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DISCRIMINATORY INTENT

L. H. LaRue[1]

What are we trying to prove when we prove discriminatory intent? My question is provoked by some puzzles in the leading cases. So let me begin by sketching out the background, and then I will state why the cases puzzle me so.

We start with the majestic generalities of our Constitution, wherein it is prohibited that any state should "deny to any person within its jurisdiction the equal protection of the laws."[2] The paradigm case has always been racial discrimination,[3] even though different judges have differed in judging which racial distinctions add up to the prohibited discriminations.[4] (Even today, for example, I suppose that public health officials can investigate the links between disease and genes, even though doing so may entail making racial classifications.)

However, in the paradigm cases, such as *Brown v. Board of Education*,[5] we have no doubt that state officials were using racial categories; in other words, there was no proof problem. When public officials segregated schools, they were explicit about their use of racial categories to segregate. And when public officials inquire into the links between having sickle cell anemia and being of African-American heritage, they too are explicit in using racial categories. But matters are not always so simple. When sentencing for criminal action distinguishes between crack cocaine and regular cocaine,[6] do we then have a racial discrimination? According to the case law, the prevailing answer to this question is, "No," and I wish to question why this is so.

It is customary to cite *Washington v. Davis*[7] as the leading modern case. This case upheld the constitutionality of a civil service examination administered to all candidates who wished to be police officers, even though African-Americans were flunking the test more often than were Caucasians. The Supreme Court asserted that disparate impact alone was not enough to trigger "strict scrutiny."[8] Instead, a plaintiff must prove that the official actors had an invidious intent to discriminate; the opinion acknowledged that the proof would normally proceed by way of circumstantial evidence, but otherwise, little was said about the details of the proof process.

Subsequent cases have spelled out the procedures that govern this process of proof.[9] The plaintiff has the burden of producing evidence that establishes an initial, prima facie case of intent to discriminate. The defendant then has the burden of coming forward and producing evidence that refutes the inference. The burden of persuasion remains on the plaintiff throughout the trial. These procedures are perhaps overly baroque, but they are plausible. These procedures can be justified by asserting that the plaintiff ought to bear some initial burden, so that judges can screen out frivolous cases; but once the case is shown to be serious, and not frivolous, then the defendant ought to have the obligation to produce evidence, since the defendant has possession of most of the crucial documents.

However, a reasonable procedure for proving something is rather hollow unless we know what we are trying to prove. What exactly is this "intent" that the plaintiff must prove? And is the definition of the requisite "intent" plausible?

The intent that a plaintiff must establish is defined in Justice Powell's opinion for the Court in *McCleskey v. Kemp*.[10] In that case, Warren McCleskey wished to challenge the death penalty as it was administered in Georgia; he claimed that the system was administered in a racially discriminatory manner. McCleskey's proof was statistical; the numbers

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[2] U.S. Const. amend. XIV, §1.

[3] *In re Slaughterhouse Case*, 83 U.S. (16 Wall.) 36 (1872); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[4] *See Plessy v. Ferguson*, 163 U.S. 537, 544 (1896); *Brown v. Board of Education*, 347 U.S. at 495. *Plessy* and *Brown* differed on the issue of state enforced segregation in public schools.

[5] 349 U.S. at 294.

[6] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

[7] 426 U.S. 229 (1976).

[8] *Id.* at 238. Had strict scrutiny been triggered, the District of Columbia would have had to introduce evidence showing that the test did indeed predict the quality of the candidates' performance as a police officer; the requisite studies had not been done, so no such evidence would have been available. A failure of evidence, given the relevance of strict scrutiny, would have entailed that the test was unconstitutional.

[9] *See Keyes v. School District*, 396 U.S. 1215 (1969); *Keyes v. School District*, 413 U.S. 189 (1973).

[10] 481 U.S. 279 (1987).

showed that the combination of black criminal and white victim was the most lethal combination.[11] Thus, if a black killed a black, he was far less likely to receive the death penalty than if he had killed a white.[12] As you probably already know, the claim was rejected: it was held that the numbers did not establish the requisite bad (unconstitutional) intent. Consider the following passage, which summarizes Justice Lewis Powell's assessment of the evidence: McCleskey also suggests that the [statistics prove] that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But " '[d]iscriminatory purpose'. . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' it adverse effects upon an identifiable group." For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty *because* of an anticipated racially discriminatory effect.[13]

The excerpt just quoted establishes a high hurdle; it defines the intent that the plaintiff must prove as being "because of" and not "in spite of." This contrast is not crystal clear, although the line it draws is probably no more fuzzy than most lines that we lawyers draw. On one side of the line (the good side, the constitutional side) is "in spite of," and legislators on that side of the line presumably know that their legislation will fall more heavily upon African-Americans, but regret that fact. On the other side of the line (the bad side, the unconstitutional side) is "because of," and legislators on that side of the line both know and desire that their legislation will disadvantage African-Americans. For example, the type of school segregation that was litigated in *Brown* was something that legislators consciously sought; it was not a by-product of pursuing some other end.

Should we draw the line as Powell has drawn it? Perhaps it would be good to compare "intent." Powell has defined it with "intent" as we use that word in the criminal law, wherein "intentional homicide" is punished more severely than lesser grades of homicide. Justice Oliver Wendell Holmes, Jr. gave a classic summary of the law on this issue. Holmes began by distinguishing between "intent" and "malice," as those words are understood in ordinary discourse:

> When an act is said to be done with an intent to do harm, it is meant that a wish for the harm is the motive of the act. Intent, however, is perfectly consistent with the harm being regretted as such, and being wished only as a means to something else. But when an act is said to be done maliciously, it is meant, not only that a wish for the harmful effect is the motive, but also that the harm is wished for its own sake, or as Austin would say with more accuracy, for the sake of the pleasurable feeling which knowledge of the suffering caused by the act would excite.[14]

Is the distinction that Holmes draws between the ordinary use of "intent" versus "malice" the same as the distinction that Powell would draw between "in spite of" versus "because of"? The distinctions sound similar, although there may be some subtle differences. At any rate, for the moment let me point out that Holmes asserts that "malice," in its ordinary meaning, is not part of the law of homicide, even though the phrase "malice aforethought" is commonly used in describing that law; as a term of art, "malice aforethought" does not mean the same thing as does the ordinary English word "malice" in its colloquial sense. To prove the point, Holmes cites the following hypothetical: "It is just as much murder to shoot a sentry for the purpose of releasing a friend, as to shoot him because you hate him."[15]

In short, the harm caused by the act, the consequences of the act, can be the means to an end and yet the "intent" still be a criminal intention. Holmes then points out that the intent which is directed toward the consequences of the act can be further analyzed. He states the issue as follows: "But intent again will be found to resolve itself into two things; foresight that certain consequences will follow from an act, the wish for those consequences working as a motive which induces the act."[16] Are both foresight and wish required, or is foresight enough? Holmes thought that foresight alone was enough.

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[11] *Id.* at 286.

[12] *Id.*

[13] *Id.* at 29 (quoting *Personnel Administrators of Mass. v. Feeney*, 442 U.S. 256, 279 (1979))(footnotes and citations omitted)(emphasis in original).

[14] Oliver Wendell Holmes, The Common Law 44 (1963).

[15] *Id.* at 45.

[16] *Id.*

"For instance, a newly born child is laid naked out of doors, where it must perish as a matter of course. This is none the less murder, that the guilty party would have been very glad to have a stranger find the child and save it."[17]

Having come this far in his analysis, Holmes goes on to break down the issue once more. What does it mean to say that one foresees the consequences? Holmes puts the matter as follows: But again, What is foresight of consequences? It is a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in the relation of effect to cause. Again, we must seek a reduction to lower terms. If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not.[18]

In other words, it is enough for Holmes that one has "actual present knowledge of the present facts which make an act dangerous."[19] If one knows the facts, ignorance about the regular course of cause and effect is irrelevant. Once again, Holmes illustrates the point with a hypothetical:

> For instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder. But if the workman has reasonable cause to believe that the space below is a private yard from which every one is excluded, and which is used as a rubbish-heap, his act is not blameworthy, and the homicide is mere misadventure.[20]

This last hypothetical may be controversial, but it shouldn't be. One should remember that we have subdivided the law of homicide, creating a set of subcategories that complicates, but does not refute nor render invalid Holmes' analysis. In a state such as Virginia, one might suppose that a jury could rationally reach three different judgments about the workman who throws the beam off the roof: 1) they could judge that the workman had acted recklessly and convict him of second degree murder; 2) they could determine that there was gross negligence and convict him of involuntary manslaughter; 3) or they could find that there was only ordinary negligence and conclude that there was no crime, leaving the matter to the civil courts.[21] I would like to point out that Holmes did not invent his hypothetical; he cites Blackstone; and one should note that the Virginia Supreme Court also cites the very same passage from Blackstone and, like Holmes, follows it.[22]

What should one conclude from these excerpts from Holmes? At the very least, they establish that defining the concept of "intent" is no easy task and that there is more than one way to do it. If there is more than one way to define "intent," then Justice Powell was neither right nor wrong in defining it as he did. If it is not a question of right or wrong, then it is a question of better or worse. What is the best way to define the "intent" that is necessary to find that the legislature has set up a de jure classification on the basis of race? Powell's way of proceeding seems puzzling, on first reading, since his definition entails that we are being far more harsh to criminal defendants than we are to state legislatures; evidence that can send someone to jail for having intended a homicide is not good enough to determine that a legislature has intended to make a racial classification. Why should we do that?

Perhaps the answer to the puzzle is to be found in the fact that a legislature is a collective body, whereas a criminal is a single individual. When we say that a legislature "intends" something, we are treading on dangerous grounds. When a group of legislators vote for a bill, different members will differ among themselves as to their motives; they will differ in their knowledge and beliefs about the circumstances; and they will differ in their knowledge of the words of the bill, with most voting without

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

[21] *Whiteford v. Commonwealth*, 27 Va. (6 Rand.) 810 (1828); For a further discussion see also *Essex v. Commonwealth*, 228 Va. 273, 322 S.E.2d 218 (1984) (Poff, J. concurring and dissenting).
[22] *Id.* at 813-814.

having read the bill. Perhaps the point of Powell's test is creating a strict burden of proof. Perhaps Powell thought that proof should be made difficult because one is trying to prove something that may be non-existent.

To understand the puzzle, however, is not to approve of the solution. It seems that Powell's test makes proof hard because it may be wrong to say that a legislature "intends" to discriminate. However, this entails that we regard the danger of an improper labeling as that which must be avoided. Further, it asks us to look away from the suffering of the plaintiff. One could say that Powell's primary sympathy is with the perpetrator rather than the victim.[23] Or to put it more neutrally, one could say that Justice Powell is pro-defendant rather than pro-plaintiff. Of course, it is not a logical mistake to prefer defendants to plaintiffs; but then, those who disapprove are not being illogical either. It is also logical to say that civil rights law is supposed to protect the plaintiffs of the world, and consequently, defining "intent" so strictly as to make it impossible to prove is simply bad policy.

However, on this question, as on many others in the law, there are sharp divisions, which are not merely legal divisions but political divisions. The politics of civil rights law is a mine field, and my own judgment is that the politics are currently running in favor of the defendant and against the plaintiff. I suppose that judges have a hard time deciding whether they should swim against the tide or with it.

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[23] *See* Alan D. Freeman, Antidiscrimination Law: A Critical Review, in The Politics of Law (David Kairys ed., 1982).