Proving Discriminatory Intent

Kaneesha R. Johnson
University of North Carolina at Chapel Hill
kaneesha.johnson@unc.edu

Frank R. Baumgartner
University of North Carolina at Chapel Hill
frankb@unc.edu

Marty A. Davidson, II
University of Wisconsin at Madison
madavidson2@wisc.edu

Abstract
We propose a new theoretical perspective on discriminatory legislative intent in making criminal law. First, we note the difference between disparate impact and discriminatory intent, and the wealth of literature on the former compared to the later topic. Second, we review judicial standards of demonstrating such intent: Direct (plain meaning of the words, official statements) and circumstantial evidence (historical background, sequencing of events leading to the law, legislative or administrative history) and we note that for the courts, the mere demonstration of statistical disparities is generally insufficient to establish intent. Next, we look at additional indicators of intent beyond those generally been recognized by the courts. First is law enforcement discretion and differential surveillance. In the case of laws written with ambiguity, police discretion and surveillance systems will play an important role in determining whether the law has a racially disparate impact. Similarly, laws may be overly broad, or they can accumulate to make virtually everyone be in violation of some part of the law, at least technically; this has a similar impact on possible disparities because of the surveillance system. Finally, we point to instances where disparities are widely observed but never rectified. If disparities in the operation of the law are apparent but no legislative action to address them follows, then we can conclude that the legislature either intended to achieve this outcome or is comfortable with it.

Key words: Racial discrimination; race and ethnic politics; racial disparities; legislative intent

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Introduction

This paper is based on a chapter from a book manuscript from a forthcoming book entitled *Working As Intended*. In previous chapters, we have shown the various ways in which the intensity of law enforcement surveillance and contact differs across demographic groups. Some groups, most notably Black people living in lower-income neighborhoods, experience much more intense policing compared to others, such as wealthier white people living in areas with higher average income and relatively less police surveillance. We have shown how this differs by age, race, gender, and place. We have also shown the areas of the criminal code that are associated with disparate rates of arrest of various demographic groups. Here, we move beyond documenting large race- and place-based disparities in arrests and turn to the question of whether the laws themselves were designed with racially discriminatory intent. Specifically, we detail the major themes and considerations surrounding intent that emerge from the courts and from the legal and academic literatures, and introduce some new ways to infer intent. As with most social systems, the criminal legal system is messy and dynamic. We do not attempt to present a grand theory that would help us precisely locate legislative intent under a given set of circumstances. Instead, we simply enumerate a number of the strategies that have been employed in this line of work, and what we will be using in subsequent chapters.

While many people have studied disparate impact, and we have done so as well in previous chapters, discriminatory intent is relatively under-studied in the social science literature on race and politics. But we should care about whether various laws just happen to have disparate impacts or whether they are doing exactly what they were designed and intended to do. While it may seem impolite, impolitic, or just not nice to suggest it, we find little reason to believe that racial motivations would be left at the door when lawmakers consider legislation.

Because we want to understand how politics, lawmaking, and law enforcement work, and what are the causes of the monumental differences in law enforcement activity in different geographic and demographic communities, we address this question head-on with no assumptions that lawmakers "just wouldn't do that." Perhaps they do.

Suggestions of the impact of race in policymaking are by no means absent from the literature. David Bateman and collaborators (2018) conducted extensive analyses of lawmaking in the US Congress over many decades of policymaking, showing how the political power of Southern Democrats was cemented into the system by the one-party structure of the South before the 1980s, the unified voice that this group had on issues affecting race relations, and the many policy implications of this. Social Security was designed to omit domestic workers and farm laborers, for example, omissions that had massive racial implications. The law itself does not state the racial motivation, but the bargaining position of Southern democrats on this and many other pieces of legislation was that if large numbers of Blacks were to benefit, a law would simply not pass. The results of this were sometimes racialized policy design, as in the Social Security example, and sometimes wide discretion for state officials to implement federal programs, allowing federal funds to flow, but with implementation in accordance with "local practices" which in the South were clearly racialized.

Similarly, Richard Rothstein's (2017) extensive analysis of housing policies makes clear the racialized intent encapsulated in federal housing policies, including that for veterans and the federal involvement in red-lining practices by accepting them when federal mortgage policies could easily have been designed to disallow such racially discriminatory practices. Of course, Michelle Alexander (2010) has critiqued the massive incarceration system in terms very much consistent with what we are arguing. So, our point is not that we are the first to suggest racially

discriminatory intent, far from it. Rather, we want to shift focus now from documenting disparities to exploring where they come from. Are they evidence of a system off its rails, or signs of a system working exactly as intended?

Despite the growing body of literature that robustly documents the disparate impact of law enforcement systems, there are many that have not yet been persuaded of the racialized intention of the law. The courts have been resistant to amend laws based on differences in outcomes alone, and large swarths of the general public have been hesitant to deem the criminal legal system as being built on racist foundations based on observed outcomes. Many people resisting these conclusions might point to a belief that racially disparate outcomes are likely due to the underlying behaviors of different groups, despite limited data showing such differences (Piquero and Brame 2008).

Relying on an argument of disparate impact requires us to wait until parties can prove that disproportionate harm has fallen on a specific group of people, and that such harm could have been avoided. In other words, continuing to draw conclusions on the harms of areas of the criminal code by highlighting the harms after they have been done, is highly inefficient. Furthermore, by relying on disparate impact arguments, we run the risk of assuming that criminal law was written in a racially neutral manner, and that somewhere down the line various factors resulted in the disproportionate use against certain demographics. Although we believe that disparate impact is an important area of inquiry, we turn our attention to more institutional and systemic reasons why we observe disparate impact in criminal law, asking the central question: Were these laws designed to have the impact that we observe, including disparate racial impact?

Before we delve into our analysis, it is worth asking a clear question: Why would a legislative body *not* have racially discriminatory intent? If such a question seems out of bounds,

is this because it is impolite or because it is so improbable as to be nearly inconceivable? When we consider that many laws remaining on the books today were passed during previous generations when racialized laws were common and accepted, can we be so confident that maintaining a segregated racial order would not have been at least one of the considerations in the minds of many lawmakers, perhaps even a prime one? We need not answer this question at the moment. However, we pose it so that readers will understand what the real question is.

Realistically, why would elected officials considering laws in, say, 1937 when Jim Crow was the law of the land, not be expecting that these laws should be part of a system that upholds laws rooted in White supremacy? Similarly, is it reasonable to think that legislators and elected officials generally, not to mention journalists, advocates, and other commentators, had no idea that the drug laws of the 1970s and 1980s would have a disparate impact by race? And, more importantly, when they considered this likelihood, what was their response: Did they immediately pull back from it because of the expected racial impact, or did they go forward nonetheless, seeing that relative lack of impact on white or privileged communities as a virtue or a sign of a well-designed piece of legislation, perhaps even of their own cleverness? It seems unlikely that informed opinion at the time many laws were passed would have been unaware that a given law might have a disparate impact. Rather, the question is whether this was seen as a feature or a bug. If a bug, was it such a serious bug that it needed to be fixed? These are the key questions with which we engage in this chapter, and in the following ones.

In the sections that follow, we discuss four important components of criminal law: disparate impact, discriminatory intent, law enforcement discretion, and policy feedback. Understanding the connection between these four factors gives insight into why criminal laws were created, how criminal law is enforced, the outcomes of criminal laws, and the ability of

lawmakers to amend or revise laws in the face of policy feedback showing how they are enforced. In subsequent chapters, we use a range of historical methods to uncover whether certain key areas of the North Carolina criminal code were intended to target a group of people from their moments of inception. But for this chapter, our goal is to set up the analysis by exploring the various ways in which discriminatory intent may translate into eventual disparate impact.

We do not mean to imply that the criminal legal system presents problems or should be called into question only when discriminatory intent can be identified. There are, of course, areas of the law that might have originated with no intention to target certain groups, but somewhere down the line have been applied in a manner that produces disparate outcomes. There could also be areas of the law that were developed with the intention to target certain groups that did not have that outcome. All these areas are worthy of attention. Instead, we focus our analysis on those instances where there were, or may have been, discriminatory motivations to pass certain laws that did result in disparate impact and join a growing group of researchers and advocates to shift the focus from the criminal legal system as being bad because it results in racial differences, to uncovering the ways that the criminal legal system has been used as a tool to oppress certain racial groups from its inception. This form of inquiry therefore shifts from critiques of individual behaviors or outcomes towards critiques of the entire system of law.

We are not the first to attempt to prove legislative discriminatory intent. Previous academic scholars, legal advocates, and community organizers have all attempted such an endeavor (Alexander 2010, Rothstein 2017, Climate Justice Alliance n.d.). We join this group by highlighting not only the court approved methods of proving discriminatory intent, but offering additional scenarios that, we argue, should also be considered instances of discriminatory intent.

Disparate Impact

As we have highlighted throughout this book, most social science research on law enforcement systems has focused on whether laws result in disparate impact or not. The basic assumption underlying this method of analysis is that those laws that have disparate outcomes by racial groups should be focused on while those areas of the law that have equal outcomes by race or sex groups tend to not be called into question. In this book, we define disparate impact as an area of the law that results in an overrepresentation of a demographic group by 140 percent of their population share. Recall from Chapter 3 that different parts of the criminal code result in different degrees of disparate impact.

Given the nature of law enforcement, it is highly unlikely to be able to classify a criminal law as either completely neutral or where enforcement is limited only to one demographic group.[1] Most likely, the impact of criminal laws falls somewhere between these two extremes. In fact, we found only one law on the books that appears to have a neutral effect across demographic groups: Failure to stop for a stopped bus (code 5428). Table 1 shows the percent of charges by race-sex groups for this specific charge compared to their demographic share for the 10,361 charges under this crime code.

[1] Note, however, that some laws such as those regulating people with uterus' reproductive choices may lead to the arrest only of people with uterus, by definition. As the criminal legal system only categorizes men and women, most of these people would be categorized as "women" in the data.

Table 1. An Example of Equity: Failure to Stop for a Stopped Bus.

Race-Sex Group	Population (%)	Charges (%)	Ratio
White Female	32.2	30.6	0.95
White Male	30.8	33.4	1.08
Black Female	11.4	11.1	0.97
Black Male	10.0	10.8	1.08
Latine Male	4.9	5.12	1.04
Latine Female	4.5	4.0	0.89
Asian Female	1.5	0.8	0.53
Asian Male	1.4	0.7	0.50
Native Female	0.6	0.3	0.50
Native Male	0.6	0.3	0.50
Total	98.0	97.1	

For all the demographic groups with more than 4 percent of the population, the share of those arrested is within 10 percent of the share in the population. No other element of the criminal code has an impact as neutral as this crime code. Note that laws may have equal impact, slightly disparate impact, or highly disparate impact. Some examples of highly disparate-impact laws include the following (for a more complete list please refer to Tables 3-2 to 3-6 in Chapter 3):

- Failure to return rental property (code 2649), where Black females are 41 percent of those charged, but 11.4 percent of the population, a ratio of 3.6.
- Threatening phone calls (code 5338), where Native American males are 2.9 percent of those charged, but 0.6 percent of the population, a ratio of 4.8.
- School attendance law violation (code 3822), where White women are 48.8 percent of those charged, but 32.2 percent of the population, a ratio of 1.5

While there will naturally be some variation in the share of people who are arrested under any given law, it is striking that so few criminal codes are applied in a neutral manner. Why is this? Is it because this is the only crime that people across race-sex demographic groups commit equally? Or maybe it that the safety of school children is such an important that there is limited discretion from law enforcement? Many explanations offered by social scientists for why we

observe disparate outcomes hinge on differences in behaviors of various demographic groups (Harris, et al. 2009, Blumstein 1982), the role of racism in law enforcement (Romero 2006), policies and laws from specific time periods (Fellner 2009), and social environments (Crutchfield, et al. 2012). Previous chapters in this book have added to this growing list by demonstrating the role of geography and neighborhoods in law enforcement discretion, contact, and surveillance. The question we now turn to: what is the role of discriminatory intent in producing these disparate outcomes?

Discriminatory Intent

There has been considerable confusion and debate surrounding definitions of discriminatory intent and acceptable methods of proving it in the social science and legal academic literature. In this section, we provide an overview of these debates and then highlight where our work is situated within this scholarly and legal terrain.

The law and legal scholarship typically recognize two forms of discriminatory conduct within the enforcement of the law: disparate impact and discriminatory intent. The difference between the two centers on whether there was intent for a racially disparate outcome to occur or if there was a racially discriminatory motivation at play when a policy was being developed (Moreau 2010). Discriminatory intent is discrimination in the eyes of the law. Though the Supreme Court has never provided a clear-cut definition of discriminatory intent, in its simplest terms, it is when there was a decision, policy, or rule created with the intention that it will be used disproportionately against a group of people on the basis of a protected class identity. Such discrimination is unconstitutional. Because it is unconstitutional, any law where such intent was demonstrated would be ruled invalid. Therefore, legislators may go out of their way to hide or camouflage any such intent, since to reveal it would render the policy or law moot. When

considering the intent of the legislature, therefore, we must be aware that: legislators are human, subject to the same implicit biases and cultural norms and expectations as others; that they generally operate in an institutional environment with substantial resources; and that if discriminatory intent were demonstrated in their deliberations, it would render any resulting legislative product legally invalid.

Surprisingly, the role of intent in unconstitutional discrimination is fairly recent in doctrinal articulation (Huq 2018). After several decisions that highlighted the court's skepticism on the role of intent when invoking the Constitution's protection against discrimination, the US Supreme Court made clear in the landmark decision of *Washington v. Davis* that in order to bring about a claim of intentional discrimination, there had to be "discriminatory racial purpose" (Washington V. Davis 1976). In the early 1990s, the courts decided that the law must not "infringe upon or restrict practices because of their religious motivations" (Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah 1993), thereby deeming intent to be a central component when invoking the Constitutional protection against discrimination because of race, ethnicity, or religion (Huq 2018).

Some legal scholars have suggested that there is more than one category of discriminatory intent. Eric Schnapper (1982) argues that much of the doctrinal confusion surrounding discriminatory intent is because the court has failed to distinguish between goal and means of discrimination. Goal discrimination involves the "invidious consideration of race" in the objective that a government policy seeks to achieve, whereas means discrimination involves the "invidious consideration of race" in selecting the method of achieving the policy objective (Schnapper 1982). When policy or law decision makers are faced with developing or enacting a law or policy, there are a few considerations that they must take. First, they need to consider the

goal of the proposed action—what is the legislation or policy attempting to achieve? Second, they need to consider how to go about achieving the stated goal. In considering the goal and the means of some government action, there will naturally be some undesirable outcomes along the way, conferring benefits on some individuals and disadvantages to other individuals, and it is down to the decision-maker to weigh whether those anticipated consequences are worth the end.

It might be useful to consider some examples of very clear examples of racist goals of the law or means for achieving a goal. The most common examples of racially discriminatory goals include segregating individuals based on race, denying the right to vote for Black people, extending privileges to White people, and excluding access to other racial groups. Others have called this "direct discrimination", where the action is taken knowing that it is based on prejudices against that group. For example, a legislature might believe that Black people are inherently mentally inferior to White people and therefore should not be granted the right to vote. Indeed, many of the laws in the United States before the Civil Rights Movement were written with direct discrimination. During the era of chattel slavery, laws were written to enslave people based on their race based on White supremacist ideology. Following the abolition of slavery Black codes were restrictive laws written to limit the freedoms of people based on their race. The Jim Crow system was designed to segregate people based on the same White supremacist ideology that justified slavery (Alexander 2010). In each of these cases, the goal of the law was to discriminate based on race.

Clear examples of means to achieve some goals that burden certain racial groups while benefiting other racial groups include urban renewal in the 1960s and the creation of the interstate highway system. The stated goal of the government was the need for interstate highways, and the decision to build the highways through Black neighborhoods and not White

neighborhoods clearly placed a higher burden on Black over White people. Similarly, "urban renewal" projects often tore apart Black neighborhoods while imposing little burden on Whites (see Segrue 2005). Another way to think of this "means" form of discriminatory intent is as a collateral consequence of a racial-neutral decision. Some scholars have referred to this as "racially selective indifference" (Brest 1976). The interstate-highway system may not have had any discriminatory intent with respect to its goals; but the means that were used had significant racial implications. Means-based discrimination can be thought of as discrimination in implementation or policy design. Goals-based discrimination is more direct. Both are unconstitutional if they can be demonstrated.

In some instances, apparently racially neutral means are specifically designed to achieve racially discriminatory ends, as when written examinations unrelated to the subject matter of the job have been used for promotion and hiring decisions, or when literacy tests or "grandfather clauses" were used for voting following Reconstruction. If previous discriminatory practices have rendered Black people, on average, less able to pass such tests, and there is no substantive value in the test itself, then the test can be seen as a demonstration of discriminatory intent (Griggs v. Duke Power Company 1971).

It is also possible to see racially disparate outcomes coming about through means that may not be intended by the legislature, but rather on the basis of inadvertent error, ignorance or indifference to the likely outcome of any particular policy or program. For an example from our own employment domain, consider university administrators deciding when to hold faculty meetings. If those administrators do not have children in school, they may be unaware of school vacations or afternoon pick-up times. With no intent to impose burdens on faculty members who do have children in school and who must abide by these constraints, they may inadvertently

schedule meetings at times that are convenient for some, but burdensome for others. Generally, they do not do this multiple times because of the feedback that they receive from unhappy colleagues.

Contrast the situation where a university administrator thoughtlessly but without malice schedules a series of meetings at times that are differentially burdensome to some members of the faculty to that where a legislature enacts laws that have disparate impacts. Key questions include: Was it really by error? Will those adversely affected have access to the decision-makers in order to point out the disparate impact? If advised of the adverse impacts, will the law be corrected or revised? In the case of the 3pm faculty meetings, one can expect that those adversely affected will make their voices heard and the administrators will find another time that works for a greater share of those expected to attend. The decision-makers made an error; it was brought to their attention, and they fixed it. Of course, if the administrators had done this on purpose, with knowledge of the likely effects, then most likely they would not reschedule. So, a key question is whether policymakers take steps to remedy adverse situations when these are pointed out. If they do, then the idea that they were inadvertent in the first place gains traction. If they do not, they may have been seeking the observed outcome; they may be indifferent to and comfortable with it; or there may be some compelling reason why it is necessary. A related question is whether those adversely affected by a government decision have the means or ability to point it out to those in charge. If they do not, or if the decision-makers ignore them on purpose, then we can say that there was indifference to the adverse effect.

We will return to this issue of "indifference" in later sections. By looking at legislative response after adverse impacts are pointed out or can easily be determined, we may be able to distinguish inadvertent mistakes from legislative hostility to the over-burdened group.

Judicial Standards to Demonstrate Discriminatory Intent

The first time the Supreme Court signaled its willingness to entertain a range of strategies for identifying discriminatory intent was in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (1977). In *Arlington Heights*, the Court held that disproportionate impact was not sufficient to prove that a government action violated the Equal Protection Clause. In considering what evidence may be used to prove intent, the Court canvassed a wide range of methods including disparate impact, historical background, contemporary statements by officials, and trial testimony of decision makers under oath.

The various ways that the Court has classified the different methods of intent fall into one of two buckets: direct and circumstantial evidence. Direct evidence is the direct proof of a fact, whereas circumstantial evidence is indirect evidence that does not prove a fact, but gives rise to logical inference that a fact exists. In the following sections, we highlight the various methods that the Court has used to prove discriminatory intent under these two categories. An important caveat is that not all these methods are "approved" for all areas of the law. Our goal in surveying these methods is to provide the reader with insight into methods that have been used in past legal struggles.

Direct Evidence

Direct evidence of discriminatory intent is direct proof of the fact. Direct evidence includes evidence that, "if believed, proves the fact without inference or presumption" (Coghlan v. American Seafoods Co. 2005). The clearest forms of direct evidence are express classifications, which include the semantic content of a law or an official admitting to having considered race as a basis for their action. Other examples of direct evidence of discrimination include "any statement or document which shows on its face that an improper criterion served as the basis for an adverse action" (Fabela v. Socorro Independent School District 2003).

Semantic Content and Plain Meaning of the Words

Perhaps the most straightforward of the methods to go about proving discriminatory intent is the plain meaning of the words of the text or the semantic content, described by legal scholar Lawrence B. Solum as "the semantic context of a legal text is simply the linguistic meaning of the text" (2010, 98). This method simply states that a law is discriminatory if the law states, in the plain meaning of the words and definitions at the time of passage (*Caminetti v. United States*, 1917), that it should be applied differentially to groups according to race, ethnicity, or religion. While the logic of relying on the meaning of the words makes intuitive sense, it is unlikely to yield successful attempts given that laws are not written to explicitly mention race anymore. In some cases, the courts have been sensitive to the specific use of vocabulary that may signal specific groups, rather than explicitly mentioning a racial group (Huq 2018).

Official Statements

Another direct method that has commonly been used in the courts to prove discriminatory intent is examining the official statements from an official responsible for state action. Under this method, discriminatory intent can be established if the official makes a statement to another person that signals the action will be used improperly against a group of people. One such example of this is found in *Cooper v. Harris*, a 2017 North Carolina racial gerrymandering case where the Court identified statements on the North Carolina Senate floor made by legislators responsible for the map making, stating the maps "must include a sufficient number of African-Americans" in the challenged district (Huq 2018).

Direct evidence of discriminatory intent in the form of explicitly identity-based laws or public or recorded statements by decision-makers expressing a racially discriminatory intent are relatively rare, for obvious reasons. Generally, we must look for circumstantial evidence.

Circumstantial Evidence

While semantic content and official statements offer direct evidence of discriminatory intent, a range of methods have been or could be adopted to prove discriminatory intent in an indirect fashion. Such examples include statistics demonstrating a clear pattern of discriminatory effect, specific sequencing of events, historical background of the decision, departure from normal procedure, the relevant legislative or administrative history, and a consistent pattern of actions from decision-makers that impose a greater harm to a protected class of people (Village of Arlington Heights v. Metropolitan Housing Development Corporation 1977). The *Arlington Heights* decision directs the courts and agencies to consider the totality of the circumstances or a cumulative assessment of the evidence at hand. An example of such an approach is seen in *North Carolina State Conference of the NAACP v. McCrory* (2016), a successful challenge to North Carolina's voter ID law on the basis of discriminatory intent to disenfranchise Black voters in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. In striking down the district court's decision, the Fourth Circuit stated that "th[e] error resulted from the court's consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*" (N.C. State Conference v. McCrory 2016).

Historical Background

Examining the historical context of a law or policy can be one method to show circumstantial evidence of discriminatory intent. Under this method, if one can show a history of the state engaging in discriminatory actions to target a protected group, including the creation of laws to target a specific group, repealing protections for groups, and other official actions, even if those actions are written in a neutral manner, then a case can be made for discriminatory intent.

For example, in *North Carolina State Conference of the NAACP v. McCrory*, the court considered "North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state" particularly relevant in determining discriminatory intent in Senate Bill 824, which required voters to provide one of ten authorized photo IDs to vote in state elections. The court found "the record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to dilute the voting rights of African Americans" p.33 (N.C. State Conference v. McCrory 2016).

The court considered the long history of efforts to disenfranchise African Americans in North Carolina, including the 1899 Act to Regulate Elections, literacy tests, poll taxes, accusations of Black voters engaging in fraudulent practices, and gerrymandering. The court, convinced by this history, found that "a series of official actions taken for invidious purposes," and held that the district court "erred in ignoring or minimizing these facts" (p.31).

The Sequence of Events Leading to the Decision

Another method of proving discriminatory intent hinges on the sequencing of events that lead to a decision. Under this method, the motivations of an official, or officials, can be deduced by examining whether there is a pattern of discrimination leading up to the policy or law in question. Unlike historical background, which considers a wide range of factors contributing to the collective history and often spanning a much longer time period, the sequencing of events method tends to be confined to the actions leading up to a specific piece of legislation.

In *North Carolina State Conference of the NAACP v. McCrory* the Fourth Circuit noted that the sequence of events leading to H.B. 589, including "the General Assembly's eagerness to at the historic moment of *Shelby County's* issuance, rush through the legislative process the most restrictive voting law North Carolina has ever seen since the era of Jim Crow", as persuasive

evidence of the General Assembly's discriminatory intent (*North Carolina State Conference of the NAACP v. McCrory* 2016, 229).

Legislative or Administrative History

As outlined in *Arlington Heights*, courts can also consider the legislative or administrative history in proving discriminatory intent. The examination of legislative or administrative history requires the examination of the documents and proceedings that take place during the creation of a law. Such documents include congressional committee reports, legislative debates, committee hearings, and earlier versions of the bill. These documents are critical to understanding what was being considered when debating and drafting legislation.

In the NC voter ID case, the record revealed that the General Assembly had requested a report on voting patterns by racial groups in the state which revealed the provisions outlined in the proposed legislation would disproportionately target Black people. The court held:

> This data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID … In sum, relying on this racial data, the General Assembly enacted legislation restricting all — and only — practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made … we cannot ignore the choices the General Assembly made with this data in hand. (*N.C. State Conference of the NAACP v. McCrory* 2016, 48a)

Statistical Evidence of Discriminatory Effect Alone is Generally Insufficient

The courts have been particularly wary of allowing disparate impact claims alone to prove discriminatory intent or violations of the Eight Amendment. In the landmark death penalty decision of *McCleskey v. Kemp (1987),* the US Supreme Court held that studies showing that the death penalty has a racially disproportionate impact do not mean that there was an Eighth Amendment violation *unless* a discriminatory purpose can be proven. Taking at face value the evidence presented that the State of Georgia operated a death penalty system that was rife with racial differences, particularly by the race of the victim, the Court ruled that this had no bearing

on the matter. The burden was on the plaintiff to show the intent to discriminate, in their particular case, based on race, gender, or another protected element. In sum, while statistical evidence of disparate impact may be part of a pattern of evidence used to show intent, it is not sufficient by itself. This line of reasoning is not confined to death penalty litigation. In *Arlington Heights*, the court held that, while evidence of disparate impact could be used as a component in establishing discriminatory intent, it could not prove intent without further supporting evidence.

The factors above are those commonly used in legal analyses and in judicial decisions about the constitutionality of legislation that has been challenged. But there are other signs of discriminatory intent. Some of these have been used in the courts, and some have not. Because we are social scientists and not beholden to the standards of the court, we can be far more wide-reaching in our understanding and definition of discriminatory intent. We turn our attention to these additional factors now.

Law Enforcement Discretion

An important, and often overlooked, component of legislative intent is the degree of discretion that the law leaves to members of the law enforcement community. Broadly speaking, law enforcement discretion is defined as the power of the police to make a choice. Early understandings of police discretion held that discretion could only occur when the officer was acting outside of the norms or rules of the agency (Sellin 1938). Later definitions of police discretion have posited that law enforcement officers, and law enforcement agencies, have discretion when "the effective limits on his power leave him free to make a choice among possible courses of action or inaction" (Davis 1969).

Research on police discretion has shown that there are various factors that influence law enforcement decisions. Some of these factors are legally relevant, such as jurisdiction and

seriousness of the crime, and some are not, such as race and the neighborhood where actions occur. Most of the work in this book so far has presented the non-legal factors that contribute to police discretion, such as race, geography, and the sex of a person. Exploring police discretion in this way assumes that discretion comes only at the point of the law enforcement decision. While this is likely the case in some areas of the law, if the state passes a law that is intended to result in disparate impact, then there necessarily must be an understanding that the law will be applied in such a way. Law enforcement discretion can, in some ways, be dependent on how the law is written, who it is written by, and the expectations of how it should be enforced. Judges, prosecutors, defense attorneys, police officials, and sheriffs are typically consulted during the legislative process and have ample access to decision-makers, many of whom are former law enforcement officials themselves. (For example, the current Governor of North Carolina, Josh Stein, served for eight years as Attorney General, as did the governor before him, Roy Cooper.) It is reasonable to expect that policymakers enacting new laws have good understandings of how police may implement these new laws, and we will show specific examples in the chapters to come of where laws were specifically written with the expectation of differential enforcement.

We do not mean to imply that the existence of discretion is evidence of discriminatory intent. There are certainly instances where less discretion could also lead to disparate outcomes. But if there was an intention on the part of the legislature for the law to target a certain group, then they need to ensure that police can enforce it in the intended way (we will provide examples of this collaboration and cooperation in later chapters). In the past, the legislature was allowed to write laws in a way that would target certain groups. For example, during antebellum slavery, a slave revolt was commonly defined as three or more enslaved people organized with the intent of achieving personal or group freedom. Or later in 1854, the NC General Assembly passed a law

stating that, “[a]ssault of a white woman by a person of color with the intent to commit rape is punishable by death” (NCGS, Ch. 40, section 10). Here, there is a strict racial boundary with little discretion needed for law enforcement to target the law along racial lines. As we entered a period of “color blind” and broadly written laws that rendered most actions criminal (for example defining a riot as “a public disturbance involving an assemblage of three or more persons”—an interesting parallel to the definition of a slave rebellion) law enforcement had to be offered a significant amount of discretion to enforce the law in a way that reflected the discriminatory intent.

Ambiguous Language

One way in which law enforcement is granted discretion is through ambiguity in the language of the law. Ambiguity within the law typically refers to scenarios where there is a lack of clarity in the wording of the law or where there is uncertainty in the application of a term (Schane 2002). Ambiguity is usually raised as an issue in contract law, where there is a need for the court to intervene to settle disputes on the meaning of the terms of a contract. Ambiguity in criminal law arises when a criminal statute is unclear or ambiguous. The vagueness doctrine, also called the void-for-vagueness doctrine, which has been hailed as “among the most important guarantees of liberty under law” (Sunstein 2018), is a constitutional requirement that a State cannot take away life, liberty, or property under a law that fails to “give a person of ordinary intelligence adequate notice of what conduct is prohibited” or lacks “sufficient standards to prevent arbitrary and discriminatory conduct” (Manning v. Caldwell for City of Roanoke 2019, Carolina Youth Action Project v. Wilson' 2023).

The vagueness doctrine also limits the arbitrary enforcement of the law (Goldsmith 2003). If a criminal law is deemed too vague or obscure for the average person to understand

then the law is void. Another remedy to vagueness is the rule of lenity, which holds that if a law is unclear or ambiguous, then the court should apply it in a way that favors the defendant. Though once a useful tool in the courts, the rule of lenity has largely fallen out of practice (Price 2004).

Ambiguous laws in criminal legislation, we suggest, are laws that have been written with such vague language that grants law enforcement substantial discretion in deciding how to enforce the law on the spot. The vague or ambiguous use of language means that there is no clear understanding of what behaviors would deem an action in violation of a law. When ambiguous laws grant broad discretion to police it can lead to an increased likelihood of disparate outcomes either because it allows individual officers to act on underlying prejudice or biases (Glaser 2024, Charbonneau and Glaser 2021) or, as we will explore later, it allows the law to be implemented in preconceived discriminatory ways. A clear example of ambiguous language of the law is criminal code 4401 defined as "imped[ing] traffic by slow speed" under NCGS 20-141(h), which states:

> [n]o person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law; provided, this provision shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles

According to the text of this law, there is no defined speed limit that a driver would clearly be in violation of the law. Instead, it is down to the police officer to decide if the speed is slow enough. Of the 821 charges in our database, Black men account for almost 24 percent of the total charges, despite being just 10 percent of the North Carolina population. Similarly, Latine men account for around 5 percent of the population, yet are close to 18 percent of 4401 charges. These two groups are therefore over-represented by large shares; the vagueness of the law may

be what allows this disparity to emerge, since the observing officer can choose whether or not to apply the law after they see who is engaging in the behavior.

Another example is the aggravating circumstance in death penalty litigation of homicides deemed to be "especially heinous, atrocious, or cruel", "vile", "horribly inhuman", or 'depraved", which, when found, can lead to more severe sentencing for a defendant. Unlike other aggravating circumstances, such as robbery or having a victim who is a member of law enforcement (both of which are easily verifiable based on objective standards), these ambiguous standards offer no clear line. With no clear line, District Attorneys may seek death in some cases but not in others, leading to differences in how the standard is applied state to state, over time, and, possibly, based on the identity of those involved in the crime (Welner, et al. 2018).

Of course, absolute clarity in all legislative texts may not be possible, and perhaps is not desirable in all cases. But where objective standards are replaced by subjective ones, or where police or prosecutors have wide leeway in deciding whether or not to enforce a law, the legislature has opened the gates to possible disparate treatment based on identity.

Broad Language

Related to, but distinct from, ambiguous language are criminal laws that are written so broadly that they essentially deem every action illegal and therefore give law enforcement discretion in deciding whom to arrest. This is not a new concept within the legal world. The term overbreadth is used within constitutional law to describe a statute that reaches far beyond the subject matter it was originally intended to regulate.

A recent example of a law being struck down because of overbreadth is *United States v. Alvarez (2012)* and the Stolen Valor Act. In mid-2007 Xavier Alvarez was invited to give remarks at the Walnut Valley Water District Board of Directors. At the meeting, he stated that he

was a retired marine and during his service was awarded the Congressional Medal of Honor. Both statements were false, and Mr. Alvarez was charged with two counts of falsely representing that he was awarded a Congression Medal of Honor under the Stolen Valor Act of 2005, which makes it a crime to falsely claim receipt of military declarations or medals. The United States Supreme Court held that the Stolen Valor Act violated the Free Speech Clause of the First Amendment because Congress drafted the Act too broadly and attempted to limit speech that could cause no harm.

Borrowing from this legal standard, we propose that another way of thinking of overly broad laws is those that are written in such a way that deems almost every action criminal, thus granting police huge discretion in whom to target. An example of a North Carolina criminal law that fits into this category is criminal code 4454 (failure to stop at a stop sign). Of course, there certainly may be a select few among us who do comply with every road law, but it is much more likely the case that we have all, at some point, not come to a complete stop at a stop sign. Indeed, some observational studies have shown that the majority of drivers do not come to a complete stop at stop signs (Woldeamanuel 2012). By deeming most drivers in violation of a criminal law, it is then down to the discretion of the police of whom to charge. Like ambiguous laws, overly broad laws can lead to disparate outcomes. Of the 38,354 charges in our database for failure to stop at a stop sign, 32 percent were against Black men despite being just 10 percent of the population.

Of course, overly broad laws abound throughout the criminal legal system (see Silvergate 2011). The traffic code is replete with laws that are routinely broken (note particularly that speeding does not have a “buffer zone” by which one is not breaking the law if one is only slightly over the speed limit. Therefore, on a routine basis, virtually every driver is speeding. If

they are not, they may be found in violation of laws that prohibit driving behaviors such as "impeding traffic by slow speed" (code 4401), "unsafe movement" (4458), "improper turn" (4447), or any number of other traffic or vehicle codes. The traffic code is by no means the only area in which routine behaviors are criminalized but rarely enforced. Trespassing, sleeping in a public park, having an open container of alcohol, jaywalking, carelessness with fire, littering, failing to have dog tags or a dog on a leash, making excessive noise after a certain time at night, and many other behaviors we may see in everyday life are generally prohibited by law. While these laws are on the books, they are rarely enforced. Of course, having the laws on the books allows the police to enforce them when the situation calls for it, for example if a dog is routinely left off lead and bites the neighbors, or if a teenage party gets out of hand and becomes a nuisance to the neighbors. But when laws are routinely broken, but no enforcement action follows, it becomes clear that the police may be able to pick and choose when to enforce them. More importantly, they can pick and choose against whom to enforce them.

On the other side of the spectrum are laws that are written with such specificity that they strictly limit when the law can be enforced. For example, NCGS 14-12.12 states that it is a crime to "place a burning or flaming cross on property of another or on public street or highway or on any public space". The wording of NCGS 14-12.12 is highly specific, and it is not hard to imagine what would constitute a violation of this law, the only discretion granted to law enforcement is whether to charge and arrest a person or not. Our point is not that laws are generally too broad or ambiguous; it is that some are narrow and clear, and others are not, and that this may be a sign of discriminatory intent.

Privileged Access to the Legislative Bargaining Table

Another reason that law enforcement is granted broad discretion is that they usually have a seat at the table when legislation is being created. In many ways, this makes sense. When creating laws or policies, it is a wise decision to have input from the key stakeholders and experts in the area of the law being created. For example, if traffic legislation is being considered, it would make sense to involve legislators, urban planners, local residents, highway or transportation engineers, advocacy groups, law enforcement, social scientists who can help anticipate any potential disparate impacts, and any other relevant parties. Having a diverse group at the table with different viewpoints, and a process that weighs the various voices in a meaningful way, would help in crafting legislation that not only centers public safety but also helps anticipate possible disparate impacts or other problems before they occur. However, if there is an exclusion of some voices and an overreliance on others, then legislation is likely to be skewed toward the preferences of those at the table. These concerns give meaning to the general adage: "If you're not at the table, then you are probably on the menu."

As we will show in later chapters, law enforcement representatives are systematically included at the table of people creating criminal legislation. This privileged access to the legislative table results in placing higher value on law enforcement perspectives, which stresses the role of criminal law in solving societal problems, and excludes perspectives that place community needs or preventative steps at the forefront. As we expand upon in the next section, this access also bridges the gap between legislative intent and disparate outcomes.

When considering whether disparate impacts are intended or unintended, it is helpful to consider who is at the table, and why that group was invited. As marginalized social groups are often targeted for adverse legislation, one question is whether those at the negotiating table understand the likely impact of a piece of legislation. If they do not, they could make inadvertent

errors. To the extent that the bargaining table includes a wide variety of voices, this possibility is lessened. Or, those who may be adversely affected by the proposed rule may make their voices heard during the legislative process and the law may be enacted over their objections and in spite of their warnings of its adverse impact. We will come back to this issue in later chapters. A key issue in assessing legislative impact is legislative response to later demonstrations of adverse impact. Where a law was inadvertently written in such a manner as to generate a disparate impact, and the lawmakers had no such intention, then they might rectify the situation in a later legislative session, even years later. Where the disparity is pointed out to them and they take no action, then we must conclude that they are relatively indifferent or accepting of the disparity.

Inaction in the Face of Observed Disparate Impact

While most of our discussion has focused on definitions of discriminatory intent, methods of uncovering whether discriminatory intent by the legislature exists, and the role of law enforcement discretion, it is also helpful to consider what it means when the legislator enacts a law that later is demonstrated to produce disparate impact. Does the legislature or other governmental bodies take action to remedy the situation or no? Can we infer intent from the failure to act when adverse outcomes are pointed out in public debates, research studies, and journalistic investigations?

In a way, failure to take remedial action when disparate impacts are documented is perhaps the most telling demonstration of adverse legislative intent. For example, there is no mystery or surprise in the disparate impact adversely affecting African-Americans in the criminal legal system. Calls for reform, demonstrations of inequal treatment, and reams of literature documenting these outcomes have been developed. State agencies routinely gather data to track the demographics of those affected by given policies, especially within the law. Occasionally, as

when punishments for crack and powder cocaine were moved in the direction of greater equality (but not eliminated), we see legislative recognition of an unacceptable situation.

One recent example was the Task Force on Racial Equity in Criminal Justice (TREC), established by Governor Roy Cooper in June 2020, and co-chaired by Attorney General (now Governor) Josh Stein and Supreme Court Justice Anita Earls (see https://ncdoj.gov/trec/). The Group's 2024 year-end report lists 125 recommendations for improvements to the criminal legal system ranging from "eliminate cash bail for Class I, II, and III misdemeanors unless risk to public safety" (#79) to "analyze and report on racial disparities in sentencing laws and recommend possible changes" (#115) and "prohibit capital punishment for people with serious mental ill ness and people 21 or younger" (#117), ending with recommendation #125: Establish the Commission for Racial Equity in the Criminal Justice System as a permanent, independent commission (see TREC 2024, 47-49). The executive order that established the Task Force expired on December 31, 2024, and it was disbanded. In spite of the Task Force's having been eliminated, NC Senate Leader Phil Berger targeted it in a news conference in September 2025 while promoting "Iryna's law", HB 306, which expanded the death penalty and mandated pre-trial detention for thousands of criminal defendants: Berger said: "'That task force advanced weak-on-crime policies that kept the murderer on the streets,'... 'We cannot keep our citizens safe if our policies favor criminals over public safety'" (Carswell 2025). In sum, not only may the legislature ignore evidence that racial disparities are present in the implementation of laws, but they may not like the message and may take the very actions that are being cautioned against by those looking at the data and expressing alarm.

Some forms of disparate impact may be great, but perhaps truly not intended. For example, various traffic enforcement actions related to undocumented driving (e.g., driving

without a valid driver's license, driving without proof of insurance) have strongly adverse effects in the Latine community, and in some cases local district attorneys have agreed not to prosecute these cases. One question is whether the traffic laws from the 1930s that mandated having a driver's license or car insurance were designed on purpose with the intent to discriminate against the Latine population; we do not think this corresponds to the historical record, mostly due to the fact that the Latine community was such a small percentage of the North Carolina population in the 1930s. But the disparate impact of certain driving offenses against Latine people is a fact today.

In other examples, such as drug laws currently having disparate impacts on Black and White populations, it seems clear that the disparate impact was predictable at the time of the legislation and indeed that it was at least partially intended. We can look at whether the legislature acts when disparate impact is demonstrated to understand this better.

We should state from the get-go that disparate impact litigation is fairly limited in criminal law, in part due to the seminal 1987 Supreme Court case *McCleskey v. Kemp* (1987). McCleskey, a Black man, was convicted and given a death sentence of murdering a police officer. In a writ of habeas corpus, McCleskey argued that a statistical study proved that the imposition of a death sentence was in some part explained by the race of the victim and the accused. While the Supreme Court held that statistical evidence, absent evidence of purposeful discrimination, alone could not amount to a constitutional violation, internal memos written by the Justices in the *McCleskey* case highlight some important elements of the Justices' thinking around disparate impact claims broadly.

First is the sentiment that if the Court allowed McCleskey to make a disparate impact claim in death sentencing, then it would create a slippery slope that would allow disparate impact

claims relating to non-capital charges, indeed throughout the entire criminal legal system. In a memo to file dated September 30th, 1986, Justice Powell wrote, "if similar statistics were produced, the rationale of McCleskey's argument would apply to all crimes" (McCleskey v. Kemp, n.d., p. 33)

A second point illuminated by the *McCleskey* internal memos is that not only were the statistical claims of racial discrimination accepted, but that the racial discrimination in capital cases was unavoidable. Allow us to quote Scalia's January 6th, 1987, memo fully:

> I plan to join Lewis's opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately to make these points, but not until I see the dissent (McCleskey v. Kemp, n.d., p. 147)

Scalia's comments in the unpublished memorandum show that there was somewhat of an understanding by the highest Court of the land that racial discrimination was real and that it was "ineradicable". Here, behind closed doors, the Court knew that there are, and perhaps always would be, racial discrimination. Yet even in the face of this fact, the Court was unwilling to act to remedy such an injustice. It is this form of inaction or avoidance that we argue should be considered a form of discriminatory intent: where past, existing, and future racial disparities exist, and when faced with an opportunity to correct course, inaction was the path taken. In his discussion of *Mcleskey*, attorney John Charles Boger referred this as "Grand Racial Avoidance" (2018), whereby the justices turned away "from the reality of widespread racial discrimination in

Georgia's capital sentencing system and an acquiescence to Scalia's cynical perspective" (p. 1680).

The unpublished *McCleskey* memo's highlight another important factor: that much of the reasoning that goes into making a decision regarding a law or policy is rarely made public. In those few instances that supporting documents are uncovered, it becomes clear that what is presented in the wording of the law does not always match the real motivations of the decision-maker. The *McCleskey* example was brought to light because Supreme Court Justice Powell was meticulous in his record keeping. But no such law exists that mandates Justices or legislators preserve their personal or legislative files. In North Carolina, as of 2023, legislators are considered custodians of their own files and can make decisions about what can and cannot be destroyed (Section 27.9.(a) G.S. 121-5). As we have highlighted in this Chapter, many of the methods of proving discriminatory intent through direct evidence depend on having access to personal files or supporting documents of legislative action. In a world where it is becoming increasingly difficult to gain access to these files, one major addition to the list of proving legislative intent is inaction in the face of observed disparate impact.

Action in the Face of Disparate Impact: Disparate Impact Litigation

Although the example of *McCleskey* highlights an example of inaction in the face of observed racial differences in the law, there are numerous examples where legislators have intervened when confronted with evidence of disparate impact. We will explore some of these examples in greater detail in subsequent chapters, but for now we will focus on the use of disparate impact litigation itself as an example of how the legislator can, and has, intervened in the face of inequality.

Begin with the fact that disparate impact litigation is itself an example of the government intervening to correct a past racial inequality under the law. In recognizing the detrimental effects of race-based discrimination in employment against Black people, highlighted by organizers, lawyers, and scholars during the civil rights movement, the federal government allowed for litigation based on unequal treatment. Disparate impact litigation was a tool developed by government agencies under the Civil Rights Act of 1964 (Johnson 2014), reaffirmed under *Griggs v. Duke Power Company (1971)*, in which aptitude tests for internal promotions were ruled by the Supreme Court to be in violation of Title VII of the 1964 Civil Rights Act, and then solidified with a provision in the Civil Rights Act of 1991 that codified the standard of proving disparate impact. While the 1964 and 1991 Acts were targeted to employment discrimination, it serves as an important example of the willingness of the government to intervene and enact policies that counter harmful race-based practices of the past. In this instance, when the federal judicial branch was faced with evidence that hiring practices were resulting in the disparate impact against African-Americans, they instituted policies that would help counter this trend. Although there have since been several attempts to reel in this protection (Johnson 2014), disparate impact litigation remained a valuable tool for racial equity in employment practices for decades.

It is not lost on us that, at the time of writing this book, the country is living through a renewed attack on measures designed to limit racial- and sex-based discrimination. On April 23rd, 2025, Donald Trump signed an executive order "Restoring Equality of Opportunity and Meritocracy", which attempts to eliminate the ability to bring about disparate impact discrimination litigation. Racial preferences in college admissions have been eliminated, and the Supreme Court held hearings in October 2025 on whether race should be eliminated as a

consideration in Voting Rights Act cases, potentially affecting legislative districts throughout the South. All of these actions are part of a larger movement to eradicate many of the protections against racial discrimination that have been developed over the past six decades. The executive order begins with words that acknowledges, and accepts, disparate outcomes in no uncertain terms, "[a] bedrock principle of the United States is that all citizens are treated equally under the law. This principle guarantees equality of opportunity, not equal outcomes". The executive order goes on to note that disparate-impact litigation is one of the tools used in a "pernicious movement" that "endangers this foundational principle".

In sum, disparate impact has been seen as a first step in an effort to eradicate it unless it can be shown not to derive from pernicious intent. Now, government authorities are attempting to eliminate it from consideration even when it may be overwhelming.

Conclusion

In the chapters that follow, we select areas of the criminal code and examine the intent of the legislatures when either enacting new criminal laws or reforming existing ones. We use the range of methodological techniques that we have outlined in this chapter to explore the origins of anti-Klan laws, anti-protest laws, gang laws, laws for certain types of drugs, capital punishment, reforms in structured sentencing, and the traffic code. In our historical examination, we show that the creation of criminal law by the legislature, at least in the areas of the law that we examine, are done with the motivation to both target racial groups and to control behaviors that they associate with that group.

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