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The Supreme Court Still Refuses to Acknowledge Systemic Racism

Ending qualified immunity is important, but a much more obscure yet monumental Supreme Court decision needs to be overturned.

By MARK KENDE and DAHLIA LITHWICK

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The U.S. Supreme Court in 1976. Library of Congress

American society is rapidly changing its attitudes about racism in policing after Minneapolis police killed George Floyd. In a matter of a few short weeks, once-radical sounding policy demands, like defunding the police, have become commonplace thanks to the massive and diverse protests across the country. Prominent politicians, athletes (including NASCAR drivers), and other community leaders have joined the calls for a

systemic reimagining of policing and the legal system. The courts have an important role to play in this national soul-searching. There is widespread agreement, including between Justices Clarence Thomas and Sonia Sotomayor, that the high court's qualified immunity doctrine has contributed to a culture of impunity. But there is a far more pervasive and enduring Supreme Court decision that needs to be changed if we genuinely want to tackle institutional racism.

In *Washington v. Davis*, decided in 1976, the U.S. Supreme Court ruled that laws or government policies that disproportionately harm Black people do not violate the Constitution's equal protection clause. The case was brought by aspiring Black police officers challenging the statistical disparity in test scores between Black and white test takers as a reflection that the D.C. police department's hiring policy was unconstitutional. The test, known as Test 21, was chock full of white cultural and idiomatic references that may well have contributed to the fact that from 1968 to 1971, 57 percent of Black applicants failed the test as compared with 13 percent of whites.

In a 7–2 decision penned by Justice Byron White, the Supreme Court decided that courts can only find that a law or governmental action violates the equal protection clause when a plaintiff can show that a state actor *intended* to discriminate, and that this intention, in turn, caused a discriminatory result. But discriminatory intent is virtually impossible to prove. Who openly admits they are racist? This nearly insurmountable bar means that laws that treat Black people worse than white people (for example, laws requiring exponentially harsher sentences for crack possession than for cocaine use) remain tolerated throughout society.

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As Osagie K. Obasogie noted in the New York Times, the result of this decision was the perpetuation of systemic racial discrimination and the ascendance of "what is now known as the 'intent doctrine,' which emerged in later cases as a simplistic search for a smoking gun—individual bad actors intentionally doing bad things with nothing but racial animus on their minds."

That isn't how structural racism works, it never was, and it meant that—ironically enough—policing itself became both a profession with higher barriers to Black people and a mechanism to carry out racially discriminatory criminal laws. And discriminatory intent became a kind of unprovable holy grail in any effort to redress racist policies. A state simply had to assert a reasonable public interest to justify laws, such as promoting health, safety, or morals.

The result is a kind of cyclical trap. Requiring evidence of racist intent means that many laws that harm minorities, either by design or as a result of vestigial racial bias, nevertheless survive constitutional scrutiny. Those laws in turn perpetuate racial disparities and weaken minorities' political power, while the people who make laws have no incentive to upend the order they have created. For example, an April statistical analysis in Iowa revealed that 7.3 times more Black people in that state and 3.64 times more Black people nationally were arrested for marijuana possession than white people, even though both groups use the substance to approximately the same extent. Despite this obvious disparate impact, governments pretend that they do not well know that marijuana laws give the police a pretext to arrest more Black people. (A few states have now moved toward legalization, in part because of these racist results, even though the courts refuse to acknowledge the significance of these differences). Iowa also has a troubling disparity in its comparatively large Black prison population despite the state's overwhelmingly white population. As Michelle Alexander's book *The New Jim Crow* details, hundreds of seemingly neutral laws work to criminalize and imprison Black men at extraordinarily high rates.

One might think this systemic inequality can be solved by voting for legislators who will not tolerate racial disparities. But that option is also walled off. In 2008, the U.S. Supreme Court's decision in *Crawford v. Marion County Election Board* provided that photo ID requirements for voting were allowed, although the evidence clearly showed the purportedly neutral rules had a disparate impact on minority voting. The court nevertheless determined that voter ID laws prevent fraud, although there was almost no evidence of voter fraud that warranted curing. So: Black voters are prevented from using the not-particularly-neutral voting system to redress the not-particularly-neutral laws that are used against them in the criminal law apparatus.

In short, the U.S. Supreme Court's cramped reading of the equal protection clause in the 1970s has actively subjected people of color to unfair treatment, across the decades, and it has led to a ponderous case-by-case scrutiny of subjective bad intentions of selective bad apples, ducking a broad and results-oriented scrutiny of racialized systems. So long as the courts refuse to see a racial disparity as a problem deserving the strictest scrutiny, authentically neutral justice will remain out of reach.

The scope of the problem was laid bare in the 1987 death penalty case *McCleskey v. Kemp*, which reaffirmed *Davis* and concluded that even overwhelming evidence of systemic racial disparities was not sufficient to show a constitutional violation. The majority dismissed statistics showing that Georgia's legal system was far more likely to impose capital punishment in cases with a white victim than in cases with a Black victim. In the majority opinion, Justice Lewis Powell argued that accepting this evidence of racial disparity would force the court to reconsider "the principles that underlie our entire criminal justice system." Justices William Brennan and Thurgood Marshall presciently dissented this amounted to a "fear of too much justice." Powell even admitted regretting his decisive vote in the case before his death.

It is high time now for "too much justice." Overturning *Washington v. Davis* would move the country significantly closer to racial equality. Such a reevaluation need not topple the entire legal system overnight. The court could, for example, find that a disparate impact creates a presumption of illegality that the government has to ultimately rebut by satisfying strict scrutiny. The government, after all, has in its possession the evidence explaining its actions. And if the government cannot respond, or gives a pretextual response, minority plaintiffs should prevail. Another important reform could require all state legislatures and Congress to make racial impact reports before any new crimes or punishments are enacted (Iowa already does this).

This shift would place monumental pressure on the government to treat minorities equally. Truly taking on racial disparity in the law will require a determined grassroots effort and a more sympathetic Supreme Court. But first we must have the conversation about this decades-old decision's distorting effect on the various bureaucracies that comprise the justice system. The ultimate goal would be to use the formidable power of the legal system to ensure that Black Lives Matter in reality, and not just in theory.

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