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Moran, Rachel F.

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Rachel F. Moran

Dean and Michael J. Connell Distinguished
Professor of Law

Prior to her appointment at UCLA Law, Rachel Moran was Robert D. and Leslie-Kay Raven Professor of Law at Berkeley Law School, and she served as a founding faculty member of the UC Irvine School of Law.

Following law school at Yale, Dean Moran clerked for Chief Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit and worked for the San Francisco firm of Heller Ehrman White & McAuliffe. She joined the Boalt faculty in 1983. She was a visiting professor at UCLA, Stanford, New York University, the University of Miami, the University of Texas, and Fordham University School of Law. From 1993 to 1996, she served as chair of the Chicano/Latino Policy Project at UC Berkeley's Institute for the Study of Social Change, and in 2003 she became the director. In 1995, she received the UC Berkeley Distinguished Teaching Award.

Dean Moran is highly active in the legal community. She was appointed as President of the Association of American Law Schools (AALS) in 2009. She is a member of the American Law Institute and served on the Executive Committee of the AALS. She sat on the American Bar Association's Standing Committee of the Division of Public Education and on the executive board of the Berkeley Law Foundation. She currently serves on the board of advisors for the *Texas Hispanic Journal of Law and Policy*.

WHAT COUNTS AS KNOWLEDGE? A REFLECTION ON RACE, SOCIAL SCIENCE, AND THE LAW

Rachel F. Moran*

In the years since the U.S. Supreme Court handed down *Brown v. Board of Education*,¹ most discussions of the case have focused on whether it was effective in promoting lasting equality of opportunity in the public schools. Although this profoundly important question dominates retrospectives on *Brown*, another unresolved controversy relates to whether the ruling has altered in any fundamental way the role of social science evidence in constitutional litigation. More than 50 years later, substantial disagreement persists about whether this kind of research has played or should play any important role in the jurisprudence of race. Today, social scientists face increasing doubts about their neutrality and objectivity, struggle to be heard in a marketplace of ideas increasingly flooded with information of questionable quality, and encounter growing resistance to the notion that expertise provides a proper foundation for legal decisionmaking. For those who still believe that social science has a role to play in advancing racial justice, the strategy used in *Brown* can no longer be taken for granted. The time is ripe to reassess what counts as knowledge so that social science is not increasingly marginalized in courts of law.

The gap between *Brown's* multidisciplinary aspirations and today's jurisprudential realities derives at least in part from inherent tensions between the epistemologies of law and social science, tensions that were not fully addressed in the flush of a landmark school desegregation victory. As Susan Haack, a professor of law and philosophy, explains:

The culture of the law is adversarial, and its goal is case-specific, final answers. The culture of the sciences, by contrast, is investigative, speculative, generalizing, and thoroughly fallibilist: most scientific conjectures are sooner or later discarded, even the best-warranted claims are subject to revision if new evidence demands it, and progress is ragged and uneven. . . . It's no wonder that the legal system often asks more of science than science can give, and often gets less from science than science could give; nor that strong scientific evidence sometimes falls on deaf legal ears, while flimsy scientific ideas sometimes become legally entrenched.²

[Social Science Enters the Courtroom: Does This Evidence Generally Count As Knowledge?](#)

Haack contends that the divergence of law from science calls into question the very legitimacy of the adversarial process as a truth-finding device—at least when “key factual questions can be answered only with the help of scientific work beyond the comprehension of anyone not trained in the relevant discipline.”³

The clash of epistemologies that Haack describes has grown even more fraught due to an information explosion that makes quality control urgent yet extremely difficult to achieve. According to law professor Elizabeth Warren, because research can play a strategic role in calls for reform, markets for data have arisen that distort the neutrality and objectivity of expertise. The problem is especially pressing when the flow of information is unregulated, for example, in the political process. As she writes,

In the rough and tumble world of legislative policy-making and campaigns to shape public opinions, there is . . . no concept of junk science, no datum too filthy or too bizarre to be barred from the decision-making process. Instead, when legislative decisionmaking is at stake, the free market of the economists’ happiest dreams exists: an unrestricted and rough world of competing ideas, information, and misinformation that parties will evaluate based on quality signals—and their own idiosyncratic needs.⁴

Warren worries that assurances of quality, particularly those associated with an academic reputation for independence and integrity, have been seriously degraded. Increasingly, scholars must seek outside funding to support their work. As government grants shrink, there is increasing pressure to undertake research for hire. According to Warren, “For anyone who does independent academic research, who has little to trade in but her independence and reputation, the idea that the market for data has devalued the premier signal for independence and quality—university affiliation—is deeply discouraging.”⁵

Though Warren focuses primarily on the troubled relationship between law and social science in the legislative realm, courts have not been exempt from these perils. Judges have worried about whether “hired guns” distort the pursuit of the truth in the adversarial process. Justice David Souter sparked a firestorm of controversy when he announced in *Exxon Shipping Co. v. Baker*⁶ that the Court “decline[d] to rely” on research that ran counter to anecdotal reports on the unpredictability of punitive damage awards. Justice Souter dismissed the studies because they had been funded by Exxon, which sought to limit its liability after a major oil spill in Alaska.⁷ Justice Souter’s comments were especially hard-hitting because some of the rejected work was prepared by prominent scholars and published in prestigious law journals.⁸ Though directed at Exxon’s efforts to manipulate the academic debate, Justice Souter’s skepticism clearly had ramifications for the credibility of social science evidence more generally.⁹ Indeed, to identify work potentially

tainted by bias, the Court now requires friends of the court to disclose any source of compensation that could distort their submissions.¹⁰ Despite efforts to root out misleading evidence, one sociologist involved in the *Exxon Shipping* litigation has concluded that “The legal system and the scientific method co-exist in a way that is really hard on truth.”¹¹

Battles over the meaning of racial equality are not apt to attract the sort of big-money players involved in corporate and business disputes like the *Exxon Shipping* case. Nonetheless, high-profile public interest litigation is extremely polarized and inevitably triggers an arms race for amicus briefs. In the late 1940s and early 1950s, amicus briefs were filed in 23 percent of cases litigated before the Supreme Court. With the advent of a public law litigation model, the number rose to 85 percent in the late 1980s and early 1990s. The mean number of briefs filed in each case also went up, especially when a prominent social controversy was at issue.¹² Cases with more than 20 amicus briefs first appeared on the Court’s docket in the 1970s. *Regents of the University of California v. Bakke*¹³ held the record with 57 briefs until it was toppled by *Webster v. Reproductive Health Services*¹⁴, an abortion case with 78 briefs.¹⁵ More recently, the affirmative action lawsuits against the University of Michigan attracted record numbers of amici.¹⁶ Of course, not all these briefs were filed by social scientists, but typically, at least some of them were.¹⁷

Confronted with an onslaught of information, the Court has struggled to regulate access to the adversarial process in a meaningful way. In the early 1990s, the justices revisited the standards for admitting expert testimony in *Daubert v. Merrill Dow Pharmaceuticals*.¹⁸ Previously, the *Frye*¹⁹ test had looked to whether findings were generally accepted in the scientific community to decide whether research was reliable. The *Daubert* decision added several additional criteria, including the falsifiability of the findings, the known or potential error rate for the methodology, and peer review and publication of the results.²⁰ The changes were made in response to fears that “junk science” was entering the courtroom.

This new approach empowered courts to second-guess the experts’ conventional wisdom, given increasing doubts about the integrity of the partisan evidence being introduced.²¹ *Daubert*, however, created problems of its own. For one thing, it was not clear that judges were competent to make independent assessments of scientific reliability.²² For another, a significant body of evidence did not conform to *Daubert’s* model of scientific inquiry, which was based on traditions in the natural and physical sciences.²³ As a result, trial courts had to treat some expert testimony as “other specialized knowledge,” which further muddled the standards for admissibility.²⁴

Most of the controversy surrounding *Daubert* has ignored the way in which it targeted adjudicative facts, specific factual questions that arise in applying a doctrinal principle. The standard did not reach legislative facts, which inform courts in making normative judgments about relevant policy concerns.²⁵ So, for example, in

Brown itself, data on the equalization of teachers and facilities in segregated schools related to adjudicative facts. The findings pertained to whether conditions in each school district satisfied the “separate but equal” doctrine.²⁶ Today, in an affirmative action lawsuit, data on the weight given to race in the admissions process also would be an adjudicative fact. These studies evaluate whether race is so influential that it operates as an impermissible quota rather than a constitutionally acceptable plus.²⁷ Expert testimony on adjudicative facts like these is carefully scrutinized for reliability under *Daubert*.

Brown’s brave new vision, however, was focused on social science’s role in effecting transformation in the law, not merely in resolving narrow factual questions under existing doctrine. So, in *Brown*, research on the inescapable harms of segregation, even in dual school systems that had equalized, was a legislative fact. It bore on the normative question at the heart of the Court’s constitutional dilemma: Could separate ever be equal?²⁸ In *Parents Involved in Community Schools v. Seattle School District*,²⁹ studies on the benefits of diversity in elementary and secondary schools played an analogous role. This research was deployed to support a normative commitment to color consciousness, not just as a remedy for past discrimination but as a bridge to a multiracial future.³⁰

Daubert does not reach evidence on legislative facts, which judges are free to admit at their discretion. For that reason the Court has been able to adopt a liberal, open-door policy on amicus briefs. Though a formal rule mandates that briefs be submitted only when they provide new factual or legal information, in practice the Court grants nearly every application to file.³¹ This open-door policy is important to *Brown’s* multidisciplinary legacy because amicus briefs can address legislative facts that counsel may not address due to procedural and evidentiary constraints.³² Yet merely submitting evidence is not the same as wielding influence, particularly when there are few safeguards to assure reliability and relevance.

The real business of sifting through amicus briefs occurs when the justices and their clerks decide which ones are worth reading. These choices are made behind closed doors, leaving the impact of any submission hard to gauge. There are anecdotal accounts that amicus briefs often become part of a vast unread literature.³³ Yet some do feature in the Court’s opinions. Indeed, one common way of measuring the briefs’ influence is to count how many times they are actually cited.³⁴

This approach yields mixed results. The Court has grown increasingly willing to refer to amicus briefs in decisions. From 1946 to 1955, 17.60 percent of all opinions cited an amicus brief, a figure that steadily grew in the ensuing decades to 27.57 percent in 1976–1985 and then to 36.97 percent in 1986–1995.³⁵ Nonetheless, the likelihood that any particular brief will make its way into an opinion remains quite low. For instance, just 3 percent of all amicus briefs filed were actually cited between 1946 and 1995.³⁶ Given these long odds, only a few repeat players like the Solicitor General could feel relatively confident of getting the justices’ attention.³⁷

The analysis of citation rates has been supplemented by an examination of success rates for amicus brief filers—that is, how often they prevail relative to an overall rate of winning outcomes. Once again, the results are not straightforward. Amici generally do not bolster the chances that a petitioner who has successfully obtained a grant of certiorari will win; however, amicus briefs do systematically enhance a respondent’s chances of prevailing. A notable exception is the Solicitor General, who enjoys an extraordinary rate of success, whether supporting the petitioner or the respondent.³⁸

These studies do not address the impact of briefs filed by social scientists in particular. This is an issue worthy of further exploration, but there are reasons to doubt that the submissions exert any special pull on the Court. Scholars, who typically participate in cases on an ad hoc basis, are unlikely to enjoy the substantial reputational advantages that come with being a repeat player. To mitigate this disadvantage, briefs can boast multiple signatories, preferably from prestigious institutions, to enhance credibility and clout.³⁹ Moreover, enlisting organizational support, for example, from professional associations, may help as well.⁴⁰ Social science briefs, to the extent that they are filed in controversial cases, face special obstacles because of the large numbers of submissions on each side. In this sort of arms race, amici are not likely to affect outcomes unless they offer original arguments.⁴¹ Yet very few amicus briefs are cited for their substantive propositions, and these typically are filed by repeat players, most notably the Solicitor General.⁴²

Even with a dramatic expansion in amicus participation, there is no decisive support for the argument that briefs filed by social scientists shape the judicial decisionmaking process. The unique impact of repeat players in the Supreme Court bar, especially the Solicitor General, probably has little to do with *Brown’s* multidisciplinary turn. If anything, the justices are likely swayed by the trustworthiness of legal interpretations offered by these experienced practitioners, not by their artful use of nonlaw experts. Until further study is done, the impact of social science evidence—at least when introduced in amicus briefs—will remain an open question.⁴³ Available research on citation counts and success rates could be usefully supplemented by efforts to gauge the impact of expert testimony in other settings, such as lower court proceedings and the Supreme Court’s grant of petitions for certiorari.⁴⁴

Inquiries like these shed some light on whether a proliferation of amicus briefs amounts to nothing more than a thin veneer of constitutional empiricism. According to legal scholar Timothy Zick, the Court cites findings selectively, deploying social science information in ways that blunt its actual impact on outcomes.⁴⁵ If he is correct, then social science evidence is mere window dressing in constitutional disputes. The haunting possibility therefore remains that an arms race in amicus briefs, including those filed by social scientists, has not changed in any definitive way what counts as knowledge in the courts.

In discussing the role of experts, Haack⁴⁶ describes irreducible tensions between law and social science as distinct ways of understanding the world. What *Brown* augured, however, was a change in the courts' epistemological universe, one that would reconcile these different ways of knowing. Sociologists Philippe Nonet and Philip Selznick describe *Brown* as the triumph of "responsive law," which requires legal institutions to "give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change. In that reconstruction, activism, openness, and cognitive competence . . . combine as basic motifs."⁴⁷ Responsiveness should make law look more like science. To use Haack's words, legal analysis becomes "investigative, speculative, generalizing, and thoroughly fallibilist," and like most scientific conjectures, "even the best-warranted claims are subject to revision if new evidence demands it, and progress is ragged and uneven."⁴⁸

With this flexibility and openness, a responsive model of the law can be generous—even bold—in using social science evidence to reconsider fundamental normative commitments, much as the *Brown* Court was. Social pressures then become "sources of knowledge and opportunities for self-correction."⁴⁹ This approach is not without risk, however. As courts become increasingly receptive to alternative sources of knowledge, the adjudicative process loses its claim to a unique authority. This loss of authoritativeness in turn jeopardizes integrity, although Nonet and Selznick ultimately conclude that the gains justify the costs. In particular, other forms of knowledge, including social science, enable courts to distill the meaning of the public good in ways that transcend a purely self-interested use of political power.⁵⁰

Today, the Supreme Court is awash in information, a phenomenon that might appear to vindicate responsive law's possibilities.⁵¹ Yet as already noted, bombarding the justices with briefs does not necessarily mean that social science becomes a source of knowledge for self-correction. Writing about the Rehnquist Court, Zick contends that constitutional empiricism often has served as a smokescreen to reinstate a formalistic approach to the law.⁵² In his view, the Rehnquist Court was able to manipulate research because there were no clear benchmarks for interpreting the findings. Without a "way to distinguish 'good' and 'bad' empirical results," he asserts, "courts [were] not using data to falsify their own notions of what the law should be, but to support their claims of what the law is."⁵³ Contrary to appearances, the Rehnquist Court's epistemological universe did not expand, and the divide between law and social science evidence remained wide. According to Zick, research remained subordinated to legal verities, always confirming rather than testing them.

Under Chief Justice William Rehnquist's successor, Chief Justice Roberts, the Court now includes a plurality of justices who embrace formalism. They do not indulge in any pretense of constitutional empiricism and so largely exclude social science evidence as a way of knowing. Chief Justice Roberts and his colleagues, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito share a belief that law is abstract and universal; it can be discerned from legal texts and, for some of the justices, from legal history.⁵⁴ This jurisprudential philosophy has significant epistemological consequences. According to legal scholar Grant Gilmore,

[Formalism] seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal.⁵⁵

Under this closed system of American law, "[s]tare decisis [with its assumption of limited change in the law has] reigned supreme."⁵⁶

Because legal interpretation does not require attention to context or changing conditions, formalism maximizes the tensions between law and science as ways of knowing. A formalist approach requires courts to look to their judicial predecessors, not contemporary social scientists, to determine what the law should look like. Haack's dichotomy reemerges with a vengeance: Law is immutable; science is tentative; law is certain; science is speculative. At most, then, social science can speak to adjudicative facts, but it cannot offer up legislative facts that serve as the motive force in a public law litigation model. For instance, in the challenge to affirmative action at the University of Michigan, the constitutionality of race-conscious admissions policies would depend entirely on the text of the Fourteenth Amendment and perhaps its history, but certainly not on social science research on the benefits of diversity that Michigan had amassed.

Given *Brown's* precepts, the decision has been something of a thorn in the formalists' side. After all, the reasoning in Chief Justice Warren's opinion, including footnote 11, bears little resemblance to the closed epistemological universe that Chief Justice Roberts and his colleagues envision. In a recent debate over constitutional philosophy, Justice Breyer asked how *Brown's* result could be squared with Justice Scalia's commitment to strict reliance on constitutional text. Justice Scalia did not answer the question, but he has called the tactic "waving the bloody shirt of *Brown*."⁵⁷ In truth, dramatic changes in American race relations, catalyzed in part by the Court's constitutional leadership, pose a seemingly insurmountable challenge to the static system of jurisprudence that formalists endorse.

Perhaps reacting prudentially to the “bloody shirt,” other members of the Court have declined to adopt a formalist philosophy. In *Grutter*, for example, Justice O’Connor penned the majority opinion, which clearly rejected a textualist claim that the Constitution is color-blind based on race-neutral language that “no State shall deny to any person within its jurisdiction the equal protection of the laws.”⁵⁸ Instead, her decision rested on the diversity rationale without reaching more profound questions of social justice. According to law professor Cass Sunstein, Justice O’Connor was practicing the virtues of “judicial minimalism.”⁵⁹ Minimalism, as Sunstein defines it, is a far cry from responsive law. A minimalist judge strives, to the extent possible, to reserve legislating for legislators. Courts therefore dispose of cases on grounds that “leave open the most fundamental and difficult constitutional questions.”⁶⁰ In doing so, judges allow the democratic process to resolve complex questions that provoke deep and divided views among the citizenry.

In the area of affirmative action, for example, a minimalist adopts neither a strictly color-blind approach that bans race-conscious admissions policies, nor a theory of justice that would legitimate quotas and set-asides. As Sunstein says, members of the Court who adhere to minimalism have “endorsed no rule and no theory” in this hotly contested area.⁶¹ Their stance “has, however, attempted to help trigger public debate, with, perhaps, an understanding on the part of some of the justices that until recently, the debate was neither broadly inclusive nor properly deliberative—and that it did not honestly reflect people’s underlying concerns.”⁶² Because this jurisprudential strategy has been democracy-promoting and keeps the discussion of affirmative action alive, Sunstein concludes that it is “possible to celebrate what many have seen as the Court’s indefensible course of rule-free judgment.”⁶³

Race presents some unique problems for Sunstein’s celebratory account of minimalism, particularly insofar as *Brown* itself “appears to be the strongest example against the claim that [Sunstein means] to defend.”⁶⁴ In an attempt to reclaim the jurisprudential high ground, Sunstein argues that *Brown* “was far less maximalist than it might seem; it can even be taken as a form of democracy-promoting minimalism.”⁶⁵ To justify this rather improbable statement, he relies on the fact that the landmark decision was the culmination of a litigation campaign that involved incremental victories. Moreover, in *Brown II*,⁶⁶ when the Court addressed implementation of its pathbreaking school desegregation decision, the justices relied on a gradualist approach. The decision to integrate “with all deliberate speed” allowed the Court to wait until the political branches signaled their support before moving aggressively to enforce the integration mandate.⁶⁷

Sunstein’s account of *Brown* is not wholly satisfactory. Efforts to integrate higher education in the years before *Brown* were arguably maximalist in their way. Certainly, images of George McLaurin, an African American graduate student, sitting in roped-off sections of the classroom, cafeteria, and library at the University of Oklahoma suggest that democratic deliberation was, standing alone, unlikely

to carry the day.⁶⁸ Nor do memories of forcible integration, for example, when President Dwight D. Eisenhower sent federal troops to Little Rock, Arkansas, indicate that dialogue and reason were the spur to meaningful implementation of the Court's mandate.⁶⁹ If minimalism prizes judicial humility and deference to the political process, Chief Justice Warren and his opinion in *Brown* seem unlikely candidates for accolades. After all, President Eisenhower, in the wake of the desegregation decision, described "[t]he appointment of that S.O.B. Earl Warren" to the Supreme Court as the worst mistake of his Presidency.⁷⁰

If anything, Sunstein's account suggests the limits of responsive law, the political perils that come with judicial engagement in broad social controversies. These dangers in turn explain the Court's gradual retreat from the bold innovations of the Warren Court. Through the judicial appointments process, Congress has steadily populated the Court with justices who—at least during the nomination hearings—expressly disavow any desire to make rather than apply the law. Confirmation proceedings have served as a vehicle to discredit responsive law by treating it as the province of wayward judicial activists.⁷¹ Law professor Stephen Carter attributes the shift directly to the Supreme Court's stand on school desegregation:

Brown changed everything. Infuriated by the Supreme Court's temerity in striking down public school segregation, the Southern Democrats who in those days still largely ran the Senate began to require that all potential justices give testimony before the Judiciary Committee. When the nominees appeared, the Dixiecrat Senators grilled them on *Brown*. The first was John Marshall Harlan in 1955, who declined invitations to discuss either specific cases or judicial philosophy as a matter of "propriety." One by one, later nominees followed his example.⁷²

According to Carter, today's hearings "follow the same model that they did half a century ago when the Dixiecrats invented them."⁷³ This screening process, then as now, is designed to limit the prospects for responsive law, including its openness to social science evidence as a source of normative guidance.

- * Dean and Michael J. Connell Distinguished Professor of Law, UCLA School of Law. This article is excerpted from *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 *LAW & SOC'Y REV.* 515 (2010).
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64. *Id.* at 37.
65. *Id.* at 38–39.
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