FROM *LOVING V. VIRGINIA* TO *WASHINGTON V. DAVIS*: THE EROSION OF THE SUPREME COURT'S EQUAL PROTECTION INTENT ANALYSIS

Angela Onwuachi-Willig [*]

[*] Dean, Boston University School of Law.

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INTRODUCTION

IN 1967, the United States Supreme Court issued an opinion that contained its most searing and explicit condemnation of white supremacy: *Loving v. Virginia*.[1] At issue in *Loving* was the constitutionality of a statutory scheme in the state of Virginia that prohibited marriages between individuals solely on the basis of race.[2] Among other things, provisions in this statutory scheme punished intermarriage between a "white person" and a "colored person," meaning not only Blacks,[3] but also Asian Americans and American Indians who did not fall under the Pocahontas Exception.[4] The provisions also punished evasion of the state's interra-

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[1] *Loving v. Virginia*, 388 U.S. 1 (1967).

[2] *Id.* at 2.

[3] Throughout this Essay, we capitalize the words "Black" and "White" when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Additionally, we find that "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. Ill. L. Rev. 1043, 1044, n.4 (1992). Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that "Black" deserves capitalization because "Blacks, like *A*sians [and] *L*atinos, . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332, n.2 (1988). Also, we generally prefer to use the term "Blacks" to the term "African Americans" because "Blacks" is more inclusive. For example, while the term "Blacks" encompasses black permanent residents or other black noncitizens in the United States, the term "African Americans" includes only those who are formally Americans, whether by birth or naturalization. That said, given the historical nature of several parts of this Essay, and in light of the fact that a large influx of black immigrants did not occur in the United States until the 1960s and 1970s, we sometimes use the term "African American" where the term "Black" is not needed for inclusivity reasons. *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1484 (2002) ("The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country.").

[4] Va. Code Ann. §§20-54, 1-14 (1960 Repl.Vol), invalidated by *Loving v. Virginia*, 388 U.S. 1 (1967). The "Pocahontas Exception" is a term used by scholars to refer to the statute's classification of distant descendants of Native Americans as "white persons." *See* Kevin Noble Maillard, *The Pocahontas*

cial marriage ban by Virginians who chose to legally marry each other in another state and then return to live together as spouses in Virginia.[5] Indeed, Section 20-59 of the statutory scheme subjected individuals who violated Virginia's anti-miscegenation laws to imprisonment for one to five years.[6]

In 1958, Mildred Jeter, a black and American Indian woman,[7] and Richard Loving, a white man, violated Virginia's anti-miscegenation statutory scheme when they travelled to Washington, D.C. to get married and then returned to Caroline County, Virginia to reside as husband and wife.[8] The state of Virginia indicted the Lovings for violating its anti-miscegenation laws, and the Lovings pled guilty to crimes charged against them.[9] The trial judge in the case initially sentenced each of the Lovings to one year in prison; however, he offered to suspend their sentences on the condition they leave Virginia for 25 years without any return.[10] Famously, the trial judge asserted:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[11]

Accepting the trial judge's conditional offer for a suspended sentence, the Lovings moved to Washington, D.C.[12] However, a homesick Mildred disliked living in Washington, D.C. so much that the Lovings ultimately filed a class action that challenged Virginia's anti-miscegenation statutory scheme.[13] Nearly a decade later, the United States Supreme Court decided the lawsuit in the Lovings' favor.[14] In so doing, the Court rejected the state of Virginia's argument that its anti-miscegenation laws did not violate the Equal Protection Clause of the Constitution because they equally restricted and punished Blacks and

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Exception: The Exemption of American Indian Ancestry from Racial Purity Law, 12 MICH. J. RACE & L. 351 (2007) (explaining the origins and outcomes of the "Pocahontas Exception").

[5] *Loving*, 388 U.S. at 4-5.

[6] *Id.*

[7] Robert A. Pratt, Essay, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229, 230 (1998).

[8] *Loving*, 388 U.S. at 2-3.

[9] *Id.* at 3.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*; *see also* Pratt, supra note 7, at 237 (describing how Mildred hated living in the city and wanted her children to grow up in the country).

[14] *Loving*, 388 U.S. at 9-13.

Whites.[15] The Court also proclaimed that the invidious nature of Virginia's anti-miscegenation laws was evident, in part, from the fact that "[t]he statutes proscribe[d] generally accepted conduct if engaged in by members of different races."[16] Finally, the Court rebuffed the state of Virginia's argument that it had enacted its anti-miscegenation statutes as a means of protecting the purity of the races. The Court reasoned, "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[17] In other words, the very fact that the statute prohibited only marriage between a white person and a "colored person," meaning Blacks, Asian Americans, and American Indians, and did not preclude marriages between colored people of different races, exposed the real motive behind the statute: maintenance of white supremacy.[18]

The *Loving* decision portended a promising future for analyses of discriminatory intent in equal protection cases. After all, the Court in *Loving* was willing to engage in the type of analysis that could uncover the motives behind the state's legislative actions, despite any formal "equal" treatment of different racial groups. Specifically, the Court was willing to address two key questions in its evaluation of the Lovings' claims and, more so, the state's intent: (1) whether Virginia's enactment of the statutory scheme made sense in light of its stated purpose, and (2) what types of statutes would Virginia have enacted if it actually wanted to achieve its stated purpose.

Fast forward nine years later to the Court's opinion in *Washington v. Davis* in 1976,[19] and the Court had all but abandoned this willingness to interrogate the meaning and true intent behind governmental actions. *Washington v. Davis* addressed whether the Washington, D.C. Police Department's procedures for selecting officers discriminated against black applicants on the basis of race.[20] The Court's inquiry in *Washington v. Davis* focused exclusively on the Department's use of Test 21, "'an examination that is used generally throughout the federal service,' which 'was developed by the Civil Service Commission, not the Police Department,' and which was 'designed to test verbal ability, vocabulary, reading and comprehension,'" but which had not been validated by the Department, in its selection process.[21] Both parties to the lawsuit agreed that the use of Test 21 "excluded a disproportionately high number of

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[15] *Id.* at 8-10.

[16] *Id.* at 11.

[17] *Id.*

[18] Angela Onwuachi-Willig, *There's Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia*, 2007 WISC. L. REV. 319, 324.

[19] *Washington v. Davis*, 426 U.S. 229 (1976).

[20] *Id.* at 232-33.

[21] *Id.* at 234-35.

Negro applicants"— "four times as many blacks as whites failed the test."[22] Still, the Department claimed it needed to administer Test 21 to confirm that applicants had "acquired a particular level of verbal skill" in order to communicate orally and in writing as an officer, including through police reports.[23] The plaintiffs in *Washington* were all Blacks who had applied for police officer positions but were denied such positions based on their Test 21 scores. They wanted the Court to affirm the lower court's holding that proof of discriminatory intent was not necessary to prove an equal protection violation, extending the same rules that applied in Title VII disparate impact cases to equal protection cases.[24]

In the end, the Court refused to affirm the Court of Appeals decision, declaring that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose" in equal protection cases.[25] Furthermore, the Court held that there was no proof of discriminatory intent on the part of the Washington, D.C. Police Department. Just like the trial court, the Court reasoned that there could be no discriminatory intent where "44% of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area"[26] and where "the Department had systematically and affirmatively sought to enroll black officers[,] many of whom passed the test but failed to report for duty."[27] Additionally, the Court upheld the Department's use of Test 21, noting that "the test was a useful indicator of training school performance," despite the fact that it had no validated a relationship to actual job performance, and asserting that the test "was not designed to, and did not, discriminate against otherwise qualified blacks."[28]

Washington v. Davis dealt a devastating blow to the future of civil rights litigation: its intent requirement essentially made it impossible for plaintiffs to prove an equal protection violation.[29] Although, as Professor

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[22] *Id.* at 230, 233.

[23] *Id.* at 245-46.

[24] *Id.* at 237.

[25] *Id.* at 240.

[26] *Id.* at 229.

[27] *Id.* at 235.

[28] *Id.* at 229.

[29] *See* Mario Barnes, *"The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINNESOTA L. REV. 2043, 2077 (2016) ("In cases such as *Washington v. Davis* and *McCleskey v. Kemp*, both involving facially race-neutral government practices, the Court found no availability to assert a constitutional claim without specific reference to a particular actor who intentionally discriminated against a suspect class member. In these cases, where applying such a precedent would benefit people of color, the Court refuses to peek under the veneer of facial neutrality in the law or treat impact as sufficient evidence of intent."); *see also* Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1056

Katie Eyer illustrates, the intent doctrine initially emerged during the 1960s as a more progressive means for "invalidating invidiously intended but facially race-neutral government action" (much like the state action in *Loving*), it was, as she also explains, later "re-appropriated by racial justice opponents as a means of circumscribing efforts to allow for constitutional invalidation on non-intent-based grounds."[30] In this sense, Eyer details, the intent doctrine that re-emerged in *Washington v. Davis* transformed the meaning of the Court's 1960s intent doctrine, adopting an extremely narrow meaning of the word "intent" to make it more difficult for plaintiffs to prevail in equal protection cases and thus making it harder for the Equal Protection Clause to be used as a means for eliminating discrimination as it was actually practiced.[31] Like many other race scholars, I find the Court's requirement for proof of discriminatory intent in equal protection cases very troubling.[32] However, in this Essay, I do

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(1978) (contending that by requiring evidence of intent, the Court adopted a "perpetrator perspective" which saddles the plaintiff with the "nearly impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an identified blameworthy perpetrator"); Alan Goldman, *Employment Discrimination - Washington v. Davis: Splitting the Causes of Action Against Racial Discrimination in Employment,* 8 LOY. U. CHI. L. J. 225, 227 (1976) (hypothesizing that the more demanding intent standard the Court required in *Washington v. Davis* will drastically diminish the utility of bringing an equal protection claim in employment discrimination cases); Katherine Lambert, *Discriminatory Purpose: What It Means under the Equal Protection Clause - Washington v. Davis,* Note, *26* DEPAUL L. REV. 26 650, 650 (1977) (describing the Court's discriminatory purpose standard as "far more difficult" for plaintiffs to satisfy than proving disproportional impact under Title VII employment discrimination claims).

[30] Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. REV. 1, 4 (2016).

[31] *Id.* (citing Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997)).

[32] Many scholars have criticized the Court's discriminatory intent requirement. *See, e.g.,* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004), (extending Professor Charles Lawrence's critique of Washington v. Davis to argue that "racial stigma, not intentional discrimination or unconscious racism, is the true source of racial injury in the United States"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (noting that "[m]inorities and civil rights advocates have been virtually unanimous in condemning *Davis* and its progeny"); Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397 (1983) (contending that the Court's holding establishing intent as a necessary element of an Equal Protections claim deviated from the text of the Fourteenth Amendment as well as the Court's previous interpretations of the amendment); Robert A. Sedler, *The Constitution and the Consequences of the Social History of Racism*, 40 ARK. L. REV. 677, 693 (1987) (arguing that the Court should have instead

not delve into a critique of the discriminatory purpose requirement in equal protection cases. Instead, I take a deeper look at the mistakes that the Court made in evaluating and deciphering "intentional discrimination" and "racially motivated discrimination" in *Washington v. Davis*. Specifically, I consider how the plaintiffs in *Washington v. Davis*, and thus later equal protection lawsuits, might have fared better if the Court had followed the same analytical approach that it undertook to determine discriminatory intent in *Loving*. First, I explore what the result in *Washington v. Davis* might have been if the Court had, as it did in *Loving*, asked whether the government's actions made sense in light of its stated purpose. Specifically, I consider what the decision in *Washington v. Davis* would have been like if the Court had looked underneath the Department's use of Test 21 made sense as a way of ensuring that police officers had the verbal skills necessary to perform their jobs. Relatedly, I consider what the result in *Washington v. Davis* might have been if the Court had more closely evaluated the Department's actions to assess whether its attempts to recruit more diverse police force had been in good faith.[33]

In making these considerations, I first highlight how the Court completely failed to consider how the Washington, D.C. Police Department's decision to continue using Test 21, despite the fact that its reliability for predicted actual job performance had not been validated, could have served as proof of an intent to exclude Blacks from the Department's ranks. After all, the Department's continued use of the Test itself may have served as proof that the Department sought to limit the presence of Blacks or even the "kinds" of Blacks who filled its ranks.[34] In so doing, I also turn a critical lens to *Griggs v. Duke Power Company*,[35] which foreshadowed the Court's abandonment of its prior willingness to dig behind the meaning of any workplace policies and hiring practices that treated Blacks and Whites the same on face. Thereafter, I point out flaws in the Court's conclusion that the Washington, D.C. Police Department could not have intentionally discriminated against Blacks because it was engaged in efforts to diversify its workforce. I do this by exploring whether

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put forth a standard examining if the consequences of a statute will have a racially discriminatory effect); David A Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 951-954 (1989) (explaining that the Court's intent standard unnecessarily limits the Equal Protection Clause to prohibit explicit racial discrimination but not prejudice or stigma).

[33] *Washington*, 426 U.S. at 246.

[34] DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA (2013) ((explaining how in the post-Civil Rights era, employers know they cannot exclude, for example, all Blacks and thus include those who are racially palatable); *see also* Anthony Alfieri & Angela Onwuachi-Willig, *Next Generation of Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1514 (2013)(same).

[35] 401 U.S. 424 (1971).

the Department's actual actions fell in line with its stated goals, much like the Court questioned Virginia's actions in *Loving*. Exploring these arguments in further depth first requires a foundational understanding about the questions on Test 21 itself.

I. UNDERSTANDING TEST 21 AND THE FLAWS IN USING IT AS A MEANS OF EVALUATING THE COMMUNICATION SKILLS OF POLICE OFFICE APPLICANTS

Test 21, which the Washington, D.C. Police Department used as a screening mechanism in its hiring process in *Washington v. Davis*, consisted of 80 multiple choice questions.[36] Although the test had not been validated as predictive of job performance, the Department claimed it used Test 21 in order to ensure "some minimum verbal and communicative skill [that] would be very useful, if not essential," in performing the job of a police officer.[37]

In spite of the Department's strong reliance on the test as a tool for determining which applicants had the communicative skills necessary for being a police officer, Test 21 was not centered on the topics or types of conversations that officers frequently encountered on the job. Simply reviewing a small representative sample of the questions on Test 21 reveals as much. For instance, question 6 concerned the use of palm tree dates as a source of food in Africa, Asia, and other locations:

> 6. (Reading) "Dates are the fruit of a species of palm tree which ranges from the Canary Islands through northern Africa and the southeast of Asia to India. These trees have been cultivated and their fruit much prized throughout most of these regions from remotest antiquity. In Arabia date palms are an important source of national wealth, and their fruit forms the staple article of food in the country."
>
> The quotation best supports the statement that date palms
>
> A) are the chief source of wealth in many countries
>
> B) have long been valued as a source of food
>
> C) were first grown in the Canary Islands and Africa
>
> D) were not prized for their fruit in early times
>
> E) cannot be grown in other than tropical climates[38]

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[36] *See* Test 21 (on file with author).

[37] *Washington*, 426 U.S. at 250.

[38] *See* Test 21.

Similarly, Question 73 inquired about the definition of a word that few police officers, particularly those in Washington, D.C., have ever used in performing their duties: promontory. Question 73 read:

> 73. PROMONTORY means most nearly
>
> A) marsh
>
> B) monument
>
> C) headland
>
> D) boundary
>
> E) plateau[39]

Ironically, Question 64 on Test 21 describes exactly what the Department failed to do when it designed its process for selecting new officers:

> 64. (Reading) "Adhering to old traditions, old methods, and old policies at a time when new circumstances demand a new course of action may be praiseworthy from a sentimental point of view, but success is won most frequently by facing the facts and acting in accordance with the logic of the facts."
>
> The quotation best supports the statement that success is attained through
>
> A) recognizing necessity and adjusting to it
>
> B) using methods that have proved successful
>
> C) exercising will power
>
> D) remaining on a job until it is completed
>
> E) considering each new problem separately[40]

The correct answer to Question 64 asserts that entities must adjust to shifting circumstances by adopting new courses of action rather than "[a]dhering to old traditions, old methods, and old policies."[41] Yet, the police department from *Washington v. Davis* did exactly the opposite when it insisted on using Test 21 in its hiring processes. Social context was quickly making clear that the Department's overwhelmingly white police force was ill-equipped to interact well and protect the largely black population of Washington, D.C., and that the Department needed new means for communicating and working with the city's black resi-

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[39] *Id.*
[40] *Id.*
[41] *Id.*

dents. In November 1967, less than three years before the plaintiffs filed their lawsuit in *Washington v. Davis*, 80 percent of the Department was white[42] while the city itself was nearly 70 percent black.[43] During that year and the next, several events exposed the gaps in the D.C. Police Department's ability to effectively police, communicate with, and protect the black residents of Washington, D.C.. On April 4, 1968, Dr. Martin Luther King, Jr. was assassinated in Memphis, Tennessee, a tragedy that sparked riots and protests within black communities all across the nation.[44] Within D.C., more than 1,200 fires burned within the city's boundaries in response to the murder of Dr. King.[45] Together, the riots and fires resulted in what the D.C. Redevelopment Land Agency estimated to be more than $13 million in damages.[46] And, in the midst of the 1968 uprisings, government officials mobilized the overwhelmingly white, 2,800-member police force, plus more than 13,000 federal troops, in an effort to regain control of the city.[47]

Less than one year after Dr. King's assassination and nearly five years after the Civil Rights Act of 1964, the nation's most comprehensive civil rights statute, was enacted, the Washington, D.C. Police Department began to engage in greater efforts to recruit black police offic-

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[42] *See* John W. Hechinger Sr. & Gavin Taylor, *Black and Blue: The D.C. City Council vs. Police Brutality, 1967-69,* 11 WASH. HISTORY 4, 10 (2000) (noting that when the former Chairman of the D.C. City Council arrived in office in November of 1967, "80 percent of the policemen were white").

[43] *See* Michael Ruane, *Fifty Years Ago Some Called D.C. 'The Colored Man's Paradise.' Then Paradise Erupted*, WASH. POST (March 26, 2018), https://www.washingtonpost.com/local/fifty-years-ago-some-called-dc-the-colored-mans-paradise-then-paradise-erupted/2018/03/22/6ae9ec1c-208e-11e8-94da-ebf9d112159c_story.html? utm_term=.d9ce60d8b967) (stating that in 1968, 68 percent Washington, D.C.'s population was black).

[44] Alan Taylor, *The Riots That Followed the Assassination of Martin Luther King Jr.*, THE ATLANTIC (April 3, 2018), https://www.theatlantic.com/photo/2018/04/the-riots-that-followed-the-assassination-of-martin-luther-king-jr/557159/

[45] Lorraine Boissoneault, *Martin Luther King Jr.'s Assassination Sparked Uprisings in Cities Across America*, SMITHSONIAN MAG. (April 4, 2018), https://www.smithsonianmag.com/history/martin-luther-king-jrs-assassination-sparked-uprisings-cities-across-america-180968665/#yqcczcbbdzHfJtGw.99

[46] DaNeen L. Brown, *A Black Bank Witnessed Devastation After The 1968 Riots. Now 'The Future Is Bright.'* WASH. POST (March 26, 2018), https://www.washingtonpost.com/local/a-black-bank-witnessed-devastation-after-the-1968-riots-now-the-future-is-bright/2018/03/22/069fde30-1cf9-11e8-b2d9-08e748f892c0_story.html?utm_term=.4a67dac7adc0

[47] John Mullen, *The Legacy of DC's 1968 Riots,* GREATER GREATER WASHINGTON (April 8, 2011), https://ggwash.org/view/8938/43-years-ago-today-dc-stopped-burning; *see also* Ruane, *supra* note 42 (discussing the role of the federal troops).

ers to its rolls, presumably in order to better communicate with and work with the city's residents.[48]

II. WHAT IF THE *WASHINGTON V. DAVIS* COURT HAD FOLLOWED THE PATH IN *LOVING*?

Had the Court in *Washington v. Davis* analyzed the facts and claims before it just like the *Loving* Court did in 1967, it likely would have concluded that the plaintiffs had offered sufficient proof of an intent to discriminate by the Washington, D.C. Police Department, specifically because the Department's use of Test 21 made absolutely no sense in light of its stated purpose, ensuring officers had effective communication skills for the job. However, instead of taking the *Loving* Court's approach of examining the logic and social meaning behind the government's actions, the Court in *Washington v. Davis* chose to adopt a narrower conception of the word "intentional."

Although the Court's opinion in *Washington v. Davis* actually included promising language—language that suggested the possibility of a broader meaning of the terms "intentional" or "racially motivated"—the Court ultimately landed on a definition that belied its own words. Promising language in the opinion consisted of declarations (1) that equal protection law does not require "that the necessary discriminatory racial purpose be express or appear on the face of the statute,"[49] (2) that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race,"[50] and (3) that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[51] Still, the *Washington v. Davis* Court chose not to delve into the totality of the factual circumstances of the case in a way that could have uncovered an intent to discriminate against Blacks, either by limiting the number of black officers in the D.C. Police Department or by restricting the type of Blacks who would be entering the police department's ranks. For example, the Court failed to ask critical questions related to the position's required "special ability to communicate orally and in writing."[52] Specifically, the Court failed to ask exactly what kind of communication skills were needed by the Department's police officers to perform their jobs: it did not inquire into whom the

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[48] The Court described the district court's finding that "[s]ince August 1969, 44% of the new police force had been black [...]" as "undisputed" evidence that "the Department had systemically and affirmatively sought to enroll black officers [...]'" *Washington*, 426 U.S. at 235.

[49] Washington v. Davis, 426 U.S. at 241.

[50] *Id.*

[51] *Id.* at 242.

[52] *Id.* at 246. Ironically, the conjunctive phrase "communicate orally and in writing" fails to follow the rule of parallel construction.

D.C. Police Department officers regularly communicated with or whom needed to better communicate with, nor did it ask what language or understanding of the world the officers needed to comprehend such communications. Yes, the officers had to know how to read and write language well enough to write police reports and understand the basics of the law, but as the riots of 1968 revealed, the officers also needed knowledge of how to more effectively communicate with the city's largely black citizenry. In spite of this reality, the Court did not question the Department's failure to create a test that would have directly focused on the types of communications that its officers were most likely to engage in. In other words, the Court failed to interrogate whether the Department truly wanted to hire officers who could engage in the types of communications that were truly needed to effectively serve and protect the overwhelming majority of black citizens in the city.

Relatedly, the Court failed to ask another question that the *Loving* Court posed, one which would have shed light on the questions concerning the D.C. Police Department's possible intent to discriminate on the basis of race: "What actions would the defendant have taken if it *truly* wanted to fulfill its stated purpose?" In the *Loving* case, the Court explained that the state of Virginia would have prohibited all interracial marriages, and not just those between Whites and non-Whites if it truly wanted to accomplish its stated objective of protecting the "purity" of the "races." In *Washington v. Davis*, the parallel question would have been: "What actions would the D.C. Police Department have taken if it *really* wanted to achieve its stated goal of being racially diverse and inclusive and having a more accessible hiring process?"

Rather than engaging in a searching inquiry about the meaning of the D.C. Police Department's actions in using Test 21, the Court essentially assumed both good faith in hiring a diverse police staff on the behalf of the police department, which had a supervisory group of white decisionmakers, and presumed meaningful success in achieving that diversity. In other words, the Court blindly accepted the Department's claim that it was actively engaged in efforts to become a more diverse police force—what I would call the Department's "we're trying" defense. Moreover, the Court applauded the D.C. Police Department for its claimed success in hiring a diverse police force:

> Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated.[53]

[53] *Id.* at 235.

The Court, however, failed to ask the most probative question in its evaluation of the claims in *Washington v. Davis*, which was first filed in April 10, 1970. It did not examine the most telling evidence about the Department's efforts to diversify its rank: the policies implemented between 1965, when Title VII became effective, and April 1970, the month in which the lawsuit was filed. Instead, the Court focused only on the Department's recruitment efforts after August 1969, a mere eight months before the case was filed, and six years of recruitment data from *after* the lawsuit was filed—precisely the period when the Department would have been on its best behavior. The most probative evidence, which really would have shed light on whether the good faith and good motive that the Court imputed to the Department was accurate, would have been the evidence regarding diverse hiring in the 4 and a half years *before* the lawsuit was filed and before the Department knew its hiring patterns were under scrutiny. The Court, however, never even bothered to ask about that data.[54]

Moreover, it is unclear why the Court ever assumed good faith on the part of the Department. After all, the Department had not validated the test to establish its reliability for measuring actual performance. The Department demonstrated only that there "was a positive relationship[, though not predictive,] between Test 21 scores and performance in police training courses," but provided no clear evidence about a positive or predictive relationship between the test and actual success on the job or even between the training and actual performance on the job.[55].[56]

Basically, despite some promising language, the Court in *Washington v. Davis* ended up requiring proof of total or near total exclusion of the target group in the post-Civil Rights era that made such total exclusion illegal. In this regard, the Court ignored the point that scholars like Devon Carbado, Mitu Gulati, and Judge Guido Calabresi have made about the post-Civil Rights era of inclusion in the workplace: that in a post-Civil Rights world, employment discrimination may not be about,

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[54] Furthermore, the Department never presented the raw numbers presenting its hiring. After all, 44% could mean 5 out of 11, or it could mean 88 out of 200.

[55] *Washington*, 426 U.S. at 250.

[56] The Court also never asked why a disproportionate number of African-American officers engaged in the act of taking the test only to fail to report for duty. *Washington*, 426 U.S. at 235. It never even considered that there could be some nefarious reason why African-American officers failed to report to duty after passing the test. For instance, were black candidates being discouraged or pushed away from the job? Were they not given information about where to report for work? Or, if, for example, transportation obstacles were a reason for this disproportionate no-show problem, why wasn't this supposedly properly motivated Department working to address those systemic obstacles? The Court chose not to address any of these questions.

or often is not about, full exclusion of a disfavored group.[57] Instead, discrimination is now about limiting that group's presence in the workplace.

Not only did the Court give the benefit of the doubt to the employer, the D.C. Police Department, in *Washington v. Davis*, it engaged in an empathetic examination of the Department's efforts to diversify its ranks.[58] The Court's examination was very much rooted in the myopic perspective of some of the most privileged men in the nation—here, 8 out of 9 white men with elite law school educations. Had the Court followed the approach of *Loving*, the end result certainly would have been a more just decision in not just *Washington v. Davis*, but in all other equal protection cases to come.

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[57] *See* CARBADO & GULATI, *supra* note 34; *see also Holcomb v. Iona College.*, 521 F.3d 130, 143 (2d Cir. 2008) (Calabresi,J., concurring) (holding that the plaintiff's case survive summary judgment even as not all Blacks were excluded from involvement with the basketball teams because discrimination could be shown just by the school's desire "to minimize the number of African Americans involved with the basketball team.)

[58] Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 38 (2013) (describing how the empathy that justice had for white plaintiffs in cases involving challenges to affirmative action has resulted in "one body of law governing minority complaints that was deferential to democratic actors, and another body of law responsive to majority complaints that closely scrutinized democratic decisionmaking").