Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence

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Introduction

Intentionality plays a central role in the methodology that the Supreme Court has endorsed for analyzing facially neutral government action that imposes a disproportionate burden on a discrete racial group.[1] In order to prevail on a claim that a facially neutral government action violates the Equal Protection Clause, plaintiffs must convince courts that the government acted with intent to discriminate.[2] But what does this mean? Justices, judges, scholars, litigants, and government institutions have long debated what it means for the government to act with discriminatory intent, but have failed to coalesce around a settled conception of how impermissible intent can be established.[3] This Note seeks to add to the conversation by advocating that courts pay more attention to human intuitions of intentionality. Recent research from moral psychologists and empirical philosophers suggests that humans have different intuitions about intentionality in contexts where there is a strong societal consensus about the moral badness of the consequences of an action.[4] In such contexts, a philosophical principle known as the "Knobe Effect" predicts that people are very likely to ascribe intentionality to an actor who can foresee morally bad consequences before acting. Be-

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[1] *See* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 Sup. Ct. Rev. 397, 403–04 n.4; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1105 (1989).

[2] *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

[3] *Compare* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 291-94 (1997) (arguing that the Court discerns an intention to discriminate through counterfactual inferences and circumstantial evidence, and that "it is unnecessary to prove that the defendant acted with conscious intent or was aware of the implications of the actions taken"), *with* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2189 (1996) (arguing that plaintiffs must show "a state of mind akin to malice" to prove discriminatory intent).

[4] Joshua Knobe, *The Concept of Intentional Action: A Case Study in the Uses of Folk Psychology*, 130 Phil. Stud. 203, 211 (2006) [hereinafter Knobe, *The Concept of Intentional Action*]; Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 Analysis 190, 192–93 (2003) [hereinafter Knobe, *Intentional Action and Side Effects*].

cause a widespread acknowledgement of moral badness exists in the context of government action that foreseeably causes disproportionate harms to discrete racial groups, this Note argues that legal doctrine should accord more weight to evidence of foreseeable, discriminatory outcomes of government action.

Since the watershed holding in *Washington v. Davis* that parties claiming equal protection violations must prove discriminatory intent,[5] the Supreme Court has at times treated intentionality as something that can be inferred from circumstantial evidence, and at other times treated it as a subjectively real mental state that must be proven. On one hand, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court put forth a series of factors that courts may consider to infer intentionality in government action.[6] These factors include some intuitive indicators of intentionality, but omit other plausible indicators.[7] On the other hand, the Court held in *Personnel Administrator of Massachusetts v. Feeney* that a litigant must show that the government engaged in an action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[8] This inquiry purports to require a showing of actual intent, which cannot be proven with circumstantial evidence alone or by showing that the government foresaw that its action would cause harmful effects to a racial group. The Court has repeatedly reaffirmed the *Arlington Heights* factors as binding on lower courts,[9] but has also selectively invoked *Feeney* as necessitating a showing of subjective intent.[10] The consequence of these precedents is that lower courts remain in a state of doctrinal confusion as to what evidence supports an inference of discriminatory intent.

Two district court opinions illustrate the divergent approaches that lower courts take when conducting a discriminatory intent analysis in equal protection cases. In a class action brought by a group of black plaintiffs against the city of Kissimmee, the District Court for the Middle District of Florida found that the city had intentionally discriminated against its African American residents by paving, maintaining, and resurfacing public streets in

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[5] *Davis*, 426 U.S. at 240.

[6] *See* 429 U.S. 252, 267 (1977).

[7] *See infra* notes 47–58 and accompanying text.

[8] 442 U.S. 256, 279 (1979).

[9] *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 488 (1997) ("In conducting [a discriminatory intent] inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing 'whether invidious discriminatory purpose was a motivating factor' in a government body's decisionmaking. . . . In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades . . . .").

[10] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (citing *Feeney* to support the holding that the Georgia legislature did not maintain its sentencing scheme because of the discriminatory impact that it caused); *see also* Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065, 1085 (1998) ("Though the Court in *Feeney* set out to define the meaning of discriminatory purpose . . . adherence to the *Feeney* conception of intent has been selective. In some cases, the *Feeney* standard is explicitly invoked and relied upon by the Court. In other cases, this narrow conception of intent is virtually ignored.").

white residential areas much more often than in black residential areas.[11] Examining the nature and magnitude of the discriminatory impact, the foreseeability that the government's action would deprive the black residential community of municipal resources, the legislative and administrative history of municipal decisionmaking, and the City's knowledge that its actions would result in a discriminatory impact, the court concluded that the plaintiffs had proven that the City intended to discriminate against the black community.[12]

The Federal District Court of New Jersey likewise conducted a discriminatory-intent analysis when a community organization representing the primarily-minority citizenry of Camden brought suit against the New Jersey Department of Environmental Protection for licensing the construction of a granulated blast furnace slag grinding facility in the neighborhood.[13] While the court acknowledged that the plaintiffs had alleged evidence of a discriminatory impact, foreseeability and knowledge of that impact, and a potential history of discriminatory enforcement, the court nonetheless granted summary judgment for the Department.[14] The court reasoned that the plaintiffs had not shown evidence of discriminatory intent "specifically relating" to the government's issuance of permits, seemingly requiring evidence of subjective intent to discriminate.[15] Curiously, a finding of disparate impact, foreseeability, knowledge, and historical background was doctrinally sufficient for recovery for the plaintiffs in the first case, but did not allow the second group of plaintiffs to move past the summary judgment stage. These cases are illustrative of a general disagreement in lower federal courts as to which evidentiary factors are necessary and which are sufficient to prove discriminatory intent. Indeed, Supreme Court case law since *Arlington Heights* and *Feeney* has also shown doctrinal incoherence.

In this Note, I apply a line of research in empirical philosophy, put forth by Joshua Knobe, that has broadened our understanding of how people ascribe intentionality to other people and to institutional actors like legislatures. Specifically, I argue that the Knobe Effect, which indicates that foreseeability of morally bad side effects leads most people to judge that the

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[11] Baker v. City of Kissimmee, 654 F. Supp. 571, 588 (M.D. Fla. 1986).

[12] *Id.* at 585–88.

[13] S. Camden Citizens in Action v. N.J. Dep't. of Envtl. Prot., No. Civ.A. 01-702(FLW), 2006 WL 1097498, at *1–3, *22 (D.N.J. Mar. 31, 2006). The plaintiffs brought suit under Section 601 of Title VI of the Civil Rights Act of 1964 rather than on equal protection grounds. Pursuant to *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001), an analysis under Title VI "extends no further than the Fourteenth Amendment," so plaintiffs had to prove discriminatory government intent and the district court applied the same test as it applies to equal protection claims. *See S. Camden Citizens in Action*, 2006 WL 1097498, at *22.

[14] *S. Camden Citizens in Action*, 2006 WL 1097498, at *26, *36, *37.

[15] *Id.* at *36 ("When the Court grants all inferences in favor of Plaintiffs, including evidence of potentially discriminatory enforcement and of a foreseeable disparate impact, Plaintiffs still fail to establish that the NJDEP issued permits to SLC because of, not merely in spite of, its adverse effects upon the minority community of Waterfront South.") (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

side effect was caused intentionally, should inform equal protection jurisprudence.[16]

The Knobe Effect suggests that in the particular context where there is societal consensus that the outcomes of an action are morally bad, there is a much less clear line between specific purpose and knowledge or foresight when people ascribe intentionality.[17] Yet this is not so in situations where there is not a societal consensus about the moral badness of certain outcomes, where the outcomes of an action are morally neutral or morally good.[18] I argue that because the Knobe Effect suggests that foresight of a morally bad outcome raises the inference of intentionality in most people's minds, the Supreme Court should better account for and elevate the role that the foreseeability of a disproportionate impact plays in a discriminatory-intent analysis. Some commentators interpret the Court's case law as sanctioning an important role for foreseeability in the discriminatory intent analysis,[19] while others argue that the Court has explicitly declined to accord foreseeability the same evidentiary value that it gives other factors that support an inference of intent.[20] The Supreme Court has sent mixed signals about the scope of a foreseeability inquiry when evaluating the presence of discriminatory purpose in government action. The Knobe Effect suggests that such foreseeability of morally bad outcomes plays a major role in how people judge intentionality.

In Part I of this Note, I review *Davis*, *Arlington Heights*, and *Feeney*, and their respective implications for discriminatory-intent analysis. Then, I detail some problems that have emerged from these equal protection precedents, including doctrinal incoherence, chilling of equal protection claims, and perverse government incentives. Part I ends by reviewing an additional problem stemming from the *Davis* progeny: the case law has not accounted for the possibility that the government can act with multiple motivations nor that there can be multiple consequences of government action. I argue that equal protection jurisprudence does in fact accord weight to both the primary objective of government action and the foreseeable side effects of government action. In Part II, I review the increasing role that research on folk intuitions is playing in informing the law, and then introduce Knobe's re-

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[16] *See infra* notes 187–198 and accompanying text.

[17] Knobe, *The Concept of Intentional Action*, *supra* note 4, at 206–07, 211; Knobe, *Intentional Action and Side Effects*, *supra* note 4, at 192–93.

[18] Knobe, *The Concept of Intentional Action*, *supra* note 4, at 206–07, 211; Knobe, *Intentional Action and Side Effects*, *supra* note 4, at 192–93.

[19] *See, e.g.*, Bruce E. Rosenblum, Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376, 1393 (1979) (arguing that even though foreseeability of harm is not a substitute for discriminatory intent, it remains an "important element" of proving a discriminatory purpose after *Feeney*).

[20] *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1189, 1189 n.165 (1991) (arguing that the Court would not approve of lower courts' reliance on foreseeability evidence in discriminatory intent analyses, particularly since the Court has repeatedly reaffirmed the *Arlington Heights* factors without expansion).

search and its findings.[21] Finally, in Part III, I argue that the Knobe Effect should inform equal protection jurisprudence. Specifically, I argue that Knobe's research on human ascriptions of intentional action should inform the constitutional understanding of intentionality, and that foreseeability of disparate racial impacts should play a more prominent role in equal protection jurisprudence. I conclude by suggesting a few implications of this argument for the discriminatory intent test, including incorporating foreseeability into a balancing test, or giving foreseeability more explicit weight in a burden shifting approach.

PART I

A. *The* Washington v. Davis *Framework and the Concept of Intentionality*

When courts review the constitutionality of government action that appears facially neutral but in fact produces a disproportionately harmful effect on a discrete racial group, the Supreme Court resolved that courts may not invalidate a statute solely because of its discriminatory effect. In *Washington v. Davis*, the Court held that a government action violates the Equal Protection Clause only if, despite its facially neutral appearance, the action was motivated by an intention to discriminate.[22] That is, a factual finding that a statute imposes a disproportionate burden on a particular racial group is not sufficient to invalidate that statute absent some other indication of a discriminatory purpose for enactment.[23]

When plaintiffs challenging a government action or statute cannot prove that it was purposefully discriminatory toward the race in question, courts will uphold the action if it is rationally related to a legitimate govern-

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[21] As used in the philosophical literature, "folk intuitions" refers to intuitive judgments made by most people. In other words, the term "folk" refers to the fact that these intuitions are shared by large percentages of a representative sampling of human subjects. These intuitions are unconscious and automatic, and may differ from judgments arrived at through reasoning or conscious analysis.

[22] 426 U.S. 229, 240 (1976). As used in *Davis*, a government's "discriminatory purpose" is a synonym for a government's "intentionally discriminatory action." Throughout the majority opinion, the Court uses "purpose" and "intent" to denote the same idea. *See id.* at 240 ("the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose" and "The essential element of De jure segregation is 'a current condition of segregation resulting from intentional state action. . . . The differentiating factor between De jure segregation and so-called De facto segregation . . . is Purpose or Intent to segregate.'") (citations omitted). Subsequent cases have also used these terms interchangeably. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). Consistent with the Supreme Court, I use "purpose" and "intent" interchangeably throughout this Note.

[23] *Davis*, 426 U.S. at 242.

ment interest.[24] This deferential standard of review works as a presumption of validity of the government action.[25] If a plaintiff can prove that the government intended to discriminate on the basis of race despite the facially neutral action, the Court will apply a strict scrutiny analysis, upholding the government action only if it is necessary to achieve a compelling government objective and is narrowly tailored to achieve that objective.[26] This probing analysis is the same test applied to government action or statutes that make explicit classifications based on race.[27] The Court has explained that strict scrutiny is designed to "smoke out" improper government uses of race classification and to ensure that "there is little or no possibility that the motive for the classification [i]s illegitimate racial prejudice or stereotype."[28] Sufficiently narrowly tailored statutes that make racial classifications are rare,[29] and courts usually invalidate the discriminatory government action when applying strict scrutiny analysis.[30]

In *Davis*, the plaintiffs alleged that a qualifying test for a position as a police officer in the District of Columbia violated the Equal Protection Clause because a higher percentage of blacks than whites failed the test, yet the test had not been validated as predictive of future job performance.[31] The plaintiffs did not allege that the test was intentionally discriminatory. Ap-

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[24] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635–36 (1996) (finding that a binding statewide ballot initiative prohibiting state or local government institutions from enacting antidiscrimination measures protecting gay and lesbian citizens bore no rational relationship to a legitimate government interest); Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (finding no rational relationship between a prohibition of participation in the food stamp program for individuals who live with non-family members and any legitimate government interest).

[25] *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993) ("[o]n rational basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity . . . ."); Lyng v. United Auto. Workers, 485 U.S. 360, 370 (1988) ("[w]e have stressed that [rational basis] review is typically quite deferential . . . .").

[26] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 904 (1995); Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944) (legislative classifications based on race can sometimes be justified under "pressing public necessity"); Pryor v. Nat'l Collegiate Athletic Ass'n, 258 F.3d 548, 562 (3d Cir. 2002) ("Once a plaintiff established a discriminatory purpose based on race, the decisionmaker must come forward and try to show that the policy or rule at issue survives strict scrutiny, *i.e.*, that it had a compelling interest in using a race-based classification and this classification is narrowly tailored to achieve that compelling interest.").

[27] When a statute or government policy does explicitly make racial classifications, the Court infers a discriminatory intent based on the language, so no other inquiry into discriminatory purpose is necessary. *See, e.g.*, Selmi, *supra* note 3, at 290.

[28] City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989).

[29] *See* Selmi, *supra* note 3, at 290.

[30] *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982) ("Purposeful discrimination invokes the strictest scrutiny of adverse differential treatment."); Washington v. Davis, 426 U.S. 229, 247–48 (1976); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1059 (5th Cir. 1984) (noting that a suspect classification "will almost never be based on legitimate government reasons," and so is quite unlikely to survive a strict scrutiny analysis). For an example of a racial classification upheld following a strict scrutiny analysis, see *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003), which found a state law school admissions process that considered race as one of the factors in admissions decisions was narrowly tailored to the compelling government purpose of achieving a more diverse student body.

[31] *Davis*, 426 U.S. at 232, 235.

plying their newly-formulated analysis,[32] the Court held that the test did not offend the Equal Protection Clause merely because there was a correlation between race and passage rates.[33] Presented with this facially neutral government action, the Court applied the standard rational basis test, and found that the test was rationally related to the permissible government purpose of upgrading the communicative skills of department personnel.[34]

In resolving that a disproportionate racial impact was not enough to trigger a strict scrutiny analysis, the Court nonetheless affirmed that "disproportionate impact is not irrelevant."[35] Sometimes, the Court noted, a discriminatory purpose can be inferred from the "totality of the relevant facts," including the presence of a discriminatory impact that is "difficult to explain on nonracial grounds."[36] An oft-cited example of such a statute is the one enacted by the Alabama legislature and challenged in *Gomillion v. Lightfoot*.[37] Though the statute made no racial classifications on its face, it redrew the boundary of the city of Tuskegee from a square to an "uncouth twenty-eight-sided figure," such that nearly all the African American voters in Tuskegee, but none of the white voters, were excluded from the new city jurisdiction.[38] Because it was difficult to conceive of any plausible government purpose for this redefinition of Tuskegee's boundaries that was not motivated by racial animus, the Court in *Gomillion* inferred a discriminatory intent from the effects of the statute and invalidated the statute as violative of the Equal Protection Clause.[39]

The Court in *Davis* did not expound on how litigants could prove discriminatory purpose, or what factors it would consider in analyzing whether a discriminatory purpose was present.[40] In adopting a "totality of the relevant facts" test, it left open several different interpretations of the level of intent and evidentiary burden of proof sufficient for a finding of a constitutional violation.[41] For instance, some courts and commentators believed that *Davis* could have been read to sanction a previously-used, tort-based notion of intent, which holds that actors intend the natural and foreseeable consequences of their decisions.[42] In its lack of clarity, the *Davis* Court appeared

[32] Prior to *Davis*, the Court had treated judicial inquiry into the purpose and motivations of the legislature as inappropriate. In *Palmer v. Thompson*, decided just two years before *Davis*, the Court intoned, "no case in this Court . . . has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. 217, 224 (1971).

[33] *See Davis*, 426 U.S. at 246.

[34] *Id.*

[35] *Id.* at 242.

[36] *Id.*

[37] 364 U.S. 339 (1960).

[38] *Id.* at 340.

[39] *Id.* at 347.

[40] *See* Foster, *supra* note 10, at 1076.

[41] *Davis*, 426 U.S. at 242.

[42] In his concurrence in *Davis*, Justice Stevens invoked this tort law formulation of intent and suggested that it could provide an objective standard for searching for legislative intent. *See id.* at 253 (Stevens, J., concurring) ("For normally the actor is presumed to have intended

to permit litigants to bring forth a variety of evidentiary factors, including foreseeability of disparate impact, to prove a discriminatory government purpose.

B. *Sniffing Out a Discriminatory Purpose: The* Arlington Heights *Factors*

Merely one year after deciding *Davis*, the Court took the opportunity to clarify the methods lower courts must use in searching for a discriminatory government purpose and the evidentiary burden on litigants alleging that a facially neutral statute is infected with discriminatory intent.[43] In *Arlington Heights*, the Court put forth a collection of objective factors to evaluate whether or not a government body's action was motivated by an impermissible discriminatory purpose.[44] At issue in *Arlington Heights* was a municipality's rejection of a petition for rezoning in a wealthy, predominantly white Chicago suburb. The rezoning would have cleared the way for the Development Corporation to build a low- and moderate-income housing development, which would have been affirmatively advertised to racial minorities in an effort to produce integrated housing.[45] In the Village's public meetings addressing the petition for rezoning, many members of the community spoke in favor of the zoning variance, while others adamantly opposed it.[46] Notably, the transcripts from the public meetings did not reflect verbal opposition based on a desire to exclude racial minorities from the Village.

In *Arlington Heights*, the litigants presented the Court with a government action that suggested a possibly racially discriminatory motive and a clearly disproportionate racial impact, so the Court expounded on the factors that might lead it to "sniff out" an invidious purpose. Citing *Gomillion*,[47]

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the natural consequence of his deeds. This is particularly true in the case of government action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."); *see also* United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976) ("[W]e agree . . . [that] our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions."); Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) ("We do not think that the Supreme Court has said that intent may not be established by proof of the foreseeable effect on the segregation picture of willful acts."); Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 29 (1976) (using tort notions of intent, which embrace the foreseeability of outcomes, to illustrate a burden-shifting regime for finding violations of the antidiscrimination principle); *The Supreme Court, 1976 Term—Proof of Discriminatory Intent*, 91 HARV. L. REV. 163, 166 n.33 (1977) (commenting that *Arlington Heights* might have foreclosed the view of some commentators and courts that equal protection intent standard embraced a tort law foreseeability test).

[43] *See* Foster, *supra* note 10, at 1077.

[44] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).

[45] *Id.* at 257.

[46] *Id.*

[47] Gomillion v. Lightfoot, 364 U.S. 339 (1960). The Court also cited *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886), a case in which the Court reversed a Chinese American's conviction for violating a local ordinance, when over 200 exemption petitions for the ordinance

the Court noted, "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[48] Without the infrequent "clear pattern" of *Gomillion*, however, the Court identified five other relevant factors:

> The *historical background* of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The *specific sequence of events* leading up to the challenged decision also may shed some light on the decisionmaker's purposes. For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. *Departures from the normal procedural sequence* also might afford evidence that improper purposes are playing a role. *Substantive departures* too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. The *legislative or administrative history* may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meeting, or reports.[49]

Noting that the Village's rejection of the rezoning petition did disproportionately impact racial minorities, the Court proceeded to apply these five factors to determine if the rejection was infected with a discriminatory purpose. Relying on the absence of any abnormalities in the sequence of events leading up to the rezoning petition rejection and the absence of discriminatory statements in the administrative history, the Court concluded that the Development Corporation had failed to carry its burden of proving a discriminatory purpose.[50]

The approach the Court took in *Arlington Heights* was more precise than in *Davis*. In denoting clear, objective factors that litigants can use to prove discriminatory purpose, the Court attempted to create a scheme for discerning the government's purpose in acting.[51] These factors foreclosed prior interpretations of *Davis* that would have permitted finding constitutional violations on the theory that actors intend the natural and foreseeable consequences of their actions.[52] Notably, the Court did not include foreseeability as one of the factors in *Arlington Heights*, implicitly rejecting any

had been rejected for Chinese nationals, but all but one exemption petition had been granted to non-Chinese nationals.

[48] *Arlington Heights*, 429 U.S. at 266.

[49] *Id.* at 267–68 (emphasis added to denote each factor) (citations omitted).

[50] *Id.* at 270.

[51] *See* Foster, *supra* note 10, at 1077.

[52] *See* Michael J. Perry, *Modern Equal Protection: A Conceptualization and an Appraisal*, 79 Colum. L. Rev. 1023, 1038–39 (1979) (comparing a foreseeability approach with the *Ar-*

incorporation of a tort law or constructive knowledge standard into its evidentiary schema for proving a discriminatory legislative intent. On the other hand, the Court did leave a window open for subsequent revision or supplementation of its factors, noting, "[t]he foregoing [factors] identif[y], *without purporting to be exhaustive*, subjects of proper inquiry in determining whether racially discriminatory intent existed."[53]

C. Feeney *and Foreseeability as a Permissive Objective Indicator of Discriminatory Intent*

It is notable that the justices did not include foreseeability of harm as one of the factors they put forth in *Arlington Heights*. Foreseeability of harm plays a central role in many other areas of law, and in the school desegregation cases of the 1970s, lower courts had relied on foreseeability of racially-imbalanced schools as a sufficient condition for a finding of intent to discriminate.[54] For instance, in 1975, in *Hart v. Community School Board of Education*, the Second Circuit concluded that government actions and omissions that "have the natural and foreseeable consequence of causing educational segregation" can support a finding of de jure segregation.[55] Although the Supreme Court never explicitly overturned similar holdings, it did suggest that *Davis* altered the application of this foreseeability test. In a per curiam decision in 1976, the Court summarily vacated and remanded *Austin Independent School District v. United States*,[56] a Fifth Circuit case

lington Heights approach, and arguing that a natural and foreseeable consequences test is preferable to the *Arlington Heights* factors); *see also supra* note 42.

[53] *Arlington Heights*, 429 U.S. at 268 (emphasis added).

[54] *See, e.g.*, United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976); Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975).

[55] *Hart*, 512 F.2d at 50. Professors Perry and Driessen argue for a renewed application of this test to facially neutral statutes that have a disparate impact on racial minorities. Margueritte A. Driessen, *Toward a More Realistic Standard for Proving Discriminatory Intent*, 12 TEMP. POL. & CIV. RTS. L. REV. 19, 42 (2002) ("When there is a racial[ ] dispar[ity] [sic], obviously discriminatory impact should be presumed to have been intended by the government if that impact is a natural and foreseeable consequence of the challenged government action."); Perry, *supra* note 52, at 1038–39.

[56] Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 991 (1976). In a concurring opinion, Justice Powell noted, "the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified." *Id.* (Powell, J., concurring). He then proceeded to cite the lower court's use of foreseeability of segregation as evidence of segregative intent with apparent disapproval. *Id.* at 992 n.1. Justices Brennan and Marshall dissented "because they [were] persuaded that the Court of Appeals correctly interpreted and applied the relevant decisions of [the Supreme Court]." *Id.* at 990 (Brennan and Marshall, JJ., dissenting). On remand, the Fifth Circuit continued to apply a form of a foreseeability inquiry, writing, "the most probative evidence of intent will be objective evidence of what actually happened rather than describing the subjective state of mind of the actor," and "normally the actor is presumed to have intended the natural consequences of his deeds." United States v. Texas Educ. Agency, 564 F.2d 162, 167 n.6 (5th Cir. 1977) (citing *Davis*, 465 U.S. at 253 (Stevens, J., concurring)).

that affirmed the use of foreseeability of racial imbalance in schools as probative of intent, "for reconsideration in light of *Washington v. Davis*."[57]

Three years after *Austin Independent School District*, the Court clarified its view that mere foreseeability of a disparate impact was insufficient to find a government action unconstitutional.[58] In *Personnel Administrator of Massachusetts v. Feeney*, the Court rejected a claim of unconstitutional gender discrimination that was based "upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions."[59] In *Feeney*, a group of female plaintiffs brought suit challenging a Massachusetts statute that required the applications of veterans who qualified for state civil service positions to be considered ahead of other applications.[60] The Court acknowledged that this statute operated "overwhelmingly to the advantage of males."[61] Indeed, in his majority opinion, Justice Stewart admitted that it would be "disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable."[62] Thus, the Court saw a form of intentionality in the Massachusetts legislature's passage of the statute, but this generalized intent was insufficient proof of a discriminatory purpose, which to the Court "implies more than intent as volition or intent as awareness of consequences."[63]

In *Feeney*, the Court required a more specific intent where the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[64] This more subjective inquiry into the specific intent of the legislature has been sporadically required in subsequent challenges to government action with a disproportional harmful impact on a particular racial group.[65] Indeed, scholars have noted that this subjective inquiry imposes a significantly more demanding burden of proof on plaintiffs alleging a discrimina-

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[57] 429 U.S. 990, 991 (1976); *see also* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 328–32 (1976).

[58] *See* Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COL. L. REV. 387, 418 (1999); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1134–35 (1997).

[59] 442 U.S. 256, 278 (1979).

[60] *Id.* at 259.

[61] *Id.*

[62] *Id.* at 278.

[63] *Id.* at 279 (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977) (Brennan, J., concurring)).

[64] *Id.*

[65] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (citing *Feeney*, 442 U.S. at 279, and then stating, "For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect."); *cf.* Wayte v. United States, 470 U.S. 598, 610 (1985) (citing *Feeney*, 442 U.S. at 279, and then stating, "In the present case, petitioner has not shown that the Government prosecuted him *because of* his protest activities.").

tory government purpose than the more objective inquiry from *Arlington Heights*.[66]

The Court required a stronger showing of specific intent for a discriminatory purpose, but still reaffirmed the necessity and "practicality" of the "objective factors" from *Arlington Heights* as establishing the framework for proof of discriminatory intent.[67] In a footnote, the Court observed that:

> This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the Massachusetts statute], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof.[68]

This footnote in *Feeney* at once left the door open for an inquiry into whether the foreseeability of harm supports an inference of intent and confirmed that foreseeability of harm is not sufficient evidence to find intent to harm. Paradoxically, *Feeney* also reaffirmed the *Arlington Heights* factors, which omit foreseeability, as the touchstone evidentiary guideposts for proving a discriminatory purpose.[69] While the Court suggested that evidence of foreseeability can support a "strong inference" of intent, the Court's dicta did not equate foreseeability with the other *Arlington Heights* factors, and it did not clarify the appropriate role for foreseeability in the context of the totality of the circumstances test.

Later the same year, in *Columbus Board of Education v. Penick*, the Court reiterated that government actions maintaining segregated schooling "having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose"[70] and "may be considered by a court in determining whether an inference of segregative intent should be drawn."[71] The Court continued, "the foreseeable effects standard [may be] utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn."[72] Affirming *Feeney*'s reasoning, the Court once again noted that "foreseeable consequences, without more, do not establish a constitutional violation."[73]

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[66] *See* Foster, *supra* note 10, at 1082–85.

[67] *Feeney*, 442 U.S. at 279 n.24 (citing *Arlington Heights*, 429 U.S. at 266).

[68] *Id.* at 279 n.25.

[69] *Id.* at 279 n.24.

[70] 443 U.S. 449, 465 (1979) (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 255 (S.D. Ohio 1977)).

[71] *Id.* at 464 (1979).

[72] *Id.*

[73] *Id.*

After *Feeney* and *Penick*, foreseeability of a disparate impact is neither a necessary nor sufficient condition for a finding of discriminatory intent. Showing foreseeability is a permissible strategy, but it is not clear whether proof of foreseeability of disparate racial effects should have any impact on a court's ultimate determination of whether a plaintiff has met her evidentiary burden.

D. *Problems with* Arlington Heights, Feeney, *and Subsequent Applications of* Davis

1. *Doctrinal Incoherence*

Commentators have identified numerous intellectual problems and inconsistencies with the case law that emerged from *Davis*, *Arlington Heights*, and *Feeney*. Perhaps most obvious is the incoherence of the various approaches sanctioned by the Court to prove intent.[74] While *Arlington Heights* created an exhaustive list of objective factors that can each raise an inference of discriminatory intent, *Feeney* required a subjective inquiry into the actual intent of the government.[75] Waffling between government intent as something that may be discerned by examining objective factors and government intent as something purely subjective has created doctrinal incoherence, and caused incoherence in lower courts.[76]

These divergent approaches have also been used inconsistently by the Supreme Court itself in subsequent cases. The Court sometimes relies on *Feeney*'s narrower conception of intent, and other times invokes *Arlington Heights*' methodology of using circumstantial indicators to ascribe intent. Indeed, the Court has reaffirmed that the *Arlington Heights* factors remain the touchstones of intent analysis in cases challenging facially neutral government action with a discriminatory impact.[77] One application of the *Arlington Heights* approach came in *Rogers v. Lodge*, where the Court

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[74] *See generally* Foster, *supra* note 10; Ortiz, *supra* note 1.

[75] *See* Foster, *supra* note 10, at 1086–93 (describing how the Court has both required proof of specific government intent to discriminate and inferred discriminatory intent from objective and circumstantial evidence).

[76] The doctrine was further muddled by *Castaneda v. Partida*, which permitted litigants to raise a prima facie case of unconstitutional racial discrimination in the context of jury selection merely by showing a disparate impact. 430 U.S. 482, 498–99 (1977). This holding is directly contrary to *Davis*, since discriminatory intent could be proven by disparate impact evidence alone if the government cannot rebut the prima facie showing of intentional discrimination.

[77] *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 488 (1997) ("In conducting [the discriminatory purpose] inquiry, courts should look to our decision in *Arlington Heights* for guidance."); *Feeney*, 442 U.S. at 279 n.24 ("Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* . . . ."). Lower courts also regularly invoke the *Arlington Heights* factors. *See, e.g.*, Williams v. Hansen, 326 F.3d 569, 585 (4th Cir. 2003) (applying the *Arlington Heights* factors to determine if a police chief violated his troopers' equal protection rights when he only interviewed African American police officers, but not white officers, in a departmental investigation about internal discrimination); Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 563–64 (3d

invalidated an at-large voting scheme in Burke County, Georgia, that had the effect of preventing African Americans from being elected members of the County Executive Committee.[78] Noting that "evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination," the Court cataloged the historical background of exclusion of African Americans from the voting and political process in the county.[79] The specific sequence of events leading up to the lawsuit was also informative: the elected county officials had been unresponsive to the needs of the black community in the county, and past voting along racial lines had prevented each black candidate for county office from being elected.[80] Combined, these objective indicators of intent were sufficient for the Court to form an inference of a government purpose to discriminate based on race.[81]

In other cases, however, the Court has cited *Feeney* as requiring a much higher evidentiary showing of intentionality.[82] For example, in *McCleskey v. Kemp*,[83] the Supreme Court upheld an African American man's death sentence despite robust scientific evidence that the race of the victim predicted enormous disparities in the likelihood that the defendant would be assessed with the death penalty in Georgia. In rejecting McCleskey's equal protection claim, the Court determined that there was no evidence that the jury acted with a discriminatory purpose toward McCleskey at sentencing,[84] nor was there sufficient evidence that the legislature acted with a discriminatory purpose in allowing the capital punishment scheme to remain in force despite discriminatory outcomes.[85] The Court was satisfied that the Georgia legislature maintained its capital punishment scheme, with its large disproportionate racial impact, for the "legitimate reasons" of retribution and deterrence of capital crimes.[86] Citing *Feeney*, the Court concluded that while Georgia may have maintained its capital sentencing scheme in spite of its discriminatory impact on blacks, McCleskey had not shown that Georgia maintained the scheme *because of* its racially skewed effects.[87] The clear correlation between race and rates of death penalty assessment would have made it plainly foreseeable to any state legislature that its capital scheme discriminated against a discrete racial group. But there was no evidence that the

Cir. 2002) (applying the *Arlington Heights* factors to determine whether an NCAA rule intentionally discriminated against black athletes).

[78] 458 U.S. 613, 622 (1982).

[79] *Id.* at 624–25.

[80] *Id.* at 623, 625.

[81] *Id.* at 627.

[82] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 610 (1985).

[83] 481 U.S. 279 (1991).

[84] *Id.* at 292–93.

[85] *Id.* at 297–98, 299.

[86] *See id.* at 299 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.")).

[87] *Id.* at 298 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

Georgia legislature's true, sole intent was to cause disparities in capital punishment based on the race of the victim or defendant.

In addition to wavering between whether a litigant can prove discriminatory intent through objective factors or must prove subjective intent, the *Davis*, *Arlington Heights*, and *Feeney* progeny have also sent confusing signals about the role of foreseeability of disparate racial impacts. The language from *Feeney* and *Penick* suggests that while the Court has declined to explicitly add foreseeability of disparate effects to the *Arlington Heights* list of objective evidentiary indicators of intent, it does acknowledge that the objective foreseeability inquiry supports an inference of subjective discriminatory intent.[88] On the other hand, the Court has chosen not to permit a foreseeability inquiry that is coextensive with the *Arlington Heights* factors,[89] and continues to view it as neither a necessary nor sufficient condition for discriminatory intent.

The Court's inconsistent signals on whether foreseeability can be probative of intent have left lower courts in a state of doctrinal confusion. Tellingly, a 1991 study by Theodore Eisenberg and Sheri Lynn Johnson found that district court judges rely on foreseeability of a disparate impact in 25% of cases challenging a facially neutral statute as infected with discriminatory intent.[90] When those cases go up on appeal, the appellate courts only rely on foreseeability as probative of a discriminatory purpose in 9% of cases.[91] Eisenberg and Johnson note that this reliance on foreseeability is "puzzling" because it was not "included in the *Arlington Heights* list of factors probative of discriminatory intent, a list that is authoritative for, and binding on, the lower courts."[92] Interpreting the lower court application of a foreseeability factor, the authors posit, "district court judges appear to be responding to intent cases in ways the Supreme Court has not prescribed, and of which it would not approve. Perhaps the lower courts are silently rebelling against the intent standard's constraints."[93]

Several commentators have tried to explain these doctrinal incoherencies. Daniel Ortiz believes that the substantive value at stake in a case determines the degree to which the Court is willing to interfere with government action.[94] Ortiz argues that in cases involving political rights (like voting), criminal rights (like jury composition), and education, the Court takes a more aggressive position in reviewing government action, and thus lowers the evidentiary burden on plaintiffs.[95] He believes that in cases involving

[88] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979).

[89] Eisenberg & Johnson, *supra* note 20, at 1185, 1189 n.165 ("Although *Arlington Heights* said that the list was not exhaustive, the Supreme Court has repeatedly quoted and referred to that list without expansion.").

[90] *Id.* at 1184.

[91] *Id.*

[92] *Id.* at 1189.

[93] *Id.*

[94] Ortiz, *supra* note 1, at 1107, 1134–42.

[95] *Id.* at 1141–42.

social and economic goods, like housing and job availability, the Court is more cautious about intervening in the choices of the government, and thus is comfortable imposing a higher burden on plaintiffs.[96] In other words, "the nature of the case makes all the difference."[97] Sheila Foster contends that democratic process theory can account for much of the doctrinal incoherence.[98] She believes that the Court requires proof of a specific intent to discriminate when the government decision maker is highly democratically accountable, as when the legislature makes decisions.[99] But when the decision maker is a less democratically-accountable agency or prosecutor, Foster believes that the Court will accept proof of more general intent to establish an equal protection violation.[100]

2. *Equal Protection Impotence*

A second critique of the *Davis* progeny is that the strictures of the discriminatory-intent test have rendered the Equal Protection Clause a dead letter.[101] Because of the high evidentiary burden of proving that a legislature or government official subjectively intended to cause a disparate racial impact, it is extremely difficult for a litigant to prevail on an equal protection claim without a facial classification or smoking-gun evidence of racial animus.[102] In an age where obvious racial animus in statutes, regulations, or official actions is extremely rare, the Court has, on several occasions, declined to find an equal protection violation despite strong circumstantial and objective

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[96] *Id.* at 1137. He writes:

> In the housing and employment cases, the plaintiff must show current, actual discriminatory motivation; in the others, current disparate effects plus some other showing—at most of motivation in the past or in decisions unrelated to the one under consideration—suffice. Not only is it much more difficult to prove intent in the housing and employment cases, but, more interestingly, they involve a completely different kind of inquiry.

Id.

[97] *Id.* at 1007.

[98] *See* Foster, *supra* note 10, at 1121.

[99] *Id.* at 1122-25.

[100] *Id.* at 1128-29.

[101] *Cf.* John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160 (1978) (expressing concern that the intent analysis has been used to deny, rather than remedy, claims of equal protection violations).

[102] *See, e.g.*, Eisenberg & Johnson, *supra* note 20, at 1171 (arguing that constitutional litigation is not addressing much of the race discrimination that likely pervades American society); David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U.L. REV. 729, 731 (1996) (describing the "near impenetrable brick wall" that minorities run into when bringing an equal protection claim); Kaswan, *supra* note 58, at 426-32 (acknowledging the Court's unwillingness to infer discriminatory intent, notwithstanding strong circumstantial evidence); Selmi, *supra* note 3, at 295 (observing that even though discrimination claims are subject to a preponderance of the evidence standard of proof, the Court rarely invokes this standard, which is another reason why "discrimination is so difficult to prove"); Siegel, *supra* note 58, at 1136 (noting that "discriminatory purpose requirement now insulates many, if not most, forms of facially neutral state action from equal protection challenge").

evidence of discriminatory intent.[103] Even though the Court itself has acknowledged that most discrimination today is subtle rather than overt,[104] it has maintained a view of the Equal Protection Clause that requires blatant acts of discrimination and often denies relief when discrimination is strongly suggested by circumstantial evidence.[105]

Tellingly, the same study by Eisenberg and Johnson indicates that while plaintiffs in cases alleging intentional discrimination prevail at rates similar to other claims brought under section 1983,[106] fewer plaintiffs bring these claims of intentional discrimination than would be expected statistically.[107] In fact, the authors found that each district court would issue an average of one opinion per year in favor of a plaintiff claiming facially neutral but intentionally discriminatory government action.[108] The authors suggested that the high evidentiary burden required by the *Davis* progeny may deter lawsuits brought by plaintiffs who have been discriminated against by the government.[109]

Furthermore, district courts often see cases where an equal protection claim of intentional government discrimination is plausible, but where plaintiffs have simply chosen not to raise the claim. For example, the Fifth Circuit recently decided *Collins v. Ainsworth*, a case in which the litigants challenged the Copiah County, Mississippi police department's decision to set up driver's license checkpoints on the roads leading up to a rap concert.[110] The sheriff claimed that he was concerned that unlicensed drivers would attend the concert, and the police department ultimately arrested nearly eighty people on their way to the concert.[111] In fact, the police only made two or three arrests for driver's license infractions; the majority of the arrests were for illegal possession of beer.[112] Prior to his decision to target the rap concert with driving checkpoints, the sheriff had consulted with the state attorney general over the legality of his proposed action; he had never set up

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[103] *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 361, 369 (1991) (holding that excluding only Spanish-English bilingual jurors from serving on a Latino defendant's jury in his criminal trial did not violate the Equal Protection Clause); McCleskey v. Kemp, 481 U.S. 279, 292–93, 297–99 (1987).

[104] *See* Rose v. Mitchell, 443 U.S. 545, 559 (1979) (noting that "today . . . discrimination takes a form more subtle than before. But it is not less real or pernicious."); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("[W]omen still face pervasive, although at times more subtle, discrimination . . . .").

[105] *See* Selmi, *supra* note 3, at 284.

[106] 42 U.S.C. § 1983 (2006) (granting federal courts jurisdiction to hear claims alleging violations of constitutional or federal statutory rights by state or local official acting under the color of law).

[107] *See* Eisenberg & Johnson, *supra* note 20, at 1165–68. This study is twenty years old, but seems to be the best empirical examination of disparate impact cases to date. Unfortunately, there is no updated data.

[108] *Id.* at 1193.

[109] *See id.* at 1166.

[110] Collins v. Ainsworth, 382 F.3d 529, 534 (5th Cir. 2004).

[111] *Id.* at 534-35.

[112] *Id.* at 535.

checkpoints for predominantly-white county-sponsored rodeos, because he was not concerned about unlicensed drivers attending the rodeos.[113] The African American sponsors of the rap concert and several black attendees who were arrested brought suit,[114] claiming violation of Fourth Amendment rights against unreasonable search and seizure, First Amendment prior restraint rights, and Fourteenth Amendment due process rights.[115] Curiously, the plaintiffs did not challenge the sheriff's actions under the Equal Protection Clause, perhaps because of the difficulty of proving that discriminatory intent infected this facially neutral government action. This case is but one example of a fact pattern that suggests a clear equal protection violation, but where the plaintiff did not bring that claim, perhaps because of the formidable barriers to proving discriminatory intent under the current evidentiary requirements.[116]

3. *Perverse Incentives*

A third problem with the *Davis* progeny is that the cases have signaled to government actors how to construct statutes and engage in action in a way that will avoid an equal protection problem. Even if a government official intends to harm a racial group, she can act in a facially neutral manner and leave few circumstantial indicators of impermissible intent. Or, if a legislature intends a disparate impact, it will make sure to write a facially neutral statute and exclude any evidence of impermissible intent from the legislative history. So long as negative consequences of government action do not have obvious indicators of subjective discriminatory intent, the government can explain a harmful effect by reference to a different permissible purpose, and any equal protection challenge is unlikely to prevail.[117]

Presciently, Justice Stevens noted in his dissent in *Adarand Constructors v. Peña*, "[a] state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended 'effects.'"[118] Although the Court has developed tools for uncovering clandestine government race-based classifications, it has simultaneously encouraged opaqueness in government intentions and motives. For instance, in *Gratz v. Bollinger*, the Supreme Court overturned the University of Michigan's college admissions policy, which assigned points for membership in an underrepresented racial

[113] *Id.* at 534.

[114] The plaintiff brought suit under 42 U.S.C. § 1983 (2006).

[115] *Collins*, 382 F.3d at 535.

[116] *See* Siegel, *supra* note 58, at 1134.

[117] *See* Siegel, *supra* note 3, at 2189 ("Lawmakers can always articulate socially benign (or at least, nonmalicious) reasons for policies they adopt that may 'incidentally' perpetuate status inequalities among groups. Cumulatively, this body of equal protection doctrine has given lawmakers a strong incentive to change the rule structure of policies that long enforced racial or gender stratification and to articulate 'legitimate, nondiscriminatory reasons' for those policies in order to immunize them from further equal protection challenge.").

[118] Adarand Constructors v. Peña, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting).

minority group,[119] but on the same day it upheld the more discretionary "percentage plan" form of affirmative action used by Michigan's law school in *Grutter v. Bollinger*.[120] Justice Souter saw very little to distinguish these two plans other than the transparency of the admissions policies:

> The "percentage plans" are just as race conscious as the point system (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.[121]

In the context of harmful effects on racial minorities, just as in the context of helpful effects for racial minorities, the Court has seemed to encourage "hiding the ball." So long as the government can justify its policy with a legitimate primary objective, foreseeably disproportionate burdens on racial groups have thus far proven inadequate for convincing the Court of the unconstitutionality of the government policy.

Reva Siegel's theory of "preservation through transformation" supports the notion that facially neutral government action can mask various degrees of discriminatory intent merely by changing the language employed in crafting statutes.[122] Siegel's theory posits that underlying civil rights violations can preserve themselves partially because of the changing language used to describe those violations.[123] She argues that as status hierarchies incorporated into the law are successfully contested, the language once used to describe those status hierarchies is decried as morally repugnant.[124] The new language used to describe the underlying violation is not imbued with the same sense of moral badness, as in laws that are now facially neutral but once made explicit racial classifications.[125] Siegel argues that the changing rhetorical forms oftentimes do little to change the inherent rights violation, and actually can serve to preserve the practice that the legal reforms seek to remedy. In this way, civil rights violations are preserved through the transformation in the rhetoric used to describe them, often despite the best intentions of the legal reformers.[126] In the context of facially neutral laws, Siegel concludes:

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[119] Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

[120] Grutter v. Bollinger, 539 U.S. 306, 337–38, 343 (2003).

[121] *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

[122] Siegel, *supra* note 3, at 2184; Siegel, *supra* note 58, at 1113, 1119; *see also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 825–26 (2002) (describing Professor Siegel's "preservation through transformation" theory).

[123] Siegel, *supra* note 3, at 2175–88.

[124] *Id.* at 2189.

[125] *Id.*

[126] *Id.* at 2180.

> Unfortunately, as currently constituted, the Court shows scant interest in revising equal protection doctrines of heightened scrutiny and discriminatory purpose. This body of constitutional law once served to dismantle status-enforcing state action, but, because of its very success in precipitating the reform—and modernization—of status-enforcing state action, the doctrines now serve to rationalize, rather than scrutinize, the new, facially neutral forms of status-enforcing state action they have helped bring into being.[127]

In other words, the discriminatory-intent test successfully purged statutes and official action of overt, facial discrimination against racial groups. At the same time, it signaled to government officials ways to accomplish the same disparate impacts through facially neutral language and action. So, Siegel claims, the same disproportionate harms to racial minorities still exist, but they are now constitutionally sanctioned by the new language of the discriminatory intent test. That racial discrimination has survived by changing itself and by changing linguistic norms suggests that the Court today should reevaluate the tools that it adopted thirty years ago for identifying government discrimination.

4. *Unclear Role of Multiple Effects of Government Action*

In addition to doctrinal incoherence, the likely chilling of equal protection claims, and the perverse incentives created by current equal protection jurisprudence, the *Davis* progeny has also not adequately addressed how courts should consider multiple effects of government action. For example, it is unclear how courts should assess a government action when at last one effect flows from a legitimate government purpose but another harms a discrete racial group. In the suspect classification context, the Court has, on the one hand, suggested at times that it first determines which effect was the primary objective of the government action, and then second considers that primary objective in light of the foreseeable side effects.[128] On the other hand, the Court has also sent signals that it will not attempt to discern the dominant motivation of government action, and instead will invalidate any action that is proven intentionally discriminatory.[129]

Historically, the Supreme Court has noted the difficulty of making constitutional determinations based on an assumption that a legislature is motivated by only one objective.[130] In *Palmer v. Thompson*, Justice Black's

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[127] *Id.* at 2195.

[128] *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278–79 (1979).

[129] *E.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

[130] *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 233–34 (1973) (Powell, J., concurring) (noting the extreme difficulty of discerning the collection of motivations lying behind a legislative enactment); Palmer v. Thompson, 403 U.S. 217, 224 (1971) (noting that it is "extremely difficult for a court to ascertain the motivation, or collection of different motivations,

majority opinion acknowledged that a legislature or administrator can be motivated by many different objectives, noting that it is "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."[131] Six years later in *Arlington Heights*, the Court implicitly reaffirmed the notion that a government decisionmaker can act with multiple motivations, noting that *Davis* "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes."[132] Indeed, it is often a challenge to discern which specific objective primarily motivated a legislature, and which of several foreseeable side effects may have motivated a legislature to a lesser extent.

Paul Brest acknowledged that many objectives can flow from one government action in his seminal paper urging courts to adopt what later became an *Arlington Heights*-esque objective approach to discerning legislative motivation.[133] In doing so, he argued that it was inappropriate for the Court to search for the "sole" or "dominant" motive for the statute or administrative action.[134] To Brest, "an illicit motive may have been 'subordinate' and yet have determined the outcome of the decision."[135] Because, in Brest's view, either a constitutionally impermissible subordinate or dominant motive is sufficient to invalidate the government action, it is unnecessary to distinguish between the primary objectives and the side effects of government action.[136] Brest would instead presume that if evidence suggests that the government gave any weight to an illicit objective, even one that was not the primary motivation of the government, then the "consideration of the [illicit] objective [should] determine[ ] the outcome of the decision and should invalidate the decision in the absence of clear proof to the contrary."[137]

Brest believed that whenever clear and convincing evidence indicates that the government could foresee a morally harmful primary objective *or* side effect, the government action should be invalidated absent extraordinary

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that lie behind a legislative enactment"); Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) ("It is difficult enough to find the collective mind of a group of legislators."); *see also* Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 881 (1985) ("[A]scertaining the motives that may have affected the decision of a collective body can be even more demanding.").

[131] 403 U.S. at 225. *Palmer* applied an "effects test," which was subsequently superseded by *Davis*'s requirement of proof of purposeful discrimination. Washington v. Davis, 426 U.S. 229, 242–45 (1976).

[132] *Arlington Heights*, 429 U.S. at 265 (emphasis added); *see also* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 539 (6th Cir. 2002) (refusing to grant qualified immunity to a police officer if the plaintiff could prove that the trooper was partially motivated by a discriminatory purpose).

[133] Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119–22.

[134] *Id.* at 119.

[135] *Id.*

[136] *Id.* at 116–17, 119.

[137] *Id.* at 117.

justification.[138] In his view, foreseeability of a side effect that will harm a racial minority is conclusively intentional, and thus dispositive. This viewpoint blurs the distinction between any specifically intended objectives and foreseeable side effects. It also influenced the Court, which reversed *Palmer*'s effects-based approach and adopted Brest's motivation-based approach six years later in *Davis* and *Arlington Heights*.[139] Indeed, *Arlington Heights* acknowledged the difficulty of discerning a "single" government motivation, or even a "dominant" or "primary" government motivation:

> In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or rationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been *a* motivating factor in the decision, this judicial deference is no longer justified.[140]

While the *Arlington Heights* Court seemed to accept Brest's argument that courts' division of primary objectives and side effects of facially neutral statutes was blurry,[141] it curiously omitted foreseeability as one of its sanctioned factors. However, the *Feeney* Court's explicit acknowledgment that a foreseeable side effect that would burden a suspect class was insufficient to invalidate the government action cabins *Arlington Heights*' and Brest's theory and a conceptual division between the treatment of primary objectives and side effects.

The *Feeney* Court also considered the constitutional treatment of various effects differently than the *Arlington Heights* Court. Rather than declare that any side effect motivated by discriminatory intent is impermissible, the *Feeney* Court first determined the primary objective of the Massachusetts legislature, and then second considered the constitutionality of that effect in light of the foreseeably discriminatory side effect. In that case, the Court ultimately found that the primary objective of the Massachusetts statute was to "grant a preference to veterans," but it recognized that the legislature surely foresaw that the statute would heavily advantage males over females.[142] The disproportionate impact on women was an "unavoidable consequence," or side effect, of the primary objective, which "itself always

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[138] *Id.* at 130–31.

[139] The *Arlington Heights* Court cited Brest's influential article in its majority opinion. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.12 (1977); *see also* Ortiz, *supra* note 1, at 1109 ("It was Brest's [as opposed to John Hart Ely's] purer application of process theory that the Court later cited with approval and followed.").

[140] *Arlington Heights*, 429 U.S. at 265–66 (emphasis added).

[141] Indeed, the Court noted in a footnote, "The search for legislative purpose is often elusive enough, *Palmer*, 410 U.S. at 225, without a requirement that primacy be ascertained." *Arlington Heights*, 429 U.S. at 265 n.11 (quoting McGinnis v. Royster, 410 U.S. 263, 276–77 (1973)).

[142] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 278 (1979).

[had] been deemed to be legitimate."[143] Even though, in the Court's view, the Massachusetts legislature did foresee the harm to women, it did not enact the statute "in part 'because of,' not merely 'in spite of,' its adverse effects upon [women]."[144] The harm to women was clearly treated as a side effect in the Court's analysis, even though it was not discriminatory or purposeful enough to merit invalidation of the statute. Importantly, the Court in *Feeney* engaged in a weighing of the primary objective against the foreseeable side effect, examining the two consequences of the government action in the full context of the statutory outcomes. It neither pretended that the side effect did not exist, nor did it argue that the two effects were equally intended.

Contemporary cases have confirmed the *Feeney* Court's distinction between the primary objectives and side effects of government action on suspect classes. In the redistricting context, the Supreme Court has recently held that a plaintiff alleging that a redistricting scheme unconstitutionally burdens racial minorities must show that "race, for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing district lines."[145] That is, the Court was framing redistricting schemes in terms of whether or not a race-based effect was the primary objective, which would be unconstitutional, as opposed to a side effect, which would be constitutional. In *Easley v. Cromartie*, Justice Breyer distinguished between disparate racial impacts in redistricting as side effects of government action and as the primary objective of government action.[146] In the context of redistricting challenges, the Court held that a finding that race was merely "'*a* motivation for the drawing of a majority minority district'"—meaning that a distinct effect on a racial group was a foreseeable side effect—would not trigger strict scrutiny.[147] On the other hand, a finding that race was the "predominant factor" of the redistricting plan—or the primary objective—would trigger strict scrutiny of the plan.[148]

Since *Arlington Heights*, the Court increasingly distinguishes between the primary objective and side effects of government action. This framework of analysis has not been explicitly recognized by the Court, but instead tends to underlie many of the decisions handed down since *Arlington Heights*. It permits the Court to weigh both factors when analyzing statutes or other action challenged as purposefully discriminatory towards a particu-

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[143] *Id.* at 279 n. 25.

[144] *Id.* at 279.

[145] Miller v. Johnson, 515 U.S. 900, 917 (1995) (upholding the District Court's finding that plaintiffs had met their burden of proof in showing that race was the predominant factor motivating the Georgia legislature's redrawing of its Eleventh Congressional District); *accord* Bush v. Vera, 517 U.S. 952, 959 (1996) ("For strict scrutiny to apply, the plaintiffs must prove that . . . race [was] the 'predominant factor motivating the legislature's [redistricting] decision.").

[146] 532 U.S. 234, 258 (2001) (overturning a District Court's finding that race was the predominant factor in the North Carolina legislature's redistricting of its Twelfth Congressional District).

[147] *Id.* at 241 (quoting *Vera*, 517 U.S. at 959).

[148] *Id.*

lar race, but does not impute the same degree of intentionality to all foreseen effects of government action. It is also within this framework that the Knobe Effect can inform equal protection jurisprudence, and thus I assume that this framework is constitutionally acceptable for the remainder of this Note.

PART II

The Court's declaration that the factors in *Arlington Heights* were not exhaustive and its treatment of foreseeability of harm in *Feeney* and *Penick* suggest a potential openness to providing lower courts with more tools for discerning government intent and for sniffing out racially discriminatory intentional action. Early advocates for review of government motives saw the need to look into the psychology of government decisions. John Hart Ely recognized that there were political and psychological dimensions of reviewing government action, and thus argued for an inquiry into the intent of government actors in claims of racial prejudice.[149] By "focus[ing] more on the psychology of the decision," judges and juries could use various tools and inferences to "flush[ ] out unconstitutional motives."[150] Subsequent scholars have used insights from psychology and mind science to comment on the Court's successes and failures at capturing human notions of intentional discrimination.[151] Yet determining intentionality of a decision is easier said than done, and as discussed, the Court has sanctioned a number of different approaches to the intent inquiry.

Breaking down the concept of intentional action has also been an area of inquiry in contemporary empirical philosophy and cognitive psychology, and these scientific studies can be useful in evaluating the Court's success at capturing intuitive concepts of how people make inferences about intentionality. In the sections that follow, I review this body of research and make some preliminary suggestions as to how it could inform the framework the Court has developed for facially neutral statutes and government action that cause disproportionate burdens for discrete racial groups.

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[149] John Hart Ely, Democracy and Distrust 153 (1980).

[150] *Id.*

[151] *See, e.g.*, Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323, 331–44 (1987) (arguing that the Court's doctrine has "ignor[ed] much of what we understand about how the human mind works" by neglecting to accord constitutional protection to victims of unconscious racism, which psychology has shown pervades human cognition); Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decisionmaking*, 8 Mich. J. Race & L. 395, 413–18 (2003) (making recommendations about how to apply psychological findings from the implicit association test to the *Davis* framework); Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 Vand. L. Rev. 937, 941–45 (1993) (using psychological research to comment on the subconscious nature of racism and the failure of equal protection jurisprudence to protect against that form of racism).

A. *The Role of Research on Intuitions in Informing Legal Doctrine*

We generally think of the law as a system of rules that can be applied to real-world situations in an analytic manner. Lawyers and judges take statutes, regulations, and precedents, identify the relevant rule, and then make a reasoned judgment as to how that rule applies to a particular fact pattern. Yet psychologists and economists have shown over the past three decades that ordinary humans take a much less deliberative approach to decision-making and judgment formation. In many contexts, humans rely on their intuitions or on cognitive heuristics to make everyday decisions and judgments.[152] Whereas analytic judgments tend to be calculated and consciously reasoned, intuitive judgments tend to be automatic, implicit, effortless, and unconscious.[153]

Where people's decisions have moral consequences, an emerging body of research demonstrates that humans consistently and regularly appeal to moral intuitions and heuristics to make judgments.[154] For example, the vast majority of people believe that a sexual relationship between a brother and sister is morally wrong, even when the fact pattern makes clear that no pregnancy could have resulted from the incestuous affair and that the brother and sister involved enjoyed the interaction and were not harmed emotionally.[155] When justifying their moral judgment of wrongness in this incest scenario, people first attempt to appeal to some logical reason, but find that none exists.[156] Only then do they acknowledge that the fact pattern just seems wrong intuitively.[157] Given other fact patterns, such as familiar trolley car

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[152] *See, e.g.*, Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 710 (2003). *See generally* Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002); Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 531, 542 (2005) (reviewing many moral heuristics and cautioning that applying them to legal and political contexts may result in error); Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105 (1971).

[153] *See, e.g.*, Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 51 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 5 (2007) (citing Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 698 (2003)); Sunstein, *supra* note 152, at 533.

[154] *See, e.g.*, Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCIENCES 517, 517 (2002); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001); Robinson & Darley, *supra* note 153, at 6-8; Paul H. Robinson, Robert Kurzban, & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1639, 1685 (2007); Sunstein, *supra* note 152, at 533.

[155] Haidt, *supra* note 154, at 814.

[156] *Id.*

[157] *See id.*

scenarios,[158] psychologists have found similar results: most people have strong moral intuitions about particular outcomes, but are unable to ground those moral judgments in any plausible reason.[159] As Jonathan Haidt has remarked, "[m]oral intuition is a kind of cognition, but it is not a kind of reasoning."[160]

Psychologists have also begun to catalog moral principles that generally predict people's moral judgments in a wide variety of moral fact patterns. For example, people systematically judge causing harm as a means to an end as morally worse than causing equivalent foreseeable harm as a side effect of an otherwise permissible action, causing harm through an action as morally worse than causing the same harm through an omission, and causing harm through the use of physical force as morally worse than causing the same harm without using physical force.[161]

The role of folk moral intuitions in informing the law has recently begun to generate scholarly commentary, but the discussion is still in early stages.[162] Some argue that legal analysis is different from ordinary human judgments, and that legal rules should be the product of reason and deliberation rather than a mere reflection of human intuition.[163] Others see a promis-

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[158] First conceived by philosopher Philippa Foote and thoroughly analyzed by Judith Jarvis Thomson, the trolley problem has become the standard moral dilemma used by philosophers and moral psychologists to test moral intuitions. A basic version asks subjects to imagine that a trolley car is heading down a track, and it will hit and kill five people. But, if the subject flips a switch, it will divert the trolley car onto a side track, and it will only hit and kill one person. Appealing to utilitarian justifications, most people would flip the switch. In a slightly altered scenario, the trolley car is heading down a track and will hit and kill five people, but there is a footbridge above the track, and a fat man standing on the bridge. If the subject pushes the fat man off the bridge, he will block the trolley, thus saving the five people. But, he will die. In this scenario, most people would not push the fat man. When asked to reconcile this moral intuition with the flipping-the-switch scenario, people have difficulty explaining their moral intuitions to flip the switch but not to push the fat man. *See* Fiery A. Cushman, Liane Young & Marc D. Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgments: Testing Three Principles of Harm*, 17 PSYCHOL. SCI. 1082, 1083–84 (2006); John Mikhail, Rawls' Linguistic Analogy: A Study of the 'Generative Grammar" Model of Moral Theory Described by John Rawls in A Theory of Justice (May 1, 2000) (unpublished Ph.D. dissertation, Cornell University), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=766464.

[159] *See, e.g.*, Marc D. Hauser, Liane Young, & Fiery A. Cushman, *Reviving Rawls' Linguistic Analogy*, *in* MORAL PSYCHOLOGY AND BIOLOGY 107, 115 (Walter Sinnott-Armstrong ed., 2008); John Mikhail, *Moral Grammar and Intuitive Jurisprudence: A Formal Model of Unconscious Moral and Legal Knowledge, in* THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL COGNITION AND DECISION MAKING, VOL. 50, at 36–37 (Douglas Medin, Linda Skitka, Christopher W. Bauman, & Daniel Bartels eds., 2009), *available at* http://ssrn.com/abstract=1163422.

[160] Haidt, *supra* note 154, at 814.

[161] *See* Cushman et al., *supra* note 158, at 1083, 1086 (2006) (describing the intention principle, the action principle, and the contact principle, respectively); Joshua D. Greene et al., *Pushing Moral Buttons: The Interaction Between Personal Force and Intention in Moral Judgment*, 111 COGNITION 364, 369 (2009).

[162] *See, e.g.*, Sunstein, *supra* note 152, at 533. *See generally* Mikhail, *supra* note 159.

[163] *See, e.g.*, Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1123–24 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)) (pointing out that there are many cognitive errors and biases in ordinary people's intuitions about probability and risk

ing role for research on human intuitions to inform legal debates, reform proposals, and doctrine.[164] Indeed, much of the law is a reflection of human intuitions.[165] The common law, many argue, evolved to reflect the common sense and intuitive judgments of normal people[166]; concepts central to common law understandings of harm—such as the reasonable person test, proximate causation, and the distinction between action and inaction—aim to capture community intuitions.[167] As Stephen Morse has noted, "the law implicitly adopts the folk-psychological model of the person, which explains behavior in terms of desires, beliefs and intentions."[168]

To the extent that much of law reflects human intuitions, it gains more public legitimacy. On the other hand, when the law strays too far from people's moral intuitions, and when it does not reflect people's fundamental conceptions about how individuals and groups interact, its legitimacy can suffer.[169] While there are certainly strong and correct claims that law is much more than a collection of codified human intuitions, a clearer understanding of people's shared intuitions in moral contexts can be informative in discussions about legal reform. Particularly when an area of legal doctrine has proven ineffective in protecting rights, reformers can look to moral intuitions to see if legal tests have inaccurately captured human understandings of social interaction.

There is a distinction to be made between substantive moral intuitions—like the morality of abortion policies—and structural moral intuitions—like unconscious intuitions generating judgments about causation

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perception, and people's moral intuitions, suggesting that policymakers should make decisions based on science and evidence rather than people's intuitions).

[164] *See, e.g.*, Robinson & Darley, *supra* note 153, at 11. For a short discussion of the pros and cons of using research from empirical philosophy to inform legal practice, see D. Benjamin Barros, *Legal Questions for the Psychology of Home*, 83 TUL. L. REV. 645, 646 (2009).

[165] Cass Sunstein argues that moral heuristics already inform many areas of law and policy, but can cause errors when lawmakers mistake moral heuristics as universal rules and misapply them in contexts in which they should not govern decisionmaking. *See* Sunstein, *supra* note 152, at 531, 542

[166] *See, e.g.*, Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 791 (1988) ("English common law was supposed to reflect the common sense of the English people . . . .").

[167] *See, e.g.*, Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 592 (2003); Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1066 (2003).

[168] Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 2-3 (2008).

[169] *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 6, 7 (1995); Morris Hoffman, Evolutionary Jurisprudence: The End of the Naturalistic Fallacy and the Beginning of Natural Reform? (2010) (unpublished manuscript, on file with *Harvard Civil Rights-Civil Liberties Law Review*). Of course, not all people share the same structural moral intuitions for all situations, and so legal doctrine reflecting folk intuitions does not legitimize the law in the same way for all people. However, there is value in legal norms that reflect intuitions shared by large majorities of the citizenry.

and intentionality in moral contexts.[170] These latter moral intuitions are less consciously accessible, but are also less likely to change as public mores change. John Mikhail has recently made an attempt to craft a computational theory of moral cognition, breaking down people's structural moral intuitions into functions and rules that could be used to program a computer to predict moral judgment.[171] If, as Mikhail argues, moral cognition can be broken down into a precise, formal, computational analysis,[172] then the rules used in that analysis cannot be subject to ever-changing political whims or changing societal mores. Mikhail's selective use of cross-culturally-shared,[173] structural moral principles that collectively form a "descriptively adequate moral grammar"[174] thus supports the notion that certain moral intuitions are more immutable and stable than substantive moral policy preferences.

When law diverges from cross-culturally accepted notions of these broader structural concepts, there is an important place for empirical research explicating these folk intuitions to inform legal doctrine. Structural moral intuitions reflect stable cognitive judgments of the polity and contribute to people's understanding of the law to which they consent. When legal standards or tests do not reflect those structural intuitions, however, law loses some of its democratic legitimacy. Particularly in realms where judge-crafted tests fail to protect fundamental rights or minority groups, evidence that a legal test diverges from folk moral intuitions calls the accuracy and legitimacy of the test into question. Folk intuitions may then prompt more robust discussion about the desirability of that test or may provide evidence as to how a test ought to be reformed to better reflect structural moral intuitions. For example, one recent application of research on intuitions to legal reform debates was provided by Paul Robinson and John Darley, who argue that people's moral intuitions of appropriate punishment in the criminal law context should be reflected in the criminal legal codes.[175] Because recent research suggests that most of people's judgments about appropriate criminal punishment are based on ubiquitous, cross-culturally-consistent intuitions rather than reasoned explanations, Robinson and Darley contend that efforts to reform criminal law that do not account for folk intuitions will likely fail.[176] For example, Robinson and Darley believe that movements to abolish criminal punishment, to employ a restorative justice model, or to design criminal punishment with only rehabilitation in mind are so far afield from moral intuitions of justice that they could never be implemented success-

[170] *Cf.* Robinson & Darley, *supra* note 153, at 60–63 (arguing that people's intuitions about punishment are stable and consistent, but that people's intuitions about particular substantive policies, such as the acceptability of smoking cigarettes in banned areas and driving drunk, can be more malleable).

[171] *See generally* Mikhail, *supra* note 159.

[172] *Id.* at 29.

[173] *See id.* at 35–36.

[174] *Id.* at 36.

[175] Robinson & Darley, *supra* note 153, at 11, 66.

[176] *Id.* at 12–18.

fully.[177] On the other hand, moral intuitions of justice can be altered at the margins, through methods like analogizing certain behavior to core moral wrongs or by engaging in public education campaigns.[178] Robinson and Darley also argue that criminal justice systems that reflect intuitions are likely viewed as more legitimate than those that deviate from folk intuitions of just punishment.[179]

B. The Knobe Effect

In the past decade, psychologists and philosophers have made surprising empirical findings about how humans make intuitive judgments about intentionality. This research challenges the traditional conception of intention as requiring the desire for a particular outcome and a belief about how attendant circumstances can achieve that outcome.[180] The traditional understanding of intentional action also holds that a finding of intent is prerequisite to moral blame; that is, before a government body or an individual can be judged as having committed a morally bad action, the government or person must have acted with a sufficient level of intent. Intentionality is viewed as judgment made before the moral judgment, so people's moral intuitions about the consequences of an action should not matter for their ascriptions of intent. Indeed, this understanding of intent as a prerequisite for moral blame has informed moral and legal philosophy for centuries. Writing in the thirteenth century, for example, Thomas Aquinas noted, "Moral acts . . . receive their character from what is intended and not from what is outside of intention . . . ."[181]

Most often in criminal and tort law,[182] as in the Supreme Court's approach to reviewing statutes that are facially neutral but have a disparate impact on racial minorities, intent is a necessary condition for finding moral culpability.[183] Criminal convictions, and to a lesser extent, liability for inten-

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[177] *Id.*

[178] *Id.* at 60–63.

[179] *Id.* at 25 ("Research has found that Americans are likely to obey the law when they view it as a legitimate moral authority. In turn, they are likely to regard the law as a legitimate moral authority when they regard the law as being in accord with their own moral codes.") (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 68 (1990)).

[180] *See, e.g.*, ALVIN I. GOLDMAN, A THEORY OF HUMAN ACTION 130–31 (1989) (commenting on how most conceptions in behavioral sciences of why people act involve discussions of their "wants" and "beliefs"); Michael Bratman, *Two Faces of Intention*, 93 PHIL. REV. 375, 375 (1984); Henry M. Wellman & Joan G. Miller, *Including Deontic Reasoning as Fundamental to Theory of Mind*, 51 HUMAN DEV. 105, 107 (2008) (challenging the "widely accepted framework" of beliefs and desires as organizing mental life and intentional action).

[181] THOMAS AQUINAS, SUMMA THEOLOGIAE, II–II, 64, 7 (Biblioteca de Autores 3d ed. 1963) *translated in* Edward C. Lyons, *In Cognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469, 478 (2005).

[182] With the exceptions of strict liability crimes and the subset of negligence in torts, a defendant must have the requisite intent in order be convicted or held liable.

[183] *See* Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 113–14 (1983) (discussing the moral condem-

tional torts, express a societal judgment that the defendant has committed a morally bad or undesirable action. Indeed, moral condemnation by the community has for centuries remained a reliable consequence of a criminal conviction.[184] Likewise, a legislature that intentionally harms a discrete racial minority is by its "very nature odious to a free people whose institutions are founded upon the doctrine of equality."[185] As Paul Brest noted:

> To declare a law unconstitutional on its merits is to hold that the decisionmaker made an error. But a finding of illicit motivation often is tantamount to an accusation that the decisionmaker violated his constitutional oath of office. Especially where the decisionmaker claims to have pursued only legitimate objectives, a judicial determination of illicit motivation carries an element of insult; it is an attack on the decisionmaker's honesty.[186]

By requiring a finding of intent as a prerequisite to overturning a government act as unconstitutionally burdening racial minorities, the *Davis* Court implied an unwillingness to cast a shadow of moral badness over a government body without first finding clear indicators of a discriminatory purpose.

Recent research, however, has painted a more complex picture of the relationship between intentionality and the moral character of an action. In place of the rigid one-way causal connection from intention to moral judgment, recent conversations in analysis of intentionality have revealed a more circular and interdependent relationship between moral character and intentionality. In particular, a principle known as the "Knobe Effect" fundamentally altered the scientific and philosophical discussion about how humans make judgments about intentionality when presented with the primary effects and side effects of a person's actions.[187]

The Knobe Effect works as follows: imagine the Vice President says to the Chairman of the Board of her company, "We are thinking of starting a new program. It will help us increase profits, but it will also harm the environment." The Chairman replies, "I don't care at all about hurting the environment. I just want to make as much profit as I can. Let's start the new program."[188] When experimental subjects are asked, "Did the Chairman intentionally harm the environment?" Knobe found that 82% of people an-

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nation that accompanies a violation of a criminal or constitutional law and noting that one distinct function of criminal and constitutional law is to "speak to a wider audience" than other forms of law).

[184] *See, e.g.*, H.L.A. Hart, The Morality of Criminal Law 39 (1962); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 468 (1997) ("The criminal law's power in nurturing and communicating societal norms and its power to have people defer to it in unanalyzed cases is directly proportional to criminal law's moral credibility.").

[185] Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[186] Brest, *supra* note 133, at 129–30.

[187] *See generally* Knobe, *The Concept of Intentional Action*, *supra* note 4.

[188] *Id.* at 205.

swer that the Chairman did harm the environment intentionally.[189] Now imagine the Vice President says to the Chairman of the Board of her company, "We are thinking of starting a new program. It will help us increase profits, but it will also help the environment." The Chairman replies, "I don't care at all about helping the environment. I just want to make as much profit as I can. Let's start the new program." When subjects are asked, "Did the Chairman intentionally help the environment?" only 23% answer that the Chairman did help the environment intentionally.[190]

This result is initially perplexing. In both scenarios, the Chairman makes clear that her primary objective is to maximize profits, and that she expressly does not care about helping or harming the environment. The help or harm to the environment is a mere side effect in each scenario. Knobe's explanation for his finding is that people's intuitions about the moral character of an action influence their judgment as to whether the actor behaved intentionally. Knobe reports that this surprising result emerges for a variety of different scenarios with vastly different fact patterns,[191] it emerges when the scenarios are translated into different languages,[192] and it emerges when the test is run on three-to-five-year-olds.[193] It also predicts judgments of individuals with damage to their ventromedial prefrontal cortex, the part of the brain that processes emotional responses, suggesting that it reflects something more cognitively fundamental than a purely emotional reaction to moral outcomes.[194] Thus, Knobe seems to have uncovered a deep-rooted link between people's judgments about the moral character of side effects and their judgments about the degree of intentionality in bringing about those side effects. Such a result is startling and turns our standard causal assumptions of intentionality and morality—that the intentionality of an action affects how people judge the moral character of that action, but not the other way around—on its head.

It is important to define what "side effect" means as it is used in Knobe's experiment. Knobe provides a useful working definition: "[a]n outcome can be considered a 'side effect' when (1) the agent was not specifically trying to bring it about but (2) the agent chose to do something that she

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[189] *Id.* at 206.

[190] *Id.*

[191] *See, e.g.*, Knobe, *Intentional Action and Side Effects*, *supra* note 4, at 192–93 (using scenarios where an army lieutenant intentionally repositions his troops to overtake a strategic hill, with the foreseeable side effect that his action will lead to either the death or the rescue of his troops); Fiery Cushman & Alfred Mele, *Intentional Action: Two and a Half Folk Concepts*, *in* EXPERIMENTAL PHILOSOPHY 171, 185 (Joshua Knobe & Shaun Nichols eds., 2008).

[192] Joshua Knobe & Arudra Burra, *The Folk Concepts of Intention and Intentional Action: A Cross Cultural Study*, 6 J. CULTURE & COGNITION 113 (2006).

[193] Alan M. Leslie, Joshua Knobe & Adam Cohen, *Acting Intentionally and the Side-Effect Effect: Theory of Mind and Moral Judgment*, 17 PSYCHOL. SCI. 421 (2006).

[194] Liane Young et al., *Does Emotion Mediate the Relationship Between an Action's Moral Status and its Intentional Status? Neuropsychological Evidence*, 6 J. COGNITION & CULTURE 291 (2006).

foresaw would involve bringing it about."[195] Importantly, the *foreseeability* of the side effect is a necessary condition for the Knobe Effect.[196] If the Chairman in the above scenarios could not foresee the harm or help to the environment, it is reasonable to presume that very few subjects would believe that she acted intentionally in harming or helping the environment.[197] Thus, when a foreseeable side effect of an action is seen as morally bad (harming the environment), people are very likely to see the actor as having intentionally caused that side effect; likewise, when a foreseeable side effect of an action is seen as morally good or neutral (helping the environment), people are unlikely to see the actor as having intentionally caused that side effect.[198] Put another way, when a morally bad side effect of action is foreseeable, the Knobe Effect predicts that a large majority of people will judge the actor as having intentionally caused that side effect.

C. Scholarly Reactions to the Knobe Effect

The Knobe Effect has generated a great deal of scholarly discussion,[199] and has played a major role in bringing the burgeoning field of empirical philosophy into contemporary philosophical debate and discussion.[200] Philosophers and psychologists have challenged Knobe's scenarios and his interpretation of his experimental results on numerous fronts, but his findings have also been replicated and reaffirmed by many other philosophers using different scenarios.[201] In this section, I briefly review some parallels to the Knobe Effect, affirmations of the Knobe Effect, and some of the most robust challenges to the Knobe Effect, then summarize Knobe's responses to the scholarly critiques.

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[195] Knobe, *The Concept of Intentional Action*, *supra* note 4, at 208.

[196] Additionally, a side effect cannot be specifically intended according to Knobe's definition. That is, a side effect is brought about with some level of intentionality that is less intentional than specific purpose.

[197] *See* Bertram F. Malle & Joshua Knobe, *The Folk Concept of Intentionality*, 33 J. EXPERIMENTAL SOCIAL PSYCHOL. 101, 107–08 (1997). Malle and Knobe found that when people are asked to define what it means to act "intentionally," they mention (1) belief, (2) desire, (3) intention, and (4) awareness, the last of which is similar to knowing or having foresight. *Id.* at 108.

[198] Knobe, *The Concept of Intentional Action*, *supra* note 4, at 209.

[199] *See generally* Cushman & Mele, *supra* note 191; Edouard Machery, *The Folk Concept of Intentional Action: Philosophical and Experimental Issues*, 23 MIND & LANGUAGE 165 (2008); Shaun Nichols & Joseph Ulatowski, *Intuitions and Individual Differences: The Knobe Effect Revisited*, 22 MIND & LANGUAGE 346 (2007); Dean Pettit & Joshua Knobe, *The Pervasive Impact of Moral Judgment*, 24 MIND & LANGUAGE 586 (2009).

[200] Since the publication of Knobe's original findings six years ago in 2003, his paper in ANALYSIS has been cited 162 times (as counted by Google Scholar in January 2010). For a helpful resource on Knobe's core research on intentionality, see http://pantheon.yale.edu/~jk762/publications.html. For much of the scholarly critique and discussion that it has generated, see http://pantheon.yale.edu/~jk762/responses/index.html.

[201] *See, e.g.*, Hugh J. McCann, *Intentional Action and Intending: Recent Empirical Studies*, 18 PHIL. PSYCHOL. 737, 739–41 (2005); Thomas Nadelhoffer, *The Butler Problem Revisited*, 64 ANALYSIS 277, 282–83 (2004).

Knobe's research demonstrates that when the consequences of an agent's action have moral implications, people's intuitions about the agent's intentionality blur distinctions between purposeful intention and intention with foresight. Interestingly, analogous experimental findings have been made in the context of people's intuitive ascriptions of causation given various fact patterns. Mark Alicke has found that when several factors jointly and equally cause an event with a harmful consequence, people systematically ascribe more causality to the most blameworthy, or morally bad, factor.[202] For example, in one of his initial experiments, subjects were told a story about an agent who was delayed in getting to a concert. They were told that there were four separate events that occurred on the way to the concert (such as running over a sharp object, or being bumped from behind), each of which delayed the agent the same amount of time.[203] The order of the four delays was varied, and in each scenario, one of the four delays was manipulated to seem morally blameworthy (such as getting a speeding ticket).[204] Subjects overwhelmingly attributed more causal responsibility for getting to the concert late to the delay that was designed to be morally blameworthy.[205] Alicke ran a series of other experiments with different fact patterns, and found similar results.

These findings suggest that the blameworthiness of a causal factor influences people's ascription of causation to that factor.[206] This "culpable causation" model is analogous to the Knobe Effect in that both findings show that moral badness or blameworthiness can influence people's intuitions about how a result occurred. When people make judgments about which of several factors caused an outcome, they intuitively report different attributions of causation when one of the potential causal factors has a negative moral valence. Likewise, when people make judgments about whether an agent acted intentionally to cause an outcome, we can expect that the moral status of the outcome itself affects people's intuitive ascriptions of intentionality. In both contexts, people are not consciously making different ascriptions of causation and intentionality because they notice the moral badness of the outcomes. Rather, these judgments operate intuitively, unconsciously, and in a large majority of the population.

Following publication of Knobe's first article with the Chairman scenarios, several other philosophers and psychologists tested different fact patterns and scenarios and confirmed that the moral status of an outcome does affect people's ascriptions of intentionality to the causal agent.[207] Hugh Mc-

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[202] Mark D. Alicke, *Culpable Causation*, 63 J. Personality & Soc. Psychol. 368, 372 (1992).

[203] *Id.* at 371–72.

[204] *Id.*

[205] *Id.* at 372.

[206] *Id.*; *see also* Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 Psychol. Bull. 556, 556 (2000).

[207] For example, Thomas Nadelhoffer found similarly significant effects in dice games, where the moral badness of the effect of rolling a six on the dice accounted for large differ-

Cann also reaffirmed Knobe's original findings, but worked with Knobe to address a common challenge to the Knobe Effect.[208] Specifically, some scholars argued that there is a difference between saying the Chairman *intentionally* harmed the environment when she could foresee the damage and saying that the Chairman's *intention* was to harm the environment or that the Chairman *intended* to harm the environment.[209] Knobe and McCann found support for this critique; when asked, "Did the Chairman *intend* to harm the environment?" 42% of subjects said yes,[210] and when asked whether it was the Chairman's *intention* to harm the environment, 29% said yes.[211]

These numbers are much smaller than the 82% who reported that the Chairman *intentionally* harmed the environment when she could foresee that side effect of her action.[212] Knobe and McCann reconcile these latter findings with Knobe's original findings by first pointing out that there was still a large and statistically significant gap between subjects' judgments that the Chairman did intend or act with intention depending on the moral valence of the side effect.[213] Secondly, and importantly for this paper, the words *intent* and *intend* seem to suggest an agent's dominant or sole purpose in acting, whereas the word *intentional* seems to suggest outcomes that are within the scope of the agent's aims.[214] In other words, people seem to ascribe intent in situations like the *Gomillion* fact pattern, where there could be no other possible purpose in acting. But, in contexts where there are plausibly good or neutral primary objectives and morally bad side effects, such as in *Rogers v. Lodge*, where maintaining white political power was within the scope of the council's aims, people readily ascribe intentionality.[215]

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ences in people's ascriptions of intentionality. Nadelhoffer, *supra* note 201, at 282–83. In this experiment, subjects were told that a dice roller hoped to get a six, and then did in fact roll a six. When the consequence of rolling a six was morally neutral (winning the dice game), only 10% of subjects thought the roller intentionally rolled a six, but when the consequence of rolling a six was morally bad (the death of another), 55% of subjects thought the roller intentionally rolled a six. *Id.*; *see also* Cushman & Mele, *supra* note 191, at 183–87 (finding the same effect using sixteen different scenarios with diverse fact patterns).

[208] Hugh J. McCann, *Intentional Action and Intending: Recent Empirical Studies*, 18 Phil. Psychol. 737, 740–41 (2005).

[209] *E.g.*, Fred Adams & Annie Steadman, *Intentional Action in Ordinary Language: Core Concept or Pragmatic Understanding?*, 64 Analysis 173, 181 (2004).

[210] McCann, *supra* note 208, at 741.

[211] Joshua Knobe, *Intention, Intentional Action and Moral Considerations*, 64 Analysis 181, 185 (2004).

[212] Knobe, *Intentional Action and Side Effects*, *supra* note 4, at 192–93.

[213] Hugh J. McCann, *supra* note 208, at 740–41 (2005) (finding that 0% of subjects reported that it was the Chairman's intention to help the environment); Dean Pettit & Joshua Knobe, *The Pervasive Impact of Moral Judgment*, 24 Mind & Language 586, 590–91 (2009).

[214] McCann, *supra* note 208, at 742.

[215] *Id.*

PART III

The Knobe Effect has many potential applications in law,[216] but this Note highlights one application particular to equal protection jurisprudence. Specifically, I argue that the foreseeability of a disproportionate burden on a discrete racial group caused by a government action should play a larger role in the discriminatory intent analysis. The Court has not sufficiently explained the role that foreseeability can play in determining intent, and this has led to several negative consequences. As described in Part I.D, the incoherence in this approach has rendered the Equal Protection Clause a weak tool for vindicating the rights of racial minorities,[217] and has provided incentives for the government to legislate in a way that permits judicial attribution of government intent to some other legitimate goal, even when a racially disparate harm is foreseeable.[218]

The Court should reconsider and reinvigorate its equal protection jurisprudence by elevating the role that foreseeable disparate impacts play in raising an inference of impermissible intentionality. The Court has shown a willingness to account for both the primary objective and the foreseeable side effects of government action when ruling on equal protection challenges.[219] And a growing body of empirical research suggests that when morally bad consequences, like harm to discrete racial minorities, occur, people make judgments about intentional action differently than when consequences are morally good or neutral. Since, as the Knobe Effect suggests, most people will ascribe intentionality to the government for its actions that foreseeably produce harmful effects on discrete racial groups, I argue that courts should more readily reflect those human intuitions.

A. The Moral Dimension

In arguing that Knobe's empirical findings support a larger role of foreseeability in the discriminatory intent analysis, I assume that people ordinarily view an effect that disproportionately harms a particular racial group as a morally bad effect, just as they view harming the environment in Knobe's scenarios as a morally bad effect. While this claim has not been true for the full scope of United States history, the Civil Rights movement produced the strong moral authority this claim holds today. Knobe's scenarios do not expect that *all* subjects will categorically agree that harming the environment is normatively undesirable, but rather that a substantial majority of the subjects

[216] *See, e.g.*, Julia Kobick & Joshua Knobe, *Interpreting Intent: How Research on Folk Judgments of Intentionality Can Inform Statutory Analysis*, 75 Brook. L. Rev. 405, 422–27 (2010) (exploring how, in the environmental context, Knobe's experimental findings could apply to judicial analyses of statutory language with ambiguous intent requirements).

[217] *See supra* notes 101–116 and accompanying text.

[218] *See supra* notes 117–127 and accompanying text.

[219] *See supra* notes 141–148 and accompanying text.

will view environmental harm as a morally bad or blameworthy outcome, other things being equal. Likewise, most people today agree that causing harm to a particular racial group is a morally bad or blameworthy outcome.

In 1976, Paul Brest took note of the "fundamental moral values" that justify the law's disfavor of government action that creates harms for discrete racial groups.[220] To Brest, these values are not given moral force by the language of the Fourteenth Amendment, but rather by people's shared moral norms eschewing governmentally-imposed race-based distinctions.[221] Michael Klarman has argued that the Supreme Court was only able to achieve unanimous consent in *Brown v. Board of Education*[222] and its progeny because of the Court's moral consensus that Southern policies of segregation were impermissible.[223] Since *Brown*, this moral consensus has become embedded in most Americans' moral consciousnesses. Even though scholars often argue that the Supreme Court should not inject morality into its decisionmaking, there is nearly unanimous agreement in the scholarly community and widespread agreement in the American public that the moral intuitions reflected in *Brown* were correct. In fact, people's moral intuitions about the badness of the harmful effects caused by discriminatory government segregation policies are so strong that *Brown* is one of the few cases still revered for its moral pronouncement.

This deep intuition of moral badness that people associate with discriminatory government action suggests that the Knobe Effect takes place in the context where governmental harms are imposed pursuant to race, but not necessarily in the context of other harms challenged on equal protection grounds. Many other facially neutral government classifications, whether rational or not, do not elicit the intuitions of moral badness that racial distinctions elicit.[224] Indeed, the notion of "suspect classifications" distin-

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[220] Brest, *supra* note 42, at 5; *see also* Boyle, *supra* note 151, at 938 ("The discriminatory intent standard is based in part on the idea that racial discrimination is conscious, willful, and morally reprehensible.").

[221] *See* Brest, *supra* note 42, at 5–6. When Paul Brest, John Hart Ely, and other democratic process theorists advocated for the kind of motive analysis embraced by the Court in *Davis* and *Arlington Heights*, one of their primary objectives was to correct defects in the democratic process that hindered participation of racial minorities. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 153, 159-60 (1980); Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115–18. Their argument was rooted in the notion that government action that intentionally discriminates against a racial group frustrates the workings of our democracy and denies due process of law, but it was also rooted in the moral intuition that it is morally bad to prevent racial minorities from participating fully in American democracy. *Id.* at 117.

[222] 347 U.S. 483 (1954).

[223] *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 308–10 (2004).

[224] An exception to this general moral assumption about implicit or explicit classifications based on race may be redistricting based on racial considerations. *See* Pamela Karlan, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202–04 (1996) (arguing that the use of racial considerations in redistricting decisions should not be evaluated under the Equal Protection Clause jurisprudence regime). This may be partially because of the context-dependent question of whether the use of race, either publicly acknowledged or not, to create voting districts will in effect burden or benefit racial minorities. There may be less of a moral blameworthi-

guishes between facially neutral and explicit classifications based on race and other classifications precisely because American society has determined it is so morally reprehensible to discriminate based on race.[225]

B. A False Dichotomy Between an Intent Test and an Effects Test in the Moral Context?

Given the moral context of disparate impact claims, the Knobe Effect has implications for the intent inquiry. In the discriminatory intent analysis, the moral harmfulness or wrongness of the effects of government action on a racial group does not matter, under either the *Arlington Heights* or *Feeney* approaches. While the Court has used disparate impact as an objective factor that may be probative of discriminatory intent,[226] the Court has not treated the morality of the impact as objectively probative of an intent to discriminate.

Yet the Knobe Effect suggests that the moral context of an outcome, like harm to a racial group, is important to people's ascriptions of intentionality to the government. While the Court treats an intent inquiry as entirely separate from moral judgments or intuitions, ordinary people do not conceptually sever intuitions about intentionality from intuitions about morality. Rather, the moral valence of an outcome is incorporated into people's understanding of an actor's intentionality with regard to that outcome.[227]

In *Feeney*, the Court demanded proof of subjective intent to discriminate, and some evidentiary showing that the government acted because of that intention. It conducted an analysis of the "mental state" of the legislature, concluding that despite the foreseeability of the harmful outcome to women, the Massachusetts legislature could not have subjectively intended that outcome. Yet for multi-member bodies like legislatures, there is a strong argument that it is not logically coherent to ascribe a particular sub-

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ness imputed to legislatures in their race-based redistricting decisions because of uncertainty that the foreseeable effect on racial groups of considering race in redistricting is truly a harm, or a morally bad effect. In the redistricting context then, the Knobe Effect would predict that we impute less intentionality to the legislature.

[225] *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); Adarand Constructors v. Peña, 515 U.S. 200, 214 (1995) ("[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.") (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); Shaw v. Reno, 509 U.S. 630, 657 (1993) (racial classifications "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin").

[226] *See* Batson v. Kentucky, 476 U.S. 79, 93–94 (1986) (noting that discriminatory impact can give rise to an inference of discrimination); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (noting that a discriminatory impact can be an "important starting point" in the intent inquiry); Castaneda v. Partida, 430 U.S. 482, 498–99 (1977) (noting that large statistical disparities can, in some cases, raise an inference of discrimination).

[227] *See* Kobick & Knobe, *supra* note 216, at 422–27.

jective intent. Each member of the body may have a different subjective purpose or constellation of intentions when voting for a particular statute. Many scholars have noted this quality of intentionality for group decisionmakers,[228] and Jerry Mashaw puts it succinctly:

> Looking for legislative intent is a search for a mythical beast. The Congress as a body has no intent. And the relationship between the individual intentions or preferences of the legislators who voted for a bill and the outcome of the legislative process cannot be discovered. As Kenneth Shepsle, and others before him, have put it, "Congress is a 'they,' not an 'it.'"[229]

If it does not make sense to think of a government body like Congress having a "mental state," then courts and observers must ascribe objective intentionality to the government. And when ordinary people ascribe intent to the government, the moral status of the effects matters to them.

It might therefore be a false dichotomy to maintain that there is *either* a discriminatory intent test, *or* a disparate impact test.[230] Taking into account what the Knobe Effect reveals about people's intuitions, it appears that the moral status of a disparate impact on a racial group is a significant factor in people's ascriptions of intentionality. People don't cognitively separate intent from effects when an outcome is morally bad and foreseeable. Given the morally bad status of harming particular racial groups when that harm is foreseeable, courts should give more evidentiary weight to proof that the harm was foreseeable.

C. The Role of Foreseeability: Descriptive and Normative Dimensions

When government action produces a disparate impact on a racial group, that effect is not always foreseeable. Legislatures have wide discretion to legislate in whatever way they believe will serve a legitimate purpose, and they can expect a range of probable outcomes from their action. We do not expect government actors to anticipate all of the potential outcomes of their

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[228] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1389 (2000) ("legislatures, courts, agencies, and other legal institutions do not possess mental states, independent of the mental states of the persons that make up these institutions"); Raveson, *supra* note 130, at 885.

[229] JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 96 (1997) (citing Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992)).

[230] *Accord* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987) ("Scholarly and judicial efforts to explain the constitutional significance of disproportionate impact and government motive in cases alleging racial discrimination treat these two categories as mutually exclusive . . . I argue that this is a false dichotomy.").

action. As a descriptive matter, then, an ex post foreseeability analysis does not expect government actors to anticipate low-probability outcomes of their actions that would not have played a role in the decisionmaking process.[231] As Shyamkrishna Balganesh notes, "holding a defendant liable only for harms that objectively could have been anticipated derive[s] from a common belief that the attribution of outcomes to individuals should conform to the way in which individuals ordinarily perceive the world."[232] Many of the equal protection precedents, including *Davis* itself, would arguably come down the same way if foreseeability of harm were more prominent in the intent analysis, because it is unlikely that the government would have foreseen the disparate impact in those cases.

The Court signals its lack of resolve to treat all racial groups fairly when it does not incorporate foreseeability into its analysis. By holding in *Feeney* and *Penick* that proving foreseeability of harm to a suspect class will not perfect an equal protection claim, the Court condones the government pursuing a policy that foreseeably burdens racial groups in order to achieve another permissible objective. Absent the smoking gun proof of intent required by *Feeney*'s subjective test or the presence of any of the five *Arlington Heights* objective factors, a racial group suffering a foreseeable and avoidable harm is left without recourse.

For example, in *Collins v. Ainsworth*, the 2004 case discussed in Part I.D.2, the plaintiffs could have argued that the sheriff foresaw a disparate impact because he consulted with the state attorney general over the legality of his checkpoint outside the rap concert.[233] Even assuming that the sheriff's primary objective was to curb unlicensed driving, his decision to target a large public event attended by a predominantly black audience clearly and foreseeably burdened African Americans more than whites. It was highly unlikely that the race of attendees of the large public event would have been a reliable proxy for targeting likely unlicensed drivers,[234] and the extremely small number of concertgoers actually arrested for driver's license infractions bore out that hunch. Even though the arrest of large numbers of African Americans who *were* licensed drivers may not have been the primary objective of the sheriff's action, it was a foreseeable side effect, and the Knobe Effect would predict that most people would deem the sheriff's actions intentionally discriminatory. Yet the plaintiffs were unlikely to prevail in equal protection claims under *Feeney* because there was no evidence of

[231] Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1600 (2009).

[232] *Id.* at 1600–01 (citing Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 91 (Gerald J. Postema ed., 2001)).

[233] Collins v. Ainsworth, 382 F.3d 529, 534 (5th Cir. 2004).

[234] *See* Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 945 (2008) (arguing that this case is one of implicit or unconscious bias, which can lead to "the creation of facially neutral policies that are as burdensome on innocents as those motivated by animus—but without triggering an equal protection claim").

subjective, conscious intent to discriminate, or under *Arlington Heights* because its sanctioned objective factors were not present. In other words, today's equal protection jurisprudence normatively forgives these outcomes, even though many of us intuitively believe that the sheriff acted intentionally.

Collins v. Ainsworth is a unique case in that the plaintiffs presumably could have straightforwardly shown the foreseeability of the harm. That the sheriff consulted with the state attorney general about the legality of his action suggests knowledge that his action might have caused disproportionate harm to the African American attendees of the rap concert.[235] But it is unlikely that such straightforward evidence of foreseeability will be available in most cases. In most cases, courts would conduct the standard ex post foreseeability analysis, which objectively examines the perceptions and knowledge that the actor could have had at the time, and determines whether a reasonable person would have foreseen the harm.

Sanctioning a larger role for the foreseeability of disparate impacts as evidence probative of intent to discriminate would express a stronger commitment to the Equal Protection Clause and to stamping out government action that foreseeably harms racial minorities, even if it isn't the specific intent of the government to bring about such harm. Increased incorporation of a foreseeability inquiry may also mitigate the incentive to disguise statutes and other action intended to make racial classifications in neutral language or may incentivize government actors to think more carefully about the means for achieving their primary objective; if they can foresee a harmful side effect, they may choose a different means. Pamela Karlan points out that most discriminatory conduct is not "purposeful" in the sense that the legislature consciously *wants* to burden minorities.[236] For that reason, legislative decisions that cause discriminatory effects can be defended as furthering some broader "umbrella goal" like the promotion of general welfare.[237] Elevating the foreseeability inquiry would encourage more careful and precise legislating and official decisionmaking, because it would limit the ability of government institutions to justify their actions that burden minorities with some other permissible objective. It would provide incentives for government actors to disclose ex ante the body of information on which they rely when making decisions, because that information provides evidence of what outcomes were foreseeable at the time of a decision or action.[238] Finally, a more robust foreseeability inquiry could provide lower courts with an extra tool for addressing the very real burdens that courts presently treat as constitutionally permissible.

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[235] *See Collins*, 382 F.3d at 534.

[236] Karlan, *supra* note 183, at 124 (citing John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1246–67 (1970)).

[237] *Id.*

[238] *See* Balganesh, *supra* note 231, at 1601.

D. Implications for the Discriminatory Intent Test: The Role of a Foreseeability Inquiry

I have thus far argued that because the Knobe Effect predicts that most people will judge government action as intentional when it foreseeably harms a discrete racial group, the Supreme Court should encourage a stronger foreseeability inquiry in discriminatory intent analyses. Lower courts remain confused about the permissible weight of foreseeability evidence, and so I have also called on the Court to clarify the role that foreseeability can play in the intent inquiry. In this section, I consider several doctrinal approaches to incorporating a more robust foreseeability inquiry into the "totality of the circumstances" test from *Davis*, and conclude that the Court should adopt either balancing or burden-shifting to incorporate foreseeability.

1. Two Polar Positions on the Role of Foreseeability

Given a finding that a disparate impact on a discrete racial group is foreseeable, there are several paths that the Court could pursue. The Court could determine that foreseeability of harm proves intentional action, an approach which requires the Court to invalidate any government action that has a legitimate primary objective and a foreseeably disparate side effect. That is, irrespective of how beneficial or socially desirable the primary objective of the statute or government action, it could not survive if any side effect imposes a foreseeably disproportionate burden on a discrete racial minority. On this view, the degree of intentionality of the primary objective would equal the degree of intentionality suggested by the foreseeability of the discriminatory side effects. This is similar to the approach advocated by Brest,[239] and would represent one extreme on the spectrum of approaches to incorporating foreseeability into the test. It also assumes more than Knobe's experimental findings, which only demonstrate that *most* people ascribe intentionality to an actor who can foresee morally bad side effects, as this view assumes that an actor who can foresee morally bad side effects of her action *really is* acting intentionally.

[239] *See* Brest, *supra* note 133, at 130–31. Professor Brest acknowledged that his approach was rather extreme, and so suggested that the Court impose a clear and convincing standard of proof for a showing that an illicit or suspect objective "played an affirmative role in the decisionmaking process." Yet Professor Brest still argued that the objective did not need to be "the sole, or dominant, or a 'but-for' cause of the decision—only that its consideration may have affected the outcome of the process." While this approach would ensure that government action that was only more likely than not foreseeably harmful would survive, it would also invalidate any government action that was certainly foreseeably discriminatory but only had a small disproportionate effect on the racial group.

Several commentators have similarly argued that tort notions of intent should be applied to constitutional intent inquiries.[240] Some suggest that the Court should endorse a test that presumes that actors intend the natural and foreseeable consequences of their actions.[241] Such a presumption would also equate foreseeability of a disparate impact with a discriminatory purpose. The Court in effect foreclosed such an approach in *Feeney* when it held that foreseeability of a disproportionate burden on a racial group cannot be sufficient evidence to prove intent.[242] Since the Court has explicitly rejected the notion that foreseeability alone is dispositive,[243] these proposals are unlikely to garner support from the Court. Indeed, one can imagine a facially neutral statutory scheme that would impose a small, foreseeable burden on a discrete racial group, but the overall effect of that statute would be beneficial to the majority of other racial groups (and may in fact both burden and help the racial group claiming the disproportionate impact).

The other extreme would be to accord no constitutional significance to the foreseeability of racially discriminatory side effects, and to uphold any government action with a legitimate primary objective. The Court has sent unclear signals on whether this approach is constitutionally permissible,[244] but the Knobe Effect suggests that it would not reflect an accurate understanding of most human judgments of intentionality in the moral context.

2. *Two Middle Positions for the Role of Foreseeability*

In between the two extreme treatments of foreseeability lies a large conceptual space that would permit balancing or weighing the benefits of the primary objective against the disparate impact of the side effect. This conceptual space could also encompass a burden-shifting regime, whereby the foreseeability of discriminatory side effects could be used to make out a prima facie case of unconstitutionality.[245] Adopting either a balancing or

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[240] *See generally* Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 Rutgers L. Rev. 259 (2008).

[241] *See* Perry, *supra* note 52, at 1038–39; Driessen, *supra* note 55, at 42. Before implicitly overruling itself in *Davis* and *Arlington Heights*, the Supreme Court once embraced tort notions of intent in civil rights cases. Monroe v. Pape, 365 U.S. 167, 187 (1961) (commenting that the intent sufficient for "[s]ection 1979 [claims] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

[242] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979).

[243] *Feeney*, 442 U.S. at 240 n.24; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979). *But see* Ammons v. Dade City, 783 F.2d 982, 988 (11th Cir. 1986) (suggesting that foreseeability of government action causing the deprivation of services to a particular racial group is sufficient to find a discriminatory government purpose).

[244] *Compare Feeney*, 442 U.S. at 279 n.25 (noting that the foreseeability of consequences that will inevitably discriminate supports "a strong inference that the adverse effects were desired"), *with* Eisenberg & Johnson, *supra* note 20, at 1189 (arguing that the Supreme Court would not approve of the use of foreseeability in the intent inquiry).

[245] *Cf.* Castaneda v. Partida, 430 U.S. 482, 495 (1977) (holding that in the context of jury selection procedures challenged as racially discriminatory, a defendant in a criminal trial can make a prima facie showing of discriminatory intent with discriminatory impact evidence, whereupon the burden shifts to the government to rebut that showing).

burden-shifting test would, consistent with the Court's present approach, necessarily confer some special status on the primary objective of the government action, since the degree of intentionality implied by the foreseeably harmful side effects would not equate with the degree of intentionality implied by the primary objective. However, under either of these approaches, the Court would more explicitly account for foreseeably harmful outcomes, which lead most people to infer government intentionality.

The first of these two approaches—a balancing test—is suggested by *Arlington Heights*' objective factor approach. The Court could explicitly add foreseeability of a disparate impact to the sanctioned *Arlington Heights* factors, and could conceivably accord stronger evidentiary weight to the foreseeability inquiry. This strategy has been employed by the Eleventh Circuit, which curiously has neither viewed the *Arlington Heights* list as exhaustive and binding, nor viewed *Feeney* as categorically requiring a subjective-intent inquiry. Rather, the Circuit applies its own modified version of the *Arlington Heights* factors. In a line of cases in which plaintiffs successfully alleged that city officials had provided public services in a manner that was intentionally discriminatory against racial minorities,[246] the Eleventh Circuit applied four factors to evaluate the presence of a discriminatory purpose: (1) the nature and magnitude of the disparate impact, (2) foreseeability of the disparate impact resulting from the official action, (3) the legislative and administrative history of the decisionmaking process, and (4) knowledge that the action would cause the disparate impact.[247]

Breaking with other circuits, the Eleventh Circuit uses foreseeability and awareness that the government's actions would harm racial minorities as its analytical touchstone for its intent inquiry. In *Dowdell v. City of Apopka*, for example, the court noted that while none of the four factors were "necessarily independently conclusive, 'the totality of the relevant facts' amply support[ed] the finding" that the City had acted with the full knowledge and awareness that its quality of service provision varied immensely depending on the racial makeup of the neighborhood.[248] Notably, the court placed a heavy emphasis on the "obviously foreseeable outcome" of a "continued and systematic relative deprivation of the black community."[249] The court

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[246] *See supra* notes 11–12 and accompanying text.

[247] *See Ammons*, 783 F.2d at 988; Dowdell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983).

[248] 698 F.2d at 1186 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)); *see also Ammons*, 783 F.2d at 988.

[249] *Dowdell*, 698 F.2d at 1186 ("While voluntary acts and 'awareness of consequences' alone do not necessitate a finding of discriminatory intent . . . 'actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose,'" (citations omitted)); *see also Ammons*, 783 F.2d at 988 ("[W]hen it is foreseeable . . . that the allocation of greater resources to the white residential community . . . will lead to the 'foreseeable outcome of a deprived black residential community' then a discriminatory purpose . . . is properly shown" (footnote omitted) (citations omitted)).

did not defy *Feeney* by finding that foreseeability was dispositive, but did accord substantial weight to evidence of foreseeability.

A second option for a stronger foreseeability inquiry—a burden-shifting regime—was encouraged by Justice Marshall in his *Feeney* dissent.[250] Justice Marshall agreed with the majority opinion that the Massachusetts statute would clearly have a disproportionate impact on women, particularly since women's participation in military service had been historically limited by government policy.[251] Given such a foreseeable impact on a quasi-suspect class, Marshall argued, "the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."[252] In other words, Justice Marshall's proposed test would seemingly permit plaintiffs to make a prima facie case of discriminatory intent when they can show the foreseeability of a disparate impact, and then shift the burden of proof to the government to disprove the inference of intent. If the government meets its burden of proof, the plaintiffs could then presumably rely on some of the other objective indicators recognized in *Arlington Heights* or on evidence of subjective intent to meet their burden of persuasion.

Jill E. Evans has argued for a similar burden-shifting approach in the constitutional intent inquiry.[253] Under her proposal, when a plaintiff can make a prima facie case that disparate impact is "substantially certain" to have resulted from a legislative scheme and did in fact occur, then the burden of proof would shift to the government to prove that its action or statute is actually justified by neutral selection criteria.[254] The use of the "substantially certain" language is a synonym for a foreseeability inquiry.

In fact, the Court has already adopted a burden-shifting scheme for equal protection claims of race discrimination in the context of grand jury selection. In *Castaneda v. Partida*, the Court held that a plaintiff can make a prima facie showing of intentional discrimination with statistical evidence of disparate racial impact in grand juror selection.[255] The burden of proof then shifts to the government to "dispel the inference of intentional discrimination."[256] If the government cannot do so, the plaintiff has shown an equal protection violation.[257] The Court could broaden its application of this burden-shifting regime that finds a prima facie showing of intentional discrimination based on foreseeability evidence. Such an approach would reflect the Knobe Effect's prediction that most people would judge the government ac-

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[250] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 284 (1979) (Marshall, J., dissenting).
[251] *Id.* at 284–85.
[252] *Id.* at 285.
[253] Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219 (1998).
[254] *Id.*
[255] 430 U.S. 482, 494–95 (1970).
[256] *Id.* at 497–98.
[257] *Id.* at 501.

tion to be intentional, but would permit the government to show that it in fact did not intend to discriminate against a racial group.

Either of these approaches—explicitly incorporating foreseeability in a balancing test, or permitting evidence of foreseeable harm to make out a prima facie case of intentional discrimination—would elevate the evidentiary role of foreseeability in disparate impact claims. Both approaches would also better reflect human intuitions about intentional action. Importantly, both give courts flexibility to make judgments about whether the foreseeability of the harm outweighs other primary objectives that the government may have had. Both approaches also preserve appropriate deference to legislative judgments about statutory objectives, while better protecting Americans against objectives that are infected with discriminatory intent.

Current jurisprudence has been cabined by the requirement that a plaintiff prove discriminatory intent and by the determination that foreseeable disparate impact is not sufficient to prove intent. But either unambiguously incorporating foreseeability into a balancing test, as the Eleventh Circuit has done, or incorporating foreseeability into a burden-shifting approach, as was suggested by Justice Marshall in *Feeney*, could fit comfortably within the legal parameters outlined by the Court. Such approaches hold the promise of reviving equal protection jurisprudence in an era in which the Equal Protection Clause has been doctrinally drained of much of its strength as the constitutional guarantor of equality.

Conclusion

Equal protection jurisprudence remains in a period of stagnation. Although reformers were hopeful that the *Washington v. Davis* discriminatory intent test would take great strides towards purging the law of discrimination, the burden of proving intentionality has rendered the Equal Protection Clause an ineffective protector of citizens' rights. Lower courts disagree about how to apply the inconsistent *Arlington Heights* and *Feeney* conceptions of intentionality to plaintiffs' claims of equal protection violations, resulting in incoherent doctrine throughout the federal courts.

This Note aims to bring a new factor into the conversation—research on folk intuitions of what it means to act "intentionally." While the Court has vacillated between objective and subjective notions of government intent, it has consistently assumed that intentionality is ascribed independent of the moral context of the government's action. But a robust body of research in empirical philosophy, initiated by Joshua Knobe, reveals that people's ascriptions of intentionality cannot be divorced from their moral contexts. As Knobe's research demonstrates, people are unlikely to judge foreseeable side effects that are morally good or neutral as intentional, but are very likely to judge foreseeable side effects that are morally bad as intentional.

In the context where government action foreseeably harms discrete racial groups, a context that is deeply imbued with moral sentiments, the Knobe Effect predicts that most people would judge government action as intentional. Yet current equal protection jurisprudence does not specify a clear role for either foreseeability of harm or the moral valence of the outcomes in the discriminatory intent analysis. This Note has argued that the Court should elevate the foreseeability of a disproportionate impact in the intent inquiry, a doctrinal move which would better reflect how people actually attribute intentionality. Two non-exhaustive options for stronger incorporation of foreseeability include explicitly incorporating foreseeability into the *Arlington Heights* objective factors or permitting foreseeability of harm to raise a prima facie case of discriminatory intent, thus shifting the burden of proof to the government. Both options lie within the confines of the Court's equal protection precedents, and both give courts more tools to reinvigorate constitutional protection against infringement on the rights of racial minorities.