PROBABILITY AND THE LAW

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1. RELEVANT U.S. LAW

Title VII. (k) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;

14th Amendment. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.

8th Amendment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. BAZEMOR (1986)—UNANIMOUS: BURGER, BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, O'CONNOR

ISSUE is

> "whether the Court of Appeals erred in upholding the District Court's finding that petitioners had not proved by a preponderance of the evidence that respondents had discriminated against black Extension Service employees in violation of Title VII by paying them less than whites employed in the same positions." (Brennan, part II)

EVIDENCE used by petitioners consisted in

> "multiple regression analyses designed to demonstrate that blacks were paid less than similarly situated whites. [...] these regressions used four independent variables - race, education, tenure, and job title. [...] The regressions purported to demonstrate that in 1974 the average black employee earned $ 331 less per year than a white employee with the same job title, education, and tenure." (Brennan, part II.B)

CONCLUSION is that

> "the Court of Appeals erred in stating that petitioners' regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." [...] Normally, failure to include

> variables will affect the analysis' probativeness, not its admissibility. [...] A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence." (Brennan, part II.B.1)

3A. MCCLESKEY (1987)—MAJORITY: POWELL, REHNQUIST, WHITE, O'CONNOR, SCALIA

FIRST, McCleskey claims that (part II)

> "Georgia capital punishment statute violates the Equal Protection Clause of the 14th Amendment"

The Court responds that

> "to prevail under the Equal Protection Clause, McCleskey must prove that the decision maker in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on Baldus study."

QUESTION: How is this different from a wage discrimination case under title VII?

The court notes that

> "Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. [...] the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions."

SECOND, McCleskey also claims that (PART III and IV)

> "McCleskey also argues that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment [...] and contends that the Georgia capital punishment system is arbitrary and capricious in application, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia."

The Court responds that

> "At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."

BESIDES, the Court observes (part V):

> "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."

3A. MCCLESKEY (1987)—DISSENT: BRENNAN, MARSHALL, BLACKMUN, STEVENS

In dissent, Justice Brennan notes that

> "Since Furman v. Georgia, 408 U. S. 238 (1972), the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one. Furman held that the death penalty"may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia (1980), 427. "
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> "The Baldus study indicates that, after taking into account some nonracial factors that might legitimately influence a sentencer, the jury *more likely than not* would have spared McCleskey's life had his victim been black. "
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> "As we held in the context of Title VII of the Civil Rights Act of 1964 last Term in Bazemore v. Friday, 478 U. S. 385 (1986), a multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions."
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> "The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. [...] Taken on its face, such a statement seems to suggest a fear of too much justice."

QUESTION: What is the nature of the disagreement between the majority and the dissent?