Constructing Reality: Social Science and Race Cases

BEVERLY I. MORAN*

When the Northern Illinois University Law Review planned its symposium on *Grutter v. Bollinger*,[1] the decision was still working its way through the courts and speculation on the future of affirmative action was rampant. The Supreme Court's subsequent decision to permit considerations of race in the admissions process reflects a number of factors, including the over eighty amicus briefs *Grutter* generated, the vast majority of which presented social science studies and perspectives. This essay is inspired by those briefs, the largest number ever submitted in a single case before the Court,[2] and the faith they show in social science, racial justice and law.

Given the depth of America's race conflicts, intense interest in contributing to the *Grutter* decision is no surprise. Nevertheless, each side's reliance on social science is arresting. Viewing *Grutter v. Bollinger* against other canonical American race cases, it does not necessarily follow that social science is the best way to address the questions *Grutter* raised; and yet, social science was clearly the method of choice. What gave those who submitted amicus briefs faith that social science studies strengthened their arguments, and what does that trust tell us as we evaluate future means of achieving racial justice?

My argument is that social science in race cases is either a recent phenomena or as old as the cases themselves, depending on how one defines social science. Further, whatever one's definition and regardless of

---

* Professor of Law and Sociology, Vanderbilt University Law School. I would like to thank M. Cristina Medina of the Monterey College of Law for her research assistance, the faculties of the Northern Illinois University School of Law and the Peabody College of Education for their comments on earlier versions of this piece as well as Professor Stephanie Wildman, director of the Center for Social Justice at the Santa Clara University School of Law.

1. 539 U.S. 306 (2003). *Grutter v. Bollinger*, also known as the Michigan affirmative action case, concerned the affirmative action admissions plans at both the University of Michigan-Ann Arbor's undergraduate and law school programs. Although the Supreme Court ended up rejecting the undergraduate admissions program because of an automatic point system, the same Court accepted the law school's more file-specific approach that emphasized looking at the whole applicant and how his or her experiences would enrich the entire law school class. *See id.*

2. Brendan Koerner, *Do Judges Read Amicus Curiae Briefs?*, SLATE MAGAZINE, Apr. 1, 2003.

whether social science is an old or a new strategy, its true contribution occurs well before any litigation through its effect on public opinion. Public opinion is important because judges are people who live in the world, and the world that they live in is filled with beliefs about who people are and what is just. In our century, it seems that social science often contributes to how we comprehend society. In earlier centuries, what we now call natural science or biology was another path people used to understand their world. Sometimes judges explicitly turn to extra-legal sources in their decision making and sometimes those sources are part of the background that judges use less consciously. Whether conscious or unconscious, however, lawyers working for social justice must understand how to use extra-legal sources as part of their overall litigation strategy. If these lawyers wait until writing their briefs to draw on social, natural or biological science, they will be too late. No one can absorb new information and change his or her mind in the time that it takes to read a brief. Instead, the ideas expressed in a brief must already exist in the public consciousness so that they are absorbed and available to the judge at the time of decision making.

Further, the lawyer fighting for racial justice must understand that what we know today can, and often does, change tomorrow. Memory is a strange thing. Often it reflects both what we want to remember and what we want to forget. Knowledge that was once influential is lost and becomes replaced by different stories and world views. It is important to track these changes and make active efforts to change the course of memory when what we forget is just the thing that we most needed to remember.

To make these points, I review three classic cases from America's race canon: *Dred Scott v. Sanford*,[3] *Plessy v. Ferguson*[4] and *Brown v. Board of Education*.[5]

In Dred Scott v. Sanford, the Court set its task as determining whether "the descendants of . . . slaves, when they shall be emancipated . . . are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States."[6] Because citizenship is as pure a legal ques-

---

3. 60 U.S. 393 (1856).
4. 163 U.S. 537 (1896).
5. 347 U.S. 483 (1954).
6. Dred Scott v. Sanford, 60 U.S. 393, 403 (1856). Walter Ehrlich describes the significance of the *Dred Scott* case this way:

> The Dred Scott case began in St. Louis in 1846 as Dred Scott v. Irene Emerson, a slave suing his mistress for freedom. Scott had lived in free territory before returning to Missouri, and, by Missouri law, was thereby entitled to freedom. Unforeseen developments delayed the litigation for several years. Then, through no intention of either party, the case be-

tion as any, we might expect a court to address a citizenship question through statutes and constitutions rather than, for example, biology. Yet, the *Dred Scott* Court expanded its analysis beyond legal texts to include such extra-legal sources as history, biology and public opinion research.

For history, the Court incorrectly opined that "[n]o one of that race had ever migrated to the United States voluntarily,"[7] although, in fact, free Africans voluntarily traveled through the Americas (including the British colonies and, later, the United States) as immigrants, explorers and adventurers from the 15th century onward.[8]

For public opinion research, the Court again misinformed its audience by claiming that Europeans' fixed and universal opinion of Africans was that Africans were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[9]

> came enmeshed in Missouri and national political debates involving slavery. In 1850 Missouri's lower court declared Scott free. But in 1852, in a dramatically partisan pronouncement, the Missouri Supreme Court reversed that decision, overturned numerous legal precedents, and proclaimed controversial proslavery rhetoric to be law.
>
> To enable the U.S. Supreme Court to clarify that law, St. Louis lawyers instituted a new case, *Dred Scott v. John F. A. Sanford,* in the federal courts. Specifically at issue was the "once free always free" doctrine-whether a slave once emancipated could lose freedom by returning to a slave state. During argument, though, counsel introduced additional issues involving slavery and race. The Supreme Court could have simply dismissed the suit on noncontroversial procedural grounds. Instead, the Court's Southern proslavery majority chose to deal with volatile, substantive issues, thereby hoping to settle them permanently by judicial authority.
>
> Chief Justice Roger Brooke Taney delivered the opinion of the Court on 6 March 1857. "Negroes of African descent," he decreed, could not be citizens of the United States. The Missouri Compromise, which in 1820 had prohibited slavery in the territories, above the 36 [degree] 30 [minute] line, was unconstitutional, Taney explained, because slaves were property protected by the Fifth Amendment of the Constitution. Finally, the chief justice declared that an erstwhile emancipated slave who returned to a slave state was restored to slavery if that was the law of the state. In other words, "once free" no longer meant "always free."

Walter Ehrlich, *Dred Scott Case, in* THE DICTIONARY OF AFRO-AMERICAN SLAVERY 195 (Randall Miller & John Smith eds., 1988).

7. *Dred Scott,* 60 U.S. at 411.

8. JANE LANDERS, AGAINST THE ODDS: FREE BLACKS IN THE SLAVE SOCIETIES OF THE AMERICAS (1996).

9. *Dred Scott,* 60 U.S. at 407. Here again, the Court was not entirely accurate in its use of extra-legal sources, for although it is true that many Europeans considered Afri-

For biology, the Court informed us that "the negro might justly and lawfully be reduced to slavery for his benefit."[10]

All three of these statements rely on extra-legal sources. There is no statute, no judicial decision, no constitution or learned treatise supporting the Court's historical, biological or sociological claims.

Each statement is also arguably irrelevant. Citizenship is often denied to people who are in no way defective and are, in fact, well thought of. There is no need to engage in racial calumny in order to deny a person citizenship.

Yet, in the face of some bias against extra-legal sources and a question that arguably requires only pure legal analysis, these three statements and others like them throughout the opinion were important to the Justices who put their names to the pronouncement. For them, the Constitution and related statutes standing alone were not enough, nor were the many other judicial decisions they relied on or distinguished. Instead, these Justices felt the need to bring the outside world into their analysis. That outside world was filled with the misinformation that the Court presented in its decision. The Justices truly believed that blacks were inferior and they had the natural and social sciences to draw on for support. The views that they expressed were not unique to them. These understandings came from the

---

cans inferior, that opinion was not shared by all Europeans across all time periods. For example, at the very time that the Court found a universal belief in the right to enslave, the Britain abolitionist movement was expanding through the creation of the Society for the Abolition of the Slave Trade in 1787, and the Vermont Constitution of 1777 prohibited slavery. A copy of the original 1777 Vermont Constitution can be found at the Yale Avalon project at http://www.yale.edu/lawweb/avalon/states/vt01.htm. For more on the Society for the Abolition of the Slave Trade, *see* JAMES WALVIN, THE SLAVE TRADE (1999) and HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE 1440 TO 1870 (1997).

Further, there were a number of Africans throughout European history who functioned in high positions in European society before, during and after the time discussed by the Court. *See, e.g.*, Alma C. Allen, *Literary Relations Between Spain and Africa*, JOURNAL OF NEGRO HISTORY, Apr. 1965, at 97-105; Martin Bernal, *Black Athena: The African and Levantine Roots of Greece*, *in* AFRICAN PRESENCE IN EARLY EUROPE 66-82 (Ivan Van Sertima ed., 1985); ALLISON BLAKELY, BLACKS IN THE DUTCH WORLD: THE EVOLUTION OF RACIAL IMAGERY IN A MODERN SOCIETY (1993); Allison Blakely, *The Negro in Imperial Russia: A Preliminary Sketch*, JOURNAL OF NEGRO HISTORY 61, No. 4, 351-61 (1976); DAVID DABYDEEN, HOGARTH'S BLACKS: IMAGES OF BLACKS IN EIGHTEENTH CENTURY ENGLISH ART (1987); Paul Edwards & James Walvin, *Africans in Britain, 1500-1800*, *in* THE AFRICAN DIASPORA: INTERPRETIVE ESSAYS 173-204 (Martin L. Kilson & Robert I. Rotberg eds., 1976); Asa G. Hilliard III, *Blacks in Antiquity: A Review*, *in* AFRICAN PRESENCE IN EARLY EUROPE 90-95 (Ivan Van Sertima ed., 1985); Clarence L Holte, *The Black in Pre-Revolutionary Russia*, *in* AFRICAN PRESENCE IN EARLY EUROPE 261-75 (Ivan Van Sertima ed., 1985).

10. *Dred Scott*, 60 U.S. at 407.

social world around them. We might now claim that all these statements are false, but they were as true to these Justices and their cohort as any fact recited in a brief today.

In *Plessy v. Ferguson*,[11] a man with seven white great grandparents sued when he was removed from a "white only" railroad car, claiming that transferring him to the "colored car" denied him a property right in his reputation as a white person.[12] The Supreme Court denied Plessy's claim by relying on a mixture of legal analysis, biology and psychology.

Although the decision itself made clear that Plessy's complexion was the same as others' who were routinely considered white, the Court's understanding of biology led it to opine that:

> A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal

---

11. 163 U.S. 537 (1896).

Robert P. Green, Jr. describes *Plessy v. Ferguson* this way:

> On June 7, 1892, Homer Adolph Plessy . . . boarded an East Louisiana Railway train and took a seat designated for whites. When asked by the conductor to move to the "colored" car, he refused and was immediately arrested . . . . On May 18, 1896, Justice Henry Billings Brown delivered the opinion of a near unanimous Court. Focusing on interpretation of the Fourteenth Amendment as central to the issue, Brown cited the distinction that the Court had earlier made in the *Slaughterhouse Cases* between "the rights and immunities of citizens of the United States, as distinguished from those of citizens of the States," and sought to clarify the kinds of rights protected from hostile state legislation. He concluded: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police powers."

Robert P. Green, Jr., *"Separate But Equal" Approved, in* 2 HISTORIC U.S. COURT CASES: AN ENCYCLOPEDIA 624, 627 (John W. Johnson ed., 2001).

12. *Plessy*, 163 U.S. at 547.

> equality of the two races, or reestablish a state of involuntary servitude.[13]

Further, in response to the claim that this and other emerging Jim Crow laws were meant to create a caste system with blacks at the bottom, the Court's understanding of psychology led it to state that:

> the underlying fallacy of the plaintiff's argument . . . consist[s] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[14]

In the 19th century, no one made much of the fact that the Supreme Court employed social and natural science in its pronouncements. Neither Justice Brown nor Justice Harlan in *Plessy* nor Justice Taney in *Dred Scott* were surrounded by the interdisciplinary atmosphere emerging in law schools today. Nor could they have imagined the explicit reliance on social science that we see in *Brown v. Board of Education.* Their decisions unselfconsciously drew on what was around them, including the understandings of the world reflected in what we now call natural and social science.

Almost sixty years later in the 20th century, our understanding of law and social science had changed. By the time that *Brown v. Board of Education* was decided, lawyers and courts were familiar with the explicit, self-

---

13. *Id.* at 543.

14. *Id.* at 551. Not to be outdone, the famous Harlan dissent also employs extralegal reasoning in the form of political science when the Justice points out that:

> It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons . . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while [traveling] in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

Id. at 556-57. Harlan's argument also employs judicial notice, a technique that Professor Charles Black advocated more than fifty years later in *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421 (1960).

conscious use of social science through the Brandeis brief.[15] As a result, by the 1950s, courts were more comfortable with employing this type of extra-legal evidence as witnessed by the *Brown* decision.

In addition to its place as one of the great decisions in terms of its use of social science, *Brown* is also a good example of the point that knowledge is gained and lost over time often because there are things we would rather forget than confront. Most lawyers are familiar with the fact that the Supreme Court noted a psychology study in *Brown* that related how black children reacted when presented with white dolls.[16] They are even familiar with the fact that *Brown* was a consolidation of several different actions.[17] Most, however, do not know the story of one of these actions, *Briggs v. Elliott*.[18] Nor are they aware of another study also cited by the Court, Gunnar Myrdal's *American Dilemma*.[19]

Clarendon County in South Carolina operated a segregated school system.[20] Although not required by law, the county provided bus transportation to the rural white children attending schools in far away towns but did not provide any transportation to black children who lived up to ten miles from their place of education. Nor did the county provide heat or repair services for the black children's schools. Instead, parents and teachers were required to chop the wood and make the repairs themselves.

---

15. The Brandeis brief was first presented in *Muller v. Oregon*, 208 U.S. 412 (1908). That case concerned whether Oregon State had the right to deny women access to certain jobs. Brandeis relied on social science to show that women were at least arguably weaker than men and more in need of government protection. He then used these findings to argue that the Court should defer to the state legislature when the legislature had reasonable grounds for creating protectionist legislation. *See, e.g.*, Paul L. Rosen, THE SUPREME COURT AND SOCIAL SCIENCE (1972).

16. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954); Kenneth B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Mid-century White House Conference on Children and Youth) 1950.

17. *Briggs v. Elliott* on appeal from the Eastern District of South Carolina, *Davis v. County School Board of Prince Edward County* on appeal from the Eastern District of Virginia, *Gebhart v. Belton* on certiorari from the Supreme Court of Delaware and, of course, *Brown v. Board of Education of Topeka Kansas* on appeal from the District Court of Kansas.

18. 98 F. Supp. 529 (E.D. S.C., 1951); *inj. Denied*; 103 F. Supp. 920 (E.D. S.C., 1952).

19. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1975). The original version of the study began in the late 1930s and was published in 1944.

20. For a full discussion of the events leading up to the litigation in *Briggs v. Elliott*, see J. A. DELAINE, *BRIGGS V. ELLIOTT*: CLARENDON COUNTY'S QUEST FOR EQUALITY (2002).

Because the county refused to transport their children, Clarendon County's black parents bought a used school bus for $400 and, when that bus was beyond repair, they bought another bus for $700. These amounts represented more than many families made in a year. Their sacrifice proved too costly, however, and they abandoned the bus when the costs of repairs and gasoline became too dear.

Just at the time that the parents realized that they could no longer sustain a private transportation system for their children, a young man drowned while trying to cross a lake that separated the children from their school. The parents were now afraid to let their children continue walking to school as they too would have to cross the same lake that had caused the young man's death. In desperation, they turned to Clarendon County for help with the cost of maintaining the school bus. The county denied their request, and it was this denial that led to *Briggs v. Elliott*.[21]

Gunnar Myrdal, the 1974 Nobel Prize winner in economics, was employed by the Carnegie Foundation in the late 1930s and early 1940s to study the race question in the United States. The result was *American Dilemma: the Negro Problem and Modern Democracy*,[22] a text of almost

---

21. *Id.* at 13-17.

22. Myrdal, *supra* note 19. E. Stina Lyon reports on *American Dilemma* in her essay entitled *Researching Race Relations: Myrdal's American Dilemma from a Human Rights Perspective* that:

> In 1937, the Carnegie Corporation was in search of a social scientist to direct a major scholarly inquiry into the state of race relations in the United States. This research project was to become one of the largest and most expensive social science investigations ever funded. The Carnegie Corporation, a philanthropic organisation devoted to the support of both research and social reform, had agreed to commission such a study with the aim of producing as accurate, detailed and comprehensive a picture as possible of the position of the 'Negro' in the US particularly with respect to educational issues. Its findings were to be directed to interested parties across the political spectrum in both the white and the black community, three quarters of which at the time still lived in the deeply segregated South. The President of the Corporation, Frederick Keppel, considered the project so charged with emotion and political tension that only an 'outsider' to the US could be trusted to bring it to credible fruition. Such an 'outsider' needed to come from a democratic country preferably without an imperialist past and thus not tainted by traditional 'colonial' attitudes to race. (Keppel, 1944, Lagerman, 1987). . . . Very soon into the work, 'the Negro problem' that he had been invited to study turned in his understanding into 'the White man's problem,' thus turning the original question on its head. As he noted in the introduction to the final report, during early visits to the South he became 'shocked and scared to the bones' by what he saw of violence, poverty and injustice and by the role of white Americans in

1,400 pages that distilled another 20,000 pages of research on America's race problem. In comparison to Kenneth Clark's doll study, Myrdal's work is profoundly distressing. Each page contains another outrage against American blacks. The end result is a portrait of a people so oppressed and misused by their government and society that the reader's emotions swing from anger to despair.

I bring up *Briggs v. Elliott* and Myrdal's *American Dilemma* in order to illustrate how some facts endure while others fade from memory. The story of Clarendon County's parents and their attempts to educate their children is no less compelling than the stories we know about *Brown v. Board of Education*, and for decades, *American Dilemma* was a much more influential study than *Effect of Prejudice and Discrimination on Personality Development*.[23] But Kenneth Clark's study tells a prettier story about race discrimination in which little children are affected by unseen forces, and their major harm is that they select dolls that look different from themselves. This harm and its unseen causes are much easier to deal with than 1,400 pages of atrocities with identified perpetrators, just as the pretty Norman Rockwell image we have of *Brown v. Board of Education* is much more appealing than the story of parents forced to sue or see their children die. Our lost memories of *Briggs v. Elliott* and *American Dilemma* demonstrate this essay's theme: that social science is only useful before an action is ever filed. Social science cannot change a judge's mind at the time of trial; that mind must have been open long before the action is ever considered by a tribunal. By asserting that social science's influence comes before trial, I am not arguing against the use of social science. I am only pointing out that changing people's outlooks takes a long time and many studies over a series of years. Thus, social movements and the lawyers who are interested in using social science must be willing to take a very long-term view of what they seek to accomplish.

> perpetuating it. (Myrdal, 1944: xxxv). Though most of the literature in front of him on the 'Negro problem' dealt with Negroes, this was at heart a problem of white racist attitudes and behavior. . . . Six years later, in the midst of war, the final dense two volume 1,500 page report was published under the title An American Dilemma: The Negro Problem and Modern Democracy. It was based on a synthesis of 20,000 pages of empirical evidence and included extensive methodological appendices.

London South Bank University, Faculty of Arts and Human Sciences, *Working Papers Series at* http://www.lsbu.ac.uk/ahs/research/reports/lyon/lyon17contents.shtml.

23. Clark, *supra* note 16.

A recent illustration of this need to take the long-term view is *Grutter v. Bollinger* and its amicus briefs.[24] Some of the briefs dealt with the needs of United States' industry for culturally-sensitive workers in the new global economy.[25] Others dealt with national security and the military's need for trained minority officers supplied by ROTC.[26] But only Justice Clarence Thomas' dissent dealt directly with the damning evidence submitted about the racial effects of the Law School Admissions Test (LSAT).[27]

Only Justice Thomas' dissent had the courage to ask why elite law schools have the right to both use racially-discriminatory tests as the major part of their admissions process and then ask the Court to allow them to use another process to undo the harm caused by the first.[28] As Justice Thomas pointed out, reliance on the LSAT in law school admissions encourages the belief that the bulk of law school admissions are merit-based, with some odd exception for minorities.[29] In other areas of law, we do not tolerate the use of tests to determine qualifications when the tests themselves are racially flawed.[30]

The fight against the LSAT and its sister examinations has just begun, and the fact that only one in nine Justices understood the ill-effects of these tests does not mean that the social science behind the arguments against these examinations is useless. What the failure to successfully attack the LSAT in this forum means is that there is more work to be done in the court of public opinion. We must recapture the memories of the times when great lawyers were produced without the aid of standardized examinations. These are truths that are hard to see in a world filled with the social science of standardized tests and their "neutral" pursuit of "merit." They are particularly hard to fight when many powerful opinion leaders are themselves successful veterans of these very tests. Nevertheless, this is one

---

24. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

25. *Id.* at 334. Elvia Ariola's article from the Association of American Law Schools' Workshop on Racial Justice deals extensively with these briefs.

26. *Id.*

27. Brief of Amici Curiae Society of American Law Teachers for Respondent, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

28. *Id.* at 336.

29. *Id.* at 337.

30. Owen M. Fiss, *in Groups and the Equal Protection Clause, in* MODERN CONSTITUTIONAL THEORY: A READER 470 (John H. Garvey et al. eds., 4th ed. 1999). I am indebted to Professor Jose Roberto Juarez for pointing out in his paper for the Association of American Law Schools' Workshop on Racial Justice that Justice Thomas' ability to understand this fact when the rest of the Court remains oblivious might well result from the Justice's prior experience with the EEOC.

of the battlegrounds in the fight for social justice at the moment and the one that the lawyer for social justice must work on with the social scientist as the battle continues.