

## ACCOUNTING FOR HISTORICAL FORCES IN THE EFFORT TO ALIGN LAW WITH SCIENCE

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### INTRODUCTION

During the course of this year's Childress lecture, Professor John A. Powell identified a number of principles in modern jurisprudence as remnants of Enlightenment Period concepts and argued that current scientific developments have proven these principles false.<sup>1</sup> The foremost Enlightenment concepts that he challenged were those related to individual decision-making processes and causation, both of which play a significant role in almost every aspect of the law.<sup>2</sup> This Article makes no attempt to delve further into science, or the law's consistency with it, as it largely concurs in Powell's assessment of modern science and jurisprudence. Instead this Article raises the different, but related, question of why certain aspects of the law reflect Enlightenment thinking. In particular, have courts adopted legal standards based on their understanding of science, albeit a flawed understanding, or do current legal standards reflect ulterior motives that may simply coincide with Enlightenment principles?

Of course, such a large question cannot be definitively answered in the context of a short Article, but the answer has huge consequences for legal reform efforts. This Article simply hopes to continue the conversation. Relying on a few seminal school desegregation cases, this Article posits that, first, the Supreme Court's understanding of intent and causation is sometimes more nuanced than we currently appreciate and, second, when the Court's

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\* Associate Professor of Law and Director of the Education Rights Center, Howard University School of Law. I would foremost like to thank John Powell for thinking of me when he was conceptualizing his Childress lecture and its respondents. His lecture and scholarship, as always, forced me to think beyond my normal bounds and raised the most important of questions for our society's future. I would also like to thank the other participants and authors. They collectively created a unique and stimulating intellectual environment. Finally, I would like to thank the *Saint Louis University Law Journal*, its staff, and the professors and administration that supported the lecture. The lecture and this symposium issue were managed with an efficiency and professionalism that made my participation effortless.

1. John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1037-39 (2010).

2. *Id.*

analysis reaches the height of scientific ignorance or simplicity, the Court may be acting upon ulterior motivations rather than scientific notions.

A few discrete examples in discrimination law suggest that the Supreme Court is not ignorant of science at all, but rather intuitively understands the complexities of causation, and that discrimination can occur even in the absence of an individual's conscious desire to do racial harm. Thus, when the Court in other instances acts contrary to such principles, it is not based primarily on a misunderstanding of science, but on a fear that following scientific principles to their logical legal conclusions would pose profound practical changes.<sup>3</sup> In particular, a more robust concept of causation and intent would place many aspects of the national status quo at risk. One scholar recently suggested that modern science may also pose a threat to the judiciary itself, as science is increasingly treated as the arbiter of truth.<sup>4</sup> Thus, the maintenance of our intent and causation standards may be value based—rather than scientific or Enlightenment based—decisions to protect power and privilege.

If legal standards perpetuate Enlightenment concepts, not because the judiciary continues to believe in their validity, but for ulterior reasons, scientific revelation alone is unlikely to spur legal reform. This Article posits that, as a general principle, law rarely takes its final form based simply on the truth of scientific principles or the comprehension of them. Rather, laws, like the very concepts of causation and intent that Powell addressed in the Childress lecture, are the result of a multitude of forces and motivations, many of which are not always obvious. Just as courts might misplace their attention when they focus on people's conscious motivations as a measure of whether discrimination has occurred, we too might misplace our attention if we assume that scientific understandings are the motivations behind legal standards, even when those standards are consistent with some set of past or current scientific principles.

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3. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292, 297 (1987) (rejecting petitioner's claim, in part, because it "extends to every actor in the Georgia capital sentencing process" and "challenges decisions at the heart of the State's criminal justice system").

4. Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1373 (2009) (internal citations omitted):

Science is popularly associated with such positive values as truth, certainty, goodness, enlightenment, progress, and so on. Law's relationship to science has always been somewhat uneasy. While law has often held high hopes that science would prove effective at resolving disputes without ambiguity, this very potential to be truth-producer is a cause for understandable anxiety on the part of the law. As we have suggested elsewhere, the *CSI* effect would seem to embody the law's anxiety about the threat to its legitimacy as a truth-producing institution posed by a rival truth-producing institute called "science."

Our legal standards themselves are part of a larger system that has reciprocal effects on itself. In fact, it may be the Court's hypersensitivity to the practical results of its decisions that explains its standards more than any appreciation of or disregard for scientific principles.<sup>5</sup> This does not suggest that science is irrelevant to law, but that in those highly contested areas of the law, such as discrimination, science sometimes plays only a tangential role. Although societies at the time of the Enlightenment may have made an earnest attempt to make law scientific,<sup>6</sup> one might query whether those who made law were motivated by a deep abiding adherence to science or truth. Surely many were, but it is likewise possible that the order and consistency a universal set of law could bring to society was the primary goal rather than any affinity for science itself.

Those who must live and work in the world today know all too well that law reflects our experiences as much as it shapes them.<sup>7</sup> Thus, the law cannot be reduced to a purely scientific or intellectual endeavor. Rather, the law is a manifestation of our struggle to order society in a way that we collectively (or those in power) see fit. In short, law is goal-oriented. If scientific developments are consistent with our collective goals, then science can rise to the forefront of change. Yet, insofar as the goal precedes the science, science may be but a tool or subsequent rationalization for the legal system we desire. Likewise, if science is inconsistent with our goals, it runs the risk of being cast aside, derided, or questioned as to its relevance. If the foregoing is true, securing the judicial reforms that Professor Powell suggests cannot be accomplished by scientific revelation or education alone. Legal reform will be dependent on the ability to articulate a vision of society that resonates with our citizenry. Science can then reinforce that vision as sound, adding support for existing political predispositions.

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5. See Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 536–37 (2006) [hereinafter Black, *The Contradiction*] (examining the Court's discrimination jurisprudence as a capitulation to the status quo); Robert J. Delahunty, "Constitutional Justice" or "Constitutional Peace"? *The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 54 (2008) (concluding that the Court's discrimination cases, at least those by Justice Powell, were and are attempts to secure constitutional peace rather than arrive at consistent constitutional principles); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 260–68 (1979) (describing the internal resistance on the Court to any decision that would provide sweeping remedies or widespread desegregation in the North).

6. See generally PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 47 (Cambridge U. Press 2002) (indicating that for John Austin and Jeremy Bentham the law itself could become a science).

7. See, e.g., Heather Hughes, *Counterintuitive Thoughts on Legal Scholarship and Secured Transactions*, 55 BUFF. L. REV. 863, 869–77 (2007) (discussing the reciprocal relationship between law and culture).

Rather than tackling the issue of how best to achieve legal reform, this Article simply points out a few examples that suggest that science alone will not be the key to reform. To lay the foundation for these examples, this Article first briefly recounts Professor powell's critique of modern intent and causation standards. Second, this Article reviews some key cases in antidiscrimination law that demonstrate that our judiciary understands far more about causation and intent than its more recent opinions might suggest. At times, the judiciary has adopted standards and engaged in analysis that is entirely consistent with complex systems-based causation and the limited capacity of individuals' self-knowledge. Third, this Article will explore why the judiciary has strayed from these understandings more recently and posits that the Court fears the practical change that appropriate legal standards would bring. In particular, discrimination standards that base liability on subconscious bias or the effect of one's action would pose significant threats to various aspects of the racial status quo, including housing patterns, school district policies, the criminal justice system, and various other structures that advantage majoritarian interests. Alleviating the requirement that plaintiffs demonstrate linear causation would pose the same threat. Finally, this Article points out that the fears of change and science are not necessarily unique to antidiscrimination law, but they appear to be a characteristic that regularly manifests itself in legal systems. Thus, it is an inherent problem that cannot be entirely avoided.

#### I. PROFESSOR POWELL'S CRITIQUE OF THE ENLIGHTENMENT AND LAW

By "individuality" or "individual decision-making," powell refers to the Enlightenment notion that individuals have knowledge of self and are fully conscious of their decision-making process.<sup>8</sup> Thus, people can make rational decisions based entirely on their conscious thoughts, free of outside biases, irrelevant factors, or illogical precepts. Professor powell concludes that today's intentional discrimination standard and its evidentiary requirement of conscious racial motivations grow out of the Enlightenment view of individual thought processes.<sup>9</sup> As for causality, Professor powell refers to classical physics and the Newtonian concept of linear causation, which posit that change

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8. powell & Menendian, *supra* note 1, at 1083–84.

9. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) (overturning disparate impacts "only if that impact can be traced to a discriminatory purpose"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (setting the standard for evaluating neutral policies as "whether invidious discriminatory purpose was a motivating factor"); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("A purpose to discriminate must be present."). *But see* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288–91 (1997) (asserting that conceptualizing intent as racial purpose or animus is an overstatement of the intent standard).

occurs as a result of objects colliding with one another.<sup>10</sup> In effect, the collision of physical objects alone is the cause of events.<sup>11</sup> Professor powell likewise finds that our current law's requirement of evidence of direct causation is a reflection of the Enlightenment's understanding of the world.<sup>12</sup>

Professor powell then discusses modern science and finds that its developments have undermined the premises behind and/or the accuracy of both of the foregoing Enlightenment concepts.<sup>13</sup> First, modern social science demonstrates that individuals only have access to a small percentage of their mental processes.<sup>14</sup> Most of the information that we absorb and rely on in making decisions actually occurs at the subconscious level.<sup>15</sup> Our brains sort, evaluate, and respond to massive amounts of information without any conscious thought on our part.<sup>16</sup> Ultimately, conscious thinking occurs after the brain has already sorted and evaluated the information.<sup>17</sup> Sometimes we alter our thinking or reject the conclusions our subconscious puts forward, but this thinking is still generally a response to a mental process that has already occurred. In most other instances, however, individuals fail to appreciate that any subconscious processes have already occurred and that they are simply acting upon them.<sup>18</sup>

Second, modern science demonstrates that complex systems, rather than just individual objects colliding with one another, operate to cause events.<sup>19</sup> Events that we might perceive as the result of a single force are actually the result of multiple forces and variables, all of which are, in some sense, the cause of the event we perceive.<sup>20</sup> Moreover, the complex interaction of these forces can actually result in causation loops by which an object has an effect

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10. For a brief discussion of Newtonian causation, see Troyen A. Brennan, *Casual Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469, 478 (1987).

11. *Id.*

12. powell & Menendian, *supra* note 1, at 1069–71.

13. Professor powell is not alone in this critique. Others have demonstrated the difficulty that the Newtonian concept of causation has presented in torts, in particular, toxic torts. *See, e.g.*, Brennan, *supra* note 10, at 490; A. Dan Tarlock, *Who Owns Science?*, 10 PENN ST. ENVTL. L. REV. 135, 136, 142 (2002).

14. Implicit bias is a concept that explains this phenomenon. For a thorough discussion of implicit bias, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* Stephen W. Kercel, *Biological Complexity: An Engineering Perspective*, in SYSTEMS BIOLOGY: PRINCIPLES, METHODS, AND CONCEPTS 139, 143–55 (Andrzej K. Konopka ed., 2007).

20. *See id.*

upon itself.<sup>21</sup> In short, causation cannot be reduced to single independent actions or collisions, but is rather the result of a complex set of factors and interactions.

Professor powell argues that our legal systems, however, have yet to account for these developments and remain mired in traditional Enlightenment concepts.<sup>22</sup> This failure prevents our legal system from appropriately identifying and addressing pressing social issues, including discrimination and inequality. The issue that Professor powell does not directly address, yet is central to any reform of our modern jurisprudence, is why the law is inconsistent with science. Professor powell did not explicitly attribute this flaw to any motivation on the part of those who create legal systems. Rather, he seemed to imply that the flaw results from a simple failure of lawmakers and courts to evolve in their thinking. In short, they continue to see the world in terms of traditional Enlightenment concepts. If this is the case, one might presume that the solution is simply to correct their misunderstanding. But if this is not the case, the appropriate strategy for addressing the flaws in current law will be far more complex.

## II. SCHOOL DESEGREGATION'S NUANCED AND VACILLATING APPROACH TO INTENT AND CAUSATION

A historical review of key school desegregation and discrimination cases suggests that the Court is not simply scientifically ignorant. First, the Court's modern intent and causation standards have not been uniformly or entirely inconsistent with science. The Court's discrimination standards, although currently reflecting Enlightenment notions, have vacillated through time. At times, the Court has acknowledged or adopted frameworks that are consistent with modern developments in science, only to later narrow its intent and causation standards in ways that appear consistent with Enlightenment thinking. Second, when scientific inconsistencies have arisen, the Court has been motivated, at least on some occasions, by the practical effect that modernizing the law would have.

The Court's evolution of school desegregation doctrine provides a prime example of both the vacillation in standards and external pressures affecting

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21. *Id.*

22. powell & Menendian, *supra* note 1, at 1083; *see also* Brennan, *supra* note 10, at 478; Tarlock, *supra* note 13, at 138; Richard K. Sherwin, *Foreword, Law/Media/Culture: Legal Meaning in the Age of Images*, 43 N.Y.L. SCH. L. REV. 653, 655 (1999):

The belief that truth and justice are 'out there,' just waiting to be 'discovered,' is of course only one among numerous ideas handed down to us from the European Enlightenment that postmodern thought has rendered problematic. Notions of the unified self, universalistic reason, and the linear logic of causation are others.

the Court's standards. The Court's decision in *Brown v. Board of Education*<sup>23</sup> and the decisions that followed it for two decades required neither intent nor causation.<sup>24</sup> The mere existence of segregated schools was enough to warrant judicial intervention.<sup>25</sup> Intent and causation did not begin to play a significant role in desegregation law until the mid-1970s.<sup>26</sup> Even then, the Court proceeded with caution in what was required to establish intent and causation.<sup>27</sup> But once the Court made this shift, it repeatedly narrowed its concept of intent and causation, ultimately reaching the current standards that are consistent with Enlightenment concepts.<sup>28</sup>

Science, however, was largely irrelevant to this vacillation. Instead, external social events, as well as the Court's own sense of its role in shaping these events, seemed to drive the Court. During the 1960s and early 1970s, both the Court and the federal government took the charge to combat racial discrimination seriously.<sup>29</sup> The most aggressive support for school desegregation actually came a decade and a half after *Brown* in *Green v. New Kent County*.<sup>30</sup> In *Green*, the Court was adamant in expressing the imperative of desegregation and imposed unrelenting standards for achieving it.<sup>31</sup> The Court "commanded school boards to bend their efforts" towards the principles that *Brown* established,<sup>32</sup> and charged school districts with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>33</sup> But most important was *Green*'s rejection of the relevance of schools' preferences and hesitations.<sup>34</sup> Repudiating its own past conciliatory stance, the Court

23. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954).

24. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 18 (1971); *Green v. New Kent County*, 391 U.S. 430, 437 (1968); see also john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 768–71 (1996) (finding that the intent standard marked a shift away from *Brown*'s focus on the harm of segregation and that nothing in the Constitution required this shift); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108–11 (1989) (arguing intent was irrelevant prior to *Washington v. Davis*).

25. *Swann*, 402 U.S. at 17–18.

26. Ortiz, *supra* note 24, at 1111–13.

27. *Id.* at 1112.

28. *Id.* at 1115–17.

29. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended by 42 U.S.C. § 2000e (2006)); see also GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 1–5, 15, 22–23 (1969) (discussing the shift toward serious efforts to desegregate schools).

30. 391 U.S. 430 (1968).

31. *Id.* at 437–38.

32. *Id.* at 438.

33. *Id.* at 437–38.

34. See *id.* at 438, 440.

wrote: “‘The time for mere ‘deliberate speed’ has run out,’ . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”<sup>35</sup>

While the Court was articulating its intent to force school desegregation, the federal government was likewise applying pressure. Congress passed the Civil Rights Act of 1964, prohibiting discrimination in various aspects of public life, including, but not limited to, employment, schools, and public accommodations.<sup>36</sup> Congress also placed money behind this task, extending new funds to various institutions and conditioning the receipt of those funds on nondiscrimination.<sup>37</sup> The funds for schools came in the form of the Elementary and Secondary Education Act,<sup>38</sup> which provided supplemental funds to improve the education of low-income students.<sup>39</sup> This money, in effect, became the carrot to entice schools to desegregate.<sup>40</sup> With the combined effort of the federal government, federal courts, and private litigators and advocates, school desegregation began to occur in earnest and expand geographically.<sup>41</sup>

Of course, school desegregation did not occur in a vacuum. An entire cultural shift had occurred during the 1950s and 1960s, as African-Americans pressed their case for equality through massive political protests and demonstrations.<sup>42</sup> Likewise, national television broadcasted the sheer brutality of discrimination and segregation, turning public sentiment against the ways of the past and toward change.<sup>43</sup> It is against this legal and social background that one must evaluate and understand the Court’s approach to causation and individual decision-making.

As indicated above, intent and causation were largely irrelevant during the period when racial transformation was at its height. Only when the nation and courts began to lose their fervor did these concepts become important and begin to shift. In the first school desegregation case to move toward the modern standards, *Keyes v. School District No. 1*,<sup>44</sup> the Court took up both the

35. *Swann*, 402 U.S. at 438–39.

36. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended by 42 U.S.C. § 2000e (2006)).

37. *Id.*

38. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 at § 201 (indicating the purpose and policy was to fund school districts “serving areas with concentrations of children from low-income families to expand and improve their educational programs”).

39. *Id.*

40. See ORFIELD, *supra* note 29, at 24, 47, 76–77.

41. *Id.* at 1, 24–27, 46–47, 76–78.

42. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 523–38 (2001).

43. *Id.* at 595–96.

44. 413 U.S. 189 (1973).



issues of intent and causation.<sup>45</sup> The Court's holding, however, reflected a far more nuanced approach than is currently found in the Court's jurisprudence.

*Keyes* ushered in the modern intentional discrimination standard,<sup>46</sup> but the Court's articulation of intent in *Keyes* was far less simplistic than what is found in current cases. Moreover, for school desegregation law, *Keyes* was important not just for the intent standard, but also for the presumption of intent that it created.<sup>47</sup> While the Court in *Keyes* distinguished between intentional and *de facto* segregation, which later created barriers to integrating schools,<sup>48</sup> the Court was willing to presume that intentional discrimination existed and was the cause of inequality even where direct evidence was lacking.<sup>49</sup> This presumption of intent gave litigators an important tool with which to extend desegregation remedies longer and in more aspects than they otherwise might have been able to.<sup>50</sup> In explaining how the presumption of intentional discrimination would work, the Court wrote that:

[I]t is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions. The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."<sup>51</sup>

In *Keyes*, the Court framed its analysis in the language of intent, but its willingness to presume the existence of discrimination even in the absence of facial or explicit discrimination is partially at odds with an intent standard based on transparency of the mind and conscious decision-making. In fact, the Court suggested that conscious motivations or intent are not entirely controlling. First, the Court recognized that decisions and motivations are

45. *Id.* at 215, 227.

46. *Washington v. Davis*, 426 U.S. 229, 240 (1976) (indicating that *Keyes* had created the intent standard which was now applicable to other equal protection claims as well).

47. *See, e.g., NAACP, Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960, 966 (11th Cir. 2001); *Lockett v. Bd. of Educ. of Muscogee County*, 111 F.3d 839, 843 (11th Cir. 1997).

48. *powell, supra* note 24, at 771.

49. *Keyes*, 413 U.S. at 227 (failing to find direct evidence of discrimination and explaining that "the presumption is strong that the school board, by its acts or omissions, is in some part responsible").

50. *See, e.g., NAACP*, 273 F.3d at 962–63 (discussing a desegregation plan that extended for decades).

51. *Keyes*, 413 U.S. at 210–11.

multidimensional.<sup>52</sup> Race need only be “among the factors” and “to any degree” motivate one’s action to be impermissible.<sup>53</sup> Second, the Court did not narrowly construe intent but instead indicated that the meaning or intent behind a decision cannot be assessed from a single moment or thought in time.<sup>54</sup> Likewise, impermissible motives may be subtle and emanate from the cultural and historical context in which one makes a decision rather than from a conscious motivation to discriminate. Third, the Court indicated that, although actions might be neutral on their face and in the conscious mind of the decision maker, this alone does not render an action free from bias and discrimination.<sup>55</sup>

This concept and presumption of intent produced significant consequences in subsequent cases, becoming the tool to hold districts accountable for any racial disparities that might exist. The past intent to segregate schools, however far removed, was sufficient to justify the later presumption of intentional discrimination in every aspect of a school system.<sup>56</sup> Thus, even when a school district had begun integrating its school buildings a decade ago, a court would presume that any continuing racial disparities in areas such as facilities, extra-curricular activities, discipline, ability grouping, and other areas were the result of current or prior intentional discrimination.<sup>57</sup> If a

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52. See *id.* at 210 (implicitly acknowledging that decisions and actions are motivated by multiple factors); see also *id.* at 234 n.16 (recognizing the complexity of motivations that underlie school board decisions) (Powell, J., dissenting).

53. *Id.* at 210.

54. *Id.* (“We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less ‘intentional.’”); *id.* at 211 (“[A] connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist.”).

55. *Id.* at 212:

‘Racially neutral’ assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a ‘loaded game board,’ affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

56. See, e.g., *NAACP, Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960, (11th Cir. 1997) 966 (“Since the Board operated *de jure* segregated schools in the past, there is a presumption that any current racial disparities in these areas are the result of its past unlawful conduct.”).

57. *Id.* (“In evaluating the Board’s fulfillment of [its obligation to end segregation], the . . . district court must examine six areas: (1) student assignments; (2) facilities; (3) faculty; (4) staff; (5) transportation; and (6) extracurricular activities.”).

school district could not disprove the presumption, a court would require it to remedy the disparity.<sup>58</sup>

The Court's analysis in *Keyes* similarly strayed from Enlightenment notions of linear causation. First, the Court's general concept of causation included multiple factors interacting with one another. In this respect, it rudimentarily reflects the idea of complex systems causation. For instance, the Court recognized that the certain actions that a school might take, including school construction, creating attendance zones, and attempting to segregate, cannot occur independent of any number of other forces and factors.<sup>59</sup> The Court noted that seemingly independent actions actually occur in conjunction with other municipal policies such as housing and have interdependent effects on each other.<sup>60</sup> Moreover, the interaction of these policies combine to cause results greater than any single policy could. The combined effects are wide ranging, reaching beyond the immediate place and population at which the actions were directed.<sup>61</sup> Emphasizing this point, the Court wrote: "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods."<sup>62</sup> In short, school district actions, zoning board policies, and private choices operate in synergy with one another to produce varying levels of segregated or integrated schools.

Second, the presumption of intent included a presumption of causation, as the Court presumed that current racial disparities are the result of past or current discrimination even when no evidence directly connects the two.<sup>63</sup> The Court was willing to make this presumption because of its broad concept of causation. The Court indicated that even in the context of a single school at a single point in time the racial patterns at the school cannot always be reduced to single causative acts.<sup>64</sup> In the context of the school district in *Keyes*, the Court emphasized that policies in one area of the city necessarily produced

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58. *Id.* at 965 ("Until these goals [of desegregation] are achieved, the Supreme Court has ordered district courts to supervise the desegregative efforts of school boards that formerly practiced *de jure* segregation.") (citing *Lockett v. Bd. of Educ. of Muscogee County*, 111 F.3d 839, 842 (11th Cir. 1997)).

59. *Keyes v. Sch. Dist.*, 413 U.S. 189, 201–03 (1973) (noting that a school board's creation of attendance zones and site selection of new schools has an impact neighboring schools).

60. *Id.* at 202 (noting a school board's decisions has an impact on the quality of that particular school which, in turn, influences where home buyers choose to locate).

61. *Id.*

62. *Id.* (quoting *Swann v. Mecklenberg County*, 402 U.S. 1, 20–21 (1971)).

63. *See, e.g., NAACP, Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960, 966 (11th Cir. 2001);.

64. *See supra* notes 48–51 and accompanying text.

butterfly effects elsewhere in the city.<sup>65</sup> The Court understood all existing segregation to be related in some way to current or past intentional segregation, even if that intentional act could not be precisely identified.<sup>66</sup> Given this concept of causation and the butterfly effect that a school board's action can have, the Court imposed a unique standard of causation, whereby the school district would have to rule out the possibility that its actions played a role in segregation.<sup>67</sup> In effect, the Court understood that, because school segregation results from a complex system rather than simple linear causation, isolating the causal role of a school district's action is difficult. Yet, insofar as school districts are part of the system, they almost necessarily play a causative role.<sup>68</sup>

In addition, the Court refused to limit the causation to a single moment in time. Rather, it emphasized that past acts can have lingering effects through time. As the Court explained,

[A] connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, . . . [a school board can] rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the . . . schools.<sup>69</sup>

Such statements reveal that although the Court may not have developed a concept of causation that fully reflects modern scientific developments, its concept of causation was broader than that of classical linear causation.

Yet, regardless of how the Court's intent and causation concepts correlate with science or the Enlightenment, the Court's explanation for its standards reveals that science is not a driving force. Because both proving and disproving causation and intent in the midst of complex circumstances is difficult, the Court indicated that it was simply forced to choose between

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65. *Keyes v. Sch. Dist.*, 413 U.S. 189, 204 (1973).

66. *Id.* at 210–11. The Court noted that: (1) where a substantial portion of the school is intentionally segregated, the school carries the burden of proving that subsequent or other segregated schooling did not result from intentionally segregative acts; and (2) past segregative acts and present segregation may be connected even when not apparent. *Id.* Therefore, the Court must closely examine the situation before concluding that the connection between past segregative acts and present segregation does not exist. *Id.*

67. *Id.* at 208 (noting that a finding of intentionally segregative actions creates a presumption that other segregated schooling is also intentional and shifts to school authorities the burden to disprove this presumption); *id.* at 211 (“[I]f respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.”).

68. *See id.* at 214 (indicating that it is enough that the school board's actions were “factors in causing the existing condition of segregation in these schools”).

69. *Id.* at 211.

favoring the plaintiffs or the defendants. In *Keyes*, the aforementioned history and the ongoing effort to desegregate, rather than science or any other principle, played the decisive role. Grounding its reasoning in the historical context in which the case arose, the Court concluded that “‘fairness’ and ‘policy’ demand no less” than a presumption against the school board in regard to intent and causation.<sup>70</sup> In particular, the Court wrote:

This burden-shifting principle is not new or novel. There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, “is merely a question of policy and fairness based on experience in the different situations.” In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which “fairness” and “policy” require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann*, we observed that in a system with a “history of segregation,” “where it is possible to identify a ‘white school’ or a ‘Negro school’ simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.” Again, in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation “thrust(s) upon the School Board the burden of justifying its conduct by clear and convincing evidence.” Nor is this burden-shifting principle limited to former statutory dual systems. Indeed, to say that a system has a “history of segregation” is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.<sup>71</sup>

This understanding and presumption of intent and causation, however, has largely been confined to school desegregation. And, even in school desegregation, the Court later eroded the presumption and effectively required plaintiffs to affirmatively demonstrate intent and causation.<sup>72</sup> This erosion,

70. *Keyes*, 413 U.S. at 214.

71. *Id.* at 210–11 (citations omitted).

72. *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992):

But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation being remedied. And the law need not proceed on that premise. As the *de jure* violation becomes more remote in time and these demographic changes

however, occurred slowly over time. In fact, lower courts initially resisted.<sup>73</sup> In particular, they perceived any intent standard that focused on subjective, conscious motivations to be illogical.<sup>74</sup> In the immediate years following *Keyes*, the lower courts continued to apply an objective test that focused not on individual motivations, but on the natural and foreseeable consequences of specific actions.<sup>75</sup> Only later, explicit rejections of this approach by the Supreme Court unified the judiciary's approach to intent.<sup>76</sup> Interestingly,

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intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith. In light of its finding that the demographic changes in DeKalb County are unrelated to the prior violation, the District Court was correct to entertain the suggestion that DCSS had no duty to achieve system-wide racial balance in the student population. It was appropriate for the District Court to examine the reasons for the racial imbalance before ordering an impractical, and no doubt massive, expenditure of funds to achieve racial balance . . . .

Missouri v. Jenkins, 515 U.S. 70, 101–02 (1995) (requiring evidence not just of intentional discrimination causing an effect on African-American achievement but also evidence of the precise “incremental effect” before allowing a remedy and focusing on “external factors” as explanations for African American achievement).

73. See *United States v. Bd. of Sch. Com'rs*, 573 F.2d 400, 413 (7th Cir. 1978) (advocating for use of an objective presumption of segregative purpose because a subjective test is “impossible to apply”).

74. See, e.g., *United States v. Bd. of School Com'rs*, 573 F.2d 400, 412–13 (7th Cir. 1978); see also *Hart v. Cmty. Sch. Bd. of Educ.*, 512 F.2d 37, 50 (2d Cir. 1975). The Second Circuit wrote, “To say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions.” *Id.* Similarly, the Sixth Circuit held “it would be difficult, and high impossible, for a district court to find a school board guilty of *de jure* segregation, unless the court is free to draw an inference of segregative intent or purpose from a pattern of official action or inaction which has the natural, probable and foreseeable result of increasing or perpetuating” a racially disparate impact. *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1047 (6th Cir. 1977).

75. *Oliver v. Mich. State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974) (“A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials’ action or inaction was an increase or perpetuation of public school segregation.”); see also *Morgan v. Kerrigan*, 509 F.2d 580, 588 (1st Cir. 1974) (noting that a “pattern of selective action and refusal to act can be seen as consistent only when considered against the foreseeable racial impact of such decisions”); *United States v. Sch. Dist. of Omaha*, 521 F.2d 530, 535–36, 548 (8th Cir. 1975) (overturning a district court that had failed to presume intent based on the natural, probable and foreseeable consequences of the defendant’s actions); *Hart*, 512 F.2d at 49–50. In *Hart*, the court used natural and foreseeable consequences to establish intent and dismissed the notion that *Keyes* had distinguished between “intentional acts of school authorities reasonably foreseeable as effecting segregation but without specific racial motive, and acts discriminately racial in motive. . . . We do not think that the Supreme Court has said that intent may not be established by proof of the foreseeable effect on the segregation picture of willful acts.” *Id.*

76. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979); *Dayton v. Brinkman*, 443 U.S. 526, 541 (1979).

however, even the Court initially expressed ambivalence towards a motivation-based intent standard—concluding that although the district and appellate courts applied the wrong standard—it could not “fault” them when they “drew ‘the inference of segregative intent from the . . . defendants’ failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance.’”<sup>77</sup> Thus, both the Supreme Court and the lower courts have expressed varying degrees of willingness to conceptualize and apply the intent standard in a way that is consistent with the Enlightenment’s understanding of individual self-awareness in decision-making.

Regardless of how one reads *Keyes*, the case demonstrates that neither causation nor intent were quite as simple in the judiciary’s mind as one might today think. Only in later cases did a nuanced approach to intent and causation disappear from the Court’s analysis and take on meanings more consistent with the Enlightenment.<sup>78</sup> That this disappearance occurred, however, is not in doubt. Thus, this Article next questions *why* the Court consistently narrowed intent and causation in subsequent years, notwithstanding scientific developments that would dictate otherwise.

### III. ULTERIOR MOTIVES FOR INTENT AND CAUSATION STANDARDS?

The early years of desegregation reflect the Court adopting standards that challenged various aspects of the status quo.<sup>79</sup> As desegregation expanded, however, the realization of how structurally engrained segregation and discrimination are in our country also expanded.<sup>80</sup> Thus, desegregation posed a much larger challenge to the status quo than may have initially been perceived, and the Court’s willingness to confront this challenge began to wane.<sup>81</sup> After taking aggressive stances towards segregation in cases like *Green* and *Swann*, the Court shifted its approach and limited plaintiffs’ ability to challenge segregation and discrimination.<sup>82</sup> The Court primarily achieved this through the intent standard.<sup>83</sup>

77. *Columbus Bd. of Educ.*, 443 U.S. at 463, n.12; see also *Dayton*, 443 U.S. at 539.

78. See David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753, 787 (1993) (describing the flexibility of the causation schema).

79. Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 312, 326 (2008) [hereinafter Black, *A Framework*].

80. Donald S. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post De-Segregation Society*, 48 OHIO ST. L.J. 117, 120–21 (1987).

81. Black, *A Framework*, *supra* note 79, at 315, 326.

82. *Id.* at 307.

83. *Id.* at 306.

The corollary result of this withdraw from desegregation and antidiscrimination was to protect the interests of the status quo.<sup>84</sup> And this concern, rather than an adherence to a set of principles, scientific or otherwise, largely explains the Court's decisions during the 1970s and 1980s. Time and again, the Court modified previous progressive decisions in ways that accommodated values associated with the status quo.<sup>85</sup> Even Justice Powell, who few would characterize as liberal, hinted at as much. In *Keyes*, he foresaw how the intent standard might be used to bring an end to desegregation and argued that far more was at stake in the case than a reasoned debate over intent.<sup>86</sup> He essentially accused the majority of manipulating its pre-established desegregation standards to produce a result in the instant case that was more palatable.<sup>87</sup> He wrote:

I can discern no basis in law or logic for holding that the motivation of school board action is irrelevant in Virginia and controlling in Colorado. It may be argued, of course, that in *Emporia* a prior constitutional violation had already been proved and that this justifies the distinction. The net result of the Court's language, however, is the application of an *effect* test to the actions of southern school districts and an *intent* test to those in other sections, at least until an initial *de jure* finding for those districts can be made. Rather than straining to perpetuate any such dual standard, we should hold forthrightly that significant segregated school conditions in any section of the country are a prima facie violation of constitutional rights.<sup>88</sup>

He further argued that the possibility that *de facto* segregation is happenstance is no greater than the possibility that consistently all-white juries is happenstance, writing: "it taxes our credulity to say that *mere chance* resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. *The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.*"<sup>89</sup>

Ultimately, Justice Powell suggested there was no explanation for the intent standard other than the Court's willingness to devalue the interests of blacks in favor of limiting the impact on white enclaves in the north.<sup>90</sup> He wrote, "[I]f our national concern is for those who attend [segregated] schools, rather than for perpetuating a legalism rooted in history rather than present

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84. *Id.*

85. *Id.* at 326.

86. *Keyes v. Sch. Dist.*, 413 U.S. 189, 224, 235 (1973).

87. *Id.* at 231, 233.

88. *Id.* at 231–32.

89. *Id.* at 232 (quoting *Hernandez v. Texas*, 347 U.S. 475, 482 (1954)).

90. *See id.* at 218–19.



reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.”<sup>91</sup>

The tension between the status quo and remedying discrimination became even more evident in later cases. Just two years after instituting the intent standard in *Keyes*, the Court in *Milliken v. Bradley*<sup>92</sup> narrowed the remedy that would be available to plaintiffs even if they proved that a school district had engaged in intentional segregation.<sup>93</sup> The *Milliken* Court was faced with balancing the need for a remedy to intentional segregation against the interests of the status quo and whites who fled from minority schools.<sup>94</sup> The facts were unambiguous: “Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.”<sup>95</sup> Based on state’s segregative action and the fact that anything short of a comprehensive metropolitan desegregation plan would fail, the district and appellate courts had found that the remedy must be an interdistrict one, including all of the metropolitan area’s school districts.<sup>96</sup>

While agreeing that the school district was *de jure* segregated,<sup>97</sup> the Supreme Court was concerned that providing an interdistrict would unfairly disturb the surrounding white enclaves, their school boundaries, and ultimately “alter the structure of public education in Michigan.”<sup>98</sup> In fact, historical documents reveal that some members of the Court were particularly concerned with white public opinion, which “opposed forced integration,” and kept that opposition “in mind wherever possible.”<sup>99</sup> The Court’s prior decisions regarding the presumption of discrimination, particularly given that plaintiffs

91. *Keyes*, 413 U.S. at 219; see also WOODWARD & ARMSTRONG, *supra* note 5, at 319–20 (providing a more lengthy explanation for Powell’s personal objections to the distinction and the earlier, more caustic versions of his opinion).

92. *Milliken v. Bradley*, 418 U.S. 717 (1974).

93. *Id.* at 752–53.

94. *Id.* at 763 (White, J., dissenting) (“[D]eliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State.”).

95. *Bradley v. Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971).

96. *Id.* at 594–95; *Bradley v. Milliken (Bradley II)*, 484 F.2d 215, 241, 244–45, 249–50 (6th Cir. 1973).

97. *Milliken*, 418 U.S. at 738 n.18.

98. *Id.* at 742–43; WOODWARD & ARMSTRONG, *supra* note 5, at 341 (noting that Burger believed “[i]t was unfair to punish [the suburbs] for it by involving them in any city-suburb desegregation scheme”). Some members of the Court, however, felt that Burger’s early drafts of the opinion shifted the balance too far in favor of the white suburbs, and they forced a mellowing of the decision as a result. *Id.* at 341–42.

99. WOODWARD & ARMSTRONG, *supra* note 5, at 323.

in the instant case had already established themselves to be the victims of local and state discrimination, could have warranted an interdistrict remedy for the segregation,<sup>100</sup> but the Court instead shifted the burden of persuasion to the plaintiffs.<sup>101</sup> That no remedy was available without an interdistrict remedy was irrelevant to the Court.<sup>102</sup> Rather than effectuate a remedy, the Court narrowed the import of its prior holdings so as to protect suburban white enclaves from the judicial interposition of interdistrict desegregation.<sup>103</sup> Thus, although an all-black school district existed in the city as a result of *de jure* segregation and whites fled to the suburbs to avoid desegregation,<sup>104</sup> African-American children were left with no desegregation remedy to their proven constitutional violation of segregation.<sup>105</sup> In short, the cost of that remedy was simply too high for the status quo and, hence, the Supreme Court to accept.<sup>106</sup>

These same types of challenges to the status quo have occurred outside the school desegregation context as well, and the Court has responded similarly. Moreover, the Court's motivations have been far more transparent in other contexts. For instance, in addressing equal protection discrimination claims outside of the desegregation context, the Court indicated that a standard that focused more on effects than intent "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

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100. See, e.g., *Keyes v. Sch. Dist.*, 413 U.S. 189, 208 (1973) (adopting a presumption against racial imbalances).

101. *Milliken*, 418 U.S. at 738, 744–45. Chief Justice Burger, the author of *Milliken*, "believed it was time for a definitive new direction." WOODWARD & ARMSTRONG, *supra* note 5, at 341.

102. See *Milliken*, 418 U.S. at 745.

103. *Id.* at 741–44 (expressing that no tradition in public education was more deeply rooted than the value in local control and avoiding judicial oversight); see also *id.* at 768 ("[T]he Court fashions out of whole cloth an arbitrary rule that remedies for constitutional violations occurring in a single Michigan school district must stop at the school district line. Apparently, no matter how much less burdensome or more effective and efficient . . . the metropolitan plan might be, the school district line may not be crossed.").

104. *Id.* at 804–06 (Marshall, J., dissenting).

105. It is worth noting that this deference and balancing of interests against antidiscrimination was not always so. For instance, some scholars have described *Brown v. Board* as an effects case. Ortiz, *supra* note 24, at 1134. As the Supreme Court's opinion states, the basis for its finding was not the existence of intent but rather the effect or harm that segregation produced in children: the indelible specter of inferiority. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). Likewise, although *Keyes* drew the distinction of *de facto* versus *de jure* segregation, once *de jure* segregation was established, little deference was afforded toward white interests. Instead, the presumption became that racial imbalances warranted redress, unless defendants could show that they had little if anything to do with the imbalances or segregation. See *Keyes v. School Dist.*, 413 U.S. 189, 203–05 (1973).

106. *Milliken*, 418 U.S. at 741–44 (finding the cost of altering the educational structure, consolidation, transportation and financing to be too high of a burden).

to the poor and to the average black than to the more affluent white.”<sup>107</sup> Thus, the Court rejected an effects test.

These same types of concerns have occurred in the criminal context as well. There, even when intentional discrimination was demonstrated, other concerns have motivated the Court to simply elevate the standard even further. For instance, in *McCleskey v. Kemp*,<sup>108</sup> the Court’s previous standards would have dictated a judgment in favor of a death row petitioner, as the evidence showed that race was systematically a factor in the imposition of the death penalty in Georgia and the likelihood of a death sentence quadrupled when the victim was white rather than black.<sup>109</sup> The practical problem from the Court’s perspective was that the evidence was so comprehensive that, not only did it justify relief for McCleskey, it implicated the need for wide ranging reform in the criminal justice system.<sup>110</sup> As the Court wrote: “In its broadest form, McCleskey’s claim of discrimination extends to every actor in the Georgia capital sentencing process”<sup>111</sup> and “challenges decisions at the heart of the State’s criminal justice system.”<sup>112</sup> Thus, recognizing his claim would call into question the entire criminal justice system, as it is fraught with the same racial disparities and problems as the death penalty system that McCleskey challenged.<sup>113</sup>

To avoid this result, the Court simply narrowed the intent standard further.<sup>114</sup> The Court held that showing discrimination in death penalty sentencing overall is insufficient; the defendant must instead show his particular jury acted discriminatorily.<sup>115</sup> Moreover, the Court indicated that it would not infer from statistics, regardless of their reliability, that invidious discrimination was a factor in a particular case.<sup>116</sup> The Court in previous decisions had indicated that smoking gun evidence is unnecessary and rarely available, and that judges most often must make inferences of intentional discrimination from circumstantial and statistical evidence.<sup>117</sup> But the Court in *McCleskey* effectively demanded a smoking gun and ignored compelling, one-

107. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

108. 481 U.S. 279 (1987).

109. *Id.* at 286–87. This analysis included data from all of cases where the death penalty was or could have been imposed throughout the state, and it also included multiple factors that might play into a jury’s decision. *Id.* at 287.

110. See EDWARD LAZURUS, CLOSED CHAMBERS 207 (1998).

111. *McCleskey*, 481 U.S. at 292.

112. *Id.* at 297.

113. See *id.* at 292, 297, 312.

114. *Id.* at 292.

115. *Id.*

116. *McCleskey*, 481 U.S. at 297.

117. See *Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 266 (1977).

sided circumstantial and statistical evidence.<sup>118</sup> In short, the Court modified the intent standard and its evaluation of the evidence so as to protect the status quo even in the face of proven discrimination.

While far from providing a comprehensive evaluation of the Court's intentional discrimination jurisprudence, the foregoing cases provide compelling examples that suggest that far more than reasoned analysis and scientific assumptions undergird the Court's jurisprudence. At the very least, the Court is acutely concerned with the broader social ramifications of its decisions. With that said, it is worth recognizing that the problem of externalities affecting judicial standards is not unique to antidiscrimination law. Rather, the problem may pervade any area of the law where the social consequences run high.

As just one small example, tort law has struggled with how to redress emotional harms for over a century and questions of fact and science have been bound up in this issue.<sup>119</sup> But like antidiscrimination law, the struggle has been resolved based more on the presumed effects of any given standard than science or reason.<sup>120</sup> Insofar as emotional harms were not scientifically verifiable before the late twentieth century, courts refused to recognize plaintiffs' claims even though they could otherwise demonstrate a case of negligence.<sup>121</sup> The courts rejected the claims because they were more concerned with the possibility of compensating some plaintiffs who might not have actually suffered harm than they were with compensating deserving plaintiffs.<sup>122</sup> Moreover, the courts feared they would simply encourage undeserving plaintiffs to file claims.<sup>123</sup> Even when these practical concerns were later addressed by scientific developments, many courts nonetheless continued to bar these claims altogether while others simply narrowed the available claims for victims of negligent infliction of emotional harms or simply continued to reject their claims altogether.<sup>124</sup> In short, regardless of

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118. See, e.g., *McCleskey*, 481 U.S. at 308 n.29 (declining to make an inference that race played a role because although there was "the greatest likelihood that some inappropriate consideration may have come to bear on the decision," the expert could not say with "moral certainty what it was that influenced the decision") (internal citations omitted).

119. John Diamond, *Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45–47*, 16 VA. J. SOC. POL'Y & L. 141, 142 (2008). Even the Restatement (Third) of Torts struggled to compensate for emotional harm: "[A]lthough making many very significant and insightful contributions in the vast majority of its work, [the Restatement (Third) of Torts] struggles in its reformulation of the law of tort liability for mental distress." *Id.*

120. See, e.g., Black, *The Contradiction*, *supra* note 5, at 537 (arguing that, in recent discrimination cases, the Court has created its own "wide-reaching social justice policy").

121. See, e.g., *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896).

122. *Id.*

123. See *id.*

124. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989) (limiting the class of plaintiffs who could assert a claim of negligent infliction of emotional distress to those who are

science and the legal basis supporting the claims, courts have remained concerned with the potential wide-ranging expansion of liability that recognizing claims for emotional harm might create.

At least one distinction, however, seems to separate the Court's attention to externalities in antidiscrimination law from other areas of the law: the practical effects of antidiscrimination law go to the very core of the way society is structured and operates. Antidiscrimination law even speaks to our social and cultural norms. Thus, while all law has social effects, the effects of antidiscrimination law are often viewed with heightened concern. Moreover, this concern has been with antidiscrimination law for some time. Nothing suggests it will go away any time soon.

### CONCLUSION

In law and politics, the unfortunate truth is that being right is often far from enough to vindicate one's position. In the case of antidiscrimination law, this truth resonates even clearer. In regard to race and other issues of social justice, passions run high, and reason often takes a back seat. Too much is at stake with legal norms for it to be otherwise. With that said, reason, science, and justice are the most powerful tools that those seeking reform can wield. As Martin Luther King, Jr. remarked, "[T]he arc of the moral universe is long but it bends toward justice."<sup>125</sup> As such, this Article in no way means to suggest that advocates abandon their current course. Reason, science, and justice are on their side. This Article simply suggests that, if advocates wish to see victory in the shorter term, past experience suggests that they will also need history on their side.

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closely related to a physically injured victim and who were also present at the scene of the injury).

125. Martin Luther King, Jr., *Where Do We Go from Here?* (1967), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 245, 252 (James Melvin Washington ed., 1991).

