Remedying Selective Enforcement

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Abstract

Scholars have long regarded the prohibition against racially selective enforcement by the police as a dead letter. Formally, the Supreme Court forbids police officers from stopping or searching individuals based on race. In practice, the traditional evidentiary standard for proving selective enforcement is nearly insurmountable, and successful claims are rare. Remarkably, the Court has never specified the remedy judges should grant in criminal cases to victims of selective enforcement. Nevertheless, recent years have seen a revitalization of the doctrine of selective enforcement. An increasing number of state and federal courts have made proving selective enforcement much easier by relaxing the evidentiary standard claimants must satisfy. Additionally, lower courts have adopted suppression of incriminating evidence or dismissal of criminal charges as the remedy for successful claims. This Article explores these recent developments in selective enforcement remediation, which have largely escaped academic attention. Although celebrating the adoption of powerful remedies for selective enforcement, this Article critiques the justifications courts have provided for them. Despite the promises made by courts, suppression and dismissal are unlikely to serve as effective deterrents to selective enforcement. Nor will they necessarily help courts maintain their judicial integrity. Rather than relying on these two justifications, selective enforcement remedies should be grounded in the same goal that equal protection remedies have traditionally sought to promote—namely, corrective justice for victims of unconstitutional discrimination. Courts, therefore, should grant remedies aimed at eliminating the harmful effects suffered by victims of selective enforcement due to the police's discriminatory conduct, to the greatest extent possible.

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INTRODUCTION

Legal scholars have long regarded the prohibition against racially selective enforcement by the police as a dead letter.[1] Formally, the Supreme Court has held that police officers may not engage in "selective enforcement of the law based on considerations such as race" and that such conduct could amount to an equal protection violation.[2] For example, officers are forbidden from stopping or searching an individual because they think people of the individual's race are more likely to break the law.[3] In practice, however, courts almost always reject selective enforcement claims raised by defendants in criminal proceedings.[4] Indeed, the traditional evidentiary standard for proving selective enforcement in court is considered "insurmountable" or "nearly

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1 *See, e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 650–51 (2021) (describing the practical ineffectiveness of the prohibition against selective enforcement); Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 991–92 (2021) (arguing that it has traditionally been "virtually impossible" for selective enforcement claimants to win); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 137 (10th anniversary ed. 2020) (explaining that "the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment"); *see also* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818–19, 819 n.211 (2006) (describing the failure of the Supreme Court "to guarantee 'the equal protection of the laws'" in the context of law enforcement).

2 Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Reichle v. Howards, 566 U.S. 658, 665 n.5 (2012) ("[T]he Equal Protection Clause would prohibit an officer from selectively enforcing the traffic laws based on race."); Nieves v. Bartlett, 587 U.S. 391, 414 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[A] detention based on race, even one otherwise authorized by law, violates the Fourteenth Amendment's Equal Protection Clause." (emphasis omitted)). The right to equal protection is guaranteed by the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's equal protection component. *See* U.S. CONST. amend. XIV, § 1; *id.* amend. V; *see also* Wayte v. United States, 470 U.S. 598, 608 n.9 (1985) ("Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component.").

3 *See, e.g.*, R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1203–04 (2004); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1342–43 (2004).

4 *See, e.g.*, Guy Rubinstein, *Selective Prosecution, Selective Enforcement, and Remedial Vagueness*, 2022 WIS. L. REV. 825, 829 ("[D]efendants who raise selective prosecution or selective enforcement claims in court virtually always lose."); Siegler & Admussen, *supra* note 1, at 1002 (arguing that from 1996 to 2021, "there has not been a single successful [racially] selective prosecution or [racially] selective law enforcement claim on the merits"); Alison Siegler, Judith P. Miller & Erica K. Zunkel, *Reforming the Federal Criminal System: Lessons from Litigation*, 25 J. GENDER, RACE & JUST. 99, 113 (2022) ("To our knowledge, there has never been a successful racial discrimination claim against a law enforcement agency in a state or federal criminal case.").

insurmountable."[5] The Supreme Court has thus managed to refrain from determining the appropriate judicial remedy for successful claims.[6]

Nevertheless, recent years have seen a growing number of state and federal courts breathing new life into the doctrine of selective enforcement. First, some courts have made proving selective enforcement claims much easier by relaxing the evidentiary requirements claimants must meet to win.[7] Under the traditional evidentiary standard, claimants have to identify specific individuals of a different race whom the police treated differently under similar circumstances.[8] They also need to demonstrate that their own differential treatment—or the policy underlying it—"was motivated by a discriminatory purpose."[9] These evidentiary requirements are almost impossible to satisfy.[10] Nowadays, however, some courts are more open to accepting selective enforcement claims based on statistical evidence concerning officers' or departments' enforcement patterns, even when claimants fail to offer direct evidence that they were targeted due to their race.[11] Some courts have also expanded claimants' access to police or prosecutorial materials that may contain relevant data helpful for proving selective enforcement.[12] In two states—Massachusetts and New Jersey—courts have even revised the selective enforcement doctrine substantively. These courts now recognize not only purposefully discriminatory enforcement as unconstitutional, but also differential treatment resulting from implicit bias.[13]

Second, and more pertinent to this Article, an increasing number of state and federal courts have established judicial remedies for successful selective enforcement claims raised in criminal cases.[14] As mentioned,

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5 *See, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 427 (1997); AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 122 (2021).

6 *See, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2009–14 (1998) (discussing the Court's ambiguity on the issue of remedies for selective enforcement); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 338 n.22 (1998) (same); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 741 (2002) (arguing that "[t]he Supreme Court has explicitly left [open] the question" of the appropriate remedy for selective enforcement); Rubinstein, *supra* note 4, at 833–40 (discussing the Supreme Court's choice not to specify the appropriate remedy for successful selective enforcement claims).

7 *See infra* Section I.A.

8 *See, e.g.*, United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); United States v. Washington, 869 F.3d 193, 214 (3d Cir. 2017).

9 *E.g.*, United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996) (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)); United States v. Sellers, 906 F.3d 848, 850 (9th Cir. 2018).

10 *See supra* note 5 and accompanying text; *see also infra* Section I.A.1.

11 *See infra* Section I.A.2.

12 *See infra* Section I.A.2.

13 *See infra* Section I.A.2.

14 *See infra* Section I.B.

the Supreme Court has never determined the appropriate remedy for selective enforcement, or whether defendants who have proven selective enforcement are even entitled to any remedy at all.[15] In recent years, however, lower courts have resolved the remedy question by adopting suppression of incriminating evidence or dismissal of criminal charges as the proper remedy.[16] Judges have offered two primary justifications for their remedial choices: deterrence of future selective enforcement and maintenance of judicial integrity.[17] Notably, these two justifications have historically supported suppressing evidence obtained through unreasonable searches or seizures under the Fourth Amendment exclusionary rule.[18] According to the deterrence rationale, police officers will be less likely to engage in selective enforcement if they know it could jeopardize the ultimate conviction of the suspects they stop, search, or arrest.[19] The judicial integrity rationale suggests that by responding to selective enforcement with suppression or dismissal, judges send the message that they do not turn a blind eye to police wrongdoing, thereby maintaining public confidence in both the judiciary and the criminal process.[20] Scholars writing on the subject generally agree these rationales support the adoption of suppression or dismissal as the response to successful selective enforcement claims.[21]

This Article argues against invoking deterrence and judicial integrity to justify suppressing evidence or dismissing charges as a remedy for selective enforcement. Although these justifications have supported the Fourth Amendment exclusionary rule,[22] importing them directly into the discussion around remedies for discriminatory policing may prove both erroneous and counterproductive.[23]

First, there is no basis for assuming suppression and dismissal effectively deter police officers from enforcing the law in a discriminatory

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15 *See supra* note 6 and accompanying text; *see also infra* Section I.B.1.

16 *See, e.g.*, Commonwealth v. Robinson-Van Rader, 208 N.E.3d 693, 706 (Mass. 2023) (stating that "[t]he remedy for a selective enforcement violation is suppression of the evidence that was obtained in violation of the defendant's constitutional right to equal protection" (citing Commonwealth v. Lora, 886 N.E.2d 688, 699–700 (Mass. 2008))); People v. Jones, 177 N.Y.S.3d 174, 178–79 (App. Div. 2022) (holding that suppression is the proper judicial response to racially selective traffic stops); United States v. Lewis, No. 22-14246, 2023 WL 6620313, at *2 (11th Cir. Oct. 11, 2023) (per curiam) (suggesting that suppression may be a remedy for selective enforcement); United States v. Mumphrey, 193 F. Supp. 3d 1040, 1055–59 (N.D. Cal. 2016) (adopting dismissal of charges as the remedy for selective enforcement); *Ex parte* Aparicio, 707 S.W.3d 189, 199, 202–03 (Tex. Crim. App. 2024) (same); *see also infra* Section I.B.2.

17 *See infra* Section I.B.2.

18 *See infra* notes 307–11 and accompanying text.

19 *See infra* notes 313–15 and accompanying text.

20 *See infra* notes 411–13 and accompanying text.

21 *See infra* notes 313, 411 and accompanying text.

22 *See supra* note 18 and accompanying text.

23 *See infra* Sections II.A–.B.

manner.[24] Selective enforcement claims usually arise in the context of discretionary police stops, such as investigative traffic stops by officers patrolling the road or pedestrian stop-and-frisks by officers patrolling the street.[25] Officers who conduct such stops rarely seek to secure convictions, as their professional performance is not assessed by conviction rates.[26] Instead, they are systematically encouraged by their departments to arrest individuals and seize illegal drugs and firearms to get them "off the streets."[27] Due to these professional incentives, officers who believe that targeting individuals based on race helps them arrest suspects or seize contraband are unlikely to be deterred by the threat of suppressing evidence or dismissing charges.[28] This is especially true given the very low probability that a judge would accept a selective enforcement claim and subsequently suppress evidence or dismiss charges.[29]

The negligible deterrent benefits of suppression and dismissal explain why some lower courts reject these remedies and instead hold that the only available option for selective enforcement claimants is to file civil suits against police officers.[30] Although civil remedies such as monetary damages are also unlikely to serve as effective deterrents, the fact that they do not lead to the release of factually guilty defendants makes them attractive in the eyes of many judges.[31]

The biggest concern is that courts that nonetheless insist that suppression and dismissal effectively deter selective enforcement are not only wrong, but also inadvertently mislead the public about the judiciary's ability to combat discriminatory policing.[32] This, in turn, could impede the exploration of other potentially more effective deterrent devices and strategies, thereby undermining long-term efforts to reduce racially biased enforcement.[33]

Second, it is incorrect to assume that suppressing evidence or dismissing charges in response to selective enforcement necessarily helps preserve judicial integrity.[34] There is little doubt that discrimination within the criminal process compromises the integrity of and undermines public trust in the legal system, and that judges are expected to combat selective enforcement.[35] However, it does not necessarily follow

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24 *See infra* Section II.A.1.

25 *See infra* notes 328–33 and accompanying text.

26 *See infra* notes 334–50 and accompanying text.

27 *See infra* notes 334–50 and accompanying text.

28 *See infra* notes 334–76 and accompanying text.

29 *See infra* notes 351–76 and accompanying text.

30 *See infra* Section II.A.2.

31 *See infra* Section II.A.2.

32 *See infra* Section II.A.3.

33 *See infra* Section II.A.3.

34 *See infra* Section II.B.

35 *See infra* notes 411–22 and accompanying text.

that the best way to maintain the integrity of courts is through suppressing evidence or dismissing charges.[36] Some may take issue with judges allowing prosecutions resulting from selective enforcement to continue uninterrupted.[37] Others, however, may argue that judges who suppress reliable incriminating evidence or dismiss well-founded charges undermine the integrity of the judiciary and the criminal process.[38]

This Article proposes that rather than relying on the historical justifications for the Fourth Amendment exclusionary rule, courts should ground remedies for selective enforcement in the same goal traditionally sought by *equal protection remedies*—namely, corrective justice for victims of unconstitutional discrimination.[39] Remedies, therefore, should not focus on deterring police wrongdoing or maintaining judicial integrity but on correcting the harms suffered by victims of discriminatory policing.[40]

The Supreme Court has established a relatively coherent set of principles that will guide the development of judicial remedies for equal protection violations.[41] The Court has held that the judicial response to successful equal protection claims must prioritize corrective justice for the victims of unconstitutional discrimination.[42] According to the Court, proper remedies must "be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"[43] As Justice Marshall explained, remedies should make victims of discrimination "whole" again by ensuring "*any* injurious condition flowing from the constitutional violation [is] remedied to the maximum extent practicable."[44] To achieve these aims, judges have been afforded broad discretion in shaping suitable corrective measures.[45] Nevertheless, the Court has clarified that the corrective objective of remedies for equal protection violations is not unqualified.[46] Rather, this objective must be weighed against—and sometimes yield to—other, often competing social interests, such as public health and state budgets.[47]

The same general corrective purpose that guides judicial remedies for equal protection violations should also shape the remedies that

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36 *See infra* notes 423–28 and accompanying text.

37 *See infra* note 424 and accompanying text.

38 *See infra* notes 425–28 and accompanying text.

39 *See infra* Sections III.A–.D.

40 *See infra* Sections III.A–.D.

41 *See infra* Section III.A.

42 *See infra* notes 434–46 and accompanying text.

43 Milliken v. Bradley, 433 U.S. 267, 280 (1977) (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974)).

44 Bd. of Educ. v. Dowell, 498 U.S. 237, 264 n.8 (1991) (Marshall, J., dissenting).

45 *See infra* notes 448–50 and accompanying text.

46 *See infra* notes 451–64 and accompanying text.

47 *See infra* notes 459–64 and accompanying text.

courts grant for successful selective enforcement claims.[48] Thus, when a defendant successfully proves selective enforcement, judges must grant a remedy aimed at eliminating the negative consequences resulting from the defendant's discriminatory stop, search, or arrest.[49] Consequently, if selective enforcement leads to obtaining incriminating evidence or filing criminal charges against the defendant, a proper judicial response should include the suppression of evidence or the dismissal of charges, respectively.[50] The purpose of the remedy, however, would be corrective justice, not deterring wrongdoing or maintaining judicial integrity.[51] In some cases, judges may conclude that suppressing evidence or dismissing charges would result in a particularly excessive threat to public safety and consequently refrain from granting these remedies.[52] Therefore, to ensure victims of selective enforcement are not left without any redress, the toolbox of remedies available for judges in criminal adjudication should be expanded to include additional remedies beyond suppression or dismissal.[53] For example, judges could also be empowered to reduce sentences for defendants who have been victims of selective enforcement.[54]

This Article proceeds in three parts. Part I introduces the doctrine of selective enforcement and describes how lower courts across the country have shaped the evidentiary standard for proving selective enforcement, as well as the judicial remedies for its violation. Part II critiques courts' reliance on the justifications of deterring selective enforcement and preserving judicial integrity to suppress evidence or dismiss charges. Part III proposes grounding remedies for selective enforcement in corrective justice for victims of discriminatory policing.

I. Selective Enforcement: Doctrine and Remedies

The Supreme Court considers race-based discrimination in the criminal process among the most severe of constitutional violations, referring to it as "especially pernicious,"[55] "particularly abhorrent,"[56] and "a familiar and recurring evil."[57] According to the Court, such discrimination not only harms the individual whose right to equal protection was violated, but also compromises public trust in the criminal process[58] and reinforces

48 *See infra* Section III.B.
49 *See infra* Section III.B.
50 *See infra* Section III.C.
51 *See infra* Section III.B.
52 *See infra* Section III.C.
53 *See infra* Section III.D.
54 *See infra* Section III.D.
55 Rose v. Mitchell, 443 U.S. 545, 555 (1979).
56 McCleskey v. Kemp, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting).
57 Peña-Rodriguez v. Colorado, 580 U.S. 206, 224 (2017).
58 *See* Johnson v. California, 543 U.S. 499, 510–11 (2005).

"state-sponsored group stereotypes."[59] Nevertheless, as scholars have long identified, the Court has been reluctant to take an active role in addressing, let alone reducing, racial discrimination in policing.[60] The explanations scholars have provided for this phenomenon vary, ranging from ill intentions or carelessness on the part of the Court[61] to the paucity of race-based discrimination claims by litigants.[62] While the Court has provided limited guidance on the doctrine of selective enforcement,[63] lower state and federal courts have been left to articulate the requirements for proving selective enforcement and to develop the judicial remedies for it.[64]

This Part discusses how lower courts across the country have shaped the doctrine of selective enforcement. Section A describes the demanding standard that lower courts have traditionally applied to proving claims of selective enforcement. It then discusses the recent trend among some courts to relax this standard, making proving selective enforcement much easier. Section B addresses the Supreme Court's silence regarding the appropriate judicial remedy for successful selective enforcement claims as well as the attempts of lower courts to fill this gap.

A. Proving Selective Enforcement

1. The Traditional Demanding Evidentiary Standard

Although the Supreme Court has never articulated the evidentiary standard for proving selective enforcement by the police,[65] the Court has established the requirements that defendants claiming selective

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59 Miller-El v. Dretke, 545 U.S. 231, 237–38 (2005) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994)).

60 *See, e.g.*, Stuntz, *supra* note 1, at 818–19, 819 n.211 (discussing the Supreme Court's failure to reduce discriminatory law enforcement); GUY PADULA, COLORBLIND RACIAL PROFILING: A HISTORY, 1974 TO THE PRESENT 194 (2018) (discussing the Court's "silence" on discriminatory policing); *see also* Paul Butler, *Race and Adjudication*, *in* 3 REFORMING CRIMINAL JUSTICE 211, 217 (Erik Luna ed., 2017) ("There is surprisingly little case law on racial bias in the criminal process.").

61 *See, e.g.*, I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 222 (2006) (claiming that "[t]he Court today acts blindly by pretending [racial] dynamics do not exist" in the context of law enforcement); ALEXANDER, *supra* note 1, at 136 (suggesting that the Court intentionally "adopted rules that would *maximize*—not minimize—the amount of racial discrimination" in law enforcement, and "then closed the courthouse doors to claims of racial bias").

62 *See, e.g.*, Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 927 (2023) (explaining that "in many of the Fourth Amendment cases that scholars have most heavily critiqued for ignoring race, *none* of the parties focused on race at the [Supreme] Court or in the lower court proceedings").

63 *See, e.g.*, Gross & Barnes, *supra* note 6, at 741 (suggesting that the Supreme Court's case law on selective enforcement is "undeveloped").

64 *See id.*; *see also infra* Sections I.A–.B.

65 *See* Nieves v. Bartlett, 587 U.S. 391, 418–19 (2019) (Gorsuch, J., concurring in part and dissenting in part) (suggesting that the standard for proving selective enforcement has been developed by lower courts, not the Supreme Court).

prosecution must meet.[66] In practice, satisfying the requirements for proving selective prosecution is almost impossible.[67] Yet state and federal courts have traditionally imported the same evidentiary standard for demonstrating selective prosecution into the selective enforcement doctrine.[68]

a. The Selective Prosecution Standard

According to the Supreme Court, defendants who argue that their race influenced a prosecutor's charging decision must provide "clear evidence"[69] that this decision—or the policy underlying it—"had a discriminatory effect" and "was motivated by a discriminatory purpose."[70] In other words, defendants must identify "similarly situated individuals of a different race [who] were not prosecuted" and demonstrate that the decision to prosecute the defendants was at least partly motivated by their race.[71] As the Court explained, these requirements resemble the standard that claimants alleging equal protection violations usually must satisfy in contexts beyond criminal law.[72]

The Court has acknowledged that the requirements for proving selective prosecution are difficult to meet.[73] To learn about individuals whom prosecutors did *not* charge, claimants typically need access to prosecutorial documents that mention them.[74] The Court, however, has severely restricted this access by requiring claimants seeking discovery to provide "some evidence of both discriminatory effect and discriminatory intent,"[75] including "a credible showing of different treatment of similarly situated persons."[76] As scholars have noted, the Court has effectively created a "Catch-22" situation in which claimants seeking

66 *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962); Wayte v. United States, 470 U.S. 598, 608–09 (1985); United States v. Armstrong, 517 U.S. 456, 465 (1996).

67 *See infra* notes 73–82 and accompanying text.

68 *See infra* note 83 and accompanying text.

69 *Armstrong*, 517 U.S. at 465 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

70 *Id.* (quoting *Wayte*, 470 U.S. at 608).

71 *Id.*

72 *See id.* ("The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" (quoting *Wayte*, 470 U.S. at 608)).

73 *See, e.g.*, *id.* at 463 ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one."); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (stating that "a [successful] selective prosecution claim is a *rara avis*").

74 *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 616–18 (1998) (explaining why the success of selective prosecution claims is largely dependent on access to relevant prosecutorial documents, which do not always exist).

75 United States v. Bass, 536 U.S. 862, 863 (2002) (per curiam).

76 *Armstrong*, 517 U.S. at 470.

discovery must present the same type of information that they originally sought to access.[77] Proving discriminatory purpose may pose even greater challenges for selective prosecution claimants. Prosecutors, after all, are unlikely to admit to improper motives or produce the type of "smoking gun" evidence that demonstrates they prosecuted an individual based on race.[78]

Due to these strict requirements, selective prosecution claims almost invariably fail.[79] Nevertheless, the Court has consistently defended the strict evidentiary standard by pointing to the "broad discretion" prosecutors possess in their charging decisions[80]—discretion that is considered "a special province of the Executive"[81] and that, therefore, entitles these charging decisions to a "presumption of regularity."[82]

b. The Selective Prosecution Standard Applied to Selective Enforcement

Although the Supreme Court itself has not applied the demanding requirements for proving selective prosecution to allegations of selective enforcement, lower state and federal courts have traditionally employed the same evidentiary standard for both types of claims.[83]

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77 *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 159 (1999).

78 *See, e.g.*, ALEXANDER, *supra* note 1, at 130 (arguing that "evidence [of discriminatory purpose] will almost never be available in the era of colorblindness"); McAdams, *supra* note 74, at 605 (claiming that "[t]oday, most discriminators strive to conceal their intent in order to avoid legal, social, and economic sanctions").

79 *See, e.g.*, Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. 1955, 1986 (2024) ("Studies have confirmed the existence of racial biases in law enforcement and prosecution, but the requirements for proving . . . selective prosecution are so demanding that such claims are consistently rejected." (footnote omitted)); Siegler & Admussen, *supra* note 1, at 1002–03 (arguing in 2021 that "the last successful [racially] selective prosecution claim at either the state or federal level was the very first one that reached the Court back in 1886—*Yick Wo* [*v. Hopkins*, 118 U.S. 356 (1886)]"). Some scholars argue that the Court's decision in *Yick Wo* had nothing to do with selective prosecution. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 354–55 (1997) ("In *Yick Wo* . . . the officials who were shown to have engaged in wrongful discrimination were not the prosecutors but rather the officers in charge of awarding exemptions.").

80 *Armstrong*, 517 U.S. at 464 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

81 Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999).

82 *Armstrong*, 517 U.S. at 464 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

83 *See, e.g.*, Nieves v. Bartlett, 587 U.S. 391, 418 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("Some courts of appeals . . . have already applied [the Supreme Court's selective prosecution standard in] *Armstrong* to claims alleging selective arrest under the Fourteenth Amendment." (first citing United States v. Mason, 774 F.3d 824, 829–30 (4th Cir. 2014); then citing United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); and then citing Johnson v. Crooks, 326 F.3d 995, 1000 (8th Cir. 2003))); *see also* Maclin, *supra* note 6, at 337 n.22 ("[L]ower court decisions . . . have applied [selective prosecution's] strict evidentiary burden to claims of selective enforcement by the police."); Siegler & Admussen, *supra* note 1, at 1005 ("Every circuit to address

Typically, therefore, claimants alleging selective enforcement have to prove discriminatory effect by identifying "similarly situated individuals of a differen[t] race" whom the police treated differently.[84] For instance, a defendant who argues they have been discriminatorily stopped by a police officer has to point to people of a different race whom the police did not stop under similar circumstances.[85] However, the chances of an individual learning about similarly situated others who were not stopped are incredibly small, as it is unlikely that the police have documented this type of information.[86] The records that do exist are usually those stemming from stops that resulted in an official enforcement measure, such as an arrest or a ticket, or stops that led to the discovery of contraband or other incriminating evidence.[87] Unless instructed otherwise,[88] officers are unlikely to document unfruitful stops that ended with no official measures.[89] They will almost certainly not document stops they chose to forgo despite the fact that they could have made them.[90] Even when police have recorded useful data, the demanding discovery standard, which courts have traditionally imported from the selective prosecution context into the selective enforcement doctrine,[91] usually bars claimants from gaining access to it.[92]

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the issue continues to use the same merits standard for both selective prosecution and selective law enforcement claims."). *But see* Conley v. United States, 5 F.4th 781, 789 (7th Cir. 2021) (holding that "racially selective-enforcement claims must be proven by a preponderance of the evidence").

84 United States v. Washington, 869 F.3d 193, 214 (3d Cir. 2017); *see also Alcaraz-Arellano*, 441 F.3d at 1264 ("To satisfy the discriminatory-effect element, one who claims selective enforcement 'must . . . make a credible showing that a similarly-situated individual of another race could have been, but was not, [stopped or] arrested . . . for the offense for which the defendant was [stopped or] arrested . . . .'" (alterations in original) (quoting United States v. James, 257 F.3d 1173, 1179 (10th Cir. 2001))).

85 *See, e.g.*, *Alcaraz-Arellano*, 441 F.3d at 1264.

86 *See, e.g.*, Siegler & Admussen, *supra* note 1, at 992; Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 206.

87 *See* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997).

88 *See, e.g.*, Thomas Tracy, *NYPD to Document All Vehicle Stops to Accommodate NYC Law Aimed at Curbing Racial Profiling*, N.Y. DAILY NEWS (Dec. 29, 2021, 2:56 AM), https://www.nydailynews.com/2021/12/28/nypd-to-document-all-vehicle-stops-to-accommodate-nyc-law-aimed-at-curbing-racial-profiling/ [https://perma.cc/5SCL-G95N] (reporting that "NYPD officers will have to document every traffic stop—whether or not they result in tickets or other legal action—to accommodate a new city law meant to ensure vehicles aren't pulled over because of their occupants' race").

89 *See* Harris, *supra* note 87, at 560.

90 *See, e.g.*, Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 198 (2017); McAdams, *supra* note 74, at 617–18; Siegler & Admussen, *supra* note 1, at 992; Davis, *supra* note 5, at 438.

91 *See, e.g.*, Siegler & Admussen, *supra* note 1, at 1005–06.

92 *See, e.g.*, PADULA, *supra* note 60, at 200 (arguing that the demanding discovery standard "made it practically impossible for criminal defendants to obtain relevant data from law enforcement agencies even in the rare instances in which such data exists").

Like selective prosecution claimants, defendants alleging selective enforcement must typically also present clear evidence that the choice to stop, search, or arrest them—or the policy on which the choice was based—was motivated by their race.[93] And like prosecutors, police officers too will rarely admit to discriminatory enforcement of the law.[94] In 2013, in *Floyd v. City of New York*,[95] a federal district court in New York ruled that the New York Police Department engaged in a years-long practice of racially discriminatory stop-and-frisks.[96] The court largely relied on the testimonies of officers, who explained that the Department had an "unwritten policy" of "targeting 'the right people,'" which the court concluded was in fact a euphemism for racial profiling.[97] Yet direct evidence of selective enforcement is very uncommon, as officers are aware of what to say—and what not to say—to avoid a judicial finding of misconduct on their part.[98]

Selective enforcement claimants sometimes attempt to prove either discriminatory effect or discriminatory purpose by presenting various types of statistical evidence.[99] In some cases, for instance, claimants have presented evidence of racial disparities in enforcement by either an individual police officer[100] or an entire unit.[101] Such statistics, if they exist at all, are generally obtainable only through the discovery of police or prosecutorial materials—a task that most courts have made difficult to accomplish.[102] Claimants who have nonetheless managed to present relevant statistical evidence usually find that judges do not consider it convincing enough to support a selective enforcement claim.[103] In 1987, in *McCleskey v. Kemp*,[104] the Supreme Court held that defendants raising an equal protection claim "must prove that the decisionmakers in [their specific] case acted with discriminatory purpose"[105] and suggested

93 *See, e.g.*, United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); United States v. Washington, 869 F.3d 193, 214 (3d Cir. 2017).

94 *See supra* note 78 and accompanying text.

95 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

96 *Id.* at 658, 660.

97 *Id.* at 603.

98 *See generally* Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. Chi. L. Rev. 51, 54–55 (2015) (describing how "officers have developed recurring narratives or scripts of suspicion to satisfy administrative review of their actions and the rare instances of constitutional challenges to contemporary practices").

99 *See generally* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 Cornell L. Rev. 1211, 1281–82 (2018) (mentioning various types of statistical evidence litigants can present to prove discrimination).

100 *See* United States v. Mesa-Roche, 288 F. Supp. 2d 1172, 1188 (D. Kan. 2003).

101 *See* United States v. Avery, 137 F.3d 343, 348, 356 (6th Cir. 1997).

102 *See supra* notes 91–92 and accompanying text.

103 *See* Goel et al., *supra* note 90, at 199–202.

104 481 U.S. 279 (1987).

105 *Id.* at 292.

that only statistical evidence showing "a 'stark' pattern" of racial disparities in enforcement could serve as an appropriate alternative to direct evidence of such purpose.[106] Lower courts have seldom found the statistical evidence of racial disparities that defendants have presented strong enough to meet *McCleskey*'s "stark pattern" requirement.[107] Instead, even when statistical evidence was reliable and disparities were significant, courts have typically insisted that defendants must also provide strong direct evidence that the decision to stop or arrest them specifically resulted from intentional discrimination.[108]

2. Lower Courts' Recent Doctrinal Changes

Scholars agree that proving selective enforcement under the demanding evidentiary standard borrowed from the selective prosecution doctrine is almost "impossible."[109] Scholars also argue that using the same evidentiary standard for both types of claims is both illogical and unjustified.[110] As mentioned previously, the Supreme Court has defended the demanding selective prosecution standard by pointing to the presumption of regularity that benefits prosecutorial decisions.[111] The Court has clarified that this presumption rests on prosecutors' extensive discretion in charging,[112] which is considered "a special province of the Executive."[113] As scholars note, however, "there is no 'special province' of law enforcement."[114] Although judges afford strong deference to prosecutors, they routinely review and question police officers' decisions in both criminal and civil proceedings.[115] Officers' enforcement decisions, in other words, do not benefit from the same presumption of regularity that prosecutors' charging decisions enjoy, and the high

106 *Id.* at 293–94 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

107 *See, e.g.*, Goel et al., *supra* note 90, at 199–204.

108 *See id.*; *see also* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2097 n.210 (2016) ("There is a debate among scholars as to whether *McCleskey* actually bars courts from using statistical analysis to satisfy the 'intent' prong of the equal protection analysis.").

109 *See, e.g.*, ALEXANDER, *supra* note 1, at 137; Alschuler, *supra* note 86, at 206; Siegler & Admussen, *supra* note 1, at 991–92; Rushin & Edwards, *supra* note 1, at 650–51; Gross & Barnes, *supra* note 6, at 741; Rubinstein, *supra* note 4, at 832.

110 *See, e.g.*, PADULA, *supra* note 60, at 198; Siegler & Admussen, *supra* note 1, at 1019–26.

111 *See supra* notes 80–82 and accompanying text.

112 *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

113 Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999).

114 Siegler & Admussen, *supra* note 1, at 1020.

115 *See id.* at 1019–23.

barriers to proving that officers have enforced the law discriminatorily are therefore unjustified.[116]

In recent years, an increasing number of state and federal courts have been responsive to this line of critique.[117] Consequently, some of them have applied various changes to the selective enforcement doctrine, making it easier for claimants to prevail. Some courts handling selective enforcement claims have thus relaxed the requirements for obtaining discovery,[118] adopted a more lenient evidentiary standard for proving claims on the merits,[119] and even begun to consider implicit bias—not just purposeful discrimination—unconstitutional.[120]

These doctrinal changes have not resulted in a surge of successful selective enforcement claims. However, thanks to these changes, at least some defendants managed to prove that they were the victims of selective enforcement[121]—a task that for decades had been considered almost impossible.[122] The higher probability that a court will accept a selective enforcement claim or grant a discovery motion has also potentially discouraged some prosecutors from taking cases tainted with discrimination to trial or encouraged them to extend very generous plea offers to defendants.[123] Nevertheless, further research is necessary to learn about the influence that these doctrinal changes have had on the litigation of selective enforcement claims in jurisdictions that have implemented them.

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116 *See id.*

117 *See, e.g.*, Nieves v. Bartlett, 587 U.S. 391, 418–19 (2019) (Gorsuch, J., concurring in part and dissenting in part) (describing how a few circuit courts have recognized the special evidentiary difficulties faced by selective enforcement claimants, as well as the fact that police officers' enforcement decisions should not be afforded the same "presumptions of regularity and immunity" that benefit prosecutors' charging decisions (first citing United States v. Sellers, 906 F.3d 848, 856 (9th Cir. 2018); then citing United States v. Washington, 869 F.3d 193, 219 (3d Cir. 2017); then citing United States v. Davis, 793 F.3d 712, 720–21 (7th Cir. 2015) (en banc); and then citing Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157, 1168 (10th Cir. 2003))); Conley v. United States, 5 F.4th 781, 790–96 (7th Cir. 2021) (discussing the same line of critique); Commonwealth v. Robinson-Van Rader, 208 N.E.3d 693, 707–08 (Mass. 2023) (same); People v. Sims, 207 N.E.3d 238, 265–68 (Ill. App. Ct. 2022) (same).

118 *See infra* notes 124–43 and accompanying text.

119 *See infra* notes 144–68 and accompanying text.

120 *See infra* notes 169–81 and accompanying text.

121 *See, e.g.*, Commonwealth v. Long, 152 N.E.3d 725, 731, 747 (Mass. 2020); State v. Scott, 288 A.3d 842, 849 (N.J. Super. Ct. App. Div. 2023); United States v. Moore, 716 F. Supp. 3d 415, 419 (E.D. Va. 2024).

122 *See supra* notes 5, 109 and accompanying text.

123 *See, e.g.*, Rubinstein, *supra* note 4, at 881 (explaining why "there is reason to believe that some cases with potentially strong equal protection claims never even reach trial," as they are "dismissed by the prosecution" or "resolved in a plea bargain that is favorable to the defendant").

a. Lower Discovery Threshold

Some courts have relaxed the requirements that selective enforcement claimants must satisfy to obtain discovery.[124] Traditionally, courts set a high bar for selective prosecution claimants and selective enforcement claimants seeking discovery.[125] They ask claimants to provide "some evidence of both discriminatory effect and discriminatory intent,"[126] including "a credible showing of different treatment of similarly situated persons."[127] As explained earlier, this has resulted in an absurd "Catch-22" situation in which claimants are required to provide data similar to what they are trying to discover.[128] However, a few federal courts—including at least three federal courts of appeals (the Third, Seventh, and Ninth Circuits)—have recently begun to turn away from this nearly impossible discovery standard in selective enforcement cases.[129]

For example, in 2017, in *United States v. Washington*,[130] the Third Circuit authorized judges to grant "limited discovery" even when selective enforcement claimants do not present evidence of discriminatory purpose or cannot point to specific individuals whom the police treated differently.[131] Instead, claimants are only required to present "'some evidence' of discriminatory effect"—including "reliable statistical evidence[] or its equivalent"—which could "support a reasonable inference of discriminatory intent."[132] As scholars suggest, this lower standard may lead to discovery even if claimants can only show that the officers in their case disproportionately enforced the law against people of color.[133] For instance, in 2019, in *United States v. Brooks*,[134] a federal district court in New Jersey applied the *Washington* standard and granted limited discovery.[135] The defendant was arrested by the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") following a

124 *See* Siegler & Admussen, *supra* note 1, at 1008–19 (describing circuit courts that have "craft[ed] new, lower discovery standards for selective law enforcement claims").

125 *See supra* notes 74–77, 91–92 and accompanying text.

126 United States v. Bass, 536 U.S. 862, 863 (2002) (per curiam).

127 United States v. Armstrong, 517 U.S. 456, 470 (1996).

128 *See supra* note 77 and accompanying text.

129 *See, e.g.*, United States v. Washington, 869 F.3d 193, 213–22 (3d Cir. 2017); United States v. Davis, 793 F.3d 712, 719–21 (7th Cir. 2015) (en banc); Conley v. United States, 5 F.4th 781, 791–92 (7th Cir. 2021); United States v. Sellers, 906 F.3d 848, 854–56 (9th Cir. 2018); United States v. Mumphrey, 193 F. Supp. 3d 1040, 1059–60 (N.D. Cal. 2016); United States v. Lopez, 415 F. Supp. 3d 422, 425–27 (S.D.N.Y. 2019).

130 869 F.3d 193 (3d Cir. 2017).

131 *Id.* at 220–21.

132 *Id.*

133 *See* Siegler & Admussen, *supra* note 1, at 1016.

134 No. 14-cv-382, 2019 WL 258694 (D.N.J. Jan. 18, 2019).

135 *Id.* at *4.

"stash-house sting operation"[136] in which undercover ATF agents convinced the defendant to rob a "stash house" containing cocaine, which in fact never existed.[137] The defendant demonstrated that at least five of the latest federal criminal cases in New Jersey that resulted from such ATF sting operations were brought against "defendants and respective co-defendants [who] were either African-American or minority."[138] He also pointed to "several" white people whom he argued were similarly situated to him and whom ATF agents allegedly could have targeted but did not.[139] The government maintained that "[r]eference to the races of defendants charged in other cases and a 'laundry list of white males from [the defendant's county]'" did not satisfy the *Washington* standard.[140] The court, however, found that this information was sufficient for granting limited discovery of data about these operations—data that could potentially help the defendant prove that he was the victim of racially selective enforcement.[141]

To date, state courts, on the other hand, have been reluctant to apply a more lenient discovery standard[142] unless such a relaxed standard was required by statute.[143]

b. Lenient Evidentiary Standard

A few state and federal courts have gone further than relaxing the discovery standard in cases involving selective enforcement claims. Instead, these courts have lowered the evidentiary standard for proving selective enforcement *on the merits* and no longer require claimants to present clear evidence of both discriminatory effect and discriminatory purpose.[144] For instance, in 2021, in *Conley v. United States*[145]—another case involving a stash house sting operation—the Seventh Circuit held that "racially selective-enforcement claims must be proven by a

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136 *Id.* at *1.

137 *See generally* United States v. Washington, 869 F.3d 193, 196 (3d Cir. 2017) (explaining stash house sting operations).

138 *Brooks*, 2019 WL 258694, at *1–2.

139 *Id.*

140 *Id.* at *4.

141 *See id.*

142 *But see* State v. Johnson, 890 S.E.2d 891, 895 (N.C. 2023) (Earls, J., dissenting) (stating that "[t]he differences between enforcement and prosecution make a compelling case for lowering *Armstrong*'s pre-discovery standard in the context of selective enforcement").

143 *See, e.g.*, Commonwealth v. Long, 152 N.E.3d 725, 740 (Mass. 2020) (discussing defendants' statutory "right to reasonable discovery of evidence concerning the totality of the circumstances of the traffic stop").

144 *See, e.g.*, Conley v. United States, 5 F.4th 781, 789–96 (7th Cir. 2021); United States v. Moore, 716 F. Supp. 3d 415, 420–21, 429–30 (E.D. Va. 2024); *Long*, 152 N.E.3d at 733–41.

145 5 F.4th 781 (7th Cir. 2021).

preponderance of the evidence," not clear evidence.[146] In other words, selective enforcement claimants need only demonstrate that "it is more likely than not" that they were victims of intentionally discriminatory enforcement.[147] The court also emphasized that statistical evidence can serve as "a useful tool" for proving selective enforcement on the merits.[148] Ultimately, however, it found that the defendant's statistical evidence, which aimed to show that the ATF disproportionately employed stash house sting operations against Black people like the defendant, did not meet even the lower standard.[149]

Another court that applied the preponderance of the evidence standard, however, reached a different result. In 2024, in *United States v. Moore*,[150] a federal district court in Virginia ruled that the defendant—a Black person whom the police stopped for driving with "suspicious temporary tags"[151]—successfully proved by a preponderance of the evidence that the decision to stop him amounted to selective enforcement.[152] Notably, the defendant did not identify any similarly situated individuals whom the police did not stop.[153] Additionally, he did not provide any direct evidence that the specific officers who stopped him were acting with "invidious or bad faith."[154] Instead, the court found both discriminatory effect and discriminatory purpose based solely on statistical evidence demonstrating that the Richmond Police Department, as a whole, "stop[ped] Black drivers five times as often as it stop[ped] white drivers," in addition to "evidence of Richmond's history of discrimination" in policing, housing, and other spheres of life.[155]

Some state courts have adopted even more lenient evidentiary standards for proving selective enforcement under their respective state

146 *Id.* at 789.

147 *Id.* at 798.

148 *Id.* at 796–97 (quoting United States v. Barlow, 310 F.3d 1007, 1011 (7th Cir. 2002)).

149 *See id.* at 797–98. According to the court, in the defendant's specific case, it was the Federal Bureau of Investigation ("FBI")—not the ATF—that brought about the sting operation. *See id.* Additionally, the target of the operation was not the defendant but another individual. *Id.* The court found that the defendant was "selected by co-conspirators" to participate in the (staged) robbery. *Id.* The FBI, meanwhile, was not involved in the recruitment of the defendant, and agents were not aware of the defendant's race "until his arrest." *Id.* The court concluded, therefore, that the statistical evidence the defendant provided was insufficient to demonstrate either discriminatory effect or discriminatory purpose on the part of the FBI or the ATF and rejected the defendant's selective enforcement claim. *See id.*

150 716 F. Supp. 3d 415 (E.D. Va. 2024).

151 *Id.* at 430 n.19.

152 *Id.* at 428–32.

153 *See id.* at 428–29.

154 *Id.* at 430.

155 *Id.* at 425–26, 432.

constitutions.[156] For example, in a series of three decisions published between 2008 and 2023, the Supreme Judicial Court of Massachusetts incrementally eased the requirements that selective enforcement claimants must satisfy to prevail under the Massachusetts Constitution's equal protection guarantee.[157] Nowadays, Massachusetts claimants are no longer required to prove discriminatory effect.[158] Instead, they need only "establish[] a reasonable inference that the investigation was motivated by race or membership in another constitutionally protected class."[159] The court has demonstrated a liberal approach as to the type of facts that claimants may cite to sustain a reasonable inference of such motivation.[160] According to the court, these facts could be predicated on either "personal knowledge, the [claimant]'s own investigation, evidence obtained during discovery, [or] other relevant sources."[161] If a judge is convinced that the facts the claimant cited indeed establish such a reasonable inference, the prosecution will have the opportunity to rebut it[162] by demonstrating that the police did *not* enforce the law against the claimant because of race and by "establishing a race-neutral reason" for their action.[163] If the prosecution fails to do so, the claimant will prevail. For example, in 2020, in *Commonwealth v. Long*,[164] the court found that the statistical evidence presented by the defendant—a Black person who was stopped by the Boston Police Department for a "missing inspection sticker"[165]—supported a reasonable inference of discriminatory motivation.[166] The evidence, derived from data gathered by the police department, revealed significant racial disparities in traffic enforcement by the officers involved in the defendant's stop.[167] After the prosecution failed to refute this inference, the court held that the defendant successfully proved his selective enforcement claim.[168]

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156 *See, e.g.*, State v. Segars, 799 A.2d 541, 549–52 (N.J. 2002) (describing the lenient evidentiary standard for proving selective enforcement under the New Jersey Constitution).

157 *See* Commonwealth v. Lora, 886 N.E.2d 688, 697–701 (Mass. 2008); Commonwealth v. Long, 152 N.E.3d 725, 733–41 (Mass. 2020); Commonwealth v. Robinson-Van Rader, 208 N.E.3d 693, 706–09 (Mass. 2023).

158 *See Robinson-Van Rader*, 208 N.E.3d at 706–07.

159 *Id.* at 708 (citing *Long*, 152 N.E.3d at 739).

160 *See id.* at 706.

161 *Id.* (quoting *Long*, 152 N.E.3d at 739).

162 *See id.*

163 *Id.* at 706, 711.

164 152 N.E.3d 725 (Mass. 2020).

165 *Id.* at 732.

166 *See id.* at 745–47.

167 *See id.*

168 *See id.* at 747.

c. Substantive Doctrinal Change

In recent years, appellate courts in at least two states—Massachusetts and New Jersey—have applied a major substantive change to the doctrine of selective enforcement under their respective state constitutions.[169] The U.S. Supreme Court has only regarded "*intentionally* discriminatory" law enforcement as unconstitutional,[170] therefore suggesting that "unconsciously" biased enforcement decisions would not constitute an equal protection violation.[171] But in 2020, in *Long*, discussed above, the Supreme Judicial Court of Massachusetts held that discriminatory enforcement of the law by police officers could be considered unconstitutional under the Massachusetts Constitution even if it resulted from implicit bias—namely, even when the officers involved had no "awareness" of their biases and did not engage in intentionally discriminatory policing.[172]

In 2023, in *State v. Scott*,[173] the Appellate Division of the Superior Court of New Jersey issued a similar holding under the New Jersey Constitution's equal protection guarantee.[174] In this unusual case, a woman who called the police to report that she fell victim to robbery provided some details about the robber, including his clothes, the direction that he headed, and the fact that he took her phone.[175] However, she explicitly refrained from identifying his race, explaining that she "didn't see."[176] Nevertheless, when the police dispatcher reported about the incident to officers in the field, she "improperly added to the victim's description that the robber was a Black male."[177] Based on these details, the officers observed and stopped the defendant on the street, frisked him, and discovered he was carrying the victim's phone.[178] The court held that even if the dispatcher mentioned the robber was Black unintentionally, because of unconscious biases she had, her biased description of the defendant could still be considered unconstitutional selective enforcement under the New Jersey Constitution.[179] As the court suggested, this holding was motivated by the view that "[t]he problem of implicit bias

169 *See id.* at 736–37; State v. Scott, 288 A.3d 842, 854–55 (N.J. Super. Ct. App. Div. 2023).

170 Whren v. United States, 517 U.S. 806, 813 (1996) (emphasis added).

171 *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (describing how the Supreme Court has usually "requir[ed] proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent").

172 *See* Commonwealth v. Long, 152 N.E.3d 725, 736–37, 739 (Mass. 2020).

173 288 A.3d 842 (N.J. Super. Ct. App. Div. 2023).

174 *See id.* at 848.

175 *See id.* at 849.

176 *Id.*

177 *Id.*

178 *See id.*

179 *See id.* at 854–55.

in the context of policing is both real and intolerable."[180] Ultimately, the court concluded that the defendant successfully proved selective enforcement, regardless of the exact reasons that had led the dispatcher to add race to the description of the robber.[181]

B. Remedying Selective Enforcement

1. The Supreme Court's Failure to Specify a Remedy

The Supreme Court has never decided the appropriate remedy within the criminal process for successful selective enforcement claims.[182] Even if a defendant gets over the evidentiary hurdles to proving selective enforcement, the Court's case law does not specify the remedy that a judge should grant, if any.[183]

The vagueness surrounding the proper remedy for selective enforcement is quite unusual in the field of constitutional criminal procedure. Other types of constitutional violations by the police generally result in the suppression—namely, inadmissibility—of the incriminating evidence obtained.[184] For example, searches and seizures that violate the Fourth Amendment may trigger the suppression of evidence seized by the police,[185] and the omission of warnings required by *Miranda v. Arizona*[186] for custodial interrogations may lead to the inadmissibility of

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180 *Id.* at 848.

181 *See id.* at 855; *see also* Aliza Hochman Bloom, *Policing Bias Without Intent*, 2025 U. ILL. L. REV. (forthcoming 2025) (discussing *State v. Scott* case critically).

182 *See, e.g.*, Rubinstein, *supra* note 4, at 833–40; Karlan, *supra* note 6, at 2009–14; Gross & Barnes, *supra* note 6, at 741; Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 469 n.273 (2021); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 349 (2001); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 571 (1998); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1109–11 (2000).

183 The Supreme Court has also expressly refrained from specifying the judicial remedy for successful selective prosecution claims. *See* United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996) ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race."); *see also* Rubinstein, *supra* note 4, at 833–40 (describing this remedial choice of the Court and providing possible explanations for it).

184 *See, e.g.*, ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 73 (2021) (considering suppression of unconstitutionally obtained evidence "the primary remed[y]" within the criminal process for constitutional violations by the police); Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1594 (2015) (arguing that "[t]he individual defendant who raises a Fourth, Fifth, or Sixth Amendment complaint about the police is nearly always seeking to suppress evidence").

185 *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

186 384 U.S. 436 (1966).

the confession obtained.[187] Yet the Court has never explained whether there are similar consequences for racially selective enforcement.

The Court's failure to specify the judicial remedy for successful selective enforcement claims can be attributed to the fact that it has never found any such claim to be successful,[188] and it aligns with the Court's broader reluctance to discuss discriminatory policing or develop the selective enforcement doctrine.[189] Nevertheless, this remedial uncertainty may also be a conscious choice, reflecting the Court's general disapproval of using suppression of evidence or dismissal of charges as a remedy for police misconduct.[190] Concerning the Fourth Amendment, for example, the Court has long limited and narrowed the application of the exclusionary rule,[191] citing concerns over the rule's negative consequences for society, primarily the potential impunity for factually guilty defendants.[192] Due to similar concerns, the Court might hesitate to apply the suppression or dismissal remedies to other types of police wrongdoing, including selective enforcement.[193]

Some judges and scholars suggest the Court may have already ruled out suppressing evidence as an appropriate remedy for selective enforcement.[194] They base this claim on the Court's 1996 decision

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187 *See id.* at 444.

188 *See, e.g.*, PADULA, *supra* note 60, at 22 n.72; Gross & Barnes, *supra* note 6, at 741.

189 *See supra* notes 60–62 and accompanying text.

190 *See, e.g.*, Rubinstein, *supra* note 4, at 839 (arguing that the Court's "distaste for, even aversion to, dismissal, suppression, and other strong remedies for procedural violations in the criminal process" may have influenced the Court's reluctance to specify the appropriate remedy for selective enforcement).

191 *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2505–21 (1996) (describing how the Court has gradually limited and narrowed the application of the Fourth Amendment exclusionary rule); CHEMERINSKY, *supra* note 184, at 184–90, 243–48 (same).

192 *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free . . . ."); Davis v. United States, 564 U.S. 229, 237 (2011) (stating that the rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and that "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment").

193 *See, e.g.*, Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1426 (2013) (arguing that due to the Court's negative attitudes toward the Fourth Amendment exclusionary rule, "it is very unlikely to adopt the remedy in criminal cases for equal protection violations").

194 *See, e.g.*, United States v. Weaver, 9 F.4th 129, 159 (2d Cir. 2021) (en banc) (Lohier, Jr., J., concurring) (stating that due to the Supreme Court's Fourth Amendment and equal protection case law, "any evidence obtained as a result of [a] racially biased stop could still be used against [the defendant] in [a] criminal proceeding" (first citing Whren v. United States, 517 U.S. 806, 813 (1996); then citing Karlan, *supra* note 6, at 2010–14; and then citing Gabriel J. Chin & Charles J.

in *Whren v. United States*,[195] in which the Court held that the fact that a search or seizure was racially discriminatory does not constitute, by itself, a Fourth Amendment violation.[196] The Fourth Amendment prohibits "unreasonable searches and seizures,"[197] and the remedy for its violation is the possible suppression of any evidence that the police obtained through such unlawful searches and seizures.[198] In *Whren*, the two defendants, who were charged with federal drug offenses, moved to suppress the primary evidence against them: drugs that a police officer seized after stopping the defendants' car for a number of traffic violations and noticing bags containing crack cocaine within the vehicle.[199] The defendants argued that the circumstances surrounding the traffic stop suggested that the stop was "pretextual"—namely, that the officer conducted the stop not to enforce traffic regulations (as the officer maintained), but rather to "investigat[e] other law violations," such as drug crimes, "as to which no probable cause or even articulable suspicion exist[ed]."[200] The defendants also hinted that the stop may have been motivated by the fact that they were Black.[201] Therefore, the defendants argued, the traffic stop was unreasonable in a way that violated the Fourth Amendment, and the incriminating evidence obtained must be suppressed.[202]

The Court unanimously rejected the defendants' claims. It clarified that judges should not assess the reasonableness of traffic stops based on the "actual motivations" of the police officers who conducted them.[203] Instead, the Court held that traffic stops were reasonable whenever officers had "probable cause to believe that a traffic violation ha[d] occurred,"[204] regardless of any other motivations that they may have

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Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 918 (2015))); Karlan, *supra* note 6, at 2004 (arguing that the Court's equal protection case law "raise[s] the possibility that . . . exclusion and dismissal[] will be unavailable for claims of racial discrimination" by the police); Renée McDonald Hutchins, *Racial Profiling: The Law, the Policy, and the Practice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 95, 119 (Angela J. Davis ed., 2017) ("If the police violate your equal protection rights and discover drugs and a gun . . . you cannot ask for those drugs and gun to be kept out of a future prosecution.").

195 517 U.S. 806 (1996).

196 *See id.* at 813.

197 U.S. CONST. amend. IV.

198 *See supra* note 185 and accompanying text.

199 *Whren*, 517 U.S. at 808–09.

200 *Id.* at 809–10.

201 *See id.*

202 *See id.*

203 *Id.* at 813.

204 *Id.* at 810.

had—including intentional racial bias.[205] In short, as the Court stated, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[206] The Court moved on to mention that racially selective enforcement by the police was indeed unconstitutional.[207] It emphasized, however, that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[208] The defendants in *Whren* focused their suppression motion on the Fourth Amendment and did not raise any equal protection claim under the Fourteenth Amendment.[209] For this reason, enforcement against the defendants merely had to comply with the Fourth Amendment to be constitutional.[210] Ultimately, the Court affirmed the lower courts' decision to deny the defendants' suppression motion.[211]

By holding that officers' subjective intentions are irrelevant to Fourth Amendment analysis, *Whren* effectively barred judges from suppressing, under the Fourth Amendment, evidence obtained through racially discriminatory searches or seizures.[212] Scholars have long criticized this decision,[213] arguing that the Court has encouraged police officers to engage in racial profiling,[214] especially given the difficulties of proving that a traffic stop was a result of intentional racial bias for purposes of the Equal Protection Clause.[215] This criticism is justified. Yet, contrary to suggestions made by some judges and scholars,[216] *Whren* has not prevented judges from granting suppression of evidence as a

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205 *See id.* at 813; *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 739 (2011) ("Our unanimous opinion [in *Whren*] held that we would not look behind an objectively reasonable traffic stop to determine whether racial profiling or a desire to investigate other potential crimes was the real motive.").

206 *Whren*, 517 U.S. at 813.

207 *See id.*

208 *Id.*

209 *See* PADULA, *supra* note 60, at 195.

210 *See Whren*, 517 U.S. at 819.

211 *See id.*

212 *See supra* note 206 and accompanying text.

213 *See, e.g.*, Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43, 57 (2018) ("*Whren* ranks as one of the Court's worst opinions in the last thirty years and is deserving of the vast criticism it has received.").

214 *See, e.g.*, Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365, 1410 (2021) (arguing that the Court's case law on traffic stops, including its decision in *Whren*, may have granted law enforcement officers "licenses to conduct racially-motivated exploratory searches"); Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 908 (2015) (arguing that the *Whren* Court "rebuffed an opportunity to squarely confront racialized vehicle stops").

215 *See, e.g.*, Leipold, *supra* note 182, at 571–72 (explaining that it is much more difficult to prove an equal protection violation than a Fourth Amendment violation).

216 *See supra* note 194 and accompanying text.

remedy for selective enforcement under the Equal Protection Clause.[217] Instead, as other judges and scholars have concluded, the Court has simply left the proper remedy question unresolved, leaving it to lower courts to answer it.[218] As the next Section shows, this is indeed what courts across the country have done.

2. Lower Courts' Remedial Responses

Although the Supreme Court has left the remedy question unanswered, defendants alleging selective enforcement constantly file motions to suppress evidence or to dismiss charges against them.[219] Virtually all of these motions are denied, primarily due to defendants' failure to meet the high evidentiary threshold.[220] When judges deny such motions, they often feel comfortable refraining from deciding whether the defendant's proposed remedy—suppression or dismissal—is proper, reasoning that such determination is unnecessary. The Fifth and Tenth Circuits, for example, have consistently declined to comment on the propriety of suppressing evidence as a remedy for selective enforcement in cases in which defendants have failed to prove their claim.[221]

Nevertheless, an increasing number of state and federal courts across the country have not hesitated to express their position on the appropriate remedial response to selective enforcement. Courts have generally taken one of three approaches, none of which seems to be dominant. First, some courts—including the Sixth Circuit, the Supreme Court of Maryland, and some appellate courts in Ohio—hold that successful selective enforcement claims should warrant no judicial remedy within the criminal process.[222] Second, other courts—including the highest courts of New Jersey and Massachusetts—maintain that successful selective enforcement claims should lead to the suppression of evidence against the defendant.[223] Lastly, yet other courts—including the Third Circuit and the Court of Criminal Appeals of Texas—consider the proper remedy for selective enforcement to be dismissal of charges.[224]

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217 *See* Rubinstein, *supra* note 4, at 839–40.

218 *See supra* note 182 and accompanying text; *see also, e.g.*, United States v. Chavez, 281 F.3d 479, 486–87 (5th Cir. 2002); United States v. Lopez-Moreno, 420 F.3d 420, 434 (5th Cir. 2005).

219 *See, e.g.*, Rubinstein, *supra* note 4, at 844.

220 *See supra* notes 4–6, 109 and accompanying text.

221 *See, e.g.*, United States v. Torrellas, 197 F. App'x 318, 319 (5th Cir. 2006) (per curiam); United States v. Alabi, 597 F. App'x 991, 997 (10th Cir. 2015).

222 *See infra* notes 225–42 and accompanying text.

223 *See infra* notes 243–78 and accompanying text.

224 *See infra* notes 279–04 and accompanying text.

a. No Proper Remedy Within the Criminal Process

A few state and federal courts hold that there is no appropriate remedy for selective enforcement within the criminal process and that the only type of remedy that claimants can seek is a civil one, such as under 42 U.S.C. § 1983.[225] According to these courts, selective enforcement claimants can sue the police officers who allegedly discriminated against them for damages or injunctive relief, but they cannot move to suppress evidence or dismiss charges in a criminal proceeding.[226]

For example, in 2008, in *United States v. Nichols*,[227] the Sixth Circuit held that suppressing evidence was an inappropriate remedy for selective enforcement.[228] The defendant had moved to suppress incriminating evidence against him, arguing that the police obtained it during a racially motivated traffic stop.[229] The court denied the suppression motion, holding that the only way that the defendant could obtain a remedy was by suing the police officer who allegedly discriminated against him.[230] The court acknowledged that the Supreme Court has never positively declared suppressing evidence inappropriate for successful selective enforcement claims.[231] The court implied, however, that it would not adopt such a remedy without affirmative approval by the Supreme Court.[232] Additionally, the court highlighted suppression's "costly toll upon truth-seeking and law enforcement objectives"[233] and suggested that less harmful civil remedies, like monetary damages, could be as effective as suppression in deterring selective enforcement.[234] In 2012, in *United States v. Cousin*,[235] the Sixth Circuit reaffirmed *Nichols*, holding that suppression will continue to be an improper remedy for selective enforcement "in the absence of an intervening change in law or en banc review."[236]

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225 According to 42 U.S.C. § 1983,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

226 *See infra* notes 227–42 and accompanying text.

227 512 F.3d 789 (6th Cir. 2008), *abrogated on other grounds by* Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* United States v. Buford, 632 F.3d 264 (6th Cir. 2011).

228 *Id.* at 794–95.

229 *See id.* at 793.

230 *See id.* at 794.

231 *See id.*

232 *See id.*

233 *Id.* at 794–95 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

234 *See id.*

235 448 F. App'x 593 (6th Cir. 2012) (per curiam).

236 *Id.* at 594.

Several federal district courts have followed suit.[237] For instance, in 2011, in *United States v. Harmon*,[238] a district court in New Mexico agreed that the proper judicial remedy for selective enforcement should be civil, under 42 U.S.C. § 1983, and not suppression of evidence.[239] The court reasoned that it was "not aware of [any] court that has applied the exclusionary rule for a violation of the Equal Protection Clause."[240] It also mentioned the high social costs stemming from suppression of evidence—especially compared with damages—and raised doubts about suppression's capacity to deter police wrongdoing effectively.[241]

In addition to federal courts, some state courts have also declined to adopt suppressing evidence as a remedy for selective enforcement. For example, the Supreme Court of Maryland and at least two courts of appeals in Ohio held suppression inadequate in such situations, citing the absence of supportive precedent.[242]

b. Suppression of Evidence as the Proper Remedy

In contrast to courts that deny selective enforcement claimants any recourse within the criminal process, some state and federal courts have declared that defendants can move to suppress incriminating evidence against them. The justifications that courts most commonly invoke for adopting this remedy are to deter police officers from engaging in selective enforcement and to preserve judicial integrity.[243]

In at least two states—New Jersey and Massachusetts—the highest state courts have adopted suppression of evidence as a remedy for selective enforcement under their respective state constitutions' equal protection guarantees.[244] As early as 2001, the Supreme Court of New Jersey held, in *State v. Maryland*,[245] that suppression was the proper remedy for selective enforcement.[246] The court went on to accept the

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237 *See, e.g.*, United States v. Foster, No. 07-cr-254, 2008 WL 1927392, at *5 (M.D. Ala. Apr. 28, 2008); United States v. Crawford, No. 20-cr-84, 2022 WL 2603558, at *2–3 (N.D. Ind. July 8, 2022); United States v. Christie, No. 21-cr-156, 2023 WL 4760709, at *7 (E.D. Tenn. July 26, 2023).

238 785 F. Supp. 2d 1146 (D.N.M. 2011), *aff'd*, 742 F.3d 451 (10th Cir. 2014).

239 *See id.* at 1170.

240 *Id.*

241 *See id.* at 1170 n.4.

242 *See, e.g.*, Portillo Funes v. State, 230 A.3d 121, 146 (Md. 2020); State v. Chambers, 2011-Ohio-1305, at ¶ 22; State v. Hansard, 2020-Ohio-5528, at ¶ 29. *But see* State v. Bello-Mancilla, 2017-Ohio-8003, at ¶ 29 (Horton, J., dissenting) (supporting the adoption of suppression of evidence as a remedy for selective enforcement).

243 *See infra* notes 244–78 and accompanying text.

244 The Supreme Court of Kansas has also recognized suppression as the proper remedy for racial profiling, albeit under a state statute and not under the Kansas Constitution. *See* State v. Gray, 403 P.3d 1220, 1226–27 (Kan. 2017).

245 771 A.2d 1220 (N.J. 2001).

246 *See id.* at 1228–31.

defendant's claim that the police officers who searched him in a train station initially approached him because he was Black, and therefore the court ordered the suppression of the drugs obtained in this unconstitutional search.[247] In 2002, in *State v. Segars*,[248] the court emphasized that the basis for adopting the suppression remedy was the need to deter the police from selectively enforcing the law and to preserve the integrity of the court.[249]

The Supreme Judicial Court of Massachusetts declared that suppression of evidence was the proper remedy for racially selective enforcement in 2008, in *Commonwealth v. Lora*,[250] explaining that the central reason for adopting it was to "deter intentional unconstitutional behavior."[251] The court first ordered the suppression of incriminating evidence obtained through a racially selective traffic stop in 2020, in *Commonwealth v. Long*.[252]

Trial and intermediate appellate courts in other states have also declared suppression the appropriate judicial response to selective enforcement. For example, in 2022, in *People v. Jones*,[253] the Third Department of the Appellate Division of the Supreme Court of the State of New York held that suppressing evidence was the proper remedy for a racially selective traffic stop under the New York State Constitution.[254] This decision adopted a different approach than the Appellate Division's First Department's position, under which selective enforcement claimants could only civilly sue the officers who allegedly discriminated against them but could not seek any remedies within the criminal process.[255] The Third Department explained that this different approach was necessary because suppression was the only remedy that could make defendants' rights "meaningful."[256] Notably, the court cited a portion of a 2004 decision from the Court of Appeals of New York, the state's highest court,[257] in which it highlighted the deterrent rationale underlying the remedy of suppression, albeit in a case that did not discuss the issue of selective enforcement.[258]

Federal courts that view suppression as an appropriate remedy for selective enforcement also often cite its potential to deter

247 *See id.*

248 799 A.2d 541 (N.J. 2002).

249 *See id.* at 548–49.

250 886 N.E.2d 688, 698–700 (Mass. 2008).

251 *Id.* at 699.

252 152 N.E.3d 725, 747–48 (Mass. 2020).

253 177 N.Y.S.3d 174 (App. Div. 2022).

254 *See id.* at 178–79.

255 *See* People v. Fredericks, 829 N.Y.S.2d 78, 79 (App. Div. 2007).

256 *Jones*, 177 N.Y.S.3d at 179.

257 *Id.* (citing People v. Jones, 810 N.E.2d 415, 419–20 (N.Y. 2004)).

258 *See Jones*, 810 N.E.2d at 419–20.

discriminatory policing or preserve judicial integrity. For instance, in 2009, in *United States v. Benitez*,[259] a district court in Iowa rejected the defendant's claim that the police stopped his car because of his race.[260] The court, therefore, refrained from determining the proper remedy for a successful claim.[261] However, the court commented that due to the low chances of proving selective enforcement in court, police officers would be properly discouraged from acting in a discriminatory manner only if the sanction for such conduct was as drastic as suppressing evidence.[262] The court noted that "it is highly doubtful that civil remedies would adequately deter police agencies from engaging in this unconstitutional and blatantly reprehensible behavior."[263] The court also suggested that suppression would be necessary to maintain judicial integrity, as admitting evidence obtained through discriminatory policing would "implicitly condone th[is] improper behavior by allowing the Government to utilize the evidence it garnered."[264]

In 2011, in *United States v. Bernard*,[265] a district court in New Mexico became the first federal court to suppress incriminating evidence obtained through racially selective enforcement.[266] The court found that the law enforcement officer in this case, employed by the New Mexico Motor Transportation Division, conducted an exceptionally thorough inspection of the defendants' vehicle at the state's port of entry due to their race.[267] The court then ordered the exclusion of drugs and other incriminating evidence obtained through the search of the defendants' vehicle.[268] The court emphasized that suppressing evidence was the sole remedy capable of effectively deterring police officers from engaging in selective enforcement, while civil remedies alone would be insufficient.[269] The court also suggested that suppression would help preserve the integrity of the court and the criminal process, while avoiding it "would condone discriminatory enforcement of the law, eviscerate the substance of the Fourteenth Amendment, and render hollow the promise of equal protection."[270] The court's

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259 613 F. Supp. 2d 1099 (S.D. Iowa 2009).

260 *See id.* at 1101–03.

261 *See id.*

262 *See id.* at 1101 n.3.

263 *Id.*

264 *Id.*

265 No. 09-cr-2474, 2011 WL 13277499 (D.N.M. Dec. 9, 2011), *vacated*, No. 09-cr-2474 (D.N.M. Apr. 16, 2012), *as recognized in* United States v. Alabi, No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013).

266 *See id.* at *6.

267 *See id.* at *3–5.

268 *See id.* at *5–6.

269 *See id.* (citing United States v. Benitez, 613 F. Supp. 2d 1099, 1102 n.3 (S.D. Iowa 2009)).

270 *Id.*

decision in *Bernard* was historic but also short-lived, as the court subsequently vacated it following a request made by the parties due to a procedural error in the decision.[271]

Unlike federal district courts, federal courts of appeals have rarely supported the adoption of suppressing evidence as a remedy for selective enforcement. In 1993, in *United States v. Jennings*,[272] the Sixth Circuit noted in dicta that such a step would be suitable, explaining that suppression would help deter future selective enforcement and preserve the integrity of the court.[273] However, as explained above, the Sixth Circuit reversed course in 2008, in *Nichols*, ruling that there was no remedy for selective enforcement within the criminal process.[274] Nevertheless, in 2023, in *United States v. Lewis*,[275] the Eleventh Circuit vaguely suggested that suppressing evidence was an available judicial response to selective enforcement.[276] The court found that the defendant abandoned the (unsupported) selective enforcement claim that he raised in the district court.[277] Yet the court obliquely suggested that selective enforcement claimants may move to suppress incriminating evidence against them and that the justification for this remedy was its deterrent potential.[278]

c. Dismissal of Charges as the Proper Remedy

Some state and federal courts specify dismissing charges—not suppressing evidence—as the appropriate remedy for selective enforcement. Oftentimes, they do so while refraining from providing detailed justifications for their remedial choice. For example, the Third Circuit, along with several lower courts, has suggested in passing that proving selective enforcement in court can lead to the dismissal of charges

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271 *See* United States v. Alabi, No. 11-cr-2292, 2013 WL 2284956, at *13–15, *52 (D.N.M. May 15, 2013) (discussing the vacatur of *Bernard* by the court), *aff'd*, 597 F. App'x 991 (10th Cir. 2015). The government's argument leading to the vacatur of *Bernard* was that "the Court had adopted findings from litigation to which the United States had not been a party, without giving the government an opportunity to controvert them." *Id.* at *14.

272 985 F.2d 562, 1993 WL 5927 (6th Cir. 1993) (unpublished table decision).

273 *See id.* at *4 & n.2.

274 *See supra* notes 227–34 and accompanying text.

275 No. 22-14246, 2023 WL 6620313 (11th Cir. Oct. 11, 2023) (per curiam).

276 *See id.* at *2.

277 *See id.* at *2–3.

278 *See id.* ("The proper remedy for selective-enforcement is a claim under the Equal Protection Clause rather than the Fourth Amendment. The exclusionary rule is a judicial remedy created to deter constitutional violations, not a 'personal constitutional right.'" (first citing Whren v. United States, 517 U.S. 806, 813 (1996); and then quoting United States v. Calandra, 414 U.S. 338, 348 (1974))).

against the defendant.[279] In 2024, in *United States v. Moore*,[280] a federal district court in Virginia accepted the defendant's selective enforcement claim[281] and dismissed the charges against him without explaining why this remedy was the most suitable judicial response.[282] Similarly, in 2025, in *United States v. Morgan*,[283] the Superior Court of the District of Columbia also accepted a selective enforcement claim and ordered the dismissal of the charges against the defendant without explaining its choice of remedy.[284]

A growing number of lower courts indicate that dismissal of charges is the proper, or likely proper, judicial response to selective enforcement, based on their interpretation of the Supreme Court's 1886 landmark decision in *Yick Wo v. Hopkins*.[285] These include several federal district courts,[286] the Supreme Court of Arizona,[287] and the Court of Criminal Appeals of Texas.[288] In *Yick Wo*, the Supreme Court ordered the "discharge [of] the petitioners from custody and imprisonment" upon finding that the petitioners—"aliens and subjects of the Emperor

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279 *See, e.g.*, United States v. Washington, 869 F.3d 193, 223 (3d Cir. 2017) ("If discovery is granted, and if it leads to a successful selective enforcement claim, then [the defendant's] constitutional rights can be vindicated at that time by striking the indictment in whole or in part."); United States v. Randall, No. 21-cr-28, 2022 WL 3334602, at *5 (W.D. Wis. May 23, 2022) (stating that "the selective enforcement doctrine . . . applies to dismissal motions, not suppression motions"), *report and recommendation adopted*, No. 21-cr-28, 2022 WL 2681295 (W.D. Wis. July 12, 2022); *cf.* United States v. Alcaraz-Arellano, 441 F.3d 1252, 1265 (10th Cir. 2006) (ruling that the defendant failed to prove selective enforcement and therefore should not be granted "dismissal on the basis of selective enforcement").

280 716 F. Supp. 3d 415 (E.D. Va. 2024).

281 *See supra* notes 150–55 and accompanying text (discussing the court's ruling).

282 *See Moore*, 716 F. Supp. 3d at 432.

283 No. 2024-CMD-008567 (D.C. Super. Ct. Feb. 10, 2025). Thank you to Professor Andrew Crespo for bringing this opinion to the Author's attention.

284 *See id.* at 3–4, 31–32.

285 118 U.S. 356 (1886).

286 *See, e.g.*, United States v. Mackey, No. 16-cr-772, 2016 WL 9280003, at *3 (S.D. Tex. Oct. 24, 2016) ("Consistent with *Yick Wo,* the Court concludes that dismissal of an indictment is an available remedy for a criminal defendant's selective-enforcement claim."), *aff'd*, 734 F. App'x 227 (5th Cir. 2018); United States v. Mumphrey, 193 F. Supp. 3d 1040, 1055–59 (N.D. Cal. 2016) ("[A]lthough the discrimination at issue in *Yick Wo* was a form of selective enforcement rather than selective prosecution, the Supreme Court ordered that the petitioners be discharged as a remedy for the equal protection violation—a remedy that is akin to a dismissal.").

287 *See* Jones v. Sterling, 110 P.3d 1271, 1275–76, 1276 n.3 (Ariz. 2005) (stating that *Yick Wo* "squarely stands for the proposition that violation of the Equal Protection Clause by authorities enforcing a facially neutral law can result in dismissal of resulting criminal charges" but commenting that the court here "express[es] no opinion as to the proper remedy if the superior court determines that petitioners have been the victims of selective enforcement").

288 *See Ex parte* Aparicio, 707 S.W.3d 189, 199 (Tex. Crim. App. 2024) (stating that "the strong weight of authority suggests that a successful selective enforcement [claim] also requires dismissal" and citing *Yick Wo* as an example (quoting T.J. *ex rel.* Johnson v. Rose, 635 F. Supp. 3d 65, 70–71 (D.R.I. 2022))).

of China" who operated laundry businesses in wooden buildings—were victims of unconstitutional discrimination.[289] As operators of such businesses, the petitioners were required by a local ordinance to seek the consent of the San Francisco County Board of Supervisors to continue operating them in wooden buildings—consent that they indeed sought.[290] However, like "two hundred others who . . . also petitioned, all of whom happen[ed] to be Chinese subjects," the petitioners did not receive the consent of the Board of Supervisors, while "eighty others, not Chinese subjects, [were] permitted to carry on the same business under similar conditions."[291] The petitioners continued to operate their businesses nonetheless—an act that led to their conviction and imprisonment.[292] Based on the statistics concerning the Board of Supervisors' authorization of laundry businesses in wooden buildings, the Court easily concluded that the petitioners were unconstitutionally discriminated against on the basis of their race and nationality and ordered their discharge.[293]

Generations of judges and scholars have regarded *Yick Wo* as a case involving a very rare successful selective prosecution claim.[294] As legal scholar Gabriel Chin once observed, it is "simultaneously celebrated as a classic equal protection case, establishing the rule against discriminatory prosecution, and lamented as the first and last case in which the Supreme Court invalidated a prosecution as racially motivated."[295] Others, as mentioned above, have regarded *Yick Wo* not as a case involving selective prosecution, but as a case involving selective enforcement,[296] in which "the Supreme Court ordered that the petitioners be discharged as a remedy for the equal protection violation—a remedy that is akin to a dismissal."[297] Nevertheless, as some judges and scholars, including Chin, have persuasively argued, *Yick Wo* had nothing to do with discriminatory prosecution or policing and everything to do with the San Francisco County Board of Supervisors' discriminatory treatment of Chinese people who sought their consent to operate laundry businesses in wooden buildings.[298] Indeed, "[f]or all that appears, the

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289 *Yick Wo*, 118 U.S. at 368–74.

290 *See id.* at 368, 374.

291 *Id.* at 374.

292 *See id.* at 369, 374.

293 *See id.* at 373–74.

294 *See, e.g.*, Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1359.

295 *Id.*

296 *See supra* notes 285–88 and accompanying text.

297 United States v. Mumphrey, 193 F. Supp. 3d 1040, 1056 (N.D. Cal. 2016).

298 *See, e.g.*, United States v. Falk, 479 F.2d 616, 618 (7th Cir. 1973); *Ex parte* Aparicio, 707 S.W.3d 189, 212 (Tex. Crim. App. 2024) (Keller, P.J., dissenting); Chin, *supra* note 294, at 1365; KENNEDY, *supra* note 79, at 354–55.

police and prosecutors impartially charged all who violated a law that was discriminatorily administered by someone else."[299]

A small number of courts that have relied on *Yick Wo* to support dismissal of charges as a remedy for selective enforcement have offered detailed normative justifications for their remedial choice.[300] Most significantly, in 2016, in *United States v. Mumphrey*,[301] a federal district court in California explained that dismissal could help deter police officers from engaging in discriminatory behavior and suggested it would be valuable in preserving "the integrity of the criminal justice system" and "public confidence therein."[302] Beyond these rationales—that are also commonly invoked by courts that embrace suppression of evidence as the remedy for selective enforcement—the court also offered another justification: corrective justice for victims of unconstitutional discrimination.[303] Dismissing charges, according to the court, would "redress" the harms resulting from the equal protection violation against the victim by "put[ting] the victim where he or she could have been but for racially selective conduct of law enforcement."[304]

II. Deterrence and Judicial Integrity as Inadequate Justifications

Courts have provided various rationales for adopting suppression of evidence or dismissal of charges as the judicial remedy for selective enforcement. Among them, however, two justifications appear to be prominent: deterring discriminatory policing and preserving judicial integrity. According to courts, suppression and dismissal discourage police officers from engaging in selective enforcement and send the message that judges and the criminal justice system as a whole do not overlook officers' discriminatory behavior.[305] Scholars who advocate for suppression or dismissal as a remedy for selective enforcement also invoke these two justifications.[306]

That judges and scholars focus on these two specific rationales is unsurprising given their significance to the Fourth Amendment exclusionary rule. The Supreme Court has long regarded deterrence of police wrongdoing as the primary justification for the existence of the Fourth

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299 Chin, *supra* note 294, at 1365.

300 *See, e.g.*, T.J. *ex rel.* Johnson v. Rose, 635 F. Supp. 3d 65, 70–71 (D.R.I. 2022) (suggesting that preserving "the integrity of the criminal justice system" supports the adoption of dismissal of charges as a remedy for selective enforcement (quoting *Mumphrey*, 193 F. Supp. 3d at 1055)).

301 193 F. Supp. 3d 1040 (N.D. Cal. 2016).

302 *Id.* at 1055–59.

303 *See id.* at 1058–59.

304 *Id.*

305 *See supra* notes 243–304 and accompanying text.

306 *See infra* notes 313, 411 and accompanying text.

Amendment exclusionary rule.[307] Since 2011, the Court has viewed deterrence as the rule's "sole purpose."[308] Historically, the need to preserve the integrity of the judiciary had also served as an important basis for the Fourth Amendment exclusionary rule.[309] For many years, the Supreme Court had explained that suppressing evidence seized unlawfully by the police was necessary to prevent judges from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold."[310] Nowadays, the Court considers the Fourth Amendment exclusionary rule to be serving no goal beyond deterrence.[311]

Intuitively, relying on these rationales seems logical. If they were sufficient to justify suppressing evidence in response to unlawful searches and seizures, they should also justify suppression or dismissal in response to the more morally reprehensible act of discriminatory policing.[312] This Part argues, however, that upon close examination, these justifications turn out to be unpersuasive. Section A introduces serious doubts regarding the potential of these remedies to serve as effective deterrents to discriminatory enforcement. Section B questions the claim that suppressing evidence or dismissing charges will necessarily help maintain the integrity of courts.

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307 *See, e.g.*, Elkins v. United States, 364 U.S. 206, 217 (1960) (stating that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it"); United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . ."); Arizona v. Evans, 514 U.S. 1, 10–11 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect."); Herring v. United States, 555 U.S. 135, 141 (2009) ("[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.").

308 Davis v. United States, 564 U.S. 229, 236–37 (2011); *see also* Lange v. California, 594 U.S. 295, 317 (2021) (Thomas, J., concurring in part and concurring in the judgment) ("'[W]e have said time and again that the *sole*' factor courts can consider is 'deter[ring] misconduct by law enforcement.'" (second alteration in original) (quoting *Davis*, 564 U.S. at 246)).

309 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 659 (1961) (discussing "the imperative of judicial integrity" as an important basis for the exclusionary rule (quoting *Elkins*, 364 U.S. at 222)); Terry v. Ohio, 392 U.S. 1, 13 (1968) ("Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.").

310 *Elkins*, 364 U.S. at 223.

311 *See supra* note 308 and accompanying text.

312 *See, e.g.*, State v. Segars, 799 A.2d 541, 549 (N.J. 2002) (stating that "[t]he rationales that support the suppression of evidence [as a remedy for unreasonable searches and seizures], namely, deterrence of impermissible investigatory behavior and maintenance of the integrity of the judicial system, apply equally, if not more so, to cases of racial targeting"); Holland, *supra* note 182, at 1119–26 (making a similar argument).

A. Deterring Discriminatory Policing

The most common justification for adopting suppression of evidence or dismissal of charges as a remedy for selective enforcement is to deter discriminatory policing.[313] Judges and scholars observe that, currently, the remedies that exist in the civil process—namely, monetary damages and injunctive relief—do not effectively discourage police officers from engaging in selective enforcement.[314] However, if suppression or dismissal is available as a remedy and officers know that selective enforcement on their part could lead to impunity for suspects, officers will be motivated to avoid discriminatory practices.[315]

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313 *See supra* notes 243–304 and accompanying text (discussing judges' reliance on the deterrence rationale to justify suppressing evidence or dismissing charges due to selective enforcement); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 435–36 (2001) (arguing that "[j]udicial oversight, through voiding cases, excluding evidence, and ordering discovery, can provide a significant positive incentive to change [discriminatory] police behavior" (footnotes omitted)); Karlan, *supra* note 6, at 2013 (arguing that suppression of evidence will help deter selective enforcement); Holland, *supra* note 182, at 1123–24 (contending that "[t]he deterrence rationale . . . amply supports application of the exclusionary rule to equal protection violations to safeguard equal protection rights"); Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & C.R. L. REV. 29, 59 (2010) (claiming that "an equal protection violation presents a paradigmatic case for exclusionary rule deterrence efficacy"); Rudovsky, *supra* note 182, at 321 n.146 (arguing that the deterrence rationale justifies the adoption of suppression as a remedy for selective enforcement); Abby M. Fink, *The* Long *Road to Justice: Why State Courts Should Lower the Evidentiary Burden for Proving Racialized Traffic Stops and Adopt the Exclusionary Rule as a Remedy for Equal Protection Violations*, 13 WASH. J. SOC. & ENV'T JUST. 1, 13 (2023) (arguing that "applying the [suppression] remedy to equal protection violations at the state level is a valid avenue to combat racist policing"); Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence:* Whren v. United States*,* United States v. Armstrong*, and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1116 (1998) (claiming that deterrence can be "best furthered by applying the exclusionary rule to evidence obtained from a race-motivated traffic stop"); Lisa Walter, Comment, *Eradicating Racial Stereotyping from* Terry *Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258 (2000) (claiming that a suppression remedy will help "prohibit and deter impermissible law enforcement practices"); Lawrence W. Williamson, Jr., Note, *Profiling, Pretext, and Equal Protection: Protecting Citizens from Pretextual Stops Through the Fourteenth Amendment*, 42 WASHBURN L.J. 657, 662 (2003) (considering suppression of evidence "the only remedy that serves to deter racially motivated police behavior"). The Author once commented that the suppression and dismissal remedies may create an "incentive for . . . police officers to comply with the [Fourteenth Amendment]." Rubinstein, *supra* note 4, at 876. Nevertheless, the Author also noted that these "remedies would not help deter a police officer from discriminatorily enforcing the law if by this behavior they are not hoping to secure convictions" and listed additional factors that would likely "further dilute the deterrent value of dismissal [and] suppression." *Id.* at 866–67.

314 *See, e.g.*, United States v. Bernard, No. 09-cr-2474, 2011 WL 13277499, at *5 (D.N.M. Dec. 9, 2011), *vacated*, No. 09-cr-2474 (D.N.M. Apr. 16, 2012), *as recognized in* United States v. Alabi, No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013); Rushin & Edwards, *supra* note 1, at 700–02; Holland, *supra* note 313, at 63.

315 *See, e.g.*, Karlan, *supra* note 6, at 2013 (arguing that the suppression remedy "alters the incentives of the police to engage in [selective enforcement] in the first place"); Holland, *supra* note

Basing suppression and dismissal on the theory of deterrence is intuitively appealing. As mentioned earlier, the deterrence rationale can be traced back to the Supreme Court's case law on the Fourth Amendment exclusionary rule.[316] According to the Court, the only justification for suppressing evidence obtained in unlawful searches or seizures is to deter officers from committing similar violations.[317] As the Court explained in 2006, in *Sanchez-Llamas v. Oregon*,[318] "[w]e exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement."[319] Indeed, many of the judges and scholars who invoke deterrence in support of adopting suppression or dismissal as a remedy for selective enforcement cite the Court's reliance on this rationale in the context of the Fourth Amendment.[320]

This Section argues that resting the suppression and dismissal remedies on the theory of deterrence may prove both erroneous and counterproductive. First, concerning selective enforcement, the deterrent benefits of suppression and dismissal can often be expected to be particularly insignificant.[321] Second, courts that view deterrence as the primary rationale for suppression and dismissal may conclude that these remedies are unnecessary given the availability of other "less harmful" remedies outside the criminal process, such as monetary damages.[322] Third, centering suppression and dismissal around deterrence could inadvertently convey that discriminatory policing can be sufficiently deterred through these remedies, thereby possibly discouraging the exploration of more effective tools and strategies.[323]

313, at 62–63 (claiming that suppression will be an effective deterrent because it "[d]eni[es] . . . the law enforcement objective itself"); Walter, *supra* note 313, at 291–92 ("In theory, the knowledge the police will not be able to . . . convict the defendant[] will deter police from racial targeting in general.").

316 *See supra* note 307 and accompanying text.

317 *See supra* note 308 and accompanying text.

318 548 U.S. 331 (2006).

319 *Id.* at 349.

320 *See, e.g.*, Commonwealth v. Lora, 886 N.E.2d 688, 698–99 (Mass. 2008) (discussing the deterrent benefits of the suppression remedy while citing the Supreme Court's case law on the Fourth Amendment exclusionary rule (first citing United States v. Calandra, 414 U.S. 338, 347–48 (1974); and then citing Stone v. Powell, 428 U.S. 465, 486 (1976))); United States v. Jennings, 985 F.2d 562, 1993 WL 5927, at *4 n.2 (6th Cir. 1993) (unpublished table decision) (same); Rudovsky, *supra* note 182, at 321 n.146 (arguing that selective enforcement is "at least as serious as the violation of Fourth Amendment rights and the need for deterrence would appear to be as strong").

321 *See infra* Section II.A.1.

322 *See infra* Section II.A.2.

323 *See infra* Section II.A.3.

1. Negligible Deterrent Benefits

The fundamental premise of the deterrence justification is that police officers are less likely to engage in selective enforcement if they know it could jeopardize the ultimate conviction of the suspects they stop, search, or arrest.[324] In some cases, this assumption is valid.[325] For officers who prioritize convictions, the threat of suppressing evidence or dismissing charges creates an incentive to avoid enforcing the law in a discriminatory manner.[326]

More often, however, suppression and dismissal will be particularly ineffective in deterring discriminatory behavior, as officers who engage in racially selective enforcement typically do so with motives aside from securing convictions.[327] Selective enforcement claims usually arise in the context of discretionary police stops, such as investigative traffic stops by officers patrolling the road or pedestrian stop-and-frisks by officers patrolling the street.[328] Police officers who engage in such activities do not merely wait for a dispatcher to report to them about crimes that have already occurred or about a particular suspect that needs to be apprehended. Instead, they go out into the field to scan highways, train stations, or neighborhoods for individuals who are breaking the law or are (speculatively) about to do so.[329] By their nature, discretionary stops are especially susceptible to discrimination. Because police officers retain broad discretion in determining whom to stop and whom not to stop—discretion that is barely limited or guided by the law—there is a constant concern that arbitrary or impermissible considerations, including race, could influence their decisions.[330] Empirical studies repeatedly validate that this concern is grounded in facts.[331] Indeed, as

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324 *See supra* notes 313–15 and accompanying text.

325 *See generally* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 878–79 (2014) (arguing that unlike most patrol officers, who care little about the ultimate result of the cases against the suspects they arrest, "investigators and detectives, particularly those in high-profile units like homicide or sex crimes," do care about case outcomes).

326 *See* Rubinstein, *supra* note 4, at 866 ("[T]he risk that discriminatory conduct would result in dismissal or suppression may at least be considered by . . . police officers for whom convictions are important as one reason not to engage in . . . selective enforcement.").

327 *See infra* notes 335–50 and accompanying text.

328 For example, in all but one of the cases discussed above in which courts supported the adoption of suppressing evidence in response to selective enforcement, the defendants' selective enforcement claim arose from discretionary police stops. *See supra* notes 243–73 and accompanying text.

329 *See, e.g.*, Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of* Terry, 15 OHIO ST. J. CRIM. L. 49, 55–57 (2017); Jeffrey Fagan, *No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing*, 68 UCLA L. REV. 1584, 1587–88 (2022).

330 *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26–27 (1998); Davis, *supra* note 5, at 427–28; Harris, *supra* note 87, at 560.

331 *See, e.g.*, Farhang Heydari, *The Invisible Driver of Policing*, 76 STAN. L. REV. 1, 14–15 (2024) ("Study after study confirms that Black, Hispanic, Native American, and other people belonging to already-over-policed communities are disproportionally stopped by police.").

Justice Sotomayor noted in 2016 in her dissent in *Utah v. Strieff*,[332] "it is no secret that people of color are disproportionate victims of this type of scrutiny."[333]

The fact that most selective enforcement claims arise from discretionary stops presents a significant challenge to the deterrence justification. As mentioned, suppression and dismissal can serve as potent deterrents to selective enforcement if officers prioritize convictions and are afraid to jeopardize them.[334] For patrol officers who conduct discretionary stops, however, securing convictions will very often be secondary, if not completely insignificant, in relation to other goals.[335]

As a general matter, police departments demonstrate little interest in the ultimate outcomes of cases resulting from their officers' enforcement work.[336] As legal scholar Jonathan Abel noted, "departments track the number of stops, tickets, arrests, and closed cases their officers produce, but they do not track information about the court outcomes of these cases."[337] The numbers that departments track—and particularly the number of arrests—reflect the fact that "departments almost invariably measure their own efficiency in terms of 'clearances by arrest,' not by conviction."[338] Because of these institutional priorities, police superiors also assess the professional performance of the officers working under them based on their success in arresting suspects rather than their ability to secure convictions.[339] In the case of discretionary stops specifically, there is reason to believe that police departments care even less about the convictions that their officers manage, or fail, to secure. Patrol officers often carry out discretionary stops under proactive policing

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332 579 U.S. 232 (2016).

333 *Id.* at 254 (Sotomayor, J., dissenting).

334 *See supra* notes 324–26 and accompanying text.

335 *See generally* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 Notre Dame L. Rev. 585, 600–07 (2011) (describing the various goals police officers often prioritize over securing convictions); Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 Yale L.J. 1730, 1779 (2017) (arguing that police officers "lack [any] interest in case outcomes" and, therefore, "act on the street without considering what those actions will do to their cases in court"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363, 377 (claiming that "the objective of police who conduct searches is, first and foremost, evidence to support an *arrest*, not a conviction"); Guy Rubinstein, *The Prosecutor-Oriented Exclusionary Rule*, 65 B.C. L. Rev. 1755, 1767–68 (2024) (describing the trifling importance of convictions in the eyes of many police officers).

336 *See, e.g.*, Abel, *supra* note 335, at 1781; Jacobi, *supra* note 335, at 602–03.

337 Abel, *supra* note 335, at 1781.

338 Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 793 (1970).

339 *See* Stoughton, *supra* note 325, at 877 ("Officer evaluation forms used by both large and small police departments do not mention, let alone put weight on, convictions, though most include some evaluation of arrests.").

programs.[340] These programs are geared toward promoting public safety by "preventing would be criminals from seeking to violate the law in the first place,"[341] especially by reducing illegal firearm possession.[342] The most infamous program was the New York Police Department's stop-and-frisk program, which included "a concerted effort to rid the streets of handguns, employing specialized units tasked with seizing firearms, mass stop-and-frisk, pretextual arrests, and other measures."[343] For officers in such programs, arrests and impounding contraband often become official top priorities.[344]

Given their incentives, police officers are *systematically* motivated to stop individuals whom they think carry contraband and could therefore be arrested, even if their arrest will not ultimately translate into a conviction.[345] Officers who base their enforcement decisions on race—and especially those who associate race with crime[346]—are therefore unlikely to be deterred by the consequences that their choice can have for future prosecutions against suspects.[347] In other words, if officers believe that targeting individuals based on race helps them arrest suspects or seize contraband—or more broadly, enhance public safety—the threat of suppressing evidence or dismissing charges is unlikely to deter

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340 *See, e.g.*, Harmon & Manns, *supra* note 329, at 49.

341 *Id.*

342 *See, e.g.*, Bernard E. Harcourt, *Introduction: Guns, Crime and Punishment in America*, 43 ARIZ. L. REV. 261, 262 (2001) ("Urban police departments are pursuing gun-oriented policing strategies focused on increased stop-and-frisk encounters and misdemeanor arrests as a way to get guns off the streets.").

343 Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 8 (2015); *see also* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 159–60, 165–69 (2015) (describing the preventive goals of such programs).

344 *See, e.g.*, Stoughton, *supra* note 325, at 878 ("[T]he success of a particular police program is not measured by reference to the number of convictions generated. Instead, law enforcement operations are evaluated by referring to the number of arrests that they generate, the reduction in crime generally or in particular types of crime, or less quantifiable quality-of-life factors.").

345 *See, e.g.*, Rubinstein, *supra* note 335, at 1767–68 (discussing the goals police officers usually prioritize); Jacobi, *supra* note 335, at 600–05 (same); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 721–22 (1970) (same); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1625 (2012) (discussing the focus of police officers on crime rates and arrests).

346 *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 236 (1983) (describing the tendency of "many police officers" to associate people of color with "a general propensity to commit crime").

347 *See, e.g.*, Jacobi, *supra* note 335, at 602–03 (arguing that "police [have] an incentive to arrest suspects using a potentially illegal search, if following the [law] would prevent them from making an arrest"); Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 223 (2010) ("Exclusion reduces but does not eliminate the value of borderline actions, as police administrators probably derive considerable utility from seizing drugs and weapons even if these may not be used in court.").

them from selective enforcement. And even worse, these remedies may be completely ineffective in discouraging officers from discriminatory enforcement done purely for the sake of harassment and not for legitimate policing purposes.[348] Indeed, as the Supreme Court suggested as early as 1968 in *Terry v. Ohio*,[349] the risk that defendants will ultimately go free is "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."[350]

Suppressing evidence and dismissing charges will likely not effectively deter even officers who *do* care about case outcomes from engaging in selective enforcement, because the probability of a court accepting a selective enforcement claim and subsequently suppressing evidence or dismissing charges is low.[351] Most defendants plead guilty to the charges against them,[352] and many of them never get the opportunity to raise a selective enforcement claim in court.[353] Even when defendants do raise such a claim, they virtually never succeed[354] due to both the demanding evidentiary standard and the high discovery threshold.[355] Lower courts that have adopted a more lenient evidentiary standard or more liberal discovery rules have undoubtedly helped defendants prevail.[356] Yet the number of successful selective enforcement claims is still very small, and without more substantial doctrinal changes, it is likely to remain so. Additionally, some judges who are reluctant to release factually guilty defendants may manipulatively attempt to evade doing so, such as by finding that selective enforcement has not been proven, even when they believe it has.[357] Officers who know that successful selective

348 *See* Jacobi, *supra* note 335, at 605 ("If . . . police—or at least some police—enjoy harassing innocent citizens, then they will continue to do so regardless of whether evidence found on guilty citizens through similar methods would be suppressed.").

349 392 U.S. 1 (1968).

350 *Id.* at 14.

351 *See, e.g.*, Rubinstein, *supra* note 4, at 867.

352 *See generally* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. Rev. 1435, 1437 (2020) ("[A]round 95% of criminal convictions are based on guilty pleas, most of which are the result of plea bargains.").

353 *See, e.g.*, Rubinstein, *supra* note 4, at 867.

354 *See supra* note 4 and accompanying text.

355 *See supra* Section I.A.1.

356 *See supra* Section I.A.2.

357 Scholars have discussed this phenomenon primarily in the context of the Fourth Amendment exclusionary rule. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 799 (1994) ("Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."); Paul Butler, *When Judges Lie (and When They Should)*, 91 Minn. L. Rev. 1785, 1794 (2007) ("Judges often pretend to believe police officer testimony about how evidence was obtained if the cost of not believing the police is exclusion of important evidence."); Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 Fordham Urb. L.J. 743, 784 (2010) ("No one can

enforcement claims are a rare event may not worry much that discriminatory behavior on their part will lead to suppression or dismissal.[358]

A recent empirical study supports the argument that adopting suppression or dismissal as a remedy for selective enforcement will likely have negligible deterrent benefits.[359] As explained earlier, in *Whren*, the Supreme Court held that the Fourth Amendment authorizes a traffic stop whenever officers "have probable cause to believe that a traffic violation has occurred,"[360] even if the stop is pretextual—namely, conducted to investigate another suspected offense—or motivated by intentional racial bias.[361] In 1999, however, the Supreme Court of Washington held that pretextual traffic stops in the state were unconstitutional under the Washington State Constitution.[362] Consequently, police officers who conducted pretextual stops in Washington knew, or at least should have known, that any incriminating evidence they seized during such stops could later be suppressed in court.[363] In 2012, however, the Washington Supreme Court completely revised its approach, holding that traffic stops were constitutional whenever officers "actually and consciously" conducted them—even in part—to enforce traffic laws.[364] This holding essentially "instated a standard functionally equivalent to *Whren*," permitting the same pretextual stops that the U.S. Supreme Court authorized in 1996 and that the Washington Supreme Court itself forbade in 1999.[365] Since 2012, therefore, officers in Washington have had much less reason to worry about the admissibility of evidence they seize during pretextual traffic stops.[366]

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quantify it, but there is widespread belief that police not infrequently testify untruthfully at suppression hearings and that judges not infrequently credit (I do not say 'believe') their testimony.").

358 *See, e.g.*, Rubinstein, *supra* note 4, at 867. As opposed to many law enforcement officers, "prosecutors do fear for the fate of their criminal cases and are therefore motivated to prevent police wrongdoing that could jeopardize the admissibility of incriminating evidence." Rubinstein, *supra* note 335, at 1759. However, because of the very low probability of successful selective enforcement claims, it is possible that prosecutors are not highly motivated to discourage police officers from discriminatory enforcement.

359 *See* Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops*, 116 NW. U. L. REV. 1481 (2022); *see also infra* notes 367–76 and accompanying text (explaining how this study supports the argument that suppression and dismissal are unlikely to serve as effective deterrents to selective enforcement).

360 Whren v. United States, 517 U.S. 806, 810 (1996).

361 *See id.* at 813.

362 *See* State v. Ladson, 979 P.2d 833, 842–43 (Wash. 1999) (en banc).

363 *See id.*

364 State v. Arreola, 290 P.3d 983, 991 (Wash. 2012).

365 Asirvatham & Frakes, *supra* note 359, at 1502.

366 Technically speaking, the Washington Supreme Court no longer regards traffic stops conducted even in part to enforce traffic laws as "pretextual." *See Arreola*, 290 P.3d at 991. For purposes of consistency, this Article refers to traffic stops as "pretextual" if they are conducted to investigate a nontraffic offense, regardless of whether such investigation is the sole motivation behind them.

Legal scholars Rohit Asirvatham and Michael Frakes analyzed more than seven million stops that took place in Washington between 2010 and 2015.[367] The goal of their analysis was to study the effects that the 2012 renewed permission to conduct pretextual stops had on "racial disparities in traffic stops" within the state.[368] The analysis, however, found "no robust evidence that the legal change in Washington had an effect on racial disparities in traffic stops."[369] In other words, there was no evidence that withdrawing the threat to suppress evidence seized during pretextual traffic stops "contributed to an increase in the rate of stops of non-white drivers (or Black drivers specifically)."[370] As Asirvatham and Frakes explained, these findings suggest that suppressing evidence had served as a weak deterrent to pretextual traffic stops, either because officers did not conduct such stops to obtain incriminating evidence or because they did not think defendants would successfully prove they were stopped pretextually.[371] Therefore, it made little difference for officers whether evidence obtained in pretextual traffic stops could be suppressed as a matter of law.[372]

Asirvatham and Frakes's study did not explicitly address the doctrine of selective enforcement. However, its findings support the argument made in this Section, according to which suppressing evidence and dismissing charges will not effectively discourage police officers from engaging in selective enforcement. The Washington Supreme Court's 1999 prohibition against pretextual traffic stops implicitly included a prohibition against racially motivated traffic stops, at least when the latter were conducted to investigate drivers for non-traffic offenses.[373] Because the judicial remedy for pretextual traffic stops was suppression of evidence, the same remedy also applied to racially discriminatory traffic stops.[374] In practice, therefore, Washington had embraced suppression of evidence as the judicial response to proven discriminatory traffic stops between 1999 and 2012—until the Washington Supreme Court reversed course.[375] As mentioned, however, there is no evidence that revoking this remedy encouraged officers to stop

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367 Asirvatham & Frakes, *supra* note 359, at 1487–88, 1505.

368 *Id.* at 1487–88.

369 *Id.* at 1488.

370 *Id.* at 1507. In an earlier study, published in 2021, legal scholar Stephen Rushin and economist Griffin Edwards found that the Washington Supreme Court's 2012 renewed authorization to conduct pretextual traffic stops did "contribute[] to racial profiling" in the state. Rushin & Edwards, *supra* note 1, at 644. In their 2022 article, Asirvatham and Frakes addressed and explained the different results and conclusions of Rushin and Edwards. *See* Asirvatham & Frakes, *supra* note 359, at 1488–90.

371 *See* Asirvatham & Frakes, *supra* note 359, at 1542.

372 *See id.*

373 *See supra* notes 362–63.

374 *See supra* notes 362–63.

375 *See supra* notes 362–66.

nonwhite drivers at higher rates.[376] Therefore, Asirvatham and Frakes's findings suggest not only that suppression was ineffective as a deterrent to pretextual traffic stops, but also specifically as a deterrent to discriminatory stops.

2. Less Harmful Alternatives

Although the deterrent benefits of suppressing evidence and dismissing charges are likely insignificant, they may still cause *some* police officers to think twice before stopping, searching, or arresting an individual based on race.[377] Should these limited deterrent benefits justify adopting suppression and dismissal as remedies for selective enforcement, despite their high social costs (particularly the possible impunity for factually guilty defendants)?[378] The answer that the Supreme Court has provided to a similar question concerning the Fourth Amendment exclusionary rule seems to be "no." According to the Court, when suppressing evidence is not expected to effectively deter police wrongdoing, it should generally not be available as a remedy.[379] Instead, victims of police misconduct should seek alternative remedies that are less harmful to society.[380]

The Court has long held that evidence seized in unreasonable searches or seizures may be suppressed only when the resulting deterrent benefits "outweigh [the] heavy costs" of suppression.[381] And indeed, the Court has consistently curtailed the application of the Fourth Amendment exclusionary rule whenever it found its deterrent benefits to be insignificant in relation to its costs.[382] One such example is the "knock-and-announce" exception that the Court created in 2006 in *Hudson v. Michigan*.[383] The Fourth Amendment requires that prior to entering and searching a home, "law enforcement officers must announce their presence and provide residents an opportunity to open the door."[384] An exception is made if officers have reasonable suspicion that their announcement "would be dangerous or futile" or "would inhibit the effective investigation of the crime."[385] In *Hudson*, however, the Court held that despite infringing upon the Fourth Amendment,

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376 *See supra* notes 369–70 and accompanying text.

377 *See supra* notes 325–26 and accompanying text.

378 *See supra* note 192 and accompanying text.

379 *See infra* notes 381–91 and accompanying text.

380 *See infra* note 391 and accompanying text.

381 Davis v. United States, 564 U.S. 229, 237 (2011) (first citing Herring v. United States, 555 U.S. 135, 141 (2009); and then citing United States v. Leon, 468 U.S. 897, 910 (1984)).

382 *See, e.g.*, Steiker, *supra* note 191, at 2505–21; CHEMERINSKY, *supra* note 184, at 184–90, 243–48.

383 547 U.S. 586 (2006).

384 *Id.* at 589.

385 Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

knock-and-announce violations should not lead to the suppression of evidence that the police obtained during a subsequent search.[386] The Court reasoned that suppressing evidence in response to such violations would entail "substantial social costs" without effectively discouraging officers from engaging in wrongdoing.[387] The Court assumed that officers would only avoid announcing their presence in order to prevent occupants of the house from tampering with evidence or harming officers.[388] These two risks, however, "suspend the knock-and-announce requirement anyway," and officers that avoid announcing their presence in these circumstances are not in violation of the Fourth Amendment.[389] The Court concluded, therefore, that officers lack strong motivation to violate the knock-and-announce rule to begin with and that suppressing evidence in response to violations that do occur would yield no appreciable deterrent benefits.[390] Rather than seeking suppression, the Court invited victims of knock-and-announce violations to sue offending officers for monetary damages—a remedy that will purportedly deter police wrongdoing more effectively and will not lead to the release of factually guilty defendants.[391]

Inspired by the Court's guidance on the Fourth Amendment exclusionary rule, some lower courts have rejected suppressing evidence as a proper remedy for selective enforcement, finding that "exclusion of probative, reliable evidence of a defendant's guilt is too high a price to pay for the unknown degree of deterrence that exclusion [would] achieve[]."[392] Instead, like the Supreme Court in *Hudson*, these courts have held that victims of selective enforcement should file civil suits for monetary damages against the officers who allegedly discriminated against them.[393]

To be sure, monetary damages may be an even less effective deterrent to selective enforcement than suppressing evidence or dismissing charges.[394] Although officers are unlikely to enjoy qualified immunity when sued for intentionally discriminatory law enforcement,[395] the low chance of proving selective enforcement may dissuade lawyers from

386 *See Hudson*, 547 U.S. at 599.

387 *Id.* at 594–96 (quoting Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

388 *See id.* at 596.

389 *Id.* (emphasis omitted).

390 *See id.* at 594–96.

391 *See id.* at 596–98.

392 United States v. Alabi, No. 11-cr-2292, 2013 WL 2284956, at *55 (D.N.M. May 15, 2013) (quoting United States v. Harmon, 785 F. Supp. 2d 1146, 1170 n.4 (D.N.M. 2011)), *aff'd*, 597 F.App'x 991 (10th Cir. 2015).

393 *See, e.g.*, *Harmon*, 785 F. Supp. 2d at 1170; *Alabi*, 2013 WL 2284956, at *54–55; United States v. Nichols, 512 F.3d 789, 794–95 (6th Cir. 2008), *abrogated on other grounds by* Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* United States v. Buford, 632 F.3d 264 (6th Cir. 2011).

394 *See* Rubinstein, *supra* note 4, at 843–44.

395 *See, e.g.*, Conley v. United States, 5 F.4th 781, 794 (7th Cir. 2021).

taking such cases.[396] Additionally, in rare instances in which plaintiffs sue and win, the damages awarded for humiliation and disrespect suffered are usually small, unless the discriminatory police conduct also resulted in physical harm.[397] If the discriminatory stop or search results in the discovery of incriminating evidence against the plaintiff, the plaintiff could be made "unsympathetic" in the eyes of juries and judges, potentially leading to even lower damages.[398] The combination of a low probability of civil liability and low expected damages renders civil suits inadequate as a deterrent to selective enforcement.[399]

Nevertheless, for courts facing a choice among ineffective deterrents, it is reasonable to adopt the alternative that is more likely to result in lower social costs. Thus, the fact that monetary damages cannot lead to the release of defendants can—and does—make them more desirable in the eyes of some judges who consider damages superior to suppressing evidence or dismissing charges.[400] As a federal district court in New Mexico explained in 2013 in *United States v. Alabi*,[401] the reason that monetary damages are the proper remedy for selective enforcement is not that damages necessarily deter discriminatory behavior more effectively than suppressing evidence.[402] Rather, damages "provide[] *some* remedy to the affected individual and deterrence to law enforcement" without triggering the same adverse consequences as suppression.[403]

3. The Risk of Legitimation Effect

Courts' endorsement of suppressing evidence and dismissing charges as effective deterrents to selective enforcement is not only theoretically flawed but also has the potential to inadvertently undermine long term efforts to reduce discriminatory policing.

Legal scholars Carol Steiker and Jordan Steiker employed the term "legitimation effect" to describe the risk posed by legal reforms

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396 *See generally* Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 750–53 (2004) (describing the challenges faced by selective enforcement victims suing police officers for damages).

397 *See, e.g.*, COLE, *supra* note 77, at 167 ("An illegal search motivated by race . . . may be extremely intrusive and humiliating, but as long as the police do no physical damage, it will be difficult to point to harm for which one should be compensated.").

398 Karlan, *supra* note 6, at 2011–12.

399 *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) ("If injurers pay less than for the harm they cause, underdeterrence may result . . . .").

400 *See supra* notes 392–93 and accompanying text.

401 No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013), *aff'd*, 597 F. App'x 991 (10th Cir. 2015).

402 *See id.* at *55.

403 *Id.*

that yield minimal practical benefits for the system they aim to change but manage to "promote an exaggerated or false confidence" in it.[404] An example of such a reform is a line of proposals to change the burden of proof in death penalty cases—"from 'beyond a reasonable doubt' to 'beyond any doubt.'"[405] According to Steiker and Steiker, these proposals would likely yield no real benefit for the struggle against wrongful executions, yet they may provide a false and misleading "insurance against error."[406]

Similarly, courts that (mistakenly) claim that suppressing evidence or dismissing charges discourages police officers from behaving in a discriminatory manner may inadvertently mislead the public and policymakers about the judiciary's ability to combat selective enforcement. This, in turn, could impede the exploration of other potentially more effective deterrent devices and strategies. For instance, some scholars argue that disciplinary sanctions internally imposed on police officers by their departments could be effective deterrents to police wrongdoing.[407] Indeed, it is possible that officers would be less likely to engage in selective enforcement if being caught could jeopardize their "vacation days, promotions, choice assignments, scheduling, [or] other aspects of job quality and compensation."[408] However, policymakers might not prioritize experimenting with such internal disciplinary measures if they believe that existing judicial remedies effectively discourage officers from discriminatory conduct. And even if policymakers decide to try out such measures, police officers—who presumably disfavor the establishment of additional sanctions against them—could argue that the existence of judicial deterrents obviates the need to adopt more deterrent mechanisms.

History suggests that these concerns are well-founded. Scholars have long noted that the Supreme Court's dependence on the Fourth Amendment exclusionary rule to deter unreasonable searches and seizures may have impeded the exploration of alternative deterrent devices.[409] For instance, legal scholar Dallin Oaks argued as early as 1970 that, by requiring states to suppress evidence obtained in an unlawful

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404 Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 749 (2014).

405 Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 423 (2002).

406 *Id.*

407 *See, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 259 (2018).

408 *Id.* at 259.

409 *See, e.g.*, Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2059–60 (2018); William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621, 682.

search or seizure, the Court may have unintentionally "sap[ped] state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule."[410] The genuine risk that relying on suppression or dismissal as a deterrent to selective enforcement will lead to similar outcomes makes such a move both unjustified and dangerous.

B. Preserving Judicial Integrity

Many judges and scholars who advocate for suppressing evidence or dismissing charges due to selective enforcement state that these remedies are not merely deterrents to discriminatory policing; rather, they are also measures to preserve the integrity of the judiciary and the criminal justice system by protecting judges "from becoming 'accomplices in the willful disobedience of a Constitution they are sworn to uphold.'"[411] For example, in 2021, in his concurring opinion in *United States v. Weaver*,[412] Judge Lohier of the Second Circuit called to adopt suppression as a remedy for discriminatory policing, warning that "[a]llowing the fruit of a stop tainted by racial bias to be admitted at a trial or hearing undermines the integrity of judicial proceedings" and "imperils trust in the justice system."[413]

Like deterrence, the rationale of preserving judicial integrity is also derived from the traditional justifications for the Fourth Amendment exclusionary rule. From the dawn of the twentieth century—the early days of the rule—to the mid-1970s, the Supreme Court emphasized that suppressing unlawfully obtained evidence was necessary to shield judges from accusations of tolerating unconstitutional searches

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410 Oaks, *supra* note 345, at 753.

411 United States v. Jennings, 985 F.2d 562, 1993 WL 5927, at *4 n.2 (6th Cir. 1993) (unpublished table decision) (quoting Elkins v. United States, 364 U.S. 206, 222–23 (1960)); *see also* United States v. Benitez, 613 F. Supp. 2d 1099, 1102 n.3 (S.D. Iowa 2009) (noting that "the Court would be loathe [sic] to implicitly condone [selective enforcement] by allowing the Government to utilize the evidence it garnered"); United States v. Bernard, No. 09-cr-2474, 2011 WL 13277499, at *6 (D.N.M. Dec. 9, 2011) (stating that "[a]dmission of . . . evidence [obtained through selective enforcement] would condone discriminatory enforcement of the law"), *vacated*, No. 09-cr-2474 (D.N.M. Apr. 16, 2012), *as recognized in* United States v. Alabi, No. 11-cr-2292, 2013 WL 2284956 (D.N.M. May 15, 2013); State v. Segars, 799 A.2d 541, 549 (N.J. 2002) (stating that as a remedy for selective enforcement, suppression will help "maint[ain] the integrity of the judicial system"); Holland, *supra* note 182, at 1125–26 (arguing that the goal of preserving judicial integrity justifies suppressing evidence obtained through selective enforcement); Williamson, *supra* note 313, at 681, 684 (same).

412 9 F.4th 129 (2d Cir. 2021) (en banc).

413 *Id.* at 160 (Lohier, Jr., J., concurring). It is important to note that Judge Lohier seemed to support the suppression of evidence obtained through discriminatory policing under the Fourth Amendment (by "reconsidering" *Whren*) and not under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 158–60.

and seizures—accusations that could compromise their integrity.[414] For instance, in 1968, the *Terry* Court stated that, in the interest of maintaining judicial integrity, "[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[415] With time, however, the Court has gradually shifted away from this justification, insisting instead that the lone basis for the Fourth Amendment exclusionary rule is its ability to deter police wrongdoing.[416]

The concept of "judicial integrity" is vague, and it is not always clear what judges and scholars mean when they write about the need to protect it.[417] This vagueness, in turn, may lead different judges and scholars to reach very different conclusions about the expected effects that various judicial decisions may have on judicial integrity.[418] Nevertheless, regardless of the precise definition of the concept, there seems to be little doubt that a judicial or criminal justice system that treats individuals differently based on their race (or other impermissible factors) cannot be said to have integrity. Such a system is also unlikely to inspire public confidence. Analyzing a series of survey studies conducted over fifteen years, political scientist Austin Sarat concluded that individuals' "perception of unequal treatment" was "the single most important source of popular dissatisfaction with the American legal system."[419] Similarly, the Supreme Court has consistently emphasized the disastrous ramifications that racial discrimination can have for public confidence in the criminal justice system.[420] The Court has also acknowledged its

414 *See, e.g.*, Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1382–83, 1391 (1983) (describing the rise and the demise of the judicial integrity rationale).

415 Terry v. Ohio, 392 U.S. 1, 12–13 (1968).

416 *See, e.g.*, Rubinstein, *supra* note 335, at 1763–66 (describing the Court's gradual focus on deterrence as the exclusionary rule's sole basis).

417 *See* Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 421–22 (2013) (discussing the vagueness of the concept of judicial integrity in case law and scholarship).

418 In a 2015 dissent in a context different from remedies for police misconduct, Justice Scalia accused the majority of treating the "concept of judicial integrity" as "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." Williams-Yulee v. Fla. Bar, 575 U.S. 433, 465 (2015) (Scalia, J., dissenting) (quoting Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 12 THE WORKS OF THOMAS JEFFERSON 135, 137 (Paul Leicester Ford ed., 1905)).

419 Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 434 (1977).

420 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 87 (1986) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."); Johnson v. California, 543 U.S. 499, 511 (2005) ("[P]ublic respect for our system of justice is undermined when the system discriminates based on race."); Peña-Rodriguez v. Colorado,

own "duty to confront racial animus" among criminal justice officials,[421] highlighting the positive impact such efforts would have on public trust in the system.[422]

Although judicial integrity—again, regardless of its exact meaning—may rely on judges' efforts to reduce discrimination, it does not necessarily follow that such integrity will be preserved by suppressing evidence or dismissing charges. Indeed, "appeals to judicial integrity cut in divergent directions."[423] For many of those who prioritize equal protection values or individual rights, the idea of judges allowing prosecutions resulting from selective enforcement to continue uninterrupted may be intolerable.[424] However, for others—particularly law and order proponents, but not exclusively—judges who choose to suppress reliable incriminating evidence or dismiss well-founded criminal charges are those who compromise the integrity of the judiciary and the criminal process.[425] From the latter perspective, this is especially true given that courts do not have an independent constitutional obligation to respond to selective enforcement with suppression or dismissal and that courts' decision to do so arises from utilitarian concerns over their own reputation.[426] As legal scholar Richard Re noted, "A court's integrity—actual and perceived—must grievously suffer when known criminals stride proudly out of court, unpunished."[427] To be sure, people with opposing views and values may agree that judges should actively combat discrimination in the criminal justice system. However, for many,

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580 U.S. 206, 237 (2017) (Alito, J., dissenting) ("[E]ven a tincture of racial bias can inflict great damage on [the criminal justice] system, which is dependent on the public's trust.").

421 *Peña-Rodriguez*, 580 U.S. at 222.

422 *See, e.g.*, *Batson*, 476 U.S. at 99 ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

423 Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1904 (2014) (discussing the rationale of judicial integrity in the context of the Fourth Amendment exclusionary rule).

424 *See, e.g.*, Holland, *supra* note 182, at 1126 (arguing that "our courts cannot maintain their institutional integrity while accepting the proceeds of racially discriminatory investigations by law enforcement"); *cf.* Re, *supra* note 423, at 1904 ("Perhaps judicial integrity is somewhat compromised when judges hold their nose while admitting unlawfully obtained evidence.").

425 *See, e.g.*, Re, *supra* note 423, at 1904 ("[J]udicial integrity is . . . at stake when courts keep relevant evidence away from juries and thereby oversee demonstrably false verdicts."); Amar, *supra* note 357, at 792–93 ("[I]ntegrity and fairness are . . . threatened by excluding evidence that will help the justice system to reach a true verdict.").

426 *See, e.g.*, Stewart, *supra* note 414, at 1383 ("Describing the judiciary as a 'party' to the constitutional violation begs the question: what provision of the Constitution forbids the judiciary to admit illegally obtained evidence?"); Re, *supra* note 423, at 1904 ("[I]nvocations of integrity cannot answer why courts should have legal authority to suppress evidence that, under the law of evidence, should be admitted.").

427 Re, *supra* note 423, at 1904.

an ideal judicial response—one that best upholds judicial integrity—would involve making offending police officers pay damages rather than granting impunity to defendants.[428]

III. Grounding Remedies for Selective Enforcement in Corrective Justice

Judges and scholars who advocate for adopting suppression of evidence or dismissal of charges as a remedy for selective enforcement usually rely on the two traditional justifications for the Fourth Amendment exclusionary rule: deterring police wrongdoing and preserving judicial integrity.[429] As just discussed, however, these justifications turn out to be unpersuasive in the context of selective enforcement upon close examination.[430]

This Part argues that judges and scholars should not have resorted to these rationales to begin with. Instead of relying on the justifications for the Fourth Amendment exclusionary rule, courts should ground remedies for selective enforcement in the same goal traditionally sought by equal protection remedies—namely, corrective justice for victims of unconstitutional discrimination. Section A introduces the corrective framework that the Supreme Court has applied to equal protection remediation in various contexts. Section B discusses courts' duty to eliminate the negative consequences stemming from selective enforcement. Section C describes how the concept of corrective justice both empowers and constrains judges' remedial authority. Section D explains the expected benefits of expanding the toolbox of remedies available to courts handling selective enforcement claims.

A. Equal Protection's Corrective Justice Framework

Claims of equal protection violations are not exclusively made by defendants in criminal proceedings arguing that they were victims of selective enforcement by the police. Rather, courts hear allegations of racial discrimination in various contexts both within the criminal process and outside of it, such as employment, education, housing, jury selection, and sentencing. With few exceptions, the Supreme Court has applied the same demanding evidentiary standard in these different

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428 *See, e.g.*, Amar, *supra* note 357, at 792–93 (arguing that "courts best affirm their integrity and fairness" by making offending police officers pay, not by suppressing incriminating evidence); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 70 (suggesting that courts could preserve their integrity by remedying police misconduct through the civil process).

429 *See supra* Section I.B.2.

430 *See supra* Sections II.A–.B.

contexts, requiring claimants of equal protection violations to prove both discriminatory effect and discriminatory purpose.[431]

As mentioned earlier, most state and federal courts were quick to apply the same evidentiary standard to selective enforcement claims.[432] Therefore, like other individuals alleging equal protection violations, selective enforcement claimants must typically demonstrate both discriminatory effect and discriminatory purpose.[433] Nevertheless, lower courts have largely overlooked the fact that, in addition to a uniform evidentiary standard, the Supreme Court has also emphasized a primary goal that judicially ordered remedies for equal protection violations should promote—namely, corrective justice for victims of purposeful discrimination.[434]

Tracing back to the Greek philosopher Aristotle,[435] the corrective justice concept has taken on multiple different meanings and interpretations in legal academic scholarship.[436] In essence, however, corrective justice holds that "when one person has been wrongfully injured by another, the injurer must make the injured party whole."[437] Applying this concept to equal protection violations—most commonly in school desegregation cases[438]—the Supreme Court has held that proper remedies "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the

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431 *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1311–15 (1995) (discussing the Supreme Court's "universalist approach" to proving equal protection violations); Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1228–33 (2014) (same).

432 *See supra* Section I.A.1.

433 *See supra* Section I.A.1.

434 *See, e.g.*, Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 729–35 (1986) (discussing the centrality of corrective justice to the Supreme Court's approach to remedies for equal protection violations); Stephen Barrett Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U. L. REV. 382, 382–85 (1977) (same); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 77 (2008) (same).

435 *See* ARISTOTLE, NICOMACHEAN ETHICS 72–74 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) (n.d.) (describing the principle of corrective justice).

436 *See* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 191–201 (1981) (describing legal scholars' different interpretations of corrective justice).

437 Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003); *see also, e.g.*, Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403 (1992); George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1667–68 (1993) (reviewing JULES L. COLEMAN, RISKS AND WRONGS (1992)); Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 906 (2001).

438 *See* Gewirtz, *supra* note 434, at 729 (arguing that "corrective ideas probably have received their fullest elaboration" in the context of "remedies for unlawful school segregation").

absence of such conduct.'"[439] As Justice Marshall once explained, the goal is that such remedies will make victims of discrimination "whole" again, by ensuring "*any* injurious condition flowing from the constitutional violation [is] remedied to the maximum extent practicable."[440] Of course, the aspiration to promote corrective justice is not restricted to equal protection remedies and is also shared by other types of constitutional remedies, as well as private law remedies.[441] Additionally, the Supreme Court has not considered corrective justice to be the sole aspiration—or even an aspiration at all—of equal protection remedies in each and every context. In some cases, it has regarded other goals, such as deterrence of unlawful conduct or maintenance of public trust in the criminal justice system as important.[442] Yet, as an "aspiration" and "commitment[] expressed again and again in the [Court's] case law" on equal protection remedies,[443] corrective justice seems to enjoy a uniquely prominent status that other goals do not usually have. In his classic essay on the Court's corrective justice approach to equal protection remedies, legal scholar Paul Gewirtz emphasized this approach's "distinctive moral force."[444] According to Gewirtz, because racial inequality in the United States is, to a great degree, the result of "the effects of purposeful discrimination extending throughout American society over many years," remedies for unconstitutional discrimination must focus

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439 Milliken v. Bradley, 433 U.S. 267, 280 (1977) (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974)); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 269 (1995) (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.").

440 Bd. of Educ. v. Dowell, 498 U.S. 237, 264 n.8 (1991) (Marshall, J., dissenting).

441 *See, e.g.*, Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1532–33 (2009) (discussing the importance of corrective justice as a goal of both constitutional and private law remedies).

442 *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 266 (1986) (O'Connor, J., concurring in the judgment) ("This Court has long held that upon proof of systematic exclusion of [Black people] from a grand jury issuing an indictment, the admittedly costly remedy of reversal of a conviction thereafter obtained through a fair trial is necessary in order to eradicate and deter such discrimination."); *id.* at 273 (Powell, J., dissenting) (stating that the "'appropriate remedy' for the exclusion of [Black people] from grand juries in Kings County, California, in 1962 . . . depends on (i) the utility of the remedy in either correcting any injustice to respondent or deterring unconstitutional conduct by state officials, and (ii) the remedy's costs to society" (quoting Hobby v. United States, 468 U.S. 339, 342 (1984))); Flowers v. Mississippi, 588 U.S. 284, 301 (2019) ("By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."). *But see* Gray v. Mississippi, 481 U.S. 648, 672 (1987) (Powell, J., concurring in part and concurring in the judgment) ("Our decision in *Batson* . . . was justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors . . . .").

443 Gewirtz, *supra* note 434, at 729.

444 *Id.*

on eliminating these negative effects.[445] Otherwise, if left unaddressed, "[t]hese effects will continue to work their harms even if new violations end."[446]

Gewirtz noted that adherence to corrective justice both "empower[s]" and "constrain[s]" judges' remedial authority.[447] On the one hand, judges are not only required to demand that the offending parties discontinue their ongoing discriminatory actions, but also to eliminate the negative effects stemming from specific instances of unconstitutional discrimination.[448] To achieve these aims, judges are afforded broad discretion in shaping suitable corrective measures.[449] For example, as Gewirtz pointed out, when a court finds racially discriminatory hiring practices at a school, the remedy should "include corrective steps such as paying damages to the excluded teachers and eliminating lingering consequences that the violation has had on the composition of the teaching staff."[450]

On the other hand, the corrective justice framework adopted by the Court also limits judges' remedial authority because it requires judges to refrain from attempting to eliminate any negative consequences that do *not* stem from proven unconstitutional discrimination.[451] In other words, as the Court stated in 1974 in *Milliken v. Bradley*,[452] "the scope of the remedy is determined by the nature and extent of the constitutional violation."[453] In *Milliken*, for instance, the Court held that the remedy for the intentionally segregated public school system in one school district may not include the integration of students from districts that did not have a similar segregated system.[454] Such a remedy, the Court stated, "would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in . . . any holding of this Court."[455]

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445 *Id.*

446 *Id.* at 739; *see also* Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 862 (1983) ("The constitutional requirement that courts 'eliminate the discriminatory effects of the past' is simply the obligation to prevent the perpetuation of past discrimination viewed from a different point in time." (footnote omitted) (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 438 n.4 (1968))).

447 Gewirtz, *supra* note 434, at 732–34.

448 *See id.*

449 *See, e.g.*, *id.*; Missouri v. Jenkins, 515 U.S. 70, 124–25 (1995) (Thomas, J., concurring) ("Motivated by our worthy desire to eradicate segregation . . . we indicated that trial judges had virtually boundless discretion in crafting remedies once they had identified a constitutional violation.").

450 Gewirtz, *supra* note 434, at 732.

451 *See id.* at 733; Kanner, *supra* note 434, at 382–83.

452 418 U.S. 717 (1974).

453 *Id.* at 744; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("[T]he nature of the violation determines the scope of the remedy.").

454 *See Milliken*, 418 U.S. at 744–46.

455 *Id.* at 745.

To be sure, although striving for corrective justice "as nearly as possible,"[456] remedies for equal protection violations do not always fully achieve it. For example, plaintiffs who are victims of school or housing segregation often seek—and are consequently granted—only desegregation, but not monetary damages for the harm they suffered.[457] Courts, therefore, succeed in eliminating some of the negative consequences of segregation but often struggle to make victims whole.[458] Additionally, the Supreme Court has repeatedly emphasized that the corrective purpose of remedies for equal protection violations is not unqualified.[459] Rather, it must be weighed against other often competing social interests,[460] such as local governance,[461] public health,[462] and state budgets.[463] In some cases, therefore, the elimination of the negative effects of discrimination may need to yield to more pressing considerations.[464] Nevertheless, the remedial aspiration remains the same—namely, "to remove all vestiges of invidious racial discrimination" to the greatest extent possible.[465]

B. Judges' Duty to Eliminate the Effects of Selective Enforcement

Corrective justice should guide judicial remedies for successful selective enforcement claims, just as it informs the judicial response to equal protection violations in various other contexts. Rather than

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456 Milliken v. Bradley, 433 U.S. 267, 280 (1977).

457 *See, e.g.*, James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1508–09 (1990) (discussing the common absence of monetary damages from the package of remedies granted for school segregation); Olatunde C.A. Johnson, *The Missing Half: Revisiting Monetary Remedies to Redress Racial Segregation*, 59 HARV. C.R.-C.L. L. REV. 277, 278–79, 295 (2024) (discussing the focus of victims of school and housing segregation on injunctive relief instead of monetary damages).

458 *See, e.g.*, Liebman, *supra* note 457, at 1508 (arguing that monetary damages are necessary "to restore the distributive balance that the defendant threw out of kilter by injuring the plaintiff"); Johnson, *supra* note 457, at 335 (claiming that "[m]aking humans and communities whole for past harm requires *both* monetary compensation and forward-looking action"); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 153 (2001) ("[F]rom a corrective perspective money damages more efficiently compensate plaintiffs for their injuries than do the over- and under-corrective injunctive remedies that the courts have implemented in [school] desegregation cases.").

459 *See, e.g.*, Gewirtz, *supra* note 434, at 734; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589–90 (1983) [hereinafter Gewirtz, *Remedies and Resistance*].

460 *See, e.g.*, Gewirtz, *supra* note 434, at 734; Gewirtz, *Remedies and Resistance*, *supra* note 459, at 589–90.

461 *See Milliken*, 433 U.S. at 280–81.

462 *See id.* at 280 n.15.

463 *See* Crawford v. Bd. of Educ., 458 U.S. 527, 542 (1982).

464 *See, e.g.*, Morgan, *supra* note 458, at 119–20.

465 Gray v. Mississippi, 481 U.S. 648, 672 (1987) (Powell, J., concurring in part and concurring in the judgment).

relying on the justifications of deterrence or judicial integrity, courts that find a defendant has successfully proven selective enforcement should grant a remedy aimed at eliminating the negative consequences resulting from the defendant's discriminatory stop, search, or arrest as much as possible.

In practice, the types of negative effects that courts can eliminate are constrained by the set of "tools" available to them.[466] Within the criminal process, courts have a very limited range of available remedies for violations committed by criminal justice officials.[467] These remedies include suppressing evidence, dismissing charges, and—for appellate courts—reversing convictions.[468] Judges in criminal proceedings lack the authority to order the offending officer to pay the defendant monetary damages, nor can they grant equitable relief, such as a judicial decree compelling the officer's department to implement certain preventive measures. Instead, damages and equitable relief can only be pursued through a civil suit filed separately by the victim of misconduct against the relevant police officer or department.[469]

Due to these remedial constraints, courts in criminal proceedings would struggle to eliminate all types of negative effects stemming from selective enforcement. Suppressing evidence or dismissing charges, for instance, would not compensate for the humiliation experienced by targets of discriminatory policing[470] or for any physical harm they might have suffered,[471] nor would they "restore the public trust that a criminal defendant once enjoyed."[472] Suppression and dismissal, however, can fully eliminate the two most significant consequences faced by defendants due to discriminatory law enforcement: the incriminating

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466 *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001) (explaining that courts' actions and powers are "limited by the range of tools [they] have").

467 *See, e.g.*, John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 239 (2015) ("[T]he universe of available sanctions in criminal adjudication [for constitutional violations] is limited . . . .").

468 *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1244 ("[T]he forms of [criminal procedural] remedies—exclusion of evidence, dismissal of criminal charges, and the reversal of convictions—are quite distinct in form and application from their civil counterparts."); Karlan, *supra* note 6, at 2004 (listing these three remedies as the "conventional remedies for violations of criminal procedure protections" that can be granted in criminal adjudication).

469 *See generally* Rudovsky, *supra* note 468, at 1213–41 (discussing the availability of monetary damages and equitable relief as remedies for constitutional violations within the civil process).

470 *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1048 (2010) (describing the humiliation caused by racial profiling).

471 *See, e.g.*, Rudovsky, *supra* note 468, at 1245 (explaining that "instances of excessive or unreasonable force" by the police "cannot be remedied in the criminal process").

472 Re, *supra* note 423, at 1903.

evidence against them and their subsequent criminal prosecution. For most defendants, doing away with these two negative effects of selective enforcement would be sufficient, as their top priority is "to avoid conviction and imprisonment, not to recover damages."[473] By suppressing incriminating evidence or dismissing charges resulting from proven selective enforcement, courts can fulfill their commitment to strive "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[474] As one federal court explained in 2016,[475] dismissal can "put[] the victim where he or she could have been but for racially selective conduct of law enforcement."[476] Importantly, because courts derive their power to suppress evidence or dismiss charges from their mandate to eliminate the effects of selective enforcement, they need not rely on the inadequate justifications of deterrence or judicial integrity from the Fourth Amendment context. Although these goals are important as a general matter, courts' authority to eliminate the harms of selective enforcement is independent of their success in promoting deterrence or maintaining their integrity.

Interestingly, the Supreme Court has rejected corrective justice as a justification for the Fourth Amendment exclusionary rule,[477] holding that the rule was not meant "to redress the injury to the privacy of the search victim."[478] According to the Court, the rule would simply not be able to serve as an effective corrective mechanism, as "the ruptured privacy of the victims' homes and effects cannot be restored."[479] That is, any piece of information that was exposed or revealed as a result of an unconstitutional search or seizure cannot be made private again.[480] The Equal Protection Clause, however, is not meant to protect people's right to privacy, but to guarantee them "the equal protection of the laws."[481] The Supreme Court has implicitly admitted it is often impossible to correct all of the harms that stem from unconstitutional discrimination but has insisted courts should attempt to do so "as nearly as possible"[482]

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473 Johnson, *supra* note 470, at 1064; *see also* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1353 (2017) (arguing that civil remedies "would be of little use to a defendant who primarily seeks to avoid conviction based on" selective enforcement).

474 Milliken v. Bradley, 418 U.S. 717, 746 (1974).

475 *See supra* notes 301–04 and accompanying text.

476 United States v. Mumphrey, 193 F. Supp. 3d 1040, 1059 (N.D. Cal. 2016).

477 *See* Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair.").

478 United States v. Calandra, 414 U.S. 338, 347 (1974).

479 Linkletter v. Walker, 381 U.S. 618, 637 (1965).

480 *See, e.g.*, Re, *supra* note 423, at 1903 (explaining that "[l]awless searches can . . . uncover once-private information that slips into the public domain" in a way that suppressing evidence would not be able to correct).

481 U.S. Const. amend. XIV, § 1.

482 Milliken v. Bradley, 433 U.S. 267, 280 (1977).

and "to the maximum extent practicable."[483] The judicial commitment to equal protection means courts should do their best to eliminate the negative effects of selective enforcement, even if full restoration of defendants to their former situation—before the discriminatory conduct took place—is impossible.

C. Corrective Remedies in Action

Similar to other areas of equal protection, the judicial duty to pursue corrective justice should simultaneously empower and constrain judges' authority to grant remedies for selective enforcement.[484] Thus, on the one hand, judges handling selective enforcement claims in criminal proceedings should be empowered with broad discretion when choosing remedies that could achieve corrective justice.[485] Rather than mandating a uniform remedy for all successful selective enforcement claims, judges should be authorized to determine the most effective solution to correct the harm suffered by the specific defendant in the case before them. For example, if a defendant charged with a minor traffic offense successfully proves the police conducted the traffic stop based on the defendant's race, the appropriate remedy would be to dismiss the traffic charge. But if the discriminatory stop additionally led to a search of the defendant's car and illegal drugs were discovered, excluding those drugs as incriminating evidence against the defendant would also be necessary.[486]

On the other hand, judges should refrain from eliminating negative effects that are not the result of unconstitutional discrimination.[487] For instance, a court should, of course, suppress evidence obtained through a discriminatory stop. However, the court should not dismiss the entire criminal charge against the defendant if it is based on additional incriminating evidence seized independently and lawfully. Furthermore, a court should generally refrain from granting a remedy in a case in which it cannot be demonstrated that the police officer who enforced the law against the defendant was motivated by purposeful discrimination, as opposed—for example—to implicit bias (unless required otherwise by the court's respective state law, such as in Massachusetts and New Jersey).[488]

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483 Bd. of Educ. v. Dowell, 498 U.S. 237, 264 n.8 (1991) (Marshall, J., dissenting).

484 *See supra* note 447 and accompanying text.

485 *See supra* notes 448–50 and accompanying text.

486 *See* Karlan, *supra* note 6, at 2009–10 (arguing that dismissal alone would not be an appropriate judicial response to racially selective traffic stops, because it might only apply to the traffic charge against the defendant, but not necessarily to additional charges resulting from incriminating evidence obtained during the stop).

487 *See supra* notes 451–55 and accompanying text.

488 *See supra* notes 169–81 and accompanying text.

Finally, as in other areas of equal protection, judges contemplating the proper corrective remedies for selective enforcement in the cases before them must also consider competing social interests, particularly public safety.[489] Of course, suppressing evidence and dismissing charges often result in some risk to public safety, because they frequently lead to the release of factually guilty defendants.[490] Because of that, public safety should not be a decisive consideration against granting suppression or dismissal; otherwise, those remedies would almost never be granted. Given the special severity of racial discrimination within the criminal process and the pressing need to eliminate its negative effects, judges should avoid suppressing evidence or dismissing charges only when doing so would prevent a particularly excessive threat to community well-being.

Some may argue that giving judges the option not to grant suppression or dismissal under special circumstances may sometimes lead them to refrain from granting them even when they are appropriate. Although this scenario is possible, the alternative of not having the option to refrain from suppression and dismissal might be even more concerning. Scholars have long argued that judges employ various methods to skirt their duty to grant remedies for rights violations when they consider the outcomes objectionable.[491] For example, to avoid suppressing evidence obtained in unconstitutional searches, judges have allegedly "pretend[ed] to believe police officer[s]" who testify that the search they conducted was flawless.[492] Similarly, if judges were obligated to suppress evidence or dismiss charges whenever they accepted a selective enforcement claim, they might also sometimes attempt to avoid doing so by pretending that no selective enforcement was proven.[493] By allowing judges to refrain from granting suppression or dismissal in exceptional circumstances, judges would be able to prevent undesirable outcomes while still recognizing that the police officers involved in the case before them engaged in unconstitutional selective enforcement. As the next Section explains, a judicial determination that suppression

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489 *See supra* notes 459–64 and accompanying text.

490 *See supra* note 192 and accompanying text.

491 *See, e.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) (arguing that "[w]hen facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the [Supreme] Court will adjust or manipulate the applicable law"); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999) (claiming that "the threat of undesirable remedial consequences motivat[es] courts to construct the right in such a way as to avoid those consequences"); Starr, *supra* note 441, at 1515 (arguing that "if the remedy for a rights violation is undesirable, courts will find ways to avoid granting it, such as narrowing the underlying right").

492 Butler, *supra* note 357, at 1794; *see also supra* note 357.

493 *See, e.g.*, Rubinstein, *supra* note 4, at 867 (raising a similar concern).

or dismissal would lead to intolerable results should not necessarily preclude granting some other form of relief to the defendant.

D. Expanding the Toolbox of Judicial Remedies

Under the corrective justice framework, courts that determine a defendant has successfully proven selective enforcement would typically grant suppression of evidence or dismissal of charges to eliminate the negative effects of discrimination, unless competing social interests dictate otherwise.[494] The problem, however, is that both suppression and dismissal are binary in nature—namely, they can either be granted to the full extent or not be granted at all.[495] As opposed to monetary damages, for instance, which are "infinitely divisible,"[496] suppression and dismissal are "all or nothing": "[C]harges are either thrown out or let stand; evidence is either excluded or admitted."[497] There is no in-between, and judges in criminal proceedings generally have no other remedies at their disposal.[498] This might mean that in cases in which judges determine that suppression and dismissal should not be granted due to serious public safety concerns, they will not be able to "grant any remedy at all."[499]

To prevent defendants who are victims of selective enforcement from being left without relief when suppressing evidence and dismissing charges are improper, the toolbox of judicial remedies in criminal cases must be expanded to include other remedies beyond suppression and dismissal. At a minimum, these additional remedies should have the capacity to advance corrective justice by mitigating the negative consequences resulting from discriminatory policing, even if not to the same extent that suppression or dismissal would achieve.

One example of such a potential additional remedy is sentence reduction.[500] To date, at least one federal court has adopted sentence reduction as a possible remedy for procedural violations in the criminal process,[501] and some leading scholars and jurists have advocated

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494 *See supra* Sections III.B–.C.

495 *See, e.g.*, Starr, *supra* note 441, at 1510–11.

496 Amar, *supra* note 357, at 798.

497 Starr, *supra* note 441, at 1510–11.

498 *See supra* notes 467–69 and accompanying text.

499 Starr, *supra* note 441, at 1511.

500 Another possibility is to introduce monetary damages and injunctive relief—two remedies currently available only in civil proceedings—into the criminal process. Implementing such a massive reform in the law of remedies would likely necessitate legislative authorization and raise additional practical and procedural concerns.

501 *See* United States v. Dicus, 579 F. Supp. 2d 1142, 1158–61 (N.D. Iowa 2008) (adopting sentence reduction as a remedy for prosecutorial wrongdoing).

for it as well.[502] Granting sentence reduction as a remedy for selective enforcement when suppression and dismissal are improper would help promote corrective justice by "restor[ing] some of th[e] liberty" defendants are expected to lose due to discriminatory policing, even if it cannot restore it altogether.[503] Scholars have proposed various models of sentence reduction courts could potentially follow.[504] According to legal scholar Sonja Starr, for instance, "The reduction could be a fixed amount, percentage of the sentence, or number of levels in a sentencing guidelines scheme, or the court could be permitted to tailor it to the violation."[505] Regardless of the specific model courts choose to implement, any reduction in a sentence that would not have been imposed on a defendant if not for the police's discriminatory conduct would be desirable under the framework of corrective justice.

Beyond its potential to promote corrective justice, the availability of sentence reduction could create an incentive for defendants to raise selective enforcement claims even when they know courts will likely avoid granting suppression or dismissal due to pressing competing social interests (for instance, because the defendant was charged with a particularly severe offense).[506] Moreover, sentence reduction could be granted even when a police officer's discriminatory conduct has not led to the discovery of incriminating evidence or to criminal charges against the defendant. As corrective remedies, suppressing evidence and dismissing charges would be appropriate only if a discriminatory stop, search, or arrest was the "but-for cause" of seizing incriminating evidence or bringing criminal charges against the defendant.[507] Sometimes, however, discriminatory conduct by the police does not lead directly to the discovery of evidence or the initiation of a criminal case. For instance, in a case in which there is no basis for concluding that a police

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502 *See* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 70–75 (1994) (advocating for the adoption of sentence reduction as a remedy for police wrongdoing); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 115–17 (2003) (same); Starr, *supra* note 441, at 1519–20 (advocating for the adoption of sentence reduction as a remedy for prosecutorial wrongdoing).

503 Starr, *supra* note 441, at 1540.

504 *See, e.g.*, Caldwell & Chase, *supra* note 502, at 73 (proposing that a "judge should reduce a defendant's sentence by a certain percentage based on the gravity of the [constitutional] violation"); Calabresi, *supra* note 502, at 116 (proposing that "a judge would come down [a certain number of] points on the sentencing guidelines" based on the circumstances surrounding the constitutional violation).

505 Starr, *supra* note 441, at 1519.

506 *See, e.g.*, Calabresi, *supra* note 502, at 115 (discussing defendants' interest in having their sentence reduced); Caldwell & Chase, *supra* note 502, at 70–71 (arguing that a "reduction in the prison sentence [that is] significant enough [can] provide an incentive to a criminal defendant to challenge a search or seizure").

507 *See supra* notes 487–88 and accompanying text.

officer stopped the defendant based on race but it has been demonstrated that the defendant's race was the cause for the use of excessive force by the officer during the arrest, suppression and dismissal would be improper as corrective remedies.[508] With sentence reduction as an available remedy, criminal courts would not need to have the excessive force claim "relegated to the civil law for remedies."[509] Rather, they would be able to grant sentence reduction to "compensate the defendant for any non-conviction-related harm . . . suffered."[510] In that sense, sentence reduction would serve the same role that monetary damages serve when awarded for "non-monetary injuries."[511]

To be sure, the claim here is not that when suppression and dismissal are improper, sentence reduction would be an ideal corrective measure—far from it.[512] Rather, the main takeaway from this discussion is that the toolbox of judicial remedies should be expanded to ensure the goal of corrective justice for victims of selective enforcement is served even when courts decide to refrain from granting suppression and dismissal.

Conclusion

We are currently experiencing one of the most interesting and important periods in the history of the doctrine of selective enforcement. Thanks to judges who have reconsidered the traditional demanding requirements for proving selective enforcement, successful

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508 *Cf.* Rudovsky, *supra* note 468, at 1245 ("Fourth Amendment violations that do not result in the seizure of evidence [and] instances of excessive or unreasonable force . . . cannot be remedied in the criminal process.").

509 *Id.*

510 Starr, *supra* note 441, at 1519; *see also* Mark D. Duda, *Remedying Police Brutality Through Sentence Reduction*, 107 Va. L. Rev. Online 99, 109–12 (2021) (arguing that "[s]entence reduction has unique corrective power to remedy the particular harms done by police brutality").

511 Starr, *supra* note 441, at 1539–40.

512 For example, different judges are likely to quantify the harms of selective enforcement differently, inevitably resulting in some arbitrariness in the number of "years of reduction" that victims of selective enforcement are awarded. *Id.* at 1539–43; *see also* Guy Rubinstein, *The Influence of Proportionality in Private Law on Remedies in American Constitutional Criminal Procedure*, *in* Proportionality in Private Law 201, 213–14 (Franz Bauer & Ben Köhler eds., 2023) (discussing "the problem of valuation and quantification" of harms in the context of sentence reduction as a remedy for police wrongdoing). There is also a risk that judges may sometimes "impos[e] a harsher penalty on conviction" to neutralize the corrective effects of the sentence reduction they intend—or pretend—to grant. Caldwell & Chase, *supra* note 502, at 72; *see also* Starr, *supra* note 441, at 1562–63 (discussing "the possibility that courts would just raise the base sentence to cancel out the reduction"). Some scholars argue that prosecutors may also "attempt to offset the impact of sentence reduction by exercising their discretion in ways that increase base sentences." *Id.* at 1563. Additionally, introducing the remedy of sentence reduction might lead judges to settle for this "milder" remedy instead of granting the more "drastic" remedies of suppression or dismissal. *See id.* at 1564–65.

claims are no longer impossible in a growing number of jurisdictions. No less importantly, although the Supreme Court has refrained from specifying the proper remedy for selective enforcement, an increasing number of state and federal courts have responded to successful claims by suppressing incriminating evidence or dismissing criminal charges.

Although celebrating the adoption of powerful remedies that scholars and advocates of racial justice have long called for, this Article has highlighted the flaws in the justifications courts have offered for them. Despite the promises made by courts, suppressing evidence and dismissing charges are unlikely to effectively deter police officers from engaging in selective enforcement. Nor will these remedies necessarily help courts maintain their judicial integrity. Rather than relying on these two unconvincing justifications, remedies for selective enforcement should be grounded in corrective justice—the same goal that various equal protection remedies have traditionally sought to promote. Appropriate remedies, therefore, will be those "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"[513]

513 Milliken v. Bradley, 433 U.S. 267, 280 (1977) (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974)).