Justice Blackmun and Racial Justice

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Justice Blackmun is so well known for his pioneering work in support of a woman's right to choose an abortion that his other monumental contributions to the law seem to get lost. The struggle for racial justice is one area where Justice Blackmun's decisions have made a crucial, lasting impact. Justice Blackmun has written more than thirty opinions addressing problems of racial discrimination under the Constitution and federal civil rights statutes. His work ranges from his profound, eloquent conclusion in *Regents of the University of California v. Bakke* that "[i]n order to get beyond racism, we must first take account of race,"[1] to his innovative use of statistics and probability theory to shed light on discriminatory motive, to his passionate dissents from decisions he viewed as turning back the clock on civil rights.

Justice Blackmun's jurisprudence in the area of racial justice reflects consistent qualities of mind and heart: genuine empathy with and understanding of the plight of the disadvantaged; a strong sense of history and its relevance to current issues of racial fairness; a pragmatic, fact-oriented approach to judging; and an eloquence of expression that places him among the greatest of the Supreme Court's many gifted communicators.

A comprehensive review of Justice Blackmun's opinions and votes on issues of racial justice is not possible in this short Tribute. In the discussion below, I explore four themes that run through Justice Blackmun's racial justice opinions. I then focus upon his contributions to two key debates in civil rights law: the legality of race-conscious remedies and the significance of statistical evidence for proving discriminatory motive. Justice Blackmun's opinions in these two areas capture his influence upon the Court's, and the country's, thinking on issues of racial justice.

I. PERSPECTIVES

A. *The Real World*

Justice Blackmun's focus on the "real world" of the human beings affected

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1. 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.)

by Supreme Court decisions is well recognized.[2] One of the most famous expressions of this focus was Justice Blackmun's protest in *Beal v. Doe* against the Court's decision to uphold a State's denial of Medicaid funding for nontherapeutic abortions:[3]

> For the individual woman concerned, indigent and financially helpless . . . the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake."
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> . . . There is another world "out there," the existence of which the Court, I suspect, either chooses to ignore or fears to recognize.[4]

Justice Blackmun's approach to claims of discrimination reflects this "real world" focus. His portraits of the plight of individuals who suffer from poverty, racism, sexism, and oppression are vivid. For example, in *Wards Cove Packing Co. v. Atonio*,[5] where the Supreme Court shifted the burden of proof to make it more difficult for a plaintiff to sustain a claim of discrimination under Title VII of the Civil Rights Act of 1964,[6] Justice Blackmun wrote:

> The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which . . . resembles a plantation economy. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there.[7]

Justice Blackmun's racial discrimination opinions also remind us that racial oppression of minorities, while less blatant than in the past, still thrives. In dissenting from the Court's invalidation of a Richmond minority business

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2. Professor Pamela Karlan writes: "No other Justice sitting on the Court today, and few in its history, has done more to sear the conscience of the people, or his or her Brethren, with the plight of 'the unfortunate denizens of that [other] world, often frightened and forlorn.'" Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L. REV. 527, 527 (1993) (quoting Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 541 (1990) (Blackmun, J., dissenting)); *see also* Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 729–31 (1983) (observing that images of individual suffering have helped guide Blackmun's doctrinal formulations).

3. 432 U.S. 438 (1977). Although *Beal* did not explicitly address a claim of race discrimination, it was undisputed that the denial of funding fell "with great disparity upon women of minority races." *Id.* at 459 (Marshall, J., dissenting).

4. *Id.* at 462–63 (Blackmun, J., dissenting).

5. 490 U.S. 642 (1989).

6. 42 U.S.C. § 2000e (1988). Congress substantially overturned *Wards Cove* with the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1072, 1074 (codified at 42 U.S.C. § 2000e-2(k) (Supp. IV 1992)).

7. 490 U.S. at 662 (Blackmun, J., dissenting) (citation omitted).

preference program, he referred to "those who have suffered the pains of economic discrimination in the construction trades for so long,"[8] and strongly criticized the Court's failure to recognize the existence of discrimination today: "[T]his Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation."[9] Similarly, in *Rose v. Mitchell*, a case alleging racial discrimination in the selection of a grand jury foreman, he pointed out: "[R]acial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious."[10]

Justice Blackmun's role in calling attention to the continuing reality of racial discrimination and its victims is important for several reasons. First, it has helped to provide factual balance in the larger, public debate. The Reagan Administration, and to a great extent the Bush Administration as well, used the offices of President, Attorney General, and Assistant Attorney General for Civil Rights to foment hostility toward civil rights remedies,[11] particularly affirmative action. These Administrations sketched a picture of "discrimination" quite different from Justice Blackmun's: They cast the country's major civil rights problem as discrimination against white males and systematically sought to eradicate both affirmative action and school desegregation, arguing that these remedies are illegal under the Constitution and federal civil rights statutes.[12] At one point, the Reagan Administration sought to overturn more than fifty consent decrees with race- and gender-based affirmative action provisions that prior administrations had obtained.[13] In this

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8. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting).

9. *Id.*

10. 443 U.S. 545, 558–59 (1979).

11. *See, e.g.*, Drew S. Days, III, *Turning Back The Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 310 (1984); Fred Barnes, *The Race Card: George Bush's Civil Rights Policies*, NEW REPUBLIC, Dec. 17, 1990, at 10.

12. Assistant Attorney General for Civil Rights William Bradford Reynolds summarized the Reagan Administration's strategy in an internal memorandum: "We must polarize the debate. We must not seek 'consensus,' we must confront." Memorandum to Heads of Departments (Feb. 22, 1988), *quoted in Memo Urges Justice Department 'To Polarize Debate' on Key Issues*, N.Y. TIMES, Feb. 26, 1988, at B8. In a particularly notorious example of this strategy, the Justice Department switched sides in the case of Bob Jones University v. United States, 461 U.S. 574 (1983), and refused to support the Internal Revenue Service's policy of denying tax exemptions to segregated private schools. The Supreme Court refused to let the Department of Justice dismiss the case and instead took the extraordinary action of appointing a private attorney to represent the position that the government had abandoned.

13. President Reagan also entered the first veto of a civil rights statute in 122 years when the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988), reached his desk. *See* Ruth Marcus & Helen Dewar, *Reagan Vetoes Civil Rights Restoration Act*, WASH. POST, Mar. 17, 1988, at A1; *see also* Steven A. Holmes, *President Vetoes Bill on Job Rights*, N.Y. TIMES, Oct. 23, 1990, at A1 (noting that Reagan's was first veto of civil rights act since 1866). Congress overrode the veto. President Bush followed President Reagan's lead in 1990 by vetoing the first version of the Civil Rights Act of 1991, which his Administration branded a "quota bill." *See* Ruth Marcus, *What Does Bush Really Believe?*, WASH. POST, Aug. 19, 1992, at A1. The Bush Administration also introduced, but later rescinded, a policy prohibiting minority scholarships. Sharon LaFraniere, *On Civil Rights, Bush Aides Let Conservative Crusade Fade*,

atmosphere, Justice Blackmun's focus on the reality of ongoing "old-fashioned" discrimination has special significance.

Second, viewing a particular situation through the eyes of the victim provides insight that a more theoretical approach to decisionmaking may overlook. One scholar argues that "those who have experienced discrimination speak with a special voice to which we should listen."[14] Justice Blackmun is a receptive, empathetic listener who, while not personally the victim of racial prejudice, has been able to understand enough about the experience to integrate victims' voices into his thinking.[15]

Third, the extent to which the Court thinks racial discrimination against minorities continues to be widespread may affect its decisions on difficult questions of law, such as affirmative action and burdens of proof. Justice Blackmun's opinions capture the ongoing nature of discrimination for those on the Court who are unaware or may prefer to ignore it. In *Wards Cove*, Justice Blackmun faulted the majority for failing to grasp the scope of the problem of race discrimination: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[16]

B. *The Meaning of History*

Although he was a math major in college, there can be no doubt that Justice Blackmun is an accomplished student of history. Justice Blackmun's decisions in the area of race discrimination recognize both the significance of the events of the past—particularly this country's long history of slavery, Jim Crow, and systematic oppression of African-Americans and other minorities—and the impact of those events on the present.[17] For Justice

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WASH. POST, Mar. 18, 1991, at A1. After the publicity over the nomination of Clarence Thomas to the Supreme Court, President Bush signed a version of the Civil Rights Act similar to the one that he had vetoed. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

14. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

15. Justice Blackmun's capacity to see the world through the eyes of the disadvantaged has influenced his doctrinal thinking in diverse and perhaps unexpected areas of law, such as the First Amendment. In a landmark decision expanding the First Amendment's protection of commercial speech, he explicitly relied on the impact of commercial speech restrictions on the poor and disadvantaged: "Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. . . . [I]nformation as to who is charging what . . . . could mean the alleviation of physical pain or the enjoyment of basic necessities." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763–64 (1976).

16. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (Blackmun, J., dissenting).

17. Justice Blackmun's understanding of America's history of oppression of Native Americans is similarly evident in his opinions. *See, e.g.*, Karlan, *supra* note 2, at 533–34 (discussing history and empathy in Justice Blackmun's writings on Native Americans, including opinion in which Justice Blackmun "set out in painstaking detail how the Sioux had been stripped of the Black Hills of South Dakota and of their way of life") (footnotes omitted).

Blackmun, as for one of his predecessors, Oliver Wendell Holmes,[18] "a page of history is worth a volume of logic."[19]

For example, in his dissent in *City of Richmond v. J.A. Croson Co.*, Justice Blackmun emphasized that "[h]istory is irrefutable."[20] In arguing that Richmond had the power to enact a modest, race-conscious contracting program, he found the history of that particular city to be of great significance: "I never thought I would live to see the day when the city of Richmond, Virginia, *the cradle of the Old Confederacy*, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination."[21]

For Justice Blackmun, the City of Richmond's place in the Confederacy is far from trivia. Justice Blackmun is a true Civil War buff, known to have toured Civil War battlefields with his law clerks. He deeply admires President Lincoln. And prominently displayed on a wall in his chambers is a bill of sale for the purchase of a twelve-year-old slave. For Justice Blackmun, the Civil War is very real; his perspective influences his construction of the Civil War Amendments to the Constitution.

Justice Blackmun is especially attuned to the history and original purpose of the Fourteenth Amendment. In *Rose v. Mitchell*, he explained:

> Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States . . . were aimed. The Equal Protection Clause was central to the Fourteenth Amendment's prohibition of discriminatory action by the State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on Negroes by our society.[22]

Relying on this understanding of the Fourteenth Amendment's history, Justice Blackmun concluded that racial discrimination in the selection of a grand jury foreman is not harmless error, but so "strikes at the fundamental values of our judicial system and our society as a whole" that it can be asserted as a ground to overturn a criminal conviction.[23]

C. *Fact-Oriented Pragmatism*

Justice Blackmun's pragmatic approach to issues of racial justice[24] is illustrated in his concurring opinion in *United Steelworkers of America v.*

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18. Justice Blackmun succeeded to the seat on the Court once held by Justice Holmes.
19. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).
20. 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting).
21. *Id.* (emphasis added).
22. 443 U.S. 545, 554–55 (1979).
23. *Id.* at 556.
24. For a discussion of Justice Blackmun's pragmatism in other contexts, see Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 DICK. L. REV. 541, 555–57 (1993).

Weber.[25] The *Weber* case is one of a series of cases in the 1970's and 1980's in which white male workers sought to prohibit the use of gender- and race-based hiring and promotion goals by arguing that only actual victims of past, illegal discrimination could receive preference.[26] Because *Weber* involved a private employer, it was brought not under the Constitution, but as a claim that an employer's voluntary affirmative action program violated Title VII.[27]

Justice Blackmun voted with the majority to uphold an employer's use of voluntary affirmative action programs to overcome a "conspicuous racial imbalance in traditionally segregated job categories."[28] He based his conclusions on "practical and equitable" considerations.[29] In theory, Justice Blackmun preferred that the employer justify its race-conscious affirmative action program by establishing a past "arguable violation" of Title VII. He recognized, however, that practical considerations made the "arguable violation" threshold unworkable, concluding that it would "plac[e] voluntary compliance with Title VII in profound jeopardy" by forcing employers to "eschew all forms of voluntary affirmative action."[30] If the employer were to establish a past violation, it would face liability; if it could not establish a past violation, it would "face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks."[31]

Here, Justice Blackmun sounded a recurring theme in his opinions in discrimination cases—sensitivity to the impact Supreme Court decisions will have on the incentives for employers and other institutions to comply with the law. Justice Blackmun explained: "The great difficulty in the District Court was that no one had any incentive to prove that [the employer] had violated the Act. Neither [the defendant employer] nor [the defendant union] wanted to establish a past violation, nor did [the white male plaintiff]."[32] Under these circumstances, a voluntary affirmative action program offers significant practical and economic benefits to the employer: "The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If

25. 443 U.S. 193, 209 (1979) (Blackmun, J., concurring).

26. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Firefighters Local Union No 1784 v. Stotts, 467 U.S. 561 (1984).

27. *See Weber*, 443 U.S. at 197.

28. *Id.* at 209 (Brennan, J.).

29. *Id.* (Blackmun, J., concurring).

30. *Id.* at 210.

31. *Id.*

32. *Id.* at 213. Justice Blackmun evinced a similar concern for incentives in his dissent in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), in which the Court held that African-Americans promoted as a result of a Title VII consent decree were not protected by the decree from subsequent layoffs. In response to the majority's observation that there had been no admission or finding of discrimination by the defendant city, *id.* at 579, Justice Blackmun pointed out: "Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees." *Id.* at 616 (Blackmun, J., dissenting).

past victims should be benefited by the program, however, the company mitigates its liability to those persons."[33]

D. *Power and Eloquence of Expression*

Justice Blackmun is a gifted communicator. He makes his point quickly, but so powerfully. His death penalty dissents provide some of the best examples.[34] In condemning the majority's conclusion that newly discovered evidence of innocence would not suffice to reopen a capital conviction on federal habeas grounds, Justice Blackmun wrote, "The execution of a person who can show that he is innocent comes perilously close to simple murder."[35] In *McCleskey v. Kemp*, Justice Blackmun captured the essence of his disagreement with the majority in a memorable, pointed sentence: "The Court today seems to give new meaning to our recognition that death is different."[36] And in his last Term on the Court, Justice Blackmun, who had consistently supported the constitutionality of the death penalty, powerfully described his change in position: "From this day forward, I no longer shall tinker with the machinery of death."[37] His impassioned dissenting opinion also included a graphic picture of the individual affected by the Court's decision:

> On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed . . . . Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins . . . a man, strapped to a gurney, and seconds away from extinction.
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> Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die.[38]

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33. *Weber*, 443 U.S. at 211.

34. A detailed review of Justice Blackmun's approach to and evolution in thinking about the constitutionality of the death penalty is beyond the scope of this Tribute. It is worth noting, however, that the debate over the death penalty is in large measure about racial justice and that Justice Blackmun's death penalty jurisprudence strongly reflects that understanding.

35. Herrera v. Collins, 113 S. Ct. 853, 884 (1993) (Blackmun, J., dissenting).

36. 481 U.S. 279, 347 (1987) (Blackmun, J., dissenting). He went on to explain: "Rather than requiring 'a correspondingly greater degree of scrutiny of the capital sentencing determination,' the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause." *Id.* at 347–48 (quoting California v. Ramos, 463 U.S. 992, 998–99 (1983)).

37. Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

38. *Id.* at 1128.

II. AFFIRMATIVE, RACE-CONSCIOUS REMEDIES

Since the decision in *Brown v. Board of Education*[39] that deliberate racial segregation in public education is unconstitutional, courts and the public have debated the most fundamental question of racial justice: the legality, morality, and wisdom of race-conscious remedies. During Justice Blackmun's tenure, the Court addressed the legality of race-conscious remedies under the Constitution and federal statutes in a variety of contexts, including school desegregation,[40] professional school admissions,[41] employee hiring,[42] promotion and layoffs,[43] and voting districts.[44] There are two major poles in this debate.[45] Opponents of race-conscious measures advocate absolute colorblindness, with a focus *only* on individuals,[46] regardless of the impact of group advantage or disadvantage on the individual.[47] Supporters of affirmative action generally assert that uses of race designed to help African-Americans[48] are "benign," and should be treated as presumptively legal or subjected to a lower level of scrutiny.[49]

The supporters of race-conscious measures offer a variety of justifications for them. A fairly restrictive view supports affirmative action only as a *remedy* for proven harm caused by an identified violator. This position differs from the

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39. 347 U.S. 483 (1954).

40. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

41. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

42. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

43. United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

44. Shaw v. Reno, 113 S. Ct. 2816 (1993); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

45. This, of course, is an oversimplification of complex positions that are justified on numerous distinct grounds, including morality, efficiency, and political theory.

46. The Reagan Administration aggressively pressed this position, contending that employers could grant discrimination remedies only when an individual, actual victim both demonstrated that the employer's conduct violated an actionable legal right, and proved that a particular actor caused the harm. Here, the remedy is not race-conscious, since it simply makes whole an individual whose race is relevant only as the basis of the harm. In *Bakke*, Justice Powell gave an example of such a remedy, describing "a retroactive award of seniority to Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case," as relief "to make the victims whole." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 301 (1978) (opinion of Powell, J.) (citing Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)) (internal quotation omitted).

47. *See, e.g.*, William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984).

48. While African-Americans are undoubtedly the primary beneficiaries of affirmative action, this analysis may apply to other traditionally disadvantaged groups, such as Latinos or women. In *Bakke*, the University of California argued that the Court should limit strict scrutiny under the Equal Protection Clause to "'discrete and insular'" minorities "requiring extraordinary protection from the majoritarian political process." 438 U.S. at 290 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)).

49. *See generally* John H. Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87 (1979).

Reagan Administration's victim-specific approach in that it allows members of the victim group to benefit from the remedy even if they cannot prove that they are direct victims of the bad actor's illegal conduct.[50] A more expansive view supports race-conscious remedies upon a lesser showing of illegal conduct by a bad actor, provided the measures were voluntarily adopted.[51] Moving further along the remedial scale is the view that race-conscious measures are appropriate to remedy past or current *societal* discrimination and its effects, without the need to specify any particular bad actor.

Arguably off the remedial scale altogether is the view that other interests, such as viewpoint diversity or effective law enforcement, justify *nonremedial* affirmative action.[52] Of course, even these goals can be characterized broadly as remedial, since presumably racial diversity would develop automatically in the absence of past or present discrimination.

Justice Blackmun's approach to race-conscious remedies reflects his passion for justice, his fact-oriented, pragmatic approach to problem solving, and his historical perspective. His separate opinion in the *Bakke*[53] case captures the qualities that make him a great judge.[54] In *Bakke*, the Supreme Court's seminal decision on the legality of voluntary, race-conscious, affirmative admission programs by colleges and universities, Justice Blackmun joined three other Justices in taking the position that the University of California at Davis medical school's set-aside of sixteen of one hundred places for disadvantaged, minority students did not violate the Constitution.[55] Four other Justices believed that a federal statute required colorblind admissions.[56] Justice Powell fell in the middle, voting to invalidate the California program, but indicating he would uphold more flexible programs such as Harvard College's admission process.[57]

Justice Blackmun adopts the end goal of a "society that is not race

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50. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987), Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). *See generally* Greenawalt, *supra* note 49, at 95–97

51. *See supra* notes 25–33 and accompanying text. Where the voluntary race-conscious remedy involves layoffs of white workers, however, the burden of proof again is tightened up, whether the remedy was designed to redress past discrimination, *see* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), or both to redress past discrimination and to increase diversity, *see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

52. *E.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); *Wygant*, 476 U.S. at 314 (Stevens, J., dissenting) (suggesting that law enforcement needs may justify decision to integrate police ranks)

53. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)

54. It is typical of Justice Blackmun to file a relatively short concurring opinion to add "some general observations that hold particular significance for me." *Bakke*, 438 U.S. at 402 (separate opinion of Blackmun, J.). Those short, personal statements *always* go straight to the heart of the issue

55. *Id.* at 324 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

56. *Id.* at 408–21 (Stevens, J., concurring in the judgment in part and dissenting in part)

57. *Id.* at 315–19 (opinion of Powell, J.).

conscious,"[58] explaining: "I yield to no one in earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past . . . . Then persons will be regarded as persons . . . ."[59] His concern in *Bakke*, as might be expected, was how the end goal of racial neutrality comports with the "real world" that exists now:

> I presume that [the factor of race and ethnic background] always has been there [in administration of admissions programs], though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the *real world* of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.[60]

Justice Blackmun's position in *Bakke* flowed almost inevitably from his pragmatic realism and his empathy with persons disadvantaged because of discrimination or its effects. If there were race-neutral ways to eliminate the current effects of past history and produce more minority professionals, Justice Blackmun would have considered them.[61] But his general pragmatism propelled him toward a solution that would produce actual results: "I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible."[62]

Having concluded in *Bakke* that race consciousness is the only "possible" solution, Justice Blackmun had to decide whether the University of California's remedy nonetheless must be invalidated, in favor of "idealistic equality" that

58. *Id.* at 402 (separate opinion of Blackmun, J.). For an argument that colorblindness is impossible and that the only options are different forms of race-consciousness, see David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

59. *Bakke*, 438 U.S. at 403.

60. *Id.* at 407 (emphasis added). A minor strand in Justice Blackmun's jurisprudence is confidence in professionals to make decisions within their area of expertise. One commentator suggests that this deference to professionals eroded later in Justice Blackmun's career when institutional and professional interests came into conflict with individual ones. Note, *supra* note 2, at 719–25. In *Bakke*, however, as in *Roe v. Wade*, Justice Blackmun's respect for professionals coincided with his support for individual rights:

> Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds.

438 U.S. at 404.

61. Justice Blackmun views the minuscule number of minority professionals as an effect of discrimination in American society, for which a "remedy" is needed. *Id.* at 403. Given his leadership in the evidentiary value of statistical evidence, *see infra* notes 76–86 and accompanying text, it is unlikely that he would have viewed this low representation of minorities in the professions as the result of chance. In *Bakke*, Justice Blackmun adopted a broad definition of remediation, which recognized the structural nature of the harm caused by discrimination. He noted that some precedents for race-conscious action "may be 'distinguished' on the ground that victimization was directly present," and commented, "who is to say that victimization is not present for some members of today's minority groups." 438 U.S. at 405.

62. *Id.* at 407.

would yield *no* realistic remedies for the structural, systemic effects of the accumulated harms of discrimination. Justice Blackmun's genuine insight into the plight of victims explains in large part his rejection of this "[l]et them eat cake"[63] position.

But Justice Blackmun's insight[64] goes further than a reasoned, compassionate choice between two competing ideals. Unlike those who advocate immediate imposition of a norm of colorblindness, as if the immediate eradication of racism and its accumulated effects[65] could be accomplished by pronouncement, Justice Blackmun explains that we cannot achieve racial neutrality until we address the accumulated disadvantages of the past. After recounting the small numbers of minority professionals, Justice Blackmun introduces this theme: "If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious."[66] The Justice rejects the notion that colorblindness and remediation are two different goals, and that the Court and the country, standing at a crossroads, must choose in which direction to proceed. Rather, Justice Blackmun concludes that race-conscious remedies are the *only* effective means to achieve a world in which race is irrelevant to the distribution of societal benefits and burdens. For Justice Blackmun, there is only one road toward true racial neutrality: the one paved with race-conscious remedies. Out

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63. Beal v. Doe, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting).

64. Justice Blackmun also makes a profound point when he remarks on the irony of the fact that "institutions of higher learning . . . have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful." *Bakke*, 438 U.S. at 404. This reality, which he mentions twice, *see also id.* at 406, highlights the fact that the Court is subjecting remedial preferences, designed to help minorities overcome the disadvantages caused by decades of oppression, to much higher requirements than arbitrary, non-merit-based preferences that, while facially neutral, are likely to favor whites. This is similar to the theme of the Justice's majority opinion in *Washington v. Seattle School District No. 1*, which concluded that a state law prohibiting a local school board from adopting a voluntary student assignment plan to desegregate its schools violated the Equal Protection Clause because it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." 458 U.S. 457, 470 (1982). Given the existence of myriad arbitrary preferences in admissions, it is arguable that subjecting a remedial, race-conscious preference to strict scrutiny falls within the principle of *Seattle School District No. 1*. *See* Strauss, *supra* note 58, at 99 (reasoning that prohibiting racial classifications is a race conscious, not a colorblind, decision).

The decision in *Seattle School District No. 1* could be relevant in the resolution of post *Shaw v. Reno* cases that are expected to come before the Court in the 1994 Term. Three federal district courts in Texas, Louisiana, and Georgia have invalidated the affirmative use of race to create congressional districts in which minority voters in a racially polarized environment have an opportunity to elect the candidate of their choice. *See* Johnson v. Miller, No. 194-008, 1994 U.S. Dist. LEXIS 13043 (S.D. Ga. Sept. 12, 1994); Vera v. Richards, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368 (S.D. Tex. Aug. 17, 1994); Hays v. Louisiana, No. 92-1522, 1994 WL 477159 (W.D. La. July 29, 1994), *petition for cert. filed*, (U.S. Sept. 26, 1994) (No. 94-558). In each case, the court based the invalidation on the irregular shape of the minority opportunity district, although majority-white congressional districts with equally irregular or "bizarre" shapes have been upheld. Thus, the lower courts appear to be imposing higher requirements of aesthetic appeal on minority opportunity districts than on majority-white districts.

65. *See, e.g.*, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979).

66. 438 U.S. at 403.

of this reasoning emerged his now-famous eighteen-word synopsis: "In order to get beyond racism, we must first take account of race. There is no other way."[67]

These conclusions rest on a theory of equal protection informed by a strong historical perspective on the Fourteenth Amendment, coupled with the recognition that the Constitution is a living, evolving directive. Justice Blackmun insists that the Court keep in mind the original purpose of the Fourteenth Amendment "to lift the burdens placed on Negroes by our society."[68] Race was so salient to the framers of the Reconstruction Amendments that it simply could not be ignored in the effort to "lift" the burdens of slavery. To participate in a remedy, one first had to be identified as a member of a racial group. The framers would have viewed the idea of colorblindness as surreal.[69]

While giving great weight to the original intent of the Fourteenth Amendment, Justice Blackmun does not allow it to become a straitjacket. Instead, he also emphasizes that the Constitution is a "'vehicle of life,'" noting that "[t]hese precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law."[70]

Although acknowledging that the Equal Protection Clause has been "expanded beyond its original 1868 concept" and has subjected all racial and ethnic distinctions to "exacting judicial scrutiny,"[71] Justice Blackmun is uncomfortable with this expansion, and the resulting "tension":

> This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action" in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.[72]

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67. *Id.* at 407.

68. Rose v. Mitchell, 443 U.S. 545, 555 (1979).

69. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789 (1985).

70. *Id.* at 408 (quoting WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908)).

71. 438 U.S. at 405. Justice Blackmun writes in *Bakke*: "I . . . accept the proposition[] that . . . the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where, as MR. JUSTICE POWELL states, . . . it embraces a 'broader principle.'" *Id.* at 404-05 (citations omitted). The passage in Justice Powell's opinion to which Justice Blackmun refers discusses the argument that the Fourteenth Amendment's "primary function [was] bridging the vast distance between members of the Negro race and the white 'majority.'" *Id.* at 293 (opinion of Powell, J.).

72. *Id.* at 405 (separate opinion of Blackmun, J.).

Justice Blackmun's resolution of the "tension" between the goal of lifting the particularized burdens of African-Americans and the modern "enlargement" of the Fourteenth Amendment has led him to identify a hierarchy of rights. While the Fourteenth Amendment's protections can extend to groups beyond those originally protected,[73] the Amendment cannot protect rights in *conflict* with the original purpose. He declared in *Bakke*: "We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[74] He made the same point in his recent dissent in *Shaw v. Reno*, in which the Court called into question race-conscious, remedial voting districts drawn by states to meet the goals of the Voting Rights Act: "It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction."[75]

III. STATISTICAL PROOF OF DISCRIMINATORY MOTIVE

Justice Blackmun's contributions to the development of anti-discrimination law are not limited to lofty debates about affirmative action and the meaning of equality. He has spent much time dealing with the less publicized but highly important questions of proof and procedure. One important way that Justice Blackmun has drawn upon his background in mathematics to define the law is by introducing the use of sophisticated statistical evidence to shed light on discriminatory motive.

In *Castaneda v. Partida*,[76] the Court addressed an equal protection challenge brought by a Mexican-American to Texas' system for selecting county grand jurors. The evidence showed that only thirty-nine percent of those summoned for grand jury duty were Mexican-Americans, even though Mexican-Americans made up seventy-nine percent of the population of Hidalgo County, where the trial took place.[77] The Court faced the issue of whether the underrepresentation of Mexican-Americans was the result of discriminatory

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73. Justice Blackmun led the Court to include aliens as a "suspect class" under the Fourteenth Amendment, reasoning that this group is a "discrete and insular" minority in need of special protection Graham v. Richardson, 403 U.S. 365, 371–72 (1971); *see* Harold Hongju Koh, *Equality With a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV 51, 57–60 (1985)

74. *Bakke*, 438 U.S. at 407.

75. 113 S. Ct. 2816, 2843 (1993) (Blackmun, J., dissenting) (citation omitted). Similarly, concluding that Title VII of the Civil Rights Act of 1964 does not prohibit voluntary affirmative action by an employer whose work force exhibits strong underrepresentation of African-American employees, Justice Blackmun wrote: "I would not interpret Title VII itself as a means of 'locking in' the effects of segregation for which Title VII provides no remedy. Such a construction . . . would be 'ironic,' given the broad remedial purposes of Title VII." United Steelworkers of Am. v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring)

76. 430 U.S. 482 (1977).

77. *Id.* at 495.

purpose or simply an accident of fate.[78]

In an opinion for the Court, Justice Blackmun agreed with the lower courts that a disparity of forty percentage points was sufficient to establish a prima facie case of intentional discrimination.[79] In the text of the opinion, Justice Blackmun employed the same type of intuitive analysis that the Court had previously used to evaluate the meaning of statistical disparities. Noting that disparities of twenty-three, twenty, eighteen, and fifteen percentage points had previously been "accepted by this Court as adequate for a prima facie case," Justice Blackmun concluded that the disparity of forty percentage points in *Castaneda* was clearly sufficient.[80]

Castaneda is significant, however, not for this traditional intuitive analysis, but rather for Justice Blackmun's adoption in a footnote of a scientific method used by social scientists to distinguish random occurrences from those caused by intent. In footnote 17 of the *Castaneda* opinion, Justice Blackmun led the Supreme Court for the first time to give its imprimatur to the use of standard deviation analysis and probability theory to establish a claim of group-based discrimination.

In *Castaneda*, Justice Blackmun used a binomial distribution to compute the extent to which actual grand juror selections differed from selections that a random process would predict. Justice Blackmun explained, with the precision of the mathematician he studied to become:

> The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, 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.*[81]

At the time *Castaneda* was decided, courts were just beginning to develop the law governing the use of statistics to prove employment discrimination, primarily under Title VII of the Civil Rights Act of 1964. Because racial discrimination is rarely admitted and overt, courts have had to grapple with

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78. *Id.* at 493 ("[S]ubstantial underrepresentation of [an identifiable group] constitutes a constitutional violation . . . if it results from purposeful discrimination."). Other explanations for the disparity, such as lower educational levels among Mexican-Americans, were not relevant because the State did not purport to take education or other such qualifications into account in selecting the grand jury pool.

79. *Id.* at 482–83 ("The sole issue . . . is whether the State of Texas . . . successfully rebutted respondent prisoner's prima facie showing of discrimination against Mexican-Americans in the state grand jury selection process.").

80. 430 U.S. at 496.

81. *Id.* at 497 n.17 (emphasis added) (citations omitted).

many issues concerning methods and burdens of proof to answer the difficult question of whether an employment decision was improperly motivated.

Prior to *Castaneda*, the Supreme Court had recognized that group-based disproportions are probative of whether an intentional exclusion had occurred. Yet, previous cases outlined no consistent method of determining when a disparity was large enough to be considered strong evidence of discriminatory purpose. Because plaintiffs claiming an improper, discriminatory exclusion have the burden of proof, it is likely that, in the absence of an accepted method of deciding which disparities are great enough, any case not involving a "gross" disparity would be decided in favor of the defendants. Justice Blackmun's footnote 17 provided the needed mechanism.

Castaneda's standard deviation analysis was almost immediately applied to employment discrimination claims in *Hazelwood School District v. United States*.[82] Justice Blackmun's groundbreaking analysis in *Castaneda* has proved to be of monumental importance in cases brought under the federal civil rights statutes. A highly respected treatise on employment discrimination concludes: "Following the *Hazelwood* and *Castaneda* cases, standard deviation analysis has become the predominant tool used in evaluating the legal significance of statistical disparities . . . ."[83]

Following *Castaneda*, Justice Blackmun consistently supported the use of scientific probability theory to analyze discrimination claims.[84] Especially noteworthy is his impassioned dissent in *McCleskey v. Kemp*,[85] which concerned a challenge to racial discrimination in Georgia's administration of the death penalty. Again making use of his mathematical expertise, Justice Blackmun analyzed a complex multivariate regression study of the imposition of the death penalty in Georgia. He strongly criticized the Court for refusing to apply the *Castaneda* method of proof to claims of racial discrimination in the administration of the death penalty. Justice Blackmun reasoned: "McCleskey demonstrated the degree to which his death sentence was affected by racial factors by introducing multiple-regression analyses that explain how much of the statistical distribution of the cases analyzed is attributable to the racial factors."[86] Thus, statistical evidence that would have been sufficient to

82. 433 U.S. 299 (1977).

83. BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 324 (Mark S Dichter ed., 2d ed. Cumulative Supp. 1987) (footnotes omitted)

84. This method of proof also can help defeat claims of discrimination. In Rose v. Mitchell, 443 U S 545 (1979), Justice Blackmun concluded that a prima facie case of discrimination in the selection of a grand jury foreman had not been established because a showing of statistical significance under *Castaneda* had not been made. *Id.* at 571–72. Justices White and Stevens dissented, reasoning that the *Castaneda* method of proof "may not be well suited when the focus of inquiry is a single officeholder whose term lasts two full years." *Id.* at 591 (White, J., dissenting)

85. 481 U.S. 279 (1987).

86. *Id.* at 354–55 (Blackmun, J., dissenting). *Looking at the prosecutor's decision whether to seek the* death penalty after conviction, Justice Blackmun gave great weight to the statistical inferences.

> The statewide statistics indicated that black-defendant/white-victim cases advanced to the penalty trial at nearly five times the rate of the black-defendant/black-victim cases (70% v

establish grand jury or employment discrimination failed to make out a prima facie case of discrimination when a human life was at stake.

IV. CONCLUSION

Justice Blackmun, by background and training, should be a conservative. To many, probably including the President who appointed him, he became an enigma. But to those who know him, Justice Blackmun's growth during his tenure on the Supreme Court is no surprise. Justice Blackmun is an attentive listener, genuinely interested in the lives of ordinary people. And he has a heart. These qualities, combined with his fundamental pragmatism, his mathematical expertise, and his deep understanding of history, gave rise to an intellectually innovative and emotionally compelling jurisprudence of racial justice. In evolving into a champion of the oppressed and disadvantaged, Justice Blackmun did not forsake his essential nature. It might be said, instead, that he evolved grandly into himself.

> 15%), and over three times the rate of white-defendant/black-victim cases (70% v. 19%). The multiple-regression analysis demonstrated that racial factors had a readily identifiable effect at a statistically significant level.

Id. at 356 (citation omitted).