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Although criminal justice scholars continue to debate the ovcrall value of the void-for-vagueness doctrine, broad consensus prevails that requiring crimes to be defined in specific terms reduces law enforcement discretion. A few scholars have questioned this assumption, but the conventional view remains dominant. This Article intends to resolve the question whether the void-for-vagueness doctrine really reduces police discretion. It focuses on traffic enforcement, a context in which laws are both specific and subject to discretionary enforcement. The Article concludes that specific rules do not constrain discretion unless judicial limits are placed either on the scope of activities that may be criminalized or on police authority to under-enforce the laws. The Article also argues that the Supreme Court's response to specific-rule discretion is inadequate. The Court reassures us that the Equal Protection Clause protects against discriminatory traffic enforcement. However, the Court fails to appreciate that antidiscrimination review is inherently ineffective when applied to broadly discretionary decisions. Legislatures have thus circumvented existing doctrinal constraints on delegating discretion, but the Court has failed to develop an adequate doctrinal response. Finally, the Article considers some remedial and constitutional implications of its analysis. Ultimately, the Article argues, judicial checks on specific-rule enforcement are required to maintain a balance between individual liberty and crime control in a constitutional regime committed to the rule of law.

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Ruling Out the Rule of Law

*Kim Forde-Mazrui**

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PROLOGUE

In *Kolender v. Lawson*, the Supreme Court invalidated, as excessively vague, a vagrancy ordinance requiring suspicious persons to provide "credible and reliable" identification to a requesting police officer.[1] Edward Lawson had been stopped fifteen times in less than two years pursuant to the ordinance, prosecuted twice, and convicted once.[2] He had no other criminal record.[3] Not mentioned in the Court's opinion is that Edward Lawson is "a black man of unconventional appearance."[4] According to news reports at the time, Lawson is tall and slender, with tightly coiled, shoulder-length hair.[5] Known as the "I-5 Stroller,"[6] Lawson liked to go on long evening strolls through upscale, predominantly white neighborhoods in San Diego.[7] Lawson is a civil rights activist and an occasional actor.[8] He perceives his encounters with police officers ("police") as "part of being black in this country."[9]

In striking down the ordinance, the Supreme Court expressed concern that the broad discretion the law vested in police by its vague language created an intolerable risk that police would enforce it in an arbitrary or discriminatory manner.[10] Because the ordinance "failed to describe with sufficient particularity" how to satisfy a police request for identification,[11] the Court explained, "an individual . . . is entitled to continue to walk the public streets 'only at the whim of any police officer' who happens to stop that individual . . . ."[12] Acknowledging legitimate needs of law enforcement to investigate suspicious persons, the Court reassured that "this is not a case where further precision in the statutory language is either impossible or impractical."[13] Presumably, lawmakers in California and several other states with similar vagrancy laws could redefine identification in more specific

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1. 461 U.S. 352, 353-54 (1983).
2. *Id.* at 354.
3. *Id.* at 354 n.2.
4. Aaron Epstein, *Court Rejects Loitering Law; Cops Can't Require Man's ID*, MIAMI HERALD, May 3, 1983, at 11A.
5. *Id.*
6. *Id.*
7. Tim Weiner, *Court Victory for the Individual but Law Guarding Citizen Rights Is Still Vague*, PHILA. INQUIRER, May 8, 1983, at C01.
8. Patricia Ward Biederman, *Charges Against Activist Dropped*, L.A. TIMES, May 9, 1993, at J4.
9. Epstein, *supra* note 4.
10. Kolender v. Lawson, 461 U.S. 352, 360-61 (1983).
11. *Id.* at 361.
12. *Id.* at 358 (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).
13. *Id.* at 361.

terms, such as a "driver's license" or other statutorily enumerated evidence of identity.[14]

Ten years later, Edward Lawson found himself in the news again, after being stopped and arrested by police.[15] As before, he was stopped while traveling through an upper-class neighborhood and, as before, he was arrested for failing to provide identification to police.[16] This time, however, he was stopped while driving, and he was arrested for the specific offense of failing to provide a driver's license.[17] On March 29, 1993, Beverly Hills police received a phone call from a woman who reported a black man driving at a slow speed past an elementary school.[18] Police stopped and questioned Lawson. After Lawson failed to produce his license, police arrested him and transported him to jail, where he spent two nights until arraignment.[19] According to news reports, Lawson said that "after being patted down by police officers, he raised his hands above his head, asked for a lawyer and declined to answer questions about his identity."[20] Lawson insisted that he was "never asked to show identification, only if he had it."[21] "He eventually told officers his driver's license was in his car, where one of the policemen retrieved it."[22] As to why Lawson had been driving slowly near a school, he explained that he was required to by law.[23] "It's another Catch-22," Lawson complained, "[a] black man drives fast past a school . . . it's against the law. A black man drives slow past a school . . . that's against the law. I don't know what they expect us to do."[24]

INTRODUCTION

Imagine a world in which the police have absolute discretion to stop you for any reason or no reason, to interrogate you, search you, arrest you if suspicious activity is discovered while interrogating or searching you, and, if no such activity is discovered, to decide whether

14. *See* State v. Boudette, 791 P. 2d 1063, 1065-66 (Ariz. Ct. App. 1990) (upholding part of a statute requiring licensed drivers to display a driver's license upon request by an officer).

15. Biederman, *supra* note 8.

16. *Id.*

17. *Id.*.

18. *Id.*

19. Michael White, *Challenger of Old ID Law Jailed*, DAILY NEWS (L.A.), Apr. 1, 1993, at N3.

20. *Man Whose Suit Ended ID Law Is Arrested Again*, LONG BEACH PRESS-TELEGRAM (Cal.), Apr. 1, 1993, at A15.

21. Biederman, *supra* note 8.

22. *Man Whose Suit Ended ID Law Is Arrested Again*, *supra* note 20.

23. Biederman, *supra* note 8.

24. *Man Whose Suit Ended ID Law Is Arrested Again*, *supra* note 20.

to let you go on your way or arrest you for simply being out in public. Imagine a world, that is, with a peremptory search and seizure. Presumably, most Americans would recoil at such a police state, and jurists would cite the inconsistency of unfettered police discretion with the rule of law. As understood in American jurisprudence, the rule of law requires that government officials exercise coercive power over people only when authorized by laws previously enacted by politically legitimate institutions. As Professor Jerry Mashaw explains:

> A consistent strain of our constitutional politics asserts that legitimacy flows from "the rule of law." By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority. By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.[25]

As Mashaw's statement reflects, central to the rule of law is the principle that specificity in legal rules serves to constrain the discretion exercised by those charged with their enforcement. This principle has been constitutionalized by the courts, through the void-for-vagueness doctrine, as a safeguard against legislative delegation of excessive discretion to courts and to executive officials and agencies, especially the police.[26]

The void-for-vagueness doctrine has received substantial attention in the legal literature.[27] Much of the debate has concerned

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25. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 138-39 (1997).

26. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215-16 (1985) (noting that courts' invalidation of overbroad delegations of authority can constrain police and prosecutorial abuse, particularly in the realm of "street-cleaning" statutes).

27. For sources favoring the void-for-vagueness doctrine, along with other restraints on police discretion, see Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Offices, and the Like*, 3 CRIM. L. BULL. 205, 221 (1967) [hereinafter Amsterdam, *Crimes of Status*], which asserts that "a vague statute fundamentally affronts the rule of law embodied in the Due Process Clause by permitting and encouraging more or less arbitrary and erratic arrests and convictions"; David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1062-63 (1999), which argues that scholars overestimate the courts' cabining of police discretion, and advocates more strict control; Jeffries, *supra* note 26, at 197, which notes that vagueness doctrine, while often contextual, does "bar wholesale legislative abdication of lawmaking authority"; Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 404 (2001), which advocates use of the Supreme Court's void-for-vagueness reasoning in 4th Amendment search and seizure cases; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 835-36 (1999), which argues that vague loitering laws "reinforce[] stereotypes that portray Blacks as lawless and legitimate police harassment in Black communities," thereby undermining "constitutional safeguards against race-based police abuse." For sources skeptical of the void-for-vagueness doctrine, see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1243-46 (1996), which defends discretionary use of vagrancy and disorderly conduct laws by police to maintain public

the extent to which constraining police discretion through legislative specificity is desirable, and whether courts are better than political institutions at determining how much police discretion should be allowed. Defenders of the void-for-vagueness doctrine contend that limiting police discretion by defining criminal laws in specific terms minimizes the risk of arbitrary and discriminatory law enforcement, especially against the poor, racial minorities, and other politically marginalized groups.[28] In contrast, skeptics of the void-for-vagueness doctrine contend that it has been used to limit police discretion too much, to the detriment of communities threatened by crime and that political institutions offer a more promising means for guiding police discretion than do the courts.[29]

Largely unquestioned by courts and scholars in this debate is whether specific rules do, in fact, reduce discretion; that is, whether the void-for-vagueness doctrine really limits the amount of discretion that legislatures can delegate to executive officials. Defenders of the doctrine tend to accept the conventional view that specific rules constrain discretion, emphasizing instead why constraining discretion is desirable.[30] Skeptics, who would weaken or eliminate the void-for-vagueness doctrine, also assume that specific rules limit discretion,

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order; Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289, 1289 (1999), which argues that vagueness doctrine is an unworkable response to abuse of authority and a threat to community policing; Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998), which favors greater discretion for police; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 593-94 (1997) [hereinafter Livingston, *Police Discretion*], which questions whether vague laws necessarily accord excessive discretion to police; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 559-61 (2001) [hereinafter Stuntz, *Pathological Politics*], which argues that vagueness review does not cabin police discretion, as it fails to combat specific, albeit broad statutes. The classic treatment of the void-for-vagueness doctrine is Anthony G. Amsterdam, Note, *The Void for Vagueness Doctrine in the Supremc Court*, 109 U. PA. L. REV. 67 (1960) [hereinafter Amsterdam, *Vagueness Doctrine*].

28. *See, e.g.*, Amsterdam, *Crimes of Status*, *supra* note 27, at 220-24 (1967) (discussing how vague laws invite arbitrary and discriminatory enforcement); Cole, *supra* note 27, at 1084 (stating that "vague laws invite selectivity and make discriminatory enforcement far more difficult to monitor"); Jeffries, *supra* note 26 (arguing that delegation of discretion invites abuse, including discriminatory enforcement).

29. *See, e.g.*, Kahan & Meares, *supra* note 27, at 1171-76 (arguing that because minorities' political power over their own communities has increased, traditional vagueness doctrine harms community initiatives, and advocating application of "political process" theory as an alternative); Livingston, *Police Discretion*, *supra* note 27, at 608-18 (criticizing the rules-standards divide in vagueness review and recognizing that even specific laws can be subject to discriminatory selective enforcement).

30. *See, e.g.*, Amsterdam, *Crimes of Status*, *supra* note 27, at 222-24 (denouncing the "dictatorial power over the streets" that vague laws give to police); Cole, *supra* note 27, at 1084 (arguing that "vague laws are more susceptible to selective enforcement and more impervious to community oversight than specific laws"); Jeffries, *supra* note 26, at 215 (stating that "wholesale delegation of discretion naturally invites its abuse").

but believe that courts are ill-equipped to determine how much discretion is too much.[31] Thus, while there is intense disagreement in the judiciary and the academy over the value of reducing discretion and of the courts' role in doing so, broad consensus prevails that specific rules do reduce discretion.

This consensus is showing cracks, as some scholars have begun to question the efficacy of legislative specificity in constraining discretion.[32] Professor Debra Livingston has provided the most substantial articulation of this perspective to date.[33] In defending political approaches to constraining police discretion, Livingston contends that specific laws can confer just as much discretion as vague laws.[34] Indeed, she argues that judicial invalidation of laws on vagueness grounds is not only ineffective at constraining police discretion, but it is also counterproductive because it encourages legislatures to enact overly broad, yet specific laws, such as curfews, that give police even greater discretion in enforcing public order on the streets.[35] Professor William Stuntz has made similar points in the context of prosecutorial discretion, arguing that the void-for-vagueness doctrine merely prompts legislatures to pass overlapping, specific crimes that give prosecutors broader discretion to charge multiple offenses against a defendant in order to leverage a guilty plea.[36] In contrast, while acknowledging that specific laws can confer broad discretion, Professor David Cole insists that vague laws confer

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31. *See* Kahan & Meares, *supra* note 27, at 1169-70 (arguing that courts should leave it to communities to determine how much discretion to give to police).

32. *See id.* at 1170 (claiming that when courts invalidate "vague" laws, ironically they often invite greater degrees of police discretion); Livingston, *Police Discretion*, *supra* note 277, at 667 (claiming that vagueness doctrine, interpreted too broadly, can impair the ability of communities to deal with serious problems); Stuntz, *Pathological Politics*, *supra* note 27 (noting that attacking vagueness does nothing about the breadth of statutes).

33. *See generally* Debra Livingston, *Gang Loitering, the Court, and Some Realism about Police Patrol*, 1999 SUP. CT. REV. 141 (1999) [hereinafter Livingston, *Gang Loitering*] (advocating a focus on police accountability rather than statutory vagueness); Livingston, *Police Discretion*, *supra* note 27 (maintaining that vagueness review is a poor method of containing police discretion, and it impairs community initiatives).

34. Livingston, *Police Discretion*, *supra* note 27, at 618 ("[B]road and overinclusive rules enhance police discretion, and . . . a plethora of narrow rules may not meaningfully constrain it . . . ."); *id.* at 593 ("Limiting the discretion that police exercise on the street simply by demanding specificity in the laws that they enforce is so hopeless, . . . [because] '[e]limination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system.' " (quoting Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985))).

35. Livingston, *Police Discretion*, *supra* note 27, at 615 ("[T]he aggressive invalidation of laws embodying indefinite standards . . . could put pressure on localities to adopt 'rule-like' formulations that substantially broaden police authority.").

36. Stuntz, *Pathological Politics*, *supra* note 27.

more.[37] The extent to which specific rules reduce discretion is thus uncertain and contested.

This Article intends to resolve the debate over whether requiring specificity in legal rules reduces the discretion that legislatures can delegate to executive officials. Part I explains the constitutionalization of legislative specificity as a judicial response to excessive legislative delegation and analyzes recent doctrinal developments in the context of investigatory traffic stops that call into question the efficacy of specificity as a meaningful constraint on the delegation of discretion. The degree of discretion delegated to law enforcement through specific laws in the traffic context appears to be as great as has ever been accomplished through vague laws and, moreover, borders on making police discretion to stop, search, and arrest motorists essentially unfettered.[38] In effect, a peremptory search and seizure is permissible under our constitutional regime and, with respect to motorists, a peremptory traffic stop seems to exist already.

Part II is the centerpiece of the Article. Section II.A addresses the question of what constraints, if any, the void-for-vagueness doctrine places on the capacity of legislatures to delegate discretion to executive officials. The analysis builds on, and goes considerably beyond, the important insights of Livingston and Stuntz, providing a comprehensive and systematic analysis of the relationship between specific rules and enforcement discretion. The inquiry reveals that the degree of enforcement discretion can be understood as a function of both affirmative and negative choices. By "affirmative choice," I mean the authority of police affirmatively to subject people to enforcement procedures. By "negative choice," I mean the authority of police to decline to subject people to enforcement procedures even when police are legally authorized to enforce the laws against them. Vague laws tend to vest police with broad discretion, both affirmative and

37. Cole, *supra* note 27, at 1084.

38. Several scholars have observed that traffic laws confer virtually unlimited discretion on police to investigate whichever motorist they wish. *See, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005-09 (1998) (stating that traffic stops are often pretextual and based on race); Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 693-94 (1998) (denouncing pretextual traffic stops and criticizing judicial approach to the subject); Christopher Slobogin, *Let's not Bury Terry: a Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1067-68 (1998) (characterizing traffic and loitering laws as "preventive crime" statutes, which are "designed to give police probable cause for arresting those suspected of being up to no good"); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 853-54 (2001) [hereinafter Stuntz, *O.J. Simpson*] (stating that because most everyone violates traffic laws, police may "stop anyone, anytime, for any reason").

negative. As the analysis further demonstrates, however, specifically defined crimes may delegate as much discretion as vague laws if designed according to certain factors. Such factors include the seriousness of the criminalized conduct, the difficulty of avoiding the conduct, the social norms surrounding violation of the crime, the rate of law enforcement against such crimes, and the extent to which police and other executive officials have incentives to enforce against commission of the crime for ulterior purposes. Moreover, the affirmative and negative choices created by specific rules are interdependent. That is, expansion of affirmative enforcement options also tends to expand the degree of discretion to under-enforce the law, and increasing negative enforcement authority tends to increase affirmative enforcement choice. Ultimately, as traffic laws exemplify, specific rules can be designed to delegate virtually limitless discretion.

My conclusion, however, is not that specificity in legal rules contributes nothing to constraining the delegation of discretion. Specific rules make the question of whether enforcement is authorized more predictable and less subject to manipulation. Provided that there remains some conduct outside the proscription of a specific rule, enforcement discretion is constrained by the specific rule with respect to that conduct. The discretion-constraining effect of specificity thus depends on whether limits are placed on either the scope of activities that may be criminalized by specific rules or on the authority of executive officials to under-enforce the rules. To the extent that legislatures are permitted to criminalize a broad range of conduct through specific rules and police are permitted to ignore violations of such rules, the requirement of legislative specificity places very little constraint on the delegation of discretion. Without limits on what conduct legislatures may criminalize or on what crimes police may ignore, the requirement of legislative specificity constrains only the form by which legislatures can delegate discretion to executive officials, not the degree of discretion they can delegate.

Section II.B moves beyond the debate over the effect of specific rules on discretion. Based on the analysis in Section II.A, it accepts that specific rules may confer broad discretion and considers the effect that such discretion has on the ability of courts to determine, through antidiscrimination review, whether such discretion is exercised in a discriminatory manner. The analysis reveals an inverse relationship between the degree of discretion created by specific rules and the capacity of courts to monitor the enforcement of such discretion for discriminatory motives, such as race, sex, or religion. The greater the discretion conferred by specific rules, the more difficult it is for courts to determine whether the discretion was enforced in an arbitrary or discriminatory manner. As the degree of discretion tends toward

absolute, the effectiveness of antidiscrimination review tends toward zero. The Supreme Court failed to appreciate this insight when, in response to claims of excessive police discretion created by traffic laws, the Court reassured us that the Equal Protection Clause provided a safeguard against discriminatory enforcement.[39] The Court's response is inadequate to the extent that antidiscrimination review is inherently ineffective when applied to decisions that are broadly discretionary. Indeed, the void-for-vagueness doctrine is premised on an understanding that broad discretion makes discrimination largely undetectable.[40] The Court thus seems to have misunderstood the extent to which discretion can be delegated through specific rules and the implications of such discretion for antidiscrimination review. The result is that legislatures effectively have circumvented existing constitutional constraints on delegating discretion, but the Supreme Court has failed to develop an effective doctrinal response.

Part III is suggestive only. It considers some implications of the relationship explored in Part II between specific rules and enforcement discretion and between enforcement discretion and antidiscrimination review. Section III.A considers implications for developing effective constraints against legislative delegation of excessive discretion through specific rules in the context of traffic regulation. Potential approaches include limiting the authority of police to exploit traffic laws for pretextual purposes, requiring the police to justify enforcement practices that have a discriminatory impact, requiring higher enforcement rates, and precluding enforcement of minor traffic violations. While any of these approaches alone or in combination should limit enforcement discretion, the most promising may be the requirement that police only enforce against serious traffic violations. Limiting enforcement to serious violations, such as unreasonably hazardous or reckless driving, would increase police incentives to consistently enforce the law and thereby strengthen the relationship between the law on the books and the enforcement thereof.

Section III.B considers some constitutional implications of these suggestions, primarily concerns over judicial usurpation of legislative and executive prerogative. My emphasis on judicial remedies is not because courts are better able than legislatures to limit legislative delegation of discretion. They are not. The inquiry of this Article, however, concerns whether the void-for-vagueness doctrine limits legislatures that decline to limit themselves. I argue

39. *See* discussion of Whren v. United States, 517 U.S. 806 (1996), *infra* notes 98-107 and accompanying text.

40. *See infra* text accompanying notes 144-46.

that additional judicial initiatives to limit the delegation of discretion through specific rules should not violate separation-of-powers principles. Legislative supremacy in the criminal law requires judicial checks on delegating discretion, checks among which the void-for-vagueness doctrine serves an important though insufficient role.

I. THE UNCERTAIN VALUE OF LEGISLATIVE SPECIFICITY

A. Constitutionalizing Legislative Specificity to Safeguard the Rule of Law

This Section describes key values of the rule of law and the principal constitutional doctrines designed to implement them, including the judicial development of the void-for-vagueness doctrine. It does not attempt to define the "rule of law" in a universal sense, but rather to identify significant features of the concept as understood in American jurisprudence. Although many readers will be familiar with basic rule-of-law principles, a brief primer is warranted to inform my subsequent assessment of how effectively legislative specificity safeguards the rule of law. In addition, understanding the rule of law's centrality to our constitutional regime is relevant to assessing the legitimacy of judicial mechanisms, suggested in the final Section,[41] for constraining legislative delegation through specific rules.

Reflected in the phrase, "a government of laws, and not of men,"[42] a central focus of the rule of law is constraining the discretion of government officials.[43] It requires that officials exercise governmental power pursuant to previously defined instructions that flow from collective agreement by the body politic or by representative governmental institutions, rather than pursuant to the idiosyncratic predilections or the whims of the officials.[44] The appropriate sources of such collective instruction include constitutions and legislation. Such rules, moreover, should be sufficiently clear to guide government officials in the exercise of their discretion. The rule of law means, as

41. *See infra* Section III.B.

42. RONALD A. CASS, THE RULE OF LAW IN AMERICA 2 (2001).

43. Indeed, constraining government officials is arguably the most important function of the rule of law. *See id.* at xii ("[The framers of the Constitution] saw constraining discretionary power of government officers—the central focus of the rule of law—as essential to the society they hoped to create.").

44. *See* MASHAW, *supra* note 25, at 139 (observing that the rule of law requires legal commands to "flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority").

Justice Antonin Scalia explains, a "law of rules,"[45] so that when government acts, there should be "a clear, previously enunciated rule that one can point to in explanation of the decision."[46] A corollary principle is that government decisions should be, to a meaningful degree, predictable.[47] For the administration of legal rules to be predictable, not only should individual rules be sufficiently clear, but it also should be possible to anticipate what rule shall apply when there is a conflict or overlap of applicable rules.[48] Legal rules also should be accessible to the public in order to provide fair warning of what conduct may subject one to government intervention.[49] As Friedrich Hayek succinctly explains, the ideal of the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's affairs on the basis of this knowledge."[50] It is thus inconsistent with the rule of law for executive officials to exert coercive power over individual citizens unless such action is previously authorized and fairly predictable by reference to politically legitimate collective instructions.[51]

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45. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 CHI. L. REV. 1175, 1187 (1989).

46. *Id.* at 1178.

47. *See* CASS, *supra* note 42, at 7-12 (describing the qualities of "principled predictability"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 35-36 (1977) (noting that while discretionary standards may incline a judgment one way or the other, rules dictate results); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 137-45 (1991) (discussing the "argument from reliance" and the case for certainty and predictability in decision-making); Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (discussing the law from the perspective of the "bad man," who cares only about what consequences the law will visit on his behavior); Scalia, *supra* note 45, at 1179 ("Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name." (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION 17 (William S. Hein & Co. 1996) (1960))).

48. As Ronald Cass explains:

> It is not enough that Rule *A* gives a clear indication what legal rights and duties attach in particular circumstances if Rule *B* also applies in those circumstances but with different results. A legal system's rules can meet the test for principled predictability in such settings only when there is a Rule *C* that provides guidance for resolving conflicts among other rules—and that gives a reasonably clear directive which rule (*A* or *B*) has priority.

CASS, *supra* note 42, at 8.

49. *See id.* (noting that accessible laws allow citizens the chance to anticipate and moderate the law's impact); MASHAW, *supra* note 25 (discussing the "objective and accessible" nature of the commonly asserted "rule of law").

50. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 75-76 (2d ed., Routledge 2006) (1944), *quoted with approval in* Joseph Raz, *The Rule of Law and its Virtues*, *in* THE AUTHORITY OF LAW 210, 210 (1979).

51. George Fletcher identifies two different conceptions of the rule of law: a modest version that refers to the requirement that government be bound by collectively-enacted rules by legitimate institutions, and a stronger, less widely-accepted, version that requires that the law

Legislative supremacy in defining the criminal law is a widely accepted tenet of American jurisprudence, although it was not always as well accepted as it is today. Legislative supremacy derived in part from the emerging significance of the principle of legality, which forbids retroactive crime definition. As Professors Bonnie, Coughlin, Jeffries, and Low explain:

> The essential idea is that no one should be punished for a crime that has not heen so defined in advance by the appropriate authority. Generally speaking, the appropriate institution for crime definition is the legislature. For most purposes, therefore, the principle of legality may be taken to signify *the desirability in principle of advance legislative specification of criminal conduct.*[52]

The rise of legislative supremacy also stemmed from Enlightenment theory's emphasis on the centrality of representative institutions to the legitimacy of government authority. Now "widely recognized as a cornerstone of the penal law," the insistence that crimes be defined in advance by legislatures did not emerge in Europe until the late eighteenth century.[53] Its reception in America was complicated. In its favor, advanced legislative definition of crime fit with early American notions of popular sovereignty and separation of powers.[54] In addition, more contemporary justifications stress the contribution of advanced legislative crime definition to guiding the discretion of police and prosecutors by ensuring that they initiate coercive action against individuals only when authorized by previously legislated rules.[55] In tension with legislative supremacy, however, was America's reception of English common law, which included the practice of judicial crime creation in response to innovative acts of misconduct.[56] Though decreasing as legislative supremacy gained wider acceptance, occasions of judicial crime creation in the United States can be found into the nineteenth and mid-twentieth centuries.[57]

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be just or moral. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11-13 (1996). As Fletcher observes, the quotidian work of the legal system conforms to the first version, while the second is reserved for the interpretation of certain constitutional provisions, particularly the Due Process Clause. *Id.* at 13. *See also* CASS, *supra* note 42, at 15 (noting that the stronger version is less widely accepted). This article is principally concerned with the modest version, rule of law by collective instruction, but to the extent that the collective instructions embodied in the Constitution also serve justice, the modest version tends to serve the interests of the stronger version as well.

52. RICHARD J. BONNIE ET AL., CRIMINAL LAW 85 (2d ed. 2004).

53. *Id.*

54. *Id.* at 86-87.

55. *See id.* at 89-91 ("[T]he principle of legality operates primarily to control the discretion of the police and of prosecutors." (quoting HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 88-91 (1968))).

56. *Id.* at 87-88.

57. *See id.* at 88 (noting a 1954 decision affirming a misdemeanor conviction for making obscene phone calls, despite no statutory authorization).

Today, however, American jurists widely agree that the rule of law forbids judicial crime creation.[58]

The rule of law is implemented through several constitutional provisions. The Ex Post Facto Clause prohibits criminal punishment for conduct occurring before legislative enactment of the law prohibiting such conduct,[59] and the Due Process Clause, as courts have come to interpret it, similarly forbids courts from retroactively defining crimes.[60] The provision most directly concerned with police discretion is the Fourth Amendment.[61] It requires the police to have objective evidence that a suspect has violated or will violate the criminal law before subjecting the suspect to arrest, search, or custodial interrogation.[62]

In addition to procedural constraints on legislatures and law enforcement officers, the Constitution limits the content of and motivation behind legislative instructions. The Due Process Clause, for example, forbids the criminalization of a person's status, as distinct from his conduct.[63] Furthermore, the First Amendment[64] and Equal Protection Clause[65] impose antidiscrimination constraints on the criminal law, forbidding the selective criminalization of conduct based on a group's political or religious affiliation,[66] race, or national origin,[67] or based on otherwise arbitrary or capricious factors.[68] The police likewise are prohibited directly by these constitutional

58. *Id.*

59. U.S. CONST. art. I, § 9; *see* Calder v. Bull, 3 U.S. 386, 390-91 (1798) (describing the scope of ex post facto laws).

60. U.S. CONST. amend. XIV, § 1; *see* Bouie v. Columbia, 378 U.S. 347, 354-55 (1964) (stating that unforeseeable retroactive application of criminal statutes violates the Due Process Clause).

61. U.S. CONST. amend. IV; *see* Maclin, *supra* note 27, at 418 (arguing that controlling police discretion is the central meaning of the Fourth Amendment).

62. *See* Chandler v. Miller, 520 U.S. 305, 313 (1997) (stating that searches "ordinarily must be based on individualized suspicion of wrongdoing"); Elkins v. United States, 364 U.S. 206, 222 (1960) ("[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").

63. *See* Robinson v. California, 370 U.S. 660, 666 (1962).

64. U.S. CONST. amend. I.

65. U.S. CONST. amend. XIV, § 1 (requiring that no State "deprive any person of life, liberty, or property, without due process of law").

66. *See* United States v. Eichman, 496 U.S. 310, 318-19 (1990) (declaring unconstitutional a statute that criminalizes flag-burning); Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (declaring unconstitutional a statute that burdens certain Amish religious practices).

67. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (granting writ of habeas corpus to Chinese nationals victimized by discriminatory enforcement of local ordinances).

68. *See* Baker v. Carr, 369 U.S. 186, 226 (1962) ("Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.").

constraints from selectively enforcing the law in an arbitrary or discriminatory manner.[69] Combined, these constitutional constraints limit police enforcement to persons about whom the police have objectively justified suspicion of conduct in violation of a law previously defined by the legislature and further limit the extent to which such enforcement may be invoked selectively for illegitimate reasons. In theory, court enforcement of these doctrines should restrain police discretion within tolerable bounds.

These constitutional constraints, however, proved inadequate to prevent legislatures from delegating excessive discretion to executive officers by defining laws in vague terms. Vague laws, though formally enacted in advance, effectively left it to police to decide what conduct was criminal through the ad hoc interpretation of an amorphous standard to circumstances as they arose.[70] Fair notice to the public also was undermined because vague laws provided insufficient warning as to what conduct would trigger investigation and prosecution.[71] The Fourth Amendment provided little protection, because a wide range of conduct appears reasonably to violate vague laws that can be interpreted broadly.[72] And the antidiscrimination rules of the Equal Protection Clause and First Amendment ("the Equal Protection Clause," collectively[73]) were rendered largely ineffective because identifying whether a decision was motivated by an arbitrary or impermissible reason is difficult, as a practical matter, when applied to a decision otherwise vested with broad discretion. Vague laws, in effect, gave police the authority to stop, interrogate, search, and arrest whomever they chose for any reason.

In response to legislative circumvention of the rule of law through vaguely defined crimes, the courts developed, under the Due

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69. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (stating that the Equal Protection Clause provides the constitutional basis for objecting to intentionally discriminatory application of the laws).

70. *See* Jeffries, *supra* note 26, at 196-97 (noting the potential for police and prosecutorial abuse of unduly vague laws).

71. *See id.* at 205-12 (discussing the requirements of notice and fairness).

72. *See* Amsterdam, *Crimes of Status*, *supra* note 27, at 226-28 (describing how vagrancy statutes and other vague laws can circumvent the requirement of probable cause for detention and search).

73. For convenience, I will generally refer only to the Equal Protection Clause and often only to racial discrimination in discussing constitutional constraints on discriminatory law enforcement. The Equal Protection Clause is the principal antidiscrimination provision in the Constitution, forbidding discrimination on the basis of race, ethnicity, national origin or sex, or on the basis of arbitrary or irrational reasons. The First Amendment, although different in many respects, also presumptively prohibits discrimination on certain bases, such as religion or political affiliation. For purposes of this article's inquiry into the effectiveness of antidiscrimination constraints on the exercise of broad discretion, the First Amendment and Equal Protection Clause provide essentially the same constraint, or lack thereof.

Process Clause, the void-for-vagueness doctrine, which requires specificity in the definition of crimes.[74] Specificity, the Supreme Court explained, serves to provide fair warning to the public regarding what conduct may trigger government intrusion.[75] Legislative specificity also serves to constrain the discretion delegated to executive officials, especially the police.[76] By requiring the police to act only on objective evidence that a specific rule of conduct has been violated, legislative specificity minimizes the risk that police will single out people for arbitrary or discriminatory reasons.[77] The Court thus incorporated specificity into the constitutional constraints on legislatures to ensure that advanced legislative crime definition guides the discretion of law enforcement officials.

The American constitutional regime today thus requires that law enforcement officials can search or arrest a person only if the officer has justified suspicion to believe the suspect has violated a specific rule of conduct defined in advance by the legislature. Antidiscrimination analysis also should be supported by legislative specificity because identifying potentially illegitimate motivations is facilitated by enabling a comparison across cases when the factors that may legitimately distinguish cases are identified and defined with particularity.[78] Accordingly, by incorporating a requirement of legislative specificity through the void-for-vagueness doctrine, the Court ensured a certain degree of restraint on the discretion that legislatures could delegate to law enforcement.[79]

B. Persistent Concerns Over Police Discretion and the Court's Antidiscrimination Response

This Section notes the apparent persistence of arbitrary and discriminatory enforcement of traffic laws despite their compliance with the requirement of legislative specificity and further notes the

74. *See* Jeffries, *supra* note 26, at 212-19 (discussing vagueness doctrine's role in supporting the rule of law).

75. Papachristou v. City of Jacksonville, 405 U.S. 156, 162-63 (1972) (voiding a vagrancy statute for vagueness based on lack of notice and the possibility of arbitrary enforcement).

76. *See id.* at 168-70 (citing unfettered discretion in the hands of Jacksonville police as another reason the vague law did not pass constitutional muster).

77. *See* PACKER, *supra* note 55 (discussing the importance of limiting the discretion of police and official prosecutors).

78. David Cole has made a similar observation: "Where the police selectively enforce a specific law, identification of similarly situated violators is relatively straightforward. But where the police selectively enforce a law whose very contours are imprecise, one cannot know whether the police are engaged in selective enforcement unless one knows how the contours are defined." Cole, *supra* note 27, at 1084.

79. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (recognizing that vagueness doctrine requires legislatures to adopt minimal guidelines to govern law enforcement).

Supreme Court's proposed remedy, the Equal Protection Clause, and its apparent inadequacy as a safeguard against discriminatory enforcement. The discussion emphasizes concerns over racial profiling. This is not meant to suggest that racial discrimination is the only concern implicated by police discretion. However, racial discrimination in law enforcement is a primary concern that underlies the development of the requirement of legislative specificity, and it is a concern about which there is substantial anecdotal and statistical evidence.[80] Racial profiling in enforcing traffic laws thus serves as a useful window into the risks posed by the discretionary enforcement of specific rules.

Despite the panoply of constitutional constraints on legislative delegation, widespread concern persists over the abuse of police discretion in the context of traffic enforcement.[81] The most widely cited and well-documented concern is the targeting of motorists based on race or ethnicity,[82] including more recently the investigation of people presumed to be Arab or Middle Eastern.[83] Whether race or ethnicity should be permitted as evidence of suspiciousness is a matter of dispute, but the extent to which police appear to engage in such discrimination without judicial scrutiny of a practice that is at least presumptively unconstitutional is difficult to reconcile with the rule of law. Police abuse of discretion, moreover, goes beyond race. Discriminatory police tactics against the poor, the young, and other politically marginalized or "out" groups continue to be time-honored practices.[84] And motorists of all backgrounds have experienced traffic stops that seem as likely motivated by the out-of-state license plate, the make or model of the vehicle, the physical appearance of the

80. *See* Karlan, *supra* note 38, at 2006 ("[T]here is substantial evidence that many departments use statistical profiles in which race is a factor."); Roberts, *supra* note 27, at 808 ("There is overwhelming evidence that police officers stop motorists on the basis of race for minor traffic violations.").

81. *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) (attacking racial profiling through traffic stops as both morally reprehensible and ineffective); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 659-60 (2002) (concluding that studied traffic stops were both racially imbalanced and affected by profiling); Wayne R. Lafave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1845 (2004) (noting that stops are often made on "arbitrary considerations such as the driver's skin").

82. HARRIS, *supra* note 81, at 129-44 (discussing traffic profiling across a number of races); Gross & Barnes, *supra* note 81, at 660 (finding racial profiling at work in traffic stops).

83. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413-14 (2002) (describing a new emphasis on profiling based on Arab descent).

84. *See* Chet K.W. Pager, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J.L. & PUB. POL'Y 515, 524 (2004) ("[P]olice profiling by gender and age is even stronger than profiling by race.").

driver, or the fortuity of filling an officer's revenue quota.[85] Although such intrusions usually involve mere inconvenience, a substantial amount of largely anecdotal evidence suggests a troubling number of traffic stops involve significant time, intrusiveness, physical restraint, and emotional abuse.[86]

The void-for-vagueness doctrine, concerned primarily with guarding against the risk of arbitrary and discriminatory law enforcement, is ineffective at preventing racial profiling and other forms of illegitimate traffic enforcement because the traffic laws on which officers rely are generally quite specific. Driving in excess of the speed limit, failing to signal within a specific distance of turning, or failing to stop completely at a stop sign are as precise as any rule of law and more precise than most. The Fourth Amendment is also impotent in constraining police discretion created by traffic laws. It requires that police have reasonable suspicion of a traffic violation before they can stop and investigate a motorist and have probable cause before conducting a search or arrest.[87] However, as several scholars have observed, traffic laws are violated frequently by most people.[88] As a result, suspicion of a traffic violation by those the police wish to question is usually easy to substantiate.[89]

The procedures authorized by the Fourth Amendment, moreover, are not limited to the temporary detention of a driver. In

85. *See* Illya Lichtenherg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 442-44 (2003) (analyzing the effects of quotas on frequency of traffic stops).

86. *See* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 438-40 (1997) (recounting the experience of a Harvard Law School graduate who, while returning from a funeral, was forced with his family to stand in the rain while a narcotics dog sniffed their car and found no drugs); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 336-38 (2002) (recounting the arrest of a mother for not wearing a seatbelt while her children cried in the car); Erika L. Johnson, *"A Menace to Society:" The Use of Criminal Profile and Its Effects on Black Males*, 38 HOW. L.J. 629, 658 (1995) (recounting the experience of Olympic gold Medalist Al Joyner who was "ordered to his knees" by police as a suspect for a crime, then detained again minutes later by the police for a different crime, even though his car did not match the make or model involved in the second crime).

87. *See* Wyoming v. Houghton, 526 U.S. 295, 300-02 (1999) (stating that it is reasonable to search a car when probable cause exists); Whren v. United States, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.").

88. *See, e.g.*, Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. REV. 735, 778 (2002) (stating that in a Maryland traffic study, "92% of all drivers were observed exceeding the speed limit by at least one mile per hour"); Livingston, *Gang Loitering*, *supra* note 33, at 173 ("almost everyone violates traffic rules sometimes").

89. *See* Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. PA. J. CONST. L. 474, 499 (2001) ("Given the high number of traffic laws, . . . it would be a particularly dense police officer who could not find some reason to briefly detain a person . . . .").

states where the legislature has defined traffic violations as criminal,[90] an officer with probable cause to believe a traffic violation has occurred may arrest the driver, interrogate him, and search him and his car.[91] If evidence of another crime is discovered from the interrogation or search, the officer may seize evidence of the additional crime and charge the driver accordingly.[92] If no evidence of other crime is discovered, the officer may decide whether to let the driver go uncharged or charge him by citation; alternatively, he may handcuff him, take him to the station, jail him for up to forty eight hours or longer, impound the car, and perform a comprehensive inventory search thereof.[93] Because virtually everyone, acting conscientiously and reasonably, violates traffic laws every time they drive,[94] an officer can identify a crime to justify a stop, search, interrogation, and arrest of virtually any motorist he chooses.[95]

A concern raised by such discretion is that the police may selectively enforce traffic laws against particular motorists as a pretext for investigating crimes for which they lack justified suspicion or as an excuse to target particular motorists for arbitrary or discriminatory reasons.[96] Indeed, a substantial body of anecdotal and statistical evidence suggests that such practices are common and

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90. Most states define some traffic violations as criminal. *See* Robert Henry, *In Memorium: Bernard Schwartz*, 33 TULSA L.J. 1048, 1053 (1998) (observing that traffic offenses are "still treated as criminal offenses in most states").

91. A motorist may be arrested and searched for ordinary speeding in several states, including Connecticut, Delaware, Georgia, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, Utah, and Wisconsin. *See* Memorandum from Ben Doherty, University of Virginia Law Librarian, on Search Incident to Arrest for "Ordinary" Speeding (June 30, 2006) (on file with author) (surveying state laws regarding authorization for custodial arrest and search incident to speeding). *See generally* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME I: INVESTIGATION 197-240, 251-60 (4th ed. 2006) (summarizing Fourth Amendment doctrines concerning arrest, search incident to arrest, including of automobiles, and inventory searches, including of automobiles).

92. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260, 266 (1973) (sustaining a post-arrest search and seizure of illegal drugs, when the suspect was initially arrested for driving without a valid license).

93. *See* DRESSLER & MICHAELS, *supra* note 91.

94. *See* Brady, *supra* note 88 (showing the frequency with which traffic laws are violated in a Maryland study).

95. *See* Leipold, *supra* note 89, at 499-500 (suggesting that an officer can target any motorist at will); Stuntz, *O.J. Simpson*, *supra* note 38, at 843 ("The law governing traffic stops allows police to pull over anyone for any reason."); *id.* at 853 ("Traffic rules are defined to include thoroughly ordinary behavior like driving a few miles per hour over the speed limit. Consequently, the large majority of drivers violate them.").

96. *See* Leipold, *supra* note 89 ("[I]t would be a particularly dense police officer who could not find some reason to briefly detain a person she had previously selected even if the reason for the stop is in fact race-based."); Stuntz, *O.J. Simpson*, *supra* note 38, at 843-44 ("Because limitless discretion leads naturally to discrimination, it hardly seems surprising that complaints about racial profiling have focused on traffic stops.").

widespread.[97] In *Whren v. United States*, the Supreme Court considered whether the risk that police may enforce traffic laws for illegitimate reasons warranted judicial scrutiny above and beyond whether a traffic violation reasonably appeared to have occurred.[98] The defendant was stopped for a minor traffic violation, during which the police discovered illegal drugs.[99] The circumstances suggested that the police's motivation in enforcing the traffic stop was a desire to investigate possible drug activities for which they lacked reasonable suspicion and suggested further that they may have relied on the fact that the defendant was black.[100] Not only was the traffic violation too trivial to raise the concern of most officers, but the police in this case were plainclothes vice-squad agents who, under Department regulations, were prohibited from enforcing minor traffic violations.[101] The defendant argued that the broad discretion created by the comprehensiveness of traffic regulations demanded that the Court limit enforcement to violations that a reasonable officer would enforce.[102] Such a rule would serve to minimize the extent to which police could use traffic violations as pretexts for investigating unsubstantiated crimes or for targeting motorists based on improper factors, such as race.

The Court held that objective evidence that a traffic violation occurred is all that is required for a stop to satisfy the Fourth Amendment, regardless of the actual motivation for the stop and regardless of whether a reasonable or typical officer would have responded to the traffic violation.[103] With respect to the risk of racial discrimination, the Court responded: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[104]

My research has disclosed only two cases in which a defendant has demonstrated successfully that race played a role in his traffic stop, despite the large number of cases in which claims of discrimination have been made and the growing body of empirical

97. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265-67 (1999) (describing anecdotal and statistical evidence in support of racial profiling).

98. 517 U.S. 806, 808 (1996).

99. *Id.* at 808-09.

100. *Id.* at 808, 810.

101. *Id.* at 808, 815.

102. *Id.* at 810.

103. *Id.* at 819.

104. *Id.* at 813.

evidence that such practices are common. With respect to these cases, moreover, one involved extreme facts,[105] and the other was in New York, which at the time barred pretextual stops under state law and therefore permitted inquiry into police motives when circumstances suggested pretext, an inquiry that led to discovery of the racial motive.[106] Under *Whren*, which New York has since adopted under state law, an allegation of pretext is no longer a basis to inquire into police motive, absent specific evidence of a discriminatory purpose.[107] If the police are engaging in racial profiling, but it is rarely proven, two questions arise: why does the requirement of legislative specificity seem so ineffective at constraining police discretion, and why does the Equal Protection Clause seem so inadequate at checking abuses of such discretion?

II. THE RELATIONSHIP AMONG SPECIFICITY, DISCRETION, AND ANTIDISCRIMINATION

A. Vagueness, Specificity, and Discretion

In order to understand whether and to what extent specific laws can be used to delegate as much discretion as vague laws, this Section first considers how vague laws create discretion; it then considers the extent to which specific laws can achieve a similar effect.

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105. The defendant alleged that the officer, a member of a drug task force, targeted him for a traffic stop because of his race. The officer admitted that he had engaged in racial profiling in the past, but said he had discontinued the practice after being advised it was illegal. Despite the officer's admission of past racial profiling and a continued pattern of overwhelmingly targeting black and Hispanic motorists, he denied using race in this case because, he explained, he is physically color-blind. The court found that he was lying. United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990).

106. *See* People v. Young, 660 N.Y.S.2d 165, 168 (N.Y. App. Div. 1997) (citing New York case law barring pretextual traffic stops). In *Young*, an officer pulled over a car driven by three black males for improperly changing lanes. An extensive search of the driver, passengers and car discovered cocaine on one of the passengers. The appellate court ruled based on facts adduced at a suppression hearing, that the evidence should have been suppressed because the stop was really a pretext to investigate the passengers for other criminal activity. The facts raising the inference of pretext included that the officer did not normally enforce traffic laws and did not even carry the forms necessary to issue a traffic ticket. Rather, he was an investigative detective who at the time was wearing a business suit, driving an unmarked car, and on his way to investigate a burglary. He also followed the defendant's car for several miles before initiating a traffic stop. Finally, although the officer also claimed he had reason to believe the car was stolen, he said to an another officer called to the scene that he was determined to continue his investigation into whether the car was stolen even after a file check uncovered no discrepancies in the defendants' answers to his initial questions and after finding that the car's license plate number was not listed as stolen. The court ultimately concluded that the stop was both pretextual and based in part on the race of the vehicle occupants. *Id.* at 165-168.

107. 517 U.S. 806, 819.

Vague laws create discretion by expanding enforcement choice in two respects—affirmatively and negatively. By "affirmative choice," I mean the authority of police to subject observed people to enforcement procedures. By "negative choice," I mean the authority of police to decline to subject observed people to enforcement procedures even when enforcement against them is authorized. Vague laws facilitate police discretion both in deciding whom to arrest and in deciding whom to ignore.

Vague laws expand affirmative choice in a number of ways. First, a vague law can be manipulated by police to apply to a wide range of conduct and therefore to a wide range of people engaged in such conduct.[108] Second, a vague law expands the pool of potential suspects by limiting notice to the public as to what conduct violates the law. Although lack of fair notice is often cited as its own justification for prohibiting vague laws,[109] lack of notice also affects affirmative enforcement opportunities. To the extent that the public is unable to understand the nature of the conduct proscribed by a vague law, the public is more likely to violate the law unwittingly, thereby expanding the pool of potential suspects.

Vague laws facilitate negative choice by enabling police to ignore potential suspects. The open-endedness of a vague law enables police who are not concerned with a potential suspect's conduct to interpret the law as inapplicable to the conduct. The conclusion may be one of good faith, i.e., the police sincerely believe the law should not be implicated and construe the law consistent with their subjective reaction. A vague law also enables police to ignore those suspects they believe are in violation of the law, because the vagueness in the law enables police plausibly to deny that it applies to the observed conduct.[110]

The question is whether requiring specificity in the definition of crimes reduces the discretion that can be delegated to police as compared to the degree of discretion afforded by vague laws. Initially, it would seem obvious that specific laws constrain discretion more than vague laws. If discretion is expanded, both affirmatively and negatively, by the uncertainty and manipulability of a vague law, then

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108. Amsterdam, *Crimes of Status*, *supra* note 27, at 219 (explaining that vague laws often act as a "catch-all").

109. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.' " (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939))); Amsterdam, *Crimes of Status*, *supra* note 27, at 217-20 (discussing the lack-of-notice objection to vague statutes).

110. *See* Amsterdam, *Crimes of Status*, *supra* note 27, at 222 (stating that a vague law could become a "*de facto* licensing scheme").

precise, clear laws should limit the extent to which police can affirmatively choose whom to arrest (only those in violation of a specific rule of conduct) and whom not to arrest (those whose conduct does not violate any specific rule). Specific laws also should give more effective notice than vague laws to the public regarding exactly what conduct to avoid if police intrusion is undesired, thereby minimizing the number of unwitting violators from whom police can select enforcement targets.

The proposition that legislative specificity constrains the delegation of discretion also informs the law outside the criminal context. The nondelegation doctrine in separation-of-powers jurisprudence, for example, requires Congress to provide an "intelligible principle" when delegating authority to administrative agencies.[111] Vague statutory standards are thought to vest excessive policy discretion in executive agencies in violation of the constitutional allocation of "[a]*ll* legislative Powers" to Congress.[112] Accordingly, Congress must define agency authority through guidelines of sufficient specificity and detail to ensure that important policy questions are decided by Congress and that agencies and courts reviewing their actions can discern congressional will sufficiently.[113] Although the Court has not enforced the nondelegation doctrine with meaningful rigor since the New Deal,[114] it nonetheless assumes that legislative specificity constrains the delegation of discretion, even though it has declined to require sufficient specificity to limit Congress's penchant for delegation.

Support for the discretion-constraining effect of specific laws also can be found in the literature on standards versus rules.[115]

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111. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down . . . an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power."); *see also* Mistretta v. United States, 488 U.S. 361, 378-79 (1989) (finding the Sentencing Reform Act constitutional, as it provided an "intelligible principle").

112. U.S. CONST. art. 1, § 1 (emphasis added).

113. *See* Yakus v. United States, 321 U.S. 414, 426 (1944) (stating that an absence of acceptable standards exists when "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed").

114. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103-06 (2004) (explaining how the Nondelegation Doctrine has been "uniformly rejected" since Franklin Roosevelt's presidency).

115. *See, e.g.*, CASS, *supra* note 42, at 5 ("When distinguished from standards, rules are commonly described as not requiring a similar degree of judgment in their application."); DWORKIN, *supra* note 47, at 22-28 (contrasting rules, which are "applicable in an all-or-nothing fashion," with the principles and policies of standards); Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66-71 (1983) (describing the implications of and tradeoffs inherent in transparent rules).

Standards or, more precisely, rules that embody standards,[116] provide only general guidance and call for further interpretation in application. Specific rules, in contrast, dictate unique outcomes whenever particular conditions arise, making the resolution clear once the facts have been determined.[117] For example, a standard may forbid unreasonably fast driving, whereas a rule may forbid driving in excess of a specified speed limit.[118] The former regulation calls for a greater degree of interpretive judgment in application to facts and, as such, is more susceptible to the exercise of discretion in its application.[119] The vaguer the standard, the greater the degree of judgment and the correspondingly greater degree of discretion that may be exercised.[120] Vague standards are less clear than specific rules and therefore provide less guidance and predictability with respect to what conduct violates the law or justifies enforcement.[121] In economic terms, specific rules provide more guidance ex ante and are more susceptible to monitoring than vague standards; in so doing, they serve to reduce prediction costs[122] and agency costs[123] associated with enforcing the rules.

The foregoing virtues of legislative specificity are certainly plausible. However, they are premised on an assumption that may not hold true with respect to certain kinds of executive authority, including that exercised by the police. The assumption is that executive decisions enforcing specific rules are meaningfully obligatory, affirmatively or negatively. Specific rules constrain negative discretion only if those charged with their enforcement are obligated to enforce the rules against known violators. Specific rules constrain affirmative discretion only if enforcement officers are negatively obligated to ignore non-violators—and if ignoring non-violators appreciably limits the pool of people from whom police can

116. *See* Diver, *supra* note 115 (discussing the process of formulating rules that conform to the drafter's intended standards).

117. *See* DWORKIN, *supra* note 47, at 24 (noting the "all-or-nothing" nature of rules).

118. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 586 (7th ed. 2007).

119. *See id.* (noting that the broader the statutory rule, the greater the judges' latitude of interpretation).

120. *Id.*

121. *Id.*

122. Prediction costs are generally regarded as the costs involved in predicting the legal consequences of a given action. *Cf.* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562-63 (1992) (noting that ex ante promulgations (rules) are more costly to create than ex post promulgations, which shift costs to those who must interpret the law).

123. Agency costs are the costs involved in keeping an agent on task and executing the intentions of the principal. POSNER, *supra* note 118, at 420. *See id.* at 587 (noting that broad standards increase agency costs).

select enforcement targets. If, however, legislatures defined, through specific rules, a wide range of common conduct as criminal, and if law enforcement were largely free to ignore violations, then police would have broad choice to enforce or not to enforce against a large portion of the population.

Traffic laws illustrate this phenomenon. They are generally quite specific and are defined as crimes in several states.[124] Speed limits alone cast a wide net for the police. The majority of motorists violate such laws, and law enforcement, often admittedly, ignores most drivers who exceed the limit by less than five miles per hour.[125] Under-enforcement is not, moreover, merely a result of limited resources. For instance, a certain degree of non-compliance is probably desired to avoid the traffic burdens that would result from full compliance with posted speed limits.[126] Indeed, the safest driving speeds on most highways exceed posted limits.[127] However, because driving sixty-seven miles per hour in a zone posted at sixty-five violates the law, police can rely on the violation of a specific rule to justify stopping almost any motorist on the road. When the totality of

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124. *See* Memorandum from Ben Doherty, *supra* note 91 (discussing the criminal/noncriminal nature of speeding among the states and whether custodial arrest is available).

125. *See* Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1405 n.39 (2002) (citing police officers' statements on non-enforcement for drivers exceeding the speed limit by 7 to 10-15 mph).

126. *See* POSNER, *supra* note 118, at 587 (explaining the economic benefits of creating overinclusive speed limit laws).

127. Most traffic safety engineers agree that the safest speed limits should be set between the 80th and 90th percentile speed of free flowing traffic under good conditions, rounded to the nearest 5 mph interval. This is usually referred to as the "85th percentile rule" or 85th percentile speed. Thus set, about 85% of the traffic would be defined as traveling at legal speeds and only about 15% would be in violation. Most posted limits in the United States, however, are set between the 50th and 10th percentile speeds, thereby defining 50% to 90% of all drivers as driving illegally. Citations to research about the 85th percentile methodology and other speed limit research can be found at National Motorists Association, Speed Limits, Frequently Asked Questions, http://www.motorists.org/speedlimits. A point of great controversy with the National Motorists Association and others who support scientifically set speed limits for safety is the fact that the safest speed of travel with the lowest possible risk of having an accident is also around the 70th to 90th percentile speed range. *See infra* note 132 and accompanying text. Thus, when the speed limit is set at the 30th percentile speed, a common range for highway limits, it is illegal for anyone to travel at the speed which gives them the lowest risk of having an accident. The upshot is that, on most highways, the majority of motorists are prudent to violate the speed limit, which in turn leaves them subject to be stopped at the discretion of the police. The information in this footnote was provided to me by James Walker, a recognized expert in speed limits and traffic safety. *See* e-mail from James Walker, President, JCW Consulting, to author (Apr. 25, 2007) (on file with author). *See also* Susan L. Oppat, *Speed Limits Slated to Go Up*, ANN ARBOR NEWS, June 2, 2007, at A1 (identifying James Walker as speed limit expert and discussing safety and arbitrary enforcement concerns with speed limits set below the 85th percentile); James Walker, *Safety, Not Ticket Revenue Should Be Goal of Speed Limits*, ANN ARBOR NEWS, July 12, 2007, at A14 (same, and identifying Walker as traffic safety expert).

traffic and vehicle regulations are considered, the great majority of motorists are in violation of the law within a relatively short period of driving, affording the police the discretion to pick virtually any car and follow it until a violation of the law is observed.

A related factor that affects the degree of discretion that can be delegated through specific rules is the seriousness of the conduct proscribed. The less serious the conduct covered by a specifically defined offense, the larger the pool of violators will be, thereby increasing affirmative enforcement opportunities. Laws directed to minor or innocuous conduct enlarge the pool of violators because such conduct is likely to be consistent with reasonable, law-abiding behavior, and the public therefore will believe it is socially and morally acceptable. The public is also less likely to believe such conduct violates the criminal law, and thus the incentive to avoid such conduct is decreased. Consider traffic regulations. Although those rules necessary to ensure safety are generally known, the myriad driving and vehicle rules covers conduct too harmless to intuit as violative of social norms or the criminal law.

Even when the content of the law is known by the public, the incentive to comply will be minimal when the expected burden from violation is low. With traffic laws, for example, people often assume that their violation can result only in an inconvenient, temporary stop and a fine, not a custodial arrest and criminal prosecution. Notice the controversy surrounding the arrest of a mother in front of her children for seatbelt violations, which the Supreme Court upheld in *Atwater v. City of Lago Vista*.[128] Similarly, the lack of stigma associated with violating rules that proscribe common and innocuous conduct minimizes the incentive to avoid such conduct. Despite the status of traffic laws in many states as criminal,[129] the stigma associated with their violation is trivial. People routinely acknowledge, with as much indignation as embarrassment, having been stopped by the police for speeding,[130] and employment applications often inquire about prior criminal charges "other than traffic violations."[131] Indeed, because

128. 532 U.S. 317, 323 (2001). *See, e.g.*, Op-Ed., *A Supreme Wrong; Trashing the Fourth Amendment*, S.D. UNION-TRIBUNE, May 8, 2001, at B8 (criticizing the decision); Molly Ivins, Editorial, *Hey, All of You Petty Criminals, Now You're Going Straight to Jail*, CHI. TRIBUNE, May 10, 2001, at N31 (same).

129. *See* Memorandum from Ben Doherty, *supra* note 91 (noting the criminal or quasi-criminal nature of speeding in the states of Arizona, Delaware, Iowa, Louisiana, Massachusetts, Nebraska, New Hampshire, New Mexico, South Dakota, Utah, Vermont, and Wisconsin).

130. *See* Raymond, *supra* note 125, at 1406-09 (discussing public outrage over "speed traps").

131. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 26 (1996) [hereinafter Stuntz, *Civil-Criminal Line*] ("Job applications often ask for criminal histories but distinguish between traffic 'crimes' and other crimes, suggesting that the criminal label carries no sting for most traffic offenses.").

variance in speed among cars on the road contributes to the risk of accident, it is safer, not just more convenient, to exceed the speed limit to match the flow of traffic.[132] Because of the minimal burden and stigma, as well as potential benefits, associated with traffic violations, the rate of violation will tend to be high and increase the number of violators subject to enforcement.

Negative enforcement discretion, i.e., the freedom to ignore motorists, including those observed violating the law, is also unconstrained by specific criminal laws because of the legal and practical authority police have to ignore violators. By "legal authority," I mean the extent to which police are not required legally to make arrests that they are authorized legally to make. Constitutionally, police are prohibited from making unjustified arrests and may be held liable when such arrests violate clearly established law.[133] However, police generally have no constitutional obligation to arrest anyone.[134] It is true that some states have passed statutes containing general "full enforcement" obligations[135] or specific enforcement obligations with respect to certain crimes, such as domestic violence.[136] Sanctions for failing such obligations, however, rarely are invoked against individual officers. More importantly, full-enforcement obligations are non-constitutional and therefore do not restrain legislatures that desire to delegate broad enforcement discretion, as illustrated by the trend to replace full-enforcement statutes with ones containing more permissive language.[137]

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132. *See* Raymond, *supra* note 125, at 1427 nn.137-39 (stating that "speed variance" is the prime cause of accidents).

133. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must he sufficiently clear that a reasonable official would understand that what he is doing violates that right."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[Officials] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

134. Any duty to arrest is statutorily dictated, not constitutionally required. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 755-56 (2005) (stating that a duty to arrest or protect could not arise from the Due Process Clause, but must come from state law); Recznik v. City of Lorain, 393 U.S. 166, 174 (1968) (Black, J., dissenting) (describing statutory duty to arrest under Ohio law).

135. *See* Gregory Howard Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 133-43 (1984) (surveying and discussing "full enforcement" statutes).

136. *See* Barbara Fedders, *Lobbying for Mandatory Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 286-96 (1997) (discussing and analyzing mandatory arrest in the domestic violence context); *Developments in the Law, Legal Responses to Domestic Violence: New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1537 n.68 (1993) (surveying state mandatory arrest requirements for domestic violence and protection order violations).

137. *See* Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 IND. L.J. 873, 894 (1989) (noting a statutory trend toward discretionary enforcement).

By "practical non-enforcement authority," I mean the extent to which police can, as a practical matter, ignore a substantial amount of criminal conduct, even when statutorily obligated to enforce the law. To the extent specific rules are designed to cover common, innocuous conduct like minor traffic infractions, there is little risk of accountability for police who decline to investigate or to arrest violators. Such crimes are unlikely to have interested victims pressing for arrest and prosecution, and there is unlikely to be a public outcry over under-enforcement of traffic laws, at least with respect to minor violations. Contrast this with serious crimes. Even if courts lack authority to require police to step up enforcement of robbery and burglary crimes, the political heat from under-enforcement would create significant pressure to enforce these laws.

Another factor contributing to negative, non-enforcement discretion is limited resources. When specific laws are violated in large numbers and resources are limited, total or even significant enforcement is impossible. Traffic laws are again illustrative. Significant enforcement of traffic laws would require the devotion of far more law enforcement resources than is economically or politically feasible in most jurisdictions. As a consequence, the police and the public expect under-enforcement.

It also should be recognized that the exercise of negative and affirmative discretion are interdependent. Under-enforcement tends to cause the pool of violators to expand, which, in turn, reduces the feasible rate of enforcement. The lower the rate of enforcement, the lower will be the expected cost of violation, causing an increase in the rate of violation and the scope of affirmative enforcement opportunities. Under-enforcement also reduces the stigmatic cost associated with violation, thereby increasing the rate of violation. The greater the number of violators, the less police can enforce the laws against a high percentage of violators, thus increasing the pressure to make negative non-enforcement decisions. Reducing the rate of enforcement reduces the cost of violation, causing an increase in the rate of violation, and so on. In exercising their enforcement discretion, police can, and to some degree must, make choices between enforcement and non-enforcement based on criteria other than the fact of violation. While they may rely on legitimate public policy considerations, such as the seriousness of the violation, overly broad discretion without legislative guidance invites police officers to resort to their idiosyncratic values and preferences.

Raising the foregoing concerns over excessive police discretion does not assume that police generally act in bad faith. Indeed, it reflects the opposite assumption: that, in general, police only enforce against suspects they believe they are authorized to investigate.

Otherwise, the range of conduct that legislatures define as criminal would not affect police discretion because police would investigate whomever they desired, whether or not a law was violated. The concern, then, is not that police in general are overzealous bigots without respect for people's rights, but rather that the authority to enforce against too many people without adequate guidance from the law on the books inevitably leaves the police to rely on their own idiosyncratic hunches and sub-conscious stereotypes. With vague laws, the concern is that police will select among people plausibly violating the vague law, not that police will harass anyone without any statutory authorization. While harassment and invidious discrimination by some police is inevitable, a full appreciation of the concerns underlying the void-for-vagueness doctrine includes recognizing that lack of enforcement guidance encourages police inadvertently to resort to stereotypes in a good faith effort to investigate people they believe are acting suspiciously. Similarly, with over-criminalization through specific rules, such as traffic regulations, the dearth of legislative enforcement guidance leaves many police officers, acting in good faith, to rely on ad hoc or stereotypical assumptions in selecting among observed violators.

The discussion thus far does not demonstrate that specificity in the written law is not desirable or preferable to vagueness. The point is that formal specificity in the legislative definition of the law does not assure that the law will be enforced in a consistent and predictable manner. Predictability depends on many factors other than the language of legislative rules. To the extent that specific rules are defined to cover conduct that reasonable people would assume is legal, or is so underenforced as to provide the same impression, then the public will not have the capacity to predict the occasions of enforcement. Moreover, even to the extent that potential targets understand the content of specific rules, the overwhelming under-enforcement of such rules leaves unclear when they will be enforced. When social norms and enforcement patterns are unpredictable, the criminal law is uncertain, even though its written content is clear.

The foregoing observations suggest that formally specific rules may be used to delegate as much discretion as vague laws. In some respects, moreover, specific rules may confer more discretion than vague laws. First, consider that a standard that is vague on its face may be more predictable than a specific rule directed at similar conduct if the specific rule is inconsistent with social norms and enforcement policy. For example, a police officer probably has a greater range of choice in selecting against whom to enforce the speed limit than he does to enforce a law prohibiting unreasonably fast driving. Although a number of motorists could be stopped based on

reasonable suspicion of driving unreasonably fast, the great majority of motorists could be stopped, with complete confidence, for violating the speed limit.[138] The inconsistency between the conduct proscribed by specific speed limits and the reasonable expectations of enforcement by the public creates a larger pool of violators than does the vaguer standard against unreasonably fast driving.

Second, consider one concern with vagueness: that police may select suspects for arbitrary or discriminatory reasons with the plausible hope that a court will convict the suspect under a statute sufficiently vague to apply to whatever conduct the suspect engaged in. While this concern is legitimate, it is ameliorated by the fact that a court may decline to convict the suspect if the conduct does not merit punishment in the court's view. Not only may a court disagree with applying a vague law to a defendant whose conduct was not serious, but the requirement that courts, unlike police, act openly and give reasons for their decisions further restrains the extent to which a court would be willing to endorse an excessively broad interpretation of a vague law.[139] To be sure, the arrest itself under a vague law would be difficult for a court to prevent, but at least the risk of arbitrary or discriminatory convictions is minimized by the court's authority to construe for itself the contours of a vague law.

With specifically defined crimes, in contrast, a court has less authority to overrule a police officer's decision to subject a suspect to criminal proceedings. When evidence supports the violation of a specific law, a court cannot as easily dismiss the charge simply because it disagrees that the defendant's conduct justified proceeding with the charge. Thus, while specific laws that apply to widespread, innocuous conduct can create as much enforcement discretion as vague laws, they limit judicial discretion and thereby enhance the discretionary authority of police, not only as to whether to arrest, but also whether to ensure a conviction.[140]

To illustrate, a vague law that prohibits unreasonably fast driving may be applied to a wide range of conduct within a police officer's discretion. However, a court looking at the same facts and having to explain why the prosecution should proceed may decline to

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138. *See* Raymond, *supra* note 125, at 1397-99 (citing studies that indicate that most drivers speed to some degree).

139. Although referring to judicial crime creation, rather than judicial construction of vague laws, Herbert Packer explained that the obligation of courts to act openly and give reasons for their rulings minimizes the risk that they will act arbitrarily or otherwise abuse their discretion. *See* PACKER, *supra* note 55.

140. William Stuntz makes a similar point about the effect of numerous, specifically defined crimes in enhancing prosecutorial discretion over judicial review. *See* Stuntz, *Pathological Politics*, *supra* note 27, at 561.

find that the speed was unreasonable even when it accepted the facts reported by the officer. In contrast, when a motorist is charged with speeding, a court would be hard-pressed to overrule the officer's judgment that a specific speed limit was violated. Thus, an officer who observes a violation of a specific rule is able to make the charge "stick" more than if the officer enforces a vaguely defined offense. I recognize that police do not necessarily desire convictions for low-level criminal conduct, often using such crimes for street-sweeping and order-maintenance purposes, but to the extent that judicial review of arrests places any constraint on police behavior, a vague law may provide greater restraint than a specific law, the violation of which a court cannot as easily second guess.

A third way in which specific laws can create a higher degree of discretion than do vague laws is with respect to the penalty range applicable to a suspect's conduct. In a world where vague laws are tolerated, legislatures have less incentive to enact several criminal laws, because a few cover the majority of cases. To ensure a similar scope of coverage under a regime that requires specific rules, legislatures have an incentive to enact numerous, targeted rules, many of which will simultaneously apply to a single course of conduct. With an array of violated specific rules, an officer has a range of charges to choose from, enabling him to decide not only whether to arrest and charge, but also whether to file one or several charges, creating the potential for a broader penalty range, because multiple charges could be punished consecutively or could raise the penalty range under the applicable sentencing system.[141] With increased discretion in the penalty threat, and not just the conviction threat, a police officer has a greater degree of discretionary power to employ in a potentially illegitimate manner.[142]

The foregoing discussion demonstrates, at a minimum, that specific rules can be used to delegate discretion substantially comparable to that delegated through vague laws in a world—our world—in which fairly innocuous conduct may be defined as criminal and under-enforcement of such crimes is widely tolerated. Indeed, we have seen that, in some respects, specific laws can confer more discretionary authority than vague laws. The question arises whether

141. William Stuntz makes a similar point about the effect of specific rules on prosecutorial discretion to determine a defendant's penalty. *See id.* at 519-20.

142. It should be acknowledged that, for the great majority of crimes, prosecutors will have discretion over whether to prosecute all the charges made by a police officer. The leverage afforded a prosecutor by a police file alleging multiple charges will, however, likely be used by the prosecutor to induce a plea agreement less favorable to the defendant than if fewer charges had been made by the arresting officer.

legislative specificity contributes anything to constraining the delegation of discretion.

Whether legislative specificity constrains the delegation of discretion depends on the causal relationship between the content of law and its enforcement. Only if the content of law affects enforcement decisions could the specificity of that content have an effect on enforcement decisions. The content of law, which sets forth the elements of crimes, determines what conduct is illegal. When an officer decides whether to enforce the law by investigating and potentially arresting a suspect, he must make at least two determinations: whether a suspect is committing a crime and, if so, whether to enforce the law against the suspect. The first inquiry is a legal interpretation question that involves applying the elements of a defined crime to the facts of a suspect's conduct. The second question involves a largely discretionary determination, weighing the cost of enforcement against that of non-enforcement in light of a variety of legitimate considerations, such as the seriousness of the crime and resource constraints, and more problematic considerations, such as the race or sex of a suspect, which may nonetheless affect an officer's calculus as to whether to enforce the law against a particular suspect.

The content of law thus affects enforcement discretion to the extent that an officer's determination that a suspect has committed a crime affects his ultimate decision to enforce against the suspect. The conventional assumption is that the first determination largely determines the second; that is, whether an officer believes a suspect has committed a crime usually will cause him to enforce the law against the suspect. Traditionally, this assumption is reasonable, especially with respect to *malum in se* crimes or other crimes involving dangerous conduct. An officer who witnesses such a crime usually will intervene. Conversely, although there always will be exceptions of abuse, most officers will not subject a suspect to enforcement procedures if the officer believes no law has been violated. The content of law, in effect, expresses the message that an officer *should* enforce the law whenever it has been violated and the message that he *should not* enforce the law when it has not been violated. To the extent law enforcement officers abide by these legislative commands, the content of law largely predicts its enforcement. To the extent the content of legislation guides enforcement, then enforcement decisions will reflect the democratic, collective agreements that produced the legislation.

Specificity in the content of law thus affects enforcement discretion by making the determination whether the law has been violated more clear and, consequently, more consistent and predictable from one officer to the next. Vague laws, by definition, are

ambiguous or otherwise unclear in certain applications. Under vague laws, there will be circumstances where officers are more likely to differ in their determination of whether the law has been violated–the violation determination–than they would under more specific laws. Some officers may believe certain conduct violates the law, indicating they should enforce it, whereas other officers believe similar conduct complies with the law indicating they should not intervene. Vagueness in the law thus produces more inconsistency and unpredictability with respect to the violation determination. Accordingly, to the extent the violation determination causes the enforcement decision, specificity in law contributes to the consistent and predictable enforcement thereof.

As the discussion of traffic enforcement reveals, however, the connection between the content of law and its enforcement breaks down when the law is defined in certain ways. Defining crimes to include, for example, conduct which is harmless or trivial, commonly engaged in by reasonable, law-abiding people, and grossly under-enforced, can dampen the causal relationship between an officer's determination that the law has been violated, which is based on the content of law and the determination of whether he will enforce it. To the extent the police, the public, and the legislature are indifferent to minor traffic violations, such violations merely authorize enforcement without commanding or even encouraging enforcement based on the violation alone. Where traditionally a violation of law expressed the normative message to the police that they *should* enforce the law, these traffic violations merely send the message that they *may* enforce the law. To the extent officers are indifferent toward enforcing the law based on its violation alone, they will tend to rely on other factors in deciding whether to enforce against a particular suspect. If, for example, an officer suspects a motorist may be carrying contraband for reasons other than the fact of speeding, the officer has an incentive to rely on the contraband suspicion in selecting that motorist from among the pool of speeders, all of whom he is otherwise indifferent toward. If the officer believes race or some other illegitimate or arbitrary factor increases the suspiciousness of an observed motorist, such a factor will contribute to his decision to enforce a traffic violation that, by itself, would not motivate the officer to intervene. More broadly, when officers face far too many minor traffic violations to enforce, are personally indifferent to them, and are unaccountable for ignoring them, they inevitably will rely on a range of legitimate and illegitimate factors peculiar to each officer in selectively enforcing the law. Despite their specificity, traffic laws vest so much discretion in police that predicting enforcement is exceedingly difficult.

Does it follow that legislative specificity serves no useful role in reducing discretion? No. It means that specificity in the law guides

enforcement discretion only to the extent the violation determination affects enforcement decisions. Admittedly, if specific laws criminalized all conduct and left police completely free to ignore violators, then the content of specific laws would provide no more guiding or predictive value than the vaguest of laws. Police could always investigate or ignore anyone. If, however, a specific law leaves some room for compliance, then it will make predictable those occasions when enforcement is not authorized even if the law criminalizes so much conduct as to make such occasions rare. In those instances in which vague laws create uncertainty about the violation determination, police will vary in determining what conduct justifies enforcement. In the context of traffic laws, their specificity leaves some, though admittedly little, room for motorists to comply with the law and for police to know consistently on those occasions that enforcement is not authorized and, therefore, should not be exercised.

The benefits of specificity in traffic laws, however, should not be exaggerated. To the extent specific traffic laws reach a wide range of conduct, compliance may be very difficult as a practical matter, even if theoretically possible. For example, a motorist armed with comprehensive knowledge of the traffic laws may still find it difficult to adhere constantly to all of them. Furthermore, even if compliance with specific laws can be achieved with greater confidence than can compliance with vague laws, the result may be that members of groups more likely targeted by discriminatory enforcement are required to comply with the law on the books whereas members of non-targeted groups can violate the law without significant risk of enforcement. For example, although black motorists may well minimize the risk of traffic stops by driving in strict compliance with the speed limit, the result is that blacks are effectively subject to a different speed limit than whites. It is hardly a satisfactory cure to the risk of discriminatory enforcement created by specific-rule discretion that members of minority groups must abide by standards of conduct that the majority may safely ignore. Nevertheless, such a state of affairs is still preferable to a regime in which a vague crime—such as "prowling by auto"[143]—leaves minority motorists at a complete loss as to when, if ever, they can avoid enforcement. Thus, although specificity is no panacea against discriminatory enforcement, it contributes some guidance to the determination of when enforcement is authorized and in so doing contributes some consistency and predictability to enforcement itself.

143. The landmark case of Papachristou v. City of Jacksonville invalidated a law on vagueness grounds under which four defendants were charged and convicted for "prowling by auto." 405 U.S. 156, 157-58 (1972).

The amount of discretion created by specific rules, then, does not result from the rules' specificity, but rather from the range of conduct they proscribe, combined with a lack of effective obligation of police to enforce them. However, although specificity alone is insufficient to make enforcement predictable, it does contribute to predictability, provided other mechanisms serve to limit either the scope of conduct proscribed or the authority of police to ignore violations. Such other mechanisms are lacking in the case of traffic laws. Before suggesting, in Part III, what strategies may help to constrain the delegation of enforcement discretion through specific rules, the following Section considers why current doctrines are inadequate to the task.

B. Discretion and Antidiscrimination Review

Recall that in *Whren*, the Supreme Court's response to concerns over the discriminatory exercise of discretion created by traffic laws was, essentially, "prove it."[144] This response is inadequate because it is inherently impractical to prove a discriminatory intent by a decisionmaker vested with broad discretion.[145] Indeed, in developing the void-for-vagueness doctrine, the Court previously recognized that broad discretion precludes effective detection of discrimination. The Court invalidated vague laws that delegated broad discretion to the police on the ground that such laws created an intolerable risk of arbitrary and discriminatory enforcement.[146] The risk of discrimination would exist only to the extent that discrimination could not be detected directly. Otherwise, courts could simply ensure through direct review of vague-law enforcements that illegitimate reasons did not play a role. But the Court recognized that the broad discretion created by vague laws effectively shielded such decisions from antidiscrimination review. As a prophylactic to guard against discrimination, therefore, the Court required legislative specificity. To

144. *See* discussion of Whren v. United States, 517 U.S. 806 (1996), *supra* notes 98-104 and accompanying text.

145. Several courts and commentators have recognized the difficulty of identifying discriminatory motives in a broadly discretionary decision. *See, e.g.*, City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758-59 (1988) (noting that discretion in city licensing process allows discrimination against "unfavorable[] expression"); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1361-62 (2005) (observing that broad discretion makes discrimination difficult to detect on a case-by-case basis); Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 HARV. L. REV. 2098, 2104-05 (2001) (observing that broad discretion gives rise to cloaked racial discrimination).

146. *See Papachristou*, 405 U.S. at 168-71 (invalidating an anti-vagrancy statute); Kolender v. Lawson, 461 U.S. 352, 359-62 (1983) (invalidating a law requiring citizens to provide "credible and reliable" identification).

the extent that legislatures can delegate a comparably broad degree of discretion to police through specific rules, judicial detection of discrimination should be similarly ineffective.

Thus, by referring complaints of excessive specific-rule discretion to the Equal Protection Clause, the *Whren* Court failed to appreciate its earlier insight that antidiscrimination review of broad discretion is impractical, an insight of considerable merit. Consider why. Antidiscrimination review requires comparing cases treated differently to determine whether the difference in treatment is explainable by reference to legitimate factors that distinguish them, or whether the cases are similar in all legitimate respects, raising an inference that an illegitimate factor motivated the difference in treatment. Identifying illegitimate motivations is facilitated when the legitimate factors on which the decision may be made are relatively few and when the weight to be accorded each factor is known and measurable. In such circumstances, the legitimate differences between cases can be ruled out more easily. In contrast, identifying an illegitimate motivation is complicated when a greater number of legitimate factors may enter a decision and when the decisionmaker has greater flexibility regarding the weight accorded to each factor. In these circumstances, the probability is comparatively higher that some legitimate explanation involving some combination of relevant factors weighted in some way will happen to be consistent with the decision, even if the proffered explanation was not the actual reason for the decision.

Discretion decreases the likelihood that an illegitimate motivation behind a decision will be detected because it increases the range of legitimate explanations that can be articulated in defense of the decision. Discretion means that the decisionmaker has a broad range of choice, either as to which factors to base the decision on or how much weight to give to each factor, or both. Total discretion tends toward an infinite number of factors that may be relied upon and complete prerogative over the weight to be given each. There is thus an inverse relationship between the degree of discretion a decisionmaker has and the ability to rule out legitimate explanations for a decision that was in fact motivated by an illegitimate reason.

The inverse relationship between discretion and antidiscrimination review serves to explain the difficulty of proving discrimination in a variety of contexts in which discretion is broad. Consider, for example, prosecutorial charging decisions. In *United States v. Armstrong*, the defendant proffered evidence that the District Attorney's office was targeting black defendants selectively for federal crack prosecutions sufficient to convince the District Court to order discovery from the government regarding its criteria for prosecuting

crack defendants under federal law.[147] The government refused to comply, and the trial court dismissed the charges.[148] Reversing, the Supreme Court held that the trial judge abused her discretion in ordering discovery from the government before the defendant had made a more convincing showing that the government had failed to prosecute similarly situated white defendants.[149] By "similarly situated," the Court seems to mean indistinguishable on any grounds that might explain declining to prosecute white defendants while subjecting black defendants to federal prosecution. Only then would an inference that race played a role in the exercise of prosecutorial discretion be sufficiently convincing. After *Armstrong*, courts should not permit even an inquiry into a plausible allegation of racial discrimination unless the defendant can already demonstrate convincingly that other similarly situated suspects of a different race were ignored. Given the myriad facts and circumstances unique to each crime and the broad discretion accorded prosecutors over which to charge, it would be extremely difficult to make the requisite showing. My research has disclosed no case in which a defendant successfully demonstrated that his prosecution was racially motivated or, after *Armstrong*, any case in which the defendant was granted discovery to obtain support for such a showing.[150] Hopefully, racial—and other illegitimate—discrimination in prosecutorial charging is exceptional, but the broad discretion vested in such decisions suggests that we will never know.

The context of capital sentencing reveals that, even when a defendant can prove a statistically significant pattern of discrimination across cases, proving discrimination in a particular case remains extremely difficult. In *McCleskey v. Kemp*, the Court assumed the validity of a sophisticated statistical study demonstrating that juries in Georgia systematically favor imposing the death penalty on defendants found guilty of murdering white

147. 517 U.S. 456, 459 (1996).

148. *Id.* at 461.

149. *Id.* at 469-71.

150. Conversely, courts have dismissed claims of racial discrimination for failing to meet *Armstrong*'s rigorous standard. *See* United States v. Bullock, 94 F.3d 896, 899 (4th Cir. 1996) (finding against black defendant who claimed his traffic stop "was motivated by a race-based drug courier profile" because he "failed to meet the rigorous standard for proving such a violation" imposed by *Armstrong*); United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996) (finding that black bicyclist stopped for lack of headlamp who "showed the only people arrested for violating the statute during a certain month were black" and that "there are no lights on 98% of all bicycles in the Des Moines area, which is populated predominantly by white people" did not meet his *Armstrong* burden, as he "presented no evidence about the number of white bicyclists who ride their bicycles between sunset and sunrise," though police admitted they had "targeted" a high-crime area "populated primarily by minorities" (cited and described as above in Lafave, *supra* note 81, at 1861 n.99).

victims.[151] The evidence also suggested that prosecutors were more likely to seek the death penalty in cases involving white victims.[152] Nonetheless, the Court rejected the defendant's claim that the risk of discrimination warranted reversal of his death sentence. The Court reasoned that the composition of each jury is unique and therefore the evidence of past jury discrimination did not establish that his particular jury had acted on racial grounds.[153] With respect to the risk of prosecutorial discrimination in seeking the death penalty, the Court viewed the sample as insufficiently large with respect to the particular prosecutor to establish a pattern of racial discrimination.[154] Although the Court expressed concern that capital punishment in Georgia appeared to be racially biased, it simply observed that with discretion comes the risk of its abuse and that it is for the legislature to determine whether that risk is too great.[155] My research has disclosed no case before or after *McCleskey* in which a defendant has successfully challenged his death sentence as racially biased, despite continued evidence that the race of the victim plays a statistically significant role in capital sentencing.[156]

Peremptory challenges in jury selection also reveal the difficulty of proving racial discrimination by a decisionmaker vested with broad discretion. Traditionally, the peremptory challenge could be based on any reason and did not require explanation. In a line of cases beginning with *Batson v. Kentucky*, however, the Supreme Court has interpreted the Equal Protection Clause to forbid the exercise of peremptory challenges based on race or sex.[157] Here, the results are a

151. 481 U.S. 279, 292 n.7 (1987).

152. *Id.* at 286-87.

153. *Id.* at 293-95.

154. *Id.* at 297 n.17 ("Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts.").

155. *Id.* at 312-13, 319.

156. *See* Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL'Y 1, 16 (2005) (quoting Professor Sam Gross, whose findings show that defendants "cbarged with killing white victims are far more likely to be sentenced to death than those who were charged witb killing black victims"); *see also* David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 202 (2003) (reviewing numerous post-1990 studies and finding widespread race-of-victim discrimination by juries in imposing the death penalty); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 644 n.120 (1998) (citing sources indicating that prosecutorial decisions to seek death penalty appear to be influenced by race of victim).

157. 476 U.S. 79 (1986); *see also* J. E. B. v. Alabama *ex rel.* T. B., 511 U.S. 127, 145-46 (1994) (holding that peremptory challenges based on gender violate the Equal Protection Clause); Georgia v. McCollum, 505 U.S. 42, 46-59 (1992) (holding that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 617-18

qualified failure. Given the vast range of race-and-sex-neutral factors on which a litigant can purport to base a peremptory challenge, identifying those instances in which race or sex played a motivating role has proved notoriously difficult.[158] There have been cases in which *Batson* challenges were successful. However, the great weight of opinion is that such cases are rare, reach a fraction of actual cases of discriminatory challenges, and involve circumstances in which a litigant has, in view of the trial judge, struck a series of jurors of a particular race without any apparent non-racial rationale.[159] The conventional view is that a litigant gets at least one and probably two bites at discrimination before there is any risk that the trial judge will find a racially discriminatory motive.[160] Justice Thurgood Marshall's concurrence in *Batson* was probably on the mark: the only way to prevent racial discrimination in the exercise of peremptory challenges is to eliminate them altogether.[161]

The difficulty of proving discrimination within broad discretion also can be seen outside the criminal justice system. Employment decisions, such as hiring and firing, are more easily monitored for racial discrimination when the permissible grounds for such decisions are limited, rather than "at will," facilitating cross-case

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(1991) (holding that a private litigant in a civil case may not use peremptory challenges on account of race); Powers v. Ohio, 499 U.S. 400, 415 (1991) (holding that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause prohibits a prosecutor from challenging potential jurors solely on account of race).

158. *See* Amanda S. Hitchcock, *"Deference Does Not By Definition Preclude Relief": The Impact of* Miller-El V. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328, 1334 (2006) (arguing that Batson is essentially meaningless); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 633 (1994) (arguing that, because of *Batson*'s evidentiary requirements, courts are unable to detect illegitimate stereotypes on which litigants rely in selecting juries); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 179-80 (2005) (noting that race-based challenges continue despite Batson because "courts are not equipped to evaluate the validity of a litigant's purportedly neutral explanations"); Shari Seidman Diamond et al., *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 CORNELL J.L. & PUB. POL'Y 77, 80-83 (1997) (discussing the minimal effect of Batson).

159. *See* Lucy Adams, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?*, 32 AM. J. CRIM. L. 381, 399 (2005) (citing different extreme prosecutorial explanations that have survived a *Batson* challenge); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459 (1996) (citing statistics showing that success rates of *Batson* challenges by criminal defendants are very low).

160. *See* Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 554-55 (1992) (indicating that parties now just have to know how much discrimination is allowed before judicial intervention).

161. Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

comparisons.[162] Consider also that the use of race in college admissions for affirmative action purposes is facilitated by the degree of discretion vested in admissions officers.[163] Indeed, this may explain why conservatives increasingly advocate exclusive reliance on "standardized" criteria rather than simply excluding race from an otherwise broadly discretionary decision; the exclusive use of standardized criteria would facilitate determining whether admissions officers were engaging covertly in racially preferential decisions.[164] Finally, consider the placement of children in child custody disputes and in adoption cases, contexts in which consideration of race continues to be controversial.[165] It is commonly recognized that the broad discretion conferred in child placement agencies and family courts by the "best interests" standard frustrates the ability to determine the extent to which placement decisions are based on race.[166]

Turning to the context of traffic stops, the foregoing analysis suggests that a motorist who was discriminated against would have little chance of proving it. As previously noted, the broad array of traffic laws affords the officer, as an initial matter, the ability to readily identify a traffic violation as a justification for the stop. Furthermore, under *Whren*, the officer is permitted pretextually to single out motorists from observed traffic violators for objectives unrelated to the traffic violation, even without reasonable suspicion to

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162. Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 402 (2001) (suggesting that it is too hard to detect discrimination when a case is not an exception to the at-will rule).

163. *See* BERNARD SCHWARTZ, BEHIND *BAKKE*: AFFIRMATIVE ACTION AND THE SUPREME COURT 156 (1988) (noting that discretion in admissions allowed by *Bakke* permitted affirmative action).

164. *See* Robert P. George, Gratz *and* Grutter*: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1639 (2003) (noting that discrimination can be accomplished as long as it is hidden in the admissions process and calling those admission policies "clearly unconstitutional"); Terence J. Pell, Editorial, *Camouflage for Quotas*, WASH. POST., June 30, 2003, at A15 (critiquing hidden discriminatory admissions policies at major universities).

165. *See* Elizabeth Bartholet, *Cultural Stereotypes Can and Do Die: It's Time to Move on with Transracial Adoption*, 34 J. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 315, 315-20 (2006) (discussing the controversy and evolution of race considerations in adoption); Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 932-42 (1994) (describing the battles over transracial adoption among adoption agencies and in the courts); Christine M. Metteer, *A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy*, 38 BRANDEIS L.J. 47, 47-52 (1999) (showing the controversy that has developed regarding racial considerations in child-placement).

166. *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION 375-76 (2003) (showing a case where a judge was able to hide a race-based custody decision through discretion); R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 HARV. C.R.-C.L. L. REV. 455, 474 n.106 (2003) (book review) (noting ways that discretion in child placement can allow for racial considerations).

support the ulterior objective. Accordingly, to prove a racial motive the defendant would have to establish that the officer ignored motorists of a different race who violated the same traffic laws, in the same or more egregious manner, and that there were no circumstances in defendant's case supporting an ulterior police motive for which the traffic stop served as a pretext. Within the large pool of traffic violators, innumerable circumstances may distinguish motorists from one another if, as *Whren* permits, the circumstances need not relate to the traffic violation. For example, even if a suspect could identify other comparable or even more egregious traffic violators known to, but ignored by, the same police officer who stopped him, the officer could readily offer factual differences between the suspect and the other motorists that were suspicious to the officer, although not legally sufficient to justify the stop independent of the traffic violation. Such differences could include the age, posture, gesture, hair, or clothing of the driver, the appearance or number of his passengers, the make, model or condition of the vehicle, or the direction from which the vehicle was coming. Even if such factors were not particularly probative of suspicious activity, the permissibility of pretextual stops and the presumption of good faith accorded police officers would almost always lead a court to credit any race-neutral explanation given for the stop.[167]

Indeed, per *Armstrong*, the defendant would have to make a convincing showing that the officer ignored motorists similarly situated in all respects before a court would permit him to inquire, or otherwise discover from the officer, anything about the reasons he stopped the defendant or whether and why he had ignored other motorists.[168] In contrast to *Armstrong*, moreover, even a showing of similarly situated motorists that were not stopped may not constitute a sufficient showing of discrimination to justify further inquiry from the officer. The impossibility of stopping all speeding motorists means an officer could claim plausibly, even if falsely, that he had to make a

167. William Stuntz observes that the ability for an officer to point to *a traffic violation* as the reason for stopping a black motorist enables the officer to readily identify a race-neutral explanation for the stop. Stuntz, *O.J. Simpson*, *supra* note 38, at 871-72. My point goes further in that an officer's ability to point to *a pretextual reason* as the basis for selecting among traffic violators gives an officer virtually limitless reasons to justify a stop even where the motorist can show the police ignored other motorists who were violating the traffic laws more egregiously than he was.

168. Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United States*: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 729-33 (2000) (demonstrating the two ways to challenge a race-based arrest in court and stating the limitations following *Armstrong* and *Whren*).

selection from among identically offending motorists.[169] Consider also that even if statistical evidence were available that suggested the police department for which the officer works has engaged in racial profiling, *McCleskey* suggests that courts would find such evidence inadequate unless it contained a sufficient sample of stops by the particular officer in question, and then only if non-racial grounds could be ruled out to explain the stop in the instant case. And although peremptory challenges have been successful occasionally, such occasions are rare, tend to involve a stark pattern of suspicious strikes by a particular litigant, and, perhaps most importantly, occur in view of the trial judge, who could observe the same circumstances on which the litigant purportedly relied. In contrast, in determining the circumstances surrounding an allegedly discriminatory traffic stop, the trial judge would have to rely entirely on the respective accounts of the officer, who enjoys a presumption of good faith, and a defendant, who is usually before the judge because evidence of more serious criminal activity was discovered during the traffic stop. Although a discriminatory purpose may be identifiable under unusual circumstances, the breadth of discretion conferred by traffic laws suggests that such circumstances would have to be extreme. Accordingly, it would seem that the traffic stop is more "peremptory" than the peremptory challenge.[170] The risk of racial profiling, moreover, is heightened by the extent to which race is believed by law enforcement to predict criminality.[171] Law-abiding people and public officials, who generally desire to comply with legal proscriptions on racial discrimination, may nonetheless find it difficult to ignore race when they believe attention to it serves laudable purposes.[172] For example, college admissions officers, child placement workers, and litigants selecting juries may find it difficult to be colorblind when they believe attention to race would serve, respectively, to rectify racial injustice, benefit the interests of children, or ensure a jury sympathetic to their case. If police believe racial profiling contributes

169. Realistically, one police officer can only stop and question or ticket three to six vehicles per hour. E-mail from James Walker to author, *supra* note 127. If, for example, one thousand vehicles per hour are going past the officer's position and 82% are violating a low posted speed limit, the officer can easily claim that the failure to stop other vehicles of equal or greater speed was unavoidable.

170. "Peremptory," including as used in the term "peremptory challenge," refers to a decision that is final, absolute, or not requiring any shown cause. BLACK'S LAW DICTIONARY 1172 (8th ed. 2004).

171. *See* Karlan, *supra* note 38, at 2006 (describing several studies of police behavior showing that race is a factor in profiling); Roberts, *supra* note 27, at 806-807 ("Police officers are particularly notorious for using race as a proxy for criminal propensity.").

172. *See* KENNEDY, *supra* note 166, at 376 (recounting how a judge allowed evidence regarding an interracial relationship and later said that race did not affect his decision).

effectively to law enforcement, the incentive for officers to take account of race is high. To the extent that the Equal Protection Clause is ineffective at identifying and therefore deterring such tendencies, an expectation that police will ignore race is unrealistic. Accordingly, by referring the defendant in *Whren* to the Equal Protection Clause in the face of the broad discretion conferred by traffic regulations, the Court effectively denied any meaningful safeguard against racial, or other illegitimate, discrimination.

III. REMEDIAL AND CONSTITUTIONAL IMPLICATIONS

According to the foregoing analysis, legislatures can delegate virtually limitless discretion to police through specific rules, and the Court's antidiscrimination response is inadequate to check the abuse of such discretion. This raises the question of what, if anything, can be done to limit the degree of discretion that can be delegated through specific rules. Section A considers some strategies courts might employ to reduce the discretion delegated to executive officials through specific rules. Section B considers potential constitutional objections to their implementation. As before, the primary focus of analysis will be traffic enforcement.

Two clarifications of scope are worth emphasis at the outset. First, my aim is not to propose a uniquely effective approach to limit police discretion. A rich body of scholarship discusses a variety of promising, if imperfect, approaches to managing police discretion.[173] Making practical improvements to such approaches is outside my expertise. Rather, my objective is to draw on the previous analysis of the relationship between rule specificity, discretion, and antidiscrimination to identify key factors and considerations that could inform the design of discretion-reducing measures. I will also note, without attempting to resolve, some difficulties that such strategies would encounter.

Second, my aim is not to engage directly the ongoing debate over precisely how much discretion police should have and whether

173. *See generally, e.g.*, KENNETH CULP DAVIS, POLICE DISCRETION (1975) (discussing policies and research regarding discretionary enforcement by police officers); Cole, *supra* note 27 (summarizing and criticizing popular critiques of and approaches to police discretion); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960) (discussing how visibility of non-enforcement can be increased and evaluated); Jeffries, *supra* note 26 (discussing how to properly balance factors affecting judicial and law enforcement discretion in creating penal law); Kahan & Meares, *supra* note 27 (arguing for an abandonment of close judicial control of police discretion on the grounds that minorities can now effectively protect themselves through the political process); Livingston, *Police Discretion*, *supra* note 27 (calling for a rejection of vagueness doctrine enforcement against community based, order enforcement policing).

limits thereto should be political or judicial. Difficult questions will persist over the extent to which police discretion, including in traffic enforcement, is justified in the interests of crime control and the war on terrorism. My claim is limited to the widely accepted proposition that *some* limit on police discretion is required by the rule of law, and my inquiry asks—assuming legislatures fail to design specific laws that constrain discretion within meaningful limits—how might courts place some limits on discretion consistent with their constitutional role.[174]

A. Remedial Strategies for Limiting Specific-Rule Discretion

As we have seen, police discretion derives from freedom of enforcement choice in both affirmative and negative directions, that is, having a large pool of potential targets to enforce affirmatively against and having broad latitude in declining to enforce the law even when authorized to do so. Accordingly, constraints on police discretion should involve either limiting the scope of affirmative enforcement choice or of negative non-enforcement choice, or both. Limiting affirmative choice would require narrowing the authority to subject motorists to enforcement action, while limiting negative choice would require reducing the authority to ignore motorists who violate the law.

Constraining the degree of affirmative and negative choice delegated through specific rules should address those factors that tend to create unfettered discretion and the doctrinal impediments to checking the abuse of such discretion. As the previous analysis of traffic laws reveals, broad discretion can be delegated through specific rules through a confluence of various factors and circumstances, which include criminalizing conduct that is: commonly engaged in; largely innocuous, harmless or trivial; impractical or inconvenient to avoid; and significantly underenforced. Furthermore, politicians and the public are largely indifferent to minor violations, and police are unaccountable for under-enforcement due to the invisibility of non-enforcement and the public indifference toward the violations. At the same time, police have strong incentives to exploit the benefits of pretextual enforcement for purposes other than preventing the conduct that legally justifies the enforcement. Finally, current constitutional doctrines not only expressly permit pretextual

174. Thus, if legislatures revised traffic laws so that only hazardous violations were illegal and speed limits were set to define the normal safe driving behavior of the average motorist as legal, courts would not need to consider imposing limitations on enforcement discretion.

enforcement, but they also make it impractical to prove illegitimate enforcement motivations.

Ameliorating the risks of discretion created by specific rules could begin with reforms to the Equal Protection and Fourth Amendment doctrines that, as currently conceived, preclude effective constraints on arbitrary and discriminatory enforcement. Regarding equal protection, curbing the discriminatory enforcement of traffic laws without disabling their enforcement altogether could be pursued by easing the burden of proving discriminatory intent. A useful change could be to shift the burden of proof to the government when enforcement of certain laws appears to have a substantial discriminatory impact. Borrowing from employment discrimination law[175] and other disparate-impact doctrines,[176] prohibiting discrimination would be more effective if discriminatory impact triggered a presumption of discriminatory intent, rather than requiring proof of actual intent. The Court in *McCleskey* in fact gave serious consideration to applying the employment discrimination framework to juries, but concluded that the uniqueness of each jury made any inference based on patterns of past jury behavior unfounded.[177] Statistical evidence may be more probative in evaluating the motives of individual police officers than individual juries. To the extent that law enforcement agencies can be expected to

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175. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that employer must show how a business practice relates to job performance if that practice is discriminatory in effect); Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1074-81 (1998) (giving a brief history and explanation of the difference between disparate treatment and disparate impact in employment law).

176. The Supreme Court has applied disparate impact analysis, or something close to it, in the context of jury selection, school desegregation, electoral procedures, welfare, public facilities, and municipal services. *See generally* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 833 (1993) (observing that some federal courts have been more willing to infer discriminatory intent from disparate impact in the context of municipal services than in the context of environmental justice claims); Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (demonstrating throughout that, in the context of housing, employment, jury selection, electoral procedures, and school desegregation, the Court has been willing to infer discriminatory intent on what is essentially a showing of discriminatory impact); Joelle S. Weiss, *Controlling HIV-Positive Women's Procreative Destiny: A Critical Equal Protection Analysis*, 2 SETON HALL CONST. L.J. 643, 682 n.189 ("Similarly, the Supreme Court has applied the disparate impact model in the voting, welfare, education, and public facilities contexts."); *see also* Natonabah v. Bd. of Educ., 355 F. Supp. 716, 724 (D.N.M. 1973) (applying disparate impact theory in educational setting); Fair Hous. Council v. Ayres, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (applying disparate impact theory to housing).

177. 481 U.S. 279, 293-95 (1987) ("[Because] each jury is unique in its composition . . . the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case.").

train individual officers to follow department-wide enforcement policies, a pattern of disparate enforcement practices by a police department plausibly has some probative value in assessing an officer's motivation in an individual case. A substantial disparate impact at least suggests that the law may be especially prone to discriminatory enforcement, justifying closer judicial scrutiny of police motives.

Fourth Amendment doctrines could also be reformed, especially the two doctrines previously discussed that enhance the exploitative value of enforcing traffic laws for purposes unrelated to the traffic violation. The first doctrine, per *Whren*, is the permissibility of admittedly pretextual enforcement. Second, per *Atkins*, police are permitted, if authorized by state law, to arrest and search the person and vehicle of a motorist who violates even a minor traffic law, which in turn affords the opportunity to find evidence of other crimes. Traffic laws thus afford police the ability to investigate any crime they want, including searching the vehicle for evidence thereof, without first having reasonable suspicion of the investigated crime. Prohibiting either pretextual enforcement of traffic laws or the search and seizure of motorists who commit only minor traffic violations would reduce the benefits of pretextual enforcement and thereby tend to encourage enforcement only in situations in which the traffic violation is serious enough by itself to motivate enforcement.

Invalidating pretextual stops also would facilitate antidiscrimination review for arbitrary and discriminatory motives. By requiring that police only target violators because of the violation itself, rather than as a pretext for investigating other crimes, an anti-pretext doctrine would limit the range of reasons an officer could expressly rely on in enforcing the laws. By minimizing the list of reasons for targeting particular motorists, police would have less opportunity to explain discriminatory or arbitrary decisions by reference to pretextual suspicions. Moreover, the very inquiry into whether a pretextual reason motivated an enforcement decision could lead to more direct evidence of illegitimate intent. Accordingly, an anti-pretext doctrine would not only minimize the exploitation of traffic laws to pursue unsubstantiated suspicion of other crimes, but would serve to minimize the risk of racial, and other illegitimate, discriminations as well. Moreover, even if some pretextual or discriminatory stops still occurred, a further prohibition on searching or arresting the suspected traffic violator would tend to minimize the intrusiveness to motorists of potentially discriminatory traffic stops.

Reforming Fourth Amendment and Equal Protection doctrines thus should have some ameliorative effect in checking the enforcement of traffic laws based on arbitrary, discriminatory, and pretextual

reasons. These strategies would be limited, however. First, given the ease with which a traffic violation could be substantiated, it would be difficult to prove the officer's enforcement was not motivated by unlawful conduct, but instead by a pretextual or discriminatory motive. Also, even a disparate-impact approach to proving discrimination, while more promising than current doctrine in detecting discrimination, has at least two significant limitations. One is that such an approach depends on having reliable data on the race of motorists stopped and those overlooked. Expecting police who act on discriminatory motives to record accurately the race of the motorists they stop may be unrealistic. Creating records of violators not stopped, a necessary comparison group to establish a disparate impact, would be particularly difficult given the invisibility of unenforced minor traffic violations. Finally, even to the extent that these doctrinal reforms would help to curb traffic enforcement based on race or other documentable traits, they would not address the risk that police would enforce traffic laws in idiosyncratic or arbitrary ways that would not necessarily produce an observable pattern, but would, nonetheless, raise rule-of-law concerns. To the extent that police remain indifferent to minor traffic violations for their own sake and unaccountable for under-enforcement, they will inevitably resort to motivations—unrelated to the violation–that will vary from one officer to the next. Finally, although reforming Fourth Amendment doctrine to preclude arrest or search for minor traffic violations would reduce the police incentives to stop motorists pretextually, the ease with which police can obtain consensual searches largely would preserve the value of pretextual traffic stops.[178]

An alternative strategy would seek to limit negative enforcement choice by making enforcement for enforcement's sake more obligatory, or at least more attractive. Increasing police incentives to enforce the law against known violators could be achieved in a number of ways. One way would be to focus on increasing enforcement rates. The most straightforward approach would mandate full enforcement, that is, require police to stop everyone that they have reasonable suspicion to believe has violated the law and arrest everyone that they have probable cause to believe the same. Full enforcement is the official posture of the German legal system. As Professor George Fletcher explains, the rule of law, as understood in German jurisprudence, requires that all crimes be punished; enforcement discretion, in theory, does not include declining

178. *See* Lafave, *supra* note 81 at 1891-93 (explaining that police routinely request consent to search a vehicle during a traffic stop, and consent is granted in the overwhelming majority of cases, including by motorists carrying contraband, and citing sources).

to enforce a provable violation of law.[179] In terms of traffic laws, full enforcement would require the police to stop every motorist they observe violating the law. Predictability should be enhanced because a violation of the law in view of the police would always trigger enforcement.

This strategy would create its own difficulties. First, current levels of enforcement resources fall far short of what would be necessary to fully enforce traffic laws, at least until the rate of violation could be reduced dramatically. Until such time, moreover, if full enforcement were attempted by concentrating a large number of officers in a small area, traffic would grind to a virtual halt, with the serious risk of high-speed rear-end crashes, as unsuspecting motorists approached the back of the slow moving queue. Additionally, monitoring non-enforcement is, as a practical matter, virtually impossible. These are crimes that usually have no victims or other harm, or witnesses motivated to complain, at least with regard to minor infractions. It is therefore unlikely that courts could identify non-enforcement decisions. Indeed, as discussed previously, the low visibility of these crimes is in part the cause of their under-enforcement in the first place. Even if non-enforcement actions were documented, it would be difficult to verify that the officer knew of the violation and ignored it. Proving that an omission was intentional is more difficult than proving that affirmative conduct was intentional.[180] The fact that some states have full enforcement statutes that continue to be ineffective illustrates the difficulty of mandating full enforcement even when legislatures, and not just courts, mandate such policies.

To the other end of the enforcement-rate continuum, rather than requiring full enforcement, courts could require some minimal level of enforcement so that enforcement would not be rare. If enforcement were rare in relation to the frequency of violation, courts could invalidate or enjoin enforcement of those laws. Such an approach would be akin to the common law doctrine of desuetude, which holds laws invalid that are so rarely enforced as to in effect have been abandoned or rendered obsolete.[181] The risk that a law would be invalidated due to non-enforcement would exert pressure on police to enforce the laws at least occasionally to maintain their

179. *See* GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 207 (1998) (contrasting the American and German legal systems).

180. *See generally* Francis Barry McCarthy, *Crimes of Omission in Pennsylvania*, 68 TEMP. L. REV. 633, 637-38 (1995) (discussing the evolution of omissions as criminal in light of the actus reus requirement).

181. *See* Stuntz, *Pathological Politics*, *supra* note 27, at 591-94 (discussing the doctrine of desuetude).

validity. Desuetude also has an evidentiary advantage over mandating full enforcement because determining whether there have been any enforcement actions at all, a matter of public record, should be more readily achieved than determining whether there have been any declined enforcements, a matter of which there likely would be no record.

The practical value of desuetude for curbing arbitrary or discriminatory enforcement, however, would be minimal. First, few laws are virtually never enforced, so few laws would be vulnerable to invalidation. Moreover, it would have no application to the context under consideration: traffic enforcement. While speeding and other traffic and vehicle regulations are significantly underenforced, they are still enforced in non-trivial numbers. Indeed, the public controversy over the pretextual use of traffic laws for drug interdiction purposes or on the basis of race stems from the repeated enforcement of traffic laws. A doctrine of desuetude would afford some protection to people against the arbitrary invocation of a law that is virtually never enforced, such as failing to honk while passing,[182] but it would do little to address the common use of speeding and other low-level traffic laws for drug enforcement or public order policing, including pursuing these enforcement objectives in a discriminatory manner.

The foregoing strategies seek to reduce negative enforcement choice, that is, to make under-enforcement more difficult. An alternative strategy to reducing police discretion would seek to limit affirmative choice, i.e., reduce the opportunities to enforce the law. Courts could narrow the pool of violators from which police could select enforcement targets by narrowing the range of conduct that authorizes enforcement. In the context of traffic violations, courts could limit what constitutes an enforceable traffic violation to conduct that is endangering, hazardous, or otherwise seriously objectionable by community standards. Interestingly, while narrowing enforcement to more serious violations would reduce affirmative enforcement authority, it also would tend to limit negative enforcement discretion, because it would increase police incentives to enforce the law when enforcement is authorized. Police would be unlikely to ignore dangerous or otherwise serious misconduct, and the public would complain if they did. This would involve courts in a kind of substantive due process review, invalidating or enjoining enforcement of traffic violations that were insufficiently serious. In contrast to

182. *E.g.*, R.I. GEN. LAWS § 31-15-4(1) (2007) (requiring "a timely, audible signal" while overtaking). Other criminal activities that could fall under the desuetude doctrine include collecting seaweed at night, N.H. REV. STAT. ANN. § 207:48 (2007), and impersonating an auctioneer or corder of wood, R.I. GEN. LAWS § 11-14-2 (2007).

conventional substantive due process, however, the rationale would not be that engaging in minor traffic violations constitutes a fundamental liberty interest, but rather that such violations are too trivial under contemporary community standards to motivate enforcement to a sufficiently predictable degree.[183] Thus, for example, if speeding were enforced unpredictably in the first five or ten miles over a posted limit, a court could require that speeding violations only be enforced when exceeding ten miles over the limit,[184] or when traffic or weather conditions make speeding within the first ten miles over the limit hazardous and therefore predictably subject to police intervention.[185] This strategy thus would limit affirmative choice by precluding enforcement against minor traffic violations and would indirectly limit negative choice by making the violations that may be enforced too politically costly to ignore. By reducing discretion accordingly, enforcement should be sufficiently consistent and predictable by reference to legitimate law enforcement objectives.

Limiting enforcement to serious traffic violations as a means to reducing discretion is supported by experience with capital punishment. At first blush, a comparison between misdemeanor traffic violations and capital crimes may seem inapposite. But consider that capital sentencing is also a context in which specifically defined crimes can create excessive discretion. In addition to invalidating some capital sentencing criteria on vagueness grounds, the Supreme Court has invalidated capital sentencing schemes that use reasonably specific elements of murder, but which failed adequately to narrow the

183. William Stuntz suggests a different rationale for precluding enforcement of minor traffic violations, namely, that they should not count as "reasonable" under the Fourth Amendment because conscientious, law abiding citizens would not expect minor speeding to trigger enforcement. Stuntz, *O.J. Simpson*, *supra* note 38, at 871-72. There may not be any meaningful difference between substantively invalidating minor traffic crimes on the one hand and holding their enforcement unreasonable under the Fourth Amendment on the other. If enforcement of certain minor traffic violations were precluded as unreasonable under the Fourth Amendment, even when the evidence of the violation is clear, then such laws would be in effect as inoperative as if they were directly invalidated under the Due Process Clause.

184. The ten-mile-over rule described above is meant only as an example of what rate might be optimal for a particular highway in light of the posted limit, road conditions, and enforcement patterns. A more general approach, informed by traffic safety engineers, would be to set the enforceable speed limit on each road at between the 80th and 90th percentile speed of free flowing traffic under good conditions. A lower speed limit could be enforced when poor conditions warranted it. For further explanation of the "85th percentile rule," see *supra* note 127.

185. William Stuntz makes an analogous suggestion in the Fourth Amendment context, namely, that the reasonableness of a traffic stop ought to be based on local custom and enforcement policy rather than whether the speed limit was technically violated, so that stops would be authorized only when speeding violations were serious enough that police regularly enforce them against all drivers. *See* Stuntz, *O.J. Simpson*, *supra* note 38, at 872.

pool of convicted murderers "eligible" to receive the death penalty.[186] The effect of these schemes had been that the death penalty was imposed rarely and under circumstances that were indistinguishable from the great majority of murder convictions that led to sentences of incarceration.[187] The Court recognized that requiring conviction for murder, even first degree murder as defined in many states, as a condition for capital punishment did not guard adequately against the risk that juries would impose the death penalty in an arbitrary or discriminatory manner. To enhance the consistency and predictability of capital punishment, the Court now requires at least one aggravating circumstance in addition to the traditional elements of capital murder.[188] Similarly, in the traffic context, even when the laws are reasonably specific, violation thereof does not narrow adequately the pool of motorists "eligible" to be stopped sufficiently to make stops consistent and predictable. Were courts to require the existence of aggravating circumstances, such as hazardous speeding or swerving, in addition to the elements of a minor traffic violation before the violation would be eligible for enforcement, the risk that the enforcement selection decision would be arbitrary or discriminatory should be reduced. The aggravating circumstances should be serious enough to narrow the pool of enforcement-eligible motorists to an acceptable degree.

Notice also that minimizing the risk of discriminatory enforcement by narrowing the pool of violators is similar to the anticipated effect of the void-for-vagueness doctrine. A primary concern with vague laws was that they tended to cast a wide net, authorizing police to enforce against a large pool of people.[189] By invalidating vague laws, courts left police to enforce laws with a narrower focus, limiting the pool of potential suspects from whom to select. As legislatures have increasingly overcriminalized through specifically defined laws, police are able again to cast a wide net, with

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186. *See* LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 95-103 (2004) (explaining constitutional requirement that, in addition to elements of first degree murder, jury must find at least one aggravating circumstance before defendant is eligible for death sentence in order to narrow the pool of death-eligible murderers); *id.* at 109-14 (explaining as distinct requirement that aggravating circumstances must be sufficiently specific to guide discretion).

187. *See* Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) ("[T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

188. *See* Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (recognizing that jury discretion must be curtailed by legislative guidelines governing application of the death penalty, and upholding the Georgia statutory scheme requiring identification of aggravating factors).

189. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 165-66 (1972) (denouncing the "wide net" of vague laws and the "arsenal" of power they provide to police and courts).

broad discretion in selecting among the potential suspects. By limiting enforcement to infractions that include aggravating circumstances, law enforcement discretion can again be channeled in a more principled manner.

Although invalidating or enjoining the enforcement of specific laws that create broad discretion likely would reduce discretion, it would not be unproblematic. Perhaps the most significant problem is a lack of a determinable standard for assessing which specific laws create excessive discretion. Just as collecting reliable data on enforcement rates and on the discriminatory impact of enforcement discussed above would be difficult, so too would be gathering sufficiently probative data on the degree of discretion that a specific law creates, alone or in combination with other laws. To the extent that consistency and predictability are indicators of guided discretion, a court would need reliable measures of how consistent and predictable enforcement patterns were. In addition to the practical challenge of measuring discretion, this strategy also raises a problem of normative indeterminacy. That is, even if the breadth of discretion created by specific laws could be measured reliably, determining whether such discretion exceeds a tolerable degree would call for a controversial and potentially arbitrary judgment. As discussed in the next Section, the lack of a determinate standard for assessing which specific laws create excessive discretion also calls into question the constitutional legitimacy of courts engaging in such assessments.

The foregoing discretion-constraining strategies could be combined to maximize effect. For example, requiring some narrowing of the class of violators subject to enforcement could be combined with measures designed to screen out illegitimate motivations. Indeed, the two approaches would complement each other, in that the more predictable enforcement is by limiting the circumstances that authorize it, the more effectively cases could be compared to detect discriminatory treatment of similar cases. A parallel to the void-for-vagueness doctrine can be observed again. While the Court recognized that reducing discretion was necessary to check the risk of discriminatory enforcement, antidiscrimination review under the Equal Protection Clause remained a supplementary check—one that was made more effective by limiting enforcement to specifically defined laws, the enforcement of which could be more easily compared across cases than could the enforcement of vague laws.

We can also observe, as before, that affirmative choice and negative choice are interdependent. Recall from the analysis in Section II.A that increasing affirmative choice tends to increase negative choice and vice-versa. Similarly, *decreasing* one type of choice tends to decrease the other. Thus, as affirmative choice could be

limited by prohibiting enforcement except when violations are serious, negative choice would also tend to be limited because serious crimes are more difficult for police to ignore. Or, as negative choice could be limited by requiring greater levels of enforcement, stepped-up enforcement would tend to deter violations, reducing the pool of motorists subject to affirmative enforcement. As enforcement and compliance rates increase, social norms also would reinforce the objectionability of those violations, further reducing the rate of violation and the affirmative opportunities for police to stop motorists. With fewer violations, enforcement resources would be enhanced, relative to the number of violations, limiting the political acceptability of resource-based excuses for under-enforcement, and so on.

Implementing any of the foregoing strategies likely would involve difficult trade-offs between law enforcement objectives and the interests of motorists in even-handed treatment and between legislative and executive policy choices on the one hand, and judicial interventions on the other. The discussion in this Section has not delved into these issues, much less sought to resolve them. The point has not been to particularize the most effective means for controlling police discretion, but rather to identify key strategies that could be pursued to reduce the discretion of law enforcement created by specific laws. If our nation is to protect the rule-of-law values that the Constitution reflects, and upon which the void-for-vagueness doctrine is premised, courts need to develop constraints on legislative delegation of excessive discretion unless and until our political institutions limit themselves. Whether courts have constitutional authority to develop such approaches on their own initiative is the inquiry of the next Section.

B. Constitutional Concerns Over Judicial Intervention

Although discretion cannot and should not be eliminated, we have seen that approaches could be implemented that would reduce discretion more than is currently achieved through existing doctrinal constraints. Judicial intervention, however, raises its own constitutional concerns about the legitimacy and competence of courts to limit the breadth of discretion created by specific rules, such as traffic laws. The Supreme Court expressed this concern in *Whren*:

> Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that

> infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.[190]

The Court's refusal to invalidate enforcement of traffic laws that vest police with broad discretion seems to reflect two related constitutional concerns regarding judicial intervention: legitimacy and manageability. With legitimacy, the concern is whether courts may engage properly in functions constitutionally assigned to the democratic institutions of government: the legislature and executive. Regarding the legislative function, the point is that, for at least a century, American jurisprudence has insisted on legislative supremacy in defining the criminal law. Legislatures are democratically accountable and therefore have greater political legitimacy in defining the limits of lawful conduct. Legislatures are also best suited in general to advance rule-of-law values, such as equality and fair warning, because they act prospectively and with generality, that is, without reference to particular individuals. Were courts to constrain actively the circumstances under which motorists were subject to laws enacted by the legislature, courts would arguably be lawmaking. As to the executive function, to the extent that courts would be scrutinizing and limiting enforcement policy, they arguably would be usurping executive prerogative over law enforcement. If limited resources preclude full enforcement of traffic laws, it is arguably the responsibility of the police and other politically accountable enforcement agencies to set enforcement priorities. Whether conceived as lawmaking or executing, the concern is that courts lack the constitutional authority to define or enforce traffic policy.

Regarding manageability, the concern is whether courts have judicially manageable standards in reviewing specific laws by which to assess whether particular laws create sufficiently broad discretion to warrant remedial intervention. In the context of traffic enforcement, courts would need to identify which regulations are violated with sufficient frequency, while at the same time substantially underenforced as to be especially susceptible to arbitrary and discriminatory enforcement. For example, do speed limits in a particular jurisdiction or locale constitute such laws? If so, what speed limit would narrow enforcement discretion adequately? Although speed limits on many roads may present a fairly obvious example of

190. Whren v. United States, 517 U.S. 806, 818-19 (1996).

excessive discretion,[191] assessing the broad range of traffic and motor vehicle regulations would involve significant uncertainty. Unless courts competently can identify instances of excessive discretion through specific laws and provide effective remedies, then judicial intervention may not be justified in practice, even if justifiable in theory.

The forgoing objections are serious and counsel caution in any approach toward constraining police discretion through judicial review. While the following responses suggest that the objections are not dispositive, the responses are not either. The challenge is to strike a balance between collective interests and individual rights, a balance that cannot be defined easily or uncontroversially. With respect to the legitimacy or separation-of-powers objection, the first response is that judicial involvement under these circumstances, in fact, does not undermine legislative supremacy; it *promotes* it. The concept of legislative supremacy, despite its empowering connotation, includes a significant restriction on legislative choice. Namely, legislatures may not consent, through the delegation of broad discretion, to executive lawmaking. Instead, legislative supremacy requires legislatures to provide case-by-case guidance to executive officials, especially the police, regarding what conduct should trigger law enforcement procedures. The Court's nondelegation doctrine reflects this point by requiring an intelligible principle when Congress delegates authority to executive agencies, so that each agency decision can be justified by reference to congressional instruction. If Congress were to delegate authority to executive agencies through a standard so broad as to lack an intelligible principle, such agencies would be engaged in unconstitutional lawmaking, rather than executing. In the law enforcement context, vague laws are objectionable because they vest so much discretion in the police that "enforcement" decisions are, in effect, lawmaking.[192] Similarly, by creating excessive discretion through specific traffic laws, legislatures have delegated lawmaking authority to the police.[193] By constraining police discretion through the

191. As explained previously, *see supra* note 127 and accompanying text, the vast majority of posted speed limits on major roads and highways define 50-90% of all drivers as criminals or violators. This is particularly true in the eastern half of the country.

192. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."); Stuntz, *Pathological Politics*, *supra* note 27, at 559 (noting that void-for-vagueness doctrine requires legislatures to specify crimes rather than delegating their definition).

193. William Stuntz makes a similar observation. *See* Stuntz, *Civil-Criminal Line*, *supra* note 131, at 24 ("When the state retains crimes that go largely unenforced, and gives prosecutors and the police the power to decide which violators (if any) to charge or arrest, prosecutors and the police become legislators; they have the practical power of crime definition. The essence of the

strategies outlined in the previous Section, courts would help to ensure that legislative criteria, rather than police whim, determine each law enforcement action. In the end, judicial intervention is arguably necessary both to preserve legislative supremacy in the criminal law and to limit enforcement officials to the function of enforcing law, rather than making it.

Second, even if legislative supremacy were undermined by judicially imposed constraints on enforcing specific laws, it should be recognized that the primary justification for legislative supremacy in defining criminal law is based on a form of legislation that is lacking here. A primary justification for legislative supremacy is that such supremacy promotes the predictable and even-handed administration of law. This presumes a form of legislative enactment that provides meaningful, advance guidance to law enforcement. Although legislation generally provides greater advanced guidance than judicially created crimes, the void-for-vagueness doctrine recognizes that vague laws defined by the legislature do not necessarily provide adequate guidance and, as this Article has argued, specific laws do not either. In developing the void-for-vagueness doctrine, the Court sought to ensure that the presumed virtues of legislative supremacy would be served by requiring legislatures to be more specific in defining crimes. Similarly, with specific laws that fail to provide guidance sufficient to promote the consistent and even-handed enforcement of the law, courts may legitimately intervene to safeguard rule-of-law values, such as consistency, predictability, and equality in the enforcement of the law.

It is also worth noting that the court interventions suggested in the previous Section do not constitute the kind of judicial crime creation repudiated by modern American jurisprudence; instead, they represent judicial crime *limitation*. Judicial crime creation raised fairness concerns because defendants may be convicted of crimes they unwittingly committed because no court or legislature had previously defined their conduct as illegal. Here, however, the suggested judicial interventions would not raise the same risk of unfair surprise. Were a court to preclude enforcement of a specific law because the law creates excessive discretion or because the court finds that enforcement had an unjustified disparate impact, the judicial intervention would be favorable to the defendant's interests. It is thus unpersuasive in this context to cite legislative supremacy as an objection to judicial involvement when the development of legislative supremacy as a doctrine was premised, at least in part, on fair notice interests that

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problem of over-criminalization, then, is the delegation to executive officials of the power to define crimes.").

here require judicial involvement to protect. Even if a court were to adopt the strategy of mandating greater enforcement of a specific law, enforcement occurring as a result of the court's order would come only after the order, which presumably would be a matter of public record. Although a motorist still might be surprised at being stopped for violating the law, the fact that the law previously was enacted in legislation and enforcement was ordered by a court would raise less serious fairness concerns than a conviction for a crime retroactively created by a court. In any event, it would not involve any more surprise than the current regime, in which police unpredictably enforce minor traffic laws without a court-ordered mandate.

Finally, while it is true the rule of law has developed to privilege legislative supremacy in defining criminal law and executive prerogative over its enforcement, the rule of law also requires that these institutions to adhere to constitutional protections of individual rights. Courts should, and arguably must, intervene beyond their traditional role if necessary to protect individual rights against constitutional infringement. To the extent that specific laws, such as traffic regulations, result in members of the public being subjected to arbitrary and discriminatory government intrusions, courts legitimately act to safeguard equal protection and due process limitations on government power.

The judicial manageability objection is legitimate, but probably overstated. Courts do lack the ability to monitor enforcement rates as effectively as political institutions, and determining the public need to enforce low-level traffic laws would seem to require an understanding of safety-convenience trade-offs that courts are less equipped to make. Historical experience suggests, however, that courts can engage effectively in traditionally executive functions when doing so is required to protect constitutional rights. For example, courts have played an important role in desegregating public schools,[194] ameliorating prison conditions,[195] and, most importantly for present purposes, reforming police practices and other criminal procedures.[196] Moreover, through consent decrees reached through negotiations with the regulated institutions, courts can help to ensure that the expertise of the executive branch is consulted. Indeed, in the context of traffic

194. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 874-78 (1999) (discussing the constitutional bases for eliminating school segregation).

195. *See id.* at 878-82 (same, for judicially driven reform of prison conditions).

196. *See* Terry v. Ohio, 392 U.S. 1, 16-20 (1968) (defining the proper orbit of police "stop and frisk" power under the Fourth Amendment); Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (holding that the Fifth Amendment requires that a suspect be informed of his rights to remain silent and consult with an attorney); Mapp v. Ohio, 367 U.S. 643, 654-56 (1961) (incorporating the Fourth Amendment's exclusionary rule against the states).

stops, consent decrees imposing restrictions on racial profiling have been reached under judicial supervision in a number of states.[197] This is not to say that all of these reforms have been adequately effective or satisfying. The question is whether they have been effective enough to be worth pursuing in the absence of politically initiated changes, and the answer would seem to be a cautionary yes.

An analogy to capital punishment may again be instructive. Assessing whether a capital sentencing scheme leaves excessive discretion to juries is by no means ministerial. It involves a judgment about the probability that certain aggravating circumstances adequately narrow the pool of death-eligible defendants to a degree that imposition of the death penalty is sufficiently consistent. It is a judgment about which judges often disagree. In *Furman v. Georgia*, for example, a fractured majority of justices concluded that the capital sentencing scheme gave insufficient guidance to juries, rendering imposition of the death penalty excessively arbitrary and unpredictable to satisfy due process concerns.[198] In *McCleskey v. Kemp*, a divided majority came out the other way on a more modern sentencing statute, concluding that while the existence of some discretion created a risk of discriminatory verdicts, the risk was insufficiently great to warrant invalidation of the statute.[199] Other justices would have invalidated all death sentences under the statute.[200] Justice Stevens's assessment was in between.[201] He suggested that, rather than invalidating the scheme altogether, the Court could limit the death penalty to the most heinous murders, which, according to statistical evidence, resulted in a verdict of death on a more consistent basis.[202] While measuring and assessing the degree of discretion created by a law is thus difficult and often subject

197. *See* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 92-93 (2001) (noting racial profiling consent decrees between states/municipalities and the Justice Department in California, New Jersey, Pennsylvania, and Ohio, among otber ongoing investigations/proceedings).

198. 408 U.S. 238, 240-371 (1972) (explaining the problem of arbitrary and discriminatory sentencing in five concurring opinions, written by Justices Douglas, Brennan, Stewart, White, and Marshall). *But see id.* at 396-403 (Burger, C.J., dissenting, joined by Blackmun, Rehnquist, and Powell, JJ.) (arguing that capital punishment is not cruel and unusual, and that the Court's majority has usurped the power rightfully delegated to legislatures and juries).

199. 481 U.S. 279, 311-12 (1987) (recognizing that discretion plays a fundamental role in the criminal justice system, and finding that "the inherent lack of predictability of jury decisions does not justify their condemnation").

200. *See id.* at 320-45 (Brennan, J., dissenting, joined by Marshall, J., and joined in part by Blackmun and Stevens, JJ.) (arguing that the statute provided the opportunity for racially discriminatory decisionmaking, which the evidence sufficiently demonstrated).

201. *See id.* at 366-67 (Stevens, J., dissenting) (favoring a limitation of the death penalty's applicability and a remand to the trial court for consideration of the statistical evidence).

202. *Id.* at 367 (Stevens, J., dissenting).

to disagreement, it does not follow that courts ought not to make such determinations. Drawing a line between individual liberty interests in due process and collective interests in crime control is often difficult, but, as the Court explained in a different context, "[l]iberty must not be extinguished for want of a line that is clear."[203]

Consider also that the void-for-vagueness doctrine involves courts in making uncertain judgments about the degree of discretion created by imprecise language. As Dean John Jeffries has observed, assessing whether a law with imprecise language creates an intolerable risk of arbitrary and discriminatory enforcement is not mechanistic.[204] Rather, it involves a nuanced judgment that takes account of the degree of ambiguity in the statutory language, as well as an assessment of the nature of the conduct regulated, the context in which enforcement takes place, the severity of the authorized penalty, and the cost of invalidating a law on vagueness grounds if greater precision in defining the crime is impracticable.[205]

In the context of traffic enforcement, the forgoing examples support the plausibility of courts making contextual assessments of specific laws, taking account of the innocuous nature of the conduct proscribed, the frequency of violation, the rate of under-enforcement, and the danger, or lack thereof, of permitting the prohibited conduct to escape enforcement. Common experience, expert witnesses, and statistical data or surveys about, for example, the percentage of motorists who speed compared to the number of motorists stopped for speeding could be consulted. Although, as previously explained, statistical evidence that proved racial profiling in a particular case would be difficult to obtain, some evidence tending to show the infrequency of enforcement of certain laws over time should be obtainable and would be probative of whether a law is enforced in an unduly selective manner. The question ultimately comes down to a balance between virtually unfettered discretion if no judicial intervention is taken and some assurance of predictability in law enforcement albeit with some degree of uncertainty and imperfection in the design of judicial remedies.

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203. Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

204. *See* Jeffries, *supra* note 26, at 196 ("The difficulty [with the vagueness doctrine] is that there is no yardstick of impermissible indeterminacy.").

205. *See id.* at 196 (noting feasibility concerns); *see also* Amsterdam, *Vagueness Doctrine*, *supra* note 27 at 95-96.

CONCLUSION

Do specific rules reduce discretion and thereby reinforce the rule of law? It depends. Most directly, specific rules have the effect of making more clear, and therefore more consistent, the determination whether certain conduct violates the law. Provided that specific criminal laws leave some room for compliance, such laws do limit affirmative enforcement discretion by precluding enforcement against those whose conduct clearly complies with the specific rules. In addition, if the conduct proscribed by a specific law is conduct that, if observed by law enforcement officials, would exert pressure to enforce the law, then specific rules limit negative enforcement discretion by constraining the willingness of enforcement officials to ignore clear violations of the law. If, however, specific laws criminalized all conduct and imposed no obligation on officials to enforce against observed violations, then specific laws would not reduce enforcement discretion at all. Indeed, they would expand discretion to a limitless degree. More realistically, as this Article demonstrates in the context of traffic laws, specific rules directed at a broad range of conduct, commonly engaged in by reasonable, law-abiding people, the violation of which creates little stigma or expectation of enforcement, and which are, in fact, dramatically underenforced, can create an extremely broad degree of discretion, both as to whom to investigate and whom to ignore. The predictable result is that enforcement officials will enforce the law in an unpredictable, arbitrary, and discriminatory manner. On most streets and highways in America, police authority to stop motorists is essentially unfettered.

Moreover, the unfettered nature of enforcement discretion created by traffic laws makes antidiscrimination review an unrealistic check on enforcement motivated by race or other illegitimate factors. Just as peremptory challenges in jury selection are very difficult to monitor for discriminatory motives because all race-and-gender-neutral explanations are legally permissible, so too are traffic stops when a technical violation of law is all that is required to justify a stop and when unsubstantiated pretextual suspicions may justify targeting motorists whose traffic violations are less serious than those of other motorists whom police admittedly ignore. Unlike peremptory challenges, however, the circumstances surrounding the peremptory traffic stop are not observable to a court, making the traffic stop more difficult to review. To the extent that enforcement officials, who are products of our society, believe that race and other constitutionally suspect traits are predictive of criminal behavior, it is unrealistic to assume that those officers will not act on those suspicions when there is virtually no risk of accountability for doing so. In addition to

discriminatory motives, unguided discretion also creates a significant risk that enforcement will be arbitrary or ad hoc from one individual officer to the next. Accordingly, the Court's assurance that equal protection doctrine guards against discriminatory traffic enforcement rings hollow.

The question arises whether the relationship between specific rules, enforcement discretion, and antidiscrimination review examined in this Article is generalizable beyond traffic enforcement and beyond the criminal law. This Article has not considered other contexts and therefore cannot speak to this question with confidence. It is difficult to see, however, why a similar dynamic would not operate in other contexts in which legislatures have increased the scope of conduct and activities brought under regulation. Specifically defined crimes against, for example, littering and jaywalking vest police with broad discretion to investigate pedestrians in a selective manner. Similarly, the overbroad scope of federal law, from mail fraud and other white collar crime to the ubiquitous reach of the Patriot Act, vests federal prosecutors with wide latitude over whom to prosecute and for what misfeasance. Beyond criminal law, administrative regulations addressed to such contexts as securities, taxes, immigration, the environment, and health and safety conditions in the workplace vest a broad degree of discretion in the agencies and regulators charged with their enforcement. The more such regulations address a broad range of actions that are often harmless or otherwise not intuitively wrong, are difficult to avoid, and are significantly underenforced, the more discretion such agencies will have to investigate and sanction regulated persons and entities for arbitrary or discriminatory reasons. While the confrontation between armed police officers and citizens on the streets and highways raises particularly acute concerns over broad delegations of discretion, these other contexts also warrant attention and possible redress.

This Article also has suggested, in the context of traffic enforcement, some strategies to reduce the degree of discretion delegated through specific rules. In general, they would seek either to increase the obligation to enforce the law or to decrease the scope of conduct enforceable under law. Whatever mechanisms would most effectively constrain discretion through specific rules, judicial initiative under constitutional authority is probably required. The political incentives for legislatures to delegate excessive discretion to executive agencies, especially the police, are too great to entrust restraint to the political process. Courts should at least intervene to the extent that legislatures decline to do so.

By taking a broader perspective, we can understand judicial intervention as a move within a larger historical dialectic between the

courts and legislatures over the proper role of each in a system premised on the rule of law. Recall that, in early common law, courts created crimes in response to situations as they arose. By the nineteenth and early twentieth centuries, judicial crime creation had gone into disrepute. Rule-of-law values such as fair warning and equality, as well as concerns over democratic legitimacy, led courts and other jurists to shift the locus of crime creation from courts to legislatures. Over time, legislatures, by enacting vague laws, delegated lawmaking authority to police and courts, undermining the collective and consistent guidance ostensibly provided by advance legislative specification of crimes. In response, courts developed the void-for-vagueness doctrine which, by requiring legislatures to define crimes in specific terms, sought to return the locus of crime definition to the legislature, in function as well as in form. In recent years, legislatures again have circumvented their role in guiding the enforcement of the criminal law, this time by over-criminalization through specifically defined crimes. Exemplified by traffic laws, the functional locus of criminal law largely has been delegated to traffic cops, drug enforcement agents, and other law enforcement officers, who can exploit traffic laws to investigate virtually any motorist for any reason, recreating an excessive risk of arbitrary and discriminatory enforcement. If rule-of-law values, including the principle that coercive action by government officials should be consistent and predictable by reference to collective, legislative instructions are to be preserved, then courts must respond to this more modern form of legislative delegation. While the proposals in this Article are new in one sense, they are old in another. They represent a continuing and appropriate struggle between courts and legislatures over the proper role of each in a tripartite constitutional democracy.

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