Lynch*, 127–50. On anti-lynching campaigns, see Francis, *Civil Rights and the Making of the Modern American State*.

[20] Practices of systematic exclusion were not uniform throughout the Jim Crow South. Louisiana effectively nullified the veto power of the occasional Black juror when it adopted a new constitution in 1898 that permitted nonunanimous juries to hand down verdicts in criminal cases. Thomas Ward Frampton emphasizes that the architects of Jim Crow laws saw voting and jury service as intertwined and crafted new legal tools with explicitly white supremacist goals. This was due to the fact that agitation from activists often helped ensure the presences of Black men in jury boxes, which he emphasizes continued later than most scholars of Reconstruction's end admit. Peremptory and for-cause challenges remained powerful tools to be used at the unbridled discretion of counsel. See, generally, Thomas Ward Frampton, "The Jim Crow Jury," *Vanderbilt Law Review* 71, no. 5 (October 1, 2018): 1593–1654.

the press in an era of expanding communications technology.[21] Moreover, these changes meant that challenges to racialized violence had to be waged through the law as much as, if not more than, politics. 'Legalized' lynching would have to be attacked obliquely, in courtrooms where conservative judges and lily-white juries were not the ideal audience for arguments based in aggregate statistics.

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Lawyers turned to a different kind of data to document the exclusion of Black men from juries: population statistics and administrative records like tax registries and voter rolls. A constitutional issue that received surprisingly strong condemnation by a Supreme Court struggling over the meaning of the Civil War amendments, challenges to Jim Crow jury selection practices decisively shaped the doctrine supporting statistical proof of discrimination under the Equal Protection clause. However, few lawyers were willing to make these arguments in practice, and when the numbers suggested anything other than total exclusion, judges balked at the idea of the Fourteenth Amendment underwriting a standard of proportional representation.

Challenging the Jim Crow Jury

Throughout the 1880s, the same newspapers that published lynching figures commented frequently on the changing racial composition of juries. They noted when locales had their first Black jurors—an 1885 *New York Times* article, for example, described "a great deal of comment" accompanying the empanelment of not one, but two Black jurors on a Circuit Court grand jury in Kentucky—and even speculated upon their apparent proclivity to convict.[22] As with broader Black political representation during Reconstruction, this state of affairs would not last, with targeted violence against organized

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[21] Waldrep, *The Many Faces of Judge Lynch*, 152; Klarman, *From Jim Crow to Civil Rights*, 119.

[22] Nancy S. Marder, "The Changing Composition of the American Jury," in *Then & Now: Stories of Law and Progress* (Chicago: Chicago-Kent College of Law, 2013), 69–70.

political groups on the rise.[23] To be sure, many tried to solidify these legislative gains with rules specifying proportional representation, like the 1868 South Carolina legislature that wrote a law requiring that the proportion of white to black jurors match that of voters.[24] But by the end of the nineteenth century, Booker T. Washington lamented, "In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts."[25] One lawyer nuanced this observation through enumeration in 1909, sending questionnaires to court clerks in majority-Black counties across the South. Though one should be skeptical of such self-reported figures, the study suggested that if exclusion was not total, inclusion was rare, or at least highly out of proportion to the population.[26] Whether through intimidation, juror qualification laws that amounted to *de facto* exclusion, or innovations in racial paperwork that facilitated the administration of Jim Crow without explicit racial identification, juries became whiter.[27]

The contours of this new era's oppressive politics were limned by legal decisions that gutted the rights enshrined by the Civil War amendments and nullified key legislation that had underwritten the massive social transformation of Reconstruction. Most infamous among these was *Plessy v. Ferguson* (1896). Upholding a Louisiana law requiring segregated railroad cars, the Supreme Court enshrined the "separate but equal" interpretation of the Fourteenth Amendment that laid the foundation for Jim Crow. It rejected Plessy's lawyers' argument that segregation marked Black

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[23] See, generally, Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2003).
[24] Christopher Waldrep, *Jury Discrimination: The Supreme Court, Public Opinion, and a Grassroots Fight for Racial Equality in Mississippi*, Studies in the Legal History of the South (Athens, Ga.: University of Georgia Press, 2010), 158.
[25] Quoted in Schmidt, "Juries, Jurisdiction, and Race Discrimination," 1406.
[26] Gilbert Thomas Stephenson, *Race Distinctions in American Law* (New York: D. Appleton and Company, 1910). For discussion, see Schmidt, "Juries, Jurisdiction, and Race Discrimination," 1407; Frampton, "The Jim Crow Jury," 1619n152.
[27] On racial paperwork, see above, Chapter One, and below on *Whitus v. Georgia*.

people "with a badge of inferiority" by appealing to the "natural affinities" of racial kinds—distinctions undergirded by contemporary science and medicine—which legislation was "powerless" to abolish.[28] In spite of this, some of the Court's rulings on jury selection gave surprisingly strong endorsements of Equal Protection as a bar on discrimination, though their enforcement would turn for decades on judgments of capacity or "character" not unlike those invoked to justify segregation.

Though not as visible as voting rights or segregated facilities, jury service was a major undercurrent of Reconstruction politics. Its conspicuous absent from the set of legal rights enumerated in section one of the 1866 Civil Rights Act was to an extent by design, to ensure the bill's passage. When the Republican House Chairman introduced the legislation, he even took pains to reassure Democrats that civil rights did *not* mean "that all citizens shall sit on juries, or that their children shall attend the same schools."[29] By making such demarcations, Republicans committed themselves to a long game. Efforts to pass legislation to enforce the act and the constitutional amendments that followed—in effect, to make racial discrimination illegal—continued to elude them over the next several years. Finally, facing serious losses following the 1874 election, Republicans rallied in a lame-duck session of Congress to pass a bill that historian Eric Foner has called "an unprecedented exercise of national authority [that] breached traditional federalist principles more fully than any previous Reconstruction legislation."[30] The Civil Rights Act of 1875 criminalized discrimination in jury selection, transportation, and public accommodations. Though

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[28] Welke, *Law and the Borders of Belonging*, 137–38.

[29] The named rights are: "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. Whether this list of limited legal rights necessarily circumscribed the provisions of the Fourteenth Amendment was one of the debates that helped launch originalism in the 1970s.

[30] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, Updated ed. (New York: Harper Perennial Modern Classics, 2014), 556.

an education clause that funded the desegregation of public schools ended up being scrapped, the issue of juries had been no less controversial.[31] The chief issue for most critics, however, was that the act was geared toward enforcement. Historian John Hope Franklin points out that newspapers objected to the financial penalties it recommended, claiming "'shyster lawyers' would make a business of sending Negroes into places of public accommodation with the hope that they would be refused service, thus giving them an opportunity to collect damages."[32] But when the Supreme Court struck down much of it three years later in the *Civil Rights Cases*, its provision for juries was left intact thanks to a set of cases that upheld the right to jury service, symbolically if not substantively.[33]

Either in spite or because of the vexed politics of race and masculinity it reflected, *Strauder v. West Virginia* (1880) was incongruous. Not only was it the Supreme Court's first finding of racial discrimination under the fourteenth amendment's equal protection clause, it the first state court decision overturned by the Court using the removal jurisdiction granted under the Civil Rights Act of 1866.[34] A man had killed his wife for catching her in an affair with another man; the jury that sentenced him to death might have expected him to kill the paramour rather than his wife in defense of his honor, and husbands tended to be acquitted for temporary insanity in such

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[31] Waldrep, *Jury Discrimination*, 160–63. See also "In Pursuit of 'Practical Freedom,'" US House of Representatives: History, Art & Archives, accessed July 12, 2023, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Fifteenth-Amendment/Civil-Rights-Act-of-1875/.

[32] John Hope Franklin, "The Enforcement of the Civil Rights Act of 1875," *Prologue, Journal of the National Archives*, Winter 1974, 225–35.

[33] Thomas Ward Frampton writes that many scholars erroneously portray the *Civil Rights Cases* as invalidating all of the 1875 Civil Rights Act, rather than just the public accommodations portions that were most visible: Frampton, "The Jim Crow Jury," 1600.

[34] In the *Slaughter-House Cases*, the Court announced a very clear understanding of the equal protection clause: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision": *Slaughter-House Cases*, 83 U.S. 36 (1873) at 81. As most legal historians know, things did not turn out this way: it was primarily used by corporations to shirk off regulation.

situations. But Taylor Strauder was a Black man and his victim was white, and per an 1873 West Virginia statute, so was the entire jury that found him guilty.[35] Over the course of Strauder's lengthy appeal, the end of Reconstruction considerably weakened federal authority, but the Supreme Court nonetheless thought West Virginia had gone too far with a race-based qualification for jury service. Anticipating the very reasoning it would reject in *Plessy*, in *Strauder* the Court called juror exclusion laws a "brand" of inferiority and a "stimulant to…race prejudice," though Justice Strong, the opinion's author, arrived at this reasoning through a decidedly paternalistic rendering of the Fourteenth Amendment's incorporation, describing Black people as "mere children" needing the protection of "a wise government."[36] Constitutional scholar Benno C. Schmidt called *Strauder* "the most vigorous statement of the antidiscrimination principle to be found in the United States Reports for a full century after Emancipation," but also one that reveals "the gulf between explication and implementation of constitutional rights" with rare acuity.[37] The decision was directed only toward laws that *explicitly* excluded Black jurors on the basis of race.[38] As states adopted standards of character evaluation and tied jury service to voter registration, they achieved the same results through rules that were neutral on their face.[39]

In fact, that process was already in motion, as evidence by a case decided along with *Strauder*, one more relevant to our story about statistics. Republican federal judge Alexander Rives

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[35] Waldrep, *Jury Discrimination*, 168.

[36] *Strauder v. West Virginia*, 100 U.S. 303 (1880) at 306-8.

[37] Schmidt, "Juries, Jurisdiction, and Race Discrimination," 1414, 1429.

[38] A few years later, the Supreme Court ruled that a San Francisco ordinance banning the operation of laundries in wooden buildings without permits violated Equal Protection because it allowed officials to discriminate against Chinese immigrants, the lion's share of laundry workers and owners, but *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) is something of an outlier, one of the only equal protection cases to countenance a standard of "disparate impact."

[39] Alexis Hoag, "An Unbroken Thread: African American Exclusion from Jury Service, Past and Present," *Louisiana Law Review* 81, no. 1 (December 11, 2020): 63.

seized control of a case when its lawyers appealed to him, claiming that the Virginia had denied them their right to provide for equal rights. Their client, a Black teenager accused of murdering a white man, had been convicted repeatedly by all-white juries. Rives took to the case with gusto. Claiming that the neutral language of the state law was not at fault, he accused county officials of discrimination, since the repeated selection of an all-white jury could not "be imputed to chance."[40] To add to the drama, he ordered the arrests of fourteen judges who oversaw these practices. Rives exemplified the kind of federal authority Democrats sought to undercut as they took control of Congress. The Virginia lawyers who challenged Rives did not believe a mixed-race jury was a matter of equal protection, as one could more easily claim "that civil rights had been denied where *judges* were not taken in equal proportion from all races and colors without reference to previous condition of servitude," and saying the quiet part out loud, "[w]e do not believe there is a State in the Union the bench of which is adorned by judges selected from the colored race."[41]

In *Virginia v. Rives* (1880), the Supreme Court decided that Rives had gone too far in assuming jurisdiction over the case, and that he had no right as a federal judge to exercise such authority over state officials. A jury challenge could be made, but "only if state authorities confessed their prejudice and the highest state court endorsed the discrimination," something not likely to happen.[42] The decisions were welcome enough to Black leaders and Republicans, but the long-term consequences were dire. Schmidt argues that they "may well have had a disastrous effect on race relations for more than a half-century by closing federal trial courts to proof of jury discrimination," a perfect example of what legal scholar Michael Klarman has called "subconstitutional rules" of

[40] Waldrep, *Jury Discrimination,* 174.
[41] Waldrep, 174.
[42] Waldrep, 179.

procedure that permitted courts to affirm constitutional principles in name only while upholding the unfettered discretion of jury officials.[43]

Still, there were moments when the Supreme Court did come close to admitting proto-statistical evidence of systematic exclusion. The best-known case was *Neal v. Delaware* (1880), which leaned on population statistics to make out a *prima facie* case that total exclusion of Black jurors under an otherwise neutral statute violated equal protection because it took place "during a period of many years," deploring the "violent presumption" of officials that "[all members of] the black race in Delaware were utterly disqualified" when they made up roughly seventeen percent of the state's population, according to Census figures.[44] Black lawyers worked to turn *Neal* into a replicable numbers-based strategy for challenging all-white juries. Wilford H. Smith and Emanuel D. Molyneaux Hewlett became the first Black lawyers to win a case before the Supreme Court in *Carter v. Texas* (1900), drawing on the proportional argument that Black jurors had been excluded despite "constituting about one fourth of the registered voters in the county." Hewlett had unsuccessfully attempted the strategy of introducing voter rolls in two earlier cases, but this time

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[43] Schmidt, "Juries, Jurisdiction, and Race Discrimination," 1434; Klarman, *From Jim Crow to Civil Rights*, 42–43. Similarly, Waldrep views a little-known successful attempt to crack Mississippi's all-white jury system as evidence that if the Supreme Court had "set different evidentiary rules, making it easier to prove discrimination, there might have been tens of thousands of black jurors throughout the nation at the time when whites tried to make and enforce segregation laws": Waldrep, *Jury Discrimination*, 5. Even in places where Black jury participation remained fairly strong later than many historians recognized, like Louisiana, other reforms were adopted to insulate the system from their influence. Thomas Ward Frampton argues that "nonunanimity gained political traction as a mechanism for vitiating the veto power that the occasional minority juror might wield through his dissenting vote," and that studies focused exclusively on the Supreme Court, like Klarman's, have tended to overlook the flexibility of many state courts: Frampton, "The Jim Crow Jury," 1598, 1605.

[44] *Neal v. Delaware*, 103 U.S. 370 (1880) at 397: "The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State, — although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand, — presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution."

the lower court had refused to even admit any witnesses to back up the figure—the case established a right to introduce witnesses to prove jury discrimination.[45] At first, this strategy succeeded at the state level, but over time judges raised the numerical bar for defining "a period of many years."[46] Meanwhile, the Supreme Court paid even greater deference to state jury selection procedures, and it would take the global visibility of the Scottsboro case during the 1930s to prod them into it.

In these early jury exclusion cases, it is tempting to see statistics as a tool for mitigating distrust.[47] The suspicion and animosity between federal and state-level officials after the end of Reconstruction certainly seems to fit the bill. But the statistical case was typically made to justify federal intervention into state practices, weighing administrative records against Census figures—a trend that would continue. After 1880, states leaned into strictly legal questions of *evidence* rather than matters of principle, and confessions of prejudice far outweighed documentation of exclusion. Absent such admissions, discrimination could only be inferred, not deduced; a probability or likelihood rather than a certainty, despite the shared social experience of all involved.[48]

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As Jim Crow's hold strengthened during the Progressive Era, jury exclusion largely receded from the Supreme Court's view. At the same time, a set of critiques of formalist jurisprudence known as

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[45] *Carter v. Texas*, 177 U.S. 442 (1900) at 448. The other cases, argued with lawyer Cornelius J. Cones were *Smith v. Mississippi* 162 U.S. 592 (1896) and *Gibson v. Mississippi* 162 U.S. 565 (1896), both dismissed for procedural reasons. See also Waldrep 194-200. Interestingly, Hewlett was also involved in a 1915 class action suit of former slaves against the Secretary of the Treasury: Mary Frances Berry, "Taking the United States to Court: Callie House and the 1915 Cotton Tax Reparations Litigation," *The Journal of African American History* 103, no. 1–2 (March 2018): 91–103.

[46] One law review from the 1930s pointed out that a "Florida court was content to say that 'it has been a long time since men of that race have served on the jury in the court,' and deemed this sufficient proof of discrimination on account of race or color. But the same court, eight years later, refused to consider as sufficient proof of race discrimination, the absence of Negroes from service on the juries for a period ranging from fifteen to twenty-five years": Bernard S. Jefferson, "Race Discrimination in Jury Service," *Boston University Law Review* 19, no. 3 (1939): 424–25.

[47] See, generally, Porter, *Trust in Numbers*.

[48] Waldrep, *Jury Discrimination*, 188–89.

legal realism ascended within the academy and had an impact on both the courts and the administrative agencies whose authority was bolstered by the New Deal. Realists tried a number of approaches to better align laws with the kind of scientific empiricism promoted by figures like John Dewey, and toyed with both utilitarian approaches to legal prediction and the methodologies of social science.[49] The spirit of this movement, should we chose to call it that, is perhaps best reflected in the aphorisms of Justice Oliver Wendell Holmes, Jr., who wrote that law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics" but also "[f]or the rational study of the law…the man of the future is the man of statistics and the master of economics."[50] Though the distinction between these ways of knowing was clear enough to pragmatists like Holmes, there was a tension between them that bedeviled uses of numbers in the courtroom. A lawyer with realist leanings might point to statistical disparities as evidence of the law in practice; a judge could lean into this same style of reasoning to claim that even proportions were an invalid norm.

Legal scholars have imputed a direct relationship between this legal critique and a broader embrace of "government by numbers" that impacted the way the Supreme Court understood statistical evidence. The politics of race, I argue here, were at least as important. The plight of the Scottsboro boys generated international scrutiny that elevated the stakes for the Court, while wrangling over the case itself escalated tensions between the NAACP and other left-leaning groups over what the root cause of racial oppression and its remediation. Ultimately, civil rights lawyers who had relied on statistics to make systemic claims about injustice narrowed their strategies and embraced a legal professionalism that elevated their influence in court. But regardless of the

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[49] Schlegel, *American Legal Realism and Empirical Social Science*.

[50] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Company, 1881), 1; Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897): 469.

proximal cause, from the New Deal through the years following World War II, decisions that helped lay the groundwork for modern criminal procedure made it possible for plaintiffs to prove systematic discrimination in jury selection, but many such arguments trod upon delicate questions of just how much "representativeness" the Constitution required.

During the 1930s, the cases resulting from the swift trial and conviction of nine Black teenagers for the rape of two white women in Scottsboro, Alabama defined the very image of Jim Crow injustice. The second of two major appeals to reach the Supreme Court, on behalf of Clarence Norris, raised a claim of jury discrimination.[51] Norris's lawyers cited aggregate population statistics and relied on oral testimony to confirm a pattern of exclusion that made out a *prima facie* case but their argument ultimately rested on the fact that officials claimed that they thought no Black men were fit to serve as jurors while the names of six had been added to the jury roll anyway.[52] Though the Supreme Court was particularly compelled by the revelation of forgery, it nonetheless revived the *Neal* test that had been virtually dormant for half a century.

Norris was a major victory for criminal procedure, but it revealed the limitations of challenging the racial project of white supremacy piecemeal. As Freedman argues in her history of rape in the United States, Scottsboro helped to displace Black women from the discourse on lynching and capital punishment, whether as victims of rape themselves or as political subjects excluded by the predominantly masculine notions of citizenship: "White writers concerned about the inclusion of African Americans on juries after the Norris decision did not point out or protest the fact that women could not sit on southern juries."[53] Moreover, as Michael Klarman argues,

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[51] The first, on behalf of Ozie Powell, led to a decision that provided a guarantee for counsel, *Powell v. Alabama* 287 U.S. 45.

[52] See above, Part One overview. *Norris v. State of Alabama,* 294 U.S. 587 (1935), Petition, 8 May 1935.

[53] Freedman, *Redefining Rape*, 265.

those accused of rape had recourse to a bold constitutional claim in theory, but in practice their access to counsel effective enough to make use of it was attenuated by prohibitive costs and limited to organizations like the NAACP and the ILD.[54] In its wake, court officials turned to techniques like peremptory challenges to ensure juries remained lily white.[55] Nonetheless, it set an important precedent that would continue to shape antidiscrimination law: no longer could officials rebut a *prima facie* disparity simply by denying discrimination.[56]

Though it laid a procedural foundation for subsequent challenges, *Norris* did little at first to ameliorate the exclusion of Black men from juries. Klarman argues that instead it may have served the broader purposes of mobilizing protest as well as spurring a new rights consciousness among Black folks.[57] But subsequent cases did help firm up the strategy. In *Pierre v. Louisiana* (1939) the Supreme Court sided with a trial court judge who found that jury commissioners had failed to place a sufficient number of names in the jury box "in proportion to the colored population of the parish" but refused Pierre's request to quash the indictment.[58] Louisiana's Supreme Court allowed Pierre's lawyers to call twelve witnesses—clerks of the parish and district courts, the sheriff, school superintendent, a newspaper editor who had been a census enumerator, and four Black citizens—to put a number on the disproportion. It became clear that at least four Black men on the jury roll, but their estimates of the overall population and the number of qualified jurors varied. Testimony

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[54] Klarman, "The Racial Origins of Modern Criminal Procedure," 87.

[55] See below on *Swain v. Alabama*, 380 U.S. 202 (1965).

[56] He writes that *Norris* "revitalized the presumption from *Neal* that the lengthy absence of blacks from juries in counties with substantial black populations was attributable to race discrimination, and the Court refused to defer to findings of fact by trial courts": Klarman, *From Jim Crow to Civil Rights*, 225. See above, Chapter One, on establishing a *prima facie* case of discrimination.

[57] Klarman argues instead that "these criminal procedure rulings may have indirectly contributed to the modern civil rights movement by educating blacks about their rights, mobilizing protest in the black community, and rallying support among sympathetic whites who were horrified by revelations of Jim Crow practices at their worst": Klarman, "The Racial Origins of Modern Criminal Procedure," 50.

[58] "Brief on Behalf of the State of Louisiana," *Pierre v. Louisiana*, 1938 WL 39083.

showed the population to be "between 12,000 and 14,000 and that, of this number approximately 3,000 or 4,000 are negroes," and the one time census enumerator claimed "that in his opinion there were not more than 75, and probably not over 50, negro men in the parish who could read and write."[59] The court concluded from the collected testimony—which it acknowledged as "guesswork"—that there were "no more than 75 or 100 colored males between the ages of 21 and 65 in the parish who can read and write," and the fact that at least four had made it onto the jury roll seemed sufficient. The U.S. Supreme Court found otherwise. Statistics from the 1930 Census showed that nearly half of the fourteen thousand or so residents were Black, and that only thirty percent were classified as illiterate.[60] "The findings and conclusions of the State Supreme Court, though entitled to great respect, are not binding on this Court," Justice Black wrote, and in cases such as this "it becomes our solemn duty to make independent inquiry and determination of the disputed facts."[61] It was common practice to introduce demographics through personal testimony, but the Court leaned toward the expanding repertoire of government data collection practices to establish its own conclusions.[62] This subtle yet significant shift set the stage for a new kind of conflict over numbers.

In the 1940s, appellate courts began taking seriously statistical evidence of systematic and *intentional* exclusion of Black men from Southern juries. A saga of cases coming from Dallas County, Texas how the Court established a broad template for proving jury discrimination through

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[59] *State v. Pierre*, 189 La. 764 (1938) at 773-774

[60] *Pierre v. Louisiana*, 306 U.S. 354 (1939).

[61] This was a firmer restatement of a principle declared in *Norris*: "Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured," *Norris v. State of Alabama*, 294 U.S. 587 (1935) at 590.

[62] For one example of this expanding data infrastructure, Pub. L. No. 71-218, 46 Stat. 325 established the Bureau of Prisons, which assumed management responsibility over federal prisons but also began collecting data on sentencing and executions.

statistics that it began to walk back on and set the stage for arguments over representativeness that would later threaten to tear apart the Warren court. In the first of these cases, *Smith v. Texas* (1940), the Court ruled that "chance and accident alone" could not have produced results that were not "truly representative of the community."[63] Relying on newspaper documentation, Smith's lawyers claimed a 20-to-1 disparity of Black men serving as jurors lasting sixteen years. Justice Black's statement of the "representativeness" standard warrants quoting at length:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups…is at war with our basic concepts of a democratic society and a representative government…The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.[64]

However, subsequent challenges tempered this mandate for representativeness. When a plaintiff accused Dallas County jury commissioners of limiting the number of Black jurors to one in his case, the Supreme Court denied the proportional argument. In *Akins v. Texas*, the Court deduced that "[o]n the strictly mathematical basis of population, a grand jury of twelve would have 1.8552 negro members, on the average," concluding that "[p]urposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals."[65] However, as Justice Murphy pointed out in his dissent, all three jury commissioners had admitted outright that they did not intend to put any *more* than one Black juror on the panel.[66] A lower court took the ruling a step further, claiming the Constitution

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[63] "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service": *Smith v. Texas*, 311 U.S. 128 (1940) at 131.
[64] *Smith v. Texas*, 311 U.S. 128 (1940) at 130.
[65] *Akins v. Texas*, 325 U.S. 398 (1945) at 403.
[66] *Akins v. Texas*, 325 U.S. 398 (1945) at 409-10.

"does not deal with percentages"—apparently forgetting the infamous Three-Fifths compromise.[67] However, the relationship between 'token representation' and 'proportional limitation' was difficult for judges to parse in practice.

Cassell v. Texas (1950) took the tokenism issue head on. Back in court again, the Texas jury commissioners now testified that they only chose jurors that they knew directly for a grand jury, none of whom, it turned out, were Black. Their words contradicted their actions: they continued to seat one Black juror in each case. Though the Court ruled in favor of *Cassell*, the concurring Justices expressed their reservations about extending the "representativeness" standard any further. "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation," Justice Reed wrote, perhaps mindful of the wrangling over categories in the 1950 Census, which shrank to seven from the previous ten (and would expand again to eleven for 1960).[68] Justice Frankfurter cautioned more sternly that the Fourteenth Amendment did not "turn matters that are inherently incommensurable into mere matters of arithmetic."[69]

The statistical arguments for jury discrimination were hard-won, but they could just as easily be turned against the civil rights advocates who developed the strategy. Moreover, the language of "systematic and intentional exclusion" had come to focus more on the latter as jury commissioners strained to justify their practices in order to rebut the *prima facie* statistical claim.

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[67] "The Constitution forbids discrimination; it does not deal with percentages. Percentages may be of value in cases where no representation exists or where token representation has been given": *State v. Perkins*, 31 So. 2d 188 (1947) at 192.

[68] Justice Reed, concurring in *Cassell v. Texas*, 339 U.S. 282 (1950) at 285-87; Sharon M. Lee, "Racial Classifications in the US Census: 1890–1990," *Ethnic and Racial Studies* 16, no. 1 (January 1, 1993): 75–94.

[69] Justice Frankfurter, concurring in *Cassell v. Texas*, 339 U.S. 282 (1950) at 291, 295.

The quantitative approach to discrimination, even at this early stage, was already being turned from an indictment of inherent racism to something more technical.

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As the means of proving jury discrimination were shifting, so were the politics of civil rights lawyering. Kenneth Mack discusses one prominent case that helped establish the legal reputation of Charles Hamilton Houston, dean of the Howard University School of Law and soon to be the NAACP's first general counsel. Taking up the case of George Crawford, a Black man accused of murdering a prominent socialite, Houston pursued a jury composition challenge—before *Norris* had even been heard by the Supreme Court. The argument had the makings of "an explosive combination," and as hundreds of spectators filled the Loudoun County Courthouse in the fall of 1933, "Houston's own race constituted an attack on segregated public space, as did his principal legal argument— that the exclusion of African Americans from grand and petit juries in the county was unconstitutional."[70] At the grand jury hearing, as reported by the press, Houston argued that the presiding judge was perpetuating a racial caste system "prevalent in Virginia and the South." Though he lost the jury challenge, Houston proceeded with the case in a different tone. "Once a sign of entrenched racial inequality," Mack describes, "jury exclusion now became an issue on which lawyers could take differing good-faith views…[in pursuit of] a common cause: ensuring that cross-racial professionalism would govern the conduct of the trial."[71] As the trial went on and admiration for his command of the defense on both sides of the courtroom became palpable, Houston would claim that the jury rulings were fair; in return, judges involved conceded that Black men were fit for jury service. Instead of being condemned to die or lynched, Crawford was given a

[70] Mack, *Representing the Race*, 88–89.
[71] Mack, 98.

double life sentence, and the good will among lawyers gathered at the trial's conclusion led one newspaper to declare, "Crawford Case Ends in Legal Love Feast."[72]

Mack's penetrating account of civil rights lawyers' professional politics depicts another key aspect of "representativeness" that a doctrinal focus on statistics elides. Narrowing the grounds for claiming jury discrimination to technical concerns had tangible advantages for civil rights lawyers engaged in the thankless task of representing Black clients under the Jim Crow justice system. This was all the more important as the changes wrought by *Norris* and *Pierre* made subtler means of exclusion, like peremptory challenges and colored ballots, more desirable.

Over the next few years, before his declining health led him to focus on private practice, Houston decisively shaped the legal strategies of the NAACP in pursuit of overturning the "separate but equal" doctrine enshrined by *Plessy*. His protégé Thurgood Marshall took up the torch, and criminal defense work became a crucial fundraising vehicle for the NAACP as it continued its campaigns against segregated education and racially restrictive covenants. Families of the accused frequently went on speaking tours that helped to support struggling branches and connect litigation with the concerns of communities. Though requests for assistance in criminal cases were common, legal strategy took priority over legal services.[73]

In fact, the successes of the procedural victories won by civil rights advocates had the potential to be liabilities in the political climate of the Cold War. In 1949, seven young Black men in Martinsville, Virginia were swiftly convicted for raping a white woman—by all-white juries, though Black men appeared in each pool—and sentenced to death. Lest the case become another Scottsboro, the court urged counsel to try the case "as through both parties were members of the

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[72] Mack, 106–7.

[73] Klarman, *From Jim Crow to Civil Rights*, 165–66.

same race." As Eric Rise describes, the case of the Martinsville Seven reflected a changed national mood, as civil rights lawyers navigated a fervently anti-Communist national mood and mob violence was channeled into faith in law and order to effect racial control through formal means. This changed state of affairs meant that the NAACP was "forced to initiate broad attacks on systemic racism in the legal process while simultaneously distancing themselves from radical civil rights organizations."[74] Such charges now took on a more procedural and formal tone, impugning the system of capital sentencing for its unfairness rather than as a tool of racial oppression. With assistance from the national NAACP, the law firm that represented the Martinsville Seven appealed the sentences with a two-part equal protection claim. The first element echoed the *Plessy* strategy in the school segregation campaign: using statistics, the lawyers argued that more than a thousand Black men had been convicted of rape, with fifty three sentenced to death and most executed, while eight hundred white men had been convicted of the same, the only one sentenced to death had his sentence commuted to life and was later pardoned by the governor. This was supplemented by a historical claim, referring to Virginia law prior to 1865 that specified a ten to twenty-year penitentiary stay for white persons convicted of rape and a death sentence (with confinement as an alternative) for a Black man convicted of raping a white woman. The argument, in sum, was that statistics documented persistent enforcement modeled on a statute rendered invalid by the fourteenth amendment—a "segregated dual system of justice," clearly separate and unequal. A Virginia judge declared there was "not a scintilla of evidence" in the claim. They filed an appeal

[74] Eric W. Rise, "Race, Rape, and Radicalism: The Case of the Martinsville Seven, 1949-1951," *The Journal of Southern History* 58, no. 3 (1992): 463, 465.

"rais[ing] issues which have never been clearly presented to the Supreme Court in any other criminal case…based solely on the unequal method of sentencing" but were denied certiorari.[75]

Martinsville was certainly not the last time the NAACP LDF took on a rape case, despite the discomfort they raised for Marshall.[76] Around the same time, while preparing the appeals for the school segregation cases, Marshall and LDF associate counsel Jack Greenberg were busy dealing with another rape conviction for multiple Black young men in Groveland, Florida. The case profoundly shaped both men at this crucial juncture. While they won a small procedural victory based on *Cassell*, secured a change of venue due to the outsize publicity, and pressed the Department of Justice and Federal Bureau of Investigation to intervene, the case was marred by violence that culminated in the death of the Florida NAACP executive director by a bombing in his house.[77] Perhaps Martinsville was not the new normal after all.

As campaigns against racialized lynching were translated into courtroom challenges to capital punishment, some of the force of the arguments made by Wells and other activists was blunted by an emphasis on proceduralism that seemed more promising to many who saw the courts as a potential lever of change rather than an inherently oppressive institution. Others took note. *Hernandez v. Texas* (1954) recognized the exclusion of Mexican American jurors under equal protection, opening up discrimination claims to a group that had been strategically treated by the state as white in all prior challenges.[78] It was not until 1975, however, that Supreme Court extended the "fair cross section" requirement to bar the systematic exclusion of women from

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[75] LDF Records, Box 66, Folder 8, "Rape--Martinsville Seven, Correspondence, 1950" and Folder 13, "'Report on the Case of the Martinsville Seven,' 1951"; Rise, 478.
[76] Greenberg, *Crusaders in the Courts*, 102.
[77] For a full account, see King, *Devil in the Grove*.
[78] Gross, *What Blood Won't Tell*, 277–78.

juries.[79] The promise in these strategies was evident, but commitments to quantification and, increasingly, survey research, had the potential to lead arguments in directions other than the ones their proponents desired.

Cross Sections or Discretion?

Following *Norris* and its progeny, the embrace of statistics in jury discrimination cases—and increasingly in the voting rights arena—became increasingly formal. For the most part, these challenges modeled the selection process as a particular kind of entity: Bernoulli's urn, a container of black and white balls of different proportion mixed together, from which one can make inferences about the proportion based on a set of observations, or determine the probability of a particular sequence.[80] Such models did not leave room for discretionary practices that the Court largely chose to leave intact out of concern for its legitimacy. Meanwhile, new actors came onstage: civil rights lawyers employed by the justice department, and law school graduates eager to apply knowledge and methods learned elsewhere to litigation. Though most were trepidatious, the availability of computers led some to think about how quantitative frameworks might change the administration of justice, or at least how it was understood. These changes affected the very language of law at a time when legal process thinkers tried to forge a path between realism and formalism. Speaking about randomness and proportionality in the drawing of cross-sections rather than systemic underrepresentation rooted in history helped define where discretion was allowed to enter into the process, making it more difficult to challenge.

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[79] *Taylor v. Louisiana*, 419 U.S. 522 (1975).

[80] On the Bernoulli model and different statistical analogies, see Daston, *Classical Probability in the Enlightenment*.

In the 1950s, observers of the legal system were becoming concerned with the volume of business the Supreme Court was doing and began scrutinizing the legal system itself through a statistical lens. In "The Time Chart of the Justices," the legal process scholar Henry M. Hart, Jr. argued that the Court was trying to decide more cases than it can decide well, and that it "would better serve its function, and actually relieve the pressure on its dockets, if it tried to decide fewer cases and to write in those fewer cases better-reasoned opinions."[81] The case Hart chose to exemplify the problem involved a claim of jury discrimination based on community prejudice against an accused murderer. He thought that the way it was decided compounded the problems introduced by a muddled decision in an earlier case, *Brown v. Allen* (1953), which seemed to say the use of habeas corpus required federal district courts "to hear again the controversy notwithstanding prior determinations of substantially identical federal issues by the highest state court," even when the Supreme Court declined to hear a case.[82] Hart was concerned that this would mean more business for an already overtaxed federal court system. Beyond independent scrutiny of the facts, like in *Pierre*, this wider berth would perhaps change the way that state courts did their work, in order to avoid such appeals. Put concretely: clients with shoddy representation could appeal their convictions by biased juries in courts that increasingly leaned on statistical evidence.

One scholar has called *Brown v. Allen* "the habeas corpus revolution that wasn't," but such activity was shifting toward the district courts.[83] The importance of this issue will become clear later, when the campaign against capital punishment gets off the ground, but I am interested in the

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[81] Henry M. Jr. Hart, "Foreword: The Time Chart of the Justices," *Harvard Law Review* 73, no. 1 (1959): 100–101.

[82] *Irvin v. Dowd*, 359 U.S. 394 (1959); *Brown v. Allen*, 344 U.S. 443 (1953) at 460; Hart, 119.

[83] Eric Freedman, "Brown v. Allen: The Habeas Corpus Revolution That Wasn't," *Alabama Law Review* 51, no. 4 (2000): 1541–1624. Freedman's argument addresses a debate over whether the uptick in habeas corpus review beginning in the 1960s was a longstanding development or just the result of a bad decision. The idea that *Brown* was an aberration plays into the hands of those who wish to limit use of the writ.

case for another reason. Following the jury discrimination cases of the 1930s and 40s, states began to adopt new technologies in their procedures. In *Brown v. Allen*, instead of testimony offered by a jury commissioner, the court now called in a supervisor from IBM who had been responsible for preparing all of the lists, which were then cut up into uniform slips and "the drawings were made by a small child and recorded in public," a strange performance of innocence and technocracy that meant there could be "no claim or evidence of chicanery in the drawings."[84] Challenging such practices would require a more refined statistical arsenal. Some cases, of course, were clearer cut.

Contrast this with the system at issue in *Avery v. Georgia* (1953), where the names of white and Black jurors had been placed, respectively, on white and yellow cards for the drawing. The Supreme Court easily reversed the judgment, but even here the Justices felt compelled to comment on statistical proof. Justice Reed felt compelled to state the demographics at issue, while Justice Frankfurter noted that "opportunity for working of a discriminatory system exists" when differentiation by race was a component part, but "such a mechanism certainly cannot be countenanced when a discriminatory result is reached." Regarding the statistical disparity—5% of the slips were yellow, but none were drawn of the 150 or 200 chosen for service—he added, "[t]he mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity."[85] Nonetheless, it was the fact that the different colored cards presented an opportunity to discriminate that made it an easy case.[86] While some states modernized their selection procedures

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[84] *Brown v. Allen*, 344 U.S. 443 (1953) at 467-68.

[85] *Avery v. Georgia*, 345 U.S. 559 (1953).

[86] In fact, Michael O. Finkelstein (see below) crunched the numbers and argued that the situation in Avery was far more likely than the one in *Swain*. Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 365.

with the latest in computing technology, others dug their heels in—Georgia seems to have kept using the cards.[87]

In the climate of the "massive resistance" organized by Southerners in the wake of *Brown*, control over juries was a crucial battleground. A key provision of the 1957 Civil Rights Act was civil trials without juries, fearing easy acquittals by the finely-tuned mechanism of all-white jury selection, but Lyndon Johnson added it in an effort to water down the legislation. It took another act in 1960 to expand judges' authority over voting rights cases and require states to keep detailed voting records to form the evidentiary basis of lawsuits. The 1957 Act had also provided for an additional Assistant Attorney General to head up the Civil Rights Division, expanding the most prominent avenue for civil rights lawyers outside of the LDF and ACLU.

This federal support was much needed, because it was not clear that Southern lawyers were relying on jury discrimination claims much at all. In 1959, the Fifth Circuit reversed the conviction in a 1954 murder case that had twice been denied certiorari by the Supreme Court, writing that "the naked figures prove startling enough" to make out a case of "systemic and willful" exclusion. "As Judges of a Circuit comprising six states of the deep South," they wrote further, "we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."[88] Decisions like this testify to claims throughout civil rights lore that the Fifth Circuit played a more important role than the Supreme Court in "[impressing] the lesson upon recalcitrant officials in the Deep

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[87] Del Dickson has argued that in a subsequent case, Georgia state courts refused to acknowledge *Avery*, setting the stage for the kinds of struggles that the Court would deal with in *Brown II*: Del Dickson, "State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited," *The Yale Law Journal* 103, no. 6 (1994): 1423–81.

[88] *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959) at 82.

South that evasion of constitutional standards would no longer be tolerated."[89] But the history of the case is testament to the ongoing struggle Black lawyers faced over representation described by Mack. The defendant initially retained a white lawyer who refused to work with prominent Black Chicago lawyer, George N. Leighton, to raise the jury claim. Robert Lee Goldsby's extended family asked Leighton to leave the case in the hopes of improving his chances. Leighton returned to win the appeal after the white counsel lost, but procedural safeguards were not enough. Convicted again upon retrial, Goldsby was executed in June of 1961.[90]

Goldsby's saga was a touchstone of segregationist politics in Mississippi. He was tried by avowedly segregationist lawyers including Ross R. Barnett, soon-to-be governor elect, hired as a special prosecutor by the victim's husband.[91] Yet, the Fifth Circuit's stance on statistical proof was reiterated yet again in the voting rights lawsuit against the state of Alabama brought by the Civil Rights Division, the source of the oft-cited aphorism *statistics often tell much, and courts listen* in cases of racial discrimination.[92] At the very same time, voting rights litigation had resulted in a case that threatened to tear the Warren Court apart—allegedly leading one Justice to a nervous breakdown and another to a stroke, ending both of their careers—prompting sharply divergent opinions on federal power, mathematical formalism, and the "representativeness" standard.

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[89] Randall Kennedy, *Race, Crime, and the Law* (New York: Pantheon Books, 1997), 179.

[90] *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959) at 83; "Slayer Is Executed: Negro Dies in Mississippi for Killing White Woman," *The New York Times*, June 1, 1961.

[91] "Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries," *The Yale Law Journal* 72, no. 3 (1963): 559–73; Robert E. Luckett, Jr, *Joe T. Patterson and the White South's Dilemma: Evolving Resistance to Black Advancement* (Jackson: University Press of Mississippi, 2015).

[92] See above, Part One overview.

In *Baker v. Carr* (1962), the Court held that redistricting claims counted under the Fourteenth Amendment and could thereby be raised in federal court.[93] While the majority and concurrences held that "mathematical equality" was not a reasonable requirement for redistricting, the Court clearly disagreed on how such oversight would work and the lengthy decision produced two competing formulas for gauging representation.[94] In theory, the case had nothing to do with the jury discrimination jurisprudence. One of the more remarkable features of the decision is Justice Frankfurter's searing dissent, most of which—apart from the opening salvo—was written by his law clerk, Anthony G. Amsterdam.[95] Frankfurter had both avoided endorsing constitutional arithmetic and lauded the clarity of statistical demonstrations, reflecting the tendencies of his mentor, Holmes. Here, he sought to differentiate "the relationship between population and legislative representation" from "denial of the franchise to individuals because of race, color, religion or sex."[96] Frankfurter thought that courts were inadequate to deal with "the incommensurable factors of policy that underlie these mathematical puzzles" and cautioned against "[attributing], however flatteringly, omnicompetence to judges."[97] Amsterdam provided the substance, reviewing English common law and colonial precedent, and noting "a decided twentieth-century trend away from population as the exclusive base of representation," he artfully rattled off statistical incongruities to argue that "there is not—as there has never been—a standard by which the place of equality as a factor in

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[93] *Baker v. Carr* made possible the "one person, one vote" standard that became law in *Reynolds v. Sims* (1964)
[94] *Baker v. Carr*, 369 U.S. 186 (1962) at 258. In the appendix to Justice Harlan's dissent, he argues: "The fault with a purely statistical approach to the case at hand lies not with the particular mathematical formula used, but in the failure to take account of the fact that a multitude of legitimate legislative policies, along with circumstances of geography and demography, could account for the seeming electoral disparities among counties," *Baker v. Carr*, 369 U.S. 186 (1962) at 345.
[95] Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court – A Judicial Biography* (New York: New York University Press, 1983), 413.
[96] *Baker v. Carr*, 369 U.S. 186 (1962) at 267.
[97] *Baker v. Carr*, 369 U.S. 186 (1962) at 268.

apportionment can be measured."[98] As we shall see, Amsterdam became a leading proponent of statistics and social science to contest the death penalty. His opinion is perhaps less ironic than it is telling of his adeptness with the affordances and erasures of quantification. Unfortunately, with pending legislation, such dissensus provided ammunition for conservatives. Amid debates over the Voting Right Act, Senate Minority Leader Everett Dirksen criticized *Reynolds v. Sims* (1964), which followed on the heels of *Baker*, averring, "the forces of our national life are not brought to bear on public questions solely in proportion to the weight of numbers."[99]

When it came to voting rights, the politics of numbers in the midcentury United States were like the negative image of Enlightenment wrangling over the arithmetic of canon law described by Lorraine Daston: those advocating for apportionment tied more closely to population were hoping to upend, rather than preserve, the status quo. In jury selection, the picture seemed different. Some had interpreted Frankfurter's admonition in *Cassell* as an invitation for courts to shun discretion and embrace chance more thoroughly. One law review article later invoked Frankfurter's opinion to support "a lottery system by which both grand and petit jurors are selected purely upon mathematical chance."[100] But with arguments for proportional representation off the table, the question of how to interpret discrepancies when they so often arose remained unresolved. One political scientist writing in 1962 analyzed patterns and discrepancies in jury discrimination cases by measuring the probability of discrepancies in black/white jury representation given the racial makeup of a population. Referring to *Cassell*, where the probability was less favorable, he noted that "[while] the court has not publicly used statistical tests of significance for the differences observed,

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[98] *Baker v. Carr*, 369 U.S. 186 (1962) at 319, 322-323. Thanks to Kunal Parker for pointing this out.
[99] Reapportionment of State Legislatures: Hearings Before the United States Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments, 89th Cong., 1021.
[100] Frederick W. Burnett, Jr., "Texas Grand Jury Selection System - Discretion to Discriminate?," *Southwestern Law Journal* 21, no. 2 (January 1, 1967): 551.

nothing prevents us from doing so in our search for a standard."[101] For the most part, there were no standards, only upper limits set by the moral parameters read into procedural rules.

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A decade on from the NAACP LDF's harrowing experiences in Martinsville and Groveland, the legal climate was warming to evidence of systemic racial discrimination. It seemed as though the time was ripe to try again with capital punishment. In early 1965, Greenberg proposed an LDF conference devoted to "[expansion] of the attack on capital punishment with immediate emphasis on interracial rape convictions, with eventual attack on all capital punishment against Negro defendants, regardless of the crime."[102] This was a battle to be waged on multiple fronts, but its first attempt to do so through procedural claims led to dispiriting results. The simmering conflict between chance and representativeness came to a head when the Court decided *Swain v. Alabama* (1965), a challenge to the systematic use of peremptory strikes to remove Black men from petit juries, as well as systemic underrepresentation in the pool from which the list was drawn. It was the last case LDF associate counsel Constance Baker Motley ever argued before the Supreme Court; it would be the only one she ever lost.[103] Motley spent much of oral arguments in a back-and-forth over hypothetical uses of peremptory strikes, so much so that Chief Justice Warren intervened to steer things back to the question of jury composition.[104]

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[101] S. Sidney Ulmer, "Supreme Court Behavior in Racial Exclusion Cases: 1935-1960," *The American Political Science Review* 56, no. 2 (1962): 327.

[102] Greenberg, *Crusaders in the Courts*, 597.

[103] Recently elected to the New York State Senate, Motley would be named the first woman Manhattan Borough President before Swain was announced in 1965. On Motley, see Tomiko Brown-Nagin, *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality* (New York: Pantheon Books, 2022).

[104] "Do you have to go as far as you have just gone in making this particular argument in order to prevail?" *Swain v. Alabama*, oral arguments, December 8th, 1964

The ruling was a major blow to the LDF. Justice Byron White upheld the use of peremptory challenges to strike black jurors from a panel, and rejected the proportional argument about jury composition.[105] They had claimed that only 15% of men who actually served on jury panels in the county since 1953 had been black, despite being 26% of the relevant age group—the court ruled that a discrepancy of 10% did not meet the threshold of establishing purposeful discrimination.[106] White concluded that an imperfect jury system did not amount to intentional racial discrimination: it was "wholly obvious" that the system had "not totally excluded a racial group," and more strongly that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn."[107] Justice Goldberg's dissent argued that the evidence made out a clear *prima facie* case of discrimination the state had not successfully rebutted with justification for why all Black jurors were struck. This was particularly conspicuous because the record showed black jurors were only allowed when the victim was also black.[108] But because the Court had never established a clear, numerical cutoff, *Swain* easily upheld both discretionary strikes and the composition of a jury list from anything other than racially coded cards.

A case note in the *Virginia Law Review* pointed out the extent to which White's opinion departed from the *Goldsby* logic set out by the Fifth Circuit: that even the appearance of systemic discrimination, like striking all Black jurors, precluded a fair trial. In this way, *Swain* created a new burden of proof that "[seemed] an impossible one for any single individual to carry."[109] Indeed, the

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[105] *Swain v. Alabama*, 380 U.S. 202 (1965)
[106] *Swain v. Alabama*, 380 U.S. 202 (1965) at 205.
[107] *Swain v. Alabama*, 380 U.S. 202 (1965) at 206, 208.
[108] *Swain v. Alabama*, 380 U.S. 202 (1965) at 232, 236.
[109] F. R. D., "Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury," *Virginia Law Review* 52, no. 6 (1966): 1160.

piece damningly called the case "A Constitutional Blueprint for the Perpetuation of the All-White Jury." The author took the Court to task for punting on the "knotty problems of constitutional balancing and statistical inference-drawing," a refusal that effectively "handed the states a blank check for discrimination."[110] Traditions of discretionary deference, especially at a highly political moment for criminal justice, stood above scrutiny.

Another article in the *Harvard Law Review* by statistically savvy law graduate Michael O. Finkelstein took the critique of *Swain* a step further, suggesting that courts were out of sync with an emerging literature on the science of judicial decision-making that revived a tradition dating back to Enlightenment France where *philosophes* like Condorcet, Laplace, and Poisson fleshed out the contours of modern probability theory through the study of legal problems.[111] Finkelstein argued that *Swain* threw "into sharp relief the problem of drawing a line between significant and insignificant disparities" because courts had adopted no statistical standards for demarcating legal problems from evidentiary ones.[112] Using a probability calculus, he put the situation in *Swain* into stark, practical terms: "If thirty jury venires were selected at random in Talladega County every day of the year, the daily selection would correspond to the facts in *Swain* only one day, on the average, in thousands of trillions of years."[113] Formulations like this, he argued, would draw brighter lines between rules and the evidence they applied to, serving to "make the decisions in the jury discrimination cases a more natural and inevitable consequence of the data which determine

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[110] F. R. D., 1175.

[111] Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases." For a thorough account of how classical probability was intertwined with Enlightenment politics, see Daston, *Classical Probability in the Enlightenment*. This article and a later one by Finkelstein on the identification of evidence were heavily criticized in a well-known piece by Laurence Tribe, producing a back-and-forth I do not have the space to recollect here. Tribe, "Trial by Mathematics."

[112] Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 348.

[113] Finkelstein, 357.

them."[114] Finkelstein, a former Civil Rights Division lawyer and the nerdy foil to former football star Justice White, saw no conflict between his own objectivity and advocacy for statistical methodology. He thought that this approach would do far more for civil rights cases than "more tender-minded Justices or more appealing verbal formulations."[115]

While Finkelstein was clearly a statistician's lawyer, others were on the same track. Analyses of *Swain* had been a major source for EEOC lawyer Sonia Pressman's 1966 memo about the use of statistics in Title VII cases, and the *prima facie* test had some success.[116] In *Jones v. Lee Way Motor Freight, Inc.* (1970), a group of black truck drivers hired prior to 1965 under a no-transfer rule sued their employer for maintaining racially segregated job categories and Tenth Circuit judges accepted their statistical evidence showing that race had remained a relevant category, claiming, reinterpreting the line from *Alabama v. United States* that "statistics often demonstrate more than the testimony of many witnesses."[117] Attention to voting rights spilled over into jury issues. Legislation was introduced in 1966 to make *Strauder* and *Neal* enforceable, but it died in the Senate.[118] Though the question of what thresholds of statistical *proof* were acceptable in courts remained unresolved, judges around the country still accepted statistical evidence as an *illustration* of systemic discrimination and legislators worked to write laws that made use of hard numerical triggers.

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[114] Finkelstein, 376.
[115] Finkelstein, 349.
[116] On the basis of statistics showing clear disparities between a company's workforce and the demographics of Arkansas, the Eighth Circuit overturned a lower court decision that denied Arthur Ray Parham relief from employment discrimination because the company had adopted an affirmative action policy after he filed an EEOC complaint in 1967: *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970).
[117] *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970) at 247.
[118] Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 341.

Legally-minded investigators steeped in 1960s social science were beginning to ask questions that went beyond the legal process itself: what did a fair jury look like in practice, as a sociological phenomenon? The University of Chicago Jury Project, funded by a $1.4 million Ford Foundation grant, epitomized the turn toward empirical, computer-driven investigations that scaled up the social survey for a new era. Studying the courts amidst the civil rights battles of the 1960s, lead investigators Harry Kalven and Hans Zeisel "expected [their work] to yield considerable evidence on whether or not the jury is color blind" but they ended up collecting only "a few scattered findings." Particularly embarrassing for their project were cases involving race in which the judge and jury were in conflict: "[the] jury is, as the judge sees it, moved at times to leniency because it views the defendant as not fully acculturated and therefore incapable of white standards of self-control." Such explanations, the authors noted, "[spoke] more in the language of contempt than in that of tolerance."[119]

While some used computer power to evaluate the fairness of the court system, others proposed computational means of improving it. The journal *Modern Uses of Logic in the Law* rebranded in 1966 as the *Jurimetrics Journal*. Its inaugural issue featured an optimistic note on the potential for computers to reduce caseloads, leaving courts to focus on the hard work of justice rather than be burdened with administrative functions. In so doing—and with, perhaps, a very limited audience—the author clarified some nascent trends. Investigators had embraced statistics to analyze the law in action, and computers offered the promise of streamlining legal practice, saving mental energy to exercise discretion in answering tough questions.[120] Proposals like this overlooked the fact that values of discretion and uniformity were often in competition. Liberal reformers who

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[119] Harry Kalven and Hans Zeisel, *The American Jury* (Boston: Little, Brown, and Company, 1966), 344.
[120] Mary Ellen Caldwell, "The Computer and the Demand for Interdisciplinary Research: Report of Delegate to Interuniversity Communications Council," *Jurimetrics Journal* 8, no. 2 (1966): 91–95.

wielded statistics for social justice had company, but interests in quantification also fed into other agendas.

Meanwhile, Finkelstein's article had legs. It was cited as supporting evidence in yet another Supreme Court jury selection case, one in which the county was nearly half Black, yet trial juries tended to be all white. As with earlier cases, tax lists were comprised of records that identified payees by race. Though the markings assured the argument cleared the hurdle of intent, "[a]ssuming that 27% of the list was made up of the names of qualified Negroes, the mathematical probability of having seven Negroes on a venire of 90 is .000006." Such clarity could only help.[121]

This newfound prominence as an expert citation made Finkelstein valuable for the LDF. He presented at one of the LDF's training conferences to familiarize its lawyers with the statistical strategy. As Jack Greenberg recounts fondly in his memoir:

> [Using] a large beaker from a chemistry lab, with a narrow neck, filled with black and white marbles, a dozen of which fell below a certain line when someone shook the jar. Mike had formulas by which he might predict the black-white ratio of the marbles below the line if the grouping were random…in the context of selecting jurors, where a difference occurred between the black-white ratio of jurors who actually were elected and the ratio that would have occurred through the operation of chance, we would argue that the burden of proof should shift.[122]

Swain and the LDF's ongoing investment in statistical expertise show that statistical arguments about jury composition were widely accepted in federal courts. Even when they did not succeed, and with arguments for proportional representation off the table, uses of numbers reshaped the arena of conflict itself. What determined the weight of a disparity? Was it a matter of magnitude or simply one element of a pattern? For the most part, states did not counter with their own statistical experts because the burden shifted was not a heavy one. They depended instead on isolating the

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[121] *Whitus v. Georgia*, 385 U.S. 545 (1967).
[122] Greenberg, *Crusaders in the Courts*, 459.

procedural details of cases from broader patterns, and on championing the exercise of discretion in the courtroom. After all, it was a court, not a classroom, and they made the rules.

Statistical Injustice

The *true* origins of the LDF's campaign against the death penalty are the stuff of myth. Some say that it arose spontaneously over sandwiches, others that it was handed down by edict from Greenberg.[123] Regardless of the proximal circumstances, there is little question that latent energies gathered in previous efforts by the LDF to support capital punishment cases were unleashed late in 1963, when staff lawyers were notified of a dissent by Justice Arthur J. Goldberg in the Supreme Court's refusal to grant *certiorari* in two death penalty appeals.

Emboldened by events and texts of the day, like A. Philip Randolph and Bayard Rustin's March on Washington, Michael Harrington's poverty exposé *The Other America*, and James Baldwin's explosive *The Fire Next Time*, the rookie Justice became frustrated by his inability to direct the Court toward urgent matters of inequality.[124] The death penalty, and its association with lynching based in rape accusations by white women against Black men, weighed on him. In an audacious move, Goldberg urged his fellow Justices to consider the very constitutionality of capital punishment. Though he would not be long for the Supreme Court, Goldberg's dissent in *Rudolph v. Alabama* (1963) set the terms of the death penalty debate for decades.[125]

To that extent, what was left out of the dissent mattered almost as much as what was in it. Goldberg grounded his reasoning in two Supreme Court cases that considered the scope of military

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[123] On origin myths, see Gottschalk, *The Prison and the Gallows*, 355.

[124] On the liberal anti-poverty consensus, see above, Chapter One, and Katz, *The Undeserving Poor*.

[125] In an effort to clear a seat on the court for his longtime friend, Abe Fortas, who he hoped would succeed Earl Warren as Chief Justice, President Johnson appointed Goldberg as Ambassador to the United Nations. On the Supreme Court and presidential politics, see Laura Kalman, *The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court* (Oxford: Oxford University Press, 2017).

punishment in an evolving U.S. empire. *Weems v. United States* (1910) involved a government officer in the Philippines found guilty of falsifying a document and sentenced to fifteen years of *cadena temporal*, a sort of chain gang of Spanish origin. The Court appealed to "standards of decency more or less universally accepted" to declare the punishment excessively cruel.[126] Closer to home was *Trop v. Dulles* (1958), a challenge to the Nationality Act of 1940 by a military deserter dishonorably discharged in Morocco and stripped of citizenship. Citing "evolving standards of decency" Chief Justice Earl Warren ruled denationalization unconstitutional. However, in articulating a more expansive Eighth Amendment, Warren had taken the death penalty off the table at the outset: "let us put to one side the death penalty…in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[127] Without leaning too heavily on *Trop*, Goldberg's dissent articulated three questions that appealed vaguely to the Court's prior efforts to remain in step with social change while attacking the proportional basis of the death penalty as a punishment for rape.[128] Noticeably absent was any explicit mention of racial inequality or discrimination as a constitutional issue.[129]

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[126] Arthur J. Goldberg, "The Death Penalty and the Supreme Court Symposium: Pivotal Decisions of the Supreme Court," *Arizona Law Review* 15, no. 2 (1973): 355–68.

[127] Mandery, *A Wild Justice*, 19–20. Perhaps for this reason, Goldberg's retrospective on the dissent downplays the *Trop* argument. Both of these cases were analyzed by Beverly Hills antitrust lawyer and ACLU member Gerald Gottlieb in a 1961 article, cited in neither the dissent nor the memo.

[128] "(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or 'standards of decency more or less universally accepted?' (2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive severity are greatly disproportioned to the offenses charged?' (3) Can the permissible aims of punishment (e. g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e. g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty?'" *Rudolph v. Alabama*, 375 U.S. 889 (Goldberg, J., dissenting, joined by Justices Douglas and Brennan).

[129] The dissent cites a report prepared by French Supreme Court Justice Marc Ancel for the United Nations, which contains only a passing reference to the racial inequality problem: "[In] some countries (it is added) the death penalty is applied most unequally, both from the social and from the racial points of view; some persons

This was not lost on LDF attorneys, who puzzled over how it might help them support death row clients. Leroy Clark, discussing the dissent with colleagues Michael Meltsner and Frank Heffron some months later, was bitter that the Justices did not find racial discrimination relevant enough to mention; Meltsner "worried about the difficulty of proving discrimination."[130] Despite some reservations, the omission spurred them into action. What they did not know at the time—fortunately, perhaps—was that the published dissent was a heavily watered-down version of a memo drafted by Goldberg and his law clerk, Alan Dershowitz, circulated among the Justices in an effort to stir the pot before the Court's October conference. It was unconventional and played up tensions within a Court increasingly embattled over the question of judicial review.

Through oral histories and analysis of Supreme Court conference papers, Evan Mandery has shown how the memo was inspired by concerns over racism in capital punishment that were later suppressed in response to Justices' anxieties over racial tensions.[131] The original was largely the work of Dershowitz, who had assisted in the successful appeal of a young Black man sentenced to death for accidentally killing a policeman while clerking on the Court of Appeals for Judge David Bazelon. Looking through prison statistics, Dershowitz noted the disturbing trend that nearly all death sentences in rape cases involved a white victim and Black defendant, figures that insinuated the all-too-near legacy of lynch mobs as an institution upholding the racial and sexual order of the

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have not sufficient financial means to defend themselves or are morally unable to do so." Marc Ancel, "Capital Punishment" (United Nations, Department of Economic and Social Affairs, 1962), 62.

[130] Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 31. Clark focused on issues at the intersection of racism and poverty. He would help start the LDF's National Office of the Rights of the Indigent (NORI), which played a key role in the LDF's strategy of putting a moratorium on the death penalty (see below), and served as General Counsel for the Equal Employment Opportunity Commission under Eleanor Holmes Norton, the Chair during the Carter Administration: "LDF Mourns the Loss of Leroy D. Clark, Former LDF Counsel and Venerated Law Professor," LDF Legal Defense Fund, December 6, 2019, https://www.naacpldf.org/press-release/ldf-mourns-the-loss-of-leroy-d-clark-former-ldf-counsel-and-venerated-law-professor/.

[131] Mandery, *A Wild Justice*, 16–29.

Jim Crow South.[132] His original draft foregrounded both racial discrimination and mounting evidence against any deterrent effect of capital punishment. Goldberg took up the deterrence line; leaving the inconclusiveness of the research as it was, he argued the State could not carry the burden of justification. However, he buried the discussion of racial discrimination in a final footnote pointing to the "well-recognized disparity in the imposition of the death penalty for sexual crimes committed by whites and nonwhites…between 1937 and 1951, 233 Negroes and 26 whites were executed for rape."[133]

Though the memo muted Dershowitz's exhortations to address systemic racism, even Goldberg's political allies on the bench chafed at the boldness of the proposal. Goldberg announced his intention to publish the memo in a law review, prompting former Justice Felix Frankfurter, whose seat on the court he had filled, to refer to him derisively as "Goldberg, the scholar."[134] Chief Justice Earl Warren, still managing the political backlash against *Brown*, urged him to refrain.[135] With Southern billboards calling for his impeachment, Warren hesitated to draw the court into matters involving interracial marriage, let alone rape; *Loving v. Virginia* (1967) would not be decided for another four years. Under his influence, the final dissent in *Rudolph* removed all traces of the cause that had inspired Dershowitz's conceptual framework for rendering the death penalty unconstitutional. It was a harbinger of battles to come over the significance of race in criminal justice, a line on which the Supreme Court would barely budge.

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[132] David Garland, "Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America," *Law & Society Review* 39, no. 4 (2005): 793–834.
[133] The memo was later published in its unaltered form: Arthur J. Goldberg, "Memorandum to the Conference Re: Capital Punishment October Term, 1963," *South Texas Law Review* 27, no. 3 (1986): 493–506.
[134] Mandery, *A Wild Justice*, 26.
[135] On the "backlash" thesis, see Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis," *The Journal of American History* 81, no. 1 (1994): 81–118.

That there were racial disparities in the administration of capital punishment was certainly not new, but in the 1960s the issue took on a new tone. The movement to save the life of Caryl Chessman, a death row inmate whose public writing garnered international support, prompted California Governor Edmund "Pat" Brown to ask the legislature to abolish the death penalty. He justified his opposition not primarily on moral grounds, but by claiming that it was "primarily inflicted upon the weak, the poor, the ignorant, and against racial minorities," rattling off statistics from California on the overrepresentation of Black and Mexican Americans among those executed by the state, "compelling evidence of the gross unfairness and social injustice which has characterized the application of the death penalty." Writing in the *Crisis* later that year, Franklin H. Williams—the NAACP attorney primarily responsible for the Groveland cases and now assistant attorney general of California—expanded on these statistics with data from the Federal Bureau of Prisons, and provided a comprehensive overview of available arguments against capital punishment: its lack of a deterrent effect, execution of the innocent, a worldwide trend toward abolition, and its potential to "brutalize" society, to name the biggest. He concluded by calling for the death penalty to become a civil rights issue, asking minorities to "lend their prestige and the weight of their protests and votes in any campaign for its abolition."[136]

The LDF decisively took up the call in the early 1960s, and the first step it took was to revisit the strategy it had abandoned when one client sentenced to die for breaking into a home with "intent to rape" received a life sentence on retrial.[137] The equal protection argument developed

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[136] Franklin H. Williams, "The Death Penalty and the Negro," *The Crisis: A Record of the Darker Races*, October 1960.

[137] In a 1969 article, Greenberg claims that the idea for the "cruel and unusual argument came in the course of representing the defendant in *Hamilton v. Alabama* (1961), in which the Supreme Court reversed on the basis of Hamilton being denied counsel at arraignment. Strategizing for Hamilton's new trial, LDF lawyers considered appealing another death sentence on the grounds that capital punishment was "cruel and unusual"

to defend the Martinsville seven seemed to need something extra to make it an issue the Supreme Court would consider, and Goldberg's eighth amendment suggestion seemed right on target. The professor who had helped with their previous appeal had relocated to California, but, fortuitously, he sent along his former colleague at the University of Pennsylvania Law School, Anthony G. Amsterdam. Too much lore about Amsterdam exists. But what mattered in 1965 was: he had established a reputation as a renaissance man, pursuing a graduate degree in art history while excelling in law school; clerked for Justice Frankfurter, authoring the bulk of his *Baker v. Carr* dissent (and editing his memoirs); published a last-minute research paper on the Supreme Court's "Void-for-Vagueness" doctrine that became one of the most cited law review articles of all time, leading to work defending demonstrators arrested under such laws; and finally, this activity led him to publish another article on the removal of civil rights cases from state to federal courts—as the glowing profile of him in *TIME* magazine later that year put it, he was the "leading scholar of that unfolding technique, one of the big developments in U.S. law." What's more, he had not seriously considered the death penalty before meeting with the LDF but took to it with characteristic gusto.[138] Returning to Penn, he reached out to a colleague and set to work on a social survey that would send a group of law students to the deep South that summer.

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"Whatcha doin' here?"[139]

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in a case "where no life had been taken and no bodily harm had been inflicted" and that the death penalty was imposed in a racially discriminatory manner. Instead, Hamilton received a life term, so these arguments remained within the LDF's Columbus Circle headquarters. Jack Greenberg and Jack Himmelstein, "Varieties of Attack on the Death Penalty," *Crime & Delinquency* 15, no. 1 (January 1, 1969): 114.

[138] Goluboff, *Vagrant Nation*, 133–37; "Lawyers: Prodigious Professor," *Time*, December 10, 1965.

[139] This exchange is drawn from Foerster, *Race, Rape, and Injustice*, 56.

A pair of law students rose with a start to meet the suspicious eyes of a large, older gentleman, clad in pristinely pressed pinstripe pants. This couple from Stanford had elected to spend the summer of 1965 together, roaming the South on a team of twenty-eight law students under the guise of the recently-formed Law Students Civil Rights Research Council (LSCRRC). The LDF arranged for their per diems, measly in light of what their colleagues might be earning pushing pencils at top law firms. Camped out in the sweltering basement of the Alabama Supreme Court building in Montgomery, they were busy poring over bound trial transcripts to gather information on rape trials.

"We're graduate students," the young man answered, "working on material for a paper."

It was a plausible response. At the behest of University of Pennsylvania criminologist Marvin Wolfgang, they were conducting a meticulous survey of each rape case in eleven states in the last twenty years. Their 28-page questionnaires included the usual questions on age, occupation, and prior brushes with the law, but also required surveyors to determine the degree of injury or violence and even "the nature of the intercourse" from court transcripts.[140] Some researchers blushed; others felt their stomachs turn. Collectively, these data were meant to resolve, "through the prism of statistics," whether the death penalty was used on Black defendants disproportionately. Mining cobweb-laden cellars and attics for trial details might appear to the casual onlooker as mere plodding, but the gentleman called their bluff.

"Now don't B.S. me, young man. Y'er here working for the NAACP aren't you?"

LSCRRC members were warned not to stand out. Less than one year prior, during the "Freedom Summer" voter registration campaign, FBI agents discovered the decomposed bodies of

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[140] Foerster, *Race, Rape, and Injustice*, p. 4. On researching rape, see Alexandra Rutherford, "Surveying Rape: Feminist Social Science and the Ontological Politics of Sexual Assault," *History of the Human Sciences* 30, no. 4 (October 1, 2017): 100–123.

three young civil rights workers: Northern college students Michael Schwerner and Andrew Goodman along with Mississippian James Earl Chaney. It soon came to light that their murder was coordinated by a Klansman and Baptist preacher in conjunction with the local police. Discretion was paramount; the guise of the disinterested researcher, a potential lifeline. Nonetheless, out-of-state plates made for easy targets. Efforts to cajole courthouse clerks wary of upending the racial order into retrieving files were punctuated by attempts to dodge pickup trucks full of angry white men seeking to run these "outside agitators" off the road and out of town. Up against a wall, the law students bore the risk and explained the rape study in detail.

The man smiled, baring a set of gold teeth, and introduced himself as Justice Lawson, the lone racial moderate on Alabama's Supreme Court.[141] "I know how hard y'er working and I'll help you where I can."

The couple was left speechless.

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Tense encounters like these marked the efforts of the LSCRRC to access information that was meant to be public. As outsiders, figures like Justice Lawson were crucial intermediaries in the quest for data. Requests for court documents were typically met with suspicion and incredulity, even stonewalling. The Californian couple was told by the chief clerk of Montgomery County that the public records they asked after were "not for you." Only an intervention by Lawson secured them access to the stacks. When they could, the students exploited the contradictions of "a white culture struggling uncomfortably between…rudeness bordering on violence toward blacks and

[141] Ironically, Justice Tom Lawson began his career in Alabama prosecuting one of the Scottsboro Boys. The cases, in which nine Black Alabama teenagers were convicted of rape and all but one sentenced to death, became a famous miscarriage of justice that saw years of appeals and retrials. See below on the LDF's involvement with rape trials.

graciousness showered on whites," using gifts and flattery to procure records.[142] They ingratiated themselves with Southern lawyers, who insisted that their system of justice was, in fact, *more* lenient toward Black people than that of the urban North.

Sometimes, a knowing wink belied the silent compact of racial violence. One researcher recounted coming upon a set of docket books in Louisiana listing charges against defendants but no dates of conviction or sentencing. When he asked after the case files, the elderly clerk smiled and said of the Black defendants in question, "'round he-ah…we Ku-Klan 'em."[143] With some persistence, he gained access to a dusty attic full of teetering stacks of files rife with blank entries that said everything and confirmed nothing at the same time—evidence, perhaps, but not data.

Amsterdam's colleague, in Penn's Center for Studies in Criminology and Criminal Law, was Marvin Wolfgang. Protégé of Swedish-born Johan Thorsten Sellin, arguably the most influential American criminologist during the first half of the twentieth century, Wolfgang fulfilled that status in the second.[144] Khalil Muhammad has described Sellin as a staunch critic of the pathologizing racial discourses that became written into crime statistics, providing a "source of inspiration for black researchers and crime fighters."[145] The reformist Sellin saw equality before the law as a "social fiction" and devoted much of his research to the relationship between "differential treatment" and "apparent criminality." Much of Wolfgang's scholarship cut in the same direction, but reflected the much darker side of criminology that flourished after the 1960s, rooted less in a tradition of critical sociology than professional education in the containment of crime.

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[142] Foerster, *Race, Rape, and Injustice*, 57–58.
[143] Foerster, 22.
[144] Wolfgang's devotion to Sellin is marked by the fact bought (and had long coveted, as correspondence shows) Sellin's Philadelphia house when the latter retired to New Hampshire. Robert A. Silverman, "Marvin Eugene Wolfgang," *Proceedings of the American Philosophical Society* 148, no. 4 (December 2004): 547–54.
[145] Muhammad, *The Condemnation of Blackness*, 255.

Most notably, Wolfgang developed a theory that violence was often initiated by the victims of minor conflicts and exacerbated by a shared "subculture" in which it is expected that the other person will become violent.[146] Though largely regarded as a friend to civil rights activists, serving as the expert witness in a significant lawsuit arguing that the use of arrest records in employment screening was discriminatory, the influence of his work on crime policy has drawn the scrutiny of historians. As Elizabeth Hinton points out in her work on the origins of mass incarceration in Great Society initiatives, research like Wolfgang's "convinced policymakers and law enforcement officials that crime was a foregone conclusion in low-income African American communities, where, it was thought, cultural pathologies and inadequate parental supervision fostered delinquency and violence."[147] Even the very survey instrument the students carried was based on an earlier one Wolfgang developed for his delinquency work. Promoting statistical justice while being "tough on crime" might have shored up Wolfgang's objectivity in the courtroom, but this conjuncture also suggests that research geared toward civil rights reform was coextensive with projects that helped abet the growth of the carceral state.

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[146] Marvin E. Wolfgang, *Patterns in Criminal Homicide* (Philadelphia: University of Pennsylvania Press, 1958).
[147] Hinton, *From the War on Poverty to the War on Crime*, 255. Hinton's conclusions about Wolfgang here are overly simplistic, except insofar as they emphasize how Wolfgang's conclusions were selectively incorporated into criminal justice policy. While less critical of policing than Sellin, together they helped to underwrite new forms of measurement that were taken up through Great Society crime programs. Though no radical, he actively opposed arming the police, though he opposed civilian gun ownership with greater fervor. That his work on habitual offenders fed into retributivism is unquestionable. One only needs to read James Q. Wilson's éloge to see why: "By making us think about individuals, Wolfgang set the stage for the next major development in criminology—finding out why individuals behave as they do. In the 19th and early 20th centuries, criminology was a branch of medicine, and so scholars were quite ready to consider biological as well as social explanations for crime. But then Hitler arrived and the issue of racism clouded the discussion, helping to put an end to any explanation for crime other than a purely environmental one. People must not differ in any important way, some people said, otherwise some people will be thought inferior to others. Therefore, all crime must have a social cause." James Q. Wilson, "The Lives They Lived: Marvin E. Wolfgang, Charting the Devious Mind," *The New York Times Magazine*, January 3, 1999. His trajectory is worth further exploration, and the fact that he has no personal papers is telling.

In 1965, many of these developments seemed a long way off, and Wolfgang had the resources to undertake research on a scale hitherto unseen in civil rights litigation. The proposed study would hardly be the first to consider the discriminatory application of the death penalty for rape, but LDF attorneys defended the novelty of their approach. After the first LDF strategy meeting, the *Washington and Lee Law Review* published an article on racial disparities in death sentences in Virginia, which Tony Amsterdam immediately shared, opining that its analysis was "methodologically naive and as a whole has all the worse qualities of swiss and roquefort cheeses," though valuable for its Virginia data as well as "such insights into study design as it may negatively inspire."[148] One can easily see what Amsterdam objected to. The study's author began from the observation that no white man had been executed for rape since the installation of Virginia's electric chair in 1908, but from there sought to compare black and white crime rates in the state to see what was behind the apparent disparity.[149] In the course of determining the racial breakdown of non-capital rape convictions by level of severity using records from the Virginia State Penitentiary, the author suggested that Black men committed up to four times as many rapes as white men.[150] Referencing the odious Martinsville seven ruling, he concluded that there was "more than a scintilla of evidence that there has been discrimination in the application of the death penalty for rape," but suggested mandatory appellate review as an alternative to the "statistically sound" correction of executing "an appropriate number of white men."[151] It is difficult to imagine the joke landing.

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[148] Memorandum from Tony Amsterdam to Jack Greenberg Leroy Clark, Toby Simon, Steve Antler, and Alan Lerner from Tony Amsterdam, March 31, 1965, LSCRRC Records, Series 2, Box 6, Folder 57.
[149] Donald H. Partington, "The Incidence of the Death Penalty for Rape in Virginia," *Washington and Lee Law Review* 22, no. 1 (1965): 47.
[150] Partington, 52–54.
[151] Partington, 63.

Adopting "standard statistical sampling techniques," best described as a *cluster* sample, Wolfgang and Amsterdam sent thirty law students to 230 counties in eleven states with questionnaires based on the former's study of delinquency.[152] Eventually, the questionnaires turned up outside of Wolfgang's office by the truckload, and he set up shop in one of the Wharton School's lecture halls. As he oversaw a slew of graduate students converting the data into punched cards, LDF attorneys were breathing down his neck, urging that he prioritize analysis concerning pending executions. Yet, even while the numbers were being crunched, the questionnaires gave the LDF leverage. It threatened to clog up the court system with subpoena requests for records whose existence they could now confirm if judges did not grant stays on executions that would allow the proper time to calculate.[153] This was data for action, public records wielded for public service. Yet, the production of racial discrimination as an abstract, social scientific 'fact' required concealment, aggregation, and erasure. Wolfgang was impressed by the law students' determination and—in his eyes—their objectivity. But they could not document every case in their chosen states. The final report on the study eschewed the initial completist goal in favor of "selecting counties by standard sampling techniques." The method chose to analyze the sample of 3,000 rape convictions between 1945 and the summer of 1965 was a chi-squared test of significance, used to determine whether cases within the sample fell into proportions expected by chance.

Wolfgang's study aimed to reject two null hypotheses: first, that there was no significant *association* between race of defendant and choice of death penalty and second, that there were no significant *differences* between "proportions of black defendants with white victims and all other

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[152] Marvin E. Wolfgang and Marc Riedel, "Race, Judicial Discretion, and the Death Penalty," *The Annals of the American Academy of Political and Social Science* 407, no. 1 (May 1, 1973): 126–27. Though the results of the full study were published later, the LDF began their challenge in 1968 after an initial failed petition. Mandery, *A Wild Justice*, 38.

[153] Foerster, *Race, Rape, and Injustice*, 67.

classes of rape defendants sentenced to death."[154] After establishing the strong association that black defendants with white victims were eighteen times more likely to receive a death sentence, they endeavored to show that nonracial variables did not have a similar impact. When testing for significant relationships between other variables, they discarded all but what was found to be significant: a contemporaneous offense. Wolfgang explained this away by showing that the factor of eighteen remained for cases with and without contemporaneous offenses when re-classified by the black defendant, white victim category. All other associations "wash out," they argued: "The only variable of statistical significance that remains is race."[155] Though President Johnson's Commission on Law Enforcement and Administration of Justice, otherwise known as the Katzenbach Commission, had made a similar suggestion, Wolfgang's results cast the relationship between black perpetrator, white victim, and death sentence in soberly statistical terms.[156] It would become the single most contested figure in the campaign against the death penalty.

The LDF team separately reviewed and submitted results in petitions for capital cases in each state. One of the first resulted in a district court judge embargoing the raw data in court before the analysis could be finished.[157] Once it was released, the LDF chose a test case. *Maxwell v. Bishop*, resulted from a 1964 rape conviction in Arkansas—one of the states included in the Wolfgang study—appealed by Amsterdam that made it up to the Eighth Circuit, before soon-to-be Supreme

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[154] Wolfgang and Riedel, "Race, Judicial Discretion, and the Death Penalty," 129. The study was not concerned with broader aspects of discrimination in criminal justice: "We are not here questioning the process of the differential arrest of blacks compared to whites nor the issue of varying degrees of evidentiary material for indictment of blacks compared with whites. What is at issue is whether, among persons who have been convicted of capital crimes, a statistically significantly higher proportion of blacks than of whites, all other things being relatively equal, are differentially sentenced to death." Wolfgang and Riedel, 123.

[155] Wolfgang and Riedel, "Race, Judicial Discretion, and the Death Penalty," 130.

[156] "The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups": The President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (Washington, D.C.: U.S. Govt. Print. Off, 1967), 143.

[157] *Moorer v. South Carolina*, 368 F.2d 458 (1966).

Court Justice Harry Blackmun. Blackmun questioned the logic of applying the study to exonerate Maxwell, emphasizing the individuality of his case, from a county *not* included in the study sample, while insinuating that the sample itself was based in the speculations of law students rather than scientific standards.[158] He claimed that the analysis focused on discrimination at the expense of other variables, and was incredulous at Amsterdam's selective invocation of equal protection in oral arguments: when asked whether the same standard should be applied for white rapists, Amsterdam merely replied that their situation "would take care of itself." Blackmun, no friend of the death penalty, was equivocal. He acknowledged the potential influence of discrimination in Maxwell's case with an evasive double negative but found the defense's evidence wanting. Blackmun concluded, "We are not certain that, for Maxwell, statistics will ever be his redemption."[159]

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Statistics, at least as such, would not redeem Maxwell, but the LDF's investment in social science and coordination of the abolition campaign did. Already by 1966 the organization had decided to try and block all executions. This was made easier by an influx of funding the following year from the Ford Foundation to set up a National Office for the Rights of the Indigent. Though the aim was to improve the treatment of the poor by the legal system, the argument that class discrimination in capital punishment was just as big of an issue as racial discrimination was their justification for using the office as the basis for the abolition campaign. Expanding the campaign in this way meant that the LDF would be taking on murder as well as rape cases, and even those involving white defendants. Finally, the Fund brought on board a young lawyer with an interest in psychiatry, Jack Himmelstein, to coordinate the effort, which now included managing the broad correspondence

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[158] *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968) at 144.
[159] *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968) at 148.

network of legal experts and social scientists set up by Amsterdam, and distributing "Last Aid Kits" full of legal materials that could be used by lawyers nationwide to secure a stay of execution.[160]

One early development brought things right back to the problem of representative juries, but this time the question was not the race of jurors but attitudes about punishment. At the time, most states' capital statutes included a clause that allowed prosecutors to challenge any juror who opposed or had scruples about the death penalty. When the case of a client represented by a prominent Chicago law firm reached the Supreme Court, the LDF was alarmed by the scale of the argument and the apparent thinness of evidence put forth to justify it. The firm representing William Witherspoon, convicted for the murder of a police officer, claimed in *Witherspoon v. Illinois* (1968) that juries composed of people without scruples against the death penalty were more likely to accept the prosecution's argument, and were therefore biased, violating the Sixth Amendment. As evidence, they offered two opinion surveys by psychologists conducted on college students that seemed to validate the bias claim, but the LDF was concerned that "this evidence was too slender to hold up the weight of a major constitutional ruling." Fearing that a negative ruling might take the issue out of the LDF's arsenal, Amsterdam penned a ninety-four page brief arguing the court not to decide on the "prosecution-proneness" issue but that the jury was not drawn from a fair "cross-section of the community," since Gallup polls indicated that half of adults had scruples about the death penalty. Amsterdam asked the Court to wait on a study commissioned by the Fund to analyze a proper random sample of potential jurors. The Chicago firm was furious that they had been undercut by the LDF, but as one of its lawyers put it, "concern for the five hundred other men on

[160] "Moratorium" Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*.

death row forced the Fund to take a contrary position."[161] The Supreme Court did not accept either argument in *Witherspoon*, finding the evidence "too tentative and fragmentary."[162] It did hold that a death *sentence* doled out by a "hanging jury" composed of not a single scrupled juror was unconstitutional, but not the conviction itself.

An impasse for the use of social science, *Witherspoon* was nonetheless an important success, albeit one Amsterdam worried would be quickly "cut to ribbons" by the lower courts.[163] It seemed an impossibility to block all executions through greater supervision of jury selection processes alone, and with the election of pro-death penalty governors Claude Kirk in Florida and Ronald Reagan in California, the LDF felt a bolder approach was necessary. At the suggestion of a daring Miami defense attorney and ACLU chapter head, and after consulting experts in civil procedure at Harvard Law School, the LDF decided to pursue a class action suit on behalf of all death row inmates in the state of Florida. Here again, it relied on the tools of the social survey to give the Florida judge the impression that these fifty-two men—and they were all men—were otherwise unable to protect their legal rights without a class action on their behalf. All cooperating inmates were administered the Beta nonverbal IQ test, on which the average score was 88.35, interpreted as "low average."[164] The judge accepted the class action.[165] This raised the hopes of cooperating attorneys, but Amsterdam discouraged others from replicating the strategy, which had just failed in California, cautioning that test cases should only be pursued "to save life that is in immediate

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[161] Michael Meltsner, "Litigating against the Death Penalty: The Strategy behind Furman," *The Yale Law Journal* 82, no. 6 (1973): 1120–22.

[162] *Witherspoon v. Illinois*, 391 U.S. 510 at 517.

[163] Meltsner, "Litigating against the Death Penalty," 1124.

[164] On the legacy of IQ testing, see John Carson, *The Measure of Merit: Talents, Intelligence, and Inequality in the French and American Republics, 1750-1940* (Princeton, N.J.: Princeton University Press, 2007). "[T]he private joke was that any death-row inmate with any brains was too smart to want ACLU-LDF counsel": Meltsner, "Litigating against the Death Penalty," 1128.

[165] *Adderly v. Wainwright*, 46 F.R.D. 97 (1968).

jeopardy."[166] Though the LDF was happy to coordinate the mass effort, it also sought control over the more delicate procedural and evidentiary interventions. Amsterdam and Himmelstein achieved that control by serving as arbiters of expertise, legal and scientific.

Already, some abolitionists with whom the group had become associated were arguing that they needed to be more strategic in their use of social science. Months before the Eighth Circuit ruling in *Maxwell*, Philosopher Hugo Adam Bedau, the leading academic spokesperson and coordinator for abolitionists, wrote to Sellin about the latter's deterrence research. Bedau pointed out that a key flaw in this line of research was that it was "all based on samples which, however scientifically designed, is [sic] open to the kind of objection" being raised by judges, and "the quantum of evidence does not yet reach, in my opinion, the level sufficient to establish unfairness of jurors, absence of deterrence, etc."[167] Bedau held out hope that "something more sophisticated than the simple X2 correlations might be offered, too but even that is more than we have now." But what made things difficult for them was the hybrid nature of such expertise, neither a completely detached illustration of the law in practice nor an explicit attempt to socially engineer a more just system. If the Court was more willing to weigh in on the merits of statistical evidence, it stopped short at arguments for "evolving standards of decency" when such standards seemed hopelessly interwoven with the reformist aspirations of social science.

As *Maxwell v. Bishop* headed to the Supreme Court in 1969, the procedural arguments seemed more promising than Wolfgang's study. The LDF now argued that the Constitution required a bifurcated trial, in which guilt and punishment were decided separately, and that it was a

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[166] Meltsner, "Litigating against the Death Penalty," 1130.

[167] Hugo Adam Bedau to Thorsten Sellin, October 21, 1968, Sellin Papers, Series 1, Box 3, Folder 102, "Bedau, Hugo Adam, 1958-1980."

violation of due process to give juries unguided discretion to decide between life and death.[168] At first, it seemed like a knock-out. In conference, the Court voted eight-to-one to declare the Arkansas death penalty unconstitutional, but they could not come to an agreement on the reason why. Some preferred the bifurcated trial argument, while others thought that standards, such as those developed by the Model Penal Code project earlier that decade, were necessary. Fearing that they would lead legislatures to adopt "more stringent, mandatory penalties," Justices Fortas and Marshall rejected mandatory standards: "Neither the refinement of moral criteria nor the progress of penology or of the arts of psychiatry, chemistry or environmental therapy enables me to envision the development of meaningful standards." Just when six Justices had agreed on the bifurcated trials issue, the Court's composition changed. Chief Justice Earl Warren retired and was replaced by Nixon appointee Warren Burger, and Fortas resigned after the revelation that he had accepted money from a financier being investigated for insider trading. The majority had fallen apart by the time the case was reargued the following year, and the less controversial option was to simply vacate the sentence based on *Witherspoon*, avoiding the single verdict and jury discretion challenges that had so divided them.[169] They did not discuss the Eighth Amendment.

Following *Maxwell*, the Court granted hearings for two murder cases: *McGautha v. California* and *Crampton v. Ohio*, raising the moral and practical stakes for abolishing the death penalty. The LDF had hoped to focus on rape, where discrimination was most blatant. But the moratorium strategy was proving successful, leading to a "pileup on death row," a *de facto* moratorium on capital

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[168] Banner, *The Death Penalty*, 255–56.

[169] Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (New York: Penguin Books, 1999), 101; Samuel R. Gross, "David Baldus and the Legacy of McCleskey v. Kemp," *Iowa Law Review* 97 (2012): 1907; Mandery, *A Wild Justice*, 96.

punishment.[170] Tactically stalling the system for long enough, they assumed, might lead judges deem it ineffective, or imagine a world without it, but the political climate was changing rapidly.

As *Maxwell* was making its way to the Supreme Court, the executive director of the American League to Abolish Capital Punishment, wrote to Sellin and other board members, declaring "an old era has ended and another has begun." Abolitionists needed to re-strategize. Legislative activities earlier in the decade had seemed promising, but now they saw a greater need to invest in public education. This was because, as League President Bedau put it the following year, "mounting public hysteria over the issue of 'law and order' is being reflected in the growing number of elected officials who now firmly advocate the death penalty for at least selected crimes."[171] Abolitionists' efforts would no longer be restricted to convincing more enlightened judges that capital punishment was immoral. Rather, they would draw on the full force of social science as a buffer against the rising tide of enthusiasm for harsher punishment. In so doing, the issue of racial discrimination—at least in the explicit sense—would largely be displaced in favor of broader arguments about the relationship between crime and punishment, or that the penalty of death was qualitatively different than any other kind of punishment and should be treated as such.

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As this chapter has shown, a new era had begun for the use of statistics as well. It was becoming harder to simply dismiss their rampant adoption throughout the legal system. But the word

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[170] Eric L. Muller, "The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death," *Yale Law & Policy Review* 4, no. 1 (1985): 168; Oshinsky, *Capital Punishment on Trial*, 43; John Charles Boger, "McCleskey v. Kemp: Field Notes from 1977-1991," *Northwestern University Law Review* 112 (2018): 1644–46.

[171] Sara Ehrman to Thorsten Sellin, April 25, 1969 and Letter from Hugo Adam Bedau, November 7, 1970, Sellin Papers, Series 1, Box 1, Folder 30, "American League to Abolish Capital Punishment, 1958-1971." On the rise and durability of "law-and-order," see Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005).

"system" should give us pause. The system of sanctioned racial violence that Ida B. Wells decried was not the same kind of system that social scientists modeled to convince judges to rule criminal statutes unconstitutional. Arguments about degrees of representation, or cross sections of the community, focused attention on the legal process rather than law's broader effects. By the end of the 1960s, conservative politicians had laid claim to the latter, arguing that the liberal Warren Court had created a crisis of urban criminality.

It is important not to lose sight of the real lives at stake and the concrete gains seen by civil rights lawyers who embraced statistics. While Michael Finkelstein demonstrating a Bernoulli urn full of black and white balls to a room full of civil rights lawyers is a powerful—and, I argue, representative—image, their toolkit was a capacious one. But there were both gains and losses. These are perhaps best illustrated by the 1970 ruling in the school board selection case *Turner v. Fouche*, when the Court relied upon what it called "long-established tests for racial discrimination" that made the jury rolls suspect: only 37% of the 304-member list was Black, a figure that "contrast[ed] sharply with the representation that their percentage (60%) of the general Taliaferro County population would have led them to obtain in a random selection.[172] Despite the appeal to precedent, the language of "random selection" was new, referring perhaps to the standard set by the Jury Selection and Service Act of 1968 for federal juries. While endorsing this new standard of randomness, on the road to what one author refers to as "constitutionalizing" the cross-sectional jury, the Court also "positively cited Jim Crow era precedents affirming the states' freedom to exclude from jury service those lacking 'good intelligence, sound judgment, and fair character,'"

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[172] *Turner v. Fouche*, 396 U.S. 346 (1970) at 359. The actual facts were worse: "171 of those rejected as unintelligent or not upright were Negroes—96% of the total removed for that reason," *Turner v. Fouche*, 396 U.S. 346 (1970) at 396.

according to legal scholar Thomas Ward Frampton.[173] In other words, statistics could be used to show that state officials were misbehaving, but the Court would not countenance challenges to systems that were otherwise purportedly 'neutral' regardless of their sordid history.[174] Statistics were becoming more useful for showing that rules were being misapplied than revealing an ongoing history of racism.

At the same time, others were concerned about the consequences of either relying too much on social research or modeling the law after mechanical rules of probability. Just a year after Blackmun deemed Wolfgang's study insufficient evidence of racial bias to overturn Maxwell's conviction, a group of Stanford law students published a massive, 200-page statistical analysis of the death penalty in California. Their biggest finding was class discrimination: "a blue-collar background was by itself and aggravation and….a white-collar background was by itself a significant mitigation."[175] On the other hand, they found no racial discrimination, though they did not challenge Wolfgang's still-unpublished results of the Southern survey. In their conclusion, the problem with standardless sentencing in California was not that "the penalty juries' bases of decisionmaking are impermissible, but because one crucial basis—the defendant's occupational status—is assigned independent significance by the juries in making their penalty determinations."[176] The LDF's *Maxwell* brief applied the strict scrutiny standard to argue that Black men accused of raping white women were "disproportionately sentenced to death, *by reason of their*

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[173] Thomas Ward Frampton, "For Cause: Rethinking Racial Exclusion and the American Jury," *Michigan Law Review* 118, no. 5 (April 1, 2020): 809.

[174] In a case decided with *Turner v. Fouche*, Justice Douglas dissented in part: "There comes a time when an organ or agency of state law has proved itself to have such a racist mission that it should not survive constitutional challenge," *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970) at 320.

[175] "A Study of the California Penalty Jury in First-Degree-Murder Cases," *Stanford Law Review* 21, no. 6 (1969): 1421.

[176] "A Study of the California Penalty Jury in First-Degree-Murder Cases," 1431.

race," and the goal was to *control* for other variables, not explore hitherto unknown motivations.[177] The idea of a variable being "assigned independent significance" by jurors seemed to push past the existing boundaries of motive analysis toward a more causal or technical understanding.

The extensive analysis was accompanied by a preface from Harry Kalven, one of the authors of *The American Jury*, who despite being an advocate for the empirical study of law was a bit taken aback by what he read, or perhaps simply too bored:

> The tables offered verge on the unreadable and uninteresting…they might just as well have simply given us the list of 178 items and told us which ones the computer reported were independently significant variables. The note may thus mark a major dilemma for us all and for sociology in general…the price for the new technology seems to be that humane exposition becomes virtually impossible.[178]

Kalven worried about the perverse incentives of young lawyers' need to publish and the availability of quantitative tools to achieve such ends would lead to "a mass of ill-digested, uncritical, drab empirical studies that will only confirm the skeptics." At a time when many were complaining about quotas and civil rights rules as making the law mechanical, there was reason for concern. Another battle over the use of statistics took place in the *Harvard Law Review* in 1971, when constitutional scholar Laurence Tribe decried the creep of empirical analysis of law into recommendations for the use of probability "as a tool for decisionmaking rather than simply as a mode of thought, as an instrument rather than as a language," starting a back-and-forth with Finkelstein.[179] It wasn't just opponents of civil rights who opposed the statistical approach, but those who worried about the problems its potential creep might introduce. The objective, Kalven wrote, "is not to revolutionize law but to enrich it, to develop not a competing but a companion

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[177] *Maxwell v. Bishop*, 398 U.S. 262 (1970), Petition, October 9th, 1968.
[178] "A Study of the California Penalty Jury in First-Degree-Murder Cases," 1300.
[179] Tribe, "Trial by Mathematics," 1331.

discipline for its study."[180] As lawyers sought to strengthen the new civil rights legislation of the 1960s, the companionship between law and social science was already giving way to competition.

[180] "A Study of the California Penalty Jury in First-Degree-Murder Cases," 1299.

Part II

Law and Social Science in an Era of Contradiction

THE LONG 1970S

> Trading justice for harmony is one of the unrecognized fallouts of the 1960s. So is trading law process for mind processing…[t]he loss of concern with rights created a model of law intolerant of power or conflict, its causes and its expression.
>
> – Laura Nader, "From Legal Process to Mind Processing" (1992)

In retrospect, 1971 seems like the *annus mirabilis* of antidiscrimination law, but civil rights groups held their breath. In January the court decided *Phillips v. Martin Marietta Corporation*, its first sex discrimination case, striking down a rule against hiring women with preschool-age children.[1] Two months later, in *Griggs v. Duke Power*, the Court enshrined the *disparate impact* standard under Title VII, ruling that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[2] Discrimination claims, like the ones in jury composition lawsuits, tended to turn on inquiries into motivation even when statistical disparities shifted the burden of explanation. Legal scholar Alan David Freeman called *Griggs* "the centerpiece of the era of contradiction" in antidiscrimination jurisprudence, characterized by "[a] growing tension between the concepts of violation and remedy" that led to heightened expectations.[3] Courts required

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[1] *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).
[2] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 432.
[3] Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law," 1093, 1079.

violators to do more than merely stop discriminating, perhaps awarding backpay or requiring school districts to bus students, but disparate impact was limited for the most part to private actors.[4] Governments, however, were often regarded as separate entities from their Jim Crow past, cleaved off neatly at the point when civil rights legislation went into effect.[5]

When it came to municipal actors it appeared that the Supreme Court and the liberal Fifth Circuit operated within different temporal registers. On the one hand, the two agreed in a case involving the closure of all public pools in the city of Jackson, Mississippi which the mayor justified by claiming that operating integrated pools threatened "personal safety" and "law and order," while posing additional economic burdens. The *New York Times* claimed that the case had less practical weight than "symbolic importance in underscoring recent reluctance by the Supreme Court to extend civil rights concepts."[6] On the other, where hard statistics showed disparities in the provision of vital services, the Fifth Circuit was willing to compel cities to "cure the results of the long history of discrimination which the record reveals." In *Hawkins v. Town of Shaw*, Black citizens sued the heavily segregated town of Shaw, Mississippi for a complete lack street paving, lighting, sewage, and water hookups. Again invoking strict scrutiny of statistical disparities, the court ordered town officials to devise a plan to equalize services, calling their bluff: "because they so staunchly deny any racial motivation, [we are confident town officials can] propose a program of

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[4] Ackerman, *We the People*, 175.

[5] This, I think, is an example of "legal pluralism as temporal pluralism" discussed by Natasha Wheatley: Natasha Wheatley, "Legal Pluralism as Temporal Pluralism: Historical Rights, Legal Vitalism, and Non-Synchronous Sovereignty," in *Power and Time: Temporalities in Conflict and the Making of History*, ed. Dan Edelstein, Stefanos Geroulanos, and Natasha Wheatley (Chicago: University of Chicago Press, 2021), 55.

[6] *Palmer v. Thompson*, 403 U.S. 217 (1971); *Palmer v. Thompson*, 419 F.2d 1222 (5th Cir. 1970); Fred P. Graham, "Court Says Cities May Close Pools to Bar Racial Mix," *The New York Times*, June 15, 1971.

improvements that will, within a reasonable time, remove the disparities that bear so heavily on the black citizens of Shaw."[7]

Perhaps the most significant development along these lines was the Supreme Court's ruling upholding the use of proportions and quotas for a school desegregation plan in *Swann v. Charlotte-Mecklenburg Board of Education*.[8] Chief Justice Burger took responsibility for writing the opinion, even after expressing reservations about how the Fifth Circuit had "swerved away from its original basis" in its established practice of relying on statistics to infer discrimination.[9] Burger was concerned by the plan proposed by the plaintiffs' expert: "The rigidity of the 71/29 ratio set by McMillan disturbs me. There must be some play in the joints—perhaps a 15 percent leeway?" His discomfort was evident in initial drafts, which begrudgingly affirmed the plan while endorsing President Nixon's emphasis on 'freedom of choice' and seemed to walk back on *Brown* altogether.[10] Burger's desire for "a 15 percent leeway" underscores a key feature of the era of contradiction: judges did not need to go so far as rejecting earlier decisions in their entirety when they could rely on some "play in the joints" when it came to implementation.

Likewise, conservatives were learning into subtler tactics to resist employment litigation, further politicizing the use of numbers while claiming to stand behind the values of the civil rights revolution. President Nixon's cynical endorsement of the Philadelphia Plan for racial quotas in construction work, a tactical effort to drive a wedge between labor and civil rights, signaled the

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[7] *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) at 1293.

[8] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

[9] Del Dickson, ed., *The Supreme Court in Conference, 1940-1985: The Private Discussions Behind Nearly 300 Supreme Court Decisions* (Oxford: Oxford University Press, 2001), 674. The quote is confusing because *Swann* was a Fourth Circuit case, but given the evidence that the court was taking its view on statistical disparities largely from the Fifth Circuit, it seems plausible

[10] Dickson, 677.

arrival of affirmative action as a full-fledged policy idea with volatile potential.[11] By the following year, Nixon had declared his intent to "offset" recent federal court rulings and Senator Henry "Scoop" Jackson had proposed a constitutional amendment enshrining freedom of school choice, the first liberal Democrat to do so, in advance of his own presidential campaign. The reported text of the amendment was a pastiche of shibboleths: a "right to have his or her children attend their neighborhood public school" and another "right to equal educational opportunity…[that] shall not be abridged by economic discrimination."[12] Contradictions were abundant, what remained of 'discrimination' defanged. As Daniel Rodgers puts it, opponents of affirmative action working to "[sketch] out a new world of individualized justice" were anxious "that the claims of history and memory might distract the course of the law."[13] Courtroom battles over the weight of statistics were becoming proxy wars in a national struggle over memory.

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Many of these civil rights victories and enforcement plans resulted from years of sustained collaboration between lawyers, experts, and activists. However, the coalition with experts was never stable. Though many worked within their professional organizations to develop platforms and policies endorsing civil rights laws and Great Society initiatives, not all were interested in passing or abiding by them. For the most part, before the 1970s governments and private actors did not make any substantial investment in experts to defend against charges of discrimination. As the tables turned, they began to, and found many who were willing to serve as adversaries.

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[11] Chen, *The Fifth Freedom*, 221. Nelson Lichtenstein describes the plan as "something of a shell game," the chief purpose of which "was to curb craft-union power, reduce construction industry wages, and drive a wedge between the unions and the civil rights community." Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, N.J.: Princeton University Press, 2002), 206.

[12] John Herders, "Nixon Will Move to Offset Rulings for Pupil Busing," *The New York Times*, February 15, 1972.

[13] Rodgers, *Age of Fracture*, 134.

Education was the exception that proved the rule. In *Swann*, a member of Charlotte's Board of Education had proposed his own plan, but the Court really only considered the external plaintiff expert's plan recommended by a District Court Judge.[14] Elsewhere, things were more contentious. Also in 1971, *Hobson v. Hansen*, a Washington, D.C. school segregation case, was back in the courts after a decision invalidating a "tracking" system that sorted children into schools based on test scores.[15] The plaintiff returned to court as a member of the school board, seeking to equalize resources among schools. Each side hired economists to devise plans that relied upon comparison of teacher salaries and per-pupil expenditures, launching a yearlong battle over how to measure the effectiveness of remedies. In a biting opinion, famed liberal Judge Skelly Wright decried "the unfortunate if inevitable tendency…to lose sight of the disadvantaged young students" in debating statistical jargon and admitted to forgoing expert recommendations in favor of his own "straightforward moral and constitutional arithmetic."[16] With experts obliged to clients, what use could social science be in establishing common ground? For all of its promise, many worried that *Griggs* promised more *Hobson*-esque proceedings in the realm of employment.

In the wake of *Griggs*, litigation over the meaning of psychometrics would draw scrutiny from all sides: from business leaders, personnel psychologists, skeptical judges, and an emboldened fringe of researchers who sought to reclaim the mantle of eugenics by appealing to theories of immutable and inherited intelligence.[17] Their emphasis on the biological and behavioral—underwritten by a broad preoccupation with psychology—spilled over into criminal justice, as the

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[14] Deposition of Dr. Carlton G. Watkins, Chambers Papers, Series 4, Transcripts; *Swann v. Charlotte-Mecklenburg Board of Education*, 318 F. Supp. 786 (W.D.N.C. 1970).
[15] "Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board," *Harvard Law Review* 81, no. 7 (1968): 1511–27.
[16] *Hobson v. Hansen* 327 F. Supp. 844 (D.D.C. 1971) at 859.
[17] On the IQ wars, see Panofsky, *Misbehaving Science*.

"rehabilitative ideal" that spurred the postwar growth of the profession was assaulted on all sides.[18] Criticisms of this penology and its epistemology went hand in hand. Treating crime as a social problem required comparative social statistics; regarding it as an individual affliction refocused attention on the 'motivation' that had become pervasive in poverty research.[19] Defenders of law-and-order, skeptical of criminology's liberal bent, claimed they could prove anything with statistics.

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One such figure was Samuel Leibowitz, the famed trial lawyer who had represented the Scottsboro boys—arguably the person most responsible for the rise of statistical proof of jury discrimination. Leibowitz was fiercely devoted to his clients, having lost only one death row inmate of the hundred or so he defended to the executioner. But when he crossed over to the other side of the bar, something changed, or perhaps simply revealed itself.

As Judge of Kings County Court, Leibowitz had become a staunch advocate for capital punishment, sending nearly forty men to the electric chair in his first two decades on the job. Sitting down to debate the death penalty with Thorsten Sellin on NBC's program *The Open Mind* one Sunday evening in 1962, Leibowitz informed "the dean of American criminologists" that he knew nothing worth knowing about crime and punishment:

> JUDGE LEIBOWITZ: There's an office in New York, it's the busiest prosecuting office in the entire country. That's District Attorney Hogan's office. Have you ever spoken to some of the assistant district attorneys there who prosecute murder cases?
> MR. SELLIN: No.
> JUDGE LEIBOWITZ: Well that's a place to get information; to get real information. Not the jumble of a bunch of statistics. I can prove anything with statistics.
> MR. SELLIN: Oh no you can't.

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[18] On the postwar fascination with psychology, see Herman, *The Romance of American Psychology*. On the embrace of behavioral models in criminal justice, see Jean-Baptiste Fleury, "Crime," in *Society on the Edge: Social Science and Public Policy in the Postwar United States*, ed. Jefferson D. Pooley and Philippe Fontaine (Cambridge: Cambridge University Press, 2020), 258–89.

[19] See above, Chapter One and O'Connor, *Poverty Knowledge*, 103.

Their debate continued on in very much the same manner, with the moderator barely able to restrain the pugnacious judge to save time for the milder-mannered Sellin. In his thick Brooklyn accent, Leibowitz demanded "proof from people who have labored in the vineyard," reading a statement from police who claimed to be protected by the death penalty. His insistence that the death penalty deterred crime—and on the primacy of police experience as evidence—bespoke a mounting tension among professionals, academics and officials alike, who organized themselves under the label of *criminal justice*. As the moderator tried valiantly to turn the conversation toward racial disparities, Leibowitz deflected it, denying there could be any link between executions and "prejudice," since crimes were mostly "committed by underprivileged people, whether they are white or black, yellow or green."[20]

Leibowitz's transition from defense lawyer to hanging judge was a harbinger of the death penalty's political transformation, linked to that of crime policy writ large. Beneath the inflammatory rhetoric, his opinions more or less in step with experts who sought to bring order to what could most charitably be described as a lumpy landscape of criminal law. He supported the recommendations of the Model Penal Code project that had commissioned Sellin's study in the first place—the source of the LDF's arguments for jury standards and bifurcated trials.[21] But another key doctrinal arrow in its quiver was an appeal to "evolving standards of decency," the idea that state-sanctioned killing was out of line with changing social mores. Throughout much of the 1960s, polling data backed this up, but the trend reversed as the decade went on. As political scientist

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[20] "'A Debate on Capital Punishment' (*The Open Mind*), 1962," Sellin Papers, Series 3, Box 30, Folder 1589. The moderator, interestingly enough, was Princeton History Professor Eric Goldman.

[21] Thorsten Sellin, *The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute* (Philadelphia: American Law Institute, 1959). On the mixed legacy of the Model Penal Code and capital punishment, see David Wolitz, "Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code," *Tulsa Law Review* 51 (2016): 670–72.

Vesla Weaver argues, the backlash against employment policy and busing led to a "frontlash" in criminal justice: "a powerful elite countermovement" that focused attention on uprisings to promote harsher crime policies.[22] Social science was caught right in the middle.

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This section considers how conflicts over social science prompted legal questions about the nature and scope of rights at the very height of legal campaigns for equal employment opportunity and the abolition of capital punishment. Such conflicts provided a language—and at least some of the motive force—for a shift in the national political agenda. The hard-won influence of social science in the sphere of civil rights meant that professional politics and diverging intellectual frameworks were on center stage. As the epigraph from anthropologist Laura Nader suggests, social science helped make the law increasingly intolerant of power by drawing attention away from the meaning of struggles and toward technical details.[23] However, this transformation was driven not by a loss of concern for rights but their enlargement as a sphere of contestation.

The first of these volatile issues was psychological testing. From the moment the 1964 Civil Rights Act went into effect, the EEOC worked to develop testing standards in conjunction with the American Psychological Association (APA). At the same time, LDF attorneys were devising litigation strategies to combat test discrimination and exclusionary union seniority policies. In many ways, as Chapter One described, union seniority was a more obvious issue with a better-developed body of law, aligning with the NAACP's long struggle to leverage the gains of organized labor to achieve economic equity. But for strategic reasons, testing won out. Chapter Three describes this process, beginning with psychologists' criticisms of "culturally biased" tests that inspired new work

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[22] Weaver, "Frontlash," 230.

[23] Laura Nader, "From Legal Process to Mind Processing," in *Contrarian Anthropology: The Unwritten Rules of Academia* (Berghahn Books, 2018), 162–67.

on the theory of psychological measurement, otherwise known as psychometrics. Once testing standards derived from the APA model became statutory law, they became associated with a broad set of evolving ideas and practices in fair employment policy dismissed by critics as merely quotas in disguise, bolstered by parallel debates about intelligence and merit in education. Ultimately, this divide over testing manifested in diverging agendas of government bodies and the contingencies of litigation led to a devastating Supreme Court decision that seemed to seal off equal protection from disparate impact.

Chapter Four picks up where the LDF's campaign against the death penalty left off, with statistical proof of its discriminatory application for rape seemingly off the table. In a series of clever legal maneuvers, Amsterdam and the LDF doubled down on their eighth amendment argument that capital punishment was cruel and unusual. Not only were executions erratic at best, but an irreversible punishment seemed to require a new set of procedures—the idea that "death is different." Surprising nearly everyone, the Supreme Court agreed in 1972, with a narrow ruling in *Furman v. Georgia* declaring all existing capital statutes unconstitutional. This was only phase one. The LDF and ACLU mobilized their networks to produce research and legal arguments to challenge the revised laws in the pipeline. Although they were well aware of growing public demand for law and order, abolitionists were unprepared for an econometric study that threatened the longstanding expert consensus that the death penalty did not deter violent crime. As they rallied the troops to reject this study and forestall what seemed like the Court's inevitable rejection of *Furman*, abolitionist social scientists criticized methodological choices and data sources without refuting the premise of the study itself. The econometric model (and challenges to it) performed a way of thinking about crime growing in influence within policy circles, reviving behavioral frames long discredited by criminologists. Beyond that, it ratcheted up expectations of rigor and certainty for the

abolition campaign, which jettisoned an earlier framework based in statistical fairness in favor of causal methods to prove discrimination. Equal employment opportunity advocates soon found themselves facing the same.

Chapter 3

"Masters of Reality"

Psychometrics, Black Psychologists, and the Origins of Disparate Impact Theory

In the summer of 1967, as the Equal Employment Opportunity Commission (EEOC) computed the bleak figures for its first nationwide employment survey, urban uprisings broke out across the nation. In the months prior, commentators had diagnosed a lack of employment opportunities for African American youth as a cause of simmering tensions.[1] President Johnson called together a National Advisory Commission on Civil Disorders to investigate the cause of the violence. The Kerner Commission, as it became known, was troubled from the outset by tensions that boiled over when senior staff ordered all copies of the Social Science Division's preliminary report, *The Harvest of American Racism*, destroyed. Panned by Washington insiders for taking the heat off of Black radicals, its toned-down final report made ambitious domestic policy recommendations targeting policing, housing, and jobs.[2] Noting the rise of barriers to employment such as aptitude tests, high school diplomas, and criminal background checks, the report concluded, "Racial discrimination and unrealistic and unnecessarily high minimum qualifications for promotion often have the same prejudicial effect."[3]

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[1] E.g. "Job Seekers Face Thinner Pickings," *BusinessWeek*, no. 1971 (June 10, 1967): 44.

[2] On Kerner Commission controversies, see Herman, *The Romance of American Psychology*, 219, 233–34. Elizabeth Hinton argues that the report's progressive recommendations were compromised by its emphasis on police departments as bulwarks against the "institutional vacuum" of community services. Hinton, *From the War on Poverty to the War on Crime*, 130–31.

[3] The National Advisory Commission on Civil Disorders, *The Kerner Report* (Princeton, N.J.: Princeton University Press, 2016), 413–19.

Following the assassination of Dr. Martin Luther King, Jr. in 1968, a group of more than 200 concerned Black psychologists gathered at the annual meeting of the American Psychological Association (APA) in San Francisco to form their own Association of Black Psychologists (ABPsi). Disappointed by their parent organization's failure to "recognize the new Black movement as the most promising model for solving problems stemming from the oppressive effect of American racism," they drafted a series of proposals to present before the APA council, charging the organization with failure to work toward eradicating white racism and to relate meaningfully to the Black community, having relied upon it merely as a resource to study the effects of prejudicial attitudes. As policy proposals, ABPsi asked the APA to officially endorse the Kerner report and pursue one of its recommendations:

> [To] establish a committee to study the misuse of standardized psychological instruments to maintain and justify the practice of systematically denying educational and economic opportunities to Black youth. Further that pending the thorough review and reassessment of the issue on the highly questionable validity of these measures, a moratorium be directed on comparative testing and evaluation projects.[4]

In response, the APA Council did little more than pass a "resolution expressing appreciation for the clear and eloquent presentation" and sent the proposal along to the boards of its many divisions, which had ballooned in the postwar years, asking them to consider action "with all due speed and urgency"—an ironic echo of the Supreme Court's evasive language urging the implementation of *Brown v. Board of Education* (1954) in Southern schools.[5]

While policymakers and the APA largely ignored the Kerner Report, its conclusion on testing was cited as an authority in a major Supreme Court decision three years later. In *Griggs v.*

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[4] Robert L. Williams, "A 40-Year History of the Association of Black Psychologists (ABPsi)," *Journal of Black Psychology* 34, no. 3 (August 1, 2008): 250–51.

[5] Wilbert J. McKeachie, "Proceedings of the American Psychological Association, Incorporated, for the Year 1968," *American Psychologist* 24, no. 1 (January 1969): 27.

Duke Power Co. (1971), Black workers at a North Carolina power plant represented by the NAACP Legal Defense Fund (LDF) won a lawsuit against their employer for using a battery of psychological tests as a promotion standard without any justification, arguing that it disproportionately affected Black workers seeking to transfer into better-paying positions. Seen by civil rights advocates as the most important ruling since *Brown*, *Griggs* enshrined a legal theory with the potential to address the subtle, structural aspects of racism by raising the burden for companies to justify policies that discriminated in practice. This essay considers how a critique of tests and psychological measurement among experts provided fodder for this civil rights milestone, as well as the revival of scientific racism in the retrenchment of merit-based critiques of antidiscrimination efforts amidst the political backlash of the 1970s.

Aptitude tests administered by the millions each year represent one of the most significant encounters between ordinary people and the theories and methods of psychology. Historians have accounted for their development in military applications, public education, and modern corporations in the United States during the first half of the twentieth century. While there is a growing literature exploring the impact of debates over affirmative action and merit in various spheres of social life, few have considered the intellectual content of aptitude testing as a target of civil rights advocacy amidst the employment crises of the 1970s.[6] Similarly, scholars of scientific racism, while attuned to the ongoing defense of aptitude tests by hereditarian researchers claiming persecution at the hands of an "equalitarian dogma," have not examined the process through which tests 'became' racist in a legal sense, thereby raising the stakes for their 'redemption' at the hands of

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[6] E.g. MacLean, *Freedom Is Not Enough*; Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008); Deslippe, *Protesting Affirmative Action*. An exception is Kimberly Probolus's account of *Castro v. Beecher* (1971), a Massachusetts case that invalidated a police test battery and invigorated public defense of tests' objectivity: Probolus, "'Drawn from Alice in Wonderland.'"

these researchers.[7] Here, I show how efforts to tame personnel testing became flashpoints of legal intellectual debate, and argue that ceding ground to psychological experts seeking to defend their professional autonomy—even from critics within their ranks, as the example of ABPsi shows—shaped civil rights law and politics.

An employment discrimination case affecting only a few employees at a North Carolina power plant, *Griggs* was an unlikely heir to *Brown*'s constitutional revolution and controversial invocation of social science.[8] In a succinct opinion penned on behalf of a unanimous Court, Chief Justice Burger held that the plant's requirement of a high-school diploma and a sufficient score on a personnel test battery as an internal transfer standard discriminated against its Black employees and upheld the EEOC's guidelines on testing as statutorily binding. The decision is celebrated for establishing an alternative to the requirement of proving discriminatory *intent* in order to claim relief under Title VII of the 1964 Civil Rights Act, helping plaintiffs overcome the burden of producing a smoking gun.[9] The *Griggs* theory of discrimination became known as "disparate impact": a facially neutral policy was discriminatory if, in practice, it was a barrier for minorities to access jobs, transfers, or promotions. Statistics demonstrating a racial imbalance could make a *prima facie* case of discrimination that warranted rebuttal, especially when the imbalance could be attributed to a test that had not been validated. On this basis, legal scholars and social scientists

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[7] John P. Jackson Jr. and Andrew S. Winston, "The Mythical Taboo on Race and Intelligence," *Review of General Psychology*, October 7, 2020.

[8] From different perspectives, Daryl Michael Scott and John P. Jackson Jr. argue that the importance of Kenneth and Mamie Clark's famous "doll test" to the case has been overstated, but rhetorically played into the "damage" imagery increasingly common within social policy circles: Scott, *Contempt and Pity*; Jackson, *Social Scientists for Social Justice*. For a contemporary perspective on the harms of "damage" research, see Eve Tuck, "Suspending Damage: A Letter to Communities," *Harvard Educational Review* 79, no. 3 (Fall 2009): 409–27.

[9] On *Griggs* see, *inter alia*, Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law"; Belton, *The Crusade for Equality in the Workplace*.

have argued that *Griggs* opened the floodgates for statistical evidence of discrimination.[10] For some, its eventual retraction in the 1980s sums up the long declension of civil rights law.[11]

However, population statistics played a small role in *Griggs*, which enshrined psychometric validation as a tool for demarcating between legitimate and illegitimate uses of tests. Lawyers took advantage of political sentiment against tests as vestiges of Jim Crow, but the psychologists they enlisted often sought to redeem their discipline with technical fixes like race-corrected scores.[12] Although *Griggs* endorsed the effects-based conception of discrimination favored by civil rights advocates, it also delegated more authority to psychologists as arbiters of fairness, setting up a dynamic that prioritized better tests over better outcomes.[13] Ultimately, it played into the hand of polemicists and skeptics who argued that businesses could not afford experts to defend their employment selection policies, making the case effectively a referendum in favor of racial quotas.[14] Validity theory secured a major civil rights victory, but the ensuing battle presaged struggles to come as social science became the language for proving and disproving discrimination claims.

Progressive lawyers were confident that science was on their side as they experimented with the new legal order. However, in the unsettled landscape of employment law at the dawn of the 1970s, the figures and measures proffered by experts were as much in flux as their own strategies. In this essay, I reconsider *Griggs* as the origin of a central tension within antidiscrimination law: the

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[10] Stephen E. Fienberg, ed., *The Evolving Role of Statistical Assessments as Evidence in the Courts* (New York: Springer-Verlag, 1989); Reva B. Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification," *California Law Review* 88, no. 1 (2000): 77–118; Stryker, "Disparate Impact and the Quota Debates."

[11] Murakawa, "Racial Innocence." The *Griggs* doctrine was weakened in the 1980s by *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) and *Wards Cove Packing Co., Inc. et al. v. Antonio et al.*, 490 U.S. 642.

[12] On the history of race-correction, see Braun, *Breathing Race into the Machine*.

[13] On the mutual legitimation of law and social science, see: Stryker, Docka-Filipek, and Wald, "Employment Discrimination Law and Industrial Psychology."

[14] For the Reagan administration's attempt to undermine disparate impact, see Office of Legal Policy, "Redefining Discrimination."

vexed relationship between scientific, legal, and political concepts like *validity* and *significance*. When the question of how to detect discrimination shifted toward the more contentious matter of calculating remedies, social scientists were put in the position of evaluating fairness in quantitative terms, effectively flattening concerns about historical injustice and structural racism into protracted debates over discipline-specific thresholds of proof. Moreover, the "consensus" view of testing silenced the voices of more radical Black critics and reformers who sought a wholesale reevaluation of how psychology could address structural racism. Paying closer attention to the politics of expertise explains more about why disparate impact did not live up to the hopes invested in it.

From Cultural Bias to Construct Validity

In the 1960s, lawyers and psychologists frequently confronted the fact that neither presided over an autonomous professional domain, an uncomfortable reality reinforced by encounters in the courtroom and the clinic as much as in the halls of government power. Before World War II, psychologists had largely grounded their discipline in the laboratory. This investment in academic credibility paid dividends when psychological experts were recruited to consult on Cold War policy and to expand their clinical footprint as stewards of mental health.[15] The expansion of psychological testing through organizations like the Educational Testing Service (ETS) positioned psychology as a central to the administration of formal equality.[16] Likewise, the constitutional jurisprudence of the Warren Court created a new set of opportunities and entanglements for the legal profession. These

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[15] On psychologists as government experts, see Herman, *The Romance of American Psychology*; Rohde, *Armed with Expertise*. On the rise of clinical and applied psychology, see James H. Capshew, *Psychologists on the March: Science, Practice, and Professional Identity in America, 1929-1969*, Cambridge Studies in the History of Psychology (Cambridge: Cambridge University Press, 1999); Wade Pickren, "Tension and Opportunity in Post-World War II American Psychology," *History of Psychology* 10, no. 3 (August 2007): 279–99.

[16] On ETS see, *inter alia*, Nicholas Lemann, *The Big Test: The Secret History of the American Meritocracy* (New York: Farrar, Straus and Giroux, 1999).

ranged from practical concerns like recruiting enough public defenders to guarantee due process rights, to more abstract ones regarding the impossibility of separating the executive and judicial branches of the United States government—a problem debated endlessly in the pages of law reviews and in closed-door meetings.[17] This section tells the story of how the overlapping jurisdiction of psychologists and lawyers became a problem during the civil rights reforms of the 1960s. A Critique of aptitude tests was a promising yet volatile foundation for the new doctrine.

Survey instruments, ability tests, and psychological classifications have a pernicious tendency to shore up or even naturalize existing perceptions of cultural hierarchy, something early critics knew all too well. When the cultural conversation during the interwar period shifted from the implications of novel metrics for the fabric of democratic society toward their technicalities, it was clear that they were here to stay.[18] By midcentury the affinity for aptitudes and social typologies was stronger than ever, but it tended toward pluralism; testing experts promoted a variety of metrics for sorting individuals to ensure social harmony, many of them non-hierarchical.[19] Nowhere was this spirit stronger than in industrial psychology, then in the process of rebranding itself with the suffix "organizational" to appeal to white-collar management. A 1941 feature in *Fortune* opined: "the disuse of strong aptitudes coupled with the attempt to use weak ones may result in unhappiness and personal failure…Many a potentially good mechanic has made himself, or been made by parental pressure, into a bad lawyer."[20] With the New Deal compact between labor and

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[17] On the politics of the legal profession, see Robert W. Gordon, "The Legal Profession," in *Looking Back at Law's Century*, ed. Austin Sarat, Bryant G. Garth, and Robert A. Kagan (Ithaca, N.Y.: Cornell University Press, 2002), 287–336; Mayeux, *Free Justice*. For a classic example of the debate among legal academics, see Ely, "Legislative and Administrative Motivation in Constitutional Law."

[18] Carson, *The Measure of Merit*, 269; Igo, *The Averaged American*, 190.

[19] Carson, *The Measure of Merit*, 257; Igo, *The Averaged American*, 279.

[20] "Testing for Talent," *Fortune*, January 1941, 96. A decade later, the same publication was reporting on more advanced tests to assess potential managers: "The Tests of Management," *Fortune*, July 1950. On personality

capital secure, test results read like suggestions for realizing an individual's immutable potential, enough to keep skeptics of their objectivity at bay.

The politics of intelligence testing looked different in the era of mandated desegregation following *Brown*, as the exclusionary practices that underwrote the successes of the New Deal faced new scrutiny. An employer that formerly practiced open (or covert) racial discrimination could signal commitment to 'equal' and 'fair' employment practices by adopting one among a variety of commercially available personnel tests. Racial disparities in aptitude test scores were well-known, and their widespread adoption as gatekeeping mechanisms in education and the workforce therefore raised an uncomfortable paradox for attempts to desegregate American society. As research tools, tests were a means of assessing theories of group difference; in practice, they could be an obstacle to "equality as a fact and equality as a result," as President Johnson called for in his 1965 commencement address at Howard University.[21] Undoing the formal vestiges of Jim Crow, whether with "all deliberate speed" or halting indifference, was insufficient to address centuries of oppression and minimal opportunities for education and economic independence. Could testing survive in a political climate warming to redistribution?

This question emerged at a crucial moment in the drama of federal civil rights legislation. As the Senate weathered a lengthy filibuster over the House-ratified Civil Rights Act into the summer of 1964, an examiner for the Illinois Fair Employment Practices (FEP) Commission held that a personnel test could be deemed culturally biased in favor of whites. Radio technician Leon Myart had filed a complaint after being denied a job at a Motorola plant on the basis of a failed written test developed by Prof. Philip Surrager of the Illinois Institute of Technology. The Illinois

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tests, see: Kira Lussier, "Temperamental Workers: Psychology, Business, and the Humm-Wadsworth Temperament Scale in Interwar America," *History of Psychology* 21, no. 2 (May 2018): 79–99.

[21] See above, Chapter One.

FEP Commission now demanded that Motorola hire him.[22] The *Chicago Tribune* weighed in on the case, arguing that the logic of cultural bias:

> [M]ay be reduced to the absurdity that any test acceptable to the F.E.P.C. would be one which brought out no distinction whatsoever…here the doctrine is enunciated that a political appointee is going to dictate to business [its] standards of selection.[23]

This *reductio ad absurdum* was typical of the business establishment's opposition to fair employment laws which, as Anthony Chen shows, it resisted but applauded upon passage to save face.[24]

However, the timing of this case was key. When Senate Republicans and Southern Democrats got wind of the hearings, they were concerned they set a dangerous precedent for throwing out *any* standardized test on which whites outperformed other minorities, even if justified by business needs. They responded with an amendment, named after Senator John Tower (R-TX), which guarded "professionally developed ability tests," so long as they were used without the intent to discriminate.[25] The phrase was deliberately vague, but perhaps more than the Senators behind the Tower amendment were aware. In the previous decade, the psychological community had

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[22] Irving Kovarsky, "The Harlequinesque Motorola Decision and Its Implications," *Boston College Industrial and Commercial Law Review* 7, no. 3 (1966): 535–48; Belton, *The Crusade for Equality in the Workplace*, 102.

[23] Arthur Krock, "In The Nation: A Pilot Ruling on Equal Employment Opportunity," *New York Times*, 1964. The *Times* columnist reported that the racial politics of the case went deeper than the test itself: "[Attorneys] for Motorola, Inc., have contended that the company cannot depend on a fair hearing of its rebuttal because the hearing officer designated by the commission is a Negro."

[24] Chen, *The Fifth Freedom*, 21. For a more sanguine take on equal opportunity as workplace policy, see Dobbin, *Inventing Equal Opportunity*.

[25] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 434n10. Reasoning backward from his disagreement with *Griggs*, policy historian Hugh Davis Graham argues that the amendment "reflected the law's traditional standard that proof of discrimination required evidence of intent to harm and that statistical imbalances or disproportional distributions would not suffice." Graham, *The Civil Rights Era*, 146. Tower's was one of several protections for employers the Senate introduced to Title VII. Among others were a mandate against compensatory quotas, protection against accidental discrimination, and immunity from any charges prior to July of 1965: *Civil Rights Act of 1964*, Public Law 88-352, *U.S. Statutes at Large* 78 (1964): 241-268. This defense of tests used by private industry was purely situational, even opportunistic. The following year, Senator Sam Ervin (D-NC) spearheaded an investigation into whether the use of psychological tests by the state "constituted an unjustified invasion of the individual's psyche and private life." Sam J Ervin Jr., "Why Senate Hearings on Psychological Tests in Government," *American Psychologist* 20, no. 11 (1965): 879–80.

attempted to redeem its haphazard experiments with personnel sorting during the war.[26] Despite vested interest in the continued growth of aptitude tests, there was vocal dissensus over their utility within a community of socially-conscious practitioners that saw its own fate tied to *Brown*'s promise of an integrated society. Most employers, the army included, sought tests with what psychologists called "predictive validity" for success on the job. This was the very same principle Henry Chauncey's ETS touted to promote the Scholastic Aptitude Test (SAT) to college admissions offices, demonstrating that high scores correlated with academic excellence, or rather, grades.[27] Most jobs lacked such readily quantifiable benchmarks; what "success" looked like varied among evaluators. Compounded with calls for tests that were "culture-free" or "culture-fair," this epistemological conundrum threatened to undermine the entire enterprise.[28]

In 1950, the APA convened a committee of psychologists drawn from education research to devise a set of recommendations for testing practices. In the process, leading figures in the field articulated a view of what was scientific about psychology, though not without outcry from those who felt their research was under attack. Ultimately, the committee eschewed a broader conversation about disciplinary ethics in favor of a set of technical guidelines for validation. The technical report, published as a supplement in 1954, proposed information standards for test users and detailed recommendations for four different kinds of validity: content, concurrent, predictive, and construct.[29] The latter was a novel development, elaborated in a subsequent, celebrated paper by psychometricians Lee J. Cronbach and Paul Meehl. In the original report, construct validity was

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[26] Capshew, *Psychologists on the March*, 114–15.

[27] On Chauncey and the SAT, see Lemann, *The Big Test*.

[28] James J. Kirkpatrick et al., *Testing and Fair Employment: Fairness and Validity of Personnel Tests for Different Ethnic Groups* (New York: New York University Press, 1968), 11.

[29] American Psychological Association, American Educational Research Association, and National Council on Measurements Used in Education, "Technical Recommendations for Psychological Tests and Diagnostic Techniques," *Psychological Bulletin* 51, no. 2, Pt. 2 (1954): 1–38.

presented as a response to the difficulties of accounting for a range of outcomes when "the tester has no definite criterion measure of the quality with which he is concerned," and touted as a measure of internal consistency.[30] Cronbach and Meehl went a step further, suggesting that construct validity paralleled the scientific method itself. It was "not essentially different from the general scientific procedures for developing and confirming theories," and whether they knew it or not, psychologists were *actually* engaging in construct validity research when discussing methodology.[31] Construct validity had perhaps the most potential for the still-hazy field of personality testing, but it also offered a technical solution to an enduring problem in industrial psychology: determining if a test was "culture-free."[32]

When the Civil Rights Act of 1964 passed with the Tower Amendment intact, many psychologists still felt that tests and merit-based standards were better measures of environment than potential. A comment on the Civil Rights Act in *American Psychologist* framed the issue bluntly: improving tests could only make a minor contribution to the fight against discrimination, and in "a choice between testing and expanded equal job opportunity, testing will surely lose."[33] Yet, many were confident that technical fixed could redeem the testing enterprise. While even an ETS executive was pessimistic that "300 years of deprivation [could] be overcome by a simple adjustment of test scores," the idea had been circulating since at least the 1950s.[34] The use of factor

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[30] American Psychological Association, American Educational Research Association, and National Council on Measurements Used in Education, 14.

[31] Lee J. Cronbach and Paul E. Meehl, "Construct Validity in Psychological Tests," *Psychological Bulletin* 52, no. 4 (July 1955): 300. On the interplay between methodology and theories of the scientific enterprise, particularly in the human sciences, see Henry M. Cowles, *The Scientific Method: An Evolution of Thinking from Darwin to Dewey* (Cambridge, Mass.: Harvard University Press, 2020).

[32] Cronbach and Meehl, "Construct Validity in Psychological Tests," 283.

[33] Philip Ash, "The Implications of the Civil Rights Act of 1964 for Psychological Assessment in Industry," *American Psychologist* 21, no. 8 (1966): 803.

[34] Quoted in Kirkpatrick et al., *Testing and Fair Employment*, 11.

analysis, moderator variables, and grouping by performance had all been proposed as solutions to the validity crisis, though their proponents had been careful to sidestep issues of cultural and group difference, at least at first.[35]

Criticism of personnel tests was received within the richer dialogue about educational opportunity in the wake of *Brown*. At the APA's 1964 conference, a working group from APA Division 9, the Society for the Psychological Study of Social Issues delineated a set of technical and political issues with tests in education. They raised the issue of cultural bias and argued on the basis of Cronbach and Meehl's validity principles that the spread of tests scores for minority groups did not align with expectations, perhaps because they were only validated for white children. While the group identified test misuse as "a serious breach of professional ethics," their proper use was "a sign of professional and personal maturity."[36]

Educational and industrial psychologists cautiously defended aptitude tests, but the established critical discourse made them a clear target for the newly-formed EEOC.[37] Tests were not the only avenue civil rights advocates saw for making civil rights reforms enforceable. Conservative Senators had also fortified Title VII against attacks on union seniority systems, which often operated exclusively in favor of white employees, provided another compelling target for the commission and organizations like the NAACP LDF. Given the history of tensions over seniority between labor leaders and the NAACP, the litigation was quick to develop, and by the mid-1960s it seemed like this might be the answer to making structural racism, as opposed to invidious actions,

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[35] David R. Saunders, "Moderator Variables in Prediction," *Educational and Psychological Measurement* 16, no. 2 (July 1, 1956): 209–22; Edwin E. Ghiselli, "Differentiation of Individuals in Terms of Their Predictability," *Journal of Applied Psychology* 40, no. 6 (December 1956): 374–77.

[36] Martin Deutsch et al., "Guidelines for Testing Minority Group Children," *Journal of Social Issues* 20, no. 2 (1964): 130, 144.

[37] See above, Chapter One.

a legal liability.[38] The EEOC, however, chose to sit this battle out: rather than issuing a set of seniority guidelines, it collected union data through surveys for conciliation purposes and joined amicus briefs.[39] If a campaign against personnel tests required greater effort, it afforded greater security by allowing the commission to avoid direct confrontation with organized labor. Moreover, the optics were different with aptitude tests: adopted *en masse* after the end of legally sanctioned discrimination in the 1950s, they bore an uncanny resemblance to the literacy tests adopted to deter Black voters after Reconstruction.[40]

The EEOC set about drafting guidelines on employment testing based on ones adopted by the APA, convening a panel of psychologists in May of 1966. It also hired Phyllis A. Wallace, the first Black woman to receive a doctorate in economics from Yale, to lead its survey and research arm.[41] While most personnel tests were created by corporations that conducted their own validity studies, the baseline was measured using the 'average' white American man. The EEOC guidelines recommended specifically that tests be validated for minorities and referred readers to the APA handbook for details. The only explicit mention of bias in the guidelines invoked differential validity: "Only a test which has been validated for minorities can be assumed to be free of inadvertent bias." A state-level employment commission recommended asking for validation data as the first recourse in handling a complaint, noting, "In full recognition of the [technical] difficulties it is nonetheless recommended that situational validity be enunciated as the ultimate criterion of

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[38] Graham, *The Civil Rights Era*, 251. On the complicated legacy of the NAACP's pursuit of labor rights, an agenda that was once the core of its efforts, see Goluboff, *The Lost Promise of Civil Rights*; Frymer, *Black and Blue*; Lee, *The Workplace Constitution*.

[39] Belton, *The Crusade for Equality in the Workplace*, 81–83.

[40] Blumrosen, "Strangers in Paradise," 59–60.

[41] Julianne Malveaux, "Tilting Against the Wind: Reflections on the Life and Work of Phyllis Ann Wallace," *The American Economic Review* 84, no. 2 (1994): 95.

fairness."[42] *Situational* validity was not among those endorsed by the APA and EEOC, but denoted a best practice: companies needed to validate a test for a given job in a given locale, not simply point to a study in the published literature or conducted elsewhere. On the whole, the guidelines aimed to encourage the development of 'total personnel systems' that recommended interviews and affirmative action programs as well as extensive screening for job relatedness in any test battery.[43]

Still, not all psychologists thought there was a major problem with testing, or that any existing isues were particular to minorities. In a 1966 presentation at a fair employment practices meeting in California, Pacific Gas and Electric Company psychologist William C. Burns cautioned against one-size-fits-all tests for qualities like "adaptability" that in fact tested a range of "abilities." He liked the scenario to mixing paints: "If you buy a can of 'twilight rusty rose' you are not sure what you have or how to change it." On the issue of racial and cultural biases, Burns argued that the problem was not prejudice so much as prevailing inequality that was "an artifact of American racial history." Rather than calling tests "dirty-names like 'culturally biased'" or making "the average test scores equal by changing the tests," Burns urged the platitude that society needed to "find ways of changing people, encouraging people and helping people." He boiled the matter down simply: any valid testing program was fair, but an irrelevant one was both unfair and an affront to the goal of a just society.[44]

EEOC staff psychologist William H. Enneis held similar views, though he conveyed them with sharper language than the lackadaisical Burns. He considered 'general' tests widely overused,

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[42] Jay T. Rusmore, "Psychological Tests and Fair Employment: A Study of Employment Testing in the San Francisco Bay Area," 10, APA Records, Box 226.
[43] Equal Employment Opportunity Commission, *Guidelines on Employment Testing Procedures* (Washington, D.C., August 24, 1966), EEOC Records A1-4 Box 7 Folder "Research – Testing."
[44] William C. Burns, "Guideline III Is: Use Tests Appropriately and Only When They Relate to Performance" (San Francisco: Technical Advisory Committee on Testing to the California Fair Employment Practice Commission, 1966), 7–11, EEOC Records, A1-4, Box 7, Folder "Research – Testing."

having encountered "absurd" instances "where a general intelligence test is used to screen applicants for the positions of janitor, dishwasher, window washer, and laborer." He thought it downright unethical to use tests for existing employees, arguing that a good track record was better than any predictive test. Enneis doubted the claim that the introduction of complex machinery into factories and plants warranted more stringent job requirements. Yet, he found results of differential validity studies on minorities to be "truly amazing," boding well for the discipline of personnel psychology to play a central role in fair employment oversight.[45] Perhaps, with the right adjustments, tests could be tamed rather than discarded.

Between 1965 and 1967, under the aegis of a Ford Foundation grant, a group of New York University psychologists conducted studies of differential validity on ethnic and racial groups in five work situations. The resulting technical report was so popular that it was republished the following year as a monograph.[46] Its authors enthusiastically endorsed more explicit ethnic classification as a way forward for fair employment practices, echoing the EEOC's own use of surveys as "sociological radar" to detect discrimination.[47] Their findings were summed up by a simple maxim: "Validation irrespective of race may lead to discrimination; separate validation by ethnic group will not."[48] On the strength of the study, one of its authors was tapped as an expert witness by the LDF in its case against a North Carolina power plant on behalf of a plaintiff named Willie Griggs. As the apparent backlash over President Johnson's civil rights agenda threatened the future of programs designed to

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[45] "Statement of William H. Enneis, Staff Psychologist, U. S. Equal Employment Opportunity Commission" (Philadelphia: House Post Office and Civil Service Subcommittee on Postal Operations, March 10, 1967), 7–14, EEOC Records, A1-4, Box 7, Folder "Research - Research Reports [1 of 3]."

[46] Kirkpatrick et al., *Testing and Fair Employment*, ix–x.

[47] On the controversy surrounding the EEOC's survey, see Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination.'"

[48] Kirkpatrick et al., *Testing and Fair Employment*, 37.

address structural problems, this emerging strand of racial measurement research proposed an easy solution to the paradox of equal opportunity under the reign of meritocracy.

In the wake of the Civil Rights Act, the prevailing sentiment among civil rights advocates and many psychologists was that tests should be de-emphasized or eschewed altogether in favor of advancing social goals, at least until the playing field could be leveled. These ideas were put into practice, albeit in scenarios that could easily have been construed as cynical publicity moves. *The New York Times Magazine* ran a feature on efforts by the Ford Motor Company to recruit workers from inner-city Detroit, primarily Black men, without the use of traditional tests and screening procedures. An industrial relations manager was reported to tell applicants: "We're not after supermen. We're after men who desire to work steady."[49] The language of "hard-core" unemployment played off tropes of deviance to highlight a grim scenario. As the meaning of "affirmative action" policies took shape, it became clear that the stated aim of businesses to promote egalitarianism through sorting devices sanctioned by experts was out of touch with the political reality of racial inequality. However, the battle over testing was far from over, and its next phase would help define what the pursuit of civil rights through litigation rather than legislation would look like.

"[M]easure the person for the job…not the person in the abstract"

While psychologists scrambled to determine what role experts might play in furthering the cause of civil rights, lawyers took to their books and strategized, seeking to strengthen weak legislation. Writing at the beginning of 1968 in NAACP magazine *The Crisis*, EEOC commissioner Samuel C.

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[49] Gertrude Samuels, "Help Wanted: The Hard-Core Unemployed," *New York Times*, 1968, sec. Magazine.

Jackson laid out the logic of equating the prejudicial effects of outright racism and "criteria which *prove to have a demonstrable racial effect* without a clear and convincing business motive," an approach that "[disregarded] intent…as crucial to the finding of an unlawful employment practice."[50] Yet, the EEOC was hardly the only party in the fight for fair employment. In 1967 alone, the New York-based LDF devoted 40% of its resources to employment litigation and maintained a close relationship with the EEOC's Office of General Counsel, filing amicus briefs and helping plaintiffs find legal aid for these "David and Goliath confrontations." One lawyer argued that the *Griggs* effort "was almost on par with [its] *Brown* litigation campaign," particularly in its investment in research and reliance on academics.[51] LDF attorneys spearheaded efforts to build a body of law that recognized the enduring effects of structural racism. It gathered lawyers from around the country in July of 1968 to "develop legal techniques" for grappling with both seniority and testing.[52] By sharing techniques and knowledge, they aimed to turn the largely innocuous Title VII from a bureaucratic ploughshare into a sword for civil rights groups to wield against the business establishment.

Jackson presented the consensus view of discrimination that had developed among activists as "institutionalized" rather than intentional. He also pointed out the baseline problem of psychological evaluations, "designed to select the average white American (called the 'best employee') from a cross-section of white Americans."[53] By this logic, one could not expect that a facially neutral system developed for white faces would benefit the disenfranchised. Later that month, a Virginia District Court struck down a seniority system in *Quarles v. Phillip Morris, Inc.* on the grounds that under Title VII, "Congress did not intend to freeze an entire generation of Negro

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[50] Samuel C. Jackson, "EEOC vs. Discrimination, Inc.," *The Crisis: A Record of the Darker Races*, January 1968.
[51] Belton, *The Crusade for Equality in the Workplace*, 27, 32, 6, 43.
[52] C. Gerald Fraser, "Tactics Planned on Job Bias Fight," *The New York Times*, July 20, 1968.
[53] Jackson, "EEOC vs. Discrimination, Inc.," 16.

employees into discriminatory patterns that existed before the act," a major legal victory for the LDF.[54] Jackson claimed that selection systems reflected the bias of their creators, even in the rarefied domain of intelligence tests. Even as the experts began to pivot to defend the aptitude testing enterprise, popular critiques dovetailed with the effects-based legal strategy of the EEOC and LDF, which made its way into the top-shelf law review literature via a 1969 article in the *Harvard Law Review* by George Cooper and Richard B. Sobol.[55]

Uncoincidentally, these lawyers were counsel for a number of active cases. Just months after releasing its testing guidelines, the EEOC received a complaint from a group of janitors at a North Carolina power plant about their company's adoption of a testing requirement. Duke Power's Dan River facility was segregated. All black employees were confined to the labor department, where they were paid less than half the wages of white employees in other departments.[56] As soon as the Act went into effect in July of 1965, the company adopted a formal transfer policy: a high school diploma and/or a sufficient score on a pair of tests: the Wonderlic Test and the Bennett Mechanical Comprehension Test. The Wonderlic was exactly the kind of general intelligence test abhorred by

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[54] *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) at 516.

[55] George Cooper and Richard B. Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," *Harvard Law Review* 82, no. 8 (1969): 1598–1679. David L. Rose of the DOJ reflected upon its importance in a 2011 interview: "I didn't invent the disparate impact theory. It was…Cooper and Sobol, I believe, a year or two before, that laid it out, and we lawyers heard at least about the law review articles": Vicki Schultz, "Interview with David L. Rose in Employment Discrimination: 45 Years of Enforcement of Title VII of the Civil Rights Act of 1964," *American University Labor and Employment Law Forum* 1, no. 2 (Spring 2011): 183–84. It was later branded a "Citation Classic" by a social science abstract digest: Institute for Scientific Information, "This Week's Citation Classic: Cooper G & Sobol R B.: Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion.," *Current Contents in the Social and Behavioral Sciences* 44 (November 3, 1986): 22.

[56] *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N.C. 1968) at 247. The pay outlined in the Plaintiff's brief: "The Labor Department is the least desirable one in the plant and is the lowest paid. The maximum wage ever earned by a Negro in the Labor Department is $1.565 per hour (R. 72b). This maximum is less than the minimum ($1.705) paid to any white in the plant (R. 72b). It is drastically less than the maximum wage paid to whites in the Coal Handling and "inside" departments where top jobs pay from $3.18 to $3.65 per hour (R. 72b)." George Cooper and Harriet Rabb, "Equal Employment Law and Litigation: Materials for a Clinical Law Course" (Employment Rights Project: Columbia Law School, December 6, 1972), 505.

William Enneis. With 50 questions administered in just 12 minutes, it tested combinatoric algebra and vocabulary. With the *Motorola* verdict on the table, it is little wonder that the Wonderlic became the most frequently challenged psychological assessment of the late 1960s.[57] After a failed EEOC conciliation with the company, the LDF took on the case on behalf of 12 janitors.

In trial, Duke Power brought in a business professor who provided a casual justification for the company's adoption of psychological tests as indicators of 'quality.' After seeking testimony from well-known psychologists like Kenneth and Mamie Clark, the LDF tapped industrial psychologist Richard S. Barrett, who had coauthored the Ford Foundation-funded study of ethnicity-specific validation.[58] The EEOC did not have comprehensive data on educational requirements, but submitted figures from the 1960 census showing that only 12% of black men in the state had completed high school compared to 34% of white men.[59] The District Court judge was persuaded by the defense's expert and dismissed Griggs's claim: there was nothing discriminatory about seeking quality employees.[60] The Court of Appeals reversed in part, arguing that the requirements should be waived for employees hired before the Act, leaving intact the argument that the tests served a legitimate business purpose.

However, Judge Simon Sobeloff issued a stinging dissent, invoking the logic of *Quarles* that Title VII should not "freeze" black employees into pre-act patterns; on this basis, the Act barred any "'objective' or 'neutral' standards that favor whites but do not serve business needs."[61] He also took

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[57] Cooper and Sobol, "Seniority and Testing under Fair Employment Laws," 1642. The Wonderlic is still in use today, in the National Football League (NFL): Andrew Gill and Victor Brajer, "Wonderlic, Race, and the NFL Draft," *Journal of Sports Economics* 13, no. 6 (December 1, 2012): 642–53.
[58] Belton, *The Crusade for Equality in the Workplace*, 131–32. Barrett became a notable repeat player in these lawsuits, also testifying in *Albemarle Paper Co. et al. v. Moody et. al.* 422 U.S. 405 (1975).
[59] Belton, 185–86.
[60] *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N.C. 1968) at 250, 251.
[61] *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970) at 1238.

note of the plaintiff's statistical evidence and even cited Cooper and Sobol's article outlining the LDF's approach to discrimination in both seniority and testing. While his fellow judges were content to trot out a conservative vision of Title VII's legislative intent, Sobeloff—nearing the end of his career—chose not to pass up his chance to weigh in on a case he thought "confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process."[62]

Meanwhile, ABPsi was becoming a stronger presence in the psychological community. After a group of 25 members walked out on a Western Psychological Association panel on minority and disadvantaged groups comprised entirely of white psychologists, leaders sharpened their emphasis on self-determination. President Charles W. Thomas described the way white researchers exploited and profited from research on Black subjects as "another form of rape," while educational psychologist Sandy Garcia emphasized that communities should have a say in who studies them and how.[63] Surveying a spate of "hysterical protests" within academic organizations, one commentator called the APA "[perhaps] the most splintered of all professional organizations."[64] ABPsi grew more vocal in its critique of testing, emphasizing the rights of Black parents who refused to allow their children to be subjected to "achievement, intelligence, aptitude and performance tests" that hampered positive intellectual growth.[65] In 1970, the San Francisco school district responded to these calls by adopting a moratorium on testing.[66] With educational victories secured, personnel testing was perhaps an even easier target. Black counselors within the American

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[62] *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970) at 1248.
[63] "White Doctors Cheer Black Critic," *The Province*, June 23, 1969.
[64] Richard C. Lemon, "Radicals in Disguise: Militant Professional Men Chip Away at Establishment," *The Post-Crescent*, October 8, 1969.
[65] Robert L. Williams and Horace Mitchell, "What Happened to ABPsi's Moratorium on Testing: A 1968 to 1977 Reminder," *Journal of Black Psychology* 4, no. 1–2 (August 1, 1978): 26.
[66] Jim Wood, "Black Pupil IQ Tests to End," *The San Francisco Examiner*, May 6, 1970.

Personnel and Guidance Association pressed their organization to commit to a set of resolutions to improve testing research, funding, and Black professional participation; if these initiatives did not result in "demonstrable progress," the group agreed to consider a moratorium on the use of group intelligence tests for minorities.[67]

Emboldened by Sobeloff's opinion, though perhaps unaware of growing tensions within the psychological community, the LDF immediately set about getting *Griggs* before the Supreme Court. However, EEOC deputy General Counsel John Pemberton was uncertain whether they should take the risk, for one conspicuous reason: the numbers were simply not there. He drafted a letter to LDF Director Jack Greenberg claiming that he found the intent standard to be "not particularly disturbing as applied to the record in this case": few employees had actually attempted to take the tests, validated by a professional, so there was no real record of failure.[68] Moreover, the company was willing to subsidize adult education for the remaining plaintiffs to get their diplomas and a facility with "atomic power and steam generators" did sound dangerous. Ultimately, he felt that the case had been reduced to "hypothetical arguments," which did not provide "a powerful litigating posture" for disparate impact theory.

Perhaps Pemberton had a change of heart—he never sent the letter. To shore up the case, EEOC issued new testing guidelines demonstrating that employers keep "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior," and emphasized that a test was not 'professional' merely because it "was prepared by an individual or organization claiming expertise in test preparation."[69] Meanwhile, the Chamber of Commerce submitted a brief noting the "substantial and far-reaching consequences on American industry" that

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[67] Williams and Mitchell, "What Happened to ABPsi's Moratorium on Testing," 27–28.
[68] Cooper and Rabb, "Equal Employment Law and Litigation: Materials for a Clinical Law Course," 497–98.
[69] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 433, n. 9.

would result from restricting tests used by as much as 55% of large U.S. companies.[70] The stakes were high, success uncertain. However, in light of the Kerner Report's urgent recommendations and widely held views that personnel testing was an arbitrary barrier to jobs, *Griggs* provided an opportunity for the Supreme Court to weigh in on one of the most pressing developments in employment law since the passage of the 1964 Act.

The Supreme Court ruled unanimously in favor of *Griggs*.[71] The opinion by Chief Justice Burger closely followed Sobeloff's dissent, granting authority to the EEOC as the arbiter of psychological testing in industry: "Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."[72] Though the ruling itself affected only four power plant janitors in North Carolina, *Griggs* was hailed as a major victory by the civil rights community. EEOC advisor Alfred W. Blumrosen wrote that the decision "poured decisive content into a previously vacuous conception of human rights…the statutory concept of 'discrimination' in light of the social and economic facts of our society."[73] Yet, the decision seemed to have far less to do with mobilizing the facts of systemic racism than endorsing the EEOC's approach to a qualification practice within its ambit.

As Pemberton had pointed out, there were no real statistics in *Griggs*—only data from the census showing high school diploma breakdown by race and some studies the EEOC had conducted on the effects of these same tests in *other* workforces. The Supreme Court had endorsed the idea that "Congress directed the thrust of the Act to the *consequences* of employment practices, not

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[70] "Large" meant companies with over 1,600 employees. Belton, *The Crusade for Equality in the Workplace*, 173.
[71] Michael Graetz and Linda Greenhouse argue that no judge wanted to be in the minority when it was a clear 6-2 vote, so Burger, who was one of the two against, recanted and wrote the opinion. Michael J. Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* (New York: Simon & Schuster, 2016), 286.
[72] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 433. The consensus among industrial psychologists was that "any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436.
[73] Blumrosen, "Strangers in Paradise," 62.

simply the motivation."[74] This provided the opening civil rights advocates had sought, underscoring the potential for applying a wide range of perspectives from the modern social sciences to expose the racially stratified consequences of ostensibly neutral practices. However, detractors read it as judicial endorsement of a highly technical branch of psychology, incomprehensible and inaccessible to businesses engaging in good-faith attempts to improve their employment practices. The stage was set for conflict.

"Once More to the Barricades"

The *Griggs* litigation began in February of 1968, weeks before President Johnson ended his campaign for reelection. With a liberal Democrat having overseen the passage of the 1964 Act and the original EEOC appointments, the election of Richard Nixon signaled changes to come in federal civil rights policy. Under John W. Macy, Jr., a liberal administrator who nonetheless oversaw the Lavender Scare persecution of gay federal employees, the Civil Service Commission (CSC) pursued validation studies with ETS.[75] Macy had cooperated with the EEOC, but after he resigned in 1969, his successor took things in a different direction. In the aftermath of *Griggs*, state agencies ceased using the Wonderlic. As the government's largest test administrator, the CSC recognized that it needed to ensure that its Federal Service Entrance Examination (FSEE) was up to par and announced an overhaul later that year. A subsequent lawsuit revealed that more than revising the test to comply with the EEOC guidelines, the CSC had developed its own standards of evaluation.

Eight Black college graduated who had been hired into the Department of Housing and Urban Development through an internship program sought permanent positions through the FSEE.

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[74] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 432.

[75] As part of the collaboration, the CSC began to accept ETS's Graduate Record Examination (GRE) as an alternative to its own entrance exam: *Douglas v. Hampton*, 338 F. Supp. 18 (D.D.C. 1972).

About half of them passed, while others failed and were terminated or resigned. The group filed an injunction against the CSC, claiming that the FSEE had a disparate impact on Black applicants. A D.C. District Court judge threw out the case, citing the plaintiff's lack of statistical data on the racial breakdown of pass rates, something the CSC did not systematically record. In its affidavit, the CSC took a further step, detailing its own draft guidelines for appraisal procedures. Deviating from the EEOC guidelines, the CSC proposal described a principle of "rational" validation as "a demonstrable rational relationship to important job-related performance objectives," which it contrasted with "statistical validation" procedures it deemed infeasible and limited. The judge found this perfectly suitable despite the fact that no psychologist had endorsed "rational" validity.

Lawrence Plotkin, a research psychologist working with former EEOC research head Phyllis A. Wallace at Kenneth Clark's Metropolitan Applied Research Center, sounded the alarm. He argued that "rational validity" most closely resembled the lay notions of "face validity" that the APA standards were designed to counteract—whether a test was *reasonably* related to the job, without rigorous evaluation. He called this "regression to unscientific" standards "an attempt to undercut the Griggs decision."[76] EEOC chairman William H. Brown, III chastised the CSC head for deviating from the federal coordinating council, writing "I fear that almost any test, examining procedure, standard, or employment practice could be squeezed to fit into its loose definition and proposed application." The call was not heeded. When President Carter appointed Eleanor Holmes Norton to

[76] Memorandum from Lawrence Plotkin to Phyllis A. Wallace, July 11, 1972, Wallace Papers, Box 7. In an exchange with psychologist Edward Opton Jr., the two speculated further on the extent of ETS's influence on the *Standards*: "the ability of ETS and the rest of the testing industry to manipulate the revision depends on their being allowed to do it quietly. The highly exclusionary, improper way they are carrying out the revision gives a basis for raising quite a fuss, and if a fuss is raised, a good document rather than a wishy-washy one might result…the *Standards* will be such an influential document, especially in litigation, that a real effort will be worthwhile, even if the odds were against success."

the position in 1977, her first priority was getting all federal agencies to agree on a single set of guidelines after five years of competing ones.[77]

The Civil Service Commission's pivot showed how pliable validity was. Judges might be willing to enjoin the use of tests developed by private industry but undercutting a federal agency was a bridge too far. Even as the Equal Employment Act of 1972 expanded the jurisdiction of the EEOC to federal, state, and local government employees, the first move had been made in what was becoming a struggle over the meaning of fairness. In the years following *Griggs*, validity as regulation became contorted through litigation, with psychologists on both sides of the stand.

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The civil rights rulings that shaped antidiscrimination law came at a moment when the decades of economic growth that made opening up the American workforce seem like a feasible political reality began slowing to a halt. While domestic policies focused on creating stable jobs for minority workers in flagship industries like steel, trade-focused Cold War foreign policy led to investments in foreign steel, shrinking the size of U.S. industry's economic pie as debates over how to divide it equitably gained traction.[78] The growing economic crisis of the 1970s helped turn lifelong New Deal Democrats into Republicans, and the identity politics of the white male working class gained political sway as critics lashed out at equal employment opportunity efforts.[79] EEOC officials did not necessarily help this perception. At a meeting of energy executives, Chairman William H. Brown III threatened that if they did not get their act together, this might be the agency's last appearance at a congenial luncheon: "I am afraid that our future meetings will be at opposite ends

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[77] Eleanor Holmes Norton to President Carter, December 23, 1977, EEOC Records, A1-27, Box 2.
[78] Stein, *Running Steel, Running America*.
[79] See, *inter alia*, MacLean, *Freedom Is Not Enough*; Jefferson Cowie, *Stayin' Alive: The 1970s and the Last Days of the Working Class* (New York: The New Press, 2010).

of hearing rooms, FPC examiners rooms, and courtrooms."[80] In this context, expensive litigation against professionally developed tests of ability was politicized anew: preoccupation with job *access* drew attention from the growing problem of job *scarcity*.

Griggs was taken seriously, if a bit narrowly. For one example, the state of Kentucky removed the Wonderlic as a screening device for all state jobs as soon as the decision was handed down.[81] Such preemptive actions illustrated what labor lawyers took for granted: that employers needed to perceive a genuine financial risk in order to agree to remedies leading to durable change. But if the Supreme Court had been vague in its definition of a correct validation procedure and had used its own reasoning to assess job-relatedness, it had even less to say about what counted as appropriate remedy. Such unresolved issues raised anxieties over the new civil rights regime. Lawyers began relying more on social scientists to make legal arguments about who counted in a class action suit, and how to calculate damages.

It was clear that *Griggs* gave "teeth" to Title VII; the question was who would be bitten. Writing in the *University of Colorado Law Review*, NAACP Labor Secretary Herbert Hill heralded the arrival of the decision as an antidote to anemic proceduralism in which "meritorious complaints…[became] lost in the quicksand of some administrative proceeding." Not only could courts order substantial backpay and alteration of existing practices, but any minority applicant coming into contact with a branch of a large corporation could pose a financial risk to the enterprise.[82] Yet, many were concerned about the efficacy of long and expensive litigation. Analyzing *Griggs* alongside challenges to the Philadelphia Plan, UCLA law professor Reginald H.

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[80] Remarks by William H. Brown III, EEOC Chairman, National Energy Policy Conference, Washington, D. C., February 18, 1970, 10, EEOC Records, A1-15, Box 1, Folder, "Brown Speeches 4-69-5-70."
[81] "State Commission Orders Job Agency to End Bias," *The Courier-Journal*, November 13, 1971.
[82] Herbert Hill, "The New Judicial Perception of Employment Discrimination - Litigation under Title VII of the Civil Rights Act of 1964," *University of Colorado Law Review*, no. 3 (1972): 254–55.

Alleyne, Jr. bemoaned the gap between evolving legal theory and the everyday practices of legal aid, "wide discrepancies between the enactment on paper and the enactment in operation," noting that overtaxed equal employment agencies took up to a year to investigate individual charges of discrimination, by which time a job might no longer exist.[83]

Many read into the decision an endorsement of employment demographics as a legal liability.[84] Experts were expensive cover. Blumrosen cheekily pointed out that the validation requirement rendered Title VII akin to "a full-employment act for industrial psychologists."[85] Of course, not all personnel experts were enthused about becoming expert witnesses. A policy review in *American Psychologist* pointed out that psychologists would need to defend concepts with neither professional nor administrative consensus behind them:

> [Defining] terms as 'professionally developed,' 'significantly related,' 'differential validity,' and 'bona fide occupational qualifications'…[is] part of a larger problem of demonstrating statistical validity, coalescing empirical evidence, and devising other methods of test validation that may have to meet court requirements yet unspecified.[86]

Beyond pulling psychologists out of their comfort zone, the adversarial process threatened to ratchet up expectations of certainty. Since the meanings of technical terms and measures developed in validity theory were still in flux, the translation process would be uneven at best, skewing precedent in favor of unsettled definitions.

Furthermore, scientific controversy tested allegiances in a field that was hardly unified to begin with. Already by 1971, a bubbling dispute within the psychological community had boiled

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[83] Reginald H. Alleyne Jr., "Legal Remedies for Racial Discrimination in Employment: The Evolving Search for Effectiveness," *National Black Law Journal* 2, no. 3 (1972): 303.
[84] E.g. Seligman, "How 'Equal Opportunity' Turned into Employment Quotas."
[85] Blumrosen, "Strangers in Paradise," 104.
[86] Cameron Fincher, "Personnel Testing and Public Policy," *American Psychologist* 28, no. 6 (June 1973): 494.

over into an all-out war over the explanation of an IQ gap between Black and white populations.[87] It had been catalyzed by Stanford physicist and Nobel Prize winner William Shockley, who delivered a series of lectures before the National Academy of Sciences in 1966 calling for eugenic solutions to observed racial differences in IQ and crime. Berkeley educational psychologist Arthur Jensen conferred a patina of scientific respectability on Shockley's proposals with a 1969 article asking, "How Much Can We Boost IQ and Scholastic Achievement?" His answer was a resounding "very little"; the article helped reignite controversy over the heritability of intelligence. While his immediate reference point was the debate among education researchers over James Coleman's 1966 report *Equality of Educational Opportunity*, Jensen was also interested in personnel testing. His contribution to the first issue of hereditarian research journal *Intelligence* in 1977 argued that the Wonderlic was free from cultural bias.[88] Just a few months after *Griggs* was decided, Harvard psychologist Richard J. Herrnstein defended Jensen's theories of IQ heritability in the pages of *The Atlantic*, concluding that tests provided "a more humane and tolerant grasp of human differences," echoing the earlier rhetoric of aptitude tests as a way to prevent bad career choices.[89] Conservative critics decried equal employment policy as illegitimate social engineering; Herrnstein advocated for a variety that appealed to their interests. It is no accident that the debate over the heritability of intelligence broke out when litigation against the discriminatory effects of tests was most effective

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[87] For analyses of the IQ controversy as part of deliberate attempts to rebrand eugenics and as a feature of the emerging discipline of behavioral genetics, see Edmund Ramsden, "Confronting the Stigma of Eugenics: Genetics, Demography and the Problems of Population," *Social Studies of Science* 39, no. 6 (December 1, 2009): 853–84; "The Young Field Disrupted: The Race and IQ Controversy," in Panofsky, *Misbehaving Science*.

[88] Arthur R. Jensen, "An Examination of Culture Bias in the Wonderlic Personnel Test," *Intelligence* 1, no. 1 (January 1, 1977): 51–64. On the Coleman report and its legacy, see Leah N. Gordon, "If Opportunity Is Not Enough: Coleman and His Critics in the Era of Equality of Results," *History of Education Quarterly* 57, no. 4 (November 2017): 601–15.

[89] Richard J. Herrnstein, "I.Q.," *The Atlantic Monthly*, September 1971, 64. Lee Cronbach argued that the issue of race in Herrnstein's analysis was exaggerated by the editor's framing: Lee J. Cronbach, "Five Decades of Public Controversy over Mental Testing," *American Psychologist* 30, no. 1 (January 1975): 6.

for plaintiffs. Liberal social scientists often found their staunchest opponents not among the business community or the public, but within their own fragmented professions.

Meanwhile, new organs like ABPsi's *Journal of Black Psychology* and the *Journal of Non-White Concerns in Personnel and Guidance* provided spaces for discussing racial redress in the psychological profession. While the movement had begun in advocacy, many in the community called for it to turn inward—research over revolution. Psychologist William David Smith issued a salvo in the *Journal of Black Studies* calling for "verification-innovation":

> If Black psychologists do not verify the existing theories and tests as being relevant or irrelevant to Black folks, who will? In other words, the era of rationalization, rhetoric and generalization must end, and the empirical research must begin.[90]

Personnel psychologists skeptical of testing had developed a coherent critique of common practices without a sufficiently strong *positive* theory of their own to fall back on. Enthusiasm for differential validation filled that void in part, but it left room for the hereditarian movement to gain ground and became fodder for critics of affirmative action enforcement to claim that suspect categories were overpoliced. A more experienced EEOC attempted to address common pitfalls in test litigation with firmer validity standards, to no avail. A 1975 piece in *Personnel Journal* found the EEOC's new guidelines too complicated, and endorsed the view that "existing guidelines can easily drive an employer to adopt a quota system" even though *Griggs* barred such systems by name.[91] Many questions about the meaning of tests and the definition of groups were still on the table.

The second psychometrics case heard by the Supreme Court presented an opportunity for some answers. In his unsent letter raising doubts about the *Griggs* appeal, Pemberton had been

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[90] William David Smith, "Which Way Black Psychologists: Tradition, Modification, or Verification-Innovation?," *Journal of Black Studies* 4, no. 1 (1973): 6.
[91] David E. Robertson, "Employment Testing and Discrimination," *Personnel Journal* 54, no. 1 (January 1975): 21.

optimistic about another case in the pipeline, *Moody v. Albemarle Paper Co.*, but the litigious defendants had gone out of their way to delay proceedings.[92] The case was remarkably similar to *Griggs*: a North Carolina plant with a segregated workforce that adopted the Wonderlic to regulate still largely segregated promotion lines. By the time it finally came to trial, *Griggs* was on the books and the team of repeat players from the LDF pursued two lines of argument: one aiming to solidify the rule that resting regimes had to be validated for specific jobs, per EEOC rules, and another to determine the conditions for awarding backpay under Title VII, an issue that had been mooted in lower court cases. The former was a knockout, while consensus on the latter was divided.

Awaiting trial, Albemarle had gotten its Wonderlic test usage validated. One plant official explained that the test's adoption had been haphazard:

> [W]e did not, uh, validate it, uh, locally, primarily, because of the, the expense of conducting such a validation, and…uh, we didn't know whether we would get the co-operation of the employees that we'd need…so, we used National Norms and on my suggestion after study of the Wonderlic and Norms had been established nationally for skilled jobs, we developed a, uh, cut-off score of eighteen.[93]

The study they undertook in consultation with a psychologist from Purdue University, Dr. Joseph Tiffin, assessed 105 employees (101 of whom were white) already in skilled lines of employment and "computed the 'Phi coefficient' of statistical correlation between the test scores and an average of…two supervisorial rankings." Supervisors were given no advice on how to rank employees. Adopting a standard of 'statistical significance' in line "with professional conventions," Tiffin found a suspiciously perfect correlation between test scores and rankings.[94]

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[92] Belton, *The Crusade for Equality in the Workplace*, 202–3.

[93] *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 428.

[94] *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 430. Significance here referred to "any correlation that could have occurred by chance only five times, or fewer, in 100 trials." See discussion in Belton, *The Crusade for Equality in the Workplace*, 211.

The Supreme Court found this explanation wanting. Validating a test intended for "younger, largely inexperienced and in many instances nonwhite" employees using skilled, senior, and predominantly white ones did not measure up to EEOC or APA guidelines.[95] Tiffin's study, undertaken to shrug off legal liability, was both circular in its logic and a potential exposure, since the workers who took the test had not been obliged to take it in the first place to acquire or maintain their position. This weakened any argument that testing served a legitimate business purpose. Rather than asking the company to cease testing altogether, however, the Supreme Court left it to the lower courts "to exercise such control of the Company's use and validation of employee selection procedures, as are warranted by the circumstances."[96] Nonetheless, the case evidenced a solidifying formula for disparate impact claims: using statistical evidence to establish a *prima facie* case, leaving the company to defend a business justification that was not merely be a pretext for unlawful discrimination.[97] It did so, however, on the basis that differential validity among ethnic groups was certified psychological science rather than an inevitable distortion of social inequality.

A thornier issue was whether and how backpay should be awarded to employees who screened out by the Wonderlic. The District Court declined to award backpay because it thought Albemarle's Title VII breach had not been in 'bad faith'; the Court of Appeals was divided. The Supreme Court ruled that the loss of wages due to discriminatory practices amounted to a "legal injury," and that Title VII was intended both to stamp out discriminatory practices and to "make persons whole." If a court denied backpay in any case, it needed to articulate "reasons which, if

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[95] *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 435. Though he concurred with the ruling, Justice Blackmun cautioned that "a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection." *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 449.

[96] *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 436.

[97] Belton, *The Crusade for Equality in the Workplace*, 197. On approaches to disparate impact cases, see "Legal Services Manual for Title VII Litigation" (New York: National Employment Law Project, October 1973).

applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy."[98] However, Justices disagreed on how such determinations could be made. Justice Marshall saw it as a straightforward application of the existing data on wages in the position they would have been hired into, with "no need to make additional findings and offsetting computations for wages earned in alternative employment during the relevant period."[99] Justices Rehnquist and Blackmun both pushed back, arguing that the good faith of an employer should always be considered in the fashioning of a remedy, and that applying any kind of mechanistic rules to the calculation of damages was a slippery slope. Negotiations over backpay would become one of the most hotly contested aspects of employment discrimination law, one for which the economists who were called in as witnesses developed their own body of measurement theory.[100] The burden of interpreting it would fall to the lower courts, where judges who had been applying disparate impact theory to cases outside the scope of Title VII would soon become unwitting arbiters of recent developments across the social sciences.

Though it seemed to have little bearing on the place of psychological expertise grounding civil rights, the stalemate over *Albemarle*'s backpay question was indicative of the growing backlash against disparate impact litigation. In a 1975 letter, American Jewish Committee lobbyist Hy Bookbinder chastised EEOC chairman John H. Powell, Jr. for his comments on a television program minimizing the threat of "reverse discrimination" against whites, asking him to reaffirm his commitment to the idea that employment goals for minorities would never require "the hiring of a person who is less likely to do well on the job ('less qualified') over a person more likely to do well

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[98] *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 418, 421.
[99] *Albemarle Paper Co. v. Moody et al.* 422 U.S. 405 (1975) at 440.
[100] Orley Ashenfelter and Ronald Oaxaca, "The Economics of Discrimination: Economists Enter the Courtroom," *The American Economic Review* 77, no. 2 (1987): 321–25.

on the job ('better qualified'), under valid selection processes."[101] Skeptics of civil rights administration parroted the language of psychology, appealing to scientific definitions to draw bright lines between what they deemed appropriate and inappropriate policy.

Ultimately, some advocates worried that the pursuit of tests had narrowed the movement's purview. Harvard law professor Derrick A. Bell, Jr. suggested on a roundtable later that year that *Griggs* and its progeny had done little to change the situation in white collar (and academic) employment: "We have relied a great deal on tests, but it seems to me that it is probably, as someone said recently, that tests are only used by employers for jobs if they don't really care who fills them."[102] Though Bell had in mind business leaders and professors, he had perhaps overlooked the longstanding use of testing in blue-collar professions like police and firefighting, which were beyond the initial jurisdiction of Title VII. A testing case involving applicants to a police force protected under the Constitution would have a lasting impact on antidiscrimination law, diminishing the potential of disparate impact theory wholesale.

Regulated Bias

Washington v. Davis (1976) began like any other testing case. Two Black applicants rejected from the DC police academy for failing a written verbal aptitude test—developed by the CSC, no less—sued the District of Columbia with the help of the some of the *Griggs* team. Since the failure rate for Black applicants was four that for whites, they made an argument for disparate impact under the *Griggs* standard; overturning a District Court ruling that the police department's use of CSC Test 21 was valid, the Court of Appeals accepted it.

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[101] Hyman Bookbinder to John H. Powell, Jr., January 14, 1975, EEOC Records, A1-27, Box 2, Folder "February 1975."
[102] Derrick A. Bell, Jr., "State of the Law, Current Legislation and Judicial Interpretations," *National Black Law Journal* 4, no. 2 (1975): 258.

When the department appealed to the Supreme Court in the spring of 1975, psychologists declared their allegiances. The APA's Division of Industrial-Organizational Psychology filed a brief in favor of the plaintiffs, arguing that the test validly predicted police academy grades, a reasonable proxy for performance on the job. ETS also filed a brief, arguing that the respondents adhered too rigidly to technical validation data. Their view, "perhaps paradoxically, [assigned] a less dispositive role to statistical validation evidence," which could not "be substituted for basic analytical judgments about fairness and rationality." The company largely responsible for the expansion of testing was arguing that civil rights groups had gone too far in demanding technical studies rather than a substantive discussion about fairness. Such rhetoric offered convenient cover for what was certainly a deregulatory agenda, but the irony resonates nonetheless: in their efforts to court scientific authority, had champions of civil rights lost control of their own narrative?

In a 7-2 decision, the Court held that the Constitution did not recognize disparate impact, and instead required proof that the government *intended* to discriminate. It was a shock to civil rights advocates, who regarded the decision as a major setback, an attempt by the Court to stem the tide of racial discrimination lawsuits. The majority even admitted as much, acknowledging that a constitutional recognition of disparate impact could invalidate "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." These words cemented *Davis*'s place among the most infamous constitutional law decisions of the twentieth century. According to a leading casebook, it set the standard for proving discrimination so high as to ensure that "every lawsuit

involving constitutional claims of racial discrimination directed at facially race-neutral rules would be conducted as a search for a bigoted decisionmaker."[103]

The constitutional drama of *Davis* has largely overshadowed a key technical detail. In contrast with perceptions at the time, not to mention the text of the opinions, hardly any of the leading legal commentaries provide so much as a hint that the case was about the regulation of aptitude testing or the niceties of validation.[104] The majority's concluding argument invoked the CSC's revision to the Federal Personnel Manual encouraging "rational validation" to affirm the District Court's endorsement of training program grades as a validity criterion.[105] What Plotkin called the CSC's gambit to undercut the EEOC's authority over testing proved successful.

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While *Washington v. Davis* sidestepped a growing dispute over what differential validation meant in the context of discrimination cases, its broad scope raised different problems. Disparate impact theory had been deemed suitable to help lift the "hard-core unemployed" out of cycles of poverty,

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[103] Laurence H. Tribe, *American Constitutional Law*, 2nd ed., University Textbook Series (Mineola, N.Y.: Foundation Press, 1988), 1509. The decision left *Griggs* and Title VII law intact, in theory, but was the beginning of a long process that picked it apart piecemeal.

[104] "In the opinion of many psychologists, lawyers, businessmen, educators, and others the decision in the Davis v. Washington case—oral arguments to be heard this month—could either 'finish off' industrial testing and the merit system, or give testing another chance for consideration." Benno G. Fricke to Charles A. Kiesler and Wilbert J. McKeachie, February 9, 1976, APA Records, Box 270. Focused as they are on doctrinal analysis, even some of the strongest examples from this vast literature tend to overlook the significance of *Davis*'s actual content: Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49, no. 5 (1997): 1111–48; Haney-López, "Intentional Blindness."

[105] *Washington v. Davis*, 426 U.S. 229 (1976) at 250. Interestingly, the CSC sided with the police officers, arguing that disparate impact had been clearly demonstrated but the issue of job-relatedness needed more evidence. Noting changing professional standards since its original validation study in 1967, the CSC urged the Supreme Court to remand the case to the District Court in order to furnish evidence as to whether final averages in the police academy predicted success on the job. Rather than rescinding its own validation guidelines, the CSC was looking for a chance to have them applied more rigorously.

but results were mixed when it was applied to the blue-collar professions.[106] Civil rights advocates regarded the decision as a major setback, an attempt by the Burger Court to contain not only disparate impact suits, but evidence of racial discrimination throughout the legal system. The majority opinion penned by Justice White even admitted as much, acknowledging that a constitutional recognition of disparate impact

> would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[107]

For civil rights advocates pursuing parallel efforts to root out discrimination in housing, jury selection, and sentencing, it was a harbinger of battles to come over the enforceable meaning of discrimination.

Personnel psychologists, meanwhile, saw the decision as an endorsement of their profession over administrative excess, even as researchers debated whether observed differential validity among different groups was a feature or bug of their analysis. A comment in *Personnel Journal* in the wake of *Washington v. Davis* pointed to "hopeful signs on the horizon," since the case upheld the employer's motive to upgrade the "quality" of its workforce and that "courts have upheld tests by not enjoining their use, even in some instances where the employer's actions were found to be discriminatory."[108] Just weeks before *Davis* was handed down, a psychology professor forwarded an advertisement to the chair of the APA's Committee on Psychological Tests and Assessment from

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[106] On disparate impact suits in fire and police departments, see David A. Goldberg, *Black Firefighters and the FDNY: The Struggle for Jobs, Justice, and Equity in New York City*, Justice, Power, and Politics (Chapel Hill, NC: The University of North Carolina Press, 2017); Probolus, "'Drawn from Alice in Wonderland.'" On the limitations of sex discrimination lawsuits in white collar work, see Turk, *Equality on Trial*.

[107] *Washington v. Davis*, 426 U.S. 229 (1976) at 248. This was far from the first time the question of "fear of too much justice" would influence Supreme Court jurisprudence on evidence of racial disparities. Chapter 6 of my dissertation follows this narrative through *McCleskey v. Kemp* (1987).

[108] David E. Robertson, "Update on Testing and Equal Opportunity," *Personnel Journal* 56, no. 3 (March 1977): 147.

none other than E. F. Wonderlic & Associates, whose namesake exam had been the subject of numerous lawsuits since the late 1960s, most importantly *Griggs*. The advertisement claimed that the Wonderlic Personnel Test had been "approved" by federal agencies, so long as an included "ethnic conversion table" was used.[109]

The exchange among psychologists that resulted is telling. While they chuckled at the suggestion that any test could be "federally approved," the bigger issue was the implication that a test need not be validated for a given use. Some were concerned in particular with the implications of the ethnic conversion table, that corrected score formulas were a relic like the fantasy of the "culture-free" test: "not all women are the same, nor are all blacks the same." Ultimately, more than the fear that companies might try to shirk off legal responsibility by adopting plug-and-chug race corrections, the psychologists in the exchange were "concerned about the probability that nonprofessionals who criticize tests, testing and test publishers will generalize such behavior to all professionals involved in these activities." In other words, it would easily be weaponized by critics of affirmative action.

Perhaps they had the right idea. The APA wrote to the company asking that the advertisement be corrected and received a response from E. F. Wonderlic himself. He claimed that the letter was an honest attempt to signal the company's compliance, but kept on talking:

> Federal Compliance Agencies are in no way interested in validation. Their charge is equal ratio results regardless of any or all other factors…
> Our intent is to fully, completely and yet in language understandable to our business market explain what we see as an answer to a legal and governmental policy decision that has all but put us out of business. Users believe, and have been told over and over again …that because of the Duke Power case The Wonderlic Personnel Test is "illegal"…
> Tests may have been misused, but even larger misuses of "scare" tactics have been used by our government. The issues of Affirmative Action Responsibilities can and should be separated from psychological responsibilities.

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[109] APA Records, Box 275, Folder "Wonderlic claim and response, 1974-1976, n.d."

Was Wonderlic simply out for revenge? The updated letter remained steadfast in its equation of adverse impact elimination with ethnic conversion tables. He seemed to insist that no further validation evidence was necessary because a company using quotas and cutoffs had already foregone its "psychological responsibilities" to avoid becoming the target of a lawsuit.

Invocations of "race corrected" scores cynically oversimplified what was mostly a good faith effort behind differential validation studies: to denaturalize the association between test scores and job performance, and to do so without massively disrupting the testing industry or compromising psychologists' authority. The tension between ameliorative efforts that took racial categories as pragmatic social classifications and emboldened hereditarian insistence on the immutable biological roots of racial inequality created a political and intellectual environment that allowed colorblind ideology to flourish. As influential as claims for a genetic basis of intelligence have been in dismantling redistributive policies, psychological politics also played a part in shaping the jurisprudence invoked to do the same.

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In a 1978 account of how psychologists turned from racial science to studies of "race relations," Franz Samelson pondered whether a lack of reflexivity regarding their own role in the power structure had compromised psychologists' contributions to the struggle against white supremacy. It is not difficult to imagine him addressing colleagues working to adapt personnel psychology to the civil rights struggle: "having become insiders, had they limited their questioning to the more

superficial and comfortable issues which would not threaten their newly achieved professional status?"[110]

This essay has aimed to turn Samelson's question back on its own immediate historical context. In the wake of transformative civil rights reforms, social scientific concepts like validity took center stage in debates over the meaning of equality. It may appear odd that one of the most consequential legal battles of the twentieth century would be waged over psychological tests, not to mention a highly technical body of theory for assessing how well they measured what they purported to. Nonetheless, I have argued here that such questions of merit touched on many aspects of antidiscrimination law in the post-Civil Rights era, influencing the approach taken by organizations like the LDF and EEOC to make weak laws work.

Psychologists answered the plea for equal opportunity in different ways. Collaborations with cause lawyers and bureaucrats reveal what happened when such ideals became the object of governance rather than the vision of social protest. As the Cold War science apparatus continued to pump out doctorates in all areas of inquiry, social scientists often aligned with the civil rights bureaucracy, the administrative character of which eased the longstanding tension between "advocacy and objectivity"; many, if not more, entered corporations or served as independent consultants.[111] Psychologists also sought internal reform to retain professional autonomy through self-governance, a move which, as philosopher Kathleen Slaney points out, resulted in guidelines

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[110] Franz Samelson, "From 'Race Psychology' to 'Studies in Prejudice': Some Observations on the Thematic Reversal in Social Psychology," *Journal of the History of the Behavioral Sciences* 14, no. 3 (1978): 274.

[111] Mary O. Furner, *Advocacy & Objectivity: A Crisis in the Professionalization of American Social Science, 1865-1905* (Lexington, KY: The University Press of Kentucky, 1975); Helene Silverberg, "'A Government of Men': Gender, the City, and the New Science of Politics," in *Gender and American Social Science: The Formative Years*, ed. Helene Silverberg (Princeton, N.J.: Princeton University Press, 1998), 156–84. On the Cold War demographics of the sciences, see David Kaiser, "Booms, Busts, and the World of Ideas: Enrollment Pressures and the Challenge of Specialization," *Osiris* 27, no. 1 (2012): 276–302.

that treated test bias as a kind of technical glitch to be corrected rather than a systemic problem warranting broader kinds of social intervention.[112] Accounting for the adversarial character of the American legal system complicates any neat affinities between science and liberal state power. As ever, social scientists gathered in government boardrooms and hotel ballrooms, but they also met across the witness stand, through indirect encounters that shaped how expertise governed the lives of workers.[113]

While many have written about the mismatch and distrust between law and science, the height of civil rights liberalism revealed the remarkable extent to which social science could give form and content to laws meant to be interpreted narrowly. I have also suggested here that the backlash against disparate impact and the legal weight afforded to critiques of aptitude testing helped reanimate—in a sense, to zombify—theories of innate racial aptitude that came on stage during the "IQ wars" of the 1970s.[114] When considered in light of resistance to equal employment policy, "colorblind" liberalism and hereditarianism had more in common than meets the eye, even if at first liberals were quick to distance themselves from the more radical fringe. Though admittedly drier than neo-eugenicists' experimental studies and critiques of a flawed welfare state, historians of

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[112] Looking at changing versions of the APA's validation guidelines, she points out that "[the] most obvious changes concerned developments in testing theory around potential bias in test content and potentially adverse consequences of testing," though she describes neither their content nor the motivation behind them: Kathleen L. Slaney, *Validating Psychological Constructs: Historical, Philosophical, and Practical Dimensions* (London: Palgrave Macmillan, 2017), 101. I'm looking for a better reference here.

[113] I will pause here to say that I am really hoping to develop a better account of law and science here, in dialogue with classic work by scholars like Sheila Jasanoff and Tal Golan as well as newer discussions of regulatory science and the politics of 'doubt' contemporaneous with the civil rights litigation I discuss.

[114] For an account that traces these developments from the "massive resistance" organized against the *Brown* verdict, see Jackson, *Science for Segregation*.

science should consider the subtle manifestations of scientific racism in social and legal policy as a site of ongoing conflict.[115]

Widely regarded as a watershed moment for civil rights law, *Griggs* should similarly be understood as a turning point in the history of law and social science. As the dénouement of *Brown*-era skepticism toward social science as "modern authority," it was a moment when the question of *whether* quantitative data could support a claim of discrimination shifted decisively to one of *how* to weigh competing metrics, and *who* were the disciplinary experts that could speak on their behalf. *Washington v. Davis* made the law's presumption of racial innocence more concrete, revealing the limitations of equal opportunity rhetoric in guaranteeing rights and remedies. Subsequent battles—among which, many victories—focused more on the quality of the proof rather than the nature of the harm.[116] Science provided a framework for making "formal equality" more formal, but reams of numbers often only underscored its emptiness.

[115] The work of Dorothy Roberts and other Black feminist scholars influenced by Critical Race Theory is one worthy starting point: Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, 2nd ed. (New York: Vintage Books, 2017).

[116] Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law"; Crenshaw, "Race, Reform, and Retrenchment"; Murakawa, "Racial Innocence."

Chapter 4

The Great Deterrence Controversy

Capital Punishment and the Methodological Politics of Law-and-Order

Before taking up the cause of defending school segregation in the early 1950s, Dutch-born Ernest van den Haag was wrapping up a PhD in economics at New York University, hunting for projects while eking out an existence as an adjunct lecturer.[1] Something of a polymath, van den Haag taught sociology and practiced psychoanalysis but preferred to think of himself as a "social philosopher." This was the label preferred by his mentor, Sidney Hook, who had catalyzed a more idealistic van den Haag's transformation from communist to conservative while working as a propaganda analyst for the U.S. Office of War Information. At the apex of behaviorism's Cold War influence, van den Haag wrote to a group of notable psychologists proposing an experiment with rats to determine whether animals would be deterred from acts after observing punishment for them:

> [Take] a group of, say, rats, and condition them…in such a way that…they will abstain [from taking a reward] due to their experience with punishment…do not reinforce greatly the conditioning in later age…when [unconditioned rats] take the food disregarding the prohibition…punish these rats severely and observe whether the punishment of these rats has any effect on the conduct of the previously conditioned rats.[2]

He proposed this study to three major psychologists, along with some musings on whether the legal definition of insanity could be tested using a similar setup. Only one responded with any interest. Another politely suggested that the more general problem of animal interaction needed deeper

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[1] On van den Haag's role in the scientific defense of school segregation, see Jackson, *Science for Segregation*.

[2] Van den Haag Papers, Series 4, Box 1, Folder 6, "Proposed Experiments," 1952-1953.

investigation before questions about specific types of social learning could be broached. "Experimental work moves very slowly," he cautioned.

Undeterred, van den Haag explored other avenues and intellectual foundations for his theory that penal sanctions did not have "a micro-effect (on the conscious part of the personality), so to speak, but a macro-effect (to a great extent unconscious)." His primarily interest was in the death penalty, which he believed to be the ultimate deterrent to violent crime. Returning to the issue in a 1969 article, van den Haag gestured toward animal research to argue that "[risks] and rewards are more often felt than calculated"; criminal behavior resulted from a preconscious triumph of desire over fear. With the liberal orthodoxy that poverty was the true cause of crime on the wane, this was an easier sell than it would have been a few years prior.[3] Yet, van den Haag now buttressed his own curious admixture of behaviorism and psychoanalysis with a neo-utilitarian moral framework: absent proof that it did *not* deter those who killed, the potential for sparing innocent victims, however slim, outweighed any concern for capital punishment's ineffectiveness.

As the 1960s drew to a close, politicians and experts clashed over whether harsher penal sanctions would actually decrease the crime that was alarming an increasing number of voters. Yet, when it came to capital punishment, the debate appeared to be settled: an influential study by criminologist Thorsten Sellin prepared for the American Law Institute's Model Penal Code project showed no evidence for deterrence. "I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means," van den Haag averred, "[it] is on our *uncertainty* that the case for deterrence must rest (emphasis mine)."

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[3] Ernest van den Haag, "On Deterrence and the Death Penalty," *Journal of Criminal Law and Criminology* 60, no. 2 (June 1969): 141–47. On the shifting politics of crime in the late 1960s, see Weaver, "Frontlash"; Hinton, *From the War on Poverty to the War on Crime*.

Just a few years later, van den Haag sang a different tune. In 1973, University of Chicago economist Isaac Ehrlich published a working paper detailing a multiple regression model that showed each execution between 1933 and 1969 had prevented about seven homicides. Van den Haag and retentionists like close ally William F. Buckley, Jr. received the results with, in the sharp verbiage of one commentator, "all the alacrity of starving men invited to a banquet…[finding] in Ehrlich's statistical esoterica the ultimate, unshakable confirmation of the stout common sense of the ordinary man."[4] The study came at a crucial juncture for the LDF's campaign against the death penalty. Just a year prior in *Furman v. Georgia* (1972), a divided Supreme Court rendered existing state capital statutes unconstitutional, though not irredeemable. Any evidence that the death penalty could be administered in a way that was impartial, or at the very least effective, rather than "arbitrary and capricious" threatened to bring the nation's dormant electric chairs churning to life.

The question of whether or not deterrence actually played a part in the constitutional and political crisis over capital punishment for the better part of a decade has long occupied legal scholars and political scientists. This chapter asks instead what the controversy can teach us about how experts of different stripes thought about the relationship between statistical knowledge and the practice of criminal justice as crime policy became politicized in a way it had never been before.

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The concept of deterrence has a rich history, bound to that of statistics and probability. Most accounts trace the contemporary conversation back to *On Crimes and Punishments*, a short 1764 treatise by a young Italian jurist named Cesare Beccaria. It remains a cornerstone of modern penal thought in all of its aspirations and contradictions, most often cited for the exhortation punishment be "public, speedy, necessary, the minimum possible in the given circumstances, proportionate to

[4] John P. Conrad, "The State as Killer," *American Bar Foundation Research Journal* 8, no. 2 (1983): 451–64.

the crime, and determined by the law" in order to be effective.[5] Little wonder, then, that Michel Foucault ventriloquized Beccaria to capture the spirit of Enlightenment penal reform: "not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity."[6] Rejecting prevailing justifications for punishment based in natural law, Beccaria cast utilitarian ideas in the frame of social contract theory to argue that punishment should aim not toward retribution but prevention.

Beccaria opposed the death penalty on the grounds that the psychological torment of life imprisonment seemed a greater deterrent than public execution in a world where life was already brutish and short. He argued further that public mutilation had a brutalizing effect, ratcheting up the savageness of criminality in a given society.[7] The treatise had legs, and was put to a variety of different ends. It provided language for William Blackstone, whose *Commentaries on the Laws of England* became a chief resource for common law jurists in the United States; even while excoriating Blackstone for justifying a shambolic judicial status quo, English philosopher and reformer Jeremy Bentham invoked Beccaria in asserting the primacy of pain and pleasure to moral science.[8] Elsewhere, Beccaria's reflections on the probabilistic nature of legal proof, compounded with his argument for a social contract that minimized the authority of courts, inspired French thinkers who hoped to use the theory of probability to reform the judiciary.

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[5] Bernard E. Harcourt, "Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law," University of Chicago Public Law & Legal Theory Working Paper, 2013, 13.
[6] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon Books, 1977), 82.
[7] Harcourt, "Beccaria's 'On Crimes and Punishments,'" 13.
[8] Harcourt, 4–5; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 211; Cathy Gere, *Pain, Pleasure, and the Greater Good: From the Panopticon to the Skinner Box and Beyond* (Chicago: University of Chicago Press, 2017), 87–89.

The philosophy underlying Beccaria's proposals was rooted in the idea that the exercise of good sense was inherently conjectural, sensitive to changing states of affairs, rather than rigid and rule-bound. He thus provided ammunition for *philosophes* critical of the quasi-mathematical axioms that had become calcified into canon law; for example, the notion that a fixed number of rumors could be added up like fractions to form a whole truth in the courtroom.[9] Against such archaic arithmetic, these thinkers weaponized the 'classical' theory of probability: a codification of reasoning on the basis of incomplete knowledge in place of demonstrable certainty as a standard for rationality. This was as much a practical project as an intellectual one. As Lorraine Daston and others have shown, Beccaria's popular treatise made a particularly strong impression on the Marquis de Condorcet and galvanized his project of legal reform. But this was also precisely where the limits of a "social mathematics" rooted in the calculus of probabilities began to show. Computation had been the model, or dominant metaphor, for the proper exercise of reason but shifting intellectual and political currents severed this association. The rationalistic psychology that had yoked these together in the first place became a yardstick by which experimentalists measured their own progress. After the Enlightenment, intuition was held up as the ideal of reason and formal mathematics sealed off from the domain of morals.

By the twentieth century, conversations about deterrence were centered on the analysis of historical data using the tools of frequentist statistics. Sellin's study compared homicide rates in states with and without capital punishment, finding no relationship between executions and crime

[9] Daston argues that mathematicians during the July Monarchy sought to disentangle probability theory from its reformist applications as "social mathematics" envisioned by *philosophes*. "Moral mathematics" was not so much an impulse to quantify everything—a leading contention of social theorists in the Frankfurt school who labeled it "disenchantment"—as a project that aimed to expose how laws violated the principles of 'good sense' they sought to codify. Daston documents a shift from concerns over individual morality to the rise of the social sciences: shorn of its judicial applications, "[t]he calculus of probabilities no longer described the reasonableness of individuals but rather the hidden regularities of whole societies," Daston, *Classical Probability in the Enlightenment*, 369.

trends. The Cold War, however, as recent historians of science have shown, saw the emergence of a preoccupation with "rational behavior" that hearkened back to Enlightenment social mathematics. Efforts to establish frameworks for evaluating arms control programs legitimated new intellectual programs for understanding behavior, and it is here that we can locate both van den Haag's proposed rat experiments and Ehrlich's regression model. For his part, van den Haag rejected that deterrence depended "on rational calculation, on rationality or even on capacity for it" as in Beccaria's day. Rather, it rested on regular, biological responses to the danger and the "possibility of reinforcing internal controls by vicarious external experiences." Ehrlich's economics of behavior, which reduced passions and theories of psychological regulation to incentives and utility functions, harmonized with this perspective.

The debate over deterrence, then, was not merely about the type of conclusions one could draw from crime statistics, but the factors underlying law-abiding or law-violating behavior. That this took place at a moment when policymakers weighed the extent to which the moral feelings of ordinary people should play a role in a crime policy. Throughout the Great Society years, these conversations were dominated by experts more interested in mitigating the environmental causes of crime than effecting swifter punishments.[10] It was "common sense" among experts and elites who swung liberal that ratcheting up penal sanctions in the name of law-and-order would not only exacerbate existing problems but efface the very ideals of democracy. Amid the constitutional crisis over capital punishment, the deterrence controversy was rooted in a tension—both political and

[10] While arguing that these diverging political and methodological orientations within the discipline did matter, I heed the cautionary words of critical criminologist Michael Lynch: "when we entertain the idea that criminology and criminal justice are well-intentioned, we participate in recreating (and legitimizing) an historical myth about justice…[that] inverts reality, stands justice on its head, makes it appear as its opposite…Once this inversion of history occurs, our view of reality is obscured": Michael J. Lynch, "The Power of Oppression: Understanding the History of Criminology as a Science of Oppression," *Critical Criminology* 9, no. 1 (September 1, 2000): 151.

methodological—between an old order of liberal experts and heterodox figures who sought to claim the moment for themselves. While it drew explicit attention away from the formerly dominant issue of racial discrimination, conversations about crime were saturated with the politics of race.

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This chapter explores the context and consequences of the deterrence controversy that brought social science methods onto the public stage as capital punishment became a dominant political issue during the 1970s. While the previous chapter saw civil rights groups draw on psychology as a resource for securing laws that barred discrimination, the use of social science in capital punishment litigation took virtually the opposite course. Despite what appeared to be successful efforts to achieve scientific consensus, judicial skepticism toward the applicability of aggregate statistics kept much of this evidence off the table. Once Pandora's box had been opened, the abolitionists rushed in to shut it. The deterrence controversy drew the NAACP Legal Defense Fund's (LDF) strategy further away from the question of racial discrimination that had gotten it involved in the first place. It solidified the LDF's investment in producing and policing social science in conjunction with other organizations that had joined the cause, from the American Civil Liberties Union (ACLU) to grassroots efforts. For their part, defenders of capital punishment had not found good company among the liberal criminologists who populated blue-ribbon panels on policing and criminal justice reform throughout the 1960s. The intuitive appeal of Ehrlich's claims—which arguably made it *less* successful as a work of social science—supported the type of anecdotal and common-sense reasoning about crime that came to animate national politics.

I argue that the deterrence controversy cemented new ideals of measurement and rigor among criminal justice experts while the popular narrative around deterrence became unmoored, from scientific consensus. The character of the debate around statistical modeling and data mirrored

the broader political process attending the revival of capital punishment: a shift away from civil rights legislation concerned with equality toward law-and-order politics and a growing preoccupation with predicting "future dangerousness."[11] What mattered was not statistics showing *who* got the death penalty but specifying relevant variables for an accurate model of the penal system. The abolitionists' strategy was rooted in a conceit that better data would make it more difficult for judges to uphold a sanction deemed out of step with the times, but capital punishment's resurgent popularity changed the game. The politics of criminological knowledge stirred up by the deterrence debates helped create a space for new utilitarian frameworks to take hold, most notably selective incapacitation. Ironically, as penal policy became popular politics, the emerging compromise of statutes that controlled judicial discretion—not limited to capital punishment—helped to make the rules more like the ones Beccaria had criticized.

Evolving Standards and the Infant Science of Criminology

Good in theory, but not in practice—the data were inconclusive. Prompted by the publication of the American Law Institute's Model Penal Code (MPC), a set of recommendations that promised to make criminal law more uniform, the State of New York established a commission in 1965 to consider abolishing capital punishment. Led by legal scholar Herbert Wechsler, a major architect of the MPC, the majority of commissioners voted to recommend abolition. They argued that such an extreme form of punishment could only be justified if it were deemed absolutely essential: "In the end we are obliged to choose between competing values on the basis of imperfect data and our choice, on balance, is to vote for recommending abolition."[12]

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[11] On the actuarial turn, see below, Postlude.

[12] Wechsler was a leading scholar who became famous for his critique of *Brown* in "Toward Neutral Principles of Constitutional Law," his 1959 Holmes Lecture at Harvard Law School. The lecture, and the Legal Process

A minority of four, however, sounded the alarm; fearing "the ugly moods and attitudes which now appear to prevail among varying ethnic and social groups in this state," they worried that "any weakening of criminal sanctions may be taken by the lawless masses as a signal for even further outbreaks of lawlessness." While many advocates of capital punishment tried to distance their support of it from race, they never got too far. By the end of the 1960s, LDF lawyers claimed that "deterrence is the only argument we hear in support of the death penalty." This claim, they argued, had no evidence to support it. The existence of the penalty itself was a testament to the incomplete project of criminal reform, "divert[ing] attention from a reasoned approach to crime and contribut[ing] to the irrationality underlying most criminal behavior."[13]

Arguments about deterrence had not always relied on statistics. This can partly be attributed to a paucity of data. Despite Alexis de Tocqueville's observation in the 1830s that American "minds were accustomed to definite calculations," incessantly computing risks and advantages, the United States lacked the kind of apparatus of official statistics that was developing across the Atlantic.[14] Black newspaper *The National Era* contrasted American death penalty abolitionists' reliance "upon abstract reasoning" with their English counterparts, who were inclined to "investigate with great care the statistics of crime," along with "the comparative effects" of penalties.[15] With some exceptions, like a Massachusetts reformer who cited data from Belgium

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school it represented, emphasized the broader effects of legal reasoning, rather than whether an individual case was decided justly: Ruth Bader Ginsburg, "In Memory of Herbert Wechsler," *Columbia Law Review* 100, no. 6 (2000): 1359–61. In his on-the-ground history of the LDF's early campaign against capital punishment, Michael Meltsner recounts how Wechsler attempted to persuade the ALI to take a stance against capital punishment. Though the advisory committee favored abolition, ALI membership approved a procedural innovation by Wechsler, the bifurcated trial in place of abolition: Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 21–23.

[13] Greenberg and Himmelstein, "Varieties of Attack on the Death Penalty," 120.

[14] On these perceptions, see Patricia Cline Cohen, *A Calculating People: The Spread of Numeracy in Early America* (Chicago: University of Chicago Press, 1982).

[15] Banner, *The Death Penalty*, 114.

suggesting fewer hangings might reduce murder, neither abolitionists nor retentionists relied extensively on data to make their arguments throughout most of the nineteenth century.

In fact, by the time modern social scientists entered the debate about capital punishment in the 1920s, penal reform and the implementation of new technologies like the gas chamber and electric chair had profoundly altered the social and cultural meaning of executions, turning them from public occasions to closed, state-sanctioned events reported through the media. Lewis Lawes, who oversaw hundreds of executions as warden of the infamous Sing Sing Correctional Facility believed murders were impulsive, that "thoughts of the chair do not even enter [murderers'] heads." The theory of deterrence had been literalized in the image of the hanged criminal in the public square that would cause potential offenders to think twice; now this function was assumed by lynchings that promoted racial terror through the popular amusement of white audiences.[16]

In his history of the American death penalty, Stuart Banner observes that the advent of modern criminology transformed the debate over deterrence, stacking the deck in favor of death penalty abolition even when criminologists did not necessarily succeed on their own terms. Eugenics, which saturated both scientific thought and administrative practice, recast old philosophical and moral arguments about human nature in a profoundly pessimistic way. Common sense about "defective" and unbalanced criminals put the ball in the retentionists' court to justify how *any* kind of punishment could deter those deemed irrational and incorrigible. Further, the increased availability of data, along with the possibility of comparing the few states where abolition campaigns had succeeded with those where they had not, prompted new statistical debates that led the conversation about deterrence away from abstract questions of human motivation to more concrete matters of measuring aggregate social phenomena.

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[16] Banner, 206, 217.

Although the abolitionists championed this approach, retentionists were more than happy to ride the bandwagon when the numbers aligned with their cause—depending on the year, Massachusetts might have fewer murders per capita than Maine. Notable abolitionists saw haggling over figures as a mere distraction; Clarence Darrow called measuring deterrence "a hopeless, useless job." Yet, as Banner argues, "all [abolitionists] needed was a draw." Despite the array of criticisms launched at their statistics—that comparing states was flawed methodologically, that executions were not common enough to be effective—raising the possibility that the death penalty did not *necessarily* deter was a win.[17] It makes sense, then, that even into the 1960s the LDF hoped to steer clear of the deterrence question.

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The inroads made by the elite-led campaign to abolish capital punishment during the 1960s reflected the social ferment and reformist energies—as well as the tensions—that had built up across the decade. Though the LDF began plotting earlier, its Southern survey was already in full force in 1965 when the American Civil Liberties Union (ACLU) took an official stance against capital punishment as an institution that "dehumanizes the society which employs it." The following year, a Gallup poll showed saw support for the death penalty drop the lowest point ever recorded, suggesting that more Americans opposed capital punishment than favored it. Unstable as polling data was, it complemented an even clearer trend: a dramatic decline in the number of executions from a peak of 199 in 1935 to 21 in 1963 and down again to 2 in 1967 when the LDF succeeded in effecting a moratorium. *TIME* magazine penned a eulogy that summer, declaring, "[b]y

[17] Banner, 218–19.

inches, the death penalty is dying," but at a time when uprisings were breaking out across the nation, this was perhaps premature.[18]

Procedural challenges largely happened out-of-sight, but the broader politicization of crime during these years brought capital punishment center stage. In an early episode of conservative commentator William F. Buckley's *Firing Line*, debuted in 1966, capital punishment was introduced as the issue most dividing liberals and conservatives.[19] But while there was much speculation on this apparent disparity, political scientist Marie Gottschalk argues that even on the right, "views on the death penalty had not yet calcified." If the elections of ardently pro-death penalty governors like Ronald Reagan in California or Claude Kirk in Florida seemed a grim bellwether, others issued mass commutations while state officials engaged in clandestine acts of resistance to prevent executions. Few were surprised to hear liberals like President Johnson's Attorney General Ramsey Clark publicly declare their opposition to capital punishment, but it was a sea change for a department whose leading voice on the issue had been J. Edgar Hoover, perhaps the most authoritative defender of the death penalty.[20]

By the end of the decade, the death penalty had become a political litmus test. The 1968 assassinations of Martin Luther King, Jr. and Robert F. Kennedy put the nation on alert. Pleading to abolish the death penalty before the Senate Judiciary Committee later that summer, Clark ran through the abolition platform—including extensive comments on deterrence—and argued that its

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[18] "Capital Punishment: Killing the Death Penalty," *Time*, July 7, 1967.

[19] "Firing Line with William F. Buckley, Jr.: Capital Punishment," April 11, 1966.

[20] On changing perceptions of public support for the death penalty, see Epstein and Kobylka, *The Supreme Court and Legal Change*, 46; Gottschalk, *The Prison and the Gallows*, 206, 212–13; Banner, *The Death Penalty*, 240, 253, 256; Mandery, *A Wild Justice*, 62.

fraught existence, beset with delays, "weakens public confidence in the law."[21] This language met the moment. Just a few months later, *TIME* magazine ran a cover story on "Law and Order," depicting the silhouette of a police helmet towering over the arms of unruly protesters, bearing both weapons and picket signs.[22]

These and other trends were reflected in the fortunes of the LDF's capital punishment litigation. Growing resistance to affirmative action had thoroughly colored the Circuit Court ruling in *Maxwell v. Bishop*. Writing to congratulate Blackmun on the opinion, a fellow judge expressed that he was tired of Arkansas being turned into an example, referring back to the Little Rock Nine.[23] With Chief Justice Warren's retirement, the balance on the Court shifted. With the argument about racial discrimination effectively off the table, lawyers focused more on strategizing where they had seen success: in narrow procedural claims. In 1971, *McGautha v. California* put challenges the constitutionality of standardless jury sentencing and determining guilt and punishment in a single proceeding to the test. Writing for a 6-3 majority, Justice Harlan declared that it was "beyond present human ability" to adequately enumerate aggravating and mitigating factors to guide juries, as the MPC had recommended.[24] Harlan went a step further, chastising abolitionists and his colleagues who wanted a hearing on these issues: "the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures…that accord with the most enlightened ideas of students of the infant science of criminology."[25] Marshaling the latest social science, in this new climate, would not vouchsafe the sort of ruling the abolitionists were looking

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[21] Statement by Attorney General Ramsey Clark before the Subcommittee on Criminal Laws and Procedures of Senate Judiciary Committee on S. 1760. To Abolish the Death Penalty, July 2, 1968
[22] "Law and Order," *Time*, October 4, 1968.
[23] Pat Mehaffy to Harry Blackmun, June 14, 1965, Blackmun Papers, Box 34, Folder 35, "Maxwell v. Stephens, 1964-1968."
[24] *McGautha v. California*, 402 U.S. 183 (1971) at 204.
[25] *McGautha v. California*, 402 U.S. 183 (1971) at 221.

for. In fact, broad criticism of the rehabilitative ideal that underwrote much of criminology was just getting off the ground—it would culminate a few years later in debates over a controversial article by Robert Martinson that asked, "What Works?" and answered that nothing really did.[26] But the LDF had another argument up its sleeve: the death penalty was "cruel and unusual punishment" prohibited by the eighth amendment.

At the Crossroads of Abolition and Retribution

The Court's 1971 affirmation of the death penalty in *McGautha* appeared, for a moment, to preclude all further challenges to its constitutionality under the due process clause of the fourteenth amendment. In oral arguments, Chief Justice Burger had trapped the LDF attorney arguing that jury discretion was arbitrary by prodding him to suggest that a *mandatory* death penalty for murder would not be unconstitutional; in that case, Burger continued, he was in court "because California is more lenient than it might have to be."[27] However, at their spring conference that year, an ailing Justice Black pressed his colleagues to settle the matter of a potential Eighth Amendment claim once and for all by hearing a set of "clean" cases in the following season.[28] Two rape cases, *Jackson v. Georgia* and *Branch v. Texas* were consolidated with *Furman v. Georgia* (1972), in which a man attempting burglary was sentenced to death because the homeowner was killed in the process, which he claimed was an accident.

Returning to the notion of "evolving standards of decency," Amsterdam argued *Furman* by appealing to a different kind of statistical evidence: a declining rate of executions actually carried

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[26] Robert Martinson, "What Works? Questions and Answers About Prison Reform," *The Public Interest*, Spring 1974, 22–54.
[27] Mandery, *A Wild Justice*, 101.
[28] Mandery, 114–15.

out in the 1960s, in line with the "pileup" plan he helped orchestrate.[29] He claimed that juries had, in fact, refused to impose the death penalty, and that rare "regressions" in which "the color of the defendant's skin and the ugliness of his person" were both cruel and unusual, rather than discriminatory.[30] When the state's lawyer argued that they had put forth evidence of deterrence as proof of a reasonable basis for capital punishment, Amsterdam redoubled:

> How could this Court say that boiling in oil is unnecessary if a legislature finds that in order to deter some particularly serious crime that the horrible prospect of being boiled in oil is how we do it? I think that it is the respondents and not the petitioners who are urging the Court to react to that visceral level. Our proposition is, I think, the much more objective one. It looks not to what society says, but to what it does.

In other words, while the respondents claimed that the court was being asked to subjectively weigh the decisions of state legislatures, his argument was that the Court needed to respond to the fact that for all of its justifications, the death penalty neither doled out nor implemented in a way regular enough to be deemed 'usual.' Even when pressed on the importance of racial discrimination to the case, Amsterdam deflected the question:

> [There] is an awful lot of talk here about facts, about what the Los Angeles Police Department says about deterrence, about who gets the death penalty, unpublished figures in the Georgia Bureau of Prisons, unpublished figures in the California Department of Corrections…we have been asking for an evidentiary hearing on all of these facts from a lot of Courts for a long time…We are very far from satisfied with the nature of the factual evidence presented here, but we think from the factual evidence that is judicially noticeable…the Court can call the death penalty cruel and unusual punishment.

Though it was standard practice for both sides to submit conflicting evidence of discrimination and deterrence in their legal briefs, the LDF won the day by downplaying both discrimination and deterrence in considering the operation of the death penalty.

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[29] Mandery, 150.

[30] *Furman v. Georgia*, oral arguments, January 17, 1972.

Furman was a fragile consensus in which each Justice wrote his own opinion, making it the longest Supreme Court decision to date, more than 200 pages.[31] One legal scholar called it "not so much a case as a badly orchestrated opera."[32] Without opposing the penalty's constitutionality, Justice Douglas took discrimination seriously: numbers showed that the "untrammeled discretion" of capital juries reinforced existing economic and racial inequality.[33] Justices Brennan and Marshall relied heavily on statistics and history to bolster the case for abolition. In his dissent, Justice Powell answered these broad historical claims with a doctrinal account alleging that the current challenge to the eighth amendment did not square with precedent. Surprisingly, he returned to *Maxwell* to argue that its "substantial statistical evidence" pointed a way forward, "a means of raising the equal protection challenge that is more consonant with precedent and the Constitution's mandates." Chief Justice Burger took the more traditional view, deeming it an "empirical stalemate" that rested on competing factual claims, "the truth of which cannot be tested by conventional judicial processes" and was best left to legislatures.[34]

Centrist Justices Stewart and White were the key votes, and their tentative opinions warrant unpacking for the qualifications they set up under the Benthamite calculus of utility. Neither believed that they were deciding upon the constitutionality of capital punishment *per se*. Rather, they shifted the discussion back toward the question of deterrence and the role of punishment in society. Stewart thought that stricter rules, such as an automatic death penalty for specific crimes, would prevent it from being "so wantonly and so freakishly imposed" and therefore better serve its

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[31] Oshinsky, *Capital Punishment on Trial,* 56.
[32] Robert Weisberg, "Deregulating Death," *The Supreme Court Review* 1983 (1983): 315.
[33] *Furman v. Georgia,* 408 U.S. 238 (1972) at 248.
[34] *Furman v. Georgia,* 408 U.S. 238 (1972) at 295, 405.

purpose.[35] The death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual"—rare and irreversible.[36] White doubled down on deterrence, noting that capital punishment could not serve this role "unless imposed with sufficient frequency," and that "within the confines of the statutes now before us has for all practical purposes run its course."[37] In ruling against the death penalty on these grounds, the Court left open the possibility that stricter standards could, perhaps, help tame capricious juries.

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The LDF understood the slim margin upon which the majority in *Furman* rested, so rather than resting on its own laurels, lawyers set to work planning a meeting to "pool the talent, resources, and ideas" of academics in the hopes of preparing "a roster of studies."[38] Gathering at Columbia in October of 1972, Jack Himmelstein introduced the conference as an effort to shore up the "intellectual, historical, and sociological foundation" of the decision, and that full abolition created a "unique situation…amenable to sociological research." When one participant proposed coordinating briefs signed by relevant scientific organizations instead, Anthony Amsterdam countered that "usually courts will be more persuaded with empirical data—good neutral studies whose conclusions will stand up under cross-examination," ignoring the poor track record of such efforts for the abolition campaign.[39] He further underscored the importance of social scientific inquiry in

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[35] *Furman v. Georgia*, 408 U.S. 238 (1972) at 307-8, 310. Commentators pointed out that he condemned the system as a "lottery": David C. Baldus, George Woodworth, and Charles A. Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Boston: Northeastern University Press, 1990), 59.

[36] *Furman v. Georgia*, 408 U.S. 238 (1972) at 309.

[37] *Furman v. Georgia*, 408 U.S. 238 (1972) at 312-13.

[38] "NAACP Legal Defense Fund Meeting, October 7, 1972," Sellin Papers, Series 4, Box 37, Folder 1716, "NAACP Legal Defense and Education Fund, 1972-1981."

[39] Amsterdam gave a variety of explanations for his support of social scientific evidence. In 1972 it could "help judges with rationalizations and justifications upon which they can hang their decisions," while later it was more about sewing seeds of uncertainty.

controlling the narrative around capital punishment: "Only scholars and researchers can do the spadework for the next stage of the fight and they need to get their work into the public domain."

Exactly what this data might be, and whether it could be collected and analyzed fast enough, was an open question. The LDF was now strategizing prospectively—not unlike in the school desegregation cases—rather than addressing a glut of life-or-death appeals as it had been for more than half a decade. The group discussed a variety of issues that emerged from the judicial opera of *Furman* opinions. Beyond deterrence and discrimination, Amsterdam emphasized areas like cost analysis, harshness, and randomness. Juror psychology and brutalization, or anecdotes of "suicide-murder syndrome" were also on the table. In order to counter the ongoing preoccupation with rising crime, they needed to buy into the premise. Criminologist Franklin Zimring suggested "defensive" studies to address broader perceptions of a crime spike: "[using] abolition states as positive controls…the more refined questions becomes: has the homicide rate gone up any faster in those states where executions declined than those states where there never was a death penalty at all."[40] Some thought that the deterrence question was most germane for mandatory sentencing, which could be studied independently of capital punishment. Others in the room wondered whether research could be expose how belief in deterrence was spreading through society.

On the whole, the meeting was marked by confidence that better social science would, in fact, allow them to shape the narrative on capital punishment. Coordination among the abolitionists was largely handled by philosopher Hugo Adam Bedau, who wrote in a 1973 grant proposal to the Russell Sage Foundation, "[t]he future of the death penalty in the United States now hangs in the balance; it may well be determined for decades to come by the prompt deployment of social science

[40] "NAACP Legal Defense Fund Meeting, October 7, 1972," 17.

research *in the proper hands* (emphasis mine)."[41] Despite the clear resistance to such evidence on the part of conservative and centrist justices whose votes they needed, the abolitionists saw all around them that the use of social science in court was growing, particularly in civil rights cases like *Griggs* and *Swann*. Writing to Bedau in 1973, Wolfgang thought the Supreme Court was now well "beyond the point where the same kind of criticism Justice [sic] Blackman directed at the Maxwell case would now apply." With all of the legal developments since 1968, he thought it seemed safe to "assume that the notions of probability and statistical evidence may now be acceptable to the Supreme Court."[42] Perhaps they might be able to address the discrimination question after all.

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With its nine separate opinions, *Furman* was more of a moratorium by stalemate than an endorsement of the LDF's eighth amendment argument. Even more so, it was a flashpoint for federal policy and public opinion, a litmus test for a political climate altered dramatically by the events of the late 1960s. Nixon called upon Congress to restore the federal death penalty and declared in a 1973 speech, "Contrary to the views of some social theorists, I am convinced that the death penalty can be an effective deterrent against specific crimes."[43] Public support for capital punishment leapt to 57%, up from 42% in 1965.[44] California voted in favor of Proposition 17, an effort backed by Governor Reagan to nullify the state's own pre-*Furman* ban on the death penalty. This wellspring of popular opinion helped to unsettle criminological debates that had been largely resolved, most notably the question of deterrence.

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[41] Hugo Adam Bedau, "Project Statement Submitted to the Russell Sage Foundation, January 1973," 12, Bedau Papers Series 1, Box 3, Folder 1, "The Future of Capital Punishment -- A Problem for Law and Social Science."
[42] Marvin Wolfgang to Hugo Adam Bedau, June 20, 1973, Bedau Papers, Series 2, Box 2, Folder 22, "Marvin Wolfgang/Marc Riedel, 1972-1979 (1 of 2)."
[43] Quoted in John Lampteri, "Does Capital Punishment Deter Murder? A Brief Look at the Evidence," ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2686, Folder "Deterrence."
[44] Oshinsky, *Capital Punishment on Trial*, 57–60.

State prosecutors brought their own data to the table. They began citing a "study" conducted by the Los Angeles Police Department: a survey of 316 arrestees asked if they were "deterred," "undeterred," or "unaffected" in their choice of whether or not to arm themselves with a weapon. Of the minority who were actually willing to be interviewed, half of them claimed that they had been "*[d]eterred* by fear of death penalty from carrying weapon or operative weapon.[45] Another apparent "study" furnished evidence that "in some situations the evidence of the deterrent value of the penalty is very strong." Though it was cited as "a study by the American Bar Association," Bedau did some detective work to determine that it had actually come from testimony of British law enforcement personnel reported by the Royal Commission on Capital Punishment in 1953.[46] Citations were sticky.

Already in March of 1973, following Nixon's statement, the ACLU was well aware that deterrence was a concept that, in the wrong hands, could seriously harm the campaign against the death penalty. Douglas B. Lyons drew up a pamphlet "to hit the reader over the head with the deterrence argument" above and beyond the organization's existing literature.[47] The pamphlet issued a set of points that would have to be proven by advocates of the deterrence hypothesis—the ball was in their court, and the thresholds of proof were high, since "The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that the death penalty makes no difference to the homicide rate." Later that year, Lyons's challenge received what many deemed a worthy response.

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[45] "Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case": Tony Amsterdam, "Re: Hugo Bedau's inquiry of July 30," Bedau Papers, Series 2, Box 1, Folder 1, "Anthony Amsterdam, 1972-1988."

[46] Hugo Adam Bedau, "The Nixon Administration and the Deterrent Effect of the Death Penalty," *University of Pittsburgh Law Review* 34, no. 4 (1973): 557–66.

[47] Douglas Lyons, "Re: New pamphlet on deterrence," ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2686, Folder "Deterrence."

A New Economics of Punishment

Bedau organized conferences on various aspects of the death penalty across the nation the year after *Furman*, meeting a number of researchers with whom he had yet to make much contact. In April 5th a conference focused on deterrence was held at Yale, and more general ones took place in Chicago and Florida throughout the month.[48] Following the Florida conference, Bedau wrote to an economist he had met in Chicago (though not on the program):

> It was a great pleasure to spend the time during drinks and dinner some two weeks ago to discuss with you your research on the deterrent effects of the death penalty as you infer it from the econometric model you have constructed. I do hope you will send me a copy of your paper as soon as it is available for publication (rather than waiting until reprints are available), and that you will keep me informed of your publications in this important area. Again, it was delightful to have such an earnest talk over dinner, and your adjusting you schedule so that we could meet and talk was most considerate of you.

Perhaps the chat had not gone as well as he had thought; Bedau never got the paper. Despite many attempts to follow up, Ehrlich was not willing to share. By the time he got ahold of a draft later that summer, Bedau was "In Search of a Magic Bullet for Dr. Ehrlich," coordinating among colleagues to "[line] up someone to torpedo it."[49] When the informal "gang" of abolitionist lawyers and social scientists working on the deterrence issue found out Ehrlich's paper was coming out in the *American Economic Review*, the nation's leading economics journal, they all out. With cases being prepared for appeal, he urged that time was of the essence:

> Every day we delay in coping with his stuff allows the virus to spread and circulate into hitherto uncontaminated areas, and I dread the situation another six months from now. If Ehrlich had contrived to achieve maximum impact upon the academic community, he could not have improved on what he has so far achieved.[50]

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[48] Hugo Adam Bedau to Isaac Ehrlich, April 30, 1973, Bedau Papers, Series 1, Box 6, Folder 29, "University of Illinois, 1973."
[49] Hugo Adam Bedau to David Kendall, September 9, 1974, Bedau Papers, Series 2, Box 1, Folder 13, "Isaac [sic] Ehrilich, 1973-1975." They eventually acquired a draft version from June/July of 1973.
[50] Hugo Adam Bedau to David Kendall, October 24, 1974, Bedau Papers, Series 2, Box 1, Folder 30, "David Kendall, 1973-1977."

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What was it about the study that was so controversial? In his 1961 message to law enforcement officials J. Edgar Hoover framed the deterrence question along the same lines as van den Haag's proposed rat study and Leibowitz's criticism of Sellin: "No one, unless he can probe the mind of every potential killer, can say with any authority whatsoever that capital punishment is not a deterrent."[51] Ehrlich attempted a different take on the problem. In the tradition of his mentors George Stigler and Gary Becker, who applied econometric methods to broader social problems, Ehrlich argued that "application of the economic approach to criminality permits a more systematic test of the existence of a differential deterrent effect of capital punishment."[52] Against Sellin's comparative study, Ehrlich positioned himself as the heir to Beccaria's invocation of human psychology by accounting for the influence of *incentives* (labeled "Consumption Prospects") in order to gauge the deterrence rates of capital punishment and life sentencing, rather than observing gross trends among different locales (Fig. 1).

Figure 1. An economic model of murder. Table 2, Ehrlich, "The Deterrent Effect of Capital Punishment," 8a.

[51] Quoted in Guy Favreau, "Capital Punishment: Material Relating to Its Purpose and Value" (Department of Justice, Canada, June 1965), 126, https://publications.gc.ca/collections/collection_2022/jus/J2-1765-eng.pdf.
[52] Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," Working Paper (National Bureau of Economic Research, November 1973), 4–5.

Yet, Ehrlich's calculus was different from Beccaria's. He began from Becker's refutation of holistic sociological or even psychopathological approaches to behavioral modeling, fleshed out in his own seminal paper on crime published a few years prior: "a useful theory of criminal behavior can dispense with special theories of anomie, psychological inadequacies, or inheritance of special traits and simply extend the economist's usual analysis of choice."[53] Responding to the contention that capital crimes were frequently premediated 'crimes of passion,' Ehrlich claimed:

> There is no a priori reason to expect those who hate, or, for that matter, those who love other persons to be less responsive to changes in costs and gains associated with activities they may wish to pursue in accordance with their preferences than persons who are indifferent toward the well-being of others.[54]

The paper continued very much in the same vein, casting the deterrence debate in the harsh light of cost-benefit analysis applied to individual actors, linked to their social milieu only by a few attenuating variables—some determined by his colleagues, like Milton Friedman (Fig. 2). Ehrlich's regression model incorporated measures of subjective probability—the expectations by an agent that they might be apprehended and punished—and time series data on homicide rates and economic indicators from 1933 to 1969. The model estimated the impact of the conditional probability of execution on the overall "supply of murders."[55] Ultimately, Ehrlich claimed that "one additional execution per year over the period in question may have resulted, on average, in 7 or 8 fewer murders," putting a number on the deterrence question that Sellin had deemed moot.[56] It was

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[53] Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (1968): 170.

[54] Ehrlich, "The Deterrent Effect of Capital Punishment," 6. As in Sellin's study and other literature on deterrence, there was little discussion of rape, especially since the Supreme Court was already moving toward barring rape as a capital crime altogether, eventually solidified by *Coker v. Georgia* in 1977.

[55] "[S]tatistical applications should consider the rate of murder, murder combatting activities, the probabilities of apprehension, conviction, and execution, and even the severity of punishment as endogenous variables, jointly determined by a system of simultaneous equations": Ehrlich, 24.

[56] Ehrlich, 42.

precisely this scope and its glossing over of meaningful local differences that gave fodder to his strongest critics.

Figure 2. Ehrlich model variables. Table 3, Ehrlich, "The Deterrent Effect of Capital Punishment," 51

In a letter to an LDF attorney detailing a potential response to the study, one lawyer predicted, "Ehrlich's careful qualifications will be brushed aside and his 7 to 1 tradeoff figure will be trumpeted across the nation."[57] Ehrlich did not seek to redeem the death penalty on the basis of his analysis; rather, it provided a prominent wedge for human capital theory to intervene in a major public policy debate. He showed his true stripes by proposing monetary fines as "more efficient alternatives" to executions or life imprisonment "because they may provide, in principle, an

[57] Willard J. Lassers to David Kendall, February 27, 1975, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2686, Folder "Deterrence."

equivalent deterrent to potential offenders, an adequate punishment to the guilty, and retribution as well as compensation to the families of victims."[58] Yet, without indulging the strange view of the human subject entertained by economists, death penalty advocates—most notably Bork in his *Fowler v. North Carolina* brief—quoted the figure widely and noted its provenance in the belly of a computer rather than the trained judgment of a criminologist.

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Word of Ehrlich's study spread exactly as Bedau feared it would. Many in the community had a hard time narrowing down their problems with it. One particularly sharp critique published in the newsletter *Social Action and the Law* cited "the general abandonment of purely rational theories of man's behavior by most social scientists" and accused Ehrlich of "desperately to swing the pendulum backward to a time when philosopher Jeremy Bentham sought to design a felicity calculator to satisfy the needs of all men."[59] The authors contended that Ehrlich had played fast and loose in his choice of variables, and that pivoting to an economic audience was a thinly veiled attempt to shield himself from scrutiny from criminologists with existing frameworks for evaluating the effectiveness of crime prevention. Their criticism boiled down to a mantra:

> Most social scientists who work with computers, aware that they can handle too much information, rely on an old but useful maxim which seems to us to characterize the meaning of Ehrlich's combination of factors which supposedly affect the murder rate: GARBAGE IN, GARBAGE OUT.

By fall of 1974, the abolitionist gang had their endgame. Ehrlich's piece was to be published in the *American Economic Review*, the nation's leading economics journal. They decided to try and place a paper by another economist refuting Ehrlich in the same issue—LDF attorney Peggy Cooper Davis

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[58] Ehrlich, "The Deterrent Effect of Capital Punishment," 49.

[59] James Kakoullis and Robert Buckhout, Review of Ehrlich, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2686, Folder "Deterrence."

had been "told economists tend to listen only to one another".[60] But later that year, Ehrlich's study made its way into a brief written by U.S. Solicitor General Robert Bork to uphold a death penalty conviction in *Fowler v. North Carolina*. Bork cited a "preliminary" 1973 working paper presented at the National Bureau of Economic Research indicating that "the efforts of most criminals to avoid detection and to escape being caught, show very clearly that they are sensitive to a calculus of pains and pleasures."[61] The damage was done. They could no longer try to head off the study, so they worked tirelessly to debunk it.

The Gang Strikes Back

Many nowadays would immediately associate the campaign against capital punishment with the ACLU, but it was not until 1973, following *Furman*, that the organization went beyond filing amicus briefs and established an official program to oversee abolition efforts.[62] Under the auspices of a Capital Punishment Project, a "gang" of social scientists, lawyers and activists remained in constant conversation throughout the 1970s.[63]

One of the first fruits of this campaign was a 1975 forum in *The Yale Law Journal* on Ehrlich's work, a departure from the usual subject matter of one of the nation's top law reviews, described as "essentially a statistical debate between Ehrlich and his critics."[64] Here, Ehrlich engaged with the social scientists he had been assiduously avoiding. One piece criticized Ehrlich's use of the

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[60] "Passell is an economist and I am told economists tend to listen only to one another": Peggy C. Davis, "Re: William Bowers' new deterrence research," October 31, 1974, Bedau Papers, Series 2, Box 1, Folder 11, "Peggy Davis, 1973-1977."
[61] Quoted in Thorsten Sellin, *The Penalty of Death* (Thousand Oaks, Calif.: Sage Publications, 2013), 79.
[62] Henry Schwartzschild to ACLU Board of Directors, August 6, 1981, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2687, Folder "Capital Punishment Project."
[63] ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2685, Folder "'Gang' 1978."
[64] "Statistical Evidence on the Deterrent Effect of Capital Punishment," *The Yale Law Journal* 85, no. 2 (1975): 168.

"unrepresentative" FBI *Uniform Crime Reports*—Ehrlich shot back that anyone familiar with econometrics would recognize that errors in underlying data typically led to "underestimation" of the phenomenon in question, so the argument only hurt the cause of those arguing against deterrence.[65]

David C. Baldus, who had authored studies on the statistical measure of employment discrimination, praised the methodological strengths of Ehrlich's study while defending Sellin's approach as the most appropriate way to study the deterrence phenomenon, since state-by-state comparison allowed one to account for differences in penal codes and procedures glossed over by a nationwide analysis. In a letter to death row attorney David E. Kendall, Baldus wrote, "In spite of its weaknesses, Ehrlich's piece raises questions which can not be simply dismissed simply by attacking its methodology," and sought to apply the method to smaller areas in order to glean new evidence before the court considered the broad constitutionality of the death penalty again.[66] On the whole, Baldus urged caution in the admission of such studies as evidence:

> There is a certain danger in relying on academic work, designed to promote inquiry and further research, as a basis for deciding disputes in a court of law…Until the courts develop procedures to bring complex statistical studies under the scrutiny of the adversary process, it will be necessary to carry on the technical debate over such legislative facts largely in the law reviews.[67]

Multiple regression analysis went beyond using statistics to explain how observed features of aggregates differed from what one might expect at random; it allowed one to infer relationships

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[65] William J. Bowers and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," *The Yale Law Journal* 85, no. 2 (1975): 187–208; Isaac Ehrlich, "Deterrence: Evidence and Inference," *The Yale Law Journal* 85, no. 2 (1975): 213. Muhammad argues that the *Uniform Crime Reports* solidified a link between criminality and blackness: Muhammad, *The Condemnation of Blackness*, 270–71.
[66] David C. Baldus to David Kendall, May 13, 1975, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2686, Folder "Deterrence."
[67] David C. Baldus and James W. L. Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," *The Yale Law Journal* 85, no. 2 (1975): 186.

between multiple variables and outcomes. While it was nothing new—dating back to German mathematician Karl Friedrich Gauss and eugenicist Karl Pearson in the nineteenth century—its applications were, as were the computer programs that facilitated them.[68]

The Supreme Court, however, did not need empirical proof of deterrence to reinstate the death penalty 7-2 in *Gregg v. Georgia* (1976)—not even Justices Stewart and White.[69] In their majority opinion, Justices Powell, Stewart, and Stevens decided that the "complex" matter of deterrence "properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."[70] Working from the MPC, Georgia and other states had reformed their penal codes to include a consideration of aggravating factors in the sentencing phase of capital trials, the task Justice Harlan deemed "beyond present human ability."[71] The new rules were intended to train the jury's attention on the "particularized nature of the crime and the particularized characteristics of

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[68] For an example from the period: J. T. Flynn and M. Peterson, "The Use of Regression Analysis in Police Patrolman Selection," *The Journal of Criminal Law, Criminology, and Police Science* 63, no. 4 (1972): 564–69. Legal practice caught up within the next few years: Franklin M. Fisher, "Multiple Regression in Legal Proceedings," *Columbia Law Review* 80 (1980): 702–36; Michael O. Finkelstein, "The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases," *Columbia Law Review* 80, no. 4 (1980): 737–54. The historiography of statistics, even that written by historians rather than practitioners, rarely moves past the invention of 'goodness of fit' measures by R.A. Fisher, but insinuates that the social sciences in midcentury America completed the work begun by eugenics to turn the 'measurement of uncertainty' into actionable predictions: Donald MacKenzie, "Statistical Theory and Social Interests: A Case-Study," *Social Studies of Science* 8, no. 1 (1978): 35–83; Stephen M. Stigler, "The Measurement of Uncertainty in Nineteenth Century Social Science," in *The Probabilistic Revolution, Volume 1: Ideas in History*, ed. Lorenz Krüger, Lorraine J. Daston, and Michael Heidelberger, vol. 1, 2 vols. (Cambridge, Mass.: MIT Press, 1987), 287–92; Gigerenzer et al., *The Empire of Chance*; Desrosières, *The Politics of Large Numbers*.

[69] Marie Gottschalk points out that while deterrence did not feature as much in the *Gregg* majority opinion, it was a hot topic during oral arguments. "After presenting statistics from a 1973 FBI report documenting the escalating murder rate in the United States, Justice Lewis Powell suggested during oral arguments for *Gregg* in March 1976, 'It is perfectly obvious from these figures that we need some way to deter the slaughter of Americans'…then awarded Bork five extra minutes to make his points about the deterrent value of the death penalty": Gottschalk, *The Prison and the Gallows*, 224.

[70] *Gregg v. Georgia*, 428 U.S. 153 (1976) at 186.

[71] *Gregg v. Georgia*, 428 U.S. 153 (1976) at 196-98; Wolitz, "Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code."

the individual defendant," and a series of checks and balances in the death sentencing process were instituted alongside them.[72] In a word, *Gregg* certified attempts to *rationalize*, *civilize*, and *democratize* the death penalty.[73]

The ACLU doubled down on attempts to combat studies that claimed to show a deterrent effect, which more often than not came from economists.[74] A RAND Corporation study of homicide in Harlem cited a lack of capital punishment statutes in New York as a reason for increased crime, though the author claimed to oppose the death penalty.[75] The ACLU office collected these studies and coordinated expert criticism of them. It also sought to promote studies favorable to the campaign, like one that followed Baldus's proposed approach published in the *Minnesota Law Review* in 1977.[76] Capital Punishment Project director Henry Schwartzchild received the study warmly:

> Have you sold me movie rights? Except for that one misplaced decimal, I found the piece entirely persuasive. Ehrlich should be sulking in his regression. Beccaria would have gone bananas if he had this data. It's one of those days. Forgive me.[77]

In the unforgiving world of civil rights litigation, there was a thin line between affect and objectivity. Although social science the social scientific strategy was not always successful, the pursuit of better data as a first resort for surmounting the legal and political obstacles injected energy into the abolition campaign.

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[72] *Gregg v. Georgia*, 428 U.S. 153 (1976) at 206.
[73] Garland, *Peculiar Institution*, 261–62.
[74] E.g. James A. Yunker, "Is the Death Penalty a Deterrent to Homicide? Some Time Series Evidence," *Journal of Behavioral Economics* 5, no. 1 (June 1, 1976): 45–81.
[75] Jan Hemming, "Death Penalty Called Deterrent to Murder," *The New Haven Register*, December 3, 1976, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2690, Folder "Deterrence."
[76] Brian E. Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's," *Minnesota Law Review* 61, no. 5 (1977): 743–68.
[77] Henry Schwartzschild to Brian E. Forst, October 17, 1977, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2690, Folder "Deterrence."

Arguments against deterrence were on the agenda at Amnesty International's 1977 convention in Stockholm, a gathering of anti-death penalty groups who sought to coordinate international strategies. There, Ramsey Clark gave an impassioned plea for a world campaign against the death penalty and doubled down on establishing a "Death Penalty Data Center" to support social science research, a rating system, and publicity to combat positive public perceptions of capital punishment.[78] Despite persistent setbacks, death penalty abolitionists envisioned new strategies to win the battle against state sanctioned killing with information. Yet, even if the notion of the death penalty as a deterrent was more of a popular concept than a scientific one, it was unclear whether such convictions drove public support for the penalty or served to justify it in the guise of liberal values.

The great deterrence debate was so controversial that, like Alfred Kinsey's studies of human sexuality, the National Research Council convened a panel to review it.[79] In an early report, the Panel on Research on Deterrent and Incapacitative Effects conceded that on the whole, empirical studies of deterrence had begun to point toward a positive effect. Overall, however, the panel was skeptical that non-experimental studies—since randomized human death trials would have been hard to come by—could meet the high threshold of proof required for policy relevant research. It concluded that "research on this topic is not likely to produce findings that will or should have

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[78] Ramsey Clark, "A World Strategy to Abolish Government Inflicted Death," December 10, 1977, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2698, Folder "Amnesty Interna'l."
[79] William G. Cochran et al., *Statistical Problems of the Kinsey Report on Sexual Behavior in the Human Male. A Report of the American Statistical Association, Committee to Advise the National Research Council, Committee for Research in Problems of Sex*. (Washington: American Statistical Association, 1954). For more on responses to the Kinsey study, see Igo, *The Averaged American*.

much influence on policy makers."[80] Ehrlich roundly criticized the panel, claiming that they cherry-picked criticism out of a "fear of deterrence."[81]

In their efforts to challenge Ehrlich's methodology, contributors to the Yale issue seemed to largely accept the framework as a valid one. Ehrlich's rebuttal to Bowers and Pierce pointed out that most critics analysis challenged "neither the theoretical formulation of the deterrence hypothesis nor the statistical techniques used in the theory's empirical implementation."[82] The gang tried to nail Ehrlich on technical grounds, thinking it would shore up their own legitimacy, but in doing so seemed to help legitimate the model's underlying assumptions—that this *would* be a valid way to prove deterrence, had it been done correctly.

The same could be said for the NAS report. As one reviewer concluded: "Implicit in the existence of this panel is the assumption that criminal justice policy should be based essentially on utilitarian considerations…the point cannot be emphasized too strongly that the resolution or non-resolution of the empirical and scientific (i.e., utilitarian) questions may not necessarily carry any policy implications whatsoever."[83] Another observed that the panel's efforts to comment solely on "questions of scientific validity" and leave "ideological controversies" aside "only serve to obscure the lack of [] consensus" on penal policy.[84] Though the new death penalty statutes had a formal, technocratic veneer, they masked a wide divergence among experts over the legitimate goals of

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[80] Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978), 63.
[81] Isaac Ehrlich and Randall Mark, "Fear of Deterrence: A Critical Evaluation of the 'Report of the Panel on Research on Deterrent and Incapacitative Effects,'" *The Journal of Legal Studies* 6, no. 2 (June 1977): 293–316.
[82] Ehrlich, "Deterrence," 226.
[83] Charles H. Logan, review of *Review of Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates.*, by Alfred Blumstein, Jacquelin Cohen, and Daniel Nagin, *Contemporary Sociology* 9, no. 3 (1980): 389–90.
[84] Ivan Janković, "Deterrence and Justice," *Crime and Social Justice*, no. 16 (1981): 62–66.

punishment. Even if the behavioral frameworks the neo-utilitarians depended upon were not widely accepted, they now had an audience where they would have been dismissed.[85]

Even if van den Haag had been able to conduct his proposed rat study back in 1952, the cage of liberal criminology would have prevented it from getting very far. But the economic framework that Ehrlich introduced helped to shift the moral language for debating the death penalty. Appearing on Buckley's *Firing Line* in 1976, van den Haag took a different approach to the "no deterrence" question:

> MR. CAVANAUGH: Suppose Mr. Ehrlich's critics prevail and he loses his debate, and the computer spins out X numbers the next time around. Would the elimination of the deterrence evidence convince you to change your position on capital punishment?
> MR. VAN DEN HAAG: No, it would change my argument. I am in favor of executing convicted murderers as a moral matter. I also think that it will have the deterrent effect you just described. But if it didn't—and it would greatly surprise me; it would mean that there is some sort of point of diminishing returns after which penalties no longer add to the deterrence.[86]

Thanks to Ehrlich, the rats could now run free.

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The title of this chapter is an homage to Martin J. S. Rudwick's classic account of how gentlemanly specialists in Victorian England resolved the consequences of an anomalous coal seam in Devon for geological theory.[87] This was done largely in closed-door meetings of the Geological Society or in copious private correspondence, all with strict decorum. It is hard to imagine anything further from this version of science than what I have labeled the great deterrence controversy—perhaps a food fight.

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[85] Gere, *Pain, Pleasure, and the Greater Good*.
[86] Firing Line, Episode S0260, The Death Penalty, December 13, 1976 [Transcript].
[87] Martin J. S. Rudwick, *The Great Devonian Controversy: The Shaping of Scientific Knowledge Among Gentlemanly Specialists*, Science and Its Conceptual Foundations (Chicago: University of Chicago Press, 1985).

The great deterrence controversy did little to alter public or judicial opinion of capital punishment. In fact, it never really ended.[88] It revealed that both the accelerating pace of methodological change and politically volatile research threatened what consensus-building mechanisms did exist in the social sciences, as well as ones for policing studies seen to be dangerous or misleading. Above all, it spoke to the contradictions of demands for better data and models to inform legislative and judicial decisions—there would be no 'perfect study' to break the stalemate. After the deterrence controversy, data-driven death penalty debates would turn on how well specific models mirrored the charging process. In employment discrimination, models were also beginning to play a larger role. These developments provide fodder for historian of economics Mary Morgan's claim that "empirical models are the bridge between positive theory and normative practice."[89] They focused attention on the process itself, more than its consequences, reflecting the changing debate about fairness in the post-Civil Rights Era.

The deterrence controversy also evinced a new concern for 'prediction' that drew upon the behavioral sciences for justification. Here, different kinds of expertise had purchase on the question, and even a lack of consensus or belief in the consistency of scientific predictions could not shake the authority of established forms of knowledge, like psychiatry. In *Barefoot v. Estelle* (1983), the prosecution hired two psychiatrists who testified that the defendant was likely to remain a danger to society, despite not having examined him directly. The Supreme Court ruled that the testimony of the case's psychiatrists was valid, against the insistence of the American Psychiatric Association. A less remarked-upon feature of the case is that it made available to state courts a summary process system that abbreviated the habeas corpus proceedings abolitionists had relied upon to clog the

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[88] The most extensive discussion I have seen is Mandery, *A Wild Justice*, 474–82.

[89] Frank A. G den Butter and Mary S Morgan, "What Makes the Models–Policy Interaction Successful?," *Economic Modelling* 15, no. 3 (July 1, 1998): 443–75.

legal process at the behest of abolitionists.[90] In effect, the Court held the state's right to execute above the defendant's right to due process and announced an almost unprecedented deference to social scientists in the matter of behavioral risk assessment. Amid the many debates over the role of criminological evidence in judicial decision making, *Barefoot* revealed that not all kinds of expertise were treated equally. As one legal scholar put it, "[t]hus, 'beyond a reasonable doubt' is transformed into an 'any evidence at all' standard."[91]

Above all, the deterrence controversy provided the pretext for reformed capital statutes that promised to formalize the unruly sentencing process, making it more dependable. Writing in 1983, legal scholar Robert Weisberg called attention to the "ironic effects" of this increased formality. He pointed out that the bifurcated trial represented an aspiration to create a "pure laboratory condition in which the jury had no choice but to exercise its moral discretion" in the determination of guilt, while in the penalty trial, the "prosecutor's job is essentially to help the jurors realize that their apparently painful choice is no choice at all—that the law is making it for them" through a careful "penal arithmetic."[92] It would be these formalistic procedures, rife with perverse incentives and loopholes, that the LDF and ACLU would have to attack going forward.

Over the course of the next few years, the Gang was largely focused on putting out fires. Some commentators worried that "the distorting influence of death" had led the LDF in particular to focus its resources on a campaign that was no longer primarily concerned with the racial justice issues that inspired it.[93] But insiders were also aware of the issue. In December of 1982, Bedau

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[90] Weisberg, "Deregulating Death," 343.
[91] Edward P. Richards, "The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals," *Hastings Constitutional Law Quarterly* 16 (Spring 1989): 363.
[92] Weisberg, "Deregulating Death," 370, 375–76.
[93] Muller, "The Legal Defense Fund's Capital Punishment Campaign."

circulated a harsh memo to his colleagues, pointing to recent studies that cast doubt on the racially discriminatory application of the death penalty no one seemed to be answering:

> I shudder for the day, not far ahead, when I and others on the hustings have to debate Ernest Van den Haag and perhaps a refueled Walter Berns once they learn about the "collapse" (as they will no doubt put it) of our claims that the death penalty always was and still is racially [sic] biassed…[F]or a decade and a half we have claimed to have won the war of words and of research. Now it begins to look as if we are losing even that.[94]

Civil rights organizations like the LDF had led the charge in adapting social science to litigation. But as other social scientists entered the fray, and judges raised the bar for evidence, it became increasingly difficult to control the narrative.

[94] Hugo Adam Bedau, "Racially-Related Death Penalty Research," December 15, 1982, Bedau Papers, Series 1, Box 6, Folder 33, "Conferences, 1977-1989."

Part III

Rationalizing Discrimination in the Information Age

The Reagan Era

> [S]ocietal discrimination is "too amorphous"; racial goals are labelled "unyielding"; goals are labelled "quotas"; testimony becomes mere "recitation"; legislative purpose and action become "simple legislative assurances of good intention"; lower court opinion is disregarded as just "blind judicial deference"; and statistics are rendered "generalizations." This adjectival dismissiveness alone is sufficient to hypnotize the reader into believing that the "assumption that white prime contractors simply will not hire minority firms" is completely "unsupported."
>
> – Patricia J. Williams, "The Obliging Shell" (1989)

Litigation is time-consuming; litigation aimed at broad social change even more so. "A child who was in the first grade when this action was begun is now ready to enter junior high school," began the Second Circuit opinion in *Chance v. Board of Examiners*, a lawsuit brought on behalf of a pair of Black and Puerto Rican acting elementary school principals in New York City that began just as *Griggs* became law in 1971.[1] The case is a microcosm of racial politics in the urban North throughout the decade, with demands for broader representation channeled through policy experiments and legalism. In the wake of efforts to decentralize education in favor of community control, "the defining battle in a cultural war that raged in New York City during the 1960s," as a

[1] *Chance v. Board of Examiners*, 561 F.2d 1079 (2nd Cir. 1977).

historian of the saga puts it, Boston M. Chance and Louis C. Mercado failed tests for permanent positions and filed suit against the Board of Examiners that administered them.[2]

The LDF rarely entered cases on its home turf, but here its lawyers were compelled. After months of research in collaboration with the Board, the parties presented their survey of applications to supervisory positions—along with testimony from competing experts—from which the judge deduced a narrative behind the very apparent racial disparities in test scores. Failures for candidates to pass an initial supervisory exam tended to "magnify the statistical differences between the white and nonwhite pass-fail rates" when it came to principal positions, so much so that the probability of white applicants passing, as they did, at "a proportionately higher rate in three times as many examinations as the non-whites" was "less than 1.05 in 1,000."[3] On this basis, after determining that the exams were not sufficiently related to the job, the judge issued a preliminary junction against their further use.

Chance—rarely was a plaintiff more fortuitously named—would be in and out of the federal courts for most of the decade, resulting in dozens of hearings and mountains of paperwork as the LDF and the Board of Examiners brought in experts to contest the disparity. It was twice appealed to the Supreme Court, and as a Fourteenth Amendment case concerning municipal government practices, it could have very easily replaced *Washington v. Davis*.[4] In fact, the Board appealed in 1977 on the very grounds of *Davis*, arguing that there had never been a finding of intentional discrimination in the case.[5] The judge argued that the revised examination plan had imposed no substantial burden on the Board and had, in fact, been quite successful: "the cardinal issue has, at

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[2] Jerald E. Podair, *The Strike That Changed New York: Blacks, Whites, and the Ocean Hill-Brownsville Crisis* (New Haven, Conn.: Yale University Press, 2002), 48.
[3] *Chance v. Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y. 1971) at 210-211.
[4] Meltsner, *The Making of a Civil Rights Lawyer*, 168.
[5] *Chance v. Board of Examiners*, 561 F.2d 1079 (2nd Cir. 1977) at 1085.

this juncture, receded," thanks to an interim system that helped make promotions on the basis of education, experience, and performance evaluations.[6] Throughout the litigation, the changing demographics of the city and the attempt of a white teacher to enter the case claiming "reverse" discrimination shed light on both the opportunities and shortcomings of the new civil rights regime.[7] Former LDF lawyer Michael Meltsner argued that the case succeeded because it was an integration case involving relatively favorable litigants seeking white-collar supervisory jobs, "not an effort to reconfigure the structure, management, and finances of a whole school system."[8] For a time, the same could be said for jobs: lawsuits that aimed to open up meritocratic systems were easier to win than those requiring major corporations to upend their management structure.

As the case against the Board of Examiners was going to court, the LDF took on a conscientious objector named Martin L. Mador, "an unkempt, bearded redhead who never wore a tie and was happy to get the job even with little pay."[9] According to Greenberg, Mador first got to work preparing statistical data by hand for the Fund's lawsuits against the steel industry.[10] "[W]hile companies were aided by computers," LDF employees calculated by hand; Greenberg's wife thought to ask IBM, "whose general counsel, Nick Katzenbach, was on our board, for help in developing computer capability." He sent an employee over "with a terminal resembling a portable typewriter" and pulled up data from the Department of Justice's antitrust suit against IBM using a time-sharing connection. Mador became the LDF's lead computer analyst, developing "computer programs that

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[6] *Chance v. Board of Examiners*, 561 F.2d 1079 (2nd Cir. 1977) at 1086, 1081-1082.
[7] *Chance v. Board of Education*, 496 F.2d 820 (2nd Cir. 1974).
[8] Meltsner, *The Making of a Civil Rights Lawyer*, 169.
[9] Greenberg, *Crusaders in the Courts*, 420.
[10] On the steel industry litigation, see Stein, *Running Steel, Running America*.

could 'massage' information…demonstrate[ing] disparities explainable only by race that surprised even defendants."[11] By 1975, the NAACP LDF had hired five full time "economic analysts."[12]

They were not alone. Companies and administrative bodies seeking to parry lawsuits began recruiting their own experts.[13] With the number of employment discrimination claims pouring into federal agencies exceeding 50,000 by the 1980s, many were more than happy to shell out for legal protection. It was good business for those with the right training. Some experts even spun off firms, as this 1980 feature from the *Boston Globe* on "the business of fighting bias" indicates, depicting two consultants perusing "computer analyses of minority representation of client firms."

The Business Of Fighting Bias

by Claire Berman

Antidiscrimination has become a booming industry—and a profitable one. As government requires companies to redress past wrongs against women and minorities, those companies have been turning to outside consultants whose business it is to help them avoid lawsuits and also keep up with the meticulous documentation needed for employment compliance records.

It's money well spent: more than 50,000 complaints of discrimination pour into government agencies every year. In response, the Equal Employment Opportunity Commission (EEOC) has filed charges against such corporate giants as General Motors, Ford, General Electric, AT&T and Sears.

Even large corporations are finding that often their own staffs can't keep up. "Until a few years ago," says Bill Shepherd, coordinator of the equal employment service of Organization Resources Counselors (ORC), which grew out of a consulting firm established by John D. Rockefeller Jr. in 1926, "one person was able to keep on top of it all. But the complex and contradictory laws—the overlapping, changing and increasingly demanding reporting requirements of federal, state and city watchdog agencies—has made the task impossible. The government has made it essential for companies to hire experts."

Today 170 big companies pay $1500 a year to belong to the service that Shepherd runs at ORC.

Eleven years ago, an energetic young man named G. Todd Jagerson took his savings of $5000 and founded

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Figure 3. Consultants perusing computer analyses. Claire Berman, "The Business Of Fighting Bias," The Boston Globe, March 9, 1980, p. H10

Much of this litigation produced results, but many were aware that the strategy was running its course—not that its energy was exhausted, but because opponents had learned its tactics. As

[11] Greenberg, *Crusaders in the Courts*, 421.

[12] Jack Greenberg to Harcourt Dobbs, October 9, 1975, Ford Records, Grants L-N, Reel R6390, NAACP Legal Defense And Educational Fund, Inc. (07300118), 1972 October 01-1992 September 30.

[13] This development parallels the funding and deployment of scientific research in the courtroom by tobacco and oil companies: Naomi Oreskes and Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (New York: Bloomsbury Press, 2010).

Meltsner puts it, "just as the prospects for large-scale litigation campaigning failed for race lawyers, techniques honed in the civil rights movement gained a wide acceptance among an array of organizations and their lawyers, conservative as well as left-leaning," all of whom sought to effect political and policy change through the courts.[14] During the 1980s, the LDF met with resistance from the federal government: swelling the ranks of the Department of Justice and EEOC with opponents of civil rights, the Reagan administration turned its greatest allies into formidable foes.

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A decade earlier, there was cause for optimism when EEOC attorney and National Organization of Women co-founder Sonia Pressman Fuentes spoke at the American Statistical Association's (ASA) Woman's Caucus at its 1972 meeting in Colorado. Acknowledging that the bulk of the commission's efforts had centered on race, she suggested aspects of women's experience on the job amenable to numbers-based litigation, such as gender bias in hiring and maternity leave policies. Yet, this was no mass recruitment effort. "To be honest," Pressman admitted, "I'm opposed to the idea that the way to end sex discrimination is to conduct further studies."[15] Instead, she urged woman statisticians to put their skills toward leveling the playing field within their *own* profession, addressing pipeline and seniority problems closer to home.

As legal historian Serena Mayeri has shown, the campaign for women's equality and antidiscrimination litigation overlapped at crucial junctures, making possible the race/sex analogy while stifling some of the more radical feminist claims in circulation.[16] Meanwhile, the ASA felt threatened enough by the willingness of federal agencies to declare new ad-hoc policies on

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[14] Meltsner, *The Making of a Civil Rights Lawyer*, 169.
[15] Sonia Pressman Fuentes, "The Law against Sex Discrimination in Employment and Its Relationship to Statistics," *The American Statistician* 26, no. 2 (1972): 19.
[16] Mayeri, *Reasoning from Race*.

affirmative action statistics that it decided to pursue its own guidelines. But just like the fissures that emerged within the American Psychological Association, ASA officers were divided over how the organization its constituents who so often appeared on both sides of the courtroom. The subcommittee decided not to publish their report.[17]

Even without the guidance of professional organizations, academics were finding ways around the weakening doctrine of disparate impact. The most notable was David C. Baldus, a key participant in the anti-Ehrlich symposium in the *Yale Law Journal*. Baldus was confident that statistics could shoulder the intentional burden of proving discrimination. The basic idea, following Finkelstein, was that every process under scrutiny could be decomposed into a set of decision points and analyzed. Baldus cautioned that "as the number of different decision-makers increases," in addition to time and expanding substantive questions, "our confidence in them as a reliable basis for inferring intentional discrimination in the case before the court declines."[18] Baldus was perhaps the truest believer in statistical proof of discrimination, and built up his body of research at the very same moment antidiscrimination doctrine was faltering.

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Anyone who has been through ethics training in a history department sometime in the last three decades might be familiar with the lawsuit against Sears Roebuck and Company by the Equal Employment Opportunity Commission (EEOC), decided in 1986 after years of motions and trials. As the story goes, the EEOC brought reams of statistical evidence to trial—a practice honed in years of conciliation agreements between complaining parties and corporations, with the occasional lawsuit—to support claims that Sears engaged in systemic patterns of discrimination against

[17] "Affirmative Action and Civil Rights Ad Hoc Committee, 1976-1981," ASA Papers, Box 91, Folder 3.
[18] Baldus and Cole, "Quantitative Proof of Intentional Discrimination," 61.

women. The company, however, disputed the very premise that men and women had sought, and were seeking, the same jobs. The high-profile case is known among humanists for the turn it took next. Both sides called in *historians* to establish the basis for assumptions about gender roles and job preferences that statistics alone could not provide.[19] Whether or not historical narrative blunted the EEOC's studies, the case went to Sears.

Like other discrimination cases of the era, media commentary seized upon *EEOC v. Sears, Roebuck & Co*. as a showdown between experts—the tacit assumption being that trials of numbers perverted legal reasoning and procedure. One conservative political commentator quipped that EEOC statisticians ran every kind of analysis they knew and threw a host of factors and variables into their computers, "everything but common sense."[20] Indeed, the legal use of statistics *had* come a long way in such a short time, but not because the legal imagination had been hijacked by numbers. In fact, the demand for historical consultants in this case revealed, if anything, the need for meaningful humanistic interpretation of analytical claims that were increasingly isolated from the history they were rooted in.

As far as civil rights law was concerned, the 1980s were both the apex and a *caesura* of legal measurement; a moment of rupture at the very height of liberal social scientists' investment in statistical proof of discrimination. With no consensus or standards for advocacy among professional

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[19] On the Sears case and its relationship to women's history and feminist legal studies, see Jacquelyn Dowd Hall and Sandi E. Cooper, "Women's History Goes to Trial: EEOC v. Sears, Roebuck and Company," *Signs* 11, no. 4 (1986): 751–79; Ruth Milkman, "Women's History and the Sears Case," *Feminist Studies* 12, no. 2 (1986): 375–400; Katherine Jellison, "History in the Courtroom: The Sears Case in Perspective," *The Public Historian* 9, no. 4 (1987): 9–19; Joan W. Scott, "Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism," *Feminist Studies* 14, no. 1 (1988): 33–50; Vicki Schultz, "Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," *Harvard Law Review* 103, no. 8 (1990): 1749–1843.

[20] James J. Kilpatrick, "End of a Vendetta," *The Sun*, February 26, 1986, sec. Opinion. The EEOC's missteps were a favorite target of Kilpatrick, a right-wing columnist and hardened critic of affirmative action policies. See also James J. Kilpatrick, "Firm Takes on EEOC," *The Austin American Statesman*, July 24, 1978.

organizations, conversations about relevant social science were increasingly wedded to the searching of policymakers. The real irony was that at the very same moment computing power and software made longitudinal data analysis useful for social scientists, courts and policymakers adopted methods that treated the past as a *terra incognita*.

Of the many available examples, criminologist William Wilbanks's "The Myth of a Racist Criminal Justice System" is significant for its attempt to model enough legally relevant factors to make racial disparities within criminal justice negligible.[21] Wilbanks's analysis epitomized a new school of criminology less faithful to sociology departments than to the federal block grants that expanded the field in a perversely 'clinical' direction: willing to acknowledge structural inequality but ultimately focused more on individual behavior. Even sympathetic reviewers found Wilbanks's statistics wanting, not because they felt he had committed grave measurement errors, but that "racism in our society is so prevalent that is [sic] can never be proven definitely one way or another."[22] Indeed, just like in the postwar years, many felt that racism was some kind of unconscious baseline tendency that could only be countered by education. If it existed at all, it was not a legitimate source of legal remedy.

This logic reached its climax in a 1989 Supreme Court ruling on construction contracts. In *City of Richmond v. J.A. Croson Company,* the Court applied the standard of strict scrutiny to strike down a 30 percent set-aside for minority businesses established by Richmond's city council. Justice

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[21] Wilbanks picked up on the same victims' rights discourse that the LDF leaned on in its *McCleskey* strategy: "[I]t is often pointed out that 50% of the victims of police killings are black and that this fact alone presents a prima facie case of racism. But it is seldom pointed out that 50% of the police officers who are killed are victimized by blacks. If the first fact indicates racism by white police officers why does not the second fact indicate racism by black killers of police?" William Wilbanks, *The Myth of a Racist Criminal Justice System* (Monterey, Calif.: Brooks and Cole, 1987), 6.

[22] James Davis, review of *The Myth of a Racist Criminal Justice System*, by William Wilbanks, *Journal of Contemporary Criminal Justice* 4, no. 1 (1988): 57–59.

O'Connor wrote that a "generalized assertion" of past discrimination was insufficient justification for a hard quota.[23] She warned of an incoherent "mosaic of shifting preferences based on *inherently unmeasurable* claims of past wrongs (emphasis mine)," making it such that "only 'measurable current and ongoing discriminatory acts' could generate legal remedy."[24] The ground had been prepared almost a decade ago by Justice Stevens, who wrote in *Fullilove v. Klutznick* (1980) that just as "traditional attitudes" had rationalized discrimination against minorities in days gone by, "awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole."[25] These decisions implied that historical evidence of discrimination needed continual updating and retailoring to present conditions and changing social dynamics, like software that needed to be kept compatible with an ever-complicated operating system or risk obsolescence.

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The chapters in this final section consider how this dynamic played out in employment and death penalty litigation. Once statistical evidence became the norm in discrimination lawsuits, adversarial dynamics ratcheted up expectations of certainty. As the epigraph from Williams articulates, courts played a part in this dynamic by redefining the frameworks for weighing statistical evidence.[26] Decisions tended to reset the historical clock of discrimination, filter out groups deemed irrelevant to the labor market, or raise the bar of proof by demanding the specificity promised by the more advanced "statistical radar" of multiple regression analyses.

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[23] *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) at 470.
[24] *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) at 505-506; Gordon, "Discrimination," 211; Sugrue, *Sweet Land of Liberty*, 509–10.
[25] Cited in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) at 517.
[26] Patricia J. Williams, "The Obliging Shell," in *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991), 98–130.

Chapter Five traces out the trajectory of disparate impact doctrine from a trio of cases in the late 1970s that firmed up the jurisprudence of numbers through the end of the 1980s. The Reagan administration's wholesale assault on disparate impact was only part of the story. I show how processes that the Court had once scrutinized became normalized under the law. In this new legal order "racial powerlessness, poverty, and unemployment [would] be regarded as no more than conditions," outputs of presumably neutral processes "rationalized by treating them as historical accidents or products of a malevolent fate, or, even worse, by blaming the victims."[27]

Chapter Six considers how the LDF made its boldest challenge to discrimination in capital punishment yet by following a template set by employment lawsuits. First, their own claims to historical discrimination were taken off the table. In order for *McCleskey v. Kemp* (1987) to become possible, they had to eke out a theory that accounted for racial discrimination against the victims of crimes as well as the perpetrators. It was impressive that the Baldus Study was able to turn Georgia's sentencing scheme into a multiple regression model, but by incorporating the law's own terms it presented regularity where many had been challenging the death penalty's incoherence. *McCleskey* shored up the existing boundary between disparate impact and equal protection, and helped to update and enshrine ideas about fair sentencing for the information age.

[27] Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law," 1103.

Chapter 5

The Fox and the Stork

Playing the Numbers Game in Employment Discrimination Lawsuits

In 1983, the Equal Employment Opportunity Commission (EEOC) brought a lawsuit against International Business Machines (IBM), alleging that the computer corporation had engaged in systemic racial discrimination throughout its Data Processing Division (DPD) in Maryland. Over the course of several weeks in the "hushed atmosphere of a third-floor federal courtroom," a judge heard testimony on IBM's rating-based promotion process from plaintiffs, executives, and—as had become common—statisticians. Black employees alleged they had "suffered in silence," while executives pointed to numerous affirmative action programs. The trial took place in the shadow of tragedy. A year prior, Edward Thomas Mann, a Black former DPD employee who had quit after repeatedly being denied promotion, rammed his Lincoln Continental through the glass lobby of the building where he once worked and opened fire with a machine gun. During a seven-hour standoff with the police, Mann killed three and injured many more. A statement at the outset of the trial by a group of IBM employees called Blacks Against Racism alleged that Mann "was so destroyed by his experiences that he destroyed the lives of others."[1]

Despite the charged atmosphere, the trial itself concerned the dry matter of whether the statistical data proffered by the EEOC made out a *prima facie* case of discrimination warranting a rebuttal by the company. IBM had faced discrimination charges in court fifteen times prior,

[1] Paul W. Valentine, "U.S. Suing IBM in Racial Bias Case," *The Washington Post*, May 28, 1983.

prevailing on each occasion. This time would be no different. Ruling that the EEOC had not met its burden of proof, Judge Ramsey faulted its multiple regression model for including irrelevant data from IBM's employee files and failing to control for seniority and job level. Ramsey could barely contain his enthusiasm for IBM's defense, even as he acknowledged that it was not immediately relevant to his decision. He applauded the analysis conducted by Harvard labor economist Dr. James L. Medoff, which assessed matched pairs of Black DPD employees and similarly situated white "peers" elsewhere in the company, and said of the company's evaluation procedures, "it is hard to imagine a system with any tighter controls."[2] As employment litigation entered its second decade, statistical arguments became more elaborate: each side was expected to prepare studies with the help of cutting-edge quantitative social science.

Though IBM showed up as a defendant in this particular case, the computing pioneer was becoming ubiquitous in employment discrimination suits that relied on machines like its 5150 Personal Computer launched in 1981.[3] In the 1970s, the use of computerized data in employment discrimination cases brought under Title VII of the 1964 Civil Rights Act had been pioneered by the NAACP Legal Defense Fund (LDF), which sought technical assistance from IBM itself to prepare trial evidence for lawsuits against large corporations that were often caught off-guard.[4] As the decade wore on, litigants gradually became steeped in the "numbers game," and a legal strategy that had paid dividends for civil rights advocates began to founder. Private firms cropped up selling

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[2] *EEOC v. International Business Machines Corp.*, 583 F. Supp. 875 (D. Md. 1984) at 906.

[3] For different perspectives on the PC market and the social transformation of computing, see Ceruzzi, *A History of Modern Computing*; Joy Lisi Rankin, *A People's History of Computing in the United States* (Cambridge, Mass.: Harvard University Press, 2018).

[4] Greenberg, *Crusaders in the Courts*, 420–21.

analysis of employment data and expertise to help companies guard against potential lawsuits.[5] It is a telling bit of historical irony that personal computers made statistical analysis more available than ever before precisely as the legal order grew more conservative, shaped by backlash against perceived excesses of affirmative action programs.[6] Minority plaintiffs grounded rights claims in hard statistics, but computers were increasingly branded as tools of deception producing reams of nonsense, conferring merely the patina of objectivity.[7]

When the Supreme Court unanimously certified an effects-based conception of discrimination under Title VII in *Griggs v. Duke Power Co.* (1971), an alternative to the statute's 'intent' requirement, civil rights advocate welcomed the chance to put numbers to use. A formula for *disparate impact* cases quickly solidified: statistical evidence was used to establish a *prima facie* case, leaving a company to defend the business justification behind a process producing the

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[5] For contemporary accounts of statistical consulting in the legal sphere, see William E. Blundell, "Equal Employment Records: To Know Them Is to Love Them," *Wall Street Journal*, March 19, 1984; Penny Singer, "The Expert Witness: Economists Turn Data Into Testimony," *The New York Times*, January 19, 1986, sec. Westchester Weekly. For parallel accounts of computers in politics, particularly election consulting, see Dudley Clendinen, "Small Computers Open Politics to Citizens with Little Money," *The New York Times*, February 15, 1984, sec. U.S.; Paul Starr and Ross Corson, "Who Will Have the Numbers? The Rise of the Statistical Services Industry and the Politics of Public Data," in *The Politics of Numbers*, The Russell Sage Foundation Census Series (New York: Russell Sage Foundation, 1987), 414–47.

[6] MacLean, *Freedom Is Not Enough*. Despite this, corporations came to embrace statistics and goal-setting that signaled commitment to the civil rights agenda without major structural changes and helped rationalize Human Resources management: Anne B. Fisher, "Businessmen Like to Hire by the Numbers," *Fortune*, September 16, 1985; Dobbin, *Inventing Equal Opportunity*.

[7] Regarding the highly visible *EEOC v. Sears* case, one commentator quipped that EEOC statisticians ran every kind of analysis they knew and threw a host of factors and variables into their computers, "everything but common sense." Kilpatrick, "End of a Vendetta." The EEOC was a favorite target of Kilpatrick, a right-wing columnist and hardened critic of affirmative action policies. See also Kilpatrick, "Firm Takes on EEOC." It should also be pointed out that at the very same time, conservatives were increasingly buying into computerization throughout industry and government, in particular the use of census and polling data for marketing.

disparity, which could not merely be a pretext for unlawful discrimination.[8] In *Griggs*, Chief Justice Burger invoked Aesop's fable of the fox and the stork:

> [Tests] or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox…Congress has now required that the posture and condition of the job-seeker be taken into account. It has…provided that the vessel in which the milk is proffered be one all seekers can use.[9]

In the legal debates to come, however, the fable doubled back on itself. Rather than encouraging employers to adopt the same size bowl, statistical evidence incentivized plaintiffs and defendants to proffer competing methods and explanations that contorted the vessels anew.

This chapter presents an account of the fraught legal battles over minority rights waged on the basis of statistics during the late 1970s and 1980s, when the "numbers game" was in full swing. With some variation and nuance, scholars have largely presented these as setbacks for the civil rights agenda—it is hardly an accident that these years saw the rise of Critical Legal Studies and its critique that law merely reflected an existing status quo, *contra* the transformative goals of legal liberalism.[10] Approaching these cases from the perspective of the statistical proof disputed, however, opens up two new dimensions through which to assess the lessons of this fraught era. First, moving beyond a litigation-centered model to consider how federal policymakers engaged with the problem of statistical standards demonstrates how centering common problems of knowledge production can unite political spheres often treated in isolation. When considering

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[8] Belton, *The Crusade for Equality in the Workplace*, 197.

[9] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 431

[10] For a summary of different approaches to legal mobilization, see Dara Z. Strolovitch, *Affirmative Advocacy: Race, Class, and Gender in Interest Group Politics* (Chicago: University of Chicago Press, 2007), 140–43. For two accounts that responded directly to the losses of the late 1970s and served as a conceptual bridge between CLS and Critical Race Theory, see Bell, "Serving Two Masters"; Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law." For challenges and modifications to Critical Legal Studies, see, *inter alia*, David M. Trubek, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review* 36, no. 1/2 (1984): 575–622; McCann, *Rights at Work*.

expansive issues like affirmative action, standards allow us to describe the overlap between litigation, legislation, and administration.[11] Second, moving beyond the positing of statistical categories to assessing mechanisms of proof brings literature on the politics and policy of measurement and classification into dialogue with scholarship interested in how social scientific analysis resolves the world into particular orders of gender and race.[12]

By analyzing the overlap between administrative changes in racial accounting and courtroom battles over proof of discrimination, I contribute to ongoing discussions across disciplines. Feminist legal histories of workplace activism and political organizing have approached these struggles from the ground up, moving beyond political histories told through abstract arguments over equality between talking heads.[13] In shifting the frame, however, these accounts miss the role played by the politics of knowledge and the changing character of proof in the social sciences. While historians of science have considered the relationship between law and quantification, much of the literature on law and science in the twentieth century is concerned with the regulation of novel intellectual property and forensic evidence rather than uses of numbers to make legal claims.[14] Legal and

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[11] For approaches to the history and sociology of knowledge that consider how interest groups converge on shared objects, see Peter Galison, "Trading Zone: Coordinating Action and Belief," in *The Science Studies Reader*, ed. Mario Biagioli (New York: Routledge, 1999), 137–60; Susan Leigh Star and James R. Griesemer, "Institutional Ecology, 'Translations' and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-1939," in *The Science Studies Reader*, ed. Mario Biagioli (New York: Routledge, 1999), 505–24.

[12] On measurement, see Ken Alder, "A Revolution to Measure: The Political Economy of the Metric System in France," in *The Values of Precision*, ed. M. Norton Wise (Princeton, NJ: Princeton University Press, 1995), 39–71; Williams, *Mark One or More*; Prewitt, *What Is "Your" Race?*; Anderson, *The American Census*. On the structure of knowledge and political order, Silverberg, "'A Government of Men': Gender, the City, and the New Science of Politics"; Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (Berkeley, Calif.: University of California Press, 2002); Mary Hawkesworth, *Embodied Power: Demystifying Disembodied Politics* (New York: Routledge, 2016); Michelle Murphy, *The Economization of Life* (Durham: Duke University Press, 2017).

[13] Kessler-Harris, *In Pursuit of Equity*; Mayeri, *Reasoning from Race*; Turk, *Equality on Trial*.

[14] On the relationship between legal and probabilistic reason, see Daston, *Classical Probability in the Enlightenment*; Golan, *Laws of Men and Laws of Nature*. On law and scientific novelty, see Sheila Jasanoff, *Science*

political sociologists have done remarkable work to tease apart myth from reality in the ongoing debates over affirmative action, though they have been less concerned with the consequences of these debates on the relationship between politics, knowledge, and identity.[15] By incorporating perspectives from feminist and critical race theory on the relationship between collectives and individuals, I extend this analysis to consider the implications of statistics for the ongoing pursuit of justice in an era when statistical concepts have been embedded into the algorithms that subtly reshape our social reality.[16]

In what follows, I present an overview of the major debates that took place in the process of settling the legal order around employment discrimination in an information age, highlighting the pursuit of standards as an animating force in the process of narrowing and hollowing out the potential for employment lawsuits as vehicles for racial and gender justice. First, the chapter describes a number of cases during the 1970s referred to as the *Teamsters* trilogy to document an emerging conflict between judicial interpretation of statistics and federal policy. It then turns to the various engagement with statistics by judges, highlighting the interplay between plaintiffs' *strategies*

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at the Bar: Law, Science, and Technology in America (Cambridge, Mass.: Harvard University Press, 1995); Michael Lynch et al., *Truth Machine: The Contentious History of DNA Fingerprinting* (Chicago: University of Chicago Press, 2008); Myles W. Jackson, *The Genealogy of a Gene: Patents, HIV/AIDS, and Race* (Cambridge, Mass.: MIT Press, 2015).

[15] I am particularly indebted to the extensive work of Robin Stryker and John Skrentny, both of whom explore different models for assaulting the mythos of affirmative action policies while making an honest assessment of the contradictions raised by those actually implemented: Skrentny, *The Ironies of Affirmative Action*; Stryker, "Disparate Impact and the Quota Debates"; Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination'"; Stryker, Docka-Filipek, and Wald, "Employment Discrimination Law and Industrial Psychology."

[16] For the classic critique of how statistics elide the reality of compounded discrimination, see Crenshaw, "Demarginalizing the Intersection of Race and Sex." I also have in mind Iris Young's argument for a serial approach to gender as an alternative to the "discourse of liberal individualism [that] denies the reality of groups" and obscures processes of subjugation. Iris Marion Young, "Gender as Seriality: Thinking about Women as a Social Collective," *Signs* 19, no. 3 (1994): 718. On algorithms, see Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: New York University Press, 2018); Benjamin, *Race After Technology*.

of inclusion and defendants' *strategies of disaggregation*. Finally, the chapter analyzes attempts by the Supreme Court and federal policymakers during the Reagan years to undermine disparate impact theory by setting the bar higher. Although lawyers and social scientists resorted to statistical strategies in order to make the claims of minority groups cognizable within the legal order, I suggest that disputes over the statistical proof of discrimination shored up the power and objectivity of the white male subject as an unmarked norm in both the law and social sciences.

In Pursuit of Standards

The economic downturn of the 1970s posed a new set of challenges for employment antidiscrimination efforts. The civil rights agenda was based in the presumption of postwar growth liberalism that jobs were there—they merely needed to be divided up more equitably.[17] What would happen, then, as people perceived the economic pie shrinking? Courts answered the crisis by producing Title VII rulings that drew more conservative boundaries between who exactly could count as a class and what relief they might be entitled to.[18] Black women had made use of Title VII to break into more traditional "women's" jobs, but factory jobs traditionally held by white men were a new kind of obstacle due to the intersecting and compounded marginalities of Jim Crow practices and protective labor laws still on the books.[19] After a St. Louis General Motors plant began to hire black women in the 1970s, it laid off all of them (except for a janitor) in 1974 and five of them, including Emma DeGraffenreid, filed a complaint with the EEOC. Citing the interests of "judicial

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[17] For different reflections on the relationship between labor, consumption, and the American economy, see Stein, *Running Steel, Running America*; Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: A. A. Knopf, 2003). Stein has particular scorn for the role of civil rights lawyers played in the decline of the steel industry, arguing that they "often rejected reasonable solutions, fearing they might become precedents elsewhere," and ignored the technological and economic circumstances of the industry. Stein, *Running Steel, Running America*, 315.

[18] For an account of how statistics were used to calculate remedies, and how economic anxieties over backpay intensified discrimination lawsuits, see above, Chapter Three.

[19] Crenshaw, "Demarginalizing the Intersection of Race and Sex"; Mayeri, *Reasoning from Race*, 102.

economy," Nixon appointee H. Kenneth Wangelin refused to grant the claim that these women had been discriminated on the grounds of both race *and* sex.[20] He dismissed most of the plaintiffs' historical evidence out of hand, stating that it would be illegitimate to create a "'super-remedy'" for black women under Title VII, and that class creation in general, "governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."[21] He suggested that they join an ongoing lawsuit alleging racial discrimination at the plant instead.

Though a famously criticized piece of legal reasoning, Wangelin's refusal to acknowledge black women as a class was not necessarily the only way the law refused to recognize intersectionality—the converse logic could be applied by isolating a claim to black women alone in an effort to limit the scope of a remedy. In *Payne v. Travenol*, heard around the same time, two black women sued a medical supply company for racial discrimination. Despite a finding of general discrimination on the basis of race, the court cited conflicting interests between Black men and Black women as classes as a reason for not granting relief.[22] Kimberlé Crenshaw makes the broader argument that the intersection of race and gender became a way for judges to deny plaintiffs access to statistics, either by claiming a data-centered nominalism or restricting the scope of a potential remedy. In unstable economic conditions, the intersection of damages and identities subject to a finding of discrimination made the very statistics upon which rights were claimed an ideal vehicle for limiting access to them.

As if to anticipate a coming onslaught of statistical evidence, the Supreme Court heard a number of cases beginning in 1976 that promised to set standards for the use of statistics in

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[20] *DeGraffenreid v. General Motors Assembly Div., etc.*, 413 F. Supp. 142 (E.D. Mo. 1976) at 145.
[21] *DeGraffenreid v. General Motors Assembly Div., etc.*, 413 F. Supp. 142 (E.D. Mo. 1976) at 143, 145.
[22] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 147.

discrimination cases.[23] An appeal of a criminal case charging discriminatory jury selection, rather than a Title VII violation, was the first case to come up. In *Castaneda v. Partida* (1977), a Mexican-American man sentenced to eight years for a burglary charge claimed that he had been the victim of jury discrimination at the hands of a grand jury system that only chose Spanish-surnamed jurors 39% of the time when the population of the country was 79.1% Mexican-American.[24] Footnote 17 of the Supreme Court's decision in favor of Partida endorsed the classic statistical model of a binomial normal curve and the use of a standard deviation test, accepting the basic premise that jury selection processes were intended to work randomly.

> [The] expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339…the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value…in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.[25]

The decision provided was a model for how to determine the fair operation of a straightforward process where equitable representation was an assumed premise. In later cases, the logic of modeling the underlying process with statistics would come under attack.

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[23] Here I rely heavily on analysis from a panel of experts convened to discuss the future of statistical evidence in courts, though this body did not consider how *Dothard v. Rawlinson* was tied to *Hazelwood*: Fienberg, *The Evolving Role of Statistical Assessments as Evidence in the Courts*.

[24] *Castaneda v. Partida*, 430 U.S. 482 (1977) at 485-486. On the complicated legacy of counting and identifying "Mexican-Americans," see George J Sánchez, *Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900-1945* (Oxford: Oxford University Press, 1993); Skrentny, "'We Were Advancing the Really Revolutionary View of Discrimination'"; Hochschild and Powell, "Racial Reorganization and the United States Census 1850–1930."

[25] *Castaneda v. Partida*, 430 U.S. 482 (1977) at 496n17. On the presupposition of randomness, a team of statisticians analyzing the case wrote that the jury selection system "is not a random process, but the Court might well require as a matter of public policy that its operation closely resemble a random process." Paul Meier, Jerome Sacks, and Sandy L. Zabell, "What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule," *American Bar Foundation Research Journal* 9, no. 1 (1984): 142.

The Supreme Court addressed the use of statistics in the employment context directly in *Teamsters v. United States* (1977), a pyrrhic victory for civil rights advocates. The Department of Justice brought a suit against a trucking company T.I.M.E.D., Inc. and its union, the International Brotherhood of Teamsters, alleging broad discrimination against minorities due to the near absence of any black line driver in the company at the time the litigation began.[26] The company responded to the *prima facie* case by attacking the statistics themselves, claiming that despite calling in 40 witnesses the government relied on "'statistics alone,'" and the wrong ones:

> [There] was no precise delineation of the areas referred to in the general population statistics, that the Government did not demonstrate that minority populations were located close to terminals or that transportation was available, that the statistics failed to show what portion of the minority population was suited by age, health, or other qualifications to hold trucking jobs.[27]

The Court unanimously affirmed an earlier ruling that the company's "inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'": the absence of minority employees in line driver positions spoke for itself. The majority also awarded backpay to the Black and Spanish-surnamed employees who could claim they had been discriminated against. They broadly endorsed statistics for making cases and helping determine the scope of remedies, with a caveat: "statistical analyses have served and will continue to serve an important role" in discrimination cases but that "they come in infinite variety and, like any other kind of evidence, they may be rebutted."[28]

Teamsters has been applauded for certifying the "liberal use of statistics," and its ruling that statistical evidence of disparities in the workforce alone constituted a true *prima facie* case may have been responsible for the filing of nearly 6,000 discrimination cases in federal district courts the

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[26] *International Brotherhood of Teamsters v. United States et al.*, 431 U.S. 324 (1977) at 337.
[27] *International Brotherhood of Teamsters v. United States et al.*, 431 U.S. 324 (1977) at 339, 342n23.
[28] *International Brotherhood of Teamsters v. United States et al.*, 431 U.S. 324 (1977) at 339-340.

following year.[29] Yet, there was a darker side to the ruling. By handily awarding backpay, the Justices in the majority softened the decision's real blow. Reversing earlier precedent, they determined that an otherwise neutral seniority system was valid under Title VII even if it discriminated in operation—barring disparate impact arguments against seniority systems that "froze" minority workers. Seniority discrimination cases could be made with statistics, but evidence of intentional discrimination was necessary to award relief.[30] In a strong dissenting opinion, Justice Marshall remarked upon the decision's "devastating impact" on Black people and Mexican Americans, historically forced into low-status jobs that did not permit advancement: even if they were free to seek new, better-compensated positions, "[for] many, the price will be too high, and they will be locked into their previous positions."[31] The court upheld the role of statistical evidence while simultaneously limiting its scope.

In its next major case regarding statistics, the Court considered competing interpretations of employment data. *Hazelwood v. United States* (1977) was a *Teamsters*-like "pattern-or-practice" suit over whether a school district in St. Louis County had discriminated against Black teachers based in a comparison of gross statistics. In this case, however, the argument from population statistics seemed to offer no clear guidance: 3.7% of teachers in the Hazelwood School District were black, compared to 15.4% of St. Louis County on the whole. However, if one excluded the St. Louis City district, which tried to maintain a 50% balance of black and white teachers as a means of redress,

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[29] Belton, *The Crusade for Equality in the Workplace*, 284; Fienberg, *The Evolving Role of Statistical Assessments as Evidence in the Courts*, 88.

[30] The scope of this chapter does not allow me to deal with the relationship between proof of intent and effect, but this has been a major area of discussion among scholars who see the line between these two standards as blurrier than champions of disparate impact have claimed: Baldus and Cole, "Quantitative Proof of Intentional Discrimination"; Haney-López, "Intentional Blindness."

[31] *International Brotherhood of Teamsters v. United States et al.*, 431 U.S. 324 (1977) at 387.

the number shrunk to 5.7%.[32] The Court applied the same test as used in *Castaneda v. Partida*, but this provided no resolution: "5.7% may be sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% may be sufficiently large to reinforce it."[33] The opinion also noted that other relevant data "might tell a totally different story," and sent the case back down to the District Court for fact-finding.[34] While *Hazelwood* seems to be an overall inconsequential case, it raised the question of relevant comparisons—which would come to play a key role in later decisions—and began focusing attention on the relationship between individual claimants and their role in the statistical portrait.

In a lone dissent, Justice Stevens argued that it was not necessary to "burden a busy federal court with another trial" when Hazelwood had introduced no new evidence, and had done some math with his clerks to show it was incredibly likely that the 16 cases of individual discrimination the district refused to rebut could have been due to the smaller difference.[35] He thought that the intersection between statistical patterns and individual charges aligned in a way that stood up to legal scrutiny. Justice White disagreed, and filed a separate opinion on *Hazelwood* to express his "reservations with respect to the relative neglect of applicant pool data" in the case, claiming that establishing comparable applicant pools was a better way to justify comparing gross statistics, one that might have served the school district well.[36]

White had a harder time with another case heard just after *Hazelwood*, *Dothard v. Rawlinson* (1977), and evaluated both cases side-by-side in his opinion. Dianne "Kim" Rawlinson had a college degree in correctional psychology, but the State of Alabama's height and weight requirements for

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[32] *Hazelwood School District et al. v. United States*, 433 U.S. 299 (1977).
[33] *Hazelwood School District et al. v. United States*, 433 U.S. 299 (1977) at 311.
[34] *Hazelwood School District et al. v. United States*, 433 U.S. 299 (1977) at 310.
[35] *Hazelwood School District et al. v. United States*, 433 U.S. 299 (1977) at 318.
[36] *Dothard, Director, Department of Public Safety of Alabama, et al. v. Rawlinson et al.*, 433 U.S. 321 (1977) at 347.

correctional officers left her washing hair instead.[37] The District Court weighed evidence that these minimums excluded roughly 41% women, and struck down this requirement along with another that barred women explicitly from positions that put them in contact with inmates. In an evasive double negative, the Supreme Court refused to say that the lower court was *not wrong* in applying the *Griggs* standard to height and weight, especially since the employer made no effort to challenge the plaintiff's data.[38] However, it held that "contact" positions posed a genuine threat to women with a bleak portrait of prison life:

> Alabama maintains a prison system where violence is the order of the day, inmate access to guards is facilitated by dormitory living arrangements, every correctional institution is understaffed, and a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, and that therefore the use of women guards in 'contact' positions in the maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard.[39]

As Serena Mayeri argues, the Court comfortably "reasoned from race in applying *Griggs* to the height and weight requirements," but maintained statutory differences between race and sex in the protective argument for 'contact' as a bona fide occupational qualification.[40] Where statistical arguments tilted the scales toward equalizing opportunity, prevailing social norms disguised in a language of risk in a growing carceral state provided a strong counterweight.

Reasoning from the labor pool logic he applied to *Hazelwood,* Justice White was the lone full dissent from the majority. He thought that the height and weight statistics did not make a proper case, as he was "unwilling to believe that the percentage of women applying or interested in applying for jobs as prison guards in Alabama approximates the percentage of women either in the

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[37] Mayeri, *Reasoning from Race,* 115.
[38] *Dothard, Director, Department of Public Safety of Alabama, et al. v. Rawlinson et al.*, 433 U.S. 321 (1977) at 331.
[39] *Dothard, Director, Department of Public Safety of Alabama, et al. v. Rawlinson et al.*, 433 U.S. 321 (1977) at 322.
[40] Mayeri, *Reasoning from Race,* 116.

national or state population."[41] If *Teamsters* upped the ante for building a case based on statistics, judges like White began troubling which data should be included or excluded in making an initial judgment about what was legally cognizable as discrimination.

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As the Supreme Court weighed in on the scope of statistical demonstrations of discrimination, federal policy discussion about the nature and scope of racial statistics was more active than ever. In May of 1977, the Office of Management and Budget (OMB) issued Directive 15, which standardized the racial and ethnic categories used throughout government programs. Directive 15 built on efforts to coordinate education efforts and were explicitly based in the logic of civil rights and historical recognition of patterns of exclusion. Nonetheless, the ultimate rationale behind the categories—American Indian or Alaskan Native, Asian or Pacific Islander, Black, White, and a Hispanic ethnicity category—was largely unspecified. The OMB explicitly stated that the categories "should not be interpreted as being scientific or anthropological in nature" and that they rather reflected bureaucratic and sociopolitical realities.[42] Framed as such, Catherine Lee and John Skrentny argue that it left the categories open to scientific critique as well as resistance by entities at odds with the civil rights agenda, while former Census Bureau Director Ken Prewitt argues that Directive 15 "set the stage for the widely used people-of-color formulation" that elided the particular lived marginality of groups it was intended to protect and set the stage for further political conflict.[43] The

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[41] *Dothard, Director, Department of Public Safety of Alabama, et al. v. Rawlinson et al.*, 433 U.S. 321 (1977) at 348. On the 'lack of interest' argument, see Schultz, "Telling Stories about Women and Work."

[42] "OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting" (1977), https://wonder.cdc.gov/wonder/help/populations/bridged-race/directive15.html.

[43] Catherine Lee and John D. Skrentny, "Race Categorization and the Regulation of Business and Science," *Law & Society Review* 44, no. 3/4 (2010): 628–29; Prewitt, *What Is "Your" Race?*, 99–103.

implications of the directive were subtle, as the EEOC had long mandated racial reporting.[44] However, combined with broader reforms within government statistics, the Directive stoked fears and resentment over affirmative action policy critics deemed had gone rogue.

Under Executive Order 12013, President Carter reorganized the statistical policy functions that had been previously under the exclusive domain of the OMB, placing them under the control of the Secretary of Commerce, a position then held by the economist Juanita Kreps.[45] Resulting from reform efforts begun under the Nixon administration, the Order established an official Statistical Policy Coordination Committee comprised of Cabinet officials to oversee planning for data collection and analysis. Joseph W. Duncan, the chief statistician, declared that the middle decades of the twentieth century saw a "revolution" in government statistics that made the collection and analysis of government data a worthy profession in itself, separate from both economics and administration.[46] Reorganization of federal data collection and moving functions between agencies was a major theme during the 1970s, as administrators managed the political controversy of undercounted urban populations in the Census. In order to build trust among African Americans, President Nixon's Census Bureau Director, Vincent Barabba, gathered a "credible group" of key political influencers in 1974, including Black Panther Party co-founder Bobby Seale, to convey the importance of "being counted," but ultimately had to contend with their demands to be placed on an official advisory committee.[47] A 1979 conference on the undercount sponsored by the Illinois

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[44] See above, Chapter One.

[45] "Executive Order 12013—Statistical Policy Functions" (1977), https://www.presidency.ucsb.edu/documents/executive-order-12013-statistical-policy-functions.

[46] Joseph W. Duncan and William C. Shelton, *Revolution in United States Government Statistics, 1926-1976* (Washington, D.C.: U.S. Dept. of Commerce, Office of Federal Statistical Policy and Standards, 1978).

[47] Seale ended up having to go underground but, miraculously, his name cleared the payroll checks of the Nixon administration even after J. Edgar Hoover had called out the Panthers as the number one threat to national security. Vincent P. Barabba, Oral History - Vincent P. Barabba, interview by Barbara Milton and

Council for Black Studies made firmer demands that the government provide $5 million in grant money to train 100 black demographers.[48] Federal administrators heeded the lesson that numbers were political.

Meanwhile, the EEOC was in the midst of its own statistical revolution. Eleanor Holmes Norton, President Carter's choice to lead the commission, began a massive overhaul of its structure in 1977. She expanded the number of field offices and spearheaded two computerized charge systems to even out the workflow: a rapid system designed to help gather facts about pending cases to urge a quick decision, and a backlog system designed to reduce the overwhelming inventory. By 1981 she had cut the number of pending charges at any given time nearly in half.[49] If technocracy had long been hailed as a solution to slow government responses, administrators in the 1970s were finally learning how to adapt electronic data processing to their particular needs.[50] However, with greater potential for automation came greater demands for transparency from the entities being regulated, so the EEOC set out to refine its own standards and tame the political hydra of affirmative action complaints.

In another decisive move, Norton saw through the revision the EEOC's *Uniform Guidelines on Employee Selection Procedures* in 1978 and provided a numerical definition of disparate impact:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.[51]

David Pemberton, August 7, 1989, United States Bureau of the Census; Paul Delaney, "U.S. to Appoint Panel of Blacks To Avert Undercount in Census," *The New York Times*, September 26, 1974.

[48] Illinois Council for Black Studies, *Black People and the 1980 Census: Proceedings from a Conference on the Population Undercount* (Chicago: Chicago Center for Afro American Studies and Research, 1980).

[49] Equal Employment Opportunity Commission, *The Story of the United States Equal Employment Opportunity Commission*, 28–29.

[50] On the rise of electronic data processing in welfare administration, see Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (New York: St. Martin's Press, 2018).

[51] Quoted in Fienberg, *The Evolving Role of Statistical Assessments as Evidence in the Courts*, 91.)

The "four-fifths" rule, as it came to be known, shared an unfortunate linguistic homology with the three-fifths clause of the Constitution that was used for determining federal apportionment for enslaved people who could not vote themselves.[52] The rule itself came from a committee decision by the California Fair Employment Practice Commission in 1971 to create a technical standard for gauging the 'practical significance' of a selection mechanism that both lawyers and administrators could rely on—it was a compromise between "a 70% camp and a 90% camp."[53]
Adopting this guideline allowed Norton to respond to pressure from groups who argued that defending against allegations of discrimination under the *Griggs* theory was too costly.

Comparing selection rates was meant as a rule of thumb, but a numerical standard might have easily played into the hands of those who vilified the use of quota-based hiring for affirmative action. A panel of statisticians endorsed the rule as an alternative to the *Castaneda* test of significance, arguing that the former "arose not from ignorance of the obvious statistical procedure but from an appreciation of that very procedure's shortcomings and limitations."[54] Legal experts debated the meaning and utility of the standard, which seemed too little too late.[55] The four-fifths rule addressed disparities between selection rates at the level of the groups and was a straightforward gauge of what might count as a *prima facie* case. However, the floodgates had been

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[52] On the debates leading to the three-fifths clause, see Cohen, *A Calculating People*.
[53] Dan Biddle, *Adverse Impact and Test Validation: A Practitioner's Guide to Valid and Defensible Employment Testing* (Burlington, VT: Gower Publishing Company, 2005), 3.
[54] Meier, Sacks, and Zabell, "What Happened in Hazelwood," 170.
[55] For a variety of opinions, see David C. Baldus and James W. L. Cole, *Statistical Proof of Discrimination* (Colorado Springs, Co.: Shepard's Inc., 1980); Richard Cohn, "Statistical Laws and the Use of Statistics in Law: A Rejoinder to Professor Shoben," *55 Indiana Law Journal 537 (1980)* 55, no. 3 (April 1, 1980); Marion G. Sobol and Charles J. Ellard, "Evaluating the Four-Fifths Rule vs. a Statistical Criterion for the Determination of Discrimination in Employment Practices," *Labor Studies Journal*, no. 2 (1986 1985): 153–69.

open to statistical data for nearly a decade, and more sophisticated methods and techniques raised epistemological problems that a rule of thumb could not solve.

Many people, from statistical savants to centrist politicians appealing to a white base unified in opposition to affirmative action, rejected the very premise that employment was at its core a random process subject to the kinds of statistical modeling developed to sort out the naturally occurring variation within populations.[56] The legal and quantitative issues raised by the increasingly popular use of multiple regression analysis were of a different order entirely, concerning the background assumptions, variable selection, and causal inference of models. Nonetheless, lower court judges began to embrace these unfamiliar tools with little assistance from Supreme Court doctrine or EEOC policy.

Statistical Individuals

One noteworthy example of statistical innovation in the lower courts is the 1980 ruling by Judge Patrick E. Higginbotham in *Vuyanich v. Republic Nat. Bank of Dallas*, which comprised 171 legal pages, took nearly a year to write, and presented itself almost as a textbook on the use of multiple regression analysis in econometrics.[57] Higginbotham himself was considered as President Reagan's pick for the Supreme Court after his initial choice was eponymously "borked," but the nomination went to Anthony Kennedy. In the report by Reagan's Office of Counsel, Higginbotham was described as "moderately conservative judge with a strong interest and somewhat unpredictable

[56] Fienberg, *The Evolving Role of Statistical Assessments as Evidence in the Courts*, 91. On the development of statistical methods in eugenics, see Donald MacKenzie's article from the same time: MacKenzie, "Statistical Theory and Social Interests."
[57] *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224 (N.D. Tex. 1980).

bent in the affirmative action area."[58] The long ruling in *Vuyanich* was cited as his most significant decision, engendering wider reception of regression analysis in class action suits.[59]

The opinion itself came after multiple rounds of hearings, including an early one at which data were presented that Higginbotham thought "demonstrated at least prima facie that defendant's personnel practices have been infested to the core by racial and sex discrimination."[60] Hearings were carefully orchestrated to debate the relationship between statistical analysis and the relevant statutes, "to ensure that any hidden value choices are not introduced by the quantitative techniques."[61] Higginbotham was determined "not to reject the unfamiliar for its unfamiliarity" and hoped that "the translation of Title VII equal opportunity doctrine to technocratic terms will make possible more sensitive and accurate detection of the presence or absence of discrimination." Ultimately, the findings were more conservative than his initial suspicions had been in 1978: the court upheld a race-based disparate impact claim and awarded backpay but made no findings of sex discrimination.

Higginbotham's conclusion was a well-meaning appeal to the virtues and vices of statistical jurisprudence. He urged that econometric techniques were nothing like "discrimination CAT scanners" and that the results of the proceedings were not numbers themselves but "human judgment that the facts found are more likely true than not true."[62] The moment was not an illegitimate reign of numbers, but a problem of transitional justice forced to uncertain ground:

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[58] C. Dean McGrath, "Re: Patrick E. Higginbotham," 1, Reagan Office Files, McGrath, C. Dean: Files, Box OA 15543, Folder "Judicial Nominees: Supreme Court (2)." He was also known for having struck down Southwest Airlines' female-only flight attendant requirement.

[59] McGrath, "Re: Patrick E. Higginbotham," 3-4; Fienberg, *The Evolving Role of Statistical Assessments as Evidence in the Courts*, 25.

[60] *Vuyanich v. Republic Nat'l Bank*, 78 F.R.D. 352 (N.D. Tex. 1978) at 355.

[61] *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224 (N.D. Tex. 1980) at 261.

[62] *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224 (N.D. Tex. 1980) at 394.

> [The] techniques of this suit highlight our present social conundrum of nourishing ethnicity in an effort to starve it…the story is not of good people versus bad people but of an employer caught by changing social order, ponderous in response, but now running hard to get in line…I write this unusual conclusion to this unusual opinion to make plain that this court did not select a numbers field for this contest but instead has been forced to judge a fight, there fought.

This opinion was unusual in its erudition and the enthusiasm expressed by a conservative judge for statistical techniques as a means of redress. Yet, in pinpointing the "conundrum of nourishing ethnicity in order to starve it," he revealed his allegiance to colorblindness. Numbers provided a slippery foothold amidst the morass of claims about merit.

Meanwhile, courts were raising the equally difficult problem of relating individuals to groups in disparate impact suits. In *Connecticut v. Teal* (1982), four black employees of the State of Connecticut failed a promotional exam that 32% more white employees passed. When they filed a disparate impact suit, the State alleged that the "bottom line" racial composition of the job classification at issue was equal, and that blacks had an even higher rate of promotion. The Supreme Court narrowly held that such a defense did not preclude individual respondents from claiming a *prima facie* case of discrimination, nor rebut the charge.[63] While the majority held up the importance of protecting the *individual* to Title VII, the dissent by Justice Powell argued that they had confused methods of proof for relief to individuals and to classes, "a long and unhappy step in the direction of confusion."[64] The epistemic quandary of the 'statistical individual' would come to be a dominant theme in antidiscrimination discourse as the 1980s went on.

Still, one could make a tangle of different selection rates and applicant pools while ignoring the very plain historical and circumstantial features of discrimination. Another more famous Higginbotham—A. Leon Higginbotham Jr., author of *In the Matter of Color* and the judge who

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[63] *Connecticut et al. v. Teal et al.*, 457 U.S. 440 (1982).
[64] *Connecticut et al. v. Teal et al.*, 457 U.S. 440 (1982) at 463.

Eleanor Holmes Norton clerked for—reversed a District Court decision in *Wilmore v. Wilmington* by arguing that a promotional examination for city firefighters was a clear case of disparate impact given the nature of the existing job classifications.[65] Higginbotham argued that because black firefighters had been excluded from administrative jobs, including those in the Office of Data and Statistics, they were less prepared than their white colleagues to take some of the tests used in the promotional exam, which included some of the common material used in that office.[66] He appealed to statistical correlation between administrative experience and exam performance in order to justify the disparate impact claim.[67] *Wilmore v. Wilmington* was a refreshingly straightforward application of data to circumstances, done in fewer than 170 pages.

The strategies of disaggregation disseminated through Supreme Court cases did not uniformly curtail rights claims based in statistics. In fact, these decisions and heuristics appear to have spurred new confidence among civil rights lawyers to file claims.[68] Nonetheless, as the emphasis in these cases shifted from the class to the claimant in all of her particularity, the contradictions of proportional justice left a gap for conservative judges to exploit.

Moving the Goal Post

"It's not that statistics are bad," explained EEOC chair Clarence Thomas to a *New York Times* reporter in 1984, "but they have been terribly overused."[69] As a college student, Thomas had been steeped in the black radical tradition, organizing a free breakfast program along the lines of the

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[65] *Wilmore v. City of Wilmington*, 699 F.2d 667 (3rd Cir. 1983).
[66] *Wilmore v. City of Wilmington*, 699 F.2d 667 (3rd Cir. 1983) at 673.
[67] On the problems of creating statistical individuals—fitting people based on unique characteristics to data derived from aggregates—see Bouk, *How Our Days Became Numbered*.
[68] John J. III Donohue and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation," *Stanford Law Review* 43, no. 5 (1991 1990): 983–1034.
[69] Robert Pear, "Changes Weighed in Federal Rules on Discrimination," *The New York Times*, December 3, 1984.

Black Panther Party and championing the views of its luminaries, like Angela Davis.[70] As a student at Yale Law School, he became increasingly alienated by his experiences as a beneficiary of affirmative action initiatives, a perspective hardened by the difficulty he faced finding employment after graduation. Influenced by the work of prominent black Chicago school economist and conservative Thomas Sowell, he argued that it was indefensible to presume discrimination in the case of a statistical disparity and pointed to factors like personal history, commuting patterns, education, or irreconcilable cultural differences. The class action suit undergirded by statistics and favored by the civil rights establishment was his *bête noire*.

Thomas held down the EEOC longer than any previous chair. He brokered the commission's second largest settlement to date with General Motors in 1983, which awarded $42.4 million in backpay and created career development and programs benefitting more than 900 employees—though it had already been in the works for nearly a decade.[71] He was vocally ambivalent about the Sears case filed under Norton, stating that it "relies almost exclusively on statistics," and analogizing it to prosecuting a black basketball team at a predominately white college.[72] Under Thomas, the EEOC shifted toward a 'full investigation' model premised upon "obtaining full remedies for every individual complainant."[73] But even a celebratory volume on the occasion of the EEOC's 35th anniversary belied a bit of understated, bureaucratic scorn in noting, "[ironically], while the commission was revamping its charge-processing procedures to spend more

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[70] For a nuanced, if at times overly apologetic, take on Thomas that foregrounds his jurisprudence and deep Afro-pessimism over his opportunism and the national spotlight thrust upon him in the wake of sexual assault charges by Anita Hill, see Corey Robin, *The Enigma of Clarence Thomas* (New York: Metropolitan Books, 2019).
[71] Equal Employment Opportunity Commission, *The Story of the United States Equal Employment Opportunity Commission*, 32–33.
[72] Pear, "Changes Weighed in Federal Rules on Discrimination."
[73] Equal Employment Opportunity Commission, *The Story of the United States Equal Employment Opportunity Commission*, 32.

time and money on individual charges of discrimination, EEOC's charge inventory was exploding," creating another massive backlog in the midst of staff cutbacks.[74] Yet, Thomas should be understood more a symptom than cause of changing attitudes at the EEOC following its expansion during Norton's tenure. Officials throughout the Reagan administration sought to discredit the commission's work, claiming that it had obfuscated the previously clear tools and metrics for employment and gotten away from the basic issues of discrimination.

Among the people interviewed for the *Times*'s piece on Thomas, attitudes toward employment standards varied in their content but were generally uniform in their negativity. Commissioner Fred W. Alvarez said it took "a wizard on [sic] psychology and statistics" to comprehend its guidelines. Psychologists, on the other hand, argued that they were not in step with advances in the field and represented an outdated critique. Frank Schmidt from the Federal Office of Personnel Management blamed economic stagnation on "the decline in the accuracy with which employers have been sorting people into jobs…caused by substantial reductions in the use of valid job aptitude tests." More liberal civil rights advocates were resolute. Reagan's Office of Legal Policy under Attorney General Ed Meese would affirm the same in 1987, in a broad assault on the disparate impact theory of discrimination.[75] Barry Goldstein of the LDF claimed that statistical evidence had become an essential part of the employment lawyer's toolkit, and more importantly that "[there] is no basis for questioning its use."[76] Yet, as we have seen, judges found various ways of affirming the statistical approach while restricting the rights it had been used to secure.

It is tempting to ascribe this shifting attitude to an influx of Reagan-appointed judges and policymakers. However, as Vicki Schultz and Stephen Petterson argue in an empirical analysis of

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[74] Equal Employment Opportunity Commission, 45.
[75] Office of Legal Policy, "Redefining Discrimination."
[76] Pear, "Changes Weighed in Federal Rules on Discrimination."

judicial decisions, appointees of all political stripes and presidential administrations had become "predisposed to interpret racial segregation as the expression of minorities' own lack of interest in higher-paying jobs," dispensing with evidence they had previously cited to disregard such claims.[77] They argued instead for a "significant transformation in judicial consciousness" in the wake of growing acceptance of the idea that discrimination against minorities was a thing of the past. Indeed, even Alfred W. Blumrosen, whose enthusiasm for disparate impact had shaped its widespread use, claimed:

> The success of the Civil Rights Act contained the seeds of its loss of public support. *Racism alone simply will no longer do as an explanation for the current condition of depressed minorities*. The rhetoric of the sixties sounds hollow to Americans of the eighties because it is hollow.[78]

Skepticism of formal equality had become a commonplace view on both the left and right.[79] During these years, the statistical standards elaborated during the 1970s presented an intellectual resource for undermining the statistical approach to employment discrimination altogether.

The case of Clara Watson, a black woman who had been denied a supervisory position at the Fort Worth Bank and Trust multiple times by white supervisors, was the first skirmish in what became a battle over the fate of disparate impact altogether.[80] Because the bank had relied on the subjective criteria of supervisors for promotion, this was the first time the Supreme Court weighed in on whether disparate impact could apply to standards that were not objective like tests or tenure.[81] The Department of Justice, which typically advocated for Title VII plaintiffs, sided with the

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[77] Vicki Schultz and Stephen Petterson, "Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation," *The University of Chicago Law Review* 59, no. 3 (1992): 1180.

[78] Alfred W. Blumrosen, quoted in Crenshaw, "Race, Reform, and Retrenchment," 1348.

[79] On the vanishing center in racial politics during the 1980s, see Rodgers, *Age of Fracture*.

[80] For an in-depth play-by-play of the Supreme Court's "civil rights massacre," see Belton, *The Crusade for Equality in the Workplace*, 281–95.

[81] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) at 982.

Bank and urged the Court to strike down a disparate impact analysis of subjective criteria.[82] Justice O'Connor, writing for a plurality of the Court (one Justice had yet to start his term) argued that there *was* a good reason to analyze subjective criteria under disparate impact. However, the plurality worried about creating a 'Hobson's choice' for employers, in which "quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability."[83] This capitulation, it turned out, was merely a Trojan horse for sneaking in higher standards and redefining disparate impact altogether.

O'Connor went on to take a "fresh" look at disparate impact and suggested a new standard for *prima facie* evidence: statistical causation. Looking over every significant disparate impact decision, she argued that the evidence evaluated in each case met the following test without being "framed in terms of any rigid mathematical formula":

> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.[84]

O'Connor went on to list a number of the different statistical strategies for refuting a claim that had been raised in cases like *Hazelwood*, *Dothard*, and *Teal*, documenting examples of weakness in statistics. Finally, she argued that there should be lighter burdens placed on employers to refute a claim, going against *Griggs*'s endorsement of the EEOC rules by stating that employers "are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance."[85] In effect, the

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[82] Belton, *The Crusade for Equality in the Workplace*, 195. The Department of Justice prepared its pamphlet attacking disparate impact for this case: Office of Legal Policy, "Redefining Discrimination."
[83] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) at 993.
[84] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) at 994-5.
[85] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) at 998.

plurality narrowly interpreted the existing standards of disparate impact as high enough to avoid incentivizing employers to adopt quotas. They solved the problem by suggesting that the goal posts be moved.

This plurality decision was not binding, but the conservative Justices needed only to apply its logic to the next favorable case in the pipeline. That case was *Wards Cove v. Antonio* (1989), a disparate impact suit against an Alaskan salmon cannery that, in the words of one Justice, bore a striking resemblance to "a plantation economy" in its degree of racial segregation.[86] A group of "nonwhite" employees, "persons of Samoan, Chinese, Filipino, Japanese, and Alaska Native descent" argued that they had been confined to unskilled cannery jobs and frozen out of better-paying non-cannery positions. In his majority opinion, Justice White finally got the comparison he had sought in *Hazelwood*: assessing the racial composition of jobs at a given plant against the racial composition of the relevant qualified labor market. He claimed that "comparing the number of nonwhites occupying [skilled] jobs to the number of nonwhites filling cannery worker positions is nonsensical," because of the racial makeup and bargaining structure of the market.[87] The company contracted with a local union that was predominately nonwhite to fill cannery jobs, and the racial makeup of applicants appeared—at least in an isolated example—to match the number of minorities in non-cannery jobs. Rather than permitting a comparison between areas of a company's workforce to show a *prima facie* case of discrimination, as most previous cases had allowed, the Court drew bright lines between job classifications and the kind of people existing in the world who might qualify for them.

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[86] *Wards Cove Packing Co., Inc. et al. v. Antonio et al.*, 490 U.S. 642 at 663-664.
[87] *Wards Cove Packing Co., Inc. et al. v. Antonio et al.*, 490 U.S. 642 at 651-652.

Justice Stevens's dissent pointed out that there were a number of ways available to portray an "available labor supply" that no court had cared to consider. Quibbling over such factors, he argued, distracted attention from the power dynamics at play in a single workplace, something the Court had recognized for more than a decade: evidence of racial stratification "puts the specific employment practices challenged…into perspective."[88] If the goal of statistics was to provide a numerical means to detect covert discrimination, directing their thrust to the general operation of labor markets and job qualifications not addressed by Title VII strayed from the purpose for which they were adopted.

Were these judges simply taking a lead out of the EEOC's book in attempting to claim a kind of social scientific basis for disparate impact measurement? Writing in the *Los Angeles Times*, UCLA law professor Reginald Alleyne wrote

> [Political] catch phrases like "'strict constructionist' and 'judges who are not activists' are little more than code words for judges who, among other traits, simply dislike civil rights legislation…the court not only struck down a legitimate and reasonable method for ensuring a 'level playing field' for equal opportunity; the decision has also exposed the disingenuous notion of 'ideology-free' judges.[89]

In the hands of civil rights activists, statistics were said to embody an ideological commitment to a world ordered in even proportions according to identities that were themselves fragmenting. But it was far easier for judges to reclaim that terrain in the name of quantified austerity masquerading as judicial restraint than to go back on rights claims and the promises embodied by the 1964 Civil Rights Act altogether.

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[88] *Wards Cove Packing Co., Inc. et al. v. Antonio et al.*, 490 U.S. 642 at 677.

[89] Reginald Alleyne, "Smoking Guns Are Hard to Find: Court Places Affirmative Action Burden on Employees," *Los Angeles Times*, June 12, 1989.

This chapter has explored the highly politicized employment litigation of the late 1970s through the 1980s from the perspective of the numbers and figures offered as proof and counter-proof of discrimination. By recounting how different statistical standards were promoted by federal agencies and the Supreme Court, it shows that conflicts over the meaning of numbers did not emerge *sui generis* in litigation. They figured into and drew upon discussions from throughout the policy sphere. In addition, by opening up questions about how statistical methods and legal arguments captured and complicated categorizations of race and gender, this chapter suggests that following shifting standards of comparison provides a way to comprehend the morass of evidence and frameworks proffered by different social scientists in court, who attempted to perform their objectivity while domesticating the sometimes runaway influence of computers and quantitative methods on their disciplinary imagination. Statistics were not the exclusive property of professional statisticians, as many psychologists, economists, and autodidact lawyers could attest to. Exploring these cases freighted with political significance provides a lens into broader changes in the economy of knowledge in an age of computers.

It is tempting to locate the source of the problem in statistics themselves. Taking critical writing on quantification as our guide, the narrative might go something like this: experts convinced government officials and lawyers to pursue a quantitative definition of discrimination narrow enough not to upset the balance of power, and in the process changed its meaning by stripping away necessary context. To wit, here is what one of the most celebrated histories of statistics has to say about civil rights litigation:

> [The] rise of statistical views of causation has edged out the personal elements of intent and responsibility…Statistics tends toward ethical behaviorism, in which the simple fact of the matter…suffices for conviction without further probing of motives.[90]

One would be forgiven for thinking this was drawn from an opinion by one of our current conservative Supreme Court justices, and that is just the problem. I have ventured here a reappraisal of employment litigation in the post-Civil Rights era that takes seriously the hazards of classification and quantification while considering the benefit they offered as 'weapons of the weak.'[91] The legal use of statistics came a long way in a short time, but not because the legal imagination was hijacked by numbers. Rather, the impasse between rights claims and hard numerical data was an unintended consequence of novel evidence adapted to an adversarial legal system, distorted by the funhouse mirror of political factionalism. As Serena Mayeri wrote of feminists' contemporaneous pursuit of an analogy between race and sex to secure legislative and legal victories, the strategy's "shortcomings reflected the constraints…faced more than any poverty of ambition."[92] Disparate impact was the closest civil rights advocates got to a legal theory targeting structural racism, but the statistical arguments pursued under it spilled over into disparate treatment and intentional discrimination claims as well. Any account of civil rights litigation sensitive to the dynamics of lawyer-client relations needs to account for how lawyers, increasingly honing their craft in service of data-driven firms, would be predisposed to explore quantitative proof of discrimination.[93]

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[90] Gigerenzer et al., *The Empire of Chance*, 261.

[91] On classification, quantification and politics more generally, see Porter, *Trust in Numbers*; Bowker and Star, *Sorting Things Out*. Scholars of different political stripes have proposed that the idea of proportional justice is itself an abrogation of the principles of substantial equality worked out in labor unions: Moreno, *From Direct Action to Affirmative Action*; Stein, *Running Steel, Running America*.

[92] Mayeri, *Reasoning from Race*, 224.

[93] On the study of lawyering, see Gordon, "The Legal Profession"; Mack, *Representing the Race*; Mack, "Civil Rights History: The Old and the New."

Acknowledging that these epistemic quandaries matter is not tantamount to accepting the terms of conservative jurists who lionize a limited conception of 'colorblind' constitutional equality.[94] In their very form, statistics symbolize the formal equality criticized by the left as too narrow and by the right as constitutionally illegitimate 'proportionism.' Indeed, scholars have decried the pursuit of causal demonstrations of racism as antithetical to the transformative goals of antidiscrimination law.[95] Taking the history of statistics seriously means interrogating how their integration into all domains of political life has influenced the range of strategies we have at present. Rather than fleeing from empiricism *per se* and the ample data that favor broadening civil rights protections to account for economic injustice, we need to reckon with how the overlap between legal and epistemological causality has shaped the norms of social science.

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[94] On the limited status of 'equality' as a kind of constitutional protection, see Stanley N. Katz, "The Strange Birth and Unlikely History of Constitutional Equality," *The Journal of American History* 75, no. 3 (1988): 747–62; Siegel, "Why Equal Protection No Longer Protects."

[95] Richard Thompson Ford, "Bias in the Air: Rethinking Employment Discrimination Law," *Stanford Law Review* 66, no. 6 (2014): 1381–1422; Issa Kohler-Hausmann, "Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination," *Northwestern University Law Review* 113, no. 5 (March 1, 2019): 1163–1228. For an example of a causal analysis, see Liam Kofi Bright, Daniel Malinsky, and Morgan Thompson, "Causally Interpreting Intersectionality Theory," *Philosophy of Science* 83, no. 1 (January 2016): 60–81.

Chapter 6

"The Data Were Run Under His Model"

Color-blind Epistemic Virtues and Capital Punishment in the Age of Reagan

Warren McCleskey's life hinged on a number—more precisely, an odds multiplier. Found guilty for the death of a white police officer during a furniture store robbery, the appeal of his death sentence before the Northern District Court of Georgia in August 1983 had "none of the drama" of a typical capital case, wrote a reporter for the *Atlanta Constitution*, only "long days of expert testimony and computer printouts."[1] A drawing of the scales of justice, weighing different statistical measures and tests against the backdrop of a computer printout graced the paper's front cover. The LDF had picked up McCleskey's appeal in the process of testing a legal argument based on a study of capital sentencing in the state of Georgia. The data, painstakingly coded by University of Iowa law professor David Baldus with a team of law students, comprised more than 2,000 murder indictments with information on over 500 factors, eventually narrowed to 230 variables. Baldus's chief finding was that murder convictions involving white victims were 4.3 times more likely to lead to a death sentence than if the victim were Black, and Judge Owen Forrester had granted McCleskey an evidentiary hearing. An ACLU staffer described the case as turning on "the whole sociocultural phenomenon of black lives not being of equal value to white lives." So much for a tedious academic debate over statistical models.

[1] Hal Straus, "Death by the Numbers," *The Atlanta Constitution*, August 28, 1983.

Figure 4. Walter Cunningham, "Death by the Numbers," Illustration for The Atlanta Constitution, August 28, 1983.

While the LDF had pursued statistical evidence of discriminatory sentencing before, its winning strategy since the 1960s focused on narrow procedural claims with the potential to stall pending executions. LDF staffers galvanized an abolition movement by assembling and circulating a "Last Aid Kit" containing standard petitions, applications, and briefs enumerating every available constitutional argument against the death penalty.[2] The procedures had changed in the years since, but then again, so had statistical evidence, now widely relied upon in employment and jury discrimination lawsuits. Baldus, a lawyer by training, played the part of the impartial statistical expert better than even the most seasoned among the LDF's cadre of social scientists. Commentators took notice. *New York Times* Supreme Court correspondent Linda Greenhouse singled out *McCleskey* as potentially one of "the last generic challenges to how the death penalty is

[2] On the early legal strategy, see above Chapter Two.

carried out."[3] A *Los Angeles Times* editorial agreed, and saw encouraging prospects for abolitionists: forcing the question of whether the Constitution tolerated "the assumption that the lives of some races are more valuable than others" was "probably their last chance, but should be their best."[4] In a political and legal climate increasingly defined by a retributive model that elevated victims' rights over due process for the accused, the "race-of-victim" argument challenged colorblind norms through the language of law-and-order.

Ultimately, the gambit failed. In a narrow 5-4 vote, the Court deemed Baldus's analysis scientifically "valid" but insufficient proof that Georgia had intentionally discriminated against McCleskey. It was the most significant blow to the abolition campaign since *Gregg v. Georgia* (1976), which revived executions by way of rationalized statutes that "guided" the discretion of courts with a set of technocratic checks and balances. Moreover, since the argument that its discriminatory application was "cruel and unusual" necessarily invoked the Fourteenth Amendment's Equal Protection clause, some worried that the shadow cast by *McCleskey* would stretch beyond capital punishment. Anthony Amsterdam, longtime consulting attorney and architect of the LDF's capital punishment campaign, called it "the *Dred Scott* decision of our time," effectively excluding Black Americans from the citizenship enjoyed by whites.[5]

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Too much has been written about *McCleskey* for my own comfort, let alone my expertise, but one lesson stands out. Justice Brennan claimed in his dissent that the Court was acting out of a "fear of too much justice," or a concern that lower courts would be overwhelmed by statistical challenges to

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[3] Linda Greenhouse, "Charting the Crucial Course of Capital Punishment," *New York Times*, 1985.
[4] "Death and Race," *Los Angeles Times*, October 17, 1986, sec. Editorial.
[5] Hugo Adam Bedau, "Someday McCleskey Will Be Death Penalty's Dred Scott," *Los Angeles Times*, May 1, 1987.

sentences. Scholars have taken up this interpretation, arguing that *McCleskey* was a referendum on proving racial discrimination with statistics altogether, most notably Michelle Alexander in *The New Jim Crow*.[6] But accounts of the case as a turning point in struggles against racism in criminal justice almost unanimously defend the Baldus study, implicitly or explicitly, against the cynical calculus of the Supreme Court—after all, Justice Powell changed his mind a few years off the bench—or its various critics. Rarely, if ever, do they historicize it.

What could we see instead if we considered Baldus's study as the product of a particular convergence of epistemic virtues, institutional priorities, technical choices, and even conflicting interests? Centering the study itself as a historical artifact allows us to ask such questions, opening up avenues for understanding how shifting discourses and practices around computing shaped the racial politics of law. The outcome and chilling consequences of *McCleskey* should neither inure us to the potential its architects saw in the strategy, nor should they be read back into the historical record as the inevitable victory of colorblind conservatism over liberal data positivism. In fact, the broader historical context of quantification and computing allows us to see the common ground these perspectives shared.

Against this backdrop, *McCleskey* illuminates ideas about racism, statistics, and justice that were taking shape during the rise of computers and a more conservative political and legal regime. Information systems shaped what could be known about racial discrimination in capital punishment and criminal justice more generally in the post-*Gregg* era. Political scientists Naomi Murakawa and Katherine Beckett have argued that the intent-based ruling in *McCleskey*'s was an essential step in

[6] A glance into the background notes for Justice Powell's majority opinion largely confirms Brennan's claim: "McCleskey v. Kemp," Powell Papers, Box 132.

the "unknowing" of racism in American law and governance.[7] Building on this insight, I argue that fracturing epistemologies and standards of proof were part of the process; there were *too many* ways of knowing racism to be resolved by scientific consensus, which liberal lawyers assumed would be on their side. Novel theoretical frameworks, data sources, and software had conceptual and political baggage; the pursuit of computational rigor in the social sciences, wedded to reformist social justice movements, shored up an understanding of racism as a bug, rather than a feature, of liberalism.[8]

More specifically, the Baldus study was a crucial point along a trajectory that saw the LDF and its collaborating social scientists responding directly to the demands of judges in a legal order increasingly defined by colorblindness, and doubling down on *epistemic virtues* that elevated modeling the sentencing system itself over evidence of disparate outcomes. In simpler terms, rather than seeking to challenge the very terms of a racist criminal justice system, social scientists gave judges everything they asked for and got little in return. By situating these developments in their proper historical context, we stand to learn much about we stand to learn much about what is at stake in the present-day pursuit of algorithmic fairness.

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The narrative tug of the LDF's fight against capital punishment is undeniable, but it is not the whole story. Nonetheless, the twists and turns of their legal strategy can help illuminate broader developments in the epistemology of racial liberalism. On balance, the temporal logical of legal drama and its attendant language—"battles" and "campaigns," "victories" and "losses"—drive this particular narrative more than the patient toil of number-crunching.

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[7] Naomi Murakawa and Katherine Beckett, "The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment," *Law & Society Review* 44, no. 3–4 (2010): 695–730.
[8] For a discussion of this phrasing, see above, Introduction.

This chapter begins by considering how the LDF revamped its legal campaign in the mid-1970s by pursuing two sociolegal theories: that showing racial disproportionality in victims of capital crimes would sway judges, and that sentencing could be analogized to decisions on hiring and promotion in the workplace, an area of law with an established framework for statistical modeling. Scrutinizing the design and implementation of Baldus's two successive studies on capital punishment in Georgia reveals how the data were gathered and interpreted in light of causal, epidemiological models at a moment of transition for the collection and dissemination of criminal justice statistics. Two subsequent sections follow the Baldus study in the courtroom and in scholarly circles to highlight the variety of ways judges and social scientists evaluated its methods and results. Finally, the chapter considers *McCleskey*'s aftermath in efforts to pass legislation and in competing computerized models that contradicted its findings of a racialized criminal justice system. I conclude by drawing connections between criminology's quantitative trajectory, the risk analysis the Court read into *McCleskey*, and efforts to curb judicial and prosecutorial discretion through the use of predictive tools and algorithms today.

"The bias-hunters are at it again"

On the first day of his dream job working for the LDF in January of 1978, Jack Boger hardly expected to walk into a room full of social scientists. While pursuing a divinity degree at Yale, Boger got involved in anti-war protests and re-routed his path toward the law. Joining a liberal New York firm after law school, he threw himself into pro bono work. At the time, Boger had no strong stance on the death penalty. Nonetheless, he took to working on the legal team for one of the five cases gathered in *Gregg* concerning new statutes drafted after the Court's 1972 ruling in *Furman* had invalidated all existing capital sentencing schemes. This put him on the LDF's radar enough that

when the attorney in charge of the capital punishment project left, Boger got the call. Apart from an economics course that had been little more than a pretext for spending a summer in Germany, Boger had no social science background to speak of. Hoping to make a good impression, he assumed the unenviable role of social science "liaison."[9]

With capital punishment at a constitutional crossroads in the early 1970s, *Gregg* was a sharp righthand turn. Justices who had deemed its administration arbitrary and capricious just a few years prior welcomed new sentencing standards that 'guided' the discretion of juries. If forging ahead with the capital punishment project in its wake was not difficult enough already, this was also a moment of stark contradictions among social scientific approaches to the law. The broad-tent Law and Society movement touted quantitative social science as a tool for studying the law in practice, the "methodological counterpart" to postwar legal liberalism's conception of law as an instrument for social change.[10] A breakaway faction known as Critical Legal Studies rejected the broader movement's positivism and reformist aspirations. Disaffected by the failures of liberalism and the New Left, these scholars argued that "empirical" analyses of law in action merely reinforced the status quo, ignoring the ideological dimensions of legal doctrine as well as the subjective position of the observer with respect to the social world.[11] Meanwhile, Law and Economics, flush with conservative funding, captured the spotlight with intuitive conceptual frames bolstered by elaborate mathematics. Historian Daniel Rodgers writes that problems of public interest law, from environmental regulation to product liability, made cost-benefit analysis salient, "a compelling

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[9] In interviews and writing, Boger recalled this as "one of the best poorly-thought-out decisions I ever made": Boger, "Field Notes," 1658–59. Thanks to Jack Boger for agreeing to speak with me

[10] Legal historian Christopher Tomlins argues that it was unified by guiding metaphor of "law as a dependent variable": Christopher Tomlins, "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative," *Law & Society Review* 34, no. 4 (2000): 954–55, 959–60.

[11] Trubek, "Where the Action Is."

instrument of simplification" for thorny distributive questions.[12] Then, as ever, social scientists testified on both sides of hot-button lawsuits—liberal lawyers even drew from the Law and Economics toolkit.[13] For jurists who had once sought guidance in social scientific consensus, cognizance of options yielded skepticism that better methods could ever draw bright lines in matters of legal interpretation, particularly in the civil rights arena.

The criminologists, statisticians, and economists who frequently testified as expert witnesses and collaborated on strategy with the LDF did not overlap much with any of these crowds, preferring the more established Social Statistics Section of the American Statistical Association or eschewing academic organizations altogether for the non-profit sector. For many, opposition to the death penalty, more than the eradication of racism or a shared vision of legal change, was the sole connecting thread. Participants in a 1977 conference at Howard University put on by the LDF and the University of Pennsylvania's Department of Criminology and Criminal Justice ran the gamut from Karl Menninger, a psychiatrist who launched a broadside against contemporary penal practice, to Alfred Blumstein, a systems analyst and criminologist who modeled the 'careers' of offenders. Psychologists focused on attitudes and economists compelled by theories of social cost gathered in growing numbers at meetings sponsored by the LDF, ACLU, and the Southern Poverty Law Center across the late 1970s.[14]

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[12] Rodgers, *Age of Fracture*, 59. Rodgers acknowledges that other external drivers, such as an influx of funding from the Olin foundation for summer camps, also supported the ascendance of this framework, but not its enduring appeal for both liberals and these conservative funding bodies. See also Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, N.J.: Princeton University Press, 2008).

[13] Neil K. Komesar, "Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor," *The Yale Law Journal* 82, no. 6 (1973): 1175–93.

[14] ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2685, Folder, "Experts."

These abolitionist-experts understood that judges willing to budge an inch on their resolve to leave intact the elaborate machinery of death drawn up by state legislatures were not going to do so on the basis of statistical and historical arguments they had come to expect from LDF attorneys. Putting on pragmatist hats, they set about finding new ones. Star lawyer Anthony Amsterdam had been the intellectual force behind the LDF's capital litigation for more than a decade, and rose to the occasion with a hundred-page "ridiculous memo" outlining every possible claim left open by *Gregg*.[15] But most of these doctrinal avenues were too narrow for the berth of statistical studies. Boger would quickly discover that with lives on the line, favorable outcomes at best superseded broad strategy and at worst, undercut it.

Nowhere was this truer than in *Coker v. Georgia*, a decision handed down a few months before Boger's arrival that achieved the Fund's long-sought goal of eliminating the death penalty for rape. *Coker* succeeded precisely where the LDF had failed years earlier in *Maxwell v. Bishop*. Aiming to demonstrate through a survey of trial records that the death penalty was little more than "legalized lynching," the continuation of Jim Crow mob violence against Black men accused of raping white women, the LDF's work on *Maxwell* set off a chain of events that led an organization historically focused on racial injustice into the uncertain territory of working with white defendants convicted for murder, for which it drew frequent criticism.[16] While defending capital punishment for murder during congressional hearings, the executive director of the pro-death penalty Americans for Effective Law Enforcement, Inc., testified that he would not be disturbed "personally, if all rape death sentences were commuted."[17] Only three states retained rape as a death-eligible

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[15] Boger, "Field Notes," 1656.
[16] See above, Chapter Two.
[17] Capital Punishment: Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 2d Sess. (1972), 222.

crime in their post-*Furman* revisions. After *Gregg* struck down mandatory death penalties in Louisiana and North Carolina, Georgia's statute for rape was low-hanging fruit.

Coker was a win for the Fund, but more in symbolism than in substance. For starters, the Court chose to hear the appeal of a white defendant over two petitions from Black defendants in the same state.[18] Writing for a plurality, Justice White contrasted the legislative push to revive capital punishment for murder with the muted "public judgment with respect to rape" and deemed it excessive under the reigning interpretation of the Eighth Amendment for making no "contribution to acceptable goals of punishment."[19] This did not amount to a dismissal of rape as a major problem. On the contrary, White's opinion was strongly influenced by a brief written by law professor (and future Justice) Ruth Bader Ginsburg, submitted on behalf of the ACLU and other feminist organizations as *amicus curiae* for Coker. The brief nodded to documented racial disparities in rape convictions but skirted the question of capital punishment in general.[20] Ginsburg argued that a death sentence for rape was so severe that juries might be inclined to acquit—justice thereby unserved. White drew selectively from Ginsburg's brief, nodding to feminist legal scholarship, a report by the Law Enforcement Assistance Administration (LEAA) on improving justice for rape victims, and even evolving standards in international law.[21] He studiously avoided the legacy of lynching as a tool of white supremacy.

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[18] Carol S. Steiker and Jordan M. Steiker, "The American Death Penalty and the (In)Visibility of Race," *The University of Chicago Law Review* 82, no. 1 (2015): 273.

[19] *Coker v. Georgia*, 433 U.S. 598 (1977).

[20] In the words of legal scholar Jeffrey Kirchmeier, the brief was "so narrowly crafted and careful in its argument that it did no damage to her nomination" to the nation's highest court in 1993: Jeffrey Kirchmeier and Sidney Harring, "Scrupulous in Applying the Law: Justice Ruth Bader Ginsburg and Capital Punishment," *New York City Law Review* 7, no. 2 (Fall 2004): 241–73.

[21] On the LEAA and penal policy, see Murakawa, *The First Civil Right*; Hinton, *From the War on Poverty to the War on Crime*. On international law, see Kirchmeier, *Imprisoned by the Past*.

Striking down Georgia's rape statute allowed the plurality to balance conflicting interests within the Court, extending the reasoning in *Gregg* while winning the concurrences of Justices inalterably opposed to the death penalty.[22] Some felt that recognition of rape statutes' racist legacy was implicit, but above all *Coker* signaled the commitment of the Burger Court's moderates to reset the relevant history of capital punishment to 1972, when the old laws were invalidated. This had serious consequences for existing social scientific studies: relying on data largely drawn from the period before *Furman*, they now seemed doomed to irrelevance.[23]

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In more ways than one, *Coker* brought to a close the cycle begun more than a decade prior, when a memo by Justice Goldberg first brought the question of capital punishment's constitutionality before the Court.[24] The days when polls supported the idea that "evolving standards of decency" pointed toward abolition had long since passed. Perhaps more than words and research, the LDF's greatest success had been a decade-long moratorium on executions. Their impending resumption raised new challenges and drove a search for new data.

The first person to be legally executed in the Unites States in a decade defended his right to die. Gary Gilmore was sentenced to death by firing squad for the murder of a hotel attendant, his second on the same spree.[25] Organizations like the ACLU intervened, requesting stays of execution against his will. When Gilmore's bedridden mother enlisted Amsterdam to appeal his case to the

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[22] In other words, the court could acknowledge racial discrimination mattered without giving the disparities question a hearing: Steiker and Steiker, "The American Death Penalty and the (In)Visibility of Race," 280–81.
[23] In the words of one commentator, *Coker* made it seem like social scientists and the Justices inhabited "two different worlds." He recommended that the former could stand to acquire "a broad appreciation of judicial policy-making" rather than habitually asking, "'What data do those judges want from us now?'" Dennis D. Dorin, "Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases," *The Journal of Criminal Law and Criminology* 72, no. 4 (1981): 1698.
[24] Steiker and Steiker, "The American Death Penalty and the (In)Visibility of Race," 276.
[25] "2 Murder Victims Had Much in Common," *The New York Times*, January 18, 1977.

Supreme Court, he lashed out: "I don't like the fact that the NAACP associates with my case in any way because they are a phony, Uncle Tom outfit and I am a white man."[26] His case became a media sensation as the world looked on to see whether the revival of the American death penalty would be borne out. In January of 1977, Gilmore got his wish. The second, however, neither wanted nor felt he deserved to die. John A. Spenkelink pleaded self-defense after killing a traveling companion on a string of robberies who he claimed had beaten and sexually assaulted him.[27] Unlike Gilmore, Spenkelink sought assistance from whomever would give it and appeals filed in state and federal courts delayed his execution for years. When Florida Governor Bob Graham signed Spenkelink's death warrant in May of 1979, he understood the significance of authorizing the first non-voluntary execution in the post-Gregg era and hoped it would "make clear that we value human life."[28]

Spenkelink and Gilmore represented two sides of the same coin. Legal historian Daniel LaChance contrasts the "frontierlike quality" of Gilmore's execution by firing squad, a personalized display of masculine bravado, with the impersonal, clinical character of Spenkelink's stay in the electric chair as "symptomatic of the conflicting ideological demands that accompanied the revival of capital punishment."[29] On the one hand, sentencing standards adopted to curb discretion in the wake of *Furman* gave capital punishment a technocratic, even algorithmic, veneer.[30] On the other,

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[26] "Gilmore Asks Court to 'Butt Out,'" *The Times-News*, December 5, 1976. Elsewhere, Gilmore elaborated, "Your contention is that if I am executed then a whole bunch of black dudes will be executed. Well, that's so apparently stupid I won't even argue with that kind of logic": "Gilmore Asks to Be Let Alone," *Minneapolis Tribune*, December 31, 1976.

[27] Spenkelink claimed he acted in self-defense, having been repeatedly beaten and sexually assaulted by his traveling companion, but the jury held that the circumstances of the robberies made the crime "especially heinous, atrocious and cruel" and recommended the death penalty: *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 588. Spenkelink's name was frequently misspelled in the legal record.

[28] Kirchmeier, *Imprisoned by the Past*, 109.

[29] LaChance, *Executing Freedom*, 81.

[30] Critical criminologist David Garland writes, with memorable language, that the new statutes created a "dense skein of substantive rules and procedural requirements," making capital punishment singular within criminal law: Garland, *Peculiar Institution*, 43.

the renewed public legitimacy of the death penalty depended on treating the condemned as unique moral agents who chose their own fates.[31] Officials tasked with overseeing the institution and defending it against allegations of arbitrariness thus walked a fine line, emphasizing individuality *and* systematicity in turn.

If the administration of capital punishment embodied divergent norms, its revival was driven by a convergence of demands to privilege the victims of violent crime over concerns for the due process of the accused. Political scientist Marie Gottschalk argues that the victim's rights movement harmonized progressive politics with conservative calls for law-and-order, resulting in "a zero-sum game that pitted the rights of victims against the rights of offenders" and crowded out other penal reform movements.[32] One key development in this new legal order was the LEAA, which doled out block grants for police departments to invest in military hardware and computer software, as well as money for social scientific research. It launched a National Crime Victimization Survey in 1972 to supplement the uneven FBI *Uniform Crime Reports* compiled by police precincts.[33] The LEAA's influence on crime policy and expert discourse was pronounced, and its functions were permanently absorbed by new bodies like the Bureau of Justice Statistics when Congress dissolved it in 1979. One of the agency's final grants was awarded to University of Iowa Professor David Baldus, to study the impact of post-*Furman* reforms on capital sentencing in Georgia.

The death penalty's new lease on life dovetailed with the broader political reorientation of criminal justice across the 1970s. Criticism from the Left, Right, and everywhere in between undermined rehabilitation as the dominant approach to social problems, and "tough" policies filled the void—thereby turning the knowledge apparatus that had been nurtured by the rehabilitative

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[31] LaChance, *Executing Freedom*, 82.
[32] Gottschalk, *The Prison and the Gallows*, 77.
[33] Gottschalk, 86.

state from "transforming marginalized individuals to protecting good, deserving citizens from these groups," in the words of political historian Julilly Kohler-Hausmann.[34] As the LDF shifted strategies, it challenged the injustice of capital punishment by accepting the validity of this basic policy frame and pointing out its shortcomings. Could the death penalty be held constitutional if it was biased in favor of certain victims? In the course of defending John Spenkelink—hoping to prevent the resumption of involuntary executions—LDF lawyers began taking this question seriously. It was not a position the organization had planned to take up. Writing to an abolitionist confidante in 1975, Amsterdam admitted that he was "particularly sour concerning the prospect of success in attacking classifications of victims," finding the argument tenuous.[35] Nonetheless, the exigencies of legal representation and the enthusiasm of a data-driven cohort of criminologists led them into this position.

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LDF attorneys tried to humanize and individualize John Spenkelink in a ploy for executive clemency from Florida's governor. They claimed that he was the product of a damaged background, judged unfairly by a foreign community. Florida's case against Spenkelink even misspelt his name, making for a confusing legal record. However, his attorneys simultaneously pursued an argument that Spenkelink was part of a broader statistical pattern by calling attention to an observation that had surfaced in previous studies of the death penalty without much fanfare: it tended to be reserved for cases in which the victim was white. In place of a knockout argument against capital punishment, the claim that existing laws and law enforcement did not protect Black lives was a modest compromise for criminal justice reformers and single-issue death penalty abolitionists that spoke to

[34] Kohler-Hausmann, *Getting Tough*, 6.
[35] Anthony Amsterdam to Sheila Levine, March 10, 1975, Bedau Papers, Series 2, Box 1, Folder 1, "Anthony Amsterdam, 1972-1988."

the spirit of the times. However, it raised a host of questions about the sentencing process that LDF attorneys and collaborating social scientists would now have to answer. As ever, they sought new data amenable to computational analysis.

Lawyers working on Spenkelink's case drew upon every argument they thought might pose a challenge to Florida's revised death penalty statutes, including claims of racial bias that state Justices tried to take off the table. While working on Spenkelink's appeals in Jacksonville, Stephen D. Sitt and Kay Isaly, respectively a law professor and a paralegal working for the firm Sheppard & Carithers, "serendipitously discovered a statistical pattern that had not been perceived before."[36] Between 1973 and 1976, more than 90 percent of the inmates committed to Florida's death row had murdered white victims, as opposed to less than 8 percent sentenced for the murder of a Black victim.[37] The plurality in *Furman* had expressed concern with evidence that capital punishment was largely borne by the "poor, the ignorant, and the underprivileged," but not that prosecutors only sought it in cases involving privileged victims.[38] Isaly had, in fact, been looking for evidence of discrimination against Black defendants. An abolitionist herself, she found the work agonizing—not so much for the rote data collection as the dread of pending executions. Writing to the ACLU's Deborah Leavy, Isaly revealed she had developed an ulcer preparing the case: "It isn't from the overwork, or the pace—honestly, I feel it is the intense horror that shrouds me—How do you keep

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[36] Kirchmeier, *Imprisoned by the Past*, 109. These data were published in Hans Zeisel, "Race Bias in the Administration of the Death Penalty: The Florida Experience," *Harvard Law Review* 95, no. 2 (1981): 456–68.
[37] The data here are stated in different ways in different places. The Circuit Court opinion reads: "although the estimated number of black felony murder victims and white felony murder victims for 1973-1976 is the same, 92 per cent of the inmates on Florida death row had murdered white victims, while only 8 per cent had murdered black victims": *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 612.
[38] *Furman v. Georgia*, 408 U.S. 238 (1972) at 366.

it up?" she asked.[39] The finding seemed like a dire indictment of Florida's sentencing system and, for the team of abolitionists still reeling from defeat in *Gregg*, a faint ray of hope.

When Governor Askew denied Spenkelink's clemency appeal in September of 1977, LDF attorneys moved quickly to submit a *habeas corpus* petition to the District Court that included an argument based in the recently unearthed race-of-victim data. It piqued the interest of the judge, who stayed the execution in order to conduct an evidentiary hearing. With scarcely a week to prepare, William J. Bowers of Northeastern University, one of the LDF's consulting social scientists, volunteered to testify. Bowers exemplified the trend toward what we might call 'data driven' criminology. He had made his mark on the field by computerizing an index of executions since the Civil War compiled by criminologist Negley Teeters and Charles Zibulka at the Temple University Library, discovered by a graduate student. Thanks to readily-available microcomputer facilities, women information workers, and the diligence of intellectual collaborators Andrea Carr and Glenn L. Pierce, the analysis confirmed longstanding claims that "blacks, as compared to whites, were executed for lesser crimes, at younger ages, and more often without appeals"—trends that Bowers claimed, contrary to popular wisdom, were not limited to Southern states. He enthusiastically submitted a draft of the study, eventually published in 1974 as *Executions in America*, to the Supreme Court in 1972 amid deliberation over *Furman* and received a cordial rejection.[40] As a key player in the deterrence controversy that preoccupied abolitionists while *Furman* was the law of the land, he became better acquainted with the LDF's data strategy.

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[39] Kay Isaly to Deborah Leavy, December 15, 1976, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2685, Folder, "Experts."

[40] William J. Bowers, "A Tribute to David Baldus, a Determined and Relentless Champion of Doing Justice," *Iowa Law Review* 97 (2012): 1881–82.

In his own recollection, Bowers had begun pursuing the race-of-victim disparity after the LDF's summer 1977 conference at Howard University, where Southern Poverty Law Center founder Morris Dees claimed that the only information relevant to determining if a prosecutor would pursue a death sentence in a given case was whether the victim was white.[41] Because the Teeters-Zibulka data cut off in 1967 and were limited to the race of the convicted offender, Bowers began looking into government data sources, namely the FBI's *Supplementary Homicide Reports*, which had been updated to include racial data on both homicide victims and suspected offenders. Indeed, one reviewer, while generally praising *Executions in America*, wrote that the "decade-old inventory of executions must be augmented to the extent that there are more Gary Gilmores," and on the whole that the study had not conclusively ruled out "the influence of other factors."[42] Bowers steadfastly rejected the premise that *Furman* represented a historical rupture: the end of capital punishment as a tool for racial oppression and the dawn of a new era in which harsher, predictable punishment would serve as a bulwark against violent crime. However, the language of scientific humility at the outset of a new research project crept into his testimony.

Bowers found the witness stand far less hospitable than the lectern, as Florida Attorney General Robert L. Shevin pressed him on the legal implications of the statistics. Though the LDF had experience preparing witnesses, the legal questions had changed, and Bowers was blindsided by the cross-examination. One particularly thorny issue was whether the study had considered variables related to decision points in the sentencing process:

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[41] Bowers, "A Tribute to David Baldus, a Determined and Relentless Champion of Doing Justice"; Peter Ross Range, "Will He Be the First?," *The New York Times Magazine*, March 11, 1979.
[42] Dennis D. Dorin, review of *Review of The Uses of the American Prison, Executions in America*, by Joan Smith et al., *Social Forces* 56, no. 3 (1978): 988–90.

> Shevin: With regard to the conclusions that you have reached that there is a variance of black victims and white victims as to who gets the electric chair in Florida. What are the other variables?
> Bowers: I don't understand your question, Mr. Shevin.
> S: Well, for instance, would the prosecutorial discretion as to what charges be filed, would that be relevant?
> B: Sure.
> S: And would the prosecutor's decision as to whether or not to take the case to the Grand Jury be a relevant variable?
> B: Well, as I testified, I have no knowledge of the process that stands between the arrest and the final disposition, and that is exactly the thing one should explore in order to find out how these differences come about. All I have is the final difference.[43]

Bowers's study did not interest the judge after all. Although the hearing yielded hundreds of pages of testimony, Florida's Northern District Court dismissed Spenkelink's petition just two days later. The Court of Appeals for the Fifth Circuit agreed to consider the case. It did not regard Bowers's testimony highly either, and upheld the lower court's decision in *Spinkellink v. Wainwright* (1978). These judges claimed that a case-by-case comparison of sentences, the legal process prompted by claims of aggregate statistical disparities, was unnecessary under Supreme Court-sanctioned capital statutes, which they regarded as a virtual guarantee that "the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in *Furman* have been conclusively removed."[44]

The Fifth Circuit took Spenkelink's Equal Protection claim more seriously but drew from recent decisions that narrowed the scope of civil rights claims under the Constitution. In 1976, Leavy had expressed her concern that the employment case *Washington v. Davis*—in which the Court ruled that the Constitution barred only *intentional* discrimination, not policies with a disparate impact on protected classes—was "the handwriting on the wall," an abrupt halt to the

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[43] *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 612.
[44] *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 613-14.

expansion of civil rights through the Constitution and federal administration.[45] Citing both *Davis* and the subsequent *Arlington Heights v. Metropolitan Housing Development Corp* (1977) decision that strengthened it, the Circuit Court ruled that any disparate impact claim under the Fourteenth Amendment required a showing of discriminatory intent.[46] Bowers was quoted directly, stating: "I'm far from suggesting…that there is any deliberate effort anywhere in the system to achieve this goal."[47] The opinion even claimed Bowers's discussion of methodology provided "assistance" to the state by furnishing "several lawful explanations totally unrelated to race for the racially disproportionate impact of its statute."[48] Abolitionists' grimmest predictions were coming to pass.

Most glaringly, the court claimed that no one representing Spenkelink successfully refuted an offhand contention by Attorney General Shevin that murders involving Black victims were confined to "family quarrels, lovers quarrels, liquor quarrels, [and] barroom quarrels"—in other words, they tended to be less "aggravated" under Florida's revised death penalty law.[49] Shevin was not citing Florida's statute. Rather, he made a casual appeal to law enforcement lore about Black criminality to suggest that the state actually demonstrated *more* lenience toward murderers who, along with their victims, were Black. Where Bowers and the LDF claimed that Florida systematically devalued Black lives, the Fifth Circuit was persuaded by the Attorney General's suggestion that crimes involving Black victims were qualitatively different. The opinion was an invaluable citation for judges looking to dismiss charges of discrimination in capital sentencing, and quickly became an authoritative interpretation of *Gregg*.

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[45] Deborah Leavy to Hugo Adam Bedau, June 15, 1976, ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2692, Folder, "The Gang Correspondence 1976."
[46] For more on disparate impact litigation and its broader consequences, see above Chapters Three and Five.
[47] *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 615.
[48] *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 615-16.
[49] *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) at 612n37; Fla.Stat.Ann. § 921.141

With his legal challenges nearly exhausted, Spenkelink appeared to be headed for the electric chair. When the Supreme Court passed on the case in 1979, the LDF doubled down on the race-of-victim disparity and vowed to "press the claim in all available forums."[50] Media sensation around Spenkelink's case brought the race-of-victim claim before the public at the height of the backlash against civil rights programs in the late 1970s, with explosive results.

Conservative commentators excoriated race-of-victim litigation, suggesting that its underlying logic supported *increasing* the death row population by way of that notorious dog-whistle: quotas. "The bias-hunters are still at it, stalking their sometimes elusive prey, with a zeal worthy of Ralph Nader on the spoor of a nitrite-ridden hot dog," wrote one *Washington Star* columnist. Perhaps deliberately, the author conflated this "ironic turn" of a white majority death row with the race-of-victim discrimination argument, explaining to readers that the legal theory amounted to "affirmative action" for white criminals. As an alternative, the column suggested that reformers "stop using 'research' as a footnote to paranoia and put it to work on our really intractable problems," namely (and solely) crime. [51] Commenting for a Tallahassee newspaper, Attorney General Shevin saw the issue in similar terms, with a better grasp of the emphasis on Black crime victims: "What [Spenkelink attorney] Mr. Simon is saying is that we've got to have [sic] as a quota system…to have as many black people being killed by premeditated murder as we have white victims."[52] The politicization of population statistics, from debates over affirmative action in education to rising concern for potential census undercounts of minority groups, was inescapable,

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[50] John C. Boger, "Capital Punishment," *Equal Justice: A Report from the Legal Defense Fund*, Spring 1979.
[51] "Murder by Quota," ACLU Records, Subgroup 3, Subseries 2C - Capital Punishment Project, Box 2683, Folder "[untitled]."
[52] John Van Gieson, "Stay of Execution Is Granted," *Tallahassee Democrat*, September 17, 1977.

and these charges drew on popular sentiment against perceived civil rights excesses to defend the death penalty as fundamentally fair.

Of course, not everyone regarded the new emphasis of this litigation with suspicion. *The New York Times Magazine*—whose editors, like many, saw Gary Gilmore's consensual and theatrical execution by firing squad two years prior as a mere sideshow—ran an exposé on Spenkelink, asking, "Will he be the first?" The leading periodical published Bowers's "startling data" with a breakdown by victim/offender combination, complete with probability estimates. The author noted the "subtle and ironic turn" the racial argument against capital punishment had taken: a (still disproportionate) majority of death row inmates were now white. He had less to say about the novelty of the race-of-victim claim or the statistics themselves, apart from mentioning the geographical disparities within the state of Florida surfaced by Bowers's ongoing research. Questions of victim-based discrimination to one side, the numbers suggested that arbitrariness remained the order of the day.[53]

Whatever one thought of the arguments marshaled in Spenkelink's favor, both sides agreed that it was difficult to explain how a run-of-the-mill convict appeared to be closer to execution than anyone else on Florida's death row. It was as though he had been "struck by lightning," the metaphor Justice Stewart relied on to argue that the results of capital punishment laws were too unpredictable to pass muster under the Eighth Amendment. On the morning of May 25, 1979, defense attorneys and prosecutors gathered to discuss last-minute appeals in the living room of Florida's Chief Justice before the scheduled execution. Assistant Attorney General Raymond L. Marky was exhausted, having traveled from state to state gathering background information on Spenkelink to parry attempts at stopping his execution. The Chief Justice recalled him "leaning over

[53] Range, "Will He Be the First?"

a car in the street and sobbing."[54] Marky later admitted he felt Spenkelink "was probably the least obnoxious individual on death row in terms of the crime he committed"; rather than a monster "who strangled three generations of women," Spenkelink had killed a man in self-defense whom he accused of sexual assault, which Marky underscored with a biting homophobic slur.[55]

Nonetheless, legal officials in Florida were committed to making their death penalty efficient and effective. After two motions for a stay were denied, with throngs of protestors, supporters, and reporters gathered outside of Florida State Prison, the execution proceeded. Some yelled "government murder!" and later wept; others mounted a placard urging, "Go, Sparky!"—referring to Florida's electric chair—on a silver coffin atop a mobile home. LDF strategist Anthony Amsterdam was in disbelief: "In my heart of hearts I couldn't face the reality the things could go as bad as they went…no court would listen."[56] The officials who oversaw the process were stunned as well. Despondent and drained by the time-consuming and expensive process of putting someone to death, they were further advised to avoid going returning to their offices on account of threats that had been made against them.[57]

Whatever scruples those on the inside may have had about rebooting the system of state-sanctioned killing, the enormous popularity of the death penalty obviated any moral reckoning from Florida's lawmakers following the execution. Some spoke out, with little impact. According to one source, liberal state representative William Sadowski marked the occasion by circulating literature critical of the death penalty to the Florida House; when he returned to the floor, he found the sheets returned to his desk with "obscenities scrawled by the august representatives," along with

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[54] Maura Dolan, "Executions: The South--Nation's Death Belt," *Los Angeles Times*, August 25, 1985.
[55] Jack Greenberg, "Capital Punishment as a System," *The Yale Law Journal* 91, no. 5 (1982): 926–27.
[56] Quoted in Oshinsky, *Capital Punishment on Trial*, 87.
[57] Wayne King, "Florida Executes Killer as Plea Fails," *The New York Times*, May 26, 1979.

calls for him to resign.[58] Representative Andy Johnson, one of the ten witnesses to the execution, found it "barbaric" and introduced an abolition bill that was dead on arrival.[59] Floridians defended the death penalty with vigor. When UN Ambassador Andrew Young equated the execution of Spenkelink to the revolutionary tribunals of Iran, the editorial board of *The Tampa Tribune* called for his dismissal.[60]

Other responses were more nuanced. A group of criminologists, unaffiliated with abolition efforts and "unhappy with the sparse [sic] typoligical data on death row inmates found in the professional literature," published a sociological study conducted with eighty-three of Florida's ninety-six death row inmates via a lengthy questionnaire that produced data on 145 variables. Seeking to capitalize on the intrigue surrounding death row using the tools of sociological analysis, their survey yielded few meaningful insights apart from the fact that most death row inmates believed that they would not, ultimately, be executed.[61]

However, the study was appended with a comment on *Spinkellink*, in which the authors rejected the Fifth Circuit's analysis—though not its conclusion. Since the State had produced no evidence whatsoever, they objected to the Attorney General's claim that murders involving Black victims were qualitatively different.[62] More significantly, they argued that the Fifth Circuit had used the wrong test to dismiss Spenkelink's Equal Protection claim. Drawing on *Castaneda v. Partida* (1976), in which the Supreme Court endorsed a three-part test for proving a discriminatory purpose with statistics, they argued that the victim's race "plays a significant but not unconstitutional role"

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[58] John Hanchette, "Legislators Taking Hard Line against Crime," *Fort Myers News Press*, June 3, 1979.
[59] King, "Florida Executes Killer as Plea Fails."
[60] "Enough Is Enough: Fire Andy Young!," *The Tampa Tribune*, June 3, 1979, sec. Commentary.
[61] Peter W Lewis et al., "A Post-Furman Profile of Florida's Condemned - a Question of Discrimination in Terms of the Race of the Victim and a Comment on Spinkellink V. Wainwright," *Stetson Law Review* 9, no. 1 (Fall 1979): 4, 16, 27.
[62] Lewis et al., 40.

in Florida's death penalty. According to *Castaneda*, if an appellant demonstrates "substantial under-representation of his group" at the hands of a selection procedure "susceptible to abuse or not racially neutral," the burden would fall to the State for rebuttal. Neither Spenkelink nor his victim belonged to the under-represented group in question, but he had nonetheless been granted standing to argue the race-of-victim claim. Although the authors recognized that the magnitude and durability of the disparity, they thought it impossible to prove that Florida's death penalty statutes could be abused, absent some "grand scheme or conspiracy."[63] For a challenge to supposedly watertight "guided discretion" statutes to prevail, it would be necessary to gather data on decision points at each stage of the process.

Smarting from his poor performance on the witness stand, Bowers made his case more persuasively when the race-of-victim study based on FBI *Supplementary Homicide Reports* was published in 1980, after parts of it had already been submitted as evidence in at least fifteen capital appeals and presented before the Senate Judiciary Committee. Utilizing this data source proved more difficult than Bowers or his collaborator Glenn Pierce anticipated. The FBI's crime reports, voluntarily filled out by local police departments, had long been notoriously unreliable; where data were missing, they relied on comparison with statistics on willful homicide from the Bureau of Vital Statistics to make adjustments. To validate the data, they called in trial attorneys who could provide additional information on the sentencing process. The study looked at four states, including Georgia, Texas, and Ohio, but the focus was on Florida—not only were the data more complete, but the study presented Bowers with an opportunity to respond to the questions for which he previously had no answer. When Attorney General Shevin referred to "quarrels," he had effectively

[63] Lewis et al., 5, 41–43.

meant non-felony homicides, data that were not even presented in Spenkelink's case.[64] A casual glance at these figures suggested to Bowers that even under less aggravated circumstances, Black people convicted for the murder of white victims were the most likely to receive a death sentence.

Beyond finding ways to work with incomplete data, the real innovation of Bowers's study was to consider discrete stages of the charging and sentencing process: arraignment, first-degree murder indictment, conviction, and finally, a death sentence. This categorization produced perhaps the most damning suggestion of the study: discrepancies in the data suggested that in cases involving white victims, non-felony killings filed by police were often upgraded to felony murders by the prosecutor. Bowers analogized the prosecutor to a croupier: "the dice are loaded against black offenders and the killers of whites…[with] each additional throw of the dice, or successive decision about felony-related circumstances, they are more likely to be losers." Comparing Florida with its neighbor Georgia, where the death penalty statutes relied on similar aggravating circumstances, was equally instructive. In Florida, nine of ten cases drawn from a sample were deemed "vile, heinous, torturous, cruel," a judgment reached for less than half of comparable cases in Georgia. Were murders in Florida really more heinous? Though the category was a subjective one, the authors used "objective indicators" like use of a gun, multiple offenders, or the age of the victim to suggest that Florida murders tended to be less severe. Moreover, unlike Georgia's, Florida's death penalty law required the number of aggravating circumstances of murder to outweigh mitigating ones. One would expect a lower probability of a death sentence when the opposite was true: the overall likelihood of a death sentence in Florida was .037 compared to .026

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[64] William J. Bowers and Glenn L. Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," *Crime & Delinquency* 26, no. 4 (October 1, 1980): 589, 598. Bowers pointed out that Shevin's claim for a qualitative difference in the kinds of murder "was essentially irrelevant," since these "data explicitly excluded the overwhelming majority of killings attributed to quarrels or similar passion-filled conflict. The failure to appreciate this point would appear to have been a fatal mistake even at the appellate level."

in Georgia. Sentencing guidelines, the authors argued, had "become the instruments of arbitrariness and discrimination, not their cure."[65]

For all of the minutiae explored in Bowers's study, judges continued to find it wanting. Advances in federal statistics made data about deaths easier to amass than ever, while changes in legal doctrine and practice led judges to expect more robust proof of discrimination, particularly in employment cases. To make matters worse, there was nothing like a disciplinary consensus on the prevalence of racism in the criminal justice system: further criminological studies of racial disparities in sentencing emerged, with some reaching the opposite conclusions for the same state. The lone point of consensus was the race-of-victim argument.

Allegations that the death penalty systematically devalued Black lives resonated with the law-and-order politics of the day but rankled those who had grown tired of "bias-hunters" dragging out affirmative action debates. Judges, moreover, rejected these arguments out of hand, just as Amsterdam had feared. Buttressed by decisions like *Davis* and *Arlington Heights*, which required a showing of intentional discrimination, they relied upon the same rationales that had been common since *Maxwell* to dismiss the new statistics. According to legal scholar Samuel R. Gross and psychologist Robert Mauro, who produced their own such study in 1984, analyses of discrimination and arbitrariness in capital sentencing often relied on inconsistent sampling procedures—this particularly irked judges during cross-examination—and admittedly did not consider the influence of other variables "unrelated" to race.[66] Rejecting Bowers's study, a Fifth Circuit denial for re-hearing in *Smith v. Balkcom* (1981) emphasized the latter point:

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[65] Bowers and Pierce, 611, 616, 627–29.

[66] Samuel R. Gross and Robert Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization," *Stanford Law Review* 37, no. 1 (1984): 45.

> The raw data selected for the statistical study bear no more than a highly attenuated relationship to capital cases actually presented for trial in the state. The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables.[67]

In order to make this leap, the LDF and its consulting criminologists needed to imagine a different kind of study altogether, one that could prove discrimination in the sentencing process even to those who believed that crimes committed against Black people were not commensurable with those committed against whites. Reclaiming the narrative on racial injustice in sentencing required, ironically, that they take seriously "neutral" explanations for disparate outcomes. Ultimately, the judicial trump card was *intent*.

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Discriminatory intent had not always been an insurmountable barrier for civil rights lawyers. Legal scholar Ian Haney López argues that beginning with *Brown*, intent doctrine served "as the undivided heart of equal protection" best understood as "a term of art, connoting a judicial conclusion regarding the illegitimacy of certain racial practices" like exclusion from juries.[68] Even policies apparently enacted in good faith could be deemed discriminatory if the outcomes were sufficiently unequal.[69] In the legal climate of the late 1970s, however, a shift occurred. Rather than looking to the broader context and justification for a practice or policy when considering a charge of discrimination, the Supreme Court began to rely upon a standard of *malice*. Patterns of enforcement or changes in legal policy that might have furnished evidence of discrimination in the past were now marshaled as evidence of good-faith lawfulness.

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[67] *Smith v. Balkcom*, 671 F.2d 858 (5th Cir. 1982).
[68] Haney-López, "Intentional Blindness," 1836, 1798.
[69] See above, Chapter Two and Part Two overview.

With this in mind, it would be wrong to suggest that legal officials who sought to defend the newly-popular death penalty simply ignored disparity statistics. They were cleverer than that. In an article breaking down Spenkelink's appeal appearing in the *Harvard Law Review*, sociologist and legal scholar Hans Zeisel pointed out that following Spenkelink's execution, a white man in Florida was committed to death row for the murder of an elderly Black woman, a first for the state. Taken along with the shift in death row demographics, Zeisel charged that prosecutors seemed to be gaming the numbers:

> Prosecutors may try to present the post-*Spinkellink* statistics as proof that they have put their house in order, whatever injustices may have been committed earlier…That argument should not be accepted in view of the consistent pattern…of official denial of bias followed by changes that tacitly admit that very bias.[70]

Aware that the old playbook would no longer suffice, the LDF began to talk more about capital punishment as a system maintained by the discretion of state prosecutors, rather than an aberrant practice rooted in a legacy of racial domination. Maintaining and publishing their own data on death row and retaining as many social scientists as ever, they sought out ways overcome the burden of showing malicious intent. Aggregate statistics had failed in Spenkelink's appeal; they endeavored to probe cause and effect in the charging and sentencing process from start to finish.

Database of Death

Aware that the old playbook would no longer suffice, the LDF began to talk more about capital punishment as a system maintained by the discretion of state prosecutors, rather than an aberrant practice rooted in a legacy of racial domination. While maintaining and publishing their own data on death row and retaining as many social scientists as ever, they turned to the question of how to overcome the burden of showing malicious intent. In order to go beyond the aggregate statistics

[70] Zeisel, "Race Bias in the Administration of the Death Penalty," 468.

that had failed in Spenkelink's appeal, they needed to fund a study of a state capital charging and sentencing process from start to finish. They found their ideal collaborator in University of Iowa lawyer and self-trained statistician, David C. Baldus, who himself had expressed reservations about the use of statistics in litigation and had no declared stance on the death penalty.[71] In this section, I look at the origins of Baldus's contact with the LDF and the subsequent studies in which McCleskey's case would be placed.

With degrees in law and political science, Baldus arrived at the University of Iowa, one of the leading institutions for mathematical statistics in the nation, in 1969 without any formal statistical training. As the empirical social science-driven Law and Society movement grew in the early 1970s, his first engagement with these methods was a study of public assistance payments published in the *Stanford Law Review*, one of the leading organs of the new approach.[72] This led to collaboration with Iowa statistician James W.L. Cole on measures of discrimination, fleshed out in a 1980 monograph.[73] Cole had established a Statistical Consulting Center with the only other applied statistician around, George C. Woodworth, who inherited his clientele upon Cole's departure.[74] Their work together began with a reanalysis of data collected in 1969 by *Stanford Law Review* staff on 238 California penalty trials, in which they evaluated "comparative excessiveness," a measure of

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[71] See above and James E. Baker, "The Master Mason: How Professor Baldus Built a Bridge from Learning to Law and the Legacy of Equal Justice He Leaves Behind," *Iowa Law Review* 97 (2012): 1875.

[72] David C. Baldus, "Welfare as a Loan: An Empirical Study of the Recovery of Public Assistance Payments in the United States," *Stanford Law Review* 25, no. 2 (1973): 123–250. On the development of Law and Society: Bryant Garth and Joyce Sterling, "From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State," *Law & Society Review* 32, no. 2 (1998): 409–72.

[73] Baldus and Cole, "Quantitative Proof of Intentional Discrimination"; Baldus and Cole, *Statistical Proof of Discrimination*.

[74] Baldus exerted a strong influence on Woodworth: "I was the perfect model of a mathematical statistician—do some cute math and try to find data to fit it. After Dave, the problems arising in our empirical research are what drove my statistical research agenda," George G. Woodworth, "The Scientific Evolution of Baldus and Woodworth," *Iowa Law Review* 97 (2012): 1986.

the punishment severity differential between similar cases.[75] Baldus saw statistics primarily as a safeguard for the existing system: he did not intend to make statistical review an Eighth Amendment requirement, nor "delegate this subtle and complicated determination to a computer," but maintained that "only by the uniform application of standardized quantitative methods can one truly evaluate whether the procedural safeguards…are actually preventing the systematic imposition of constitutionally impermissible sentences of death."[76]

Based in these methods, Baldus and Woodworth designed an "ambitious" study of capital punishment in Georgia before and after *Furman*, funded by the National Institute of Justice.[77] To evaluate how Georgia's proportionality review system was working, they compared a sample of pre-*Furman* murder convictions with all 594 post-*Furman* offenders between March 1973 and June 1978: emphatically "not a sample," but rather "the universe of Georgia defendants prosecuted and convicted of murder at trial…who appealed their convictions."[78] Rather than following the full case histories, they looked at two decision points following a guilt trial to measure sentencing excessiveness, as in the previous study, and discrimination.

This study had two methodological innovations that went beyond its predecessor. First, they employed a more complicated form of regression analysis to account for which factors were influential in death sentencing. While linear regression models could measure significance and

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[75] "A Study of the California Penalty Jury in First-Degree-Murder Cases."

[76] David C. Baldus et al., "Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach," *Stanford Law Review* 33, no. 1 (1980): 7–8. As a commentator on a symposium in 1983 put it, for "Baldus and his colleagues the challenge that arbitrariness poses is as much technical as it is moral, and the scholar's task is not to condemn the system but to develop a technology that will enable it to escape condemnation. Richard Lempert, "Capital Punishment in the '80's: 'Reflections on the Symposium,'" *The Journal of Criminal Law and Criminology (1973-)* 74, no. 3 (1983): 1102. Baldus's stance evolved along the lines of abolition, but he retained faith that capital punishment could ultimately be reformed: Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*.

[77] Woodworth, "The Scientific Evolution of Baldus and Woodworth," 1986; Boger, "Field Notes," 1657.

[78] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 43–44. Here, they focused on the level of the sentencing decision, rather than the individual offender.

influence, they did not permit the calculation of rates. *Logistic* regression, confined to the range of probability between 0% (never happens) and 100% (always happens) allowed them to calculate an "odds multiplier" to show the direct influence of that factor on an outcome.[79] If members of a jury might find a goodness-of-fit measure inscrutable, having a raw multiplier brought statistics closer to the realm of common sense.

Second, they looked beyond existing work in law and social science for a model of risk estimation: a large clinical study on the potentially toxic effects of the anesthetic halothane undertaken at the behest of the National Academy of Sciences beginning in 1963. This study was a compromise on a randomized clinical trial (RCT) for halothane, deemed ethically precarious due to the identified side effect under investigation. Instead, the research team conducted a retrospective survey of data from fifty-four medical centers over the course of five years to compare the risks of halothane with other general anesthetics.[80] They analyzed variables like "operation, length, and age" to calculate "standardized death rates for each anesthetic agent" and separate out risk levels in order to assess whether halothane presented an undue risk.[81] Pursuing similar measures for convictions allowed Baldus et al. to tease out relative culpability levels to make murder cases comparable as the

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[79] Woodworth, "The Scientific Evolution of Baldus and Woodworth," 1986–87.

[80] National Research Council (U.S.) Subcommittee on the National Halothane Study, "The National Halothane Study: A Study of the Possible Association Between Halothane Anesthesia and Postoperative Hepatic Necrosis" (Bethesda, MD: National Institutes of Health, National Institute of General Medical Sciences, 1969). In his autobiography, statistical luminary Frederick Mosteller highlights the portability of statistical methods developed under pressure: "these methods become available for applications to scientific and technological problems going far beyond the ones they were developed to solve." Frederick Mosteller, "The Safety of Anesthetics: The National Halothane Study," in *The Pleasures of Statistics: The Autobiography of Frederick Mosteller*, ed. Frederick Mosteller et al. (New York, NY: Springer New York, 2010), 70. On the history and politics of the RCT: Harry M. Marks, *The Progress of Experiment: Science and Therapeutic Reform in the United States, 1900-1990* (Cambridge: Cambridge University Press, 2008).

[81] National Research Council (U.S.) Subcommittee on the National Halothane Study, "The National Halothane Study," 317.

halothane study had made different anesthetics. As with Wolfgang's study, there was a robust association between black defendants and white victims.[82]

The Procedural Reform Study (PRS), as it was known, drew the attention of the LDF's Jack Greenberg, flush with a $250,000 commitment from the Edna McConnell Clark Foundation to conduct a longitudinal study of capital sentencing in Georgia.[83] With this new partnership, Baldus et al. designed a Charging and Sentencing Study (CSS) that required an unprecedented amount of coding and analysis: more than 230 variables assessed in 1,066 cases drawn from a total of 2,484, and a consideration of five different decision points to assess the discrimination and arbitrariness in earlier phases of the sentencing process.[84] Using a more elaborate protocol, they enlisted a number of students to code files from the Georgia Board of Pardons and Parole.

On the one hand, collecting data on homicides from Georgia was a great deal more convenient than collecting data on rape, since the Board of Pardons and Paroles kept all the records of homicide cases for ten years. As Boger later recalled, "it was simply a good place to bring data collectors to–instead of going to 156 counties to collect all of that information."[85] Baldus sent his plan to the State Attorney General's office, explaining the study's objectives, sampling design, and methodology.[86] It was passed on to Assistant Attorney General Mary Beth Westmoreland, who wrote that the "office is always interested in studies of this nature and would appreciate being

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[82] Baldus initially reported the findings to attorney Jack Boger in the form of percentages: "While African-American defendants had received death sentences in 22% of cases in which their murder victims had been white, only 8% of white defendant/white victim cases led to death sentences, and only 1% of black defendant/black victim cases": Boger, "Field Notes," 1660.
[83] Boger, 1657.
[84] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 45.
[85] Sarah Marshall, "Unequal Protection: Part 1," Life of the Law, accessed July 13, 2023, https://www.lifeofthelaw.org/2017/05/unequal-protection-part-1-transcript/.
[86] David Baldus to Arthur Bolton, May 13, 1981, Baldus Papers, Series 7, Box 2, Folder 20.

apprised of the information compiled by you and your associates."[87] Though he could not have known it at the time, the two would first meet on opposite sides of the courtroom as Baldus's study was put to the test.

Baldus corresponded actively with officials providing data for the study, whom he saw as collaborators. The PRS had been based on a tape containing information on nearly 900 inmates, but the CSS required more information. Fortunately for the study, Georgia's Department of Offender Rehabilitation had recognized the importance of law enforcement data and expanded its efforts, allowing it to expand its staff and technical capacity.[88] Writing to Dr. Timothy Carr, the recently-promoted Director of Systems Development—whom Baldus warmly congratulated along with his assistant Marsha Chalker, an example that "competence is rewarded in Georgia's state government"—Baldus requested an additional run of cases using the format from the original tape and offered to merge these together with data his research assistants. The result of his efforts he promised to copy for the Board of Pardons and Paroles, along with some preliminary results: "I hope we will have some results by this summer, and I look forward to sharing them with you."[89] In fact, the collaboration was close enough that Baldus even asked for clarification on different variables and classifications.[90] By the tapes were ready two months later, Chalker apologized, explaining that the department "[gets] so many requests like this that we have to start charging for the analyst's time in addition to the computer time," and hoped the bill would not be a shock.[91] Interest in criminal justice data was on a steady uptick, as the incarceration rate began a precipitous jump. Such data was hard to come by, but the ambitions of collecting crime data were increasing.

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[87] Mary Beth Westmoreland to David Baldus, May 22, 1981, Baldus Papers, Series 7, Box 2, Folder 20.
[88] Marsha Chalker to David Baldus, March 18, 1981, Baldus Papers, Series 7, Box 2, Folder 20.
[89] David Baldus to Timothy Carr, March 5, 1981, Baldus Papers, Series 7, Box 2, Folder 20.
[90] David Baldus to Marsha Chalker, March 5, 1981, Baldus Papers, Series 7, Box 2, Folder 20.
[91] Marsha Chalker to David Baldus, March 18, 1981, Baldus Papers, Series 7, Box 2, Folder 20.

The CSS formed the bulk of the evidence submitted on behalf of McCleskey. While they incorporated these multiple variables into a number of tests, the primary claim came from a culpability index that measured 39 factors gleaned from other sentencing studies and the team's "knowledge of the Georgia capital-sentencing system."[92] The numbers this time suggested a slightly different story: "Defendant was black (BLACKD)" actually showed a slightly *negative* death-odds multiplier, while the category for "One or more white victims (WHVICRC)" had one of the larger coefficients. Perhaps the most conspicuous variable is one coded, "Family, lover, liquor, or barroom quarrel."[93] Florida Attorney General Shevin's offhand remark became enshrined in the model itself.

McCleskey's case largely turned on whether a race-of-victim theory fit within the LDF's constitutional claims. While discourse had previously centered on the fraught history of 'legal lynching' and assumptions of black criminality, whether and how the system valued black lives at all was now on the table.[94] Baldus insisted that the index and other analyses in the study were "not simply a matter of statistics," but reflected expert legal acquaintance with how Georgia's system worked.[95] One could not, he suggested, simply draw conclusions from numbers without knowing the workings of the system, and his subsequent work involved close collaboration with LDF lawyers, including Warren McCleskey's defense attorney, John C. Boger. Ultimately, judges would scrutinize how thorough the legal training of coders had been. Yet, as experts were put on trial, they asserted the independence of their domain expertise—a tension that dominated oral arguments over McCleskey's sentence.

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[92] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 57.
[93] "Capital Punishment in Georgia - Case 956 (Undated)," Baldus Papers, Series 7, Box 7, Folder 4.
[94] Randall L. Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," *Harvard Law Review* 101, no. 7 (1988): 1388–1443.
[95] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 66.

Statistics on Trial

In the summer of 1982, the LDF moved to reopen a number of Georgia capital cases under Federal Rule of Civil Procedure 60(b)(2), citing preliminary results from the PRS as "newly available evidence."[96] On October 8, federal district judge J. Owen Forrester ordered an evidentiary hearing on the case of Warren McCleskey. A Fifth Circuit case decided earlier in 1982, *Smith v. Balkcom*, dismissed a habeas corpus claim based on a smaller study that was not deemed to be "of sufficient probative value," but left open the possibility that "statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but…a racially discriminatory intent."[97] But their window seemed to be closing. Before a 1983 judicial conference, Justice Powell expressed frustration with the backlog of appeals thanks to overly "permissive" appellate courts, and went so far as to suggest that states should abolish the death penalty if they could not implement it more efficiently.[98] In this section, I show how Baldus and Boger fit McCleskey's case into the broader results of the CSS, and how a competing expert witness and the judge heard the evidence in Georgia's Federal District Court.

McCleskey grew up in Marietta, Georgia in a house beset with violence—he came home from school one day to find his stepfather dying of a gunshot wound inflicted by his mother, who pleaded self-defense.[99] Schooled in an era of segregation, he graduated with a decent GPA, married his high school sweetheart, and got a job working for the Lockheed Aircraft Company. After a 1970 layoff, he committed a string of robberies for which he was arrested, sentenced to life, and released on parole in 1977. As his marriage crumbled, he fell in with another group with whom he

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[96] Boger, "Field Notes," 1660.
[97] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 309.
[98] Robert Sherrill, "Death Row on Trial," *The New York Times*, November 13, 1983.
[99] Kirchmeier, *Imprisoned by the Past*, 12–13.

attempted to rob an Atlanta furniture store in May of 1978. An altercation with the police left a white officer, Frank Schlatt, dead from a gunshot wound. Upon arrest, McCleskey's collaborators identified him as the gunman, but McCleskey asserted his innocence and never took a plea bargain. Following a poorly-planned trial in which he claimed he was playing cards in Marietta during the robbery—against the testimony of his co-conspirators and cellmates—McCleskey was put on death row. If his initial case was characteristic of a system stacked against poor defendants who lacked the resources to make a case for their innocence, the appeal would be the exact opposite: "long days of expert testimony and computer printouts."[100]

The defense's argument boiled down to two central claims for system-wide race-of-victim discrimination, based in the CSS. First was the odds multiplier of 4.3 with a regression coefficient of 1.45, which after adjustment for the other 39 background variables remained positively correlated at .08.[101] Their method of weighing variables in explaining the race-of-victim discrepancy would come to be disputed by the state's competing expert witnesses, and its significance relative to another rejected study challenged in the Court of Appeals.

However, the second claim was more interesting for how it framed McCleskey's case. On one analysis, the CSS showed that the greatest discrepancy in race-of-victim effects occurred in cases with a mid-range aggravation level, presented as graphical evidence redrawn from computer output. In this instance, McCleskey himself became a contested data point marshaled in his own defense. Baldus and his coders scored McCleskey at 42 on the aggravation index based on the circumstances of the murder, a range with a 10 to 20 percent discrepancy in the death sentencing

[100] Straus, "Death by the Numbers."
[101] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 317.

rate between white and black victims.[102] The state's expert witness, Joseph L. Katz, argued that McCleskey's score was the result of human error in ascertaining the details of the case, and a computer program error that bumped him into a high aggravation category.[103]

The matter of comparability, and the meaning of cases with a similar aggravation level, was a thorny issue in oral arguments and one that ultimately failed to persuade Judge Forrester. Baldus argued that there was no single method for defining similar cases, neither in law, nor statistics, and that their efforts revolved around "using different methods for identifying comparable cases…[in which] we see essentially the same pattern emerging."[104] For instance, they tried comparing his case to other police killings in the data set, and found a stark contrast: "the lesser sentences received by every other Fulton County defendant involved in a police officer killing demonstrates the aberrant quality of [his] punishment."[105] If *Maxwell* had been flawed because the defendant was not a part of the defense's data set, this debate suggests that there was no straightforward way of demonstrating inclusion or comparability.

If scoring McCleskey was one point of contention, Katz, the state's expert witness brought more damning criticism to the table. An applied statistician who worked largely in business schools, Katz's expertise was largely in operations research and economic analysis. Baldus provided him the data from both studies on punched cards and magnetic tape, and he analyzed them to show that the discrepancy could be explained by the fact that white victim cases were simply more aggravated

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[102] David C. Baldus, George Woodworth, and Charles A. Pulaski, "Law and Statistics in Conflict: Reflections on McCleskey v. Kemp," in *Handbook of Psychology and Law*, ed. Dorothy K. Kagehiro and William S. Laufer (New York, NY: Springer New York, 1992), 262.

[103] "Joseph L. Katz Materials (Correspondence and Memos)" 1998-1989, 24, Baldus Papers, Series 7, Box 6, Folder 10.

[104] "David Baldus Deposition (Volume II)" July 7, 1983, 17-18, Baldus Papers, Series 7, Box 3, Folder 8.

[105] David C. Baldus, George Woodworth, and Charles Pulaski, "Death Sentencing Patterns in Fulton County Georgia with Special Reference to the Case of Warren McCleskey," July 28, 1983, 15, Baldus Papers, Series 7, Box 3, Folder 9.

than black victim ones.[106] Access to computers allowed the study data to be run back through for different tests, even in the course of hearings. Judge Forrester requested that the study be processed according to *his* terms. He developed a set of criteria for identifying the most aggravated cases, though only 46 of 2,484 met his standards.[107] Relaxing the criteria somewhat to cover a more significant number of cases, Baldus ran the regression against 647 cases to yield a slightly lower, but statistically significant odds multiplier of 4.0 for race-of-victim. This real-time computer analysis would form a major component of Boger's argument before the Supreme Court, and showed that Baldus was willing to consider different models, but did not ultimately help the case before the district judge.

Katz alleged a more fundamental criticism of the data set itself: that inconsistencies in coding could explain much of the differential race-of-victim effects observed by Baldus. The contention came down to cases that had been coded with a 'U' for certain items, indicating that the quantity was unknown. Instead of being thrown out, these were coded in the negative. Katz made much of this decision:

> [S]tatistics isn't a tool in [sic] where data is manufactured; it's the analysis of hard, correct data in the search for relationships and information…There are some situations where the analysis doesn't have to be exact…In a business situation where you're trying to forecast sales and you're missing some unknown values…the impact of your decision will be relatively minor if your results are off in that case, where the impact of the decision here will be highly significant…socially significant.[108]

Katz acknowledged that in his own practice, standards could at times be relaxed, but that legal applications of statistics demanded absolute certainty. While commentators on *McCleskey* have championed its robust data collection process, the resonance of criticisms like this show how

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[106] "Joseph L. Katz Deposition (2 of 2), McClesky v. Zant," July 1, 1983, 145, Baldus Papers, Series 7, Box 3, Folder 6.
[107] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 323.
[108] "Joseph L. Katz Deposition (2 of 2), McClesky v. Zant," 78-79.

vulnerable to skepticism the entire practice was. Critics of positivist social science knew all too well that delegating authority could lead to slippages and problematic assumptions in the laborious work of data collection and processing.

In his decision, Judge Forrester rejected the discrimination and arbitrariness claim on the grounds that the database was not trustworthy, the statistical procedures were flawed, and that the evidence satisfied the requirements of neither the Fourteenth nor the Eight Amendment. He claimed that Katz's alternative analysis did not prove Baldus's theory wrong, but what a successful rebuttal that stood "to contradict any *prima facie* case of system-wide discrimination based on race of the victim even if it can be said that the petitioner has indeed established a prima facie case."[109] He found the method of regression analysis to be suspect, capable of producing an "endless series of self-fulfilling prophecies" because it lacked any *a priori* theory of what variables were significant—even though the a number of those assessed were statutory charges in Georgia's penal code.[110] The criticism that cut the deepest was that any of the cases in the analysis could be rendered comparable by quantitative methods, rejecting the "presumption that cases with similar aggravation indexes are similarly situated" with a classic legal aphorism:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[111]

This quote from Justice Holmes evinces his unease at the possibility of mistaking appearances for essences, a classic Pragmatist sentiment stressing the provisional character of language and formal systems of thought. Katz echoed this a few years later in a draft for publication of his counter-analysis, writing, "Murder cases are stories, not a collection of categorical aggravating, mitigating,

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[109] *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984) at 373.
[110] *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984) at 370.
[111] *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984) at 371.

and evidentiary factors."[112] Post-*Furman* standards were intended to diminish the sway of legal storytelling over juries, but when liberal and abolitionist statisticians embraced them to gauge—or perhaps dismantle—the system, death penalty advocates claimed things had swung too far in the wrong direction, arguing that they could corrupt legal reasoning.

There was, nonetheless, a silver lining in Judge Forrester's ruling. The case against McCleskey was based on testimony from a fellow robber who named him as the gunman and from a cellmate, Offie Evans, to whom McCleskey had allegedly confessed the same. The jury was not made aware that Evans had been offered assistance from a detective in exchange for his testimony, a detail Evans revealed during the federal court hearing. Forrester ruled that this jailhouse confession violated due process under *Giglio v. United States* and cleared McCleskey's death sentence.[113] However, things did not stop there, as the case based in the most detailed empirical study of death sentencing yet undertaken made its way to the Supreme Court.

Too Much Justice

If Forrester had criticized the Baldus study head-on, subsequent decisions were much more in line with the *Maxwell* ruling: they upheld the validity of the study while deeming it irrelevant to the constitutional claims of the defendant. Here I discuss how higher courts attempted to sidestep the statistical issues in the Baldus study and set a constitutionally higher bar for the admission of statistics in discrimination claims.

Rather than challenging the evidence head-on, the decision by the Eleventh Circuit Court of Appeals assumed the study's validity, merely deeming it *insufficient* proof of constitutional claims. It cited a study of death sentencing in Florida, rejected as evidence, that alleged a 4.8 odds multiplier

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[112] "Re: Arguments of Joseph L. Katz," January 21, 1998, Baldus Papers, Series 7, Box 6, Folder 10.
[113] Kirchmeier, *Imprisoned by the Past*, 33–34.

for white victims, .5 higher than the Baldus study's 4.3 figure.[114] Moreover, it argued that while statistics could furnish a *prima facie* case of discrimination, on the whole the "approach ignores the realities" of cases that needed to show discriminatory intent by lumping the qualitative aspects of individual cases together with broad demographic descriptions.[115]

Why, then, did McCleskey's case continue through the appeals up to the Supreme Court? Despite backlash within the Reagan administration against the use of statistics, the Court had recently affirmed the use of regression analysis as a tool for proving employment discrimination in *Bazemore v. Friday* (1986).[116] The news cycle around the Baldus study seems to have motivated the four liberal Justices to hear the case after Forrester's decision was affirmed by the Court of Appeals. In fact, the brief appealed directly to this homology:

> Evidence of racial discrimination that would amply suffice if the stakes were a job promotion, or the selection of a jury, should not be disregarded when the stakes are life and death. Methods of proof and fact finding accepted as necessary in every other area of law should not be jettisoned in this one.[117]

Boger and the LDF left initial oral arguments feeling confident; rather than pressing for the unconstitutionality of the death penalty more broadly, they were willing to accept that a ruling in favor of McCleskey could be limited to his own case.[118] In his opening, Boger played down any possible radical implications of the Baldus study, highlighting how they had even been open to input from Judge Forrester:

> [Baldus] invited the District Judge, please sir, you designate for us those factors you think make a difference…tell us a statistical method. We will with our computer here run that

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[114] Gross and Mauro, "Patterns of Death," 78.
[115] Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 343–44.
[116] "Bazemore v. Friday: Salary Discrimination under Title VII," *Harvard Law Review* 99 (1986): 655–67; Reva B. Siegel, "Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp - And Some Pathways for Charge," *Northwestern University Law Review* 112 (2018): 1281.
[117] *McCleskey v. Kemp*, Brief for Petitioner, 1986 WL 727359, 31-32.
[118] Kirchmeier, *Imprisoned by the Past*, 160.

> model. We will see whether in the test before the court we're right that race plays a part, or not. The judge accepted that test. *The data were run under his model.* And indeed, the racial effects, as Judge Forester saw the system in Georgia, actually increased. It's because Professor Baldus was wedded to no prior assumptions; it's because he subjected his statistical analysis to so many varieties of review; that his studies provide, I believe, such a powerful indictment of the Georgia system.[119]

A narrow 5-4 majority upheld the decision by the Court of Appeals, notably the claim that the study "confirms rather than condemns the system."[120] The post-*Furman* reforms had worked to confine caprice within a tolerable range.

Justice Powell, who had previously suggested that the *Maxwell* strategy could provide an avenue for discrimination claims, authored the Court's opinion. A look into Powell's files and correspondence with his law clerk, Leslie Gielow, reveals an initial reticence that firmed into an opinion based in an overarching concern that a ruling in favor of McCleskey would set dangerous precedent for statistical claims. He responded with an emphatic "yes!" to Gielow's claim that such equal protection challenges "could threaten the entire operation of the criminal justice system."[121] Gielow, however, was inclined to side with the defense, and proposed a number of "Possible Intermediate Solutions" ("popular among the clerks," Powell commented) that included limited recognition of the results to overturn McCleskey's sentence.[122] Powell and Gielow appeared to agree that the "intellectually honest" approach was to admit the significance of the Baldus study while maintaining the importance of jury discretion.[123] Nonetheless, Powell remained concerned about the potential effects of the Baldus study. In a draft of his opinion, he used pointed language to illustrate the universe of similar claims that could be made by "Jews, Arabs, and Cubans," even

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[119] Oral arguments, *McCleskey v. Kemp*, October 15, 1986.
[120] *McCleskey v. Kemp*, 481 U.S. 279 at 290.
[121] "McCleskey v. Kemp," 46, Powell Papers, Box 132.
[122] "McCleskey v. Kemp," 55, Powell Papers, Box 132.
[123] "McCleskey v. Kemp," 59, Powell Papers, Box 132.

claims about "sex and age."[124] His ultimate concern was that "blacks and other minorities might attempt to extend *McCleskey* to rape, life sentences, and possibly other crimes and penalties, relying on the Eighth Amendment." As legal scholar Randall Kennedy argued at the time, "the Court obviated the remedial question simply by declining to find a constitutional problem."[125]

The language of Powell's published opinion was more measured, and he took pains in particular to distinguish Title VII cases from criminal cases. In employment cases, he argued, "the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions."[126] Ultimately, he argued, death sentences were far more complex entities than employment decisions, and therefore required a different order of proof. Baldus saw the issue in different terms, as a matter of influence that could crop up at any stage in a decision, and argued that while the grounds may be different between the types of claims, "the methodology for assessing whether racial considerations influenced [his] death sentence is identical."[127] If all but the most liberal Supreme Court opinions took *proof* off the table, the language of *risk* and its toleration furnished common ground for discussing how to deal with the study.[128] Justice Stevens, in his dissent, upheld Baldus's claim that McCleskey's case was "within the range of cases that present an unacceptable risk that race played a decisive role in [his] sentencing"[129] Powell had a different metric:

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[124] "McCleskey v. Kemp," 122, Powell Papers, Box 132.
[125] Kennedy, "McCleskey v. Kemp," 1415.
[126] *McCleskey v. Kemp*, 481 U.S. 279 at 295.
[127] David C. Baldus, George Woodworth, and Charles Pulaski, "Death Sentencing Patterns in Fulton County Georgia with Special Reference to the Case of Warren McCleskey," July 28, 1983, 9-10, Baldus Papers, Series 7, Box 3, Folder 9.
[128] The 1980s were a period during which 'risk' and 'risk assessment' became significant political and philosophical frameworks, e.g. Ulrich Beck, *Risk Society: Towards a New Modernity*, trans. Mark Ritter, Theory, Culture & Society (Newbury Park, Calif.: Sage Publications, 1992).
[129] *McCleskey v. Kemp*, 481 U.S. 279 at 350.

> McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.[130]

Ultimately, accepting the risk framework provided fodder for the consensus that McCleskey's claims were best left to the legislatures, better attuned to the pulse of the populace.

The legislatures did, in fact, take up the case. While the Congressional Black Caucus sought to issue legislation that would override *McCleskey v. Kemp*, a federal Racial Justice Act was proposed in 1991 and again in 1994.[131] The Act sought to give prisoners rights analogous to those in Title VII that would permit them to dispute racially discriminatory sentencing.[132] Baldus cautiously endorsed this vehicle, though he was concerned that federalism might allow its provisions to be denied in states where patterns were the worst. Both death penalty advocates and abolitionists saw gains and losses in *McCleskey*. William Wilbanks, a pro-death penalty criminologist who authored a controversial study claiming that the notion of a racist criminal justice system was a "myth," thought that the Supreme Court was a poor venue for statistical claims, and saw potential for the National Academy of Sciences as a mediator.[133] Legal scholar Randall Kennedy worried about remediation by "expedient tokenism" in order to save the death penalty, which presented "a real danger that defendants might be sentenced to death primarily to create 'good' statistics."[134] In an era of rising incarceration, Aya Gruber suggests, Powell was concerned with the legitimacy of state

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[130] *McCleskey v. Kemp*, 481 U.S. 279 at 309.
[131] Kirchmeier, *Imprisoned by the Past*, 275.
[132] Baldus, Woodworth, and Pulaski, "Law and Statistics in Conflict," 269–70.
[133] William Wilbanks, "Reactions to McCleskey v. Georgia," *The Prosecutor* 21, no. 4 (1988): 24.
[134] Kennedy, "McCleskey v. Kemp," 1439.

penal authority as much, if not more than fears that the Court would be inundated with statistical claims.[135] Then again, just a few years later Powell said that he would have changed his vote.[136]

Closing the Courthouse Door?

McCleskey was a loss, but what kind of loss was it? As the LDF was in the process of appealing the case, a Yale law student named Eric L. Muller published an incendiary criticism of its capital punishment "campaign"—singling out its lawyers' gratuitous use of militaristic language for ridicule—accusing the Fund of abandoning its stated mission of eradicating racism. He argued that the death penalty campaign "showed little of the sort of architectural planning which characterized the restrictive covenant and education campaigns." Indeed, Michael Meltsner had likened it to "riding a bucking horse." Moreover, it "elicited an uncharacteristic insensitivity to the ability of campaign litigation either to educate a receptive public or horrify a hostile one." In other words, either the LDF read the room wrong or was simply uninterested in the kind of work that grassroots organizations and recognized non-profits like the ACLU were doing. Looking to *McCleskey*, Muller pointed out that the Fund had to be aware "that the Court would either accept an argument that racism was constitutionally intolerable only in death penalty cases, or ignore the insidious work of racism even in the death penalty area."[137] Up to that point, it had only ever chosen the latter, and *McCleskey* continued this trend despite the hopes placed upon the case.

Muller had an even more damning criticism of the way the LDF related to the cause of eradicating racism in the criminal justice system altogether:

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[135] Aya Gruber, "Equal Protection under the Carceral State," *Northwestern University Law Review* 112 (2018): 1337–84.
[136] John Calvin Jeffries, *Justice Lewis F. Powell, Jr.* (New York: Maxwell Macmillan International, 1994), 451.
[137] Muller, "The Legal Defense Fund's Capital Punishment Campaign," 174, 172, 184.

> [T]he Fund's commitment to the capital punishment campaign brought about a silent yet total abandonment of its general policy goals in the criminal justice system. That a law firm so committed to cleansing the American legal order of racist considerations should advance a theory so potentially at odds with its own institutional orientation is quite curious.[138]

Some of the same experts who championed the use of statistics to check judicial discretion during the 1970s and 80s have today become prominent advocates for predictive tools in criminal justice, like recently-retired University of Pennsylvania criminologist Richard Berk, who served as one of the LDF's consulting experts in *McCleskey*. Developments like these suggest that statistical proof of discrimination has shaped not only the terms of our conversation about algorithmic fairness, but some of the very technologies at its center.[139]

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In contemporary dialogue about colorblindness, Michelle Alexander's *The New Jim Crow* has become a focal point for its argument about the failure of civil rights laws to prevent one of our most urgent crises: the unprecedented rise of racialized mass incarceration, which she describes as a new system of racial caste. A central component of Alexander's thesis is her account of how the criminal justice system has been insulated from claims of racial bias. Though the War on Drugs and intense stigma attached to ex-offenders play significant parts in the story, *McCleskey* is the fulcrum of her narrative According to Alexander, "the *McCleskey* decision was not really about the death penalty at all; rather, the Court's opinion was driven by a desire to immunize the entire criminal justice system from claims of racial bias."[140] Whatever motivated the decision, it exerted a broad chilling effect on

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[138] Muller, 183.

[139] See below, Postlude.

[140] Alexander, *The New Jim Crow*, 108.

statistical evidence. Lower courts consistently rejected claims that could not show "explicit race discrimination—the very evidence unavailable in the era of colorblindness."[141]

Alexander's thesis is powerful. It draws a necessary link between the formalism of constitutional interpretation and the administration of law on the ground.[142] However, as my account bears out, the study commissioned by the LDF in *McCleskey* was not simply a paragon of quantitative rigor rejected by an ideologically skewed Supreme Court. Rather, it was the fruit of efforts to align sociolegal and criminological research with the terms of the criminal law itself; to accurately model mitigating and aggravating factors, particularly ones that were 'non-racial.'

Like Medoff's model of IBM's promotion system, the sentencing study embedded terms and assumptions that alone could render invisible forms of unequal treatment. After all, the data came from police and prosecutors. The LDF hoped to show that by the standards of Georgia law, McCleskey's case fell into the area between curves, where the observed disparity between death sentences in cases involving white and Black victims was the greatest. Although this graph was not itself entered as evidence in McCleskey's appeal, it reflects how civil rights lawyers aligned their claims with a kind of actuarial logic that, as historian Dan Bouk observes, fashioned "statistical individuals" out of aggregate data.[143] When the LDF first challenged racial disparities in capital punishment, it relied on older statistical methods: namely, the chi-squared hypothesis test, a measure of whether an observed value deviated significantly from what would be expected by a

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[141] Alexander, 110. This doctrine hampered legal challenges to racial profiling that proliferated during the 1990s, though the nail in the coffin was not an Equal Protection claim but a challenge to the administration of state driver's licenses using an English-only exam brought under Title VI of the 1964 Civil Rights Act: Alexander, 134.

[142] Other examples include Goluboff, *The Lost Promise of Civil Rights*; Murakawa, *The First Civil Right*; Seo, *Policing the Open Road*.

[143] Bouk, *How Our Days Became Numbered*.

random process.[144] From a purely statistical perspective, such rudimentary measures were outdated. As a matter of justice though, they raised important questions about what exactly constituted discrimination. Some researchers believed that questions about legal policy were best resolved through aggregate comparative statistics, while judges vacillated over their worth depending on the particular legal questions involved as well as their own inclinations.

Figure 5. McCleskey as a data point. Figure 13.3, Baldus et al. 1992, "Law and Statistics in Conflict," 261.

The narrow Supreme Court majority in *McCleskey* may well have precluded statistical evidence of biased capital sentencing under one legal theory. But we need a more dynamic metaphor than a closed door to capture how numbers mediated the relationship between technology and antidiscrimination law in an era when emphasis on the former has altered our very concepts of justice and the practices these underwrite. In her account of population modeling and Cold War development initiatives, Michelle Murphy coins the term *phantasmagram* to define the

[144] On problems inherent in null hypothesis testing along these lines, see Gerd Gigerenzer, "Mindless Statistics," *The Journal of Socio-Economics*, Statistical Significance, 33, no. 5 (November 1, 2004): 587–606.

"affectively charged and extraobjective relations that are part of the force of numbers."[145] The trajectory of antidiscrimination law in the latter half of the twentieth century has been one toward the decoupling of the information age's civic epistemology from the historical memory of Jim Crow. Statistics played a part in this process. If we can look past their speculative allure, perhaps we can reactivate that memory—that courthouse is certainly going to need a bigger door.

[145] Murphy, *The Economization of Life*, 25.

Postlude

Formalizing Fairness

This account began in the 1960s, when liberal lawyers sought to turn a compromised piece of legislation into a tool to combat prevailing inequities. Mobilizing statistical disparities was also how the LDF's capital punishment campaign got started and remained its lodestar even as the strategy evolved in more procedural directions. Along the way, the advocates who honed these strategies came to argue that statistics were evidence of ongoing historical trends, despite judges' best efforts to restart the clock.

But *Wards Cove* and *McCleskey* seemed like the end of the road for disparate impact. A more conservative Supreme Court drew bright lines between inequality—in labor markets, education, even crime victimization—and discrimination. Although the legal theory of disparate impact had been strategically and thoroughly gutted by the end of the 1980s, its political stature had grown. In the 1990s, legislators tried to restore it in statutory language, with mixed results.

Justice Thomas, former EEOC chairman, would likely prefer to think he had nothing to do with the revival of disparate impact in employment litigation, but the record suggests otherwise. In his Senate confirmation hearings, he met the moment by criticizing *Griggs* and affirmative action, but Anita Hill's claims that he had sexually harassed her during her time at the Department of Education and the EEOC threatened to derail Thomas's nomination. This put President George H.W. Bush in an even more awkward position with civil rights groups, made worse by the near success of former Ku Klux Klan Grand Wizard David Duke's gubernatorial campaign in Louisiana.

Having run on a promise that he would never sign a "quota bill," the political pressure generated by these events prompted Bush to declare his support for a new Civil Rights Act that effectively overruled the Supreme Court's 1989 decisions. The 1991 act restored the *Griggs* standard of disparate impact: with evidence of significant workforce disparities, the burden of proving the 'business necessity' of a challenged practice rested with the employer. With Thomas on the nation's highest bench, it was a pyrrhic victory for liberals.[1]

For capital punishment, things seemed to be heading in the same direction. A Racial Justice Act (RJA) that would have allowed capital defendants to present statistical evidence of racial bias to challenge their sentences was first introduced by Representative John Conyers in 1988 and put forward in nearly every House and Senate crime legislation committee for more than half a decade. Critics, however, assailed it as a "Death Penalty Abolition Act" in disguise and it repeatedly died in conference. Things came to a head in 1994, when the Clinton Administration was pushing for the passage of the Violent Crime Control and Law Enforcement Act, which became the largest crime bill in U.S. history. The Congressional Black Caucus rallied around the RJA, but the administration convinced enough members to support the omnibus bill without it, promising to issue an Executive Order fulfilling some of the RJA's provisions. Republican Senators caught wind and proposed an amendment barring the Department of Justice from using funds to implement any policy permitting "the consideration of evidence that race was a statistically significant factor" in prosecutorial decision-making. Ultimately, the RJA was dropped, and the Executive Order never came. Rather than abolishing capital punishment, the omnibus crime bill defined sixty new capital offenses, while

[1] Belton, *The Crusade for Equality in the Workplace*, 308–11.

allocating massive funding for constructing new prisons and introducing more police officers. Because of this, critics have assailed the bill as a key driver of mass incarceration.[2]

Even if the RJA had passed, the future for statistical proof of discrimination in death sentencing was becoming less certain. While a 1990 General Accounting Office report surveying twenty-eight studies of racial bias in capital sentencing concluded that race-of-victim disparities were "remarkably consistent," statistical standards and legal theories of intent aligned imperfectly at best.[3] In his *McCleskey* dissent, Justice Brennan argued that the Baldus study "relentlessly documents the risk" of race influencing the prosecutor's choice to seek the death penalty, but efforts to apply this standard in practice were mixed.[4] After New Jersey became one of the few states to implement a thorough proportionality review of death sentencing disparities, appointing Baldus as a Special Master to oversee the development of a review system, the state Supreme Court decided that it was flawed.[5] The Court appointed John W. Tukey, the famed statistician

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[2] Daniel E. Lungren and Mark L. Krotoski, "The Racial Justice Act of 1994 - Undermining Enforcement of the Death Penalty Without Promoting Racial Justice," *University of Dayton Law Review* 20, no. 2 (Winter 1995): 655–98; Justin R. Arnold, "Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act," *Washington and Lee Journal of Civil Rights and Social Justice* 12, no. 1 (September 1, 2005): 93–107; Udi Ofer, "How the 1994 Crime Bill Fed the Mass Incarceration Crisis," American Civil Liberties Union, June 4, 2019, https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis; Lauren-Brooke Eisen, "The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System," Brennan Center for Justice, September 9, 2019, https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice.

[3] Paul Schoeman, "Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act Notes," *Harvard Civil Rights-Civil Liberties Law Review* 30, no. 2 (1995): 5343–5544; Evan Tsen Lee and Ashutosh Bhagwat, "The McCleskey Puzzle: Remedying Prosecutorial Discrimination against Black Victims in Capital Sentencing," *The Supreme Court Review* 1998 (1998): 147.

[4] *McCleskey v. Kemp*, 481 U.S. 279 (1987) at 328.

[5] Baldus cautioned that "race variables [were included] in the culpability models to ensure that variables for legitimate case characteristics were not carrying any possible race effects…Because discrimination was not the primary mandate in this project, we consider these results to be strictly preliminary. More work will be required to determine if they persist under closer scrutiny and alternative analyses, to determine, for example, whether they are statistical artifacts or flukes, and to assess their legal and practical significance." *In re Proportionality Review Project (II)*, 165 N.J. 206 (2000) at 210. For more on the review, see Leigh B. Bienen, "The Proportionality Review of Capital Cases by State High Courts after 'Gregg': Only 'The Appearance of Justice'?," *The Journal of Criminal Law and Criminology* 87, no. 1 (1996): 130.

remembered as the 'father of data science,' to review the model. Tukey ran with the 'relentless' standard, questioning the Court's emphasis on a single model and suggesting a "bouquet" of analyses in order to gauge a "race effect."[6]

The judge who oversaw the report made a crucial distinction about the kind of evidence the U.S. Supreme Court had deemed acceptable in *McCleskey*, subtly changing its implications. Endorsing *statistical* evidence of racial bias was tacitly "a decision to accept performance standards employed by *statisticians*, and thus to reject partisan invitations to apply social-science notions (emphasis mine)."[7] Baldus was still seen by many as too social-scientific, and too close to the law to be objective. Under the revised Tukey standard, the New Jersey Supreme Court found no evidence of systemic racial bias in state capital sentencing. Yet, as one dissenting judge pointed out, Tukey had given technical content to a legal description, changing its meaning:

> One thing is clear: we did not derive the notion of relentless documentation from the statisticians—they got it from us…I, therefore, urge the Court to abandon "relentless documentation" and to adopt a less burdensome quantum of proof as the standard a defendant must meet in proving a "substantial discriminatory effect."[8]

Even with statistical evidence on the table, there were bound to be clashing models, and clashing opinions on how to decide which was better.

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[6] "[T]he Court has used the word 'relentless' to indicate the strength of the evidence required to affect the Court's decision...One reasonably close analysis that reaches significance is not relentless proof. Only half of a collection of reasonably close analyses reaching statistical significance is not relentless proof, either. Isolated examples are never relentless." John W. Tukey to Richard S. Cohen, n.d., Tukey Papers, Series 11, Folder "Race Bias cases – NJ." On Tukey's legacy, see James R. Thompson, "The Age of Tukey," *Technometrics* 43, no. 3 (August 1, 2001): 256–65; Alexander Campolo, "'Thinking, Judging, Noticing, Feeling': John W. Tukey against the Mechanization of Inferential Knowledge," *KNOW: A Journal on the Formation of Knowledge* 5, no. 1 (March 1, 2021): 83–111.

[7] Richard S. Cohen to Chief Justice and Associate Justices of the New Jersey Supreme Court, May 5, 1997, Tukey Papers, Series 11, Folder "Race Bias cases – NJ."

[8] *In re Proportionality Review Project (II)*, 165 N.J. 206 (2000) at 232-33.

The other development that threatened to upend whatever consensus had emerged regarding evidence like the Baldus study had to do with the epistemological status of prosecutorial discretion. Critics of *McCleskey* emphasized the extent to which the decision granted prosecutors an almost unprecedented level of discretion in pursuing death sentences. To challenge it as discriminatory, civil rights advocates were now required to provide "exceptionally clear proof" that discretion was being abused.[9] This more rigid legal standard of intent was bolstered by intellectual currents that focused more attention on the mind of the prosecutor.

Drawing on an emerging body of research on unconscious racial bias, some argued that subconscious differential valuation of white and Black victims' lives could be proven.[10] Others proposed different methods of investigation. In a testy exchange of letters between former New York City mayor Edward I. Koch and the publisher of *Harper's Magazine* following the saga of the 1994 RJA, Koch brought in Stephen P. Klein, a research scientist from the RAND Corporation who heavily criticized correlational studies of sentencing, Baldus's research in particular. Klein suggested "an experimental approach," asking cooperating prosecutors to make decisions based on case materials in which the defendant's and victim's races were systematically varied. However, Klein claimed that "no funding source seems ready to pick-up the approximately $250k tab for doing it properly," a jab at the Baldus study's grant support: "[p]erhaps you and others of like mind might generate that amount to do the study and find out what the facts really are," Koch insisted.[11]

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[9] *McCleskey v. Kemp*, 481 U.S. 279 (1987) at 297.

[10] Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review* 39, no. 2 (January 1987): 317; Lee and Bhagwat, "The McCleskey Puzzle," 159–70. For an extended critique of unconscious bias as a legal strategy, see Kahn, *Race on the Brain*.

[11] Stephen P. Klein to Edward I. Koch, December 5, 1994 and Edward I. Koch to John R. MacArthur, December 19, 1994, Baldus Papers, Series 2, Box 2, Folder 6.

Exchanges such as this were no doubt in bad faith, but with debates over statistical inference intensifying throughout the decade, criticism like Klein's had greater impact.

The fraught enterprise of proving statistical causation sent investigators looking for other kinds of evidence to shore up their claims. One key development took place in cancer research. Despite the longstanding statistical evidence of the link between smoking and lung cancer, it was only in 1996 that "smoking gun" genetic mutation was reported in cellular studies.[12] Evidence that was not 'purely statistical' more readily assumed the mantle of scientific fact. This explains in part why capital punishment abolitionists began to embrace the "innocence" strategy, exonerating death row inmates using the novel technology of DNA fingerprinting.[13] Science Studies scholars Jay Aronson and Joshua Cole have argued that the embrace of DNA has been a double-edged sword for the movement. Rooted in the conviction that a supposedly 'objective' technique (one that actually involves a great deal of interpretation) can reliably sort the guilty from the rest, emphasizing innocence risks legitimating capital punishment rather than curbing its use.[14] Legal scholar Aya Gruber makes a similar claim about the perils of race-of-victim studies: data-driven sentencing research inspired by social justice concerns bears the inexorable risk of being put to carceral ends,

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[12] Richard Doll and Austin Bradford Hill, "Smoking and Carcinoma of the Lung: Preliminary Report," *British Medical Journal* 2, no. 4682 (September 30, 1950): 739–48; David Stout, "Direct Link Found Between Smoking and Lung Cancer," *The New York Times*, October 18, 1996. On efforts by scientists to undermine evidence of smoking's harms, see Oreskes and Conway, *Merchants of Doubt*. On statistical reasoning in medicine, see, *inter alia*, Christopher J. Phillips, "Behind the Numbers: Aggregated Risks in the Age of COVID," *Los Angeles Review of Books*, May 12, 2021, https://lareviewofbooks.org/article/behind-the-numbers-aggregated-risks-in-the-age-of-covid/.

[13] See, generally, Carol S. Steiker and Jordan M. Steiker, "The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy," *Journal of Criminal Law and Criminology* 95, no. 2 (2005): 587–625; Lynch et al., *Truth Machine*.

[14] Jay D. Aronson and Simon A. Cole, "Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States," *Law & Social Inquiry* 34, no. 3 (2009): 603–33.

weaponized to support more punitive policies.[15] Where statistics have failed to gauge the weight of history in claims of discrimination, they have often succeeded in reinforcing the status quo.

In recent years, probabilistic thinking has been gaining ground in law and criminal justice through recidivism risk algorithms designed to curb discretion through prediction. Even here there is a surprising connection to statistical proof of discrimination. Richard A. Berk, a criminologist and statistician who got his start on the Kerner Commission and became one of the experts the LDF hired to defend the Baldus study, is now perhaps the leading academic proponent of recidivism risk algorithms to tame judicial discretion in sentencing. In the early 2000s, Berk teamed up with Klein at RAND to assess bias in federal charging decisions and found that "controlling for case characteristics eliminated race effects…support[ing] the view that seek decisions were driven by heinousness of crimes rather than race."[16] The report evinced Berk's growing enthusiasm for modeling and machine learning, and since then he has collaborated with Philadelphia's Adult Probation and Parole Department while steering conversations about the necessary tradeoffs between formal definitions of fairness and technical measures of accuracy.

An attention-grabbing headline captures the more sensational implications of Berk's larger project: "The Guy Trains Computers to Find Future Criminals."[17] Likewise, the use of machine learning to evaluate job applicants is on the rise, with companies claiming to bypass common

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[15] Aya Gruber, "Response: Race-of-Victim Disparities and the 'Level Up' Problem," *Harvard Civil Rights-Civil Liberties Law Review* 55 (2020): 657–65.

[16] David C. Baldus, it should be noted, was one of the consultants on the study. Stephen P. Klein, Richard A. Berk, and Laura J. Hickman, "Race and the Decision to Seek the Death Penalty in Federal Cases" (RAND Corporation, July 11, 2006), xix, https://www.rand.org/pubs/technical_reports/TR389.html.

[17] Joshua Brustein, "This Guy Trains Computers to Find Future Criminals," *Bloomberg.Com*, July 18, 2016, http://www.bloomberg.com/features/2016-richard-berk-future-crime/; Richard Berk et al., "Fairness in Criminal Justice Risk Assessments: The State of the Art," *Sociological Methods & Research*, July 2, 2018.

pitfalls of machine learning like biased training data, and even traditional notions of merit associated with aptitude tests.[18]

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There are too many problems associated with these new psychometric tools to enumerate here, to say nothing of issues with actuarial sentencing and the inequalities it reproduces or threatens to exacerbate.[19] However, the affinity between current computer programs that put a high-tech gloss on formal ideas of fairness and efforts to produce statistical evidence of, and standards for, discrimination is noteworthy, to say the least.

To conclude, I want to take us back to the past, to meditate on the relationship between numbers, law, and history that has been the fulcrum of this account.

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[18] One such company, Pymetrics, releases its own "fairness" audits to show compliance with disparate impact and the four-fifths rule, and calls its tool a "matching engine." Andrea Murad, "The Computers Rejecting Your Job Application," *BBC News*, February 8, 2021, sec. Business, https://www.bbc.com/news/business-55932977; Christo Wilson et al., "Building and Auditing Fair Algorithms: A Case Study in Candidate Screening," in *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency*, FAccT '21 (New York, NY, USA: Association for Computing Machinery, 2021), 666–77.

[19] This is a direction in which I plan to take my future research. On the actuarial turn and recidivism risk, see, *inter alia*, Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007); Angèle Christin, "The Mistrials of Algorithmic Sentencing," *Logic(s) Magazine*, December 1, 2017, https://logicmag.io/justice/the-mistrials-of-algorithmic-sentencing/; Eaglin, "Technologically Distorted Conceptions of Punishment"; Benjamin, *Race After Technology*; Wiggins, *Calculating Race*.

Conclusion

Statistical Signification

> History speaks. In some form, it can be heard forever…To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how* and *why* race matters to the very concept of who "merits" admission.
>
> – Justice Ketanji Brown Jackson, dissenting in *Students for Fair Admissions v. Harvard* (2023)

> [Justice Jackson's] dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race…The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics.
>
> – Justice Clarence Thomas, concurring in *Students for Fair Admissions v. Harvard* (2023)

Justice in Numbers has followed the process by which definitions of discrimination narrowed as the uses of data expanded—both inside and out of the courtroom in the modern United States. These developments, I have claimed, are connected and mutually reinforcing. In the 1960s, lawyers and civil rights advocates came to embrace statistics as a wedge for strengthening hard-won legislation and extending legal protections to new domains. Social scientists seized on these opportunities for collaboration, whether to realize the political changes they wished to see or to strengthen the foothold of their disciplines in the public imagination. By the 1970s, the same reaction against the perceived excesses of civil rights that came to dominate national politics also played out among experts, who increasingly appeared on the opposite side of the courtroom to defend corporations,

state governments, and municipal offices against claims of discrimination. Computer power became a vital resource in this statistical arms race, while conservative jurists devised strategies for dismissing the entire enterprise as irrelevant to a colorblind tradition.[1]

My primary argument is that changes in statistical methods and the presentation of evidence both reflected and entrenched colorblind norms, above and beyond the legal theories that shaped the era's jurisprudence. To consider how this happened, the dissertation followed the push and pull between employment discrimination and criminal justice reform through the lens of capital punishment abolition. The link between these two is surprisingly direct. Capital punishment lawyers drew directly on employment precedent, and further, both legal movements helped to define a broader, ongoing national conversation about the measurement of race and racism.[2] But somewhere along the way, advocates lost the narrative as methods became more sophisticated, and discrimination more subtle. The introduction of more advanced kinds of modeling, like the 'matched pairs' analysis discussed in Chapter Five, reinforced a more conservative definition of discrimination, best described by Kimberlé Crenshaw: "the use of race or gender factors to interfere with decisions that would otherwise be fair or neutral."[3] A far cry indeed from "sociological radar"

In providing new insight into the relationship between science and law in twentieth-century U.S. history, this dissertation has also addressed contemporary conversations about algorithmic discrimination by suggesting that convergent agendas drove the adoption of computers and growth

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[1] As I have suggested in the foregoing, some of the most trenchant critiques of statistics often came from the left and academics who balked at the (seemingly) naïve positivism of statisticians. This undercurrent has run throughout the dissertation, fed by multiple streams, most prominently Science and Technology Studies (STS), Critical Legal Studies (CLS), and Critical Race Theory (CRT), often discussed as an offshoot of the latter. Bringing this meta-critique—historicizing the very frames of analysis that have inspired this project—too far into the foreground risks weighing down an already overburdened narrative and taxing my prose beyond what it can presently afford. But I believe it is worth exploring in more detail as this project evolves.

[2] In fact, Michelle Alexander herself moved from employment to criminal justice at the ACLU. Alexander, *The New Jim Crow*, 4.

[3] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 151.

of data infrastructure in law and governance. Legal aid organizations and the social scientists who worked with them frequently complained about the quality of available data and the expense of undertaking research to help their clients, while administrators sought means of managing their own information overload. Civil rights lawyers hoped that with enough variables and data points, judges might buy their arguments linking disparate outcomes to discrimination under the law. To paraphrase another of Porter's formulations, they used statistics as a "weapon of the weak."[4] Ironically, such aspirations fed into a pernicious insistence on data-driven tools, or at the very least shielded their development from greater scrutiny. Civil rights advocates resisted the encroachment of government data collection in the 1960s, but private surveillance went largely unchecked. As "the business of fighting bias" took off, the EEOC certainly wasn't getting a cut.

With this in mind, I would like to suggest that there is a connection between the history of statistical evidence of discrimination and the automated decision systems civil rights lawyers are challenging today. Both fights involve some of the same key actors. And just like in earlier battles over statistical proof, present-day fights over the fairness of automated systems are influencing contemporary discourses and practices of quantifying bias. For one example, the measures of validity discussed in Chapter Three were shaped by litigation and federal regulation and have now been thoroughly absorbed into the vocabulary of measurement science. Much of the debate prompted by *ProPublica*'s 2016 exposé "Machine Bias," an analysis of a widely used risk assessment tool known as COMPAS, has turned on divergent understandings of validity.[5] Moreover, as the

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[4] "It should be clear that a community founded on objectivity is a weak or endangered community, one without sharp borders on the outside, and one without an effortless shared understanding—in short, a very modern kind of community." Porter, *Trust in Numbers*, 227.

[5] Julia Angwin et al., "Machine Bias," *ProPublica*, May 23, 2016, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing; Anthony W. Flores, Kristin Bechtel, and Christopher T. Lowenkamp, "False Positives, False Negatives, and False Analyses: A Rejoinder to 'Machine Bias: There's

Tukey example form the Postlude suggests, the boundary between legal and statistical notions of rigor was a porous one indeed.

Perhaps the best evidence of how colorblind ideology has prevailed as a kind of baseline, or ground truth, within the civic epistemology of the information age lies not in debates over AI but rather in the ongoing relevance of new statistical methods to pivotal Supreme Court rulings of the last term. The history I have recounted here suggests that this was not inevitable.

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As I began writing this conclusion, the Supreme Court decided *Allen v. Milligan*, leaving intact a key portion of the 1965 Voting Rights Act and dismissing an argument by the State of Alabama for a new "race-neutral benchmark" to gauge unfair apportionment. The plaintiffs challenged Alabama's proposed technical solution to redistricting: generating millions of possible maps using software and then using the average number of majority and minority districts across the entire dataset as a benchmark to assess whether a proposed map has a "fair" distribution of majority and minority districts.[6] In designing this solution, the state drew shallowly on research from computational redistricting experts, basing their technique on a study that generated "two million maps"—playing up the impressive-sounding figure—none of which contained more than one majority-minority district, just like the map proposed by state representatives. The Court, however, pointed out that experts estimated the universe of possible maps to be in the "trillion trillions" or "in the range of googols." With this in mind, the proposed race-neutral benchmark would "require courts to judge a contest of computers when there is no reliable way to determine who wins or even where the finish

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Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks,'" *Federal Probation* 80, no. 2 (September 2016): 38–46, 66.

[6] *Allen v. Milligan*, 599 U.S. ____ (2023), majority slip opinion at 15.

line is," a fruitless search for an 'objective' standard when plenty of information relevant to the provisions of the Voting Rights Act was ready at hand.[7]

Even more relevant to the developments I have recounted in this dissertation is the highly visible *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* decision, which issued a devastating blow to affirmative action in college admissions. Tossing out decades of precedent in line with the "diversity" standard of admissions preferences announced by *Regents of the University of California v. Bakke* (1978), the Court ruled that admissions programs at Harvard and the University of North Carolina (UNC) "lack sufficiently focused and measurable objectives warranting the use of race," and that racial preferences "operate like clockwork" despite these universities' insistence on holistic and contextual judgments.[8] Invoking the logic of *Croson*, the majority opinion argued that such programs ensure that race will always remain relevant. Six justices were content to decry Harvard's "focus on numbers" as patent evidence of illegitimate racial balancing, but Justice Sotomayor's dissent championed the "careful factfinding" of the lower courts. In her view, Harvard's experts demonstrated that "the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants," and moreover, that Students for Fair Admissions, Inc.'s argument that Black and Latino admissions harmed Asian American applicants ignored the broader trend of increased minority representation.[9]

While it may seem from this cursory overview of two cases that the Supreme Court has merely grown *more* skeptical of quantitative methods, this is a vast oversimplification. During oral

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[7] *Allen v. Milligan*, 599 U.S. ____ (2023), majority slip opinion at 28-29. On the history of gerrymandering mathematics, see Alma Steingart, "Democracy by Numbers," *Los Angeles Review of Books*, August 10, 2018, https://lareviewofbooks.org/article/democracy-by-numbers/.

[8] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023), majority slip opinion at 39, 31-32n7.

[9] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023), Justice Sotomayor dissent at 34-35.

arguments for the Harvard case, much of Chief Justice Roberts's line of questioning concerned whether there was a measurable 'tip' in favor of race in the admissions model. When Harvard counsel Seth P. Waxman highlighted the .2% 'plus factor' for race in the admissions model in order to describe it as microscopic, Roberts pointed out that it was "not zero," and baited Waxman by concluding, "so there's only a little racial discrimination in the case."[10] In his concurring opinion, Justice Gorsuch cited a brief from economists arguing that "[a] tip for one race" necessarily works as "a penalty against other races."[11]

Of course, none of this logic is new. The emphasis on a zero-sum game echoes the very developments this dissertation has traced. But it reflects a particularly ahistorical way of thinking about race that has gained ground in recent years. Anthopologist Duana Fullwiley argues that since the advent of genomics, a new discourse of genetic inclusion—rooted in attempts to redress disparities and gaps in care—has helped "reduce[] biological outcomes that have social origins to genetic explanations," setting up a "dynamic [with] a power effect that makes it harder to pinpoint where the pernicious aspect of race in science starts or stops."[12] In quantitative scholarship on racial health disparities, history appears to have fallen out of the frame, obscuring the long-term *processes* that sustain group-based inequities.[13] That race can be simultaneously reified in the biomedical

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[10] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023), oral arguments, October 31, 2022, at 62; Lincoln Caplan, "The Supreme Court Affirmative Action Rulings: An Analysis," Harvard Magazine, June 30, 2023, https://www.harvardmagazine.com/2023/06/harvard-affirmative-action-analysis.

[11] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023), Justice Gorsuch concurrence at 9.

[12] Duana Fullwiley, "The 'Contemporary Synthesis': When Politically Inclusive Genomic Science Relies on Biological Notions of Race," *Isis* 105, no. 4 (December 1, 2014): 812. See also Dorothy Roberts, *Fatal Invention: How Science, Politics, and Big Business Re-Create Race in the Twenty-First Century* (New York: New Press, 2011).

[13] Merlin Chowkwanyun, "The Strange Disappearance of History from Racial Health Disparities Research," *Du Bois Review: Social Science Research on Race* 8, no. 1 (Spring 2011): 253–70.

sciences and vilified as a category of legal redress reflects the degree to which the entanglement of law and social science has entrenched a "null hypothesis of no racism."[14]

As the epigraphs to this conclusion suggest, the crux of the Court's division in *Students for Fair Admissions v. Harvard* is history itself. Justice Thomas, per usual, weaponizes a selective Fourteenth Amendment originalism and limited historical memory of "the race-conscious Jim Crow era" in his own strict scrutiny analysis. He takes aim at Justice Sotomayor's account of Reconstruction but reserves particular scorn for Justice Jackson's focus on persistent racial gaps in wealth and health, decrying her invocation of "an abstract, average black person" as an affront to individuals who have persevered despite the odds.[15] Justice Jackson dismisses the six-page attack on her dissent as an "obsession with race consciousness" and formal equality in excess of the holistic and historical perspective she claims to share with UNC. While her insistence on "do[ing] what evidence and experts tell us is required to level the playing field" runs the risk of invoking an illusory social scientific consensus, I want to highlight again her charge for using law to preserve a view of "the past that explains *how* and *why* race matters."[16] While easier said than done, this is not out of reach.

In 2020, California delivered on the lost promise of the federal Racial Justice Act and passed its own, extending beyond capital cases to the criminal justice system as a whole, declaring "we can no longer accept racial discrimination and racial disparities as inevitable." The act introduced an option to appeal for an evidentiary hearing on the basis of a *prima facie* showing of discrimination, in which "evidence may be presented by either party, including, but not limited to, statistical evidence,

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[14] Murakawa, "Racial Innocence."
[15] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023), Justice Thomas concurrence at 22, 51.
[16] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ____ (2023), Justice Jackson dissent at 23n103, 26. Justice Jackson recused herself from the Harvard ruling.

aggregate data, expert testimony, and the sworn testimony of witnesses." The burden of proving discrimination remains with the defendant, but any finding of discrimination automatically makes the defendant ineligible for the death penalty.[17] While the legislation was an admirable step forward in the social movement to claim justice for George Floyd, Breona Taylor, and other Black Americans killed by police, it had serious limitations. It excluded those with convictions prior to 2021. And though it specified that statistics and aggregate data could be used, there was no mention of how to contextualize or address the limitations of numbers. The revised California Racial Justice Act for All, passed in 2022, seeks to change that by attenuating or supplementing statistical measures:

> Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin.[18]

On this logic, a race-neutral explanation cannot preclude reckoning with gross and ongoing disparities, a sharp break from the conservative trend of the Supreme Court.

The ACLU's Capital Punishment Project is currently pursuing the first challenge brought under the new law: a pre-trial challenge to the Riverside County District Attorney's decision to seek the death penalty against two Black men, backing four statistical analyses with "historical evidence that demonstrates a clear, cross-generational record of state-sponsored maltreatment and vigilante

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[17] California Assembly Bill No. 2542, Criminal procedure: discrimination (2019-2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2542.
[18] California Assembly Bill No. 256, Criminal procedure: discrimination (2021-2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB256.

violence exacted against Black people in Riverside County."[19] Time will tell if the strategy bears fruit, but it will be essential for the social scientists involved to share the same narrative, and not allow it to be occluded by technicalities.

I have suggested here that one of the most prominent early uses of statistical evidence to prove discrimination was to show how past practices bore upon the present, and only gradually was this supplanted by more formal, social scientific or statistical definitions of fairness. Whether we call it a humanistic discipline or a social science (I myself tend to vacillate), history has its own politics and intellectual baggage. This is particularly apparent in the recent fallout over the *1619 Project* and ensuing state bans on curricula supposedly infected by "critical race theory."

While few in the historical profession could question that organized opposition to such censorship is necessary in this day and age, there is an ongoing debate over how history can meet present demands for accountability. How can we reckon with the weight of the past upon our present without losing sight of contingency and possibility—the notion, often a radical one, that things could have been other than they are?[20] Though there are times and places for both, debate

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[19] Robert Ponce, "To Root Out Racism in the Criminal Legal System, We Can't Fear Too Much Justice," January 20, 2023, https://www.aclu.org/news/racial-justice/to-root-out-racism-in-the-criminal-legal-system-we-cant-fear-too-much-justice.

[20] In an interesting essay in *Harper's Magazine*, historian Matthew Karp describes the recent currency of the DNA metaphor to describe the inexorable persistence of American racism as a kind of elite shibboleth that works to neutralize demands for radical change. Invoking political theorist Wendy Brown, he asks, "[i]f one key function of the old liberal history was to fortify belief in the course of incremental progress, what is the political work of the new dispensation, with its metaphors of birth, genetics, and essential nature?" For Karp, that it was easy for President Biden to invoke slavery as America's "original sin" while promising wealthy donors he would not rock the boat speaks volumes. Matthew Karp, "History as End: 1619, 1776, and the Politics of the Past," *Harper's Magazine*, accessed July 10, 2023, https://harpers.org/archive/2021/07/history-as-end-politics-of-the-past-matthew-karp/. I am less sure about the directness of this relationship, but I do appreciate his insistence on a historical politics that seeks "the fruits, not the roots" to make space for change.

over the politics of contingency is alive and well among legal historians.[21] For historians of science, such conversations seem to still be on the margins.[22] This is a shame, because the growing community of critical data studies scholars needs histories that document not only the violence of epistemological constructs but also the alternatives and challenges that emerged alongside them.[23] If there is a future in adapting statistics to just ends, it will require collaboration. Perhaps then, returning to Alice Walker, filing cabinets and freedom will not be incommensurable after all.[24]

[21] For one noteworthy example, Justin Desautels-Stein and Samuel Moyn have criticized the "promises of edgy progressivism" prevailing in legal historiography's emphasis on contingency. Justin Desautels-Stein and Samuel Moyn, "On the Domestication of Critical Legal History," *History and Theory* 60, no. 2 (2021): 296–310.
[22] A classic exploration of these problems is Bruno Latour, "Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern," *Critical Inquiry* 30, no. 2 (2004): 225–48.
[23] For notable examples, see Sasha Costanza-Chock, *Design Justice: Community-Led Practices to Build the Worlds We Need* (Cambridge, Mass.: MIT Press, 2020); Catherine D'Ignazio and Lauren F. Klein, *Data Feminism* (Cambridge, Mass.: MIT Press, 2020).
[24] Walker, *In Search of Our Mothers' Gardens*, 336.

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